WESTERN POWER CORPORATION

Submission to the Western Australian Economic Regulation Authority regarding DBNGP (WA) Transmission Pty Ltd's proposed revisions to the DBNGP Access Arrangement

First Submission on Proposed Revised Access Arrangement

(Public Version)

18 March 2005

This is the public version of the submission lodged confidentially by Western Power on 14 March 2005

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EXECUTIVE SUMMARY

This Submission is made by Western Power (**"WPC"**), a statutory corporation established under the *Electricity Corporation Act 1994*, in response to the Proposed Revised Access Arrangement lodged by the Operator with the Regulator on 21 January 2005 (**"PRAA"**).

This Submission is divided into five main parts:

- Part 1 Introduction
- Part 2 Reference Tariff Policy
- Part 3 Services Policy
- Part 4 Terms and Conditions
- Part 5 Other Comments on PRAA.

Part 1 - Introduction

Part 1 is an introduction to the Submission. In order to provide some context to the issues identified by WPC's review of the PRAA, this part:

- contains a brief history of the T1 service;
- illustrates how, by all major DBNGP shippers entering into new contracts for T1 service based on the SSC in October 2004, it is now beyond doubt that:
    - T1 service is the firm gas transportation service being sought by the market;
    - Firm Service in the current access arrangement is not being sought by the market (either as a reference service or a non-reference service); and
    - the terms and conditions being sought by the market are those of the T1 service (now enshrined in the Standard Shipper Contract negotiated with individual shippers in October 2004 (**"SSC"**)), not those of the Firm Service or Tf Service;
- illustrates how WPC's position in this Submission is consistent with its earlier submissions to the Regulator on the current access arrangement, and is consistent with the grounds of its action before the Gas Review Board; and
- sets out in Part 1.4 the basis on which WPC asserts that there is a prior contractual right of all 2004 T1 contract shippers for a T1 reference service to be included in the PRAA.

Part 2 – Reference Tariff Policy

The PRAA and access arrangement information (and even the Operator's Submission 4, which has no regulatory standing) contain inadequate detail and information and together do not meet the requirements of section 2.6 of the Code. As a consequence WPC and its advisers have found it difficult to comment definitively upon many aspects of the PRAA or its compliance with the Code. This deficiency denies WPC its right to make submissions under the Code.

WPC will make further submissions after the Operator produces an amended access arrangement information in accordance with the Regulator's request.

The reference tariff proposed in the PRAA is considerably higher than that intended and expected to be the regulatory tariff path in the SSC (see clause 20.5 and Schedule 9 of the SSC), without any justification being provided for the increases in costs which cause the higher tariff.

Particular problems include (among other things):

- inflated capital base (including no provision for redundant capital despite the likelihood that there will be approximately 5 redundant small compressors after the planned expansion, use of a CPI escalator for the 2000 capital base which retains the GST "spike" and possible double-counting of Stage 3A capital expenditure);

- issues concerning the treatment of non-capital costs (including unexplained increases in compressor fuel costs, substantial increases in other non-capital costs compared to the current access arrangement and concerns arising from the role of ANS as a subcontracted operator);

- a lack of clarity as to how costs are to be allocated between Tf service and other services (part haul, etc.);

- a potential mismatch between forecast volumes and Tf service characteristics - the capacity of the DBNGP varies depending on what service is offered, and it appears that tariffs have been set using volume forecasts derived from higher-quality contracted T1 and other services, whereas the reference service is a fully-interruptible Tf service;

- a price path based upon 100% CPI in contrast to historical [redacted] tariff escalation of 67% CPI [redacted];

- an incentive mechanism which is likely to over-compensate the Operator;

- removal of any revenue rebate mechanism for both non-reference services and penalties; and

- the inclusion of proposed fixed principles which depart from the Code and standard regulatory practice, and in one case[1] is an obscure attempt to "de-regulate" a large portion of the DBNGP's pre-2016 revenue.

The tariff path is of critical importance for most of the major shippers (being those who entered into contracts based on the SSC) given that the SSC adopts the reference tariff as the contractual tariff from 1 January 2016 onwards.

Part 3 – Services Policy

Part 3 demonstrates why the Services Policy proposed by the Operator is inappropriate and should not be approved and why Tf is not an appropriate reference service and T1 is an appropriate reference service.

Operator has proposed a new Tf service based on the Firm Service in the current access arrangement as the reference service. However, with all major shippers entering into new contracts for T1 service in October 2004, it is now beyond doubt that the Tf service is not likely to be sought by a significant part of the market, given that:

- Tf service is not a firm service but in effect a fully interruptible service (although it has a "nominal" permissible curtailment limit of 1%, this is for all practical purposes irrelevant[2]);

[1] Section 7.13(a)(iii) of the PRAA.

- as a fully interruptible service, it could never be "bundled" with other non-reference services to synthesise a T1 or an equivalent service;

- it is based on the Firm Service in the current access arrangement, which has in fact been rejected by all major shippers who entered into contracts based on the SSC;

- [redacted]

- [redacted]

In contrast, WPC considers that entry by all major shippers into new contracts based on a T1 service SSC has demonstrated beyond all doubt that there is demand from most of the market for a T1 reference service. In addition:

- the SSC contains capacity development rights for T1 service; and

- the ACCC Undertaking and the Financial Assistance Agreement dated 27 October 2004 (**"FAA"**) oblige the Operator to provide T1 service,

so T1 service will continue to be utilised by most shippers going forward.

It would be undesirable for the Regulator to approve the Operator's proposed Tf service as the reference service and for the access arrangement to continue to focus on a service that none of the market is utilising. [redacted]

The PRAA should offer a firm reference service which WPC contends should be the T1 service since the Tf service is not a firm service. If not, DBNGP would be a unique contract carriage pipeline without a firm reference service.

Part 4 – Terms and Conditions

Part 4 outlines the problems inherent in the terms and conditions proposed by the Operator in the PRAA.

In line with WPC's submissions on the Firm Service in the current access arrangement and with its GRB action, WPC considers that many of the terms and conditions proposed by the Operator are inappropriate and should not be approved. At a high level, the proposed terms and conditions lack the level of detail and complexity required for gas transportation contracts of the magnitude of most DBNGP shipper contracts, resulting in uncertainty (opening the window for continued disputation) and generally adversely affecting those shippers requiring more flexibility in their gas services.

Particular problems identified include (among other things):

- provisions governing receipt and delivery of out-of-specification gas which favour the Operator, coupled with an unreasonable 350% penalty;

- compulsory entry into multi-shipper agreements, giving competitors the practical ability to veto access to a common outlet point;

- an unsophisticated and restrictive nomination regime with:

    - limited renomination rights;

[2] See the very wide range of matters which **do not** count towards the 1% limit in clause 14.1(b)(i) and (ii) of Annexure A to the PRAA.

  - limited rights to relocate capacity by nomination (called "aggregation" under the SSC); and
  - an unreasonable 350% penalty for nomination errors;
- an unsophisticated and restrictive overrun regime which:
  - acts to increase the shippers' overrun charges;
  - is interruptible at the discretion of the Operator; and
  - subjects shippers to an unreasonable $15/GJ penalty where the Operator issues an unavailability notice;
- an unsophisticated and restrictive balancing regime which:
  - is likely to result in shippers paying more imbalance charges in general; and
  - where a shipper exceeds the imbalance limit, subjects it to an unreasonable 350% penalty;
- an unsophisticated and restrictive peaking regime with consequences similar to those under the imbalance regime; and
- an inappropriate curtailment provision (as discussed above).

In many cases, the problems could be resolved by replacing the relevant term or condition with a provision having a similar effect as the equivalent provision in the SSC.

Part 5 – Other Comments on Proposed Revisions

Part 5 outlines a number of other deficiencies in the PRAA documentation which are not dealt with in other parts.

WPC is concerned that through the sub-contracting arrangement with ANS there may be a lack of transparency regarding costs. WPC asserts that ANS is to "operate" the DBNGP and as a consequence is a "Service Provider" under the Code.

WPC requests the Regulator to consider and to call for public submissions in respect of additional ring-fencing obligations under section 4.3 of the Code.

In addition, WPC has identified a number of material problems in connection with the drafting of the PRAA in respect of:

- access requests;
- queuing policy;
- extensions and expansions policy; and
- services policy.

This part also contains a list of apparent typographical and other minor errors identified by WPC during its review of the PRAA.

Part 1. Introduction

1. This Submission is being made by Western Power (**"WPC"**), a statutory corporation established under the *Electricity Corporation Act 1994*, in accordance with the notices published by the Regulator on 25 January and 11 February 2005 under section 2.31(b)(iii) of the Code.

1.1 Background

1.1.1 History of the T1 Service

GTR and Access Manual

2. Most of the major shippers on the DBNGP (including WPC) have been, and are still, contracted for gas transportation under some form of T1 service.

3. T1 (or "Tranche 1") service was first used to describe the service and terms and conditions for T1 capacity in the form the operator of the DBNGP was required to grant under the *Gas Transmission Regulations 1994* (**"GTR"**), which first came into effect on 1 January 1995. A number of shippers including WPC had access contracts under the GTR.

4. The GTR were substantially modified in November 1997, following a consultative review process in which the pipeline operator, the Office of Energy and a majority of DBNGP users participated. The amended GTR represented a set of terms and conditions that were effectively "negotiated" between the pipeline operator and the consultation group, and balanced the parties' respective technical, operational and commercial requirements.

5. The T1 service provided for under the Access Manual and *Dampier to Bunbury Pipeline Regulations 1998* (the third party access regime in effect after 25 March 1998) was largely the same (in commercial effect if not in layout) as the T1 service set out in the final form of the GTR (**"GTR T1 service"**).

First access arrangement (Firm Service)

6. The Access Arrangement issued under OffGAR's Further Final Decision of 30 December 2003 provided for a Firm Service reference service. To WPC's knowledge no Firm Service contract was ever entered into.

The 2004 T1 contracts

7. Commencing in the second half of 2003, WPC and the other Major Shippers embarked on negotiations with the Operator, with a view to securing long term capacity rights in the DBNGP and major capacity expansions.

8. These negotiations continued intensively from that time up to the execution of a new suite of contracts by all Major Shippers in October 2004.

Why the 2004 contracts are relevant

9. The 2004 contracts are very important for a number of reasons:

   (a) they exemplify the type of service which was sought by the entire market of large shippers in the DBNGP;

(b) they reinforce the fact that to WPC's knowledge no major shipper chose to avail itself of the regulated Firm Service, either in its reference form or as the starting point for a non-reference service;

(c) they demonstrate the continued market demand for a T1 service on terms and conditions which are dramatically different to those set out in the current access arrangement or the PRAA;

(d) they contain contractual undertakings from the Operator as to how it would conduct itself in the current access arrangement review process, which have been breached; and

(e) they contain a prior contractual right in WPC and in other shippers to obtain a T1 reference service on the terms and conditions of a SSC which is [redacted] different to the current and proposed reference service terms and conditions.

The SSC

10. [redacted]

11. [redacted]

12. [redacted]

13. On 9 February 2005, the Operator provided WPC with a copy of the SSC that the Operator stated it is intending to use with prospective shippers. WPC understands that the Operator intends to make the SSC publicly available through its website.

14. The T1 service in the SSC, which was in effect negotiated by the Operator and the Major Shippers in 2004, as reflected in the SSC (**"2004 T1 Service"**), contains even more flexibility for shippers than was built into the GTR or Access Manual T1 service.

1.1.2 Implications of the proposed reference tariff for shippers under the 2004 contracts

15. The 2004 contracts [redacted] are relevant in relation to reference tariffs in at least 2 ways:

(a) the SSC adopts a reference tariff as the contractual tariff from 1 January 2016;

(b) [redacted] shippers which entered into contracts based on the SSC had a legitimate expectation as to regulatory tariff paths arising from the Operator's representations in October 2004.

16. From 1 January 2016, the contract tariff under the SSC will adopt the reference tariff for the reference service that is at a 100% load factor the closest equivalent full-haul service to the contracted T1 service as at 1 January 2016. Thus, from that date the regulated reference tariff will directly establish the tariff payable under the SSC. (See below for a discussion of the relevant clauses).

17. The proposed Tf service tariff path is escalated at 100% of CPI. Although the access arrangement period only extends to 1 January 2011, there is exposure for shippers in the fact that the proposed tariff, if it continues to escalate at CPI in future access arrangement periods, could be significantly higher than the projected "sawtooth" regulatory tariff path shown in Schedule 9 of the SSC.

18. If this occurs, and if in 2016 the Tf reference service is the closest equivalent reference service to the contracted T1 service, then rather than experiencing a substantial tariff drop in 2016, there may be no drop or even an increase.

19. On the other hand, the current proposed Tf service may not by that time be the closest equivalent reference service for the purposes of clause 20.5(d). It is open to the Operator to propose a T1 reference service (or some other reference service that more closely resembles the T1 service) at the access resets expected to occur in 2011 and 2016. However, if it does so, we would expect it to argue that the T1 service is more valuable than a Tf service and hence should have an even higher tariff. This position has already been endorsed by OffGAR in an unsubstantiated statement in its final decision, where it speculated that the T1 tariff may be roughly 10 cents per GJ higher than the Firm Service tariff.[3] Thus, there is a material risk that any subsequent T1 reference service would have a higher reference tariff than whatever is currently projected for the Tf reference tariff, and very little prospect that it would be cheaper.

1.1.3 Earlier WPC submissions on the current Access Arrangement

20. From the time the proposed Access Arrangement was first submitted by the Operator on 15 December 1999 up to the time the Regulator issued its own Access Arrangement on 30 December 2003, WPC made a number of submissions to the Regulator under the Code.

21. WPC adopts and repeats the material set out in those submissions, save for when those submissions are inconsistent with this submission.

1.1.4 GRB dispute

22. Because the Tf Service proposed by the Operator is based very closely on the Firm Service[4], WPC considers that for many of the reasons included in its submissions arguing against the Firm Service, the Tf Service is not an appropriate reference service. For a more detailed explanation of this issue, please see Part 4 of this Submission.

23. Following the Further Final Decision, WPC applied to the GRB for review under s.39(1) of Schedule 1 to the GPAA and section 2.26 of the Code (**"Application for Review"**). The grounds of the Application for Review included amongst other things:

    (a) that OffGAR should not have approved an Access Arrangement with the Firm Service (including the terms and conditions on which it was offered) as the only reference service; and

    (b) instead, OffGAR should have made the T1 service (including its terms and conditions) the reference service.

[3] Paragraph 517 of the Regulator's Final Decision on the Proposed Access Arrangement for the DBNGP dated 23 May 2003.
[4] This is evident from the marked up versions of the Proposed Revisions (including Annexure A of the PRAA).

24. WPC refers the Regulator to the grounds of its challenge to the access arrangement for the DBNGP currently being heard before the GRB, and submissions it has made in relation to those grounds.

25. The parties to the GRB dispute recently agreed to adjourn the next hearing until 1 June 2005 [redacted].

1.2 Prior contractual right

26. Independently of the submissions made in Part 3 and Part 4 below, WPC submits that shippers with contracts based on the SSC have a contractual agreement with the Operator under clause 20.5(f)(iii) of the SSC that the T1 service (which is defined in a way to mean the T1 service on the terms and conditions set out in the SSC) should be the reference service and reference terms and conditions to be submitted by the Operator for inclusion in the PRAA.

27. Section 2.47 of the Code provides that the Regulator must not approve revisions to an Access Arrangement (or draft and approve its own revisions) if a provision of the revised Access Arrangement would deprive any person of a contractual right in existence prior to the date the revisions to the Access Arrangement were submitted.

28. The SSC acknowledges in clause 20.5(f)(vi) that clause 20.5 of the SSC is intended to be a contractual right under the Code:

> *"The Parties intend this clause 20.5 to have effect as a contractual right for the purposes of clauses 2.47 and, if applicable, 6.18(c) of the Gas Access Code in Schedule 2 to the Access Regime."*

29. Clause 20.5(f)(iii) of the SSC provides that:

> *"(iii) …Operator agrees as soon as it considers is appropriate after 27 October 2004 to endeavour as a Reasonable And Prudent Person to have the Regulator approve amendments to the Access Arrangement that have the following outcomes (and Shipper agrees to support those amendments (provided such amendments are not inconsistent with the intention of the Parties as at the date of this Contract in respect of the Firm Service Reference Tariff as of 1 January 2016, as reflected by Schedule 9) if necessary by making written submissions to the Regulator):*
>
> *(A) the Full Haul T1 Service [being the service made available under the contract] to be included as a Reference Service;*
>
> *(B) the Base T1 Tariff as adjusted under clauses 20.5(b) and 20.5(c) to be the Reference Tariff for the Reference Service referred to in clause 20.5(f)(iii)(A) for the periods identified in clauses 20.5(b) and 20.5(c) [being the periods before 1 January 2016]; and*
>
> *(C) the capacity reservation charge/commodity charge split (i.e. fixed/variable charge split) for the Reference Tariff referred to in clause 20.5(f)(iii)(B) to be 80%/20%."*

30. "T1 service" is defined in clause 3.2 of the SSC as the gas transportation service provided under the SSC which gives Shipper a right, subject to the terms and conditions of the SSC, to access capacity of the DBNGP. In other words, it refers not to a generic T1 service but to a specific T1 service made available on the particular terms and conditions set out in the SSC.

31. [redacted]

32. In relation to the Reference Tariff the SSC provides:

(a) in clause 1 that the Base T1 Tariff is $1.053 as at 1 January 2003 which escalated under the SSC equates to approximately $1.10 as at 1 January 2005;

(b) in clause 20.5(b) that the Base Tariff under the SSC until 1 January 2012 be adjusted each year by CPI;

(c) in clause 20.5(c) that the Base Tariff under the SSC each year between 1 January 2012 and 1 January 2016 be adjusted by CPI less 2.5%;

(d) in clause 20.5(d) that from 1 January 2016 the Base Tariff under the SSC be adjusted so that it is the same as the Reference Tariff for the Reference Service under the Access Arrangement that is at 100% load factor the closest equivalent Full-Haul Service to the T1 service as at 1 January 2016;

(e) in clause 20.5(f)(i) that the parties' present intention is that the tariff payable under clause 20.5(d) will be a Reference Tariff based on the Reference Tariff Policy in clause 7 of the Access Arrangement in effect at 27 October 2004 (with references in clause 7 to "Firm Services" replaced with "T1 Service"); and

(f) in clause 20.5(f)(ii) and Schedule 9, that the parties' current expectations (ie their expectations as recently as October 2004) were that the tariff under the SSC would follow a diagram showing a marked drop in the tariff from 1 January 2016 when clause 20.5(f)(i) began to operate.

33. [redacted]

34. [redacted]

[redacted]

35. At a presentation given on 11 January 2005, the Operator outlined its proposed revisions to the Access Arrangement to WPC, while noting that Board approval had not yet been received. These proposals described Access Arrangement revisions in which a T1 service was to be the only reference service. No mention was made of a proposed Tf service.

36. Not until as late as 20 January 2005 did the Operator inform WPC that it was intended to include a reference service other than the T1 service in the PRAA.

37. [redacted]

38. [redacted]

39. [redacted]

40. [redacted]

41. WPC submits that by virtue of section 2.47 of the Code it would be deprived of its contractual right under clause 20.5(f)(iii) if the Regulator approved the PRAA allowing for a reference service (including terms and conditions) which do not include a T1 reference service, or drafted and approved its own revisions to a similar effect.

Part 2. Reference Tariff Policy

2.1 Introduction

2.1.1 Outline of this Part 2

42. This Part 2 demonstrates:

(a) the access arrangement information provided by the Operator does not comply with the Code; and

(b) the Reference Tariff Policy included in the PRAA is, to the extent that it can be assessed because of the lack of adequate access arrangement information, not compliant with the Code.

2.1.2 Summary of key submissions

43. The Reference Tariff Policy proposed by the Operator is in many aspects inconsistent with the Code, resulting in substantial overcompensation for the Operator.

44. The Reference Tariff is considerably higher than the regulatory tariff path intended and expected by all parties who entered into contracts based on the SSC in 2004 (see clause 20.5 and Schedule 9 of the SSC) which were agreed only 4-5 months earlier, without any justification provided for this dramatic increase in costs.

2.1.3 Inadequacy of information

45. The access arrangement and access arrangement information (and even the Operator's Submission 4, which is not part of the access arrangement or access arrangement information) contain inadequate detail and information.

46. This deficiency hinders WPC's ability to effectively understand the derivation of the elements in the PRAA, form an opinion as to the PRAA's compliance with the Code, and hence to make submissions to the Regulator.

47. The Regulator has informed WPC that the Regulator has requested the Operator to submit revised access arrangement information by 22 March 2005.

48. WPC reserves its right to make further submissions to the Regulator when more information is available.[5]

2.1.4 Expert reports

49. WPC has commissioned Venture Associates and Charles River Associates to advise and prepare reports on the PRAA, in particular the Reference Tariff Policy.

50. Both Venture Associates and Charles River Associates expressed difficulty in reaching concluded views, due to the inadequacy of the access arrangement information. In light of this and in light of the forthcoming amended access arrangement information, WPC has asked Venture Associates and Charles River

[5] Without limiting the generality of this reservation, WPC notes that the deficiency of the information in the access arrangement information has hindered its' and its advisors' ability to prepare adequate submissions on the following matters: forecast new facilities investment; benchmarking; non-capital costs; rate of return; depreciation; and allocating Total Revenue particularly in relation to volume forecasts but also generally in relation to the allocation of costs between services and users. WPC may make further submissions on these topics when more information is made available.

Associates not to finalise their reports until they have had an opportunity to review the revised access arrangement information.

51. Once these experts' reports have been finalised, WPC will submit them to the Regulator.

52. WPC has received draft reports from Venture Associates and Charles River Associates and (subject to the reservation in paragraph 48 above) has used those reports in preparing submissions in this Part 2.

2.2 Not compliant with section 3.3 of the Code

53. WPC submits that, in addition to its non-compliance with section 8 of the Code, the Reference Tariff Policy does not comply with the requirements of section 3.3 of the Code as a Reference Tariff is not specified for at least one service that is likely to be sought by a significant part of the market. This is demonstrated by WPC's submissions in paragraphs 120 to 148 that the Tf service will not be sought by a significant part of the market.

2.3 Total Revenue

2.3.1 Duet/Alinta/Alcoa Consortium's acquisition model

54. The development of the SSC is set out in Part 1. WPC understands that clause 20.5 and Schedule 9 of the SSC represents the current contractual position of all major T1 users.

55. [redacted] the Duet/Alcoa/Alinta Consortium (**"DAA Consortium")** [redacted].

56. This Part 2 demonstrates that the PRAA differs markedly from Schedule 9 of the SSC. Some of the major differences include the PRAA's:

    (a) inflated capital base;

    (b) high inputs for the rate of return calculation;

    (c) use of a CPI escalator for the 2000 capital base which retains the GST "spike";

    (d) inexplicable increases in compressor fuel costs; and

    (e) substantial and inexplicable increases in other non-capital costs.

57. WPC submits that the Operator should be asked to explain what has changed since October 2004. If the modelling undertaken by the acquirers of the Operator in the context of a $1.86bn transaction showed an acceptable rate of return based on the assumptions in that model, it is reasonable to ask what has changed in the intervening 4 months that justifies such a substantial departure. WPC submits that in the absence of justifiable grounds for the departure the Operator should be required to use as its inputs those in Schedule 9 to the SSC, on the basis that these inputs have been widely represented to shippers as the basis on which the DBNGP was acquired and that they represent prior contractual rights for the purposes of section 2.47 of the Code.

2.3.2 Capital Base

Inflation 2000 to 2005

58. The PRAA use CPI escalation that is not corrected for the once-off impact of GST on the CPI figures for 2000.

59. This is inconsistent with the approach that was adopted in the current access arrangement.

60. Regulatory practice in Australia is to correct the 2000 CPI figures to remove the effect of GST. The main reason for this is that the GST increase does not result in an increase in the Operator's costs, because GST that is paid may be reclaimed. Where non-capital costs have increased, this is included in the cost of service. WPC submits that capital costs have not changed as a result of the introduction of GST.

61. Allowing the Operator to recover the 2000 GST CPI spike would be inconsistent with:

    (a) section 8.1(a) of the Code, because the additional 2.75% does not reflect the efficient costs of delivering the Reference Service over the relevant period;

    (b) section 8.1(b) because in a competitive market a service provider would not be able to use the artifice of the GST CPI spike to inflate the Capital Base in this fashion; and

    (c) section 8.1(e) because allowing the Operator to recover this windfall gain would be inefficient.

62. WPC submits that the Capital Base for 1 January 2005 proposed in the PRAA should be adjusted downwards to reflect the exclusion of the one off GST CPI adjustment.

Redundant capital

63. The PRAA does not include any provision for Redundant Capital, contrary to the requirements of section 8.9(d) of the Code.

64. This is not simply a theoretical issue. WPC's understanding is that the proposed capacity expansions involve (among other things) the addition of 7 new compressors. At present only 2 of the Compressor Station sites have a single compressor with the other compressor bay being vacant. Thus the other 5 compressors must be being installed as an upgrade to a smaller unit at sites which already have two compressors. Presumably the replaced smaller compressors will be redundant.

65. WPC submits that the PRAA should be amended to make provision for Redundant Capital, and the access arrangement information should be amended to provide details on how the compressors and other redundant assets are to be dealt with.

New facilities investment 2000 to 2004

66. The PRAA propose that the Capital Base be increased by an amount of $34m to account for New Facilities Investment in the last access arrangement period.

67. This is inconsistent with the forecast new facilities investment approved in the current access arrangement. It is also inconsistent with the values set out in Schedule 9 to the SSC.

68. The expenditure for new facilities investment in 2000 is $21m in contrast to $6.45m in the approved access arrangement. WPC notes that during the last access

arrangement approval process, the new facilities investment expenditure proposed by the Operator for 2000 was adjusted downwards by $20m in respect of Turbine and Compressor upgrade for Stage 3A enhancement.

69. This is another matter on which more information is required, especially regarding how actual capital expenditure in respect of the Stage 3A enhancement is treated.

2.3.3 Non-capital costs

Non-capital costs other than fuel gas

70. WPC notes that there is an unexplained increase in projected non-capital costs (other than fuel gas) from:

    (a) the forecasts contained in Schedule 9 of the SSC; and

    (b) the forecasts contained in the current access arrangement.

71. WPC wishes to know whether this is related to the new contractual arrangements with ANS, and submits that the access arrangement information should contain further information about the costs charged by ANS to the Operator.

72. WPC notes that projected non-capital costs in the Operator's August 2003 Proposed Revised Access Arrangement are at similar levels to those set out in Schedule 9 of the SSC and must have reflected the Operator's bona fide expectations at the time. Any increase in costs as a result of change of ownership is, WPC submits, not consistent with section 8.37 of the Code and should be rejected by the Regulator.

Fuel gas

73. WPC notes that there is an unexplained increase in projected fuel gas usage from the forecasts contained in Schedule 9 to the SSC, and from the forecasts in the current access arrangement. On the face of it, WPC submits that an unexplained increase in fuel gas usage from the Schedule 9 model contracted with all major non-Alcoa shippers in October 2004 and used by the DAA Consortium in their acquisition model, implies that the PRAA contain an inflated figure that does not comply with section 8.37 of the Code.

74. There is nothing in the capital expenditure programme to justify the increase in fuel gas usage projections.

75. WPC is particularly concerned in this regard because:

    (a) ANS is providing operational and other services to the Operator, and there is a risk that the management contract could be used to shift value from the DBNGP into one of its' owners' corporate groups (WPC refers the Regulator to its discussion of the relationship between ANS and the Operator in Part 5 of this submission. WPC requests further information about the costs charged by ANS to the Operator);

    (b) WPC does not know who is supplying the fuel gas, but it is likely to be an Alinta entity.

Related contracts

76. WPC requests that the Regulator scrutinise the related party contract between the Operator and ANS to ensure that the terms of the related party contract are

sufficiently flexible to deal with changing economic conditions, provide opportunities to capture efficiencies and are appropriately market tested.

2.4 Allocating Total Revenue

77. There is insufficient information in the access arrangement and access arrangement information in relation to volume forecasts, and generally in relation to how costs are allocated across:

(a) users; and

(b) services.

WPC regards this as a critical area, and so makes some initial submissions below. It will make further submissions after more detailed information is available.

78. WPC submits that:

(a) it is vital to ensure that the volume forecasts used in calculating the Tf reference service [6](if that reference service is to be retained, which is not WPC's submission) are appropriate;

(b) there is uncontracted capacity in the DBNGP which could be sold as Tf service, but the Operator has forecast zero additional sales of Tf capacity over the access arrangement period (despite proposing under section 3.2(a)(i) and 3.3 that this is a service likely to be sought by a significant part of the market);

(c) because the Tf service is unlikely to ever be sought by any shipper (because it has a high take or pay component but also very high interruptability), this spare capacity is more likely to be sold as unregulated spot capacity;

(d) the throughput forecasts in the PRAA are lower than would be expected in light of the accelerated new facilities investment (compared with the model in Schedule 9 of the SSC);

(e) the Regulator should obtain, or require the Operator to provide, an independent expert assessment of the throughput forecasts; and

(f) it is inappropriate that no throughput forecasts appear to have been made for part-haul service or any other non-Tf service despite the fact that a share of cost of service has been allocated to part-haul; and

(g) the Operator should be required to elect between:

(i) including volume forecasts for these non-reference services and allocating some costs to those forecast volumes; or

(ii) specifying the services as 95% rebateable (because they fall into the same category as penalty revenues under the current access arrangement which OffGAR made 95% rebateable).

79. WPC submits that the above issues make this an area of significant concern. WPC submits that the PRAA fall well short of complying with sections 8.38 to 8.41 of the

[6] WPC knows this from, among other things, the fact that up to 30TJ/d of capacity has historically been available on the spot market.

Code, and that contrary to the objectives of the Code would result in substantial over-recovery by the Operator. WPC submits that this would be inconsistent with:

(a) section 8.1(a) because the Operator's proposal would permit it to recover well in excess of the efficient costs of providing the reference service;

(b) section 8.1(b) because in a competitive market a service provider would not be able to extract monopoly rents in this manner, but would instead be forced to allocate costs efficiently between services without over-recovery;

(c) section 8.1(d) because distorted or over-recovering tariffs deriving from incorrect volume forecasts and distorted cost allocations, are likely to send inappropriate locational signals to users; and

(d) section 8.1(d) because the proposed structure is inefficient for the reasons stated above and because over-recovery also implies prices that are, on average, higher than they need to be (monopoly pricing) which has potential implications for demand distortions and investment.

80. WPC asks the Regulator, if there is not to be a T1 reference service as requested below, to ensure that the Operator's forecasts for reservations and throughput appropriately allocate capacity and costs between services, and to require the Operator to propose a suitable rebate mechanism for non-reference services.

2.5 Price path

2.5.1 Price path in this access arrangement period

81. WPC requests that the Regulator scrutinise the price path assumptions and calculations used by the Operator to ensure that the Operator's approach is consistent with the requirements of the Code.

2.5.2 Future price path

82. Since 1998, the standard method of tariff escalation for the DBNGP has been 67% of CPI. The current Access Arrangement and the forecast regulatory tariff in Schedule 9 to the SSC are both consistent with this. Whilst the SSC has 100% CPI escalation until 2011 for the contractual tariff, the escalation reduces to 100% CPI less 2.5% until 1 January 2016 when the Reference Tariff becomes the contractual tariff, with a stated expectation that tariffs would escalate within an access arrangement period at 67% of CPI thereafter. DBNGP should be asked to demonstrate why a change to 100% CPI is appropriate and Code-compliant.

2.6 Incentive mechanisms

83. WPC submits that the incentive mechanism in the PRAA, on the information provided by the Operator, is inappropriate and not in line with regulatory practice, and is likely to lead to overcompensation for the Operator. WPC will submit further on this subject when the amended access arrangement information is available.

84. CRA's draft advice is that the proposed incentive mechanism in section 7.12 of the PRAA is more generous to the Operator than would normally be expected having regard to normal Australian regulatory practice.

2.7 Rebate mechanism

85. WPC observes that the PRAA involve the deletion of the rebate mechanism in section 9 of the current access arrangement.

86. As discussed above, WPC submits that a Tariff Policy which assumes a single reference service and purports to allocate all costs to that (with the exception of an unquantifiable amount being allocated to part-haul), but which does not contain a rebate mechanism for non-reference services, is likely to result in substantial over-recovery by the service provider in breach of the objectives in section 8.1 of the Code.

87. Given that the DBNGP is 95% utilised, it is not clear what additional services per se are to be sold or why they should be sold on an unregulated basis. There does not seem to be a strong case for incentivising the Operator to find ways to move more gas by offering the incentive of significant potential unregulated revenue.

2.8 Key performance indicators

88. WPC submits that the information provided by the Operator in relation to key performance indicators does not meet the standard that is required by:

(a) common regulatory practice; or

(b) the Code.

2.9 Fixed principles

2.9.1 Section 7.13(a)(i)

89. WPC submits that this proposed fixed principle should not be allowed. WPC submits that this proposed fixed principle does not meet the requirements of sections 8.1, 8.47 and 8.48 of the Code.

90. WPC submits that the fixed principle does not include a reduction for redundant capital. As discussed above, insufficient information is provided by the Operator to assess the potential magnitude of redundant capital. In any event, the general regulatory approach has been to not accept such a clause as it essentially replicates a 'mechanistic procedure'.[7]

2.9.2 Section 7.13(a)(ii)

91. WPC submits that this fixed principle includes what are arguably Market Variable Elements – in particular the asset and debt betas, which can vary with changes in the estimated systematic risk to which investors in the pipeline, are exposed, which may in turn be affected by the regulatory regime applicable to the pipeline. The definition of structural elements appears to include the market risk premium, gearing ratio and value of imputation credits. However, IPART has not accepted a market risk

[7] OffGAR, 'Draft Decision Proposed Access Arrangement - Dampier To Bunbury Natural Gas Pipeline, June 2001' , Part B, p 120;
IPART, Final Decision Access Arrangement – Albury Gas Company Limited, December 1999, p 86;
SAIPAR, Final Decision Access Arrangement – Envestra Limited's South Australian Natural Gas Distribution System, December 2001,pp 178-182

premium value as a fixed principle when it is based on short-term effects,[8] and SAIPAR did not accept a debt/equity ratio as per the one proposed by DBNGP. [9]

92. The CAPM is a widely used basis for asset pricing however the Code allows for other methods to be used (such as the Arbitrage Pricing Theory), and there are many criticisms of the CAPM model. For this reason, SAIPAR declined to accept the use of CAPM as a fixed principle.[10] We note that widespread use of the CAPM has only come into relatively widespread practice within the last 25 years or so.

93. WPC submits that this proposed fixed principle should not be allowed because it does not meet the requirements of sections 8.1, 8.47 and 8.48 of the Code. In particular WPC objects to the proposal to include Market Variable Elements in the fixed principle.

94. In addition WPC notes that the reference in section 7.13(a)(ii) to section 7.5 is an error, because section 7.5 does not deal with determining the rate of return.

2.9.3 Section 7.13(a)(iii)

95. Section 7.13(a)(iii) is both:

(a) defectively drafted; and

(b) inconsistent with the Code.

96. (**Insufficient information**) At the outset, WPC notes that the PRAA and access arrangement information contain limited explanation of what this provision is intended to achieve. However, on face value it appears intended to have a far-reaching effect with potentially major ramifications for future reference tariffs. This section 7.13(a)(iii) also appears to replace former clause 9 (rebates) of the current access arrangement which has been deleted, giving rise to a very different outcome for users and probably higher reference tariffs.

97. WPC requests that the Regulator require DBNGP to amend the access arrangement information to provide;

(a) a clear explanation of what this fixed principle is intended to achieve;

(b) an explanation of how it complies with sections 8.47 and 8.48 of the Code; and

(c) illustrations of how it is intended to operate.

98. (**Possible intention**) WPC speculates that the intention of this section is to enshrine in the access arrangement the contractual outcome anticipated by Schedule 9 of the SSC, namely that the regulatory tariff path post-2016 is not adjusted downwards by reference to the "hump" by which the contractual tariff in the pre-2016 period exceeds the projected regulatory "sawtooth" tariff in Schedule 9.

99. (**Over recovery**) If DBNGP had conducted itself in accordance with clause 20.5(f)(iii) of the SSC, WPC would have supported the inclusion of a suitably-drafted fixed principle to achieve that effect. However, in view of DBNGP's decision not to seek a

[8] IPART, Final Decision Access Arrangement – Albury Gas Company Limited, December 1999, pp22-25
[9] SAIPAR, Access Arrangement for Envestra Limited's South Australian Natural Gas Distribution System, December 2001, p. 202
[10] SAIPAR, *Access Arrangement for Envestra Limited's South Australian Natural Gas Distribution System*, December 2001, p. 200

T1 Reference Service at this access arrangement revision, WPC regards the fixed principle in section 7.13(a)(iii) as posing a significant additional risk for shippers that is inappropriate and at odds with the parties' intentions in the SSC. This fixed principle can interact dangerously with the other aspects of the Tariff Policy described above, to enshrine substantial over-recovery for the Operator.

100. (**Defective drafting**) WPC has grave concerns about the possible unintended consequences which could arise from the loose drafting in section 7.13(a)(iii). Among the more immediate deficiencies are:

(a) it appears to take no account of revenue earned by the Operator by way of penalties and surcharges (which are not services);

(b) the hypothetical calculation in section 7.13(a)(iii)(A) is extremely complex and highly likely to produce unpredictable results, because it overlays a Tf Reference Tariff onto a diverse range of other services, including (presumably) the T1 services contracted in 2004, the Alcoa Exempt Contract, Spot Capacity and so on, despite the fact that these other services have:

(i) different reservation/commodity splits (and hence different revenue consequences at same load factor);

(ii) different peaking, balancing and overrun regimes which will produce different conduct and hence different load factors and different levels of penalty revenue;

(iii) different use of the pipeline capacity (and particularly the capacity available to provide the Tf Reference service) flowing from the comparative "interruptibility" of Tf compared with T1 [redacted]; and

(iv) different rights in respect of interruption including different priority for curtailment and different revenue refund mechanisms in some curtailment circumstances.

(c) the revenue defined in section 7.13(a)(iii)(B) is in effect all of the unregulated revenue from sale of non full haul services, and appears an unnecessary complication to the clause, adding further potential for misinterpretation. As stated elsewhere, this revenue should form part of the regulated revenue stream since all costs of operating the pipeline (save a notional bucket for part-haul services) have been used to derive the Total Revenue requirement and thus the Reference Tariff;

(d) the combined effect of sections 7.13(a)(iii)(A) and (B) is to make those shippers who pay the post-2016 reference tariff into underwriters of the Operator 's volume and recovery risks, because:

(i) it only excludes the surplus above the hypothetical tariff path while still permitting any shortfall in recovery to be taken into account;

(ii) the "would have been earned" enquiry arguably permits account to be taken of, for example, insolvency of a major shipper, thus allowing the amount not recovered pre-2016 to be passed to post-2016 shippers; and

(iii) the clause covers a 10½ year period in aggregate, not just a single year or the access arrangement period, incentivising systematic under-forecasting of the use of the Reference Service;

(e) it is unclear the extent to which the proposed clause goes beyond what would have been the effect of using the previous approach to rebates in section 9.2(b) of the current access arrangement but amending it to state that the rebate would be shared as to 100% Operator and 0% Users. The Operator should be asked to explain the extent to which this fixed principle is intended to achieve more, and why amending the sharing percentage in clause 9.2 is an inappropriate approach (because then shippers and the Operator can discuss the key issue which is the proportion of sharing, not what is to be shared); and

(f) the prohibition in section 7.13(a)(iii)(C) is too broadly drafted, and the prohibition in section 7.13(a)(iii)(D) is an unlawful and sweeping fetter on future Regulators (including for example, in relation to ringfencing decisions under section 4 of the Code).

101. WPC submits that the Regulator is unable to determine whether the proposed fixed principle complies with the Code without it being drafted with far more precision.

102. (**Uncertain effect**) WPC regards it as impossible to fully understand the intention and likely effect of this clause without a detailed explanation and illustrations.

103. (**Request for rejection**) WPC submits that the proposed fixed principle in section 7.13(a)(iii) fails to comply with sections 8.47 and 8.48 of the Code because for the reasons stated above it is clearly not in the interests of Users or Prospective Users, and nor does it strike any reasonable balance between those interests and the interests of the Operator. In addition, WPC submits that a Tariff Policy containing this fixed principle fails to comply with section 8.1 of the Code, because:

(a) as to s. 8.1(a) it appears designed to enable the service provider to earn a stream of revenue which substantially exceeds the efficient costs of delivering the reference service;

(b) as to s. 8.1(b), it is highly improbable that in a competitive market the service provider would be able to impose a tariff regime such as this or recover revenues in the manner apparently contemplated;

(c) as to s. 8.1(d) the uncertainty and risk that this places on post-2016 tariffs will be a disincentive against use of the DBNGP for any prospective user contemplating investment in an energy-consuming project;

(d) as to s. 8.1(e), the resulting Reference Tariff will be over-recovering efficient costs, and therefore set at an inefficiently high level. Ignoring the potential returns received from all services on the DBNGP means that the Operator can increase prices it charges for valuable but unregulated services, while recovering associated costs through the tariffs charged for the regulated services. This ability invites regulatory gaming and exploitation of market power.

104. WPC will be prepared to support a suitably-drafted mechanism (if one is necessary) in the access arrangement which is consistent with the parties' intentions and expectations in clause 20.5 and Schedule 9 to the SSC, provided the mechanism does not overreach or increase the risk of gaming

2.9.4 Section 7.13(b)

105. WPC submits that no clear justification has been provided in the PRAA or access arrangement information as to the setting of the Fixed Period to be until 31 December 2031. The Operator's further comments in Submission #4 are, in addition

to that document's lack of regulatory weight, inadequate and fail to account for the interests of users and prospective users.

106. WPC requests that the Regulator carefully scrutinise the setting of the Fixed Period by the Operator in order to ensure that it complies with section 8.48 of the Code.

2.9.5 Other fixed principles

107. WPC advises that it will be seeking other fixed principles to be included in the revised access arrangement. However given the inadequacy of information discussed in paragraphs 45 to 48, WPC will refrain from submitting other fixed principles until it has had an opportunity to revise the forthcoming revised access arrangement information and has a clear understanding on how the Operator's Reference Tariff Policy is intended to operate.

2.10 Other comments

There is a difference in the language in s 7.1(a) compared with s 8.38 of the Code. The language in s 7.1(a)(i) and (ii) does not require costs to be incurred, only that they be attributable to the reference service. Section 7.1(b) does not state that Total Revenue recovered from the reference tariff should be determined "in accordance with a methodology that meets the objectives in section 8.1 of the Code and is otherwise fair and reasonable" (see s 8.38 of the Code). These provisions should be amended so they have the same effect as the corresponding Code provisions.

Part 3. The Services Policy

3.1 Introduction

3.1.1 Outline of this Part 3

108. This Part 3 demonstrates:

(a) that the proposed Tf reference service is not an appropriate Reference Service and should not be approved; and

(b) that a T1 reference service is an appropriate Reference Service and should be approved.

109. This Part is set out as follows:

(a) Part 3.2 - outline of the Code requirements;

(b) Part 3.3 - why the Tf service is not likely to be sought by a significant part of the market; and

(c) Part 3.4 - why the T1 service is likely to be sought by a significant part of the market.

3.1.2 Summary of key submissions

110. Operator has proposed a new Tf service as the reference service. However, the Tf service is not likely to be sought by a significant part of the market, given that:

(a) Tf service is in effect a fully interruptible service (although it has a "nominal" permissible curtailment limit of 1%, this is for all practical purposes irrelevant[11]);

(b) as a fully interruptible service, it could never be "bundled" with other non-reference services to synthesise a T1 or an equivalent service; and

(c) it is based on the Firm Service in the current access arrangement, which has in fact been rejected by all major shippers;

(d) the Tf service has been designed for regulatory purposes only; and

(e) it appears that the Operator does not foresee entering into any Tf contracts in the access arrangement period.

111. In contrast, WPC considers that entry by all major shippers into new contracts based on a T1 service SSC has demonstrated beyond all doubt that there is demand from most of the market for a T1 reference service. In addition:

(a) the SSC contains a right to developable capacity through a T1 service; and

(b) the ACCC Undertaking and FAA oblige the Operator to make available a T1 service to the market,

so T1 service will continue to be utilised by most shippers going forward.

[11] See the very wide range of matters which **do not** count towards the 1% limit in clauses 14.1(b)(i) and (ii) of Annexure A to the PRAA.

112. It would be undesirable for the Regulator to approve the Operator's proposed Tf service as the reference service and for the access arrangement to continue to focus on a service that none of the market is utilising. [redacted]

113. Section 1.2 of this submission sets out WPC's grounds for asserting that it has a prior contractual right for there to be an access arrangement containing a T1 reference service from 2005 onwards.

3.2 Code Requirements

3.2.1 Sections 3.2 and 3.3

114. In the *Final Decision for the Access Arrangement proposed by Epic Energy for the DBNGP* (23 May 2003) ("Final Decision") at ¶59, OffGAR stated that the "market" includes that part of the market consisting of existing contractual arrangements.

115. The Operator has not provided any evidence for its claim that the Tf service satisfies section 3.2. WPC submits that it does not. The Operator has stated (without providing any support) that the Tf service does satisfy 3.3[12]. WPC submits that it does not.

3.2.2 Considering a service independently of its terms and conditions

116. At ¶36 in its Final Decision, OffGAR stated:

> "*In assessing whether a service is likely to be sought by a significant part of the market, it is not necessary for me to consider whether there is significant demand for the precise terms and conditions proposed for the Firm Service, that being a matter for consideration under s.3.6 of the Code. However, I am required to determine whether the nature of the service (or product) described in the Access Arrangement, considered in the context of the range of services that might be provided using the pipeline, identifies a service (or product) that is likely to be sought by a significant part of the market";*

117. WPC disagrees with this conclusion, because:

(a) a Reference Service cannot be assessed for the purposes of s.3.2 without its terms and conditions being assessed and its Tariff being assessed. The Access Arrangement should be assessed globally rather than by a piecemeal assessment of its components;

(b) the Code will not work as intended if a Reference Service can be selected for the purposes of s.3.3 but the terms and conditions under s.3.6 and/or the Tariff under s.3.5 are such that the service will not be sought by a significant part of the market[13];

(c) a fundamental objective underpinning the Code is for any shippers comprising a significant part of the market to be able to obtain the Services which they require as Reference Services. The corollary of this is that a Reference

[12] See 2.1 of the Access Arrangement Information

[13] For example, if the terms and conditions upon which a particular Service (say peaking, or park and loan) is offered are so onerous or unattractive that no Shipper would avail themselves of it, there is simply no point in setting a Reference Tariff for it. Equally, if the Service the subject of the Reference Tariff does not contain the Terms and Conditions which would make it attractive to a significant part of the market there is no point in setting a Reference Tariff for it. Similarly, if there is no Reference Tariff for a Service (including its Terms and Conditions) which a significant part of the market wants, then the basic objective of the Code will be thwarted.

Service must be a Service which shippers comprising a significant part of the market actually want i.e. s.3.2(a)(i) and s.3.3(a) should be interpreted literally. The choice by the Service Provider and/or Regulator of a Reference Service which no shipper wants defeats the objects of the Code;

(d) it is impossible to identify what a service is without reference to its material terms and conditions (including but not limited to peaking, balancing and similar rights) – the terms and conditions define the service; and

(e) unless and until the material terms and condition of the Service are defined it is impossible to say whether that is a service which would be sought by a significant part of the market.

118. At ¶63 in its Final Decision, OffGAR went on to state that:

> *"…provided that Epic Energy's Services Policy describes the services offered, this will make available the delivery of services that collectively may be regarded as equivalent to the T1 Service. Accordingly, I do not consider that it is necessary for the T1 Service to be offered as a Reference Service in order for the proposed Services Policy to comply with the Code."*

119. WPC disagrees with this conclusion, because it implies that:

(a) a shipper who wants T1 service can obtain an equivalent service by combining the Firm Service with other non-reference services; and

(b) the components of the T1 service which are not part of the Firm Service are available through those non-reference services.

However:

(c) without a detailed description of the services to be offered it is not possible to know in any detail what these services will provide (and whether they will be able to substitute for elements of the T1 service);

(d) even if a more detailed description of the services were to be provided, unless they were to be offered on acceptable terms and conditions, it would be necessary for the parties to proceed to arbitration;

(e) even without further information, it seems that the services proposed by the Operator as part of the Services Policy are of such a nature that they will not when combined with the Tf service provide a service which is equivalent to T1; and

(f) failing to provide a service on terms and conditions which are likely to be required by a significant part of the market fails to comply with the Code, and further deprives those shippers who do require that service of commercial certainty.

120. The arguments raised above are developed more fully in the WPC's Written Outline of Submissions of 1 September 2004 to the GRB (filed pursuant to Order 16 dated 16 April 2004). WPC continues to object to the Regulator's determinations in this respect.

3.3 Tf not likely to be sought by a significant part of the market

121. At first glance, the Tf service appears to be a modified form of Firm Service, the essentials of which are:[14]

(a) Tf service is a service in which gas can be received into any point on the DBNGP;

(b) impliedly, the Tf service is for only full-haul forward haul;

(c) Tf service is expressed to be not subject to interruption save as permitted by the Access Contract; and

(d) the minimum contract term is for 5 years for spare capacity or 20 years for developable capacity.

122. Even if the Tf service can appropriately be considered as a thing independent from its terms and conditions (see paragraphs 116 to 120 above), WPC considers that the Tf service is largely unattractive to any shipper or prospective shipper, other than a small segment of the market which can utilise highly interruptible capacity (usually, as in WPC's case, as part of a portfolio which also contains substantial amounts of firm capacity). Tf service is not likely to be sought by a significant part of the market.

3.3.1 Tf is in effect a fully interruptible service

123. WPC submits that because of the radical changes to the Firm Service curtailment regime – the Tf service not a "firm" service but is in effect a fully interruptible service.

124. Clause 14.1 of Tf service sets the Permissible Limit for curtailments at 1% of the shipper's MDQ multiplied by the number of gas days in the year[15].

125. The Permissible Limit of 1% for the Tf service is subject to very wide categories of "excluded interruptions" which will not count towards the Permissible Limit. These excluded interruptions are significantly broader than under the Firm Service in the current access arrangement.

126. The excluded interruptions under the Tf service include circumstances:

(a) where the Operator considers it necessary as a reasonable and prudent pipeline operator, including for planned maintenance and major works; and

(b) in order to comply with existing obligations under prior contracts.

127. The excluded interruption described in paragraph 126(a) is a very broad exclusion and in effect means that the only interruptions or curtailments that will count towards the Permissible Limit will be unreasonable or imprudent curtailments. Shippers under a Tf service will therefore have their supply subject to interruptions that the Operator considers reasonable.

128. As a result of the excluded interruption described in paragraph 126(b), the 2004 T1 Service and other services contracted individually between shippers and the Operator [redacted], will rank ahead of any contracted Tf service in priority of delivery, giving Tf worse than 10% reliability. The Tf Service will only rank ahead of Interruptible Services (e.g. Spot Capacity). Given the capacity constraints on the pipeline – this will mean that a

[14] Using the analysis undertaken by OffGAR in the Further Final Decision, ¶
[15] By way of comparison, the 2004 T1 Service sets a permissible limit of 2% of time in the relevant Gas Year

shipper who contracts for a Tf Service will be almost invariably curtailed by the Operator.

129. For these reasons, the 1% Permissible Limit provided for under the Tf Service is therefore a misleading representation of the reliability of the service.

130. As discussed above, only a small portion of the market is likely to seek access to a fully interruptible reference service and the Services Policy is deficient without a firm full haul service.

131. Certainly, the Regulator should have regard to the current disposition of shippers between firm and interruptible services. To WPC's knowledge, WPC itself is the largest user of interruptible services although from time to time other shippers use spot capacity. [redacted] In any event WPC will most likely never contract for a Tf Service for its interruptible services but would instead use the Spot Market, trade capacity with other shippers or seek developable capacity pursuant to clause 16 of the SSC.

132. WPC submits that for the only proposed reference service to be an interruptible service is clearly inconsistent with s. 3.2 of the Code.

3.3.2 The Tf service could never be "bundled" with non-reference services to synthesise a service sought by a significant part of the market

133. At ¶63 of its 2003 Final Decision on the proposed Access Arrangement, OffGAR expressed the view that shippers who sought access to a T1 reference service on T1 terms and conditions could, in effect, synthesise the T1 Service by combining Firm Service with a bundle of non-reference services (see paragraph 118 above).

134. WPC did not agree with that conclusion. However, even if that conclusion had been correct in 2003 in respect of the Firm Service, which was at least "firm", there is no viable way for a user to synthesise a T1 Service using the Tf Service, irrespective of what services it is bundled with since the Tf Service is an interruptible service as demonstrated by WPC's submissions under paragraph 123.

135. An interruptible service is a fundamentally different service to a firm service. In particular, it sits at a different place in the curtailment regime which applies on the pipeline. This regime applies across all contracts, because it governs the rights shippers have as regards other shippers, in terms of curtailment priority. However the regime is implemented by way of a number of bilateral contracts.

136. The curtailment regime for the DBNGP following the October 2004 contracts can be found in Schedule 8 of the SSC [redacted].

137. Under this regime, interruptible capacity such as Tf will appear as an "Other Reserved Service", and have much lower curtailment priority than any of the 2004 T1 Service, Firm Service, [redacted]

3.3.3 The 2004 renegotiations — Firm Service rejected by market

138. OffGAR's proposition in its 2003 Final Decision, that shippers seeking access to firm service in the DBNGP on terms and conditions similar to the T1 Service could "synthesise" the result by combining the Firm Service reference service with a bundle of other non-reference services, ultimately proved incorrect when all Major Shippers came to renegotiate their haulage contracts in 2003 and 2004.

139. Despite the existence of an approved access arrangement from the beginning of 2004, none of the Major Shippers made use of the expedited path to access which is the main reason for the existence of a reference service. Not one shipper applied for Firm Service, or for any non-reference service on the Firm Service terms and conditions set out in the current access arrangement.

140. To WPC's knowledge no shipper or prospective shipper has ever contracted for Firm Service.

141. To WPC's knowledge the Major Shippers who participated in the 2004 renegotiation account for roughly 90% of the DBNGP's current contracted capacity of 575TJ/d (including Alcoa) of throughput and in addition contracted for an additional very substantial quantity of expansion. None of this was Firm Service.

142. On the contrary, WPC and all other Major Shippers (possibly excluding Alcoa Ltd) invested extraordinary amounts of time and resources between mid-2003 and October 2004 seeking to negotiate access to the DBNGP on a non-reference service which was at all times based very closely around the GTR T1 Service and not the Firm Service Reference Service.

143. WPC submits to the Regulator that this is compelling evidence that the Regulator erred when it determined that Firm Service was a service likely to be sought by a significant part of the market.

144. WPC invites the Regulator to contemplate what might have happened, and how much time and money might have been saved, if the shippers had had access to a reference service, and on terms and conditions, which matched market demands and expectations and was sought by a significant part of the market.

145. Further, in WPC's view, compelling evidence in support of WPC's previous and continuing contention that a significant part of the market requires access to a T1 reference service on terms and conditions very different from those set out in the current access arrangement for the Firm Service or proposed in the PRAA for the Tf Service can be drawn from the following facts:

    (a) that all Major Shippers rejected the Firm Service reference service and instead opted for the more laborious process of negotiating a T1 non-reference service on terms and conditions derived not from the access arrangement but from the T1 SSC;

    (b) that all Major Shippers have previously submitted at length to OffGAR seeking access to a T1-equivalent Reference Service on terms and conditions broadly the same as those of the GTR T1 Service;

    (c) that prior to the 2004 renegotiation, the great bulk of non-Alcoa contracted capacity in the pipeline was capacity contracted under the GTR T1 Service;

    (d) that when industry and the Operator had an opportunity in 2003 and 2004 to undertake an industry-wide renegotiation of the DBNGP capacity regime, all parties chose instead to retain and refine the T1 Service;

(e) that the Operator proposes to have a T1 SSC, indicating that it shares the perception that this is a service likely to be sought by new entrants in the future;

(f) that (with the possible exception of Alcoa) all capacity expansion currently under development or contracted for the DBNGP is T1 capacity on terms and conditions set out in the SSC; and

(g) that the ACCC undertakings and FAA require the Operator to make T1 service available to shippers on the terms of the SSC.

146. For the above reasons, WPC believes that the only conclusion available for the Regulator is that no significant part of the market is likely to require a Tf Service on the proposed Tf terms and conditions.

3.3.4 Tf service designed to be unattractive to the market

147. WPC believes that the Tf Service has been designed for regulatory purposes only and is a "fictitious" service which is unlikely be sought by any substantial shipper or prospective shipper [redacted].

148. For the reasons set out above, in WPC's view, the Tf Service will either never be sought by any substantial shipper, or will only be sought because the Operator refuses to offer the 2004 T1 Service on the terms and conditions contained in the SSC and the shipper cannot justify the time and expense of arbitrating a T1 non-reference service. (WPC notes that for the Operator to refuse to offer a T1 Service on the terms of the SSC would also be a breach of its ACCC undertakings and the FAA.[16])

149. In support of the view in paragraph 147 above, WPC observes that:

(a) no sales of Tf service appear to be forecast during the access arrangement period;

(b) to its knowledge and based on the DUET Product Disclosure Statement, WPC and Alinta are the only shippers to have contracted for other services as well as T1 service;

(c) other services offered and sold by the Operator (Ty, Tw and Spot) also utilise capacity which could otherwise be sold as Tf; and

(d) expansion is only being offered by the Operator through clause 16 of SSC in the form of a 15 year T1 Service.

3.4 T1 service is likely to be sought by a significant part of the market

150. WPC believes that there is overwhelming and largely uncontradicted evidence, comprised most powerfully of the entire industry "voting with its feet" in the 2004 renegotiation, that a significant part of the market seeks a T1 Service, and in particular now the 2004 T1 Service, on terms and conditions closely akin to those in the SSC.

[16] paragraph 5.6(a) of the ACCC undertakings and Schedule 1 of the Financial Assistance Agreement

151. The evidence provided above about the market's reaction to Firm Service also provides evidence that a T1 Service has recently been sought by virtually the entire non-Alcoa market.

152. In addition, the submissions lodged previously in relation to the current access arrangement demonstrated to OffGAR's satisfaction that there was demand from a significant part of the market for a T1 Service.[17]

153. There is also reason to believe that T1 service will also be sought by a significant part of the market going forwards. T1 service has been sought by all the non-Alcoa capacity expansion contracts currently under construction. The Operator has provided in clause 16 of the SSC that future capacity expansion be done under a 15 year T1 contract. Furthermore, the Operator is required to provide shippers and prospective shippers with a T1 service on the terms of the SSC under:

(a) the ACCC undertakings; and

(b) the FAA.

154. Clause 5.6 of the ACCC undertakings provides:

(a) "Subject to clause 5.6(b), DBNGP Holdings undertakes to ensure that EEWAT offers to all Prospective Shippers who require a T1 Service, a SSC that contains Capacity Expansion Rights that are not materially less favourable than the Capacity Expansion Rights contained in any other Shipper Contract for a T1 Service.

(b) To avoid doubt, nothing in clause 5.6(a):

(i) requires DBNGP Holdings or EEWAT to enter into a Shipper Contract with a Prospective Shipper if it would not be required to do so under the Gas Access Law and the Access Arrangement. …"

155. Clause 5.6(a) suggests that all shippers requiring a T1 service will be provided with a T1 service on the terms and conditions of the SSC, including capacity expansion rights for T1 capacity, supporting the argument that a T1 Service is the only viable Service going forward.

156. Separately, clause 2 of Schedule 1 to the FAA obliges the Operator to offer all Shippers and Prospective Shippers access to Gas Transmission Capacity on a non-discriminatory basis on the terms and conditions of, and at the price, specified in the SSC. In other words, the Operator must offer shippers a T1 service on the terms and conditions (and price of) that in the SSC.

157. The Operator has notified WPC of its intention to upload the SSC onto its website for the benefit of shippers and prospective shippers.

158. Therefore, WPC submits that the Regulator should determine that a T1 Service, on terms and conditions substantially the same as in the SSC:

(a) is likely to be sought by a significant part of the market;

(b) should be a Service in the Services Policy; and

[17] Final Decision, ¶59. Note that WPC does not accept OffGAR's finding that a principal reason for this was a desire to address the "section 20 problem". That was indeed one of the reasons, but WPC believes that the submissions before OffGAR at the time made it clear that there were also other reasons. In any event, subsequent conduct including the 2004 contracting made it clear that there was demand for the service independently of a desire to solve the "section 20 problem".

(c) should be a reference service.

3.5 The undesirability of the access arrangement continuing to be out of step with the market

159. WPC considers it an inherently undesirable situation for the access arrangement to contain a sole reference service:

(a) which is not used by or is likely to be used by any substantial shipper (even if the Regulator determines that there may be significant demand for it in the future, it will take a long time before the Tf Service has any substantial market share);

(b) which is widely different in both service and essential terms and conditions from the non-reference service that is used by the vast majority of the non-Alcoa market,

but which is purportedly costed using a single tariff model.

160. [redacted]

161. Not all of these opportunities are readily apparent, but one example is that the reference tariff is proposed to be set on the assumption that 100% of contracted capacity uses the Tf Service, when in fact 0% does at present and only 0% or a tiny percentage is ever likely to during the access arrangement period. How is the Regulator to make a rigorous and credible assessment of volume forecasts in this artificial environment?

162. One particular way in which these opportunities would arise is in the commercial negotiations between the Operator and the shippers. The Reference Tariff would provide the starting point of any commercial negotiation, with the ensuing negotiation between the Operator and a shipper resulting in a higher or lower price depending on how a shipper's desired service compares to the Reference Service. Where the Reference Service is not as fully featured as the shipper's desired service, the primary role of the subsequent commercial negotiations would be to enable shippers to secure the additional features that are not included in the Reference Service. The Operator as the monopoly provider of those additional features would have an advantaged position in such negotiations.

163. [redacted]

164. WPC submits that it is inappropriate to define a Reference Service on the basis that the defined Reference Service will recover the pipeline's reasonable costs without considering the fact that the choice of Reference Service would leave the Operator free to negotiate significant additional revenues outside the protections of the access arrangement.

165. The DBNGP will be a unique contract carriage pipeline if it has no firm service reference service.

Part 4. The terms and conditions

4.1 Introduction

4.1.1 Summary of key submissions

166. WPC submits that:

(a) the terms and conditions of the Tf service proposed by the Operator are deficient and do not conform with the objectives and requirements of the Code; and

(b) the terms and conditions of the T1 service (as contracted for by most of the Major Shippers and as provided for in the SSC) should be adopted as the terms and conditions of the reference service.

4.1.2 Other relevant parts of this submission

167. Section 1.2 of this submission sets out WPC's grounds for asserting that it has a prior contractual right for there to be an access arrangement containing a reference service on the terms and conditions of the SSC from 2005 onwards.

168. Paragraphs 116 to 120 set out WPC's submission that a Service cannot be considered independently of its terms and conditions.

4.1.3 Code Requirements

169. In making its decision whether to approve the terms and conditions for a Reference Service, the Regulator is required to take into account section 3.6 of the Code. That is, the terms and conditions for the provision of the reference service are required to be reasonable, in the opinion of the Regulator.

170. In making a decision as to whether the proposed terms and conditions are reasonable, the Regulator must have regard to (section 2.34 of the Code):

(a) the submissions of the Operator submitted under section 2.28 of the Code;

(b) any submissions made by Interested Parties in accordance with the notices published by the Regulator under s2.31(b)(iii) of the Code; and

(c) the factors set out in section 2.24 of the Code (section 2.46 of the Code)[18]; and

may take into account:

(d) decisions made in other jurisdictions.

171. ORG stated that the requirement for terms and conditions to be reasonable raises the following issues[19]:

(a) the terms need to be sufficiently well defined so that it is credible to define a Reference Tariff for the Service, and so that the likelihood of a dispute over the terms and conditions of access to the Reference Service is minimised;

[18] Final decision on the *Review of the Access Arrangement of ActewAGL* October 2004 (ICRC)
[19] Final decision on the *Access Arrangement for Envestra Limited June 1999* (ORG Victoria)

(b) to the extent that the terms and conditions impose costs on users, the benefits obtained (for the market as a whole) must not exceed the cost imposed on users; and

(c) the terms should generally reflect those that one would expect to see in normal commercial instruments.

172. The level of detail provided in the terms and conditions for a Reference Service involves a trade off between:

(a) more detail, which minimises the likelihood of disputes occurring, but which may unnecessarily mandate "standardised" terms and conditions; and

(b) less detail, which minimises the transaction costs of understanding the rules, and may increase flexibility and innovation at the risk of more access disputes.[20]

Judicial Interpretations of "reasonableness"

173. Judicial interpretations of the term reasonable have consistently emphasised that, "the test of reasonableness is less demanding than one of necessity, but more demanding than one of convenience".[21]

174. "The criterion of whether a [term] or condition is not reasonable … requires the court to weigh the nature and extent of the discriminatory effect against the reasons advanced in favour of the requirement of condition, taking into account all of the circumstances of the case".[22]

175. Assessing the reasonableness of a term or condition involves a consideration of whether the imposition of that term or condition is appropriate and adapted to the performance of the relevant activity in question, in the present case, the provision of gas transmission facilities.[23]

Standard industry and commercial practice is a relevant consideration

176. In its final approval of the *Access Arrangement by Epic Energy South Australia Pty Ltd for the Moomba to Adelaide Pipeline System* (31 July 2002), the ACCC agreed with Epic Energy's submission that standard industry and commercial practice is a relevant consideration in determining whether the terms and conditions of an access arrangement are reasonable.[24]

177. Existing contracts between Operator and shippers are also a relevant consideration in assessing the reasonableness of access arrangement terms and conditions. The ACCC required the *Access Arrangement by Epic Energy South Australia Pty Ltd for the Moomba to Adelaide Pipeline System* (31 July 2002) to be amended as a result of its finding significant discrepancies when comparing the access arrangement terms and conditions to Epic's existing haulage contracts.[25]

[20] Final decision on the *Access Arrangement of Multinet Energy Pty Ltd* and *Multinet (Assets) Pty Ltd; Westar (Gas) Pty Ltd* and *Westar (Assets) Pty Ltd* and *Stratus (Gas) Pty Ltd* and *Stratus (Assets) Pty Ltd* October 1998 (ORG Victoria)
[21] *Secretary, Department of Foreign Affairs and Trade v Styles and Another* (1988) 84 ALR 408 at 429 per Wilcox J.
[22] *Secretary, Department of Foreign Affairs and Trade v Styles and Another* (1989) 88 ALR 621 at 622 per Bowen CJ and Gummow J.
[23] *Waters and Others v Public Transport Corporation* (1991) 103 ALR 513 at 534.
[24] Page 30.
[25] Page 30.

178. OffGAR stated that "for terms and conditions that do no relate to explicit requirements of the Code, the Regulator assessed "reasonableness" on the basis of the intent of the Gas Access law, his own knowledge of industry practice and to the particular circumstances of the … pipeline".[26]

Reciprocity of terms and conditions

179. In its final decision on the *Access Arrangement by Epic Energy South Australia Pty Ltd for the Moomba to Adelaide Pipeline System* (31 July 2002), the ACCC stated that "it is reasonable for reciprocal provisions to apply to users as well as the service provider".[27]

180. Reciprocity of terms and conditions is particularly important in provisions relating to insurance, liability and indemnities as a direct result of ensuring that risk is balanced appropriately on the party best equipped to manage the risk and any consequences flowing from that risk.

181. The concept of reciprocity is also highlighted in terms of clauses relating to efforts. In its submissions to the ACCC in relation to the final decision on the *Access Arrangement by Epic Energy South Australia Pty Ltd for the Moomba to Adelaide Pipeline System* (31 July 2002), Epic argues that 'best endeavours' is a very high standard that can lead to perverse outcomes. Consequently, Epic resisted the application of such a standard to itself and instead suggested that 'reasonable and prudent efforts' was a more appropriate standard. On the basis of the same logic, the ACCC concluded that the imposition of a 'best endeavours' standards to be applied to users was onerous and unreasonable.[28]

4.1.4 Shippers require flexibility

182. Individual shippers' gas usage requirements all differ from each other. Some shippers (e.g. who procure gas for industrial processes) with little variation in load requirements will not require much flexibility in their gas supply. Other shippers (including WPC, whose gas demand fluctuates according to customer demand for electricity supply) require more flexibility.

183. WPC has previously made submissions to the Regulator giving details about its business and gas usage.

184. WPC relies heavily on gas as a fuel for its generation assets, with roughly 30% of all electricity supplied by WPC to the SWIS being generated using gas-fired plant.

185. The DBNGP is the only pipeline through which gas from the North West Shelf can be transported to South West WA. WPC is a major user of the DBNGP, transporting an annual average of approximately 115-120TJ/day through the pipeline.

186. Given this level of reliance, WPC requires security of gas transmission through the DBNGP and flexibility of supply to enable it to manage its gas use in an economically efficient manner, including the ability to:

(a) relocate contracted capacity between delivery points including on an intra-day basis;

(b) manage daily gas flow peaks;

[26] Draft decision on the *Access Arrangement by CMS Transmission of Australia for the Parmelia Pipeline*, 27 October 1999 (OffGAR)
[27] Page 162.
[28] Page 142.

(c) manage daily gas flow imbalances;

(d) change its daily nomination;

(e) have seasonal variation in its contracted maximum daily quantities; and

(f) when possible without harming others or the pipeline, overrun.

187. These flexibilities are included as components of the 2004 T1 Service.

188. The need for security and flexibility is linked to WPC's business as an electricity supplier. Other power generators entering the deregulating electricity marketplace will have similar needs, depending on their load profile and other factors.

189. Other shippers also need the above characteristics to a greater or lesser extent, but for present purposes WPC focuses on the needs of the growing numbers of gas-fired generators in WA.

190. WPC and other power generators generate electricity to meet demand, which:

(a) does not occur at a constant level throughout the day (electricity consumption is higher during the day than at night, and tends to show both a morning peak and an evening peak);

(b) is seasonal – with demand higher in summer, due primarily to customers' air conditioning requirements; and

(c) is sensitive to factors substantially outside WPC's control, for example the weather.

191. As a result, the situation of a power generator (other than perhaps a dedicated cogeneration plant) is different from that of other industrial gas users with flat loads, who are able to predict their patterns and amount of gas consumption on a day with accuracy and, to the extent that such predictions are wrong, are able to control their consumption with relatively minor effects on their business. In contrast, power generators often may not be able to predict the pattern or amount of their gas consumption with precision.

192. Due to physical and financial constraints, WPC cannot generate sufficient electricity in a commercially acceptable manner from fuels other than natural gas to meet its customers' electricity load. Other power generators with gas-only portfolios will be even more dependent on the DBNGP.

193. As the electricity supply industry is deregulated, the number of shippers with variable loads requiring a more flexible gas transportation service is likely to increase.

194. Therefore, it is important for WPC and other variable load users have access to a reference service with terms and conditions that allow for flexibility in gas transportation supply so that shippers with variable loads are load adversely affected. In this regard, the Tf service proposed by the Operator is highly inadequate (see below) and WPC supports the adoption of the terms and conditions of the T1 service as the terms and conditions of the reference service.

195. At present WPC is by far the largest generator of mid-merit and peaking load in WA.

196. One possible scenario for the developing electricity marketplace is that new entrants, especially gas-fired generators and even more especially those operating gas fired

cogeneration facilities, will seek to acquire market share from WPC by contracting with base load customers.

197. To the extent that private generators are able to acquire flat-load customers which are ideally suited to the steady-state operational requirements for a cogeneration plant, this may lead the Regulator to conclude that these private generators will not have the same need for pipeline flexibility as WPC. However in fact such a scenario would exacerbate the need for pipeline flexibility for two reasons:

(a) first, as base load shifts to competing private generators, WPC's load profile becomes increasingly "peaky" and its costs of gas transportation become increasingly sensitive to inflexibility in its pipeline contracts;

(b) second, to the extent that private generators require standby power, they are likely in many cases to acquire that power from WPC (as the most logical current alternative and the most substantial multiple-fuel generator in the SWIS). Whenever a private generator suffers a standby event, either it or its standby provider, or both, will need a degree of flexibility in their pipeline contracts to ensure that they have the maximum opportunity of accessing (or swiftly relocating) gas transmission capacity in order to move fuel to whatever plant is being used to pick up the load.

198. In summary WPC submits:

(a) that WPC, as a variable load shipper, requires a functional reference service with terms and conditions which allow it certain flexibilities as to gas usage;

(b) that the Tf service proposed by the Operator is a basic "no-frills" service which does not contain these flexibilities and is therefore much more restrictive on WPC; and

(c) in contrast, the 2004 T1 Service contains a number of components not included in the Tf service terms and conditions, which makes the 2004 T1 Service more suitable for WPC.

4.1.5 Why the 2004 T1 service is relevant

199. In addition to setting out the deficiencies of particular Tf service terms and conditions, the Tf service terms and conditions are compared against the equivalent terms under the 2004 T1 Service.

200. The 2004 T1 service provides a valuable benchmark for the Regulator in undertaking its assessment of the proposed terms and conditions, for a number of reasons:

(a) first, the terms and conditions of the 2004 T1 Service are an adapted and improved version of the terms and conditions which have been in continuous use on the pipeline since 1 January 1995, first under the GTR then under the Access Manual;

(b) second, it was the earlier form of these terms and conditions that were the subject of extensive submissions to OffGAR during the first access arrangement approval, in which shippers unanimously sought to have these terms and conditions imposed in lieu of the flawed and unreasonable provisions proposed by the Operator in Annexure A;

(c) third, the earlier form of these terms and conditions form the basis of WPC's challenge in the GRB in respect of the current access arrangement;

(d) fourth, all Major Shippers except Alcoa (in effect the whole of the non-Alcoa industry), **including the Operator**, endorsed these terms and conditions as the foundation for contracting effectively the whole non-Alcoa capacity of the DBNGP in October 2004, after extensive negotiation and refinement indicating the terms and conditions represent an equitable sharing of risks between Users and the Operator;

(e) fifth, all developable capacity under the October 2004 shipper contracts is to be T1 capacity; and

(f) finally, the 2004 T1 service is the service that will be offered by the Operator on its website, in accordance with its ACCC undertakings and the FAA, and under the SSC.

4.2 The Tf terms and conditions

4.2.1 Overview

201. Paragraphs 182 to 197 above discussed the characteristics of a power generators' gas usage on the DBNGP and how those generators make use of several key features of its 2004 T1 Service.

202. The Tf Service and its terms and conditions do not include a range of components which are available as part of the 2004 T1 Service and in consequence WPC submits they are not reasonable, having regard to the factors in section 2.24 of the Code.

203. Furthermore, WPC submits that the Tf Service and its terms and conditions are not fully compliant with the provisions of the Code. This will be illustrated in the discussion below.

4.2.2 Structure of analysis

204. For ease of reference, the structure of the analysis from paragraph 220 onwards has been divided into four components:

(a) what the provision of the Tf terms and conditions does;

(b) the basis for WPC contending that the term or condition is deficient (with reference to the categories of deficiencies set out in section 4.2.3 below) and therefore inconsistent with the Code;

(c) comparison with the equivalent provision in the 2004 T1 Service terms and conditions; and

(d) WPC's proposal.

4.2.3 Categorising deficiencies

205. For the purposes of the review below (see paragraph 220 onwards), the deficiencies in the Tf service terms and conditions proposed by the Operator can be categorised into the following classes:

(a) **"Unreasonable Discretion"** – where the relevant term or condition gives the Operator too much discretion, giving it the opportunity (for example) to abuse its monopoly power to the disadvantage of shippers. The availability to a monopoly service provider of arbitrary discretionary powers to disrupt the operations of its users, and to cause them to incur substantial costs, has a potential impact greater than its direct financial impact, because it gives the

monopolist more "leverage" against the user to extract higher charges, more penalties, more charges for additional "ancillary services" which are needed to mitigate the exercise of the discretion, and so on. The presence of such discretions further weakens the user's bargaining position on a range of collateral matters. Furthermore, a reasonable contractual regime should include suitable mechanisms for the operator and shipper to work together to address the matter in question, rather than granting the operator draconian, arbitrary or unilateral powers. For the Regulator to approve terms and conditions which place excessive discretionary power in the hands of the Operator would be for it to fail to achieve the objectives of the Code.

The above comments do not suggest that the Operator is necessarily disposed to act in this fashion, merely that appropriate and reasonable terms and conditions, negotiated at arms' length between equal parties, would not grant arbitrary discretions to one party.

(b) **"No Reciprocity"** – where the relevant term or condition provides for rights to be granted to or obligations imposed on a party without a reciprocal right or obligation being granted to or imposed on the other party, without any reasonable basis or contrary to general industry practice.

(c) **"Uncertainty"** – where the relevant term or condition is unclear, ambiguous or lacks sufficient detail such that it may result in future disputation. It is not appropriate in a major gas haulage contract for certain matters to be left silent, in the hope that the pipeline operator will not utilise the leverage that discretionary or ambiguous provisions will give it. The terms and conditions need to be clear and detailed enough to prevent, for example, Unreasonable Discretion or Inefficiency.

(d) **"Inefficiency"** – where the relevant term or condition produces a result or has an effect that is not operationally or economically efficient, for example where a behavioural constraint or penalty imposed under the proposed terms and conditions is so burdensome on shipper that it is forced to pursue more expensive alternatives to mitigate the potential effects of that constraint (e.g. WPC being forced to change its gas consumption strategies by factoring the possibility of additional overrun charges into its plant-dispatch and fuel-choice strategies, which may result in WPC making plant-dispatch and fuel choices which are less than optimum, and in turn result in WPC's total operating costs being higher with concomitant increases in charges for electricity consumers).

(e) **"Unreasonable Costs"** – where the relevant term or condition imposes a cost on the shipper that is unreasonable or unjustifiable in the circumstances. For example, where a penalty a shipper is required to pay is out of proportion to: (i) the threat posed to the pipeline by the behaviour the penalty is seeking to discourage; and (ii) the ability of the Operator to accommodate the relevant behaviour with any adverse consequences; and

(f) **"Unreasonable Obligation"** – where the relevant term or condition imposes a cost or other burden on the shipper that is unreasonable or unjustifiable in the circumstances.

4.2.4 Definitions (cl. 1)

206. Definition of CPI (clause 1.1): The Regulator is requested to investigate the change to the CPI so that it is now calculated on a 8 capital city basis not just for Perth. This can be contrasted with the position under the SSC.

207. Definition of “Delivery Point MDQ” (clause 1.1): should include references to all delivery rights including purchases of Interruptible Service (e.g. Ty, Spot).

208. Definition of “Operational Grounds” (clause 1.1): should include an objective limitation such as “reasonable and prudent pipeline operator”.

209. Other definitions (clause 1.1): there are no definitions for “Operator”, “Reference Tariff” and “Shipper”, and there is no general provision that terms defined in the Access Arrangement have the same meaning when used in the Terms & Conditions.

4.2.5 Gas Specifications (cl. 2)

210. Clause 2 of the Tf service terms and conditions is proposed to be substantially revised from the current access arrangement. A comparison between the proposed new clause 2 and clause 7 of the SSC makes it clear that clause 2 has been adapted from the SSC.

211. The principal changes in clause 2 are a relatively unsophisticated series of deletions to change the clause from a balanced bilateral one into a clause with No Reciprocity.

212. Comparing clause 2 with clause 7 of the SSC reveals the following omissions:

(a) clause 2 contains no equivalent to clause 7.4(d) of the SSC providing a fallback gas specification at a gate point by reference to the interconnect agreement;

(b) clause 2 contains no equivalent to clause 7.5 requiring the parties to give each other notice of out-of-specification gas. This is Inefficient and Uncertain, and in view of the potentially serious consequences resulting from out-of-specification gas it could also result in Unreasonable Costs on either or both parties;

(c) clause 2.5 has been amended into a unilateral power for the Operator to refuse out-of-specification gas. It can be contrasted with clause 7.6 of the SSC which also permits Shipper to refuse out-of-specification gas;

(d) clause 2.6 omits the words "at its own risk", which appear in clause 7.7 of the SSC;

(e) clause 2 has no equivalent to clause 7.9 which deals with Shipper accepting out-of-specification gas and makes the Operator liable for delivering out-of-specification gas without permission;

(f) clause 2 has no equivalent to clause 7.12 which obliges the Operator to odorise gas; and

(g) clause 2 has no equivalent to clause 7.13 which permits weighted averaging in gas flows.

213. WPC submits that:

(a) the Operator should be asked to explain why it saw the need to amend a balanced clause which had been negotiated at arms’ length, into an incomplete and unfair clause;

(b) because of that amendment, and in any event on its merits, clause 2 is not reasonable;

(c) clause 2 is unreasonable because the lack of reciprocal liability provision is not in line with general industry practice, which shows that in the majority of cases liability provisions are symmetrical;

(d) having regard to sections 2.24(a) and (f) of the Code, it is reasonable and not contrary to the legitimate business interests of the Service Provider to allow for a symmetry of liability, to provide a more reasonable and balanced outcome; and

(e) having regard to section 2.24(g) of the Code, there is no reasonable commercial basis for shifting the liability for out of specification gas to user.

214. WPC notes the letter from DOCEP to the Regulator dated 23 February 2005, in which DOCEP suggested:

(a) broadening the operating specification for Minimum HHV from 37.3 to 37.0 MJ/m^3 and broadening the operating specification for Minimum Wobbe Index from 47.3 to 46.0;

(b) possibly increasing the Maximum H_2S from 2 to 5 mg/m^3; and

(c) making the broadest specification in the access arrangement align with the broadest specification in the Access Manual.

215. In relation to each of these, WPC submits:

(a) that it has no position on the proposal in paragraph 214(a);

(b) that it considers that there is insufficient information before the Regulator to implement the proposal in paragraph 214(b), that accordingly WPC at present submits that the only prudent course of action is to leave the specification unchanged for the time being, and that WPC would welcome an opportunity to make more complete submissions in relation to the proposal if the Regulator is contemplating implementing it; and

(c) that the proposal in paragraph 214(c) raises a complication in the SSC, as discussed in the following paragraph.

216. There is a drafting error in the SSC, which means that shippers with contracts based on the SSC have a practical difficulty with the proposal in paragraph 214(c) even if they would otherwise support it in practice. The "broadest specification" in the SSC is not the same as the "broadest specification" in the Access Manual. This appears to be a drafting error, because:

(a) Item 3 of Schedule 2 to the SSC is headed "Access Manual 'broadest specification'", which suggests that the two specifications should be identical; and

(b) clause 7.14(a) of the SSC, which refers to the broadest specification table, states:

> *"... the corresponding component in the 'broadest specification' as specified under the Access Manual ... (a copy of which appears in Item 3 of Schedule 3)...".*

217. A shipper with a gas purchase contract which picks up the Access Manual broadest specification is potentially exposed if it has entered into a contract based on the SSC, with its narrower broadest specification. Accordingly, until that shipper was able bring

its haulage contract into line with its gas purchase contract, it would prefer the broadest specification in the access arrangement to remain the same as that in the SSC, because that minimises any risk arising from the discrepancy between its haulage contract and its gas purchase agreement.

218. WPC observes that clause 2 of the Tf service terms and conditions has been redrafted to remove the express reference to the Access Manual, thus potentially enshrining the more restrictive "broadest specification" rather than the Access Manual one.

219. While WPC agrees that it would be preferable to reconcile these issues, WPC cannot support an access arrangement outcome which might increase its risk of a gas specification mismatch.

4.2.6 Out-of-specification gas

No right for shipper to refuse to receive out-of-specification gas

220. The Tf Service terms and conditions provide that only the Operator has a right to refuse out-of-specification gas[29].

221. WPC contends that the terms and conditions are deficient because they do not allow the shipper a reciprocal right to refuse out-of-specification gas delivered by the Operator. This is unreasonable under s 3.6 of the Code because there is No Reciprocity and it could subject shippers to Unreasonable Costs (as a result of taking out-of-specification gas it is then unable to use), which is therefore inconsistent with, among other things:

(a) the economically efficient operation of the DBNGP (s.2.24(d) of the Code) because efficient operation is more than just maximising output from the DBNGP – the service supplied must be a service valued by shippers and that would be agreed between the shippers and the Operator in a competitive market. Not holding the pipeline to quality standards can impose significant costs on shippers and diminish the Operator's incentive to ensure the quantity and quality of output is maximised; and

(b) the interests of shippers and potential shippers (s.2.24(f) of the Code).

222. In contrast, both the Operator and the shipper have rights to refuse out-of-specification gas under the 2004 T1 Service [30]. Furthermore, if the shipper receives out-of-specification gas under the 2004 T1 Service it is then entitled to a refund of the capacity reservation charge for the part of the gas it is unable to use[31].

223. WPC submits that a provision to the same effect as the 2004 T1 Service provision, which gives both the Operator and the shipper a right to refuse out-of-specification gas and entitles the shipper to a refund of capacity reservation charges for any out-of-specification gas it is unable to use, should be adopted as part of the terms and conditions of the reference service.

No liability for Operator for out-of-specification gas

224. The Tf Service terms and conditions provide that only the shipper has liability for out-of-specification gas[32].

[29] Clause 2.5 Annexure A to the PRAA
[30] Clause 7.6 SSC
[31] Clause 7.6(b) SSC
[32] Clause 2.7 Annexure A to the PRAA

225. WPC contends that the terms and conditions are deficient because there is no reciprocal provision dealing with the Operator's liability. This is unreasonable under s 3.6 of the Code because there is No Reciprocity and Uncertainty, which is therefore inconsistent with, among other things:

(a) the public interest (s.2.24(e) of the Code), by proposing terms and conditions that no shippers are likely to want, increasing the scope for disputes, etc.; and

(b) industry practice in general and the interests of shippers and potential shippers (s.2.24(f) of the Code).

226. In contrast, the 2004 T1 Service provides that the Operator is liable to the shipper for any direct damage arising in respect of the out-of-specification gas[33].

227. WPC submits that a provision to the same effect as the 2004 T1 Service provision, which provides for a more balanced allocation of liabilities between the parties, should be adopted as part of the terms and conditions of the reference service.

350% out-of-specification gas penalty

228. The Tf Service terms and conditions provide for a out-of-specification gas penalty of 350% of the relevant 100% load factor reference tariff.

229. WPC contends that the terms and conditions are deficient because:

(a) the Tf Service permits the Operator to refuse to accept such gas or having received it, to vent the gas. A shipper is fully liable for damage caused by introducing such gas. So there seems little need for an additional penalty to be imposed;

(b) as only the Operator and gas producers monitor quality data on a real time basis and have access to a means of preventing out-of-specification gas from entering the DBNGP, there is no way the penalty can influence a shipper's behaviour (a shipper will not know about a quality excursion until after the event);

(c) WPC is not aware of any adverse effects suffered by a Operator or another shipper as a result of out-of-specification gas entering the system, which would have been averted by the imposition of such a penalty; and

(d) WPC does not accept that a prescribed rate of 350% is indicative of a Operator's likely losses caused by out of specification gas entering the DBNGP. In fact, if the shipper is liable for loss and damage arising from the delivery under clause 2.7(a) of the Terms and Conditions, it should not further compensate the Operator by paying a penalty.

230. The terms and conditions are unreasonable under s 3.6 of the Code because they subject the shipper to Unreasonable Costs and produce Inefficiency, which is therefore inconsistent with, among other things:

(a) the economically efficient operation of the DBNGP (s.2.24(d) of the Code) in that it introduces a penalty out of proportion to the potential risk for the Operator and may force shippers to use more expensive alternatives to avoid the risk of having to pay the penalty;

[33] Clause 7.9(b) SSC

(b) the public interest (s.2.24(e) of the Code), by proposing terms and conditions that no shippers are likely to want, increasing the scope for disputes, etc.; and

(c) the interests of shippers and potential shippers (s.2.24(f) of the Code).

231. Neither the 2004 T1 Service or the GTR T1 Service imposed a penalty for out-of-specification gas entering the DBNGP. The fact that the 2004 T1 Service does not include any penalty for out of specification gas, even though the Operator at that stage had such a penalty in its access arrangement, is further evidence that the Operator does not regard this as an essential or necessary condition.

232. WPC submits that a provision to the same effect as the 2004 T1 Service position should be adopted as part of the terms and conditions of the reference service such that the out-of-specification gas penalty is removed.

4.2.7 Receipt points and delivery points (cl. 3)

233. Contribution Agreement (clauses 3.7): clause 3.7(a)(ii)(A) and (B) exclude related bodies corporate of Alcoa and Alinta (even though they are not excluded in the equivalent clause of the SSC, clause 6.7(a)(ii)). Why?

234. Relocations of MDQ (clauses 3.10 and 3.13):

(a) does not specify a time within which the Operator must assess a requested relocation and does not contain an obligation on the Operator to make that assessment expeditiously; and

(b) permits the Operator, even after having accepted a requested relocation and without liability to the shipper (and without any limitation on its power to curtail), to curtail deliveries of gas to the shipper if the Operator is required to deliver gas to another shipper with MDQ at that delivery point. This needs to be subject to some form of priority regime.

235. Obligation to deliver gas (clause 3.14): imposes a positive obligation on the shipper to deliver gas at the receipt point (i.e. it creates a positive obligation on the shipper to use the Tf service) which is novel and unreasonable. It is also inconsistent with the peaking and balancing clauses.

236. There are no provisions equivalent to clause 5.1 of the SSC which gives shipper a right to deliver gas up to its contracted capacity, and clause 5.2 of the SSC which creates an obligation on the Operator to deliver gas received from shipper. WPC requests that such provisions be incorporated into the PRAA, on the basis that their omission is unreasonable and their inclusion would be consistent with:

(a) section 3.6 of the Code, as being reasonable;

(b) section 2.24(b) of the Code, as it takes into account the firm and binding contractual obligations of the Operator and most of the Major Shippers under contracts based on the SSC; and

(c) section 2.24(f) of the Code, as it takes the interest of shippers and prospective shippers into account.

4.2.8 Multi-shipper Agreements

Compulsory to enter into Multi-shipper agreement

237. The Tf Service terms and conditions require that a shipper must become a party to any Multi-shipper Agreement that the Operator advises exists at the Commencement Date[34].

238. WPC contends that the terms and conditions are deficient in making entry into Multi-shipper Agreements compulsory where the Operator advises because:

(a) this in effect creates a veto right over the shipper's allocation of gas before gas can be allocated to receipt and delivery points for competitor shippers who refuse to enter into Multi-shipper Agreements except on certain conditions;

(b) even if this was not the case, the clause fails to set out adequate procedures for parties to enter into Multi-shipper Agreements; and

(c) the Operator has not demonstrated why Multi-shipper Agreements need to be made compulsory (at present they are not).

239. This is unreasonable under s 3.6 of the Code because it leads to Uncertainty and Inefficiency and places an Unreasonable Obligation on the shipper, which is therefore inconsistent with, among other things:

(a) the economically efficient operation of the DBNGP (s.2.24(d) of the Code) in that this requirement could create a further impediment for shippers wanting to access capacity on the DBNGP;

(b) the public interest (s.2.24(e) of the Code), by proposing terms and conditions that no shippers are likely to want, increasing the scope for disputes, etc.; and

(c) the interests of shippers and potential shippers (s.2.24(f) of the Code).

240. The 2004 T1 Service does not make entry into a Multi-shipper Agreement compulsory[35], evidence that the Operator does not regard this as an essential or necessary condition.

241. WPC submits that a provision to the same effect as the 2004 T1 Service position should be adopted and entry into Multi-shipper Agreements be voluntary and not compulsory.

242. As a corollary to the above, the provisions of the Tf Service terms and conditions dealing with allocation of gas at receipt points and delivery points[36] do not make provision for a situation where a shipper has not entered into a Multi-shipper Agreement as it is required to do under clause 3.2. The 2004 T1 Service avoids this by making provision for the situation where there is no Multi-shipper Agreement. In these situations the shipper's proportionate share of gas is determined by the Operator acting as a reasonable and prudent person with reference to the daily nominations for that gas day across all services for all shippers.

[34] Clause 3.2 Annexure A to the PRAA
[35] Clause 6.3(d) SSC
[36] See clause 3.4 and 3.5 (respectively) of the Annexure A to the PRAA

4.2.9 Maintenance

Requirement of shipper to ensure access

243. The Tf Service terms and conditions require a shipper to "ensure" that the Operator is given access to a Delivery Point Facility for the purpose of maintaining and operating that Delivery Point Facility[37].

244. WPC contends that the terms and conditions are deficient because they oblige shipper to take on an obligation to guarantee access, even though WPC does not have authority to grant access to all Delivery Point Facilities. This obligation is too onerous for WPC, and could expose it to remedies for breach of contract if it failed to comply. This is unreasonable under s 3.6 of the Code as an Unreasonable Obligation, which is therefore:

(a) the public interest (s.2.24(e) of the Code), by proposing terms and conditions that no shippers are likely to want, increasing the scope for disputes, etc.;

(b) inconsistent with, among other things, the interests of shippers and potential shippers (s.2.24(f) of the Code); and

(c) not justifiable as either a legitimate business interest of the Operator (s.2.24(a) of the Code) or as one of the operational or technical requirements necessary for the safe and reliable operation of the DBNGP.

245. The equivalent provision in the terms and conditions for the 2004 T1 Service is that a shipper must use reasonable endeavours to assist the Operator in gaining access to the Delivery Point Facility[38].

246. WPC submits that a provision requiring the shipper to use reasonable endeavours to assist the Operator in gaining access to a facility, to the same effect as the 2004 T1 Service position, should be adopted as part of the terms and conditions of the reference service.

Maintenance charge

247. The Tf Service[39] terms and conditions provide for a Maintenance Charge is determined by the Operator, allowing the Operator a "reasonable rate of return" for the costs of designing, installing, maintaining, operating and decommissioning Delivery Point Facilities and Gate Stations.

248. WPC contends that the terms and conditions are deficient because there is no right for a shipper to request (and receive) from the Operator a statement of the calculation used to determine the Maintenance Charge. The shipper has no recourse under a Tf Service to compel substantiation of the determination of the Maintenance Charge to ensure that the Operator is only recovering a "reasonable rate of return". This is unreasonable under s 3.6 of the Code because it creates Uncertainty and may allow the Operator to use Unreasonable Discretion in determining the Maintenance Charge, which is therefore inconsistent with, among other things,

(a) the public interest (s.2.24(e) of the Code), by proposing terms and conditions that no shippers are likely to want, increasing the scope for disputes, etc.; and

[37] Clause 3.6(a)(v) Annexure A to the PRAA
[38] Clause 6.6(a)(v) SSC
[39] Clause 3.6(i) Annexure A to the PRAA

(b) the interests of shippers and potential shippers (s.2.24(f) of the Code).

249. In contrast, the 2004 T1 Service contains a right for the shipper to request the Operator provide a statement of the calculation used to determine the Maintenance Charge.

250. WPC submits that a provision giving the shipper a right to the same effect as the 2004 T1 Service position, should be adopted as part of the terms and conditions of the reference service.

4.2.10 Limited short-term rights of relocation (aggregation by nomination)

251. The Tf Service appears to make long-term relocations and short-term relocations (which under the SSC is aggregation by nomination) subject to the same condition of technically and commercially feasibility, as reasonably determined by the Operator[40]. The Tf Service also allows Operator to make a relocation subject to conditions if the conditions are reasonable on technical and commercial grounds (including Operational Grounds).

252. WPC contends that the terms and conditions are deficient because:

(a) by treating long-term and short-term relocations the same way, the shipper's rights to make short-term relocations are unreasonably restricted; and

(b) although subject to reasonableness, because "Operational Grounds" is defined so broadly, the scope of conditions for a short-term relocation that could be set by the Operator is too broad.

253. This is unreasonable under s 3.6 of the Code because it allows the Operator Unreasonable Discretion in determining what conditions should apply to short-term relocations and how they are assessed, and creates Uncertainty for shippers, which is therefore inconsistent with, among other things:

(a) the economically efficient operation of the DBNGP (s.2.24(d) of the Code); and

(b) the interests of shippers and potential shippers (s.2.24(f) of the Code).

254. In contrast, the 2004 T1 Service allows the shipper to make short-term relocations of T1 by nomination as an "Aggregated T1 Service"[41], without any of the conditions mentioned in paragraph 251. This permits flexible short term relocation of gas deliveries to a different delivery point – which is an essential requirement for WPC's efficient gas usage.

255. WPC submits that a short-term relocation provision with the same effect as the 2004 T1 Service position should be adopted as part of the terms and conditions of the reference service.

4.2.11 No notification to shipper when refusing gas

256. Under the terms and conditions of the Tf Service, the Operator may refuse to accept[42] and deliver[43] gas for specified reasons.

[40] Clause 3.10 Annexure A to the PRAA
[41] Clauses 8.15 & 8.16 of the Standard Shipper Contract
[42] Clause 3.15 Annexure A to the PRAA
[43] Clause 3.16 Annexure A to the PRAA

257. WPC contends that the terms and conditions are deficient because:

(a) they do not require the Operator to use reasonable endeavours to notify shipper of an impending refusal (so that shipper can consider alternative sources of supply, etc.); and

(b) they do not specify the extent to which the Operator is able to refuse to accept and deliver gas where a specified reason applies.

258. This is unreasonable under s 3.6 of the Code because it results in Inefficiency and may result in the shipper paying Unreasonable Costs, which is therefore inconsistent with, among other things:

(a) the economically efficient operation of the DBNGP (s.2.24(d) of the Code);

(b) the public interest (s.2.24(e) of the Code), by proposing terms and conditions that no shippers are likely to want, increasing the scope for disputes, etc.; and

(c) the interests of shippers and potential shippers (s.2.24(f) of the Code).

259. In contrast, the 2004 T1 Service:

(a) requires the Operator to use best endeavours to notify the shipper prior to an impending refusal[44]; and

(b) provides that the Operator can only refuse to accept or deliver gas "to the extent" that the acceptance or delivery (as applicable) is affected under one of the specified reasons. In other words, to the extent that the acceptance or delivery of gas is not affected, the Operator is obliged to continue to accept or deliver gas[45]. (Contrast this with the Tf service, where the Operator may cease delivery of gas entirely if an event of force majeure occurs, even if the force majeure does not affect the entire delivery).

260. WPC submits that provisions to the same effect as the 2004 T1 Service provisions should be adopted as part of the terms and conditions of the reference service.

4.2.12 Nominations (cl. 4)

261. Weekly nominations (clause 4.2(b)): is expressed to be subject to clause 3.10 (relocations), but does not appear to anticipate that relocated capacity becomes MDQ at the new delivery point. There is little benefit in relocating capacity if clause 4.2(b) prevents it from being nominated.

Inadequate opportunity to change daily nominations

262. Under the Tf Service terms and conditions, the shipper may amend its weekly nominations by giving notice to the Operator before 14:00 hours on the day before the gas is to be supplied. There is no renomination mechanism after nominations 14:00 hours on the previous day[46].

263. WPC contends that the terms and conditions are deficient because there is no ability to make multiple renominations after 14:00 hours on the previous day, limiting WPC's ability to manage its variable load. This is unreasonable under s 3.6 of the Code because it creates Inefficiency (with shipper unable to decrease or increase

[44] Clause 5.4 and 5.8 SSC
[45] Clauses 5.3 and 5.7 SSC
[46] Clause 4.3(a) Annexure A to the PRAA

nominations to meet changes usage levels) and may lead to Unreasonable Costs being imposed on WPC (as a result of using replacement fuels or paying penalty charges[47]), which is therefore inconsistent with, among other things:

(a) the economically efficient operation of the DBNGP (s.2.24(d) of the Code); and

(b) the interests of shippers and potential shippers (s.2.24(f) of the Code).

264. In contrast, the 2004 T1 Service has significantly greater flexibility as it provides for three renomination 'windows' throughout a gas day (i.e. at 7:00 hours prior to the start of a gas day, then at 12:00 hours and 20:00 hours during a gas day).

265. WPC submits that flexible multiple renomination provisions with the same effect as those under the 2004 T1 Service position should be adopted as part of the terms and conditions of the reference service.

Lack of procedural provisions

266. The Tf Service lacks a number of procedural/mechanical provisions for nominations including:

(a) an obligation on the Operator to inform shippers of the amount of capacity available or anticipated to be available for nomination and renomination or for trading purposes;

(b) a provision for default nominations (i.e. for where a nomination is not received, due to a failure of telecommunication equipment etc.); and

(c) provisions for allocating nominations (e.g. where the amount of nominations exceeds the amount of capacity available).

267. WPC contends that the terms and conditions are deficient because these provisions have not been included. This is unreasonable under s 3.6 of the Code because it creates Uncertainty, which is therefore inconsistent with, among other things:

(a) the economically efficient operation of the DBNGP (s.2.24(d) of the Code); and

(b) the interests of shippers and potential shippers (s.2.24(f) of the Code).

268. In contrast, the 2004 T1 Service contains provisions equivalent to those referred to in paragraph 266 above[48].

[47] If WPC needs to dispatch more gas-fired generation than it was intending to dispatch on a day, it will seek to acquire additional gas for the day from its gas suppliers. If it does not have the ability to renominate to inject that gas into the DBNGP at a receipt point, then its increased gas deliveries will result in imbalance. WPC would be forced to take the unexpected additional gas as overrun and in addition, incur imbalance penalties because it could not adjust its inlet quantities. Further, because overrun is not added to the base MDQ when calculating the peaking threshold, WPC may well also be liable for peaking penalties for the same gas. It would thus be liable to two separate penalties, and possibly three (if there is a current unavailability notice), in respect of the same amount of delivered gas in circumstances where under a 2004 T1 Service it would pay no penalties and in circumstances which caused no adverse impact to the DBNGP's operation. This multiple compounding of penalties cannot be considered reasonable and therefore is in breach of section 3.6 of the Code.

[48] See clauses 8.5 (Operator to make available bulletins of available capacity), 8.7 (Allocation of Daily Nominations) and 8.8 (Default provision for Daily Nomination).

269. WPC submits that provisions with the same effect as those under the 2004 T1 Service should be adopted as part of the terms and conditions of the reference service.

Variance Notice and 350% penalty for nomination errors

270. The Tf Service terms and conditions provide for:

(a) the Operator to issue a Variance Notice requiring the shipper to nominate in good faith if it believes that a shipper is not making its nominations in good faith[49]; and

(b) the Operator to require shipper to pay a nomination surcharge of 350% of the relevant 100% load factor Reference Tariff if the quantity of gas supplied or received by shipper varies by more than 10% from the nomination[50].

271. WPC contends that the terms and conditions are deficient because:

(a) it is not clear how the Operator will be able to determine whether or not the shipper is making its nominations in good faith;

(b) the provision fails to take into account the fact that imbalances during the course of day might arise for reasons outside of the shipper's control and despite the shipper's having acted in good faith[51]. The factors which cause substantial nomination errors (e.g. plant outages, weather forecasting errors) tend to be beyond the control of the nominating shipper and occur despite the shipper using its best endeavours to nominate accurately and despite it acting as a reasonable and prudent shipper;

(c) a shipper that has received a Variance Notice becomes liable for the nomination surcharge regardless of whether the gas imbalance is within the shipper's MDQ or the nomination was made in good faith;

(d) although there is a provision that the Variance Notice must be withdrawn if a period of 3 consecutive months elapses without the shipper incurring the nomination penalty[52]:

(i) the 3 month period is arbitrary and would be reset by any surcharge payment (irrespective of the quantum or whether the shipper nominated in good faith);

(ii) there is no incentive for the Operator to exercise its discretion[53] to withdraw the Variance Notice earlier; and

(iii) the Operator actually has an incentive to issue a Variance Notice as soon as possible – for shippers with particularly variable loads, such as WPC, this means that they would be liable for the excessive nomination surcharges for forseeably the life of their contracts; and

(e) there is no justifiable basis for the Operator to charge a nomination surcharge. Given that factors causing nomination errors tend to be outside

[49] Clause 4.4(b) Annexure A to the PRAA
[50] Clause 4.4(c) Annexure A to the PRAA
[51] See paragraph 581 of the Final Decisions on the Proposed Access Arrangement for the DBNGP dated 23 May 2003.
[52] Clause 4.4(e)(ii) Annexure A to the PRAA
[53] Clause 4.4(e)(i) Annexure A to the PRAA

the control of shippers, and as there is often nothing a shipper could do to avert the nomination error, the rationale that the imposition of nomination surcharge is to encourage appropriate behaviour by the shipper is misguided. Thus, the penalty charge has no behaviour modification benefit. Also, nomination errors may not even have an adverse impact on the operation of the DBNGP. To impose a penalty in such situations indicates that the penalty is punitive and monopolistic in nature.

272. This is unreasonable under s 3.6 of the Code because it creates Uncertainty, places Unreasonable Obligations on shippers and is likely to impose Unreasonable Costs on (particularly variable load) shippers[54], and results in Inefficiency in how the DBNGP is operated, which is therefore inconsistent with, among other things:

(a) the economically efficient operation of the DBNGP (s.2.24(d) of the Code);

(b) the public interest (s.2.24(e) of the Code), by proposing terms and conditions that no shippers are likely to want, increasing the scope for disputes, etc.; and

(c) the interests of shippers and potential shippers (s.2.24(f) of the Code).

273. The 2004 T1 Service (and the GTR T1 Service before it) does not provide for either a variance notice or a nominations surcharge. In fact, from the time open access to the pipeline commenced in 1995 until the Access Arrangement for the DBNGP was approved on 30 December 2003, the DBNGP had never been subject to nominations penalties.

274. WPC submits that variance notice and nomination surcharge provisions should not be adopted as terms and conditions of the reference service.

54 [redacted]

[redacted]

[redacted]

[redacted]

Request for advance information

275. Under the terms and conditions of the Tf Service, the shipper must provide, upon the Operator's request, good faith advance estimates of the shipper's likely nominations *"covering such periods and in such detail as Operator may determine"*[55].

276. WPC contends that the terms and conditions are deficient because they allows Operator too much discretion as to what information it can request from the shipper (the lack of any restriction as to what the Operator can request suggests that the Operator may make onerous and/or unreasonable requests to the shipper. This is unreasonable under s 3.6 of the Code because it gives the Operator Unreasonable Discretion and creates Uncertainty, which is therefore inconsistent with, among other things:

(a) the economically efficient operation of the DBNGP (s.2.24(d) of the Code);

(b) the public interest (s.2.24(e) of the Code), by proposing terms and conditions that no shippers are likely to want, increasing the scope for disputes, etc.; and

(c) the interests of shippers and potential shippers (s.2.24(f) of the Code).

277. In contrast, the Operator is required to act as a reasonable and prudent person in requesting advance estimates of shipper's nominations etc. under the 2004 T1 Service [56].

278. WPC submits that a requirement that the Operator act as a reasonable and prudent person, when requesting estimates of nominations from the shipper with the same effect as those under the 2004 T1 Service, should be adopted as part of the terms and conditions of the reference service.

4.2.13 Overrun (cl. 5)

279. Section 5.2 permits aggregation of overruns within 3 zones. The first zone is the main line down to CS10, the second zone is the Kwinana West Lateral, and the third zone is the main line south of CS10. The effect of the revisions proposed in the PRAA is to restrict a Shipper's ability to aggregate underruns in one zone with overruns in another zone. The mechanism proposed is less restrictive than the flawed mechanism in the current access arrangement, but is substantially more restrictive than the mechanism in the SSC.

280. The more restrictive the overrun aggregation regime is, the greater the Operator's ability to recover overrun charges from the shipper, even though the shipper's usage of the pipeline on a gas day, taken across the whole pipeline, may not amount to an overrun. Thus, the creation of a more restrictive overrun aggregation regime increases the Operator's ability to earn unregulated revenue, and unreasonably increases the cost and risk to a shipper.

Liability to other shippers

281. The terms and conditions of the Tf Service provide that if a shipper takes overrun capacity and the Operator has to interrupt another shipper as a result, then the shipper that is taking overrun capacity is liable for all loss or damage suffered by the Operator or the other shipper[57].

[55] Clause 4.1(a) Annexure A to the PRAA
[56] Clause 8.2 SSC
[57] Clause 5.3(b) Annexure A to the PRAA

282. WPC contends that the terms and conditions are deficient because they should not extend the shipper's liability to include all loss and damage suffered by other shippers. This is in conflict with clause 32 of the Tf Service Terms and Conditions which provide that no person other than the Operator and the shipper (under that contract) is to obtain any benefit or entitlement under the contract. This is also unreasonable under s 3.6 of the Code because it subjects shippers to Unreasonable Obligations, which is therefore inconsistent with, among other things:

(a) the economically efficient operation of the DBNGP (s.2.24(d) of the Code);

(b) the public interest (s.2.24(e) of the Code), by proposing terms and conditions that no shippers are likely to want, increasing the scope for disputes, etc.; and

(c) the interests of shippers and potential shippers (s.2.24(f) of the Code).

283. In contrast, the 2004 T1 Service only provides in effect that the shipper's liability is limited to direct damages suffered by the Operator which is caused by or arises out of shipper's failure to comply with an unavailability notice[58].

284. WPC submits that a provision to the same effect as the 2004 T1 Service provision regarding the shipper's liability for overruns should be adopted as part of the terms and conditions of the reference service.

Only limited aggregation of overrun when calculating overrun charge

285. Under the Tf Service, an overrun charge is payable where the aggregate quantity of gas delivered to shipper in an Overrun Zone is greater that the shipper's aggregate Delivery Point MDQ in that Overrun Zone[59]. Zone 1 is all of the DBNGP upstream of Compressor Station 10, Zone 2 is the Kwinana West Lateral and the Rockingham Lateral and Zone 3 is everything else.

286. WPC contends that the terms and conditions are deficient because the limitation of overrun aggregation to Overrun Zones is unnecessary and inappropriate. This is also unreasonable under s 3.6 of the Code because it increases the likelihood of shippers having to pay Unreasonable Costs and results in operational Inefficiency, which is therefore inconsistent with, among other things:

(a) the economically efficient operation of the DBNGP (s.2.24(d) of the Code);

(b) the public interest (s.2.24(e) of the Code), by proposing terms and conditions that no shippers are likely to want, increasing the scope for disputes, etc.; and

(c) the interests of shippers and potential shippers (s.2.24(f) of the Code).

287. In contrast the 2004 T1 Service calculates overrun on an aggregated basis having regard to the shipper's total contracted capacity for the day[60]. WPC is not aware of any adverse operating effects caused for the DBNGP by the wider overrun aggregation regime which has operated in the DBNGP under the GTR T1 Service and now the 2004 T1 Service[61].

[58] Clause 11.7(b) SSC
[59] Clause 5.2Annexure A to the PRAA
[60] Clause 11 SSC
[61] [redacted]

288. WPC submits that a provision to the same effect as the 2004 T1 Service provision where overrun is calculated against total contracted capacity should be adopted as part of the terms and conditions of the reference service.

Overrun fully interruptible

289. Under the Tf Service all overrun is fully interruptible in the absolute discretion of the Operator[62], including overrun taken in excess of a delivery point's MDQ but below the aggregate MDQ.

290. WPC contends that the terms and conditions are deficient because of the lack of any constraints on the Operator's rights to interrupt overrun, particularly as there are many occasions on which overrun can be utilised by shippers (and particularly variable load shippers) without any adverse effect on the DBNGP. This exposure to interruption without notice poses a substantial operational and commercial risk for all shippers and for WPC in particular. Operationally, an unexpected interruption to capacity could cause severe disruption to WPC's power generation, and may either cause WPC to have to shed load (causing electrical blackouts) while alternative generation can be made ready, or cause WPC to have to burn expensive fuel oil or distillate in order to avoid load shedding.

291. This is also unreasonable under s 3.6 of the Code because it gives the Operator Unreasonable Discretion, increases the likelihood of shippers having to pay Unreasonable Costs and may result in Inefficiency, which is therefore inconsistent with, among other things:

(a) the economically efficient operation of the DBNGP (s.2.24(d) of the Code);

(b) the public interest (s.2.24(e) of the Code), by proposing terms and conditions that no shippers are likely to want, increasing the scope for disputes, etc.; and

(c) the interests of shippers and potential shippers (s.2.24(f) of the Code).

292. In contrast, under the 2004 T1 Service overrun can only be interrupted:

(a) to the extent the overrun will or is likely to impact on any other shipper's entitlement to its daily nominations[63];

[redacted]

[62] Clause 5.3(a) Annexure A to the PRAA
[63] Clause 11.2(a) SSC

(b) after the Operator has used reasonable endeavours to give the shipper reasonable advance notice of any unavailability or availability of overrun gas[64],

and in addition, because gas being delivered at less than the aggregate of all reserved capacity is not overrun, this portion of gas is not subject to the same level of interruptibility.

293. WPC submits that a provision to the same effect as the 2004 T1 Service provisions relating to interruption of overrun should be adopted as part of the terms and conditions of the reference service.

Requirements for unavailability notice

294. The Tf Service[65]:

(a) provides that an "unavailability notice" must state that overrun gas is unavailable or only available to "a limited extent" for one or more gas days, but dos not prescribe how this "limited extent" is to be determined,

(b) does not appear to oblige the Operator to issue an unavailability notice to other shippers taking overrun at the same time (in fact, the definition of "unavailability notice" suggests the opposite, impliedly allowing the Operator to unilaterally determine the overrun availability to a shipper without reference to the overrun usage of other shippers[66]);

(c) does not specify when an unavailability notice can be issued, and when it must be withdrawn; and

(d) does not specify what details are to be contained in the unavailability notice.

295. WPC contends that the terms and conditions are deficient because they lack adequate detail. The lack of prescription as to when an unavailability notice can be issued and when it must be withdraw is particularly important, given that once the Operator has issued an unavailability notice, it can require a shipper to pay the $15/GJ overrun charge[67] (see paragraphs 299 to 298 below). There may be legal avenues open to WPC to challenge the issue of an unavailability notice, but from a commercial perspective WPC must envisage the prospect of the Operator issuing an unavailability notice early in the life of a contract and leaving it in place indefinitely. This is compounded by the fact that the unavailability notice may arbitrarily restrict a significant portion of WPC's overrun capacity which, as stated above, is a fundamental characteristic of WPC's gas usage.

296. This is unreasonable under s 3.6 of the Code because it increases the level of Uncertainty and could produce Inefficiency, which is therefore inconsistent with, among other things:

(a) the economically efficient operation of the DBNGP (s.2.24(d) of the Code);

(b) the public interest (s.2.24(e) of the Code), by proposing terms and conditions that no shippers are likely to want, increasing the scope for disputes, etc.; and

(c) the interests of shippers and potential shippers (s.2.24(f) of the Code).

[64] Clause 11.2(b) SSC
[65] see definition of "Unavailability Notice" Annexure A to the PRAA
[66] Clause 1.1 Annexure A to the PRAA (definition of "Unavailability Notice").
[67] Clause 5.4 Annexure A to the PRAA

297. In contrast, the 2004 T1 Service[68]:

(a) sets out the test for calculating the "limited extent" (i.e. to the extent the overrun will or is likely to impact on any other shipper's entitlement to its daily nominations);

(b) provides that the Operator must give an unavailability notice at the same time to all other shippers taking overrun gas;

(c) requires the Operator to act as a reasonable and prudent person when issuing an unavailability notice, and (impliedly) requires the Operator to withdraw a notice when the conditions in paragraph (a) above cease to apply; and

(d) sets out what is to be included in an unavailability notice.

298. WPC submits that provisions to the same effect as the 2004 T1 Service provisions should be adopted as part of the terms and conditions of the reference service.

$15 /GJ unavailability charge

299. The Tf Service makes provision for an unavailability charge of $15/GJ, which:

(a) is payable once the Operator issues an unavailability notice;

(b) the shipper must pay for each GJ of gas delivered to shipper at a delivery point or in aggregate (as the case may be) in excess of the quantity specified in the Unavailability Notice (see paragraph 294(a) above relating to the Operator's discretion as to how this extent is determined).

300. WPC contends that the terms and conditions are deficient because of the excessive nature of the penalty, which becomes more apparent when it is presented as an approximate percentage of the Base Tariff (1000%-1500% compared to 250% for the 2004 T1 Service). WPC rejects completely the possibility that a rate of $15/GJ is indicative of the Operator's likely losses caused by a shipper's taking overrun when an unavailability notice is in effect. WPC is not aware of any adverse operating circumstances caused for the DBNGP by the absence of an unavailability charge of the magnitude provided for under the Tf Service overrun regime.

301. This is unreasonable under s 3.6 of the Code because it increases the likelihood of shippers having to pay Unreasonable Costs and results in Inefficiency, which is therefore inconsistent with, among other things:

(a) the economically efficient operation of the DBNGP (s.2.24(d) of the Code);

(b) the public interest (s.2.24(e) of the Code), by proposing terms and conditions that no shippers are likely to want, increasing the scope for disputes, etc.; and

(c) the interests of shippers and potential shippers (s.2.24(f) of the Code).

302. In contrast, the 2004 T1 Service provides for an unavailability charge of the greater of 250% of the Base T1 Tariff (defined) and the highest (bona fide) spot price bid for the day[69].

[68] Clauses 11.2 & 11.3 Annexure A to the PRAA.
[69] Clause 11.6 & Schedule 2 SSC

303. WPC submits that a provision to the same effect as the 2004 T1 Service provision should be adopted as part of the terms and conditions of the reference service.

4.2.14 Imbalance (cl. 6)

304. Obligation on shipper to not exceed Imbalance Limit (clause 6.2): hipper should not be obliged to "ensure" it does not exceed the Imbalance Limit, but should be obliged to use "reasonable endeavours" to not exceed the Imbalance Limit. An obligation to ensure suggests that shipper would be in breach of the contract if it did exceed the limit. "Reasonable endeavours" was the test agreed by the Operator under the SSC (see clause 9.2). This is particularly important for variable load shippers including WPC, whose ability to remain in balance is often affected by factors outside its control (for example, changes in weather increasing or decreasing electricity demand). WPC contends that this change would be consistent with:

(a) section 3.6 of the Code, because:

(i) an obligation on shipper to "ensure" it does not exceed the Imbalance Limit would be unreasonable; and

(ii) an obligation on shipper to use reasonable endeavours not to exceed the Imbalance Limit would be reasonable; and

(b) section 2.24(a) of the Code, because it would not be contrary to the legitimate business interests of the Operator to provide that shipper must use reasonable endeavours to not exceed the Imbalance Limit;

(c) sections 2.24(c) & (d) of the Code, because a reasonable endeavours test would not impact on the operational and technical requirements necessary for the safe and reliable operation of the DBNGP or the economically efficient operation of the DBNGP; and

(d) section 2.24(f) of the Code, because:

(i) an obligation to "ensure" would not adequately balance the interests of the service provider and user/prospective user and would place excessive and onerous burdens on shipper; and

(ii) an obligation to use reasonable endeavours would balance the interests of the service provider and user/prospective user.

305. Refusal to accept or deliver gas (clause 6.5): provides that Operator may refuse to accept or deliver gas if it determines, acting as a reasonable and prudent pipeline operator, that the "operation or integrity of the DBNGP may be compromised". This requires clarification, and should be subject to a "to the extent that…" limitation. Furthermore, it allows the Operator to refuse to accept or deliver gas even if shipper is within the Imbalance Limit.

Imbalances calculated on daily not accumulated basis

306. The Tf Service provides for an imbalance limit of 8% calculated on the basis of daily imbalances[70]. There is no provision for an outer imbalance limit.

307. WPC contends that the terms and conditions are deficient because:

[70] Clause 6 Annexure A to the PRAA

(a) calculating imbalances on a daily basis substantially increases a shipper's exposure to imbalance charges[71] (WPC is not aware of any adverse operating effects for the DBNGP arising from the operation of the accumulated imbalance regime under the 2004 T1 Service or the GTR T1 Service);

(b) not having an outer imbalance limit unfairly restricts variable load shippers such as WPC, which may be subject to balance variations which are beyond its reasonable control and despite acting as a reasonable and prudent shipper.

308. This is unreasonable under s 3.6 of the Code because it increases the likelihood of shippers having to pay Unreasonable Costs and results in Inefficiency, which is therefore inconsistent with, among other things:

(a) the economically efficient operation of the DBNGP (s.2.24(d) of the Code);

(b) the public interest (s.2.24(e) of the Code), by proposing terms and conditions that no shippers are likely to want, increasing the scope for disputes, etc.; and

(c) the interests of shippers and potential shippers (s.2.24(f) of the Code).

309. In contrast, the 2004 T1 Service calculates the imbalance limit on the basis of the shipper's accumulated imbalance[72]. The 2004 T1 Service also provides for an outer imbalance limit of 20%, which permits a balance between compensating the Operator from costs associated with a gross departures from the imbalance limit but allows for a cooperative approach in managing lesser departures from the imbalance limit which do not affect the efficient operation of the DBNGP.

310. WPC submits that a provision to the same effect as the 2004 T1 Service provision should be adopted as part of the terms and conditions of the reference service.

Lack of mechanical/procedural requirements

311. Under Tf Service:

(a) the shipper is required to "ensure" that it does not exceed the Imbalance Limit[73] (even though the Operator is only required to use best endeavours to give shipper notice if its Imbalance Limit is exceeded[74]);

(b) the shipper must pay the Excess Imbalance Charge if the shipper's Imbalance at the end of a day exceeds the Imbalance Limit[75];

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[71] This means that a shipper's exposure to imbalance penalties will be substantially increased under a Tf Service. For example, if a shipper has 100 TJ/d MDQ so that its daily imbalance limit is ±8 TJ, and on day 1 the shipper has a daily imbalance of +7 TJ, then on day 2 it has a daily imbalance of –13 TJ. In that case (assuming it started day 1 with an accumulated imbalance of zero) its accumulated imbalance after the second day would be –6 TJ which is still within the ±8 TJ band. However its daily imbalance on the second day would exceed the ±8 TJ limit and so it would be liable for 5 TJ of imbalance penalties if imbalance charges are payable on a day by day basis.
This demonstrates that the 8% limit for daily imbalances in the Tf Service is not directly comparable with the 8% limit in the 2004 T1 Service for accumulated imbalances. This increases the likelihood of exposure to the proposed 350% imbalance penalties.

[72] Clause 9.3 SSC

[73] Clause 6.2 Annexure A to the PRAA

[74] Clause 6.3 Annexure A to the PRAA

[75] Clause 6.4(a) Annexure A to the PRAA

(c) the Operator is not required to issue Imbalance Notices at the same time to other shippers with similar imbalances; and

(d) there is no mechanism for the Operator to issue a notice requiring the shipper to reduce its imbalance (and no specification of when such a notice may be issued, what is should contain, etc.).

312. WPC contends that the terms and conditions are deficient because they lack adequate detail for a gas transportation contract of this nature. This lack of detail will particularly affect shippers with variable loads such as WPC. Also, it exposes the shipper to an imbalance penalty even if the Operator has not informed it of its imbalance position. This is unreasonable under s 3.6 of the Code because it increases the level of Uncertainty and could produce Inefficiency, which is therefore inconsistent with, among other things:

(a) the economically efficient operation of the DBNGP (s.2.24(d) of the Code);

(b) the public interest (s.2.24(e) of the Code), by proposing terms and conditions that no shippers are likely to want, increasing the scope for disputes, etc.; and

(c) the interests of shippers and potential shippers (s.2.24(f) of the Code).

313. In contrast, the 2004 T1 Service presents a more balanced approach to managing imbalances. Under the 2004 T1 Service:

(a) the shipper is only required to "endeavour" to maintain an Accumulated Imbalance Limit of zero[76];

(b) the imbalance penalty only becomes payable[77]:

(i) after the Operator has given the shipper a notice specifying the extent to which the shipper must reduce its gas take and shipper does not make reasonable endeavours to comply with the notice; or

(ii) of the shipper exceeds the Outer Imbalance Limit of 20%; and

(c) if the Operator issues an imbalance notice to a shipper, it must issue a similar notice to all other shippers whose gas take is outside of their imbalance limit[78]; and

(d) there are provisions setting out the circumstances under which the Operator can issue a notice requiring the shipper to reduce its imbalance, the shipper's obligations to comply with such a notice, remedies available to the Operator for non-compliance, etc.[79]

314. WPC submits that provisions to the same effect as the 2004 T1 Service provisions should be adopted as part of the terms and conditions of the reference service.

350% imbalance penalties

315. Under the Tf Service, the Operator may require a shipper to pay a 350% Excess Imbalance Charge[80] where:

[76] Clause 9.2 SSC
[77] Clause 9.5 SSC
[78] Clause 9.5(c) SSC
[79] Clauses 9.5 9.6 SSC
[80] Schedule 1 Annexure A to the PRAA

"…

(i) the Shipper's Imbalance causes actual pecuniary loss or damage; or

(ii) in the reasonable opinion of the Operator, Shipper's Imbalance exposes the pipeline to a significant risk (whether or not that risk becomes manifest) that threatens the integrity of the pipeline.

…"[81]

316. WPC contends that the terms and conditions are deficient because:

(a) *"actual pecuniary loss"* means that any dollar amount of damage no matter how insignificant would then permit the Operator to levy the imbalance penalty[82]. There is no nexus between the loss suffered by the Operator and the penalty – consequently it cannot be considered as a matter of law to be reasonable;

(b) the test in the second limb *"significant risk … that threatens the integrity of the pipeline"* is ambiguous and unclear. Given that the Operator's determines whether this test has been satisfied (and thereby triggering the substantial imbalance penalty) it is unreasonable for the test to be so ambiguous and unclear without reference to an objective standard;

(c) it is unreasonable that the penalty can be levied either when damage occurs OR when risk arises. The penalty should be levied only when damage is caused (when aggregated with other shippers' imbalances the amount of imbalance may be reduced or even set-off, which will also affect the extent of damages suffered by Operator)[83]. It is not reasonable for the Operator to be able to levy the penalty when it is only at risk, and the words "reasonable opinion of the Operator" provide little restraint. In addition, in some instances an imbalance can assist the Operator. A positive imbalance is less harmful to the pipeline than a negative imbalance – a finding made by OffGAR in its Final Decision (at ¶578); and

(d) the Excess Imbalance Charge or 350% of the relevant 100% load factor Reference Tariff is unreasonably high. WPC does not accept that a rate of 350% is indicative of a Operator's likely losses caused by a shipper's imbalance excursions. On the contrary, WPC cannot see how even a very large imbalance could cause a Operator to incur losses of such a magnitude. WPC's modelling shows that these substantial imbalance charges, in particular being calculated on a daily basis rather than an aggregated basis, would pose a very substantial commercial risk for WPC.

317. This is unreasonable under s 3.6 of the Code because it increases the level of Uncertainty and could produce Inefficiency, which is therefore inconsistent with, among other things:

(a) the economically efficient operation of the DBNGP (s.2.24(d) of the Code);

[81] Clause 6.4(a) Annexure A to the PRAA

[82] WPC suggests that this be limited to "material actual pecuniary loss" or subject to a floor of $[300,000] to prevent claims for non-material amounts.

[83] Imbalance trading permits shippers to bring their imbalance liabilities into line with the aggregate physical impact of their imbalances on the pipeline during the gas day (for example, if shipper A on a day has an imbalance of +5 TJ and shipper B has an imbalance of –4 TJ, then although collectively they have imbalances totalling 9 TJ, in fact their cumulative effect on pipeline has only been an imbalance of +1 TJ

(b) the public interest (s.2.24(e) of the Code), by proposing terms and conditions that no shippers are likely to want, increasing the scope for disputes, etc.; and

(c) the interests of shippers and potential shippers (s.2.24(f) of the Code).

318. In contrast, the 2004 T1 Service:

(a) sets a penalty of 200% of the Base T1 tariff, which represents a balanced penalty determined as a result of commercial contractual negotiations; and

(b) provides that the Excess Imbalance Charge only applies:

(i) where:

A. the Operator has given the shipper a notice specifying the extent to which the shipper must reduce its imbalance (which can only be issued if continued imbalance would have a material adverse impact on the integrity or operation of the pipeline, etc. (see clause 10.3(a)), and

B. the shipper is deemed not to have used reasonable endeavours to comply with a notice to reduce its imbalance[84]; or

(ii) where the shipper exceeds the Outer Accumulated Imbalance Limit of 20%.

319. WPC submits that provisions to the same effect as the 2004 T1 Service provisions should be adopted as part of the terms and conditions of the reference service.

4.2.15 Peaking (cl. 7)

More restrictive peaking limits

320. Under the Tf Service, the peaking limit is set at 120% (of $^1/_{24}$ of the shipper's contracted MDQ).

321. WPC contends that the terms and conditions are deficient because:

(a) they do not allow for differences in seasonal peaking tolerances (i.e. 120% in summer and 125% in winter);

(b) they do now allow for an outer peaking limit of 140%.

Although these increased peaking tolerances appear to be marginal at face value, WPC has been promised substantial amounts of additional T1 capacity under WPC's 2004 Contract. With this additional capacity, the increased peaking tolerances could be quite considerable, and an inability to access the increased tolerances could adversely affect WPC's generation costs and hence the costs of electricity to consumers.

322. This is unreasonable under s 3.6 of the Code because it produces Inefficiency and could subject WPC and other shippers to Unreasonable Costs, which is therefore inconsistent with, among other things:

(a) the economically efficient operation of the DBNGP (s.2.24(d) of the Code);

[84] Clause 9.5(f) SSC

(b) the public interest (s.2.24(e) of the Code), by proposing terms and conditions that no shippers are likely to want, increasing the scope for disputes, etc.; and

(c) the interests of shippers and potential shippers (s.2.24(f) of the Code).

323. Under the 2004 T1 Service:

(a) the Peaking Limit is 120% in summer and 125% in winter; and

(b) there is an Outer Peaking Limit of 140%.

324. WPC submits that provisions to the same effect as the 2004 T1 Service provisions relating to peaking limits should be adopted as part of the terms and conditions of the reference service.

Reduced ability to aggregate peaks

325. The Tf Service limits the shipper's ability to aggregate peaking (for the purpose of calculating peaking limits) to between delivery points within specified pipeline zones[85], namely:

(a) between any two compressor stations upstream of the Kwinana Junction;

(b) between the Domgas plant at Dampier and compressor station 1;

(c) between compressor station 9 and the Kwinana Junction; and

(d) any lateral pipeline downstream of the Kwinana Junction.

326. WPC contends that the terms and conditions are deficient because shippers would lose the flexibility they presently have to aggregate peaking. WPC is not aware of any adverse operating effects for the DBNGP arising from the operation of the peaking aggregation regime under the 2004 T1 Service or the GTR T1 Service.

327. This is unreasonable under s 3.6 of the Code because it increases the potential for shippers to pay Unreasonable Costs, or results in operational Inefficiency (e.g. WPC could, because of the exposure to peaking penalties, be forced into fuel and plant dispatch choices which are less than optimum), which is therefore inconsistent with, among other things:

(a) the economically efficient operation of the DBNGP (s.2.24(d) of the Code);

(b) the public interest (s.2.24(e) of the Code), by proposing terms and conditions that no shippers are likely to want, increasing the scope for disputes, etc.; and

(c) the interests of shippers and potential shippers (s.2.24(f) of the Code).

328. In contrast, under the 2004 T1 Service a shipper's peaks are calculated on the aggregate of the shipper's gas deliveries across three different peaking zone:

(a) across all outlet points on the DBNGP;

(b) across Pipeline Zone 10 (the area of the DBNGP downstream of the upstream valve flanges of Kwinana Junction valves V4 and HV401A; and

(c) across Pipeline Zone 10B (mainline south)[86].

[85] Clause 7.1(b) Annexure A to the PRAA

329. WPC submits that provisions to the same effect as the 2004 T1 Service provisions relating to peaking limits should be adopted as part of the terms and conditions of the reference service.

Interruptibility of peaking

330. Under the Tf Service, the Operator has a right to refuse to deliver at any time the shippers exceeds the MHQ[87].

331. WPC contends that the terms and conditions are deficient because:

(a) giving such an unconstrained right to the Operator to interrupt a shipper's gas take would mean that shippers with consistently peaking gas take would face, on a daily basis, the risk of the Operator physically interrupting gas deliveries to peaking plant. Interruptions are likely to occur during maximum load times of the day (because that is the time when the peaking plant will be running), causing substantial disruptions; and

(b) in most instances the harm suffered by shippers (and their customers) would be out of all proportion to the threat posed to the pipeline by the peaking behaviour, and the immediacy of the injury to the shipper would also not match the fact that in most, but not all cases, the pipeline has the physical capability to accommodate a more orderly management of the shipper's peaking behaviour[88].

332. This is unreasonable under s 3.6 of the Code because it increases the likelihood of shippers having to pay Unreasonable Costs and results in Inefficiency, which is therefore inconsistent with, among other things:

(a) the economically efficient operation of the DBNGP (s.2.24(d) of the Code);

(b) the public interest (s.2.24(e) of the Code), by proposing terms and conditions that no shippers are likely to want, increasing the scope for disputes, etc.; and

(c) the interests of shippers and potential shippers (s.2.24(f) of the Code).

333. The 2004 T1 Service only permits the Operator to refuse to deliver gas:

(a) if a continuation of peaking by the shipper *"…(i) will have a material adverse impact on the integrity of operation of the pipeline; or (ii) will adversely impact, or is likely to adversely impact, on any other shipper's daily entitlement to its daily nomination for T1 Capacity, Contracted Firm Capacity or any Other Reserved Service"*[89]*;* and

(b) after it has (to the extent reasonable in the circumstances) first endeavoured to cooperate with the shipper to ameliorate the impact of the shipper exceeding its peaking limits[90].

[86] Clause 10.1 SSC
[87] Clause 7.2(a) Annexure A to the PRAA
[88] WPC acknowledges that there are some circumstances in which pipeline integrity requires urgent action by the pipeline to curtail a shipper, and fully supports the pipeline being granted those powers. However, these are the rarity. In most cases pipeline constraints develop over hours and even days, and a reasonable contractual regime should include the mechanisms for the pipeline operator and shippers to work together to address these, rather than granting the operator draconian, arbitrary and unilateral powers
[89] Clause 10.3(a) SSC
[90] Clause 10.3 SSC

334. WPC submits that provisions to the same effect as the 2004 T1 Service provisions should be adopted as part of the terms and conditions of the reference service.

350% peaking penalties

335. The Tf Service provides for a Peaking Surcharge of 350% of the 100% load factor Reference Tariff for exceeding the peaking threshold on similar terms to the Excess Imbalance Charge for imbalances[91].

336. WPC contends that the terms and conditions relating to the Peaking Surcharge are deficient for the same reasons as set out in relation to the Excess Imbalance Charge, with appropriate modifications (see paragraphs 315 to 318 above). WPC does not accept that a rate of 350% is indicative of the Operator's likely losses caused by a shipper's peak rate exceeding the specified limit. WPC believes that in most instances the DBNGP can accommodate occasional peaking excursions without any adverse impact the Operator or other shippers at all. These issues are dealt with regularly between the parties' respective control rooms[92].

337. This is unreasonable under s 3.6 of the Code because it increases the likelihood of shippers having to pay Unreasonable Costs and results in Inefficiency, which is therefore inconsistent with, among other things:

(a) the economically efficient operation of the DBNGP (s.2.24(d) of the Code);

(b) the public interest (s.2.24(e) of the Code), by proposing terms and conditions that no shippers are likely to want, increasing the scope for disputes, etc.; and

(c) the interests of shippers and potential shippers (s.2.24(f) of the Code).

338. In contrast, the 2004 T1 Service:

(a) sets a peaking penalty of 200% of the Base T1 tariff, which represents a balanced penalty determined as a result of commercial contractual negotiations;

(b) provides that the peaking penalty only becomes payable[93]:

(i) after the Operator has given the shipper a notice specifying the extent to which the shipper must reduce its gas take (which can only be issued if continued peaking would have a material adverse impact on the integrity or operation of the pipeline, etc. (see clause 10.3(a)); and

[91] Schedule 1 Annexure A to the PRAA

[92] [redacted]

[93] Clause 10.3 SSC

(ii) the shipper is deemed not to have used reasonable endeavours to comply with the notice to reduce its gas take[94]; and

(c) requires the Operator to also issue a similar peaking notice to all other shippers, as applicable, in Pipeline Zone 10[95], 10B[96] or the DBNGP as a whole.

No outer peaking limits

339. The Tf Service terms and conditions do not provide for an outer peaking limit.

340. WPC contends that the terms and conditions are deficient because they do not allow for an outer peaking limit. This is unreasonable under s 3.6 of the Code because it increases the likelihood of shippers having to pay Unreasonable Costs and results in Inefficiency, which is therefore inconsistent with, among other things:

(a) the economically efficient operation of the DBNGP (s.2.24(d) of the Code);

(b) the public interest (s.2.24(e) of the Code), by proposing terms and conditions that no shippers are likely to want, increasing the scope for disputes, etc.; and

(c) the interests of shippers and potential shippers (s.2.24(f) of the Code).

341. In contrast, the 2004 T1 Service provides for a further strata of peaking limit called the Outer Hourly Peaking Limit which is set at 140% of the aggregate MHQ across all delivery points on the DBNGP. Exceeding this outer peaking limit results in the peaking penalty becoming payable (on gas taken in excess of the limit) as soon as the Operator gives the shipper notice[97]. This permits a balance between compensating the Operator from costs associated with a gross departures from the peaking limits but allowing for a cooperative approach in managing lesser departures from the peaking limit which will not affect the efficient operation of the DBNGP.

342. WPC submits that provisions to the same effect as the 2004 T1 Service provisions should be adopted as part of the terms and conditions of the reference service.

4.2.16 Invoicing and payment (cl. 8)

343. This should contain:

(a) an explanation of the methodology of how charges are calculated (e.g. what calculations are used to arrive at the monthly charge); and

(b) a GST clause,

(see clause 20 of the SSC).

4.2.17 Control, Possession and Title to Gas (cl. 10)

344. There is no provision requiring the Operator to deliver good title to gas delivered to shipper (see clause 13.3 of SSC), and no provision setting out shipper's entitlements to receive gas (see clause 13.4 of the SSC). WPC requests that such provisions be

[94] Clause 10.3(d) SSC
[95] Under the SSC "Pipeline Zone 10" means the area of the DBNGP which is downstream of (a) the upstream flange of Kwinana Junction valve V4; and (b) the upstream flange of Kwinana Junction valve HV401A.
[96] Under the SSC "Pipeline Zone 10B" means the area of the DBNGP on mainline South, being downstream of the outlet flange of compressor station 10.
[97] Clause 10.4 SSC

incorporated into the terms and conditions in the PRAA, on the basis that their omission is unreasonable and their inclusion would be consistent with:

(a) section 3.6 of the Code, as being reasonable;

(b) section 2.24(b) of the Code, as it takes into account the firm and binding contractual obligations of the Operator and most of the Major Shippers under the SSC; and

(c) section 2.24(f) of the Code, as it takes the interest of shippers and prospective shippers into account.

4.2.18 Metering (cl. 12)

345. Metering (clause 12):

(a) clause 12.2 does not set out what happens in terms of payment for metering errors (e.g. how does clause 12.6 apply? Does clause 8.5(a) apply?);

(b) clause 12.2(c) should require the Operator to provide the information referred to in clause 12.2(b) in a timely manner.

346. The Operator's written approval in clause 12.4(a) should be subject to the requirement that the Operator be acting as a reasonable and prudent person.

4.2.19 Liability (cl. 13)

347. Shipper responsible for its and its contractors' personnel (clause 13.5): under the SSC (see clause 23.7), the Operator agreed to a reciprocal clause which provided that Operator was responsible for its and its contractors' personnel. WPC requests the inclusion of a mirror clause in the proposed Terms & Conditions. This would be consistent with:

(a) section 3.6 of the Code, as being reasonable (the lack of reciprocal obligations is not in line with general industry practice and is unreasonable. Commercial considerations would dictate that an important aspect in assessing the reasonableness is matching risks associated with the party that is best able to address the consequences – that party is likely to be the best party to assume the risks);

(b) section 2.24(b) of the Code, as it takes into account the firm and binding contractual obligations of the Operator and most of the Major Shippers under the SSC;

(c) sections 2.24(c) & (d) of the Code, as reciprocal clauses would not impact on the operational and technical requirements necessary for the safe and reliable operation of the DBNGP or the economically efficient operation of the DBNGP; and

(d) section 2.24(f) of the Code, as it takes the interest of shippers and prospective shippers into account.

348. Shipper responsible for its and its contractors' personnel (clause 13.5): The PRAA also proposes to substantially reduce the Operator's exposure under this clause, by deleting the words "except to the extent caused by the negligence of Epic Energy". WPC suggests that reinstating these words would be consistent with:

(a) section 3.6 of the Code, as being reasonable;

(b) section 2.24(a) of the Code, as it would be the legitimate business interests of the Operator; and

(c) section 2.24(f) of the Code, as it takes the interest of shippers and prospective shippers into account.

4.2.20 Curtailment and Interruption (cl. 14)

Permissible interruption

349. The Tf Service terms and conditions allow the Operator to curtail the shipper without liability:

(a) where the aggregate duration of curtailments for the Tf Service during the year is less than the Permissible Limit (1% of volume)[98]; and

(b) where the curtailment is a Permitted Curtailment, namely:

"…

(i) in such circumstances as Operator considers necessary as a reasonable and prudent pipeline operator, including for Planned Maintenance and Major Works;

(ii) in order to comply with obligations under any prior contract or any contract which is subject to curtailment or interruption only after the curtailment or interruption of the Tf Service;

(iii) if there is an event of Force Majeure where Operator is the affected party;

(iv) in the circumstances described in clause 3.10(d); or

(v) by reason of, or in response to a reduction in Capacity caused by the default, negligence, breach of contractual term or other misconduct of Shipper.

…"[99]

350. WPC contends that the terms and conditions are deficient because they do not clearly set out where the Tf ranks against other services offered by the Operator on the DBNGP. The priority of interruptions of services on the DBNGP is governed by a curtailment regime which applies across contracts, because it governs the rights shippers have as regards other shippers. The regime is implemented by way of a number of bilateral contracts (i.e. based on the SSC). WPC understands that Tf service is intended to be an "Other Reserved Service" in row five of the Curtailment Plan in Schedule 8 of the SSC [redacted]. [redacted]

351. Not clearly specifying where Tf service ranks in the curtailment regime is unreasonable under s 3.6 of the Code because it creates Uncertainty and Inefficiency, which is therefore inconsistent with, among other things:

(a) the economically efficient operation of the DBNGP (s.2.24(d) of the Code);

[98] Clause 14.1(a) Annexure A to the PRAA
[99] Clause 14.1(b) Annexure A to the PRAA

(b) the public interest (s.2.24(e) of the Code), by proposing terms and conditions that no shippers are likely to want, increasing the scope for disputes, etc.; and

(c) the interests of shippers and potential shippers (s.2.24(f) of the Code).

352. WPC submits that the terms and conditions be amended to clarify where Tf service sits in the curtailment regime which is implemented under each of the contracts between the Operator and the Major Shippers.

Lacks mechanics

353. Under the Tf service:

(a) there is no obligation on the Operator to minimise the magnitude and duration of all curtailments, or act as a reasonable and prudent person when making curtailments;

(b) there are no provisions setting out how the Operator is to give the shipper notice of a curtailment;

(c) there are no provisions setting out the required content of a curtailment notice;

(d) there are no restrictions on what the Operator can require the shipper to do under the curtailment notice (eg. operator must not require shipper to reduce its receipt of gas to a level less than shipper has already received for the gas day before a curtailment notice takes effect); and

(e) there are no requirements for the Operator to provide the shipper with reasons for the curtailment.

354. WPC contends that the terms and conditions are deficient because they lack adequate detail for a gas transportation contract of this nature. This is unreasonable under s 3.6 of the Code because it increases the level of Uncertainty and could produce Inefficiency, which is therefore inconsistent with, among other things:

(a) the economically efficient operation of the DBNGP (s.2.24(d) of the Code);

(b) the public interest (s.2.24(e) of the Code), by proposing terms and conditions that no shippers are likely to want, increasing the scope for disputes, etc.; and

(c) the interests of shippers and potential shippers (s.2.24(f) of the Code).

355. In contrast, the 2004 T1 Service presents a more balanced approach to managing imbalances. Under the Tf service:

(a) there is an obligation on the Operator to minimise the magnitude and duration of all curtailments[100], and to act as a reasonable and prudent person when making curtailments[101];

(b) there are provisions setting out that the Operator is to give the shipper notice of an impending curtailment[102];

(c) there are provisions setting out the required content of a curtailment notice[103];

[100] Clause 17.1(a) SSC
[101] Clause 17.2 SSC
[102] Clause 17.6 SSC

(d) the Operator must not require the shipper to reduce its receipt of gas to a level less than the shipper has already received for the gas day before a curtailment notice takes effect; and

(e) there are requirements for the Operator to provide the shipper with reasons for the curtailment[104].

356. WPC submits that provisions to the same effect as the 2004 T1 Service provisions should be adopted as part of the terms and conditions of the reference service.

4.2.21 No ability to have different seasonal capacities

357. The Tf service does not allow the same service to have different capacities for summer and winter.

358. WPC contends that the terms and conditions are deficient because they do not allow this flexibility, which would benefit electricity providers in summer, and gas providers in winter[105]. From 1 January 1995 the DBNGP has operated under a regime in which the two major regulated shippers, WPC and Alinta, both had different levels of contracted capacity in each season. The inability under the Tf Service to have different levels of capacity in summer and winter will create a difficulty for WPC, forcing it to choose between:

(a) reserving sufficient capacity year-round to meet its summer peaks, resulting in it having considerable unutilised excess capacity in winter, which will increase cost;

(b) reserving an amount of capacity to match its winter demand, and relying on the spot market or overrun to meet its summer peaks, which will cause substantial uncertainty in its fuel supply choices and could result in it paying a premium rate for summer capacity;

(c) either as a stand-alone option, or if forced into it because it cannot secure spot capacity at a reasonable price or has its overrun capacity terminated, implementing plant-dispatch or fuel-choice strategies which are less than optimum; and

(d) exploring very capital intensive gas storage options and gas supply alternatives such as LPG, LNG and CNG.

359. This is unreasonable under s 3.6 of the Code because it increases the level of Uncertainty and could produce Inefficiency, which is therefore inconsistent with, among other things:

(a) the economically efficient operation of the DBNGP (s.2.24(d) of the Code);

(b) the public interest (s.2.24(e) of the Code), by proposing terms and conditions that no shippers are likely to want, increasing the scope for disputes, etc.; and

(c) the interests of shippers and potential shippers (s.2.24(f) of the Code).

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[103] Clause 17.7 SSC

[104] Clause 17.6(f) SSC

[105] Gas retailer shippers such as Alinta may face a similar situation although with the seasons reversed. If both Alinta and WPC chose the inefficient option of reserving sufficient capacity to meet their respective seasonal peaks, the Operator would be in the position of selling more capacity in each season than the two shippers needed between them. This would be a very substantial over-investment by the two biggest non-Alcoa shippers, both of which have substantial seasonal variations in their loads. It does not seem like a reasonable outcome.

360. In contrast, under earlier regimes, the two major regulated shippers, WPC and Alinta, both had different levels of contracted capacity in each season. WPC is not aware of any adverse impact on the DBNGP caused by the arrangement, and does not believe there could be any such adverse impact.

361. WPC submits that provisions to the same effect as the 2004 T1 Service provisions should be adopted as part of the terms and conditions of the reference service.

362. WPC notes that the "Seasonal Service" named by the Operator in the PRAA and access arrangement information is a different kind of service, reflecting the greater capacity of the Operator to ship gas in the cooler months. This Seasonal Service would not meet WPC's particular seasonality requirements which predominantly involve peak gas consumption in the hottest months.

4.2.22 Default (cl. 17)

363. Operator default (clause 17.4): clause 17.4(a) provides that Shipper may only terminate the contract "if Operator defaults in providing the Service for 21 consecutive Days and does not remedy that default within 48 hours of receipt of notice from Shipper requiring the default to be remedied". Clause 17.4 is:

(a) confusing in it does not specify when the 21 Days is counted from (impliedly this cannot be the date of receipt of a notice to remedy from shipper); and

(b) unfair in that shippers have to wait 21 Days (a long period to go without a gas supply) before it can exercise its right to terminate, and will not be able to terminate if the Operator remedies the default within 48 hours or defaults in for less than 21 Days (on one or multiple occasions).

Clause 17.4 also does not provide for insolvency of the Operator as being a specific default. As currently drafted, this clause is not consistent with:

(c) section 3.6 of the Code, as it is unreasonable; and

(d) section 2.24(f) of the Code, as it fails to take into accounts the interests of shippers and prospective shippers.

4.2.23 Assignment (cl. 19)

364. Utilising other shippers' nominations: there is no clause addressing the use of a shipper's nominations by another shipper (see clause 25.6 of the SSC).

4.2.24 Representations and warranties (cl. 21)

365. It is difficult to see why the representations and warranties in section 21.1 given by the Operator are so different from those in section 21.2 given by the shipper. It is in particular difficult to determine how this could be considered reasonable for the purposes of section 3.6 of the Code. In this regard WPC refers the Regulator to sections 30.1 and 30.2 of the SSC, which contain a fairly balanced set of representations and warranties by each party.

4.2.25 Insurance (clause 23):

366. This only places obligations on the shipper to maintain and procure insurance. Under the SSC, Operator agreed that similar obligations mirroring those of the shipper should also be placed on the Operator (see clause 32). Amending clause 23 in this way would be consistent with:

(a) section 3.6 of the Code, as reciprocal insurance obligations follow general industry practice and are therefore reasonable;

(b) sections 2.24(c) & (d) of the Code, as this would promote the safe and reliable operation of the DBNGP and the economically efficient operation of the DBNGP; and

(c) section 2.24(g) of the Code, as the proposed clause does not adequately balance the interests of the Operator and shippers/prospective shippers and is unreasonable particularly in the way that it limits the obligations of the Operator and whilst increasing the obligations on shipper.

4.2.26 Notices clause

367. The terms and conditions should contain a notices clause.

Part 5. Other Comments On PRAA

5.1 Who are the Service Providers?

368. WPC submits that Alinta Network Services Pty Limited (ACN 104 352 560) (**"ANS"**) is a "Service Provider" of the DBNGP for the purposes of the Code. The definition of "Service Provider" in section 2 of Schedule 1 to the GPAA defines "Service Provider" as "the person who is, or is to be, the owner or operator of the whole or any part of the pipeline or proposed pipeline".

369. The GPAA does not define the term "operator". In the absence of a statutory definition, it is appropriate to adopt the ordinary meaning of "operator".

370. In *Kumaragammage v Culbert*[106] Malpass M held:

> *"Although the word "operator" appears in the body of the statute, it is not given a special or statutory definition. In my view, the word should be given its natural or literal meaning (the dictionary meaning includes "to work or run or to manage")".*

371. In the Operator's Submission #4, section 4.3, the Operator states that:

> *"ANS will operate, manage and construct … the DBNGP".*

372. Because ANS is to "operate" the DBNGP, there can be no question that ANS is a "Service Provider", and so should both lodge and be bound by the PRAA.

373. WPC also requests the Regulator to investigate and determine whether DBNGP (WA) Nominees Pty Ltd as Trustee for the DBNGP WA Pipeline Trust (**"Nominees"**) should also be caught and bound by this PRAA. WPC notes that the treatment of Nominees in section 1.3 of the PRAA has the effect that, although Nominees is mentioned in the PRAA, the PRAA does not seem to apply to it.

374. Because, as WPC understands it, Nominees owns the DBNGP, it is a Service Provider for the purposes of the Code, and so is obliged to lodge and be bound by an Access Arrangement.

5.2 Ring Fencing

375. WPC requests the Regulator to consider, and to call for public submissions regarding, whether any or all of Operator, Nominees and ANS should be the subject of additional ring fencing obligations under section 4.3 of the Code.

376. WPC notes in this regard that the ring fencing obligations in section 5.5 of the undertakings given by the DAA Consortium to the ACCC on 22 October 2004 contemplates ring fencing largely being dealt with under the Code. WPC considers that this is appropriate, and urges the Regulator to ensure that adequate ring fencing provisions are in place to protect users.

377. WPC will, if requested, make further submissions on why further ring fencing provisions are required.

[106] *[2000] NSWSC 129* (BC200000822) per Malpass M at paragraph 27

5.3 Confidential submissions

378. WPC notes that section 4.3 of the Operator's Submission #4, along with many other parts of the Operator's Submission #4, contains deleted material in respect of which confidentiality has been claimed. To the extent that the material is relevant to WPC's submission above (or elsewhere in this Submission) WPC is denied the opportunity to comment upon it.

379. WPC submits that a full and proper assessment can only be made if the public and the Regulator have the opportunity to review all related items.

380. WPC submits that it is important that the information currently contained in the confidential documents be publicly available as far as practicable because this will enhance the ability of users and prospective users to form their own views as to compliance of the PRAA with the Code.

5.4 ERA Issues Paper 25 January 2005

381. Page 5 of the Issues Paper states: "The Service Provider is not obliged to provide a Service unless it is one of the Services specified in the Access Arrangement (or an element of such a Service)."

382. This proposition is not supported by the Code. The Service Provider can still be required by the Arbitrator to provide access to a Service as defined in the Code.[107] "Service" is defined in the Code in a way which does not restrict it to Services specified in an Access Arrangement.

5.5 Access Arrangement

383. WPC's comments on the PRAA follow the order of sections in the PRAA.

5.5.1 Introduction (s.1)

384. Paragraph 1.4 of the PRAA states that the Access Arrangement sets out the "basic" terms and conditions applying to third party access. This is potentially misleading. For Reference Services, the PRAA must set out the complete terms and conditions, not merely the basic ones, see section 3.6 of the Code. For Non-Reference Services, the PRAA says nothing, and should say nothing about the terms and conditions of those Services.

385. Section 1.5 of the Introduction conveys an incorrect impression of the effect of the Code. It implies that if Prospective Shippers are unable to conclude negotiations for access, access will only be available on the terms of the Reference Service. In fact, under the Code, access seekers can seek to arbitrate an access dispute for a Non-Reference Service.

386. WPC requests the Regulator to require an amendment to section 1.5 of the PRAA to ensure that it does not provide a fetter on the Arbitrator's ability to arbitrate disputes for Non-Reference Services.

5.5.2 Background (s.2)

387. This is not appropriate. It will be for the GRB to make orders if necessary about these matters. If despite this submission, section 2.7 is to be retained, WPC reserves its rights to make further submissions.

[107] Section 6.8(a) of the Code.

5.5.3 Commencement (s.4)

388. Section 4.1 appears to be otiose. WPC requests the Regulator either require its removal, or to require the interrelationship between sections 4.1 and 4.2 of the PRAA to be made clearer.

5.5.4 Access Requests and Queuing Policy (s.5)

Introduction

389. The applications and queuing process is a critical part of the access arrangement. It establishes playing field on which an access seeker must confront the monopoly power of the service provider. It must be carefully structured to ensure a balance between the interests of the access seeker, and the interests of the service provider (and other access seekers) in preventing gaming by access seekers.

390. If the applications and queuing process contains uncertainties, or grants the service provider too much discretion, or sets unreasonable requirements on the access seeker, or allows the service provider to delay the process, it gives the service provider leverage in the access negotiation process. That leverage can be used to extract more favourable access contract terms and conditions from the access seeker.

391. In practical terms, few access seekers have the time or resources to fight an access dispute, particularly a dispute about an "interlocutory" matter such as the service provider's compliance with the applications process. Thus, ambiguity in this area of the access arrangement usually, in practice, translates into the service provider being able to adopt a "take it or sue me" approach. Time is generally on the service provider's side. The access seeker usually finds itself under ever-increasing pressure to accept a less-than-satisfactory outcome simply in order to ensure that its project can go ahead.

392. [redacted] WPC wishes to see an access regime for the DBNGP which provides greater clarity and certainty, reducing the risk of disputation for both service provider and access seekers. In addition to the comments below, WPC requests the Regulator to carefully review every aspect of section 5 of the PRAA to ensure that it achieves these objectives and complies with the Code.

Section 5.1

393. The last sentence in section 5.1(b) states:

> *"Operator reserves the right to require the Prospective Shipper to pay in advance Operator's estimate of the likely costs."*

394. This is not contemplated by section 5.5 of the Code, and WPC submits that it is not appropriate or consistent with the Code.

395. The word "reasonable" appears in section 5.1(c). WPC submits that the word "reasonable" should also be inserted before the word "costs" in each of the 3 sentences in section 5.1(b). WPC contends that this change is required under:

(a) section 2.24(d) of the Code, because the current proposal does not promote the economically efficient operation of the DBNGP; and

(b) section 2.24(f) of the Code, because the current proposal does not take into account the interests of shippers and prospective shippers.

Section 5.2

396. Regarding communication with shippers, section 5.2 should be amended to include words to the effect that "Operator will use best endeavours to consult with prospective shippers and provide reasonable information to prospective shippers about capacity and facilities". This change would be consistent with:

(a) section 2.24(e) of the Code, because having a competitive market is in the public interest; and

(b) section 2.24(f) of the Code, because the current wording does not take into account the interests of shippers and prospective shippers.

397. Regarding commencement date, under section 5.2(b)(ii), the Commencement Date in an Access Request must be at least 30 days after the date that the Access Request is submitted. WPC contends that there should be provision for this to be waived if a lesser lead period can be accommodated by the Operator. The current provision is inconsistent with section 2.24(f) of the Code, because it does not take into account the interests of shippers and prospective shippers.

398. Regarding minimum terms, the minimum terms specified in sections 5.2(b)(iii), 6.2(b) and 6.2(c) are unduly restrictive and inconsistent with the Code as argued elsewhere in this Submission.

399. Regarding sections 6.2(b) and 6.2(c), a shipper may not know whether it is applying for Spare or Developable Capacity. The sections should be redrafted to refer to the length of the contract term that the Operator will enter into, rather than the term that a Shipper may apply for. There are not, and should not be, any minimum terms specified in the PRAA for Non-Reference Services.[108]

400. In section 5.2(b)(iv) the expression "capacity related" is undefined and vague, thus increasing uncertainty in the application process.

401. In section 5.2(b)(v)(A) the last two lines refer to variations to the Access Contract Terms and Conditions, in the context of a request for a Reference Service. This is inconsistent with section 5.2(c)(ii)(B) which implies that any requested variation to the Access Contract Terms and Conditions is a Non-Reference Service. This inconsistency creates uncertainty and should be removed.

402. Section 5.2(b)(v)(B), where it contains the words "other than a Spot Capacity Service", and section 5.2(b)(v)(C) purport to place a constraint on the terms and conditions that can apply to the Spot Service. The Operator may only specify terms and conditions in the PRAA for Reference Services. Accordingly, these provisions are inconsistent with the Code, and the PRAA must be amended either:

(a) to specify the Spot Service as a Reference Service and to specify reasonable terms and conditions for the Spot Service and a Reference Tariff for the Spot Service; or

(b) to delete these provisions.

[108] Section 5.2(b)(iii) deals with access requests for reference services only. Sections 6.2(b) and 6.2(c) appear to apply to access requests for reference services only because section 6.2 is headed Tf Service.

403. WPC submits that it is unlikely that all of the details contained in the external information or documents would be relevant, therefore this may create a situation where the PRAA are either invalid or unworkable.[109]

404. WPC also submits that the incorporation into the PRAA of external information or documents may create confusion and difficulties in understanding the PRAA. This confusion may arise as the external documents change over time, particularly where the PRAA themselves are not changed.[110] Further, it is inappropriate to incorporate by reference external information or documents which may be amended other than in accordance with the Code.

405. In section 5.2(d), the PRAA should clarify that the adjustment to access charges in respect of the Prescribed Fee is to be a reduction. In addition, the reduction should relate to all amounts paid as "Prescribed Fee" in the course of the application process, including any further Prescribed Fees paid under section 5.2(g).

406. WPC submits that the Prescribed Fee of $5,000.00 is excessive.

407. WPC submits that under section 5.2(e), providing the Service Provider with unfettered discretion regarding refunding the Prescribed Fee is unfair, and provides scope for undue enrichment of the Service Provider. The discretion should be exercised having regard to expenses incurred by the Operator.

408. Section 5.2(f) should be expressed as being subject to section 5.4(k) as regards priority of amended applications. In any given case, the Operator should be required to justify why it requires the payment of a further Prescribed Fee before an amended Access Request will be deemed to be validly submitted.

409. Assessment of Access Requests (section 5.3):

(a) Operator response (s.5.3(a)): WPC requests the Regulator to reinstate the obligation in the current access arrangement that the Service Provide act as a reasonable and prudent pipeline operator in context of assessing and responding to an Access Request. As outlined above,[111] a very potent tool in the hands of a Service Provider wishing to exploit its market power is to be tardy and uncooperative in the processing and negotiation of access requests. This is an area which has historically been abused by the operator of the DBNGP, and has forced WPC to commence access disputes. It is far more efficient and desirable, and better achieves the objectives of the Code, for the PRAA to provide appropriately stringent guidance to the Service Provider on how it should conduct itself in processing applications, rather than forcing applicants to commence access disputes.

[109] In its final decision on the *Access Arrangement by Transmission Pipelines Australia Pty Ltd and Transmission Pipelines Australia (Assets) Pty Ltd for the Principle Transmission System; Access Arrangement by Transmission Pipelines Australia Pty Ltd and Transmission Pipelines Australia (Assets) Pty Ltd for the Western Transmission System; Access Arrangement by Victorian Energy Networks Corporation for the Principle Transmission System May 1998* the ACCC stated at page 111, "while the use of external documents is not a matter that would render the entire Access Arrangements invalid, the current circumstances may create a situation where the Access Arrangements are unworkable".

[110] The ACCC acknowledged this concern in its draft decision on *Access Arrangement by Transmission Pipelines Australia Pty Ltd and Transmission Pipelines Australia (Assets) Pty Ltd for the Principle Transmission System; Access Arrangement by Transmission Pipelines Australia Pty Ltd and Transmission Pipelines Australia (Assets) Pty Ltd for the Western Transmission System; Access Arrangement by Victorian Energy Networks Corporation for the Principle Transmission System May 1998* at page 112.

[111] See paragraphs 389 and 392.

(b) Further information (s.5.3(b)): The statement that: "The information specified in the Access Request form and the Information Package does not necessarily contain all of the information Operator may need to assess an Access Request" does not make sense. WPC objects to the PRAA expressly reserving to the Service Provider this wide discretionary power to impose additional hurdles on access seekers. It therefore requests the deletion of this additional flexibility for the Service Provider. However, if the Regulator determines to retain this provision, then it should be redrafted to provide something like: "The Operator may require information from a Prospective Applicant in addition to the information provided to the Operator in an Access Request and otherwise provided to it in accordance with this section 5 to assess an Access Request."

(c) The introductory words to section 5.3(b) conclude "Operator may:". WPC requests the Regulator to require the insertion of the following words "…Operator may, provided it at all times acts in good faith and in accordance with good industry practice:". WPC observes that the word "reasonably" in the concluding words of section 5.3(b) of the PRAA qualifies only the Operator's determination of whether additional information or investigations are necessary, and not to the Operator's conduct after it has made that determination.

(d) Negotiation of terms in good faith (s.5.3(c)): WPC requests the Regulator to require the PRAA to be amended to impose an obligation on the Operator, not just the access seeker, to also "proceed to negotiate in good faith…the terms and conditions on which the Service is to be provided." To have this provision operating unilaterally is manifestly unfair and inconsistent with section 2.24(f) of the Code. WPC submits that section 5.3(c) is inconsistent with section 2.24(f) of the Code because it fails to take into account the interests of Users and Prospective Users and it would not be contrary to Operator's legitimate business interests to make provision for reciprocal good faith obligations.

(e) Binding contract on Operator acceptance (s.5.3(d)(i)): It is not commercially viable for the Operator to be able to "snap" acceptance of an access contract. It is also inconsistent with the clear policy intention of the Code which emerges from section 6.24 of the Code. It would be a surprising result if a Prospective User was forced to arbitrate a dispute rather than simply applying for it, in order to protect itself from a "sudden death" outcome.

(f) Rejection (s.5.3(e)): If Operator rejects an access request under s 5.3(e) on one of the grounds set out in paragraphs (i) to (viii), it should be required to provide reasons in reasonable detail for rejecting the application. Also, it should only exercise its discretion to reject an access request acting as a reasonable and prudent pipeline operator.

(g) Rejection where access request incomplete (s.5.3(e)(i)): The interrelationship between section 5.3(e)(i) and section 5.4(e) should be clarified, to ensure that section 5.3(e)(i) contains a chance to remedy omissions or defects.

(h) Section 5.3(e)(i) should also include a materiality test.

(i) Rejection – failure to provide further information; failure to consent to Operator plan and cost allocation (s.5.3(e)(ii)): The Operator should be obliged to put forward a reasonable plan and a reasonable cost allocation proposal, and should be subject to an obligation to negotiate in good faith. Otherwise, this provision would have the effect of forcing an access seeker to

agree to an unreasonable proposal or face having its access request rejected and its priority lost.

(j) Rejection – credit worthiness (s.5.3(e)(iii)): WPC submits that it is not acceptable for the Operator to have the ability to reject an application on this ground. Rather, the Operator should be obliged to accept the application, but given a power to build in reasonable prudential requirement;[112]

(k) Rejection – Access Request substantially the same (s.5.3(e)(vii)): the Operator should be asked to explain why this provision is necessary and compliant with the Code. It is for the applicant to determine what its capacity requirements are, and whether it wishes to structure its affairs with a single access contract with a number of different access contracts. Historically, WPC has on occasions lodged numerous access requests in respect of an identical T1 service, for different quantities and for different purposes. There is no justification for it only ever being permitted to lodge a single access request for, say, a T1 service. What if an applicant lodges an application for 1 TJ/d and then realizes that it should have applied for 2 TJ/d? This provision would prevent its lodging a separate application with later priority for the further 1 TJ/d, in order to preserve the priority of its first application.

(l) Rejection – not bona fide (section 5.3(e)(viii)): This provision is open to abuse by the Operator. The Operator should not adopt the role of discretionary policeman. If the Operator believes it has good grounds for not granting the application, it should either commence an access dispute, or refuse to grant the relevant capacity and allow the access seeker to commence an access dispute. It should not retain a subjective highly flexible discretion to reject applications on this ground. Such a provision would tilt the power imbalance much further in the Operator's direction.

410. Queuing Policy (section 5.4):

(a) Non-compliant Access Requests (s.5.4(e)): This section is poorly drafted. It should also put a positive obligation on Operator to notify Shipper if its access request is non-compliant, and should not leave these matters to the subjective opinion of the Operator (in the second and final lines). WPC suggests that the provision should be expressed as follows: "If an Access Request received by Operator is incomplete or otherwise does not comply with the requirements of section 5.2, Operator must promptly notify the Prospective Shipper of the deficiencies. If the Prospective Shipper remedies the deficiencies within 10 Business Days after being given notice, the Access Request may be entered in the queue with a priority date being the date on which the original Access Request was received by Operator."

It is stated in section 5.4(e) that "This section applies only once". This is expressed too broadly, and in any event is not reasonable. It should be modified to apply in respect of each defect notified by the Operator, at the very least. However, WPC submits that it is more reasonable for both parties to be under a general obligation to act reasonably and in good faith in fine tuning the access request. In practical terms, access requests tend to evolve through a negotiation process, as both the access seeker and pipeline operator clarify their needs and circumstances. Any "sudden death" provisions of this nature distort the access negotiation process by giving the Operator unreasonable leverage. As the access request will be entered in the queue only once the deficiencies are remedied, there should be an ongoing

[112] WPC refers the Regulator to sections A2.86 and A2.87 in Appendix 2 to the *Electricity Networks Access Code 2004*.

obligation on Operator to notify the Prospective Shipper of deficiencies in its access request until the access request is accepted into the queue.

(b) Negotiation of terms – priority (s.5.4(f)): A number of points arise. First, the effect of this section is that the maximum guaranteed period for which an access request can be conditional is 40 business days if there is spare capacity and 60 business days is there is no spare capacity (it will usually be longer as this allows no time for Operator to process the access request). This is unlikely to be a sufficient period of conditionality for most applicants, because most of them will have a range of financial and other approvals to obtain after access has been secured. WPC submits that such a restricted period of conditionality does not meet the legitimate business interests of users and prospective users as required by section 3.13(b) or generate economically efficient outcomes as required by section 3.13(c).

Second, 40 or 60, as applicable, business days may not be enough time in which to complete negotiations for non-standard terms. If:

(i) the Operator is unreasonable in the negotiations; or

(ii) the terms and conditions required in the access contract are particularly complex,

the Prospective Shipper may have no choice but to accept unreasonable conditions or lose its access request's priority. WPC submits that this is an area in which the PRAA must strike a reasonable balance. It is in no shipper's interest for "squatters" to be able to occupy positions in the queue by artificially prolonging negotiations. On the other hand, if the time limit is set too early or is not able to be extended to take account of the Operator's intransigence, a cut off provision such as this places very great power in the hands of the Operator. In addition, the PRAA does not take account of the fact that the investigations proposed in a plan under s 5.5 of the Code may take a long time to complete, for example if a complicated engineering study is involved, or the consulting engineer is slow in producing its report. There may not be enough time to complete the study, let alone conclude negotiations for an access contract based on the outcome of the study.

Third, section 5.4(f)(ii) gives too much power to a recalcitrant Prospective Shipper, who can "buy time" by delaying its consent to a plan proposed under section 5.4 of the Code.

(c) Dealing with Access Requests out of order – materially different (s.5.4(g)): The expression "materially different" is vague and undefined, thus increasing the uncertainty in the application process, which increases the Operator's market power. The subjective test proposed by the Operator provides the Operator with significant discretion, while at the same time making it harder for the Shipper to access dispute resolution (because it will be hard to challenge an exercise of this discretion). Therefore, this provision is inconsistent with section 2.24(f) of the Code as it fails to take into account the interests of Users and Prospective Users because it makes it harder to determine with sufficient certainty, or enforce, their obligations under the Access Contract.

(d) Prior Access Arrangement Access Requests – priority (s.5.4(i)): Section 5.4(i) should be made subject to s 5.4(g).

(e) Priority lost if Access Request rejected (s.5.4(j)): This paragraph should be limited to circumstances in which an Access Request is validly rejected. It

should also provide a mechanism for a prospective user to dispute the rejection of the Access Request.

(f) Amended Access Requests – priority (s.5.4(k)): Once again, section 5.4(k)(i) contains a subjective test of the Operator's opinion. This should be modified into an objective test. Also, WPC enquires why it is not possible to use the material prejudice test which appears in section 5.4(g).

(g) Notification of material change in Access Request – confidential information (s.5.4(o)): Note that there are no provisions in the PRAA regarding the treatment of confidential information in access requests. Section 5.7 of the Code applies nonetheless to establish confidentiality obligations if the applicant notifies the service provider that the information provided is confidential. The information to be provided under s 5.4(o) seems to be information only as to the timing of the satisfaction of the shipper's access request, and not information as to the shipper's position in the queue.

5.5.5 Services Policy (s.6)

411. Non-Reference Services (s.6.1(b)(ii)): states that the Non-Reference Services will be made available "subject to operational availability". In contrast, in s 6.2(a) Tf Service is described as a service in which Operator, "subject to availability of Capacity" will do certain things. WPC requests the Regulator to require amendments to the PRAA which either removes this distinction or clarifies its intention. WPC cannot comment on the policy objectives of this ambiguous provision. The expression "operational availability" is a novel one. The PRAA should be amended to clarify its definition.[113] Operational availability is to be "determined by Operator as a reasonable and prudent pipeline operator". These words seem to be introducing more discretion with respect to Non-Reference Services than with Reference Services.

412. Non-Reference Services – Part Haul (s.6.1(b)(ii)(A)): WPC submits that the Regulator should:

(a) require the Operator to justify the proposed revision which deletes any part or component from the Reference Service; and

(b) in any event, modify the PRAA to ensure that there is a part-haul Reference Service available for Shippers. WPC submits that because the Mondarra interconnection between the Parmelia Pipeline and the DBNGP is north of CS9, a substantial part of the market will require access to a Reference Service for haulage to the Mondarra interconnect.

413. Non-Reference Services – Spot Capacity (s.6.1(b)(ii)(C)): The terms and conditions of the Spot Capacity Service (including tariff) are proposed to be at the discretion of the Operator. "Spot Capacity Service" is defined as "a Service for Spot Capacity by way of one or more Spot Transactions". "Spot Transactions" is not defined, however "Spot Transactions Terms and Conditions" is, and it means "the terms and conditions for the Spot Capacity Service as varied by Operator from time to time and made available on Operator's website". Similarly, the "Spot Market Rules" are "the rules published by Operator from time to time under to apply to Spot Capacity Service which Operator will make available on its website". WPC submits that these definitions do not properly integrate and hence do not make sense, but that in any event the intention is clearly that the content of the Rules will be highly discretionary.

[113] WPC refers the Regulator to the definitions of "technically practicable" and "operationally feasible" in its Shipper Contract as examples of how these concepts can be defined. The precise wording of the definition can have important ramifications for the availability of the services and WPC requests the Regulator to carefully scrutinise the practical impact of the term's definition.

WPC also notes that the Access Contract Terms & Conditions still refer to the Secondary Market, which is presumably an error. WPC requests that Regulator require amendment to the PRAA to confirm that the Secondary Market is not intended to continue. The references in the Secondary Market definitions in the Access Contract Terms and Conditions to the Access Arrangement are incorrect – they are references to the existing Access Arrangement and not the PRAA.

In the event a Reference Tariff is not provided for a Service it is not possible for the Regulator to require the terms and conditions of that Service to be specified. Therefore the terms and conditions upon which Spot Capacity will be supplied are (in the absence of arbitration) entirely within the discretion of the Service Provider, which is plainly inconsistent with section 2.24(f) of the Code. Unless the Regulator is proposing to require Spot Service to be a Reference Service, WPC requests that the Regulator require amendments to the PRAA to remove all references to Spot Service and Spot Terms and Conditions, lest the statement in the PRAA that these provisions are to be set in the Service Provider's discretion may be taken as a fetter on the Arbitrator's ability to specify the terms and conditions of this Non-Reference Service.

414. Non-Reference Services – Seasonal (s.6.1(b)(ii)(E)): Seasonal Service in the PRAA is not the type of Seasonal Service WPC has sought (i.e. the ability to have a different MDQ during the Winter months to the MDQ in the Summer months) – it is a service by which a shipper can contract for the incremental capacity available during winter due to colder temperatures.

415. WPC submits that the references to "Capacity" in the definition of Seasonal Service should not be to Capacity as defined in the Access Arrangement i.e. should not be capitalised.

416. WPC has previously submitted to the Regulator that a distinction needs to be drawn between:

(a) type (a) Seasonal Service: which is based upon seasonal variations in the capacity of the DBNGP as a result of compressor stations operating more efficiently in winter when the ambient temperature is cooler; and

(b) type (b) Seasonal Service: which is established as a component of a service such as the T1 Service and allows users to contract for higher levels of capacity for different parts of the year according to their needs and the available (whether for seasonal reasons or otherwise) capacity of the DBNGP.

417. WPC's T1 contracts (like all T1 contracts) permit WPC to have different levels of contracted capacity in summer and winter. This accommodates the fact that WPC's electricity generating load is substantially higher in summer than in winter.

418. Other shippers have the reverse seasonal profile. For example, gas retailers typically ship more gas in winter than in summer, because their gas is used (in part) for space heating and for heating facilities such as swimming pools, both of which require more heating when the weather is cooler.

419. This type of seasonal variation in contracted capacities should not be confused with the fact that the DBNGP's ability to transport gas varies on a seasonal basis. That variation in the DBNGP's total through put capability derives from the fact that the compressor stations which pump gas through the DBNGP operate more efficiently (and hence can pump more gas) when the ambient temperature is lower.

420. The inability under the Tf service to have different levels of capacity in summer and winter will create a difficulty for WPC. It will be forced to choose between:

(a) reserving sufficient capacity year-round to meet its summer peaks, resulting in it having considerable unutilised excess capacity in winter which will increase cost;

(b) reserving an amount of capacity to match its winter demand, and relying on the spot market or overrun to meet its summer peaks, which will cause substantial uncertainty in its fuel supply choices and could result in it paying a premium rate for summer capacity;

(c) either as a stand-alone option, or if forced into it because it cannot secure spot capacity at a reasonable price or has its overrun capacity terminated, implementing plant-dispatch or fuel-choice strategies which are less than optimum; and

(d) exploring very capital intensive gas storage options and gas supply alternatives such as LPG, LNG and CNG.

421. If WPC relies on the spot market or overrun to meet its summertime peak demand, and for any reason spot capacity is unavailable or overrun is interrupted, WPC would be faced, possibly at short notice, with a reduction in its gas supply which might require it to burn expensive liquids or even resort to load shedding (electrical blackouts).

422. Gas retailer shippers such as Alinta may face a similar situation although with the seasons reversed. If both Alinta and WPC chose the inefficient option of reserving sufficient capacity to meet their respective seasonal peaks, Operator would be in the position of selling more capacity in each season than the two shippers needed between them. This would be a very substantial over-investment by the two biggest non-Alcoa shippers, both of which have substantial seasonal variations in their loads. This is not a reasonable outcome.

423. From 1 January 1995 the DBNGP has operated under a regime in which the two major regulated shippers, WPC and Alinta, both had different levels of contracted capacity in each season. WPC is not aware of any adverse impact on the DBNGP caused by the arrangement, and does not believe there could be any such adverse impact.

424. The definition of “Seasonal Service” in the PRAA makes it clear that the Operator is proposing Type (a) Seasonal Service. WPC submits that this Seasonal Service would not meet WPC’s particular seasonality requirements which predominantly involve peak gas consumption in the hottest months.

425. For reasons previously submitted, WPC maintains that there is demand from a significant part of the market for Type (b) Seasonal Service, and accordingly requests that the Regulator require the inclusion of this Service in the Proposed Revised Access Arrangement. WPC submits that providing a Type (b) Seasonal Service:

(a) is consistent with the interests of Users and Prospective Users (s. 2.24(f)); and

(b) is not inconsistent with the legitimate business interests of the Operator or the economically efficient operation of the pipeline (s. 2.24(a) and (e)), as evidenced by the fact that a Type (b) Seasonal Service has been being offered since 1995.

426. Non-Reference Services - Peaking (s. 6.1(b)(ii)(F)): Peaking Service is capitalised but not defined. Section 3.2(a) of the Code states that the Access Arrangement

should provide a description of the Services that will be made available. No description at all is provided of Peaking Service (apart from its name).

427. Non-Reference Services – metering information, pressure and temperature control, odorisation, commingling (ss.6.1(b)(ii)(G) – (J)): for each of metering information service, pressure and temperature control service, odorisation service and co-mingling service, WPC submits that the PRAA should provide a description of the Service in accordance with s 3.2(a) of the Code.

428. Non-Reference Services – Services provided under prior contracts (s.6.1(b)(iii)): WPC requests that Regulator require the Operator to provide the rationale behind s 6.1(b)(iii) including as Non-Reference Services those Services which are provided under contracts entered into prior to the commencement of the Access Arrangement period and not those Services which are not Reference Services which are provided under contracts entered into after the commencement of the Access Arrangement period, thus making Services provided under contracts (if any) for Firm Service entered into under the Access Arrangement which started in January 2004 Non-Reference Services. This appears likely to have an unintended consequences.

429. Negotiation of terms for Services other than Reference Services (s.6.1(b)(iv)): WPC submits that to accurately reflect the position under the Code, the words "is prepared to" should be replaced with a mandatory obligation such as "will". In addition, WPC submits that both Operator and Prospective Shipper should be obliged to negotiate in good faith and in accordance with good industry practice.

430. Tf Service (section 6.2(a)): The Tf Service is described as being a Service in which Operator, "subject to availability of Capacity" will do certain things. Is the Operator suggesting that once contracted, the provision of the Service is subject to availability of Capacity or is it trying to say that Tf will be contracted subject to availability? This is not clear at present, and WPC requests that the PRAA be amended accordingly.

431. Tf Service (s.6.2(a)): The definition of "Capacity" in the Access Arrangement (i.e. "Capacity means the capacity in the DBNGP, as it is configured at the commencement of the Access Arrangement, to transport quantities of gas from a Receipt Point to a Delivery Point"), has the effect of disregarding expansions of the DBNGP. In this context, where Tf service is available "subject to capacity", Capacity should be the capacity of the DBNGP as it is configured from time to time.

432. The description of Tf in s 6.2(a) should expressly state that Tf will be provided on the Access Contract Terms & Conditions – s 6.2(a) contains only an outline of the characteristics of Tf, and the full description of Tf is as set out in the Access Contract Terms & Conditions.

433. Spare Capacity and Developable Capacity (ss.6.2(b) and 6.2(c)): Why does s 6.2(b) refer to "Prospective shippers seeking access to spare capacity as it is configured at the time of approval of this Access Arrangement…" as opposed to spare capacity existing from time to time?

434. Minimum term for Spare Capacity (section 6.2(b)): WPC objects to the proposed adjustment in section 6.2(b) of the minimum term of the contract for Spare Capacity from 2 years to 5 years, and requests that the Regulator require that the PRAA be amended to reinstate the two year minimum term. To the extent that spare capacity exists, what is the justification for a minimum term? The imposition of a prescribed minimum term will promote a higher tariff for shorter term contracts. This has the potential to distort allocative efficiency.

435. Minimum term for Developable Capacity (section 6.2(c)): the Operator gives no justification for requiring a minimum 20 year term for Developable Capacity. In this

context, WPC notes that the suite of contracts entered into in October 2004 to underwrite the acquisition of the entire pipeline contained only a 15 year minimum term. Further, the Capacity Expansion Rights in clause 16 of the SSC also provide for minimum terms of only 15 years. In these circumstances, The Operator's proposal of a minimum term of 20 years in section 6.2(c) of the PRAA appears an unjustified ambit claim.

436. It appears from sections 5.6, 6.8, 6.22 and 6.23 of the Code that the Code does not contemplate such a limitation being part of an Access Arrangement. Such a limitation ousts the jurisdiction of the Arbitrator to determine an application for Access to Developable Capacity for a minimum term of less than 20 years on the facts available at the time of the Application in accordance with the factors set out in section 6.15 and in accordance with section 6.22.

437. It is easy to envisage a situation in which several Prospective Users make Access Requests for Developable Capacity for periods of less than 20 years. These may together make it economic to develop Capacity. Absent section 6.2(c) which ousts the jurisdiction of the Arbitrator, if such applications were denied by the Service Provider, disputes would be dealt with by the Arbitrator on their merits in accordance with sections 6.15 and 6.22, which would allow an appropriate decision to be made at the time.

438. WPC submits that the inclusion of a 20 year minimum term in relation to Developable Capacity is inconsistent with the objectives contained in section 8 of the Code, in particular, is inconsistent with:

(a) section 8.1(b) of the Code because the outcome of a competitive market would be the development of Capacity to meet that market;

(b) section 8.1(d) of the Code because the inability to obtain capacity not presently in existence other than on a 20 year basis has the ability to distort investment decisions in Pipeline Transportation systems and/or in downstream industries because many would-be Shippers would be reluctant to commit to 20 year contracts. It would be easier for a Shipper in an emerging business to utilise an alternative fuel service;

(c) section 8.1(e) because expansion of the pipeline capacity in order to satisfy increased demand for the Tf service is likely to be conducive to efficiency in the level and structure of the Reference Tariff since it would allow more gas to be transported at the Reference Tariff; and

(d) section 8.1(f) because expansion of the pipeline capacity in order to satisfy increased demand for the Tf is likely to provide an incentive to the Service Provider to reduce costs since it would allow more gas to be transported at the Reference Tariff and to develop the market for Reference and Other Services.

439. WPC also submits that the section 6.2(c) is inconsistent with the following sections of the Code:

(a) section 2.24(d) because such a requirement is not conducive to the economically efficient operation of the DBNGP;

(b) section 2.24(e), in particular the aspect of having competition in markets, is strongly against a provision in an Access Arrangement fettering the ability of persons seeking access to Developable Capacity to go to arbitration under s.6 of the Code in order to obtain that capacity if the circumstances are such that an Arbitrator determines that they should have access to it; and

(c) section 2.24(f) because it the interests of Users and Prospective Users under are again firmly against such a provision, for the reasons set out above; and

(d) both the sections 2.24(e) and (f) because such a requirement is contrary to the public interest and the interests of Users and Prospective Users, including the interest of the respective parties in:–

(i) development of gas fields; and

(ii) ensuring that the gas requirements of Users and Prospective Users are satisfied; and

(iii) having competition in markets including upstream and downstream markets.

5.5.6 Extension/Expansions Policy (s. 11)

440. Section 11.1 should be amended to provide that the Operator's obligation to expand the pipeline is not subject to a subjective determination by the Operator of whether the test in section 6.22 of the Code have been satisfied. As drafted, it constitutes a fetter on the Arbitrator's role in this regard.

441. In section 11.6, the words "as determined by the Operator in its sole discretion" should be amended to make it clear that the Access Arrangement does not fetter the Operator's obligations or the Arbitrator's powers under the Code.

442. Section 11.7 should be modified only to Shippers using a Reference Service.

443. Regarding the statement in section 11.8 that:

> *"Operator acknowledges that at the commencement of this Access Arrangement Period, Capacity Expansion Options have already been granted to certain shippers on the DBNGP."*,

WPC submits as follows:

(a) The inclusion of a statement such as this is inappropriate, because it will fetter the Arbitrator's determination in any access dispute.

(b) The Operator should be required to provide details of all such options granted.

(c) To the extent that this statement refers to contracts based on the SSC, this is an incorrect description of how clause 16 of the SSC operates. Under that clause, the issue of a Capacity Expansion Option is not expressed to occur until the Operator issues the Operator's Expansion Offer.[114]

5.6 Access Arrangement Information

444. WPC has commented above on the adequacy of the Access Arrangement Information.

445. WPC submits that the Access Arrangement Information should include at least the information requested in the letter WPC sent to the Regulator on 11 January 2005 requesting further information be provided.

[114] clause 16.2(b)(i) of the SSC.

446. WPC will provide a list of further information which WPC submits the Regulator should require from Operator in due course.

5.7 Submission #4

447. WPC contends that the information provided by the Operator in Submission #4 (Public Version) dated 27 January 2005 should have been included in the Access Arrangement Information, and accordingly, should be subject to the requirement under section 2.6 of the Code.

448. WPC submits that Submission #4 is no substitute for the Access Arrangement Information.

449. WPC submits that the Access Arrangement Information should include at least the information requested in the letter WPC sent to the Regulator on 11 January 2005 requesting further information be provided.

450. WPC will provide a list of further information which WPC submits the Regulator should require from Operator in due course.

Appendix 1: Glossary

Access Manual means the *DBNGP Access Manual* dated 10 March 1998 having effect under the *Dampier to Bunbury Pipeline Act 1997*;

ACCC Undertaking means the undertakings given under section 87B of the *Trade Practices Act 1974* by the DUET/Alinta/Alcoa consortium on 25 October 2004;

ANS means Alinta Network Services Pty Ltd, contracted by the Operator to operate, manage and construct the DBNGP;

Code means the *National Third Party Access Code for Natural Gas Pipeline Systems* having effect under the GPAA;

DBNGP means the Dampier to Bunbury Natural Gas Pipeline;

FAA means the Financial Assistance Agreement dated 27 October 2004;

Firm Service means the Firm Service referred to in the current Access Arrangement;

GRB means the Gas Review Board;

GPAA means the *Gas Pipelines Access (Western Australia) Act 1998*;

GTR means the *Gas Transmission Regulations 1994* having effect under the *Gas Corporation Act 1994*;

Major Shippers means Alinta Sales Pty Ltd, Alcoa of Australia Ltd, CSBP Ltd, North West Shelf Gas Pty Ltd, South West CoGeneration, WPC and Worsley Alumina Pty Ltd, collectively representing 95% of the total throughput capacity of the DBNGP;

NWIS means North West Interconnected System;

OffGAR means the Office of Gas Access Regulation;

Operator means DBNGP (WA) Transmission Pty Ltd;

PRAA means the proposed revised access arrangement, access arrangement terms and conditions and access arrangement information for the DBNGP lodged with the Regulator on by the Operator on 21 January 2005;

Regulator means the Economic Regulation Authority;

SSC means the Standard Shipper Contract forming the basis of terms and conditions upon which shipper contracts [redacted] were negotiated with individual shippers in October 2004 and which the Operator intends to use as the basis for future shipper contracts;

SWIS means South West Interconnected System;

WPC means Western Power Corporation; and

WPC's 2004 Contract means the contract between WPC and Operator for gas transportation provided for under the Deed of Amendment and Restatement (WPC's 2004 Contract) (Full-Haul) dated 27 October 2004.

Appendix 2: Apparent Typographical Errors

Access Arrangement

451. Section 5.2(d): the word “adjusted” should be replaced with the word “reduced”.

452. Section 5.3(e)(iii): instead of “the Access Contract”, formulation as set out in s 5.3(b)(i) should be used (i.e. “the Access Contract that would be formed by Operator's acceptance of the Access Request”).

Access Arrangement Terms and Conditions

453. Definition of Access Guide (clause 1.1): definition of Access Guide superfluous given that this term is no longer used in the Access Arrangement. Consequential changes needed to definition of Access Request in clause 1.1.

454. Definition of Capacity Charge (clause 1.1): linked to Shippers Delivery Point MDQs. Should this refer to Contracted Capacity.

455. Definition of Contracted Capacity (clause 1.1): refers to that part of the capacity which has been reserved – however no discussion of how capacity can be reserved. Needs clarification.

456. Definition of Contribution Agreement (clause 1.1): refers to clause 6.7(b) but should refer to clause 3.7(b).

457. Definition of Force Majeure (clause 1.1): the examples listed after the word including should be made conditional on the foregoing tests being satisfied. See definition in the SSC.

458. Use of word “gas” throughout the Access Contract Terms and Conditions: “Gas” has been globally replaced with “gas”, but this is not appropriate in all cases (eg. where AGA standards are mentioned in the definition of Actual Mass Flow Rate, and in the definition of DBNGP).

459. Definition of Governmental Agency (clause 1.1): this term is not used and should be deleted.

460. Definition of Indirect Damage (clause 1.1): paragraph (a) should refer to any indirect loss or damage however “caused”.

461. Definition of Major Works (clause 1.1): use of the term “services” throughout this definition is ambiguous.

462. Definition of Multi-Shipper Agreement (clause 1.1): should refer to clause 3.3(d) not 6.3(d).

463. Definitions of Secondary Market, Secondary Market Rules and Secondary Market Terms and Conditions (clause 1.1): these terms have been removed from the Access Arrangement and therefore should also be deleted in these terms and conditions.

464. Definition of Spot Capacity (clause 1.1): the term “Standard Shipper Contract” in this definition is not defined.

465. The interpretation provisions in clause 1.2 should include:

(a) an provision that "under" includes by, by virtue, pursuant to and in accordance with;

(b) that the terms including, for example etc are not words of limitation;

(c) that a grammatical or linguistic variation of a defined work or expression has a corresponding meaning;

(d) that the interpretation provisions of *Interpretation Act 1984* apply,

given that the terms and conditions seem to have been drafted in reliance of such rules (see also the interpretation provisions of the SSC).

466. Term (clause 1A): that the Access Contract commences on the date Operator executes the Access Request Form but does not provide for a mechanism by which shipper is informed of such a date by the Operator.

467. Receipt Point/receipt point, Delivery Point/delivery point: the Operator has used these defined terms and non-defined terms inconsistently throughout the document. For example see clause 2.4(c) which uses both formulations in the same sentence.

468. Operating specifications (clause 2.8): the term Operating Specification is not defined anywhere.

469. Clause 3.3(e)(viii): the reference to the provision of metering information under clause 15.5 is incorrect.

470. Clause 3.6(a)(iv): the reference to technical requirements of operator as advised from time to time is ambiguous in that it does not state how the requirements are to be set or are to be advised.

471. Charges (clause 3.11): this clause refers to a Tariff Schedule, a term which has been deleted.

472. Weekly nominations (clause 4.2(c)): the reference to clause 6.1 in clause 4.2(c) appears to be incorrect. Operator to confirm.

473. Overrun Charge (clause 5.2(b)(i)): the term SSC is not defined.

474. Provision of Notice (clause 6.3): the term Electronic Bulletin Board is not defined.

475. Trading imbalances (clause 6.6): in the second line of this paragraph, the reference to "Shipper" should be amended to "shipper".

476. Hourly peaking (clause 7.1): the meaning of the commencing words "without limiting clause 6" are unclear in clause 7.1(a).

477. Right to recover Direct Damages (clause 7.2(b)): the meaning of "which is caused by or arises out of shippers "Peaking" (an undefined term) is ambiguous and requires clarification.

478. Use of term "Days" in clause 8: the definition of Day in clause 1.1 describes what in the SSC is a Gas Day. To make the timing consistent with the SSC, references throughout this clause to Days need to be changed to Business Days.

479. Shipper's disputes an invoice (clause 8.3(d)): should specify when the 7 Days (which should be Business Days) is calculated from. It is also not clear whether the

independent expert's jurisdiction is exclusive of the court's jurisdiction, or whether a party may elect to refer the matter to court.

480. Warranty regarding control, possession of gas (clause 10.2): use of the words "at each relevant time" in this clause is ambiguous.

481. Rights of Service Provider (clause 17.2): the reference to Secondary Market in clause 17.2(a) is incorrect given that this defined term no longer applies.

Appendix 3: Standard Shipper Contract