



SUBMISSION 1: Background Information

Public Version

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1. INTRODUCTION

- 1.1. On 1 April 2010, DBNGP (WA) Transmission Pty Ltd (DBP) filed the following documents with the Economic Regulation Authority (ERA):
 - (a) proposed revised Access Arrangement (**Proposed Revised AA**); and
 - (b) proposed revised Access Arrangement Information (**Proposed Revised AAI**).
- 1.2. These documents contain the information that the National Gas Access (WA) Act 2009 (**NGA**) (which includes the Western Australian National Gas Access Law text (**NGL**) and the National Gas Rules (**NGR**) requires to be included in order to enable them to be approved by the ERA.
- 1.3. The ERA also issued a Regulatory Information Notice on 2 March 2010 (**RIN**). This submission is aimed at supplementing the information in the Proposed Revised AA and Proposed Revised AAI in order to address the information requested by the ERA in the RIN.
- 1.4. In addition to the Revised AA and Proposed Revised AAI, a number of additional submissions on key issues will be or are to be filed to assist the Regulator to assess the Proposed Revised AA and to address the categories of information requested in the RIN. These included the following:
 1. Background Information (being this submission)
 2. AA & AAI Compliance Checklist
 3. Pipeline Services
 4. Basis for Total Revenue
 5. Terms and Conditions Justification
 6. Explanation of Queuing Requirements
 7. Capacity and Throughput Forecast
 8. Rate of Return
 9. Justification of Actual expansion Capital Expenditure (2005 – 2010)
 10. Actual Stay-in-Business Capital Expenditure (2005 – 2010)
 11. Forecast Capital Expenditure (2005 – 2010)
 12. Actual Operational Expenditure and Forecast Operational Expenditure
- 1.5. The purpose of this submission is to outline, in one location, information on a number of issues which are to be referred to in various submissions to be made by the Operator (**'common issues'**). The common issues to be addressed in this submission are as follows:
 - (a) What are elements of an access arrangement – see section 2 of this submission
 - (b) The Financial Assistance Agreement – see section 3 of this submission
 - (c) The 2004 ACCC Undertakings – see section 4 of this submission
 - (d) The change in operational circumstances for DBP – see sections 5 and **Error! Reference source not found.** of this submission.

2. CONTENT OF AN ACCESS ARRANGEMENT INFORMATION

- 2.1. This section outlines DBP's position as to what the NGL and NGR require to be included in the Proposed Revised AAI. In pre-consultations held between DBP and the ERA, there was a suggestion that the ERA could require a significant amount of information to be included in an Access Arrangement Information
- 2.2. The NGR provides that:
- (a) when submitting an access arrangement proposal, a covered pipeline service provider must submit access arrangement information for that proposal (rule 43(1) of the NGR); and
 - (b) certain sensitive information may be aggregated or suppressed (rule 43(2) of the NGR). If, in the ERA's opinion, information submitted as access arrangement information is deficient in its comprehensiveness or in any other respect, the ERA may require it to be revised or supplemented (rule 43(3) of the NGR).
- 2.3. The term 'access arrangement information' is defined in the NGR by reference to rule 42. Rule 42 provides as follows:
- “(1) Access arrangement information for an access arrangement or an access arrangement proposal is information that is reasonably necessary for users and prospective users:*
- (a) to understand the background to the access arrangement or the access arrangement proposal; and*
 - (b) to understand the basis and derivation of the various elements of the access arrangement or the access arrangement proposal.*
- (2) Access arrangement information must include the information specifically required by the Law.”*
- 2.4. There are only two provisions of the NGR that specifically require information to be included in the access arrangement information (other than rule 45(2) which applies only to limited access arrangements):
- (a) rule 72, which sets out in detail matters which must be included in the access arrangement information; and
 - (b) rule 73(2), which provides that the basis on which financial information is provided must be stated in the access arrangement information.
- 2.5. DBP is of the view that Rule 42(2) governs the content of the AAI, and rule 42(1) governs the qualities required of that information. Therefore, the only information required to be included in an access arrangement information document is that which the NGA specifically requires to be included in the AAI.
- 2.6. It is DBP's position that Rule 42 does not require to be included into the AAI all information necessary to understand the basis and derivation of all elements to an AA proposal (“broad interpretation”) unless the NGA expressly provides for information in relation to an element to be specifically included.
- 2.7. This position is supported by the following:
- (a) Rule 42(2) uses the word 'must', whereas rule 42(1) uses illustrative language.

- (b) If the broad interpretation of rule 42 were intended, the drafting would illustrate that the subsections were cumulative (for example, by stating in rule 42(2) that nothing in rule 42(1) limits the breadth of rule 42(1)).
- (c) Rule 42 is similar in content to and in the interaction between clauses 2.6 and 2.7 of the Gas Code. Under the Gas Code, the ERA adopted an approach similar to DBP's position – i.e. it has not required the AAI to contain information supporting all elements of an Access Arrangement.

2.8. In addition to the above drafting of the NGA, there are a number of previous statements of the ERA and the MCE which support DBP's position that it is the drafting and content of rule 72 of the NGR which is the statement of the minimum access arrangement information requirements.

- (a) By letter to the MCE dated December 2006, the ERA commented on the previous rule 21 (rule 72) of the draft initial NGR dated 21 November 2006, and stated:

"The AER and ERA are satisfied in most respects with the approach taken in cl. 21 to reproducing, at a higher level of generality, the subject-matter of Attachment A to the Gas Code, the minimum access arrangement information requirements. The provisions for a general regulatory information order proposed in the NGL would provide the means for the regulator, following consultations, to specify the detail of content and form of information to be provided as access arrangement information.

However, Categories 5 and 6 of Attachment A contain useful information requirements that have not been incorporated in the Law or Rules.

Category 5 lists information about system capabilities, capacity and volume and Category 6 lists industry key performance indicators (KPIs) and the service provider's own KPIs.

We suggest that clauses modelled on Categories 5 and 6 of the Gas Code Attachment A provisions be included in the Rules."

- (b) In response, the MCE stated in its Response Table to Submissions dated 14 May 2007 that the recommendation that access arrangement information should include information about system capacity and volume assumptions, and key performance indicators was accepted, and that these categories of information would be included as access arrangement information.
- (c) The Explanatory Material for the Second Exposure Drafts of the National Gas Law and National Gas Rules released by the Ministerial Council on Energy in July 2007 refers to the Gas Code AAI provisions as being clauses 2.7 to 2.9. This supports the view that clause 2.7 of the Gas Code (equivalent to rule 42(2) of the NGR) determined what needed to be included in the AAI, and not clause 2.6 (equivalent of rule 42(1) NGR).
- (d) The Explanatory Material for the Second Exposure Drafts of the National Gas Law and National Gas Rules released by the Ministerial Council on Energy in July 2007, which shows no intention to change the AAI requirements and comments. The section of the Explanatory Material that refers to Rule numbers 41-42 provides as follows:

"Rule number 41-42: These rules achieve the policy intention of separating access arrangement information for the access arrangement itself similar to 2.7-2.9 of the Gas Code."

3. FINANCIAL ASSISTANCE AGREEMENT

- 3.1. As part of the acquisition of the DBNGP in October 2004, the Government agreed to provide financial assistance in the form of a loan to the successful bidder, subject to certain commitments being given by the bidder in connection with the expansion of the DBNGP. As reported in a media statement issued by the then Minister for Energy on 27 October 2004:

"Mr Ripper said the Government had committed \$88 million to the timely expansion of the pipeline.

"The consortium will pay stamp duty in full. However, the Government has secured guaranteed, timely expansion of the pipeline through the provision of financial assistance to an equivalent amount," he said.

"The assistance will be in the form of a 99-year loan, which may convert to a non-repayable grant at the request of the consortium if the expansion commitments are satisfied.

- 3.2. Accordingly, the Financial Assistance Agreement (**FAA**) was entered into between the Minister for State Development (**the Minister**), DBNGP Holdings Pty Ltd (**DBNGP Trustee**), DBNGP (WA) Nominees Pty Ltd and DBNGP (WA) Transmission Pty Ltd (**Operator**) and is dated 27 October 2004.
- 3.3. A copy of the agreement is contained in **Attachment 1**. The FAA has been tabled in parliament and so is a matter of public record.
- 3.4. Under the FAA, the State of Western Australia provided financial assistance to the DBNGP Trustee for the purpose of enabling the expansion of the DBNGP. The financial assistance takes the form of a loan from the Minister to the DBNGP Trustee. The loan was fully drawn down on 27 October 2004.
- 3.5. The principal terms of the FAA are outlined as follows.
- (a) The amount of the loan is \$88,067,138.80. It is an interest free loan.
 - (b) The DBNGP Trustee must use the loan directly or indirectly in the implementation of the Expansion Commitments (described below).
 - (c) The loan is repayable in 99 years.
 - (d) The DBNGP Trustee may elect to repay the loan at any time before the due date, provided it has complied with the Expansion Commitments. The Minister has limited rights to demand early repayment of the loan. These rights are described in more detail below.
 - (e) The DBNGP Trustee has the right to apply to the Minister for the loan to be converted to a grant if it has completed the Expansion Commitments.
 - (f) The Minister has no obligation to convert the loan, even if the Expansion Commitments have been completed.
 - (g) The loan was originally secured by operation of a security trust deed (**Security Trust Deed**) – the Minister became a third ranking secured creditor under the Security Trust Deed. The FAA provided that the Minister ceases to be a secured creditor following the performance of the Initial Expansion Commitments (described below). This has now occurred and so the Minister is no longer a secured creditor.

3.6. There are four principal events of default under the FAA:

- (a) the DBP parties fail to perform the Expansion Commitments in a material respect (there is a cure period in this regard of at least 40 Business Days);
- (b) there is a breach of warranty in a material respect;
- (c) insolvency events in respect of any of the DBP group companies; and
- (d) any of the DBP group companies is convicted of a criminal or statutory offence that is punishable by a fine or penalty of at least \$10,000 and which has a material adverse effect on their ability to perform the Expansion Commitments.

3.7. DELETED

3.8. DELETED

3.9. The DBP group of companies has performed the Expansion Commitments described in items 9 and 10 of Schedule 1 to the FAA ("**Item 9 and 10 Commitments**").

3.10. DELETED

3.11. DELETED

3.12. DELETED

3.13. DELETED

3.14. DELETED

3.15. DELETED

4. ACCC UNDERTAKINGS - 2004

- 4.1. In addition to the expansion obligations provided for in the FAA, the Operator and other entities of the DBP group have provided undertakings to the ACCC to expand the capacity of the DBNGP.
- 4.2. These undertakings were given as part of court enforceable undertakings given under section 87B of the Trade Practices Act as part of the 2004 acquisition of the DBNGP (**2004 Undertakings**).
- 4.3. The 2004 Undertakings comprise two undertakings instruments provided to and accepted by the ACCC as follows:
- (a) The undertakings provided by the DBP Consortium Members, DBP Holdings and AAM and accepted by the ACCC on 25 October 2004 (Consortium Undertakings); and
 - (b) The undertakings provided by the Operator (then known as Epic Energy (WA) Transmission Pty Ltd (**EEWAT**) and accepted by the ACCC on 1 November 2004 (**EEWAT Undertaking**).
- 4.4. As DBP understands it, AAM provided and the ACCC accepted undertakings from AAM because it was (at that time) a wholly owned subsidiary of Alinta and a party to the DBNGP Operating Services Agreement (OSA), under which it was (at the time) to provide asset management and network services in relation to the operation, construction and maintenance of the DBNGP.
- 4.5. At the time of the acquisition by the DBP Consortium Members, Alinta:
- (a) through a wholly owned subsidiary, Alinta DBNGP Pty Ltd, ultimately had a 20% ownership interest in DBP;
 - (b) through a wholly owned subsidiary, Alinta Sales Pty Ltd, was ultimately a shipper on the DBNGP; and
 - (c) through its wholly owned subsidiary, AAM, agreed to provide asset management, operation, maintenance and construction management services to DBP in respect of the DBNGP under the OSA.
- 4.6. At the time of the acquisition of DBP by the DBP Consortium Members, the ACCC had expressed concern about Alinta's vertical integration as an owner of and shipper on the DBNGP and as to the ability of Alinta to adversely affect competition in downstream markets for gas retail and electricity generation because of AAM's involvement in operating the DBNGP.
- 4.7. Given this and the unsatisfied demand that had arisen prior to 2004, the ACCC required the inclusion of certain expansion obligations in the 2004 Undertakings. They are as follows:
- (a) Under clause 5.7 of the 2004 Undertakings:
 - (i) subject to clause 5.7, DBNGP Holdings Pty Ltd is to expand the capacity of the DBNGP between DOMGAS Dampier Plant Inlet Point and CS10 by not less than 100 TJ/day, in aggregate, to meet the known capacity requirements of contracted Shippers or Prospective Shippers who enter Standard Shipper Contracts that comply with clause 5.6 under and in accordance with the terms of those contracts (the "**Expansion**");

- (ii) each Expansion is to occur no later than 5 years following completion of the acquisition of the DBNGP; and
 - (iii) DBNGP Holdings is to invest up to \$400 million in connection with the Expansion provided that the Shippers that require expanded Capacity have entered into Standard Shipper Contracts.
 - (b) Clause 5.6(a) of the 2004 Undertakings provide that “subject to clause 5.6(b), DBNGP Holdings undertakes to ensure that the Operator offers to all Prospective Shippers who require a T1 Service a Standard Shipper Contract 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.” Relevantly, clause 5.6(b) provides that nothing in clause 5.6(a) requires the DBP group parties to enter into a Standard Shipper Contract with a Prospective Shipper if it would not be required to do so under the Gas Access Law and the DBNGP Access Arrangement.
- 4.8. These obligations, together with the Item 9 and 10 Commitments under the FAA, materially affect DBP's provision of pipeline services to which the DBNGP Access Arrangement (being an applicable access arrangement under the NGR) applies.
- 4.9. The Operator submits that the 2004 Undertakings are also a regulatory obligation or requirement for the purposes of Rule 79(2)(c)(iii) of the NGR. The reasons for this are set out in more detail below.
- 4.10. Accordingly, DBP submits that:
- (a) all the expenditure made by DBP in connection with the expansion of the capacity of the DBNGP since 2005 meets the test under Rule 79(2)(c)(iii) of the NGR in that it is necessary to comply with the regulatory obligation of clause 5.6(a) of the 2004 Undertakings, given that all the expansions since 2005 have been undertaken as a result of the operation of clause 16 of the SSCs (except in relation to the capacity provided for Alcoa under the Exempt Contract);
 - (b) If the ERA does not agree with the above submission or in the alternative, the initial \$400m expended by DBP meets the test under Rule 79(2)(c)(iii) of the NGR in that it is necessary to comply with the regulatory obligation or requirement of clause 5.7 of the 2004 Undertakings to expand the capacity of the DBNGP between DOMGAS Dampier Plant Inlet Point and CS10 by not less than 100 TJ/day, in aggregate, to meet the known Capacity requirements of Contracted Shippers or Prospective Shippers who enter Standard Shipper Contracts that comply with clause 5.6 under and in accordance with the terms of that contract (the “**Expansion**”); and
 - (c) In the alternative, the capacity provided and expenditure made by the DBP group (including the Operator) in meeting the capacity requirements of shippers and prospective shippers under Standard Shipper Contracts that were the subject of access requests that were in existence as at 27 October 2004 meets the test under Rule 79(2)(c)(iii) of the NGR in that it is necessary to comply with the regulatory obligation or requirement of clause 5.7 of the 2004 Undertakings.

“Regulatory obligation or requirement”

- 4.11. As outlined above, DBP submits that the 2004 Undertakings are a regulatory obligation or requirement for the purposes of Rule 79(2)(c)(iii) of the NGR. This is so for the following reasons:
- (a) The 2004 Undertakings materially affect the provision, by a service provider, of pipeline services to which an applicable access arrangement applies in that:

- (i) The T1 Service that is the subject of a Standard Shipper Contract is a pipeline service;
 - (ii) The 2004 Undertakings materially affect the provision of the T1 Service by regulating key obligations under the Standard Shipper Contract for the T1 Service – being the non discrimination obligations, the tariff obligations and the expansion obligations; and
 - (iii) The T1 Service is provided by the Operator – being a service provider of pipeline services to which the DBNGP Access Arrangement applies.
- (b) The 2004 Undertakings constitutes an “instrument made or issued for the purposes of an Act of a participating jurisdiction”. The Federal Court has determined that Undertakings given under section 87B of the Trade Practices Act (such as the 2004 Undertakings) are an “instrument”. In *Australian Petroleum Pty Ltd v ACCC*¹, Lockhart J considered whether an undertaking made pursuant to section 87B was an “instrument” under the TPA, and therefore by definition an “enactment” under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (the “ADJR Act”). The meaning of “regulatory obligation or requirement” under the NGAL and an “enactment” under the ADJR Act both include, amongst other things, an “instrument” made under an Act. The undertakings in *Australian Petroleum Pty Ltd v ACCC* were given to “address the Commission’s concerns” about the affect of a merger on a particular market. Lockhart J noted that the primary purpose of the undertakings was to allay the concerns of the Commission such that the Commission would not need to intervene under section 50 of the TPA. Lockhart J held that the undertakings were an “instrument” made under the TPA because the undertakings:
- (i) were given for the purposes of section 87B in connection with a matter in relation to which the ACCC has the powers or functions under the TPA;
 - (ii) owe their force and effect to section 87B of the TPA; and
 - (iii) have the capacity to affect legal rights and obligations, and in fact do affect them.

4.12. It should be noted that in March 2010, the ACCC agreed to variations to the 2004 Undertakings to reflect certain changes in the circumstances of the parties to the 2004 Undertakings since October 2004. These changes in circumstances are outlined in detail in the following section of this submission.

¹ *Australian Petroleum Pty Ltd v ACCC* [1997] 143 ALR 381

5. CHANGE OF CIRCUMSTANCES

- 5.1. On 31 August 2007, a consortium of Babcock & Brown and Singapore Power International (**SPI**) acquired the shares in the corporate group then known as Alinta (**2007 Consortium**). As part of that acquisition, Babcock & Brown Infrastructure, consisting of Babcock & Brown Infrastructure Limited and Babcock & Brown Investor Services Limited in its capacity as trustee of the Babcock & Brown Infrastructure Trust (**Prime**) and Babcock & Brown Power Limited and Babcock & Brown Power Services Limited in its capacity of trustee of Babcock & Brown Power Trust (**Alinta Energy**) provided undertakings to the ACCC under section 87B of the TPA. Those undertakings were accepted by the ACCC on 13 August 2007 (**2007 Undertakings**).
- 5.2. The Operator understands that the 2007 Consortium split up the ownership of Alinta's interests relating to the DBP group of companies and the DBNGP as follows.

20% ownership interest in DBP

- 5.3. Prime took over Alinta's 20% equity stake in the DBP group of companies through acquiring 100% of the shares in Alinta Limited (now called WestNet WA Infrastructure Holdings Limited). Alinta Limited ultimately remained the 100% owner of Alinta DBNGP Pty Ltd, the entity that holds the 20% interest in the shares of DBP Holdings and the units in the DBNGP Trust.

Interests as a shipper on the DBNGP

- 5.4. Based on information advised to the Operator by Prime and Alinta Energy, Alinta Energy has interests in the following shippers on the DBNGP:
- (a) Alinta Sales (100% owned by Alinta Energy);
 - (b) Alinta Energy (LPG) Pty Ltd (**Alinta Energy**) (100% owned by Alinta Energy).
 - (c)
- 5.5. The Operator understands that as from 30 March 2009, Alinta Energy ceased to have an economic interest in NewGen (Kwinana) Power Pty Ltd (**NewGen**) – also a shipper on the DBNGP - with Sumitomo Corporation now having an indirect interest in NewGen.
- 5.6. DELETED
- 5.7. DELETED
- 5.8. DELETED
- 5.9. DELETED

6. DELETED

7. DELETED

ATTACHMENT 1: FINANCIAL ASSISTANCE AGREEMENT

Financial Assistance Agreement part 1.pdf

Financial Assistance Agreement part 2.pdf

ATTACHMENT 2 - DELETED

ATTACHMENT 3 - ANNOUNCEMENTS

Announcements by DBP and the Minister for Energy announcing the completion of the Stage 4 Expansion project.

ATTACHMENT 4 – DELETED

ATTACHMENT 5 - DELETED