DBNGP 2010 PROPOSED REVISED ACCESS ARRANGEMENT

RIO TINTO SUBMISSION

Enquiries: Stuart Wilson

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Dear Sir,

PROPOSED REVISED ACCESS ARRANGEMENT – DAMPIER TO BUNBURY NATURAL GAS PIPELINE (DBNGP)

Please find attached submission by Rio Tinto regarding the proposed Revised Access Arrangements for the DBNGP for the period 2010-2015.

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1. Executive summary

1. Rio has an interest in the 2010 DBNGP PRAA because it is a current and prospective user of part-haul and back-haul services to support its mining and related operations in Western Australia.[1]

2. In connection with the **proposed R1 reference service**, Rio would like to make the following submissions:

   (a) **The R1 service:** Rio does not oppose the creation of a new or modified full-haul reference service, provided it does not prejudice existing and future shippers. Rio is concerned that the proposed R1 service is materially more interruptible and less flexible than the current T1 service and is concerned that this might artificially inflate tariffs for future T1 non-reference services and also for shippers with 2004 SSCs.[2] If the R1 service is to be retained, there are some issues with way the proposed terms and conditions have been amended, primarily in how the new R1 service will integrate with existing and future T1 shippers.[3]

   (b) **The proposed abolition of P1 and B1 service:** Rio opposes the proposed abolition of P1 and B1 services. It contends that a substantial part of the market seeks both of these services.[4]

   (c) Rio also makes some comments on some points of detail in how the PRAA describe the reference service[5] and on some propositions put by DBP in its Submission 3.[6]

3. In connection with the **proposed revised terms and conditions**, Rio submits that the terms and conditions of a service can be as important as its tariff,[7] and identifies the following headline issues:

   (a) DBP has proposed a different treatment for planned maintenance which could make the new reference service considerably more interruptible than the former reference service.[8]

   (b) DBP has proposed to remove short-term relocation rights (aggregation).[9]

   (c) DBP has proposed to remove the DBNGP Trustee as a contracting party. Rio does not have enough information to know whether this is a concern.[10]

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[1] See section 2 below.

[2] See section 3.1 below.

[3] See section 3.3 below.

[4] See section 3.2 below.

[5] See section 3.4 below.

[6] See section 3.5 below.

[7] See section 4.1 below.

[8] See paragraph 33 onwards, below.

[9] See paragraph 38 onwards, below.

[10] See paragraph 45 onwards, below.

(d) DBP has proposed the removal of the very important prohibition on it over-selling capacity, thus increasing the risk of interruption for all shippers.[11]

(e) The tariff payable under a shipper contract is proposed to "float" with the regulated reference tariff from time to time. Rio would prefer the ability to lock in a predictable tariff and escalation path for the life of a contract.[12]

4. Rio also makes other substantive comments on the proposed terms and conditions.[13]

5. In addition to the areas in which DBP has proposed changes, Rio comments on some issues in connection with the terms and conditions, including:

(a) The terms and conditions continue the fiction that the shipper has ownership and control of inlet point facilities.[14]

(b) The terms and conditions continue to expose the shipper to liability for out-of-specification despite the fact that the pipeline operator is in a position to manage and mitigate this risk, and the shipper is not.[15]

6. Rio does not object in principle to the **proposed use of the BEP** to provide a virtual loop of the DBNGP, but considers that it raised numerous important operational and commercial questions which need to be answered.[16]

7. Rio makes some observations about the proposed **queuing** rules, and seeks a minor clarification of the **extensions and expansions** rules.[17]

8. In relation to **tariffs**:

(a) Rio would prefer the ability to lock in a predictable tariff and escalation path for the life of a contract.

(b) Rio has no in-principle objection to DBP's proposed treatment of carbon costs pass-through but makes some comments on the detailed drafting.[18]

2. Introduction

9. This submission regarding DBP's 2010 proposed revised access arrangement (**"PRAA"**) is on behalf of the Rio group of companies, referred to collectively as **"Rio"**.

10. Rio undertakes mining and mineral processing at several sites in Western Australia, and to support these activities it operates gas-fired power stations at Dampier and Paraburdoo. Some of these are supplied directly from the DBNGP, and some are supplied from the GGP. Rio is also investigating a potential expansion of its iron ore operations which could require additional gas transport capacity. . Rio presently

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[11] See paragraph 48 below.

[12] See paragraph 49 below.

[13] See section 4.3 below and the typographical and drafting comments in the Attachment.

[14] See paragraph 51 below.

[15] See paragraph 52 below.

[16] See section 5 below.

[17] See sections 6 and 7 below, respectively.

[18] See section 8.2 below.

purchases gas from a number of producers, all of whom deliver their gas into the DBNGP.

11. Rio has power stations supplied directly and indirectly from gas transported on the DBP.

12. To accommodate its potential expansions Rio will, in the short and medium term likely require:

    (a) modifications to its current DBNGP shipper contracts (for example changes to inlet and outlet points)

    (b) additional part-haul and/or back-haul capacity to outlet points on the DBNGP and also to the GGP interconnect; and

    (c) potentially other services such as pressure services.

3. The R1 reference service

3.1 Replacement of the T1 service

13. Rio does not in principle oppose DBP creating a new or modified full-haul reference service, whether it has the same or a different name to the T1 service, provided that:

    (a) it does not result in shippers being offered a single reference service which is less attractive and less valuable than the former reference service unless there is a concomitant discounting from the full reference tariff – in this regard Rio considers that the proposed R1 service is less valuable than the T1 service but there is no concomitant discount;

    (b) the curtailment regime does not prejudice either legacy T1 shippers or shippers on the new service – in this regard Rio notes that the proposed revised terms and conditions would give R1 shippers lower curtailment priority than legacy T1 shippers which would be a clear disadvantage to any R1 shipper until between 2019 (when most 2004 SSCs expire) and 2029 (if the 2004 SSC shippers exercise both of their 5 year options); and

    (c) the terms and conditions of the new service are not so favourable to the service provider that it can use those terms to interrupt shippers on the reference service more than in the past, thus freeing up pipeline capacity which will allow DBP to sell greater-than-forecast amounts of services and hence earn better-than-regulated returns without actually increasing its efficiency. Rio's concern here is not whether DBP earns greater returns, but that it may do so at the expense of the reliability of the reference service and hence in effect at the expense of the reference shippers who are underwriting the pipeline's operation – in this regard Rio comments below on numerous proposed changes to the terms and conditions which would increase DBP's flexibility, and shippers' risk, in this manner.

14. There are also tariff implications of the proposed move to an R1 service:

    (a) First, for a range of reasons detailed below, but having largely to do with reliability, risk apportionment and operational flexibility, the R1 service is less attractive to a shipper than the T1 service. Accordingly, a prospective shipper may wish to negotiate or arbitrate for a T1 non-reference service on terms similar to those currently available, in place of the R1 reference service. However, both DBP and the arbitrator are likely to argue that if T1 is superior

to R1 then the T1 tariff should be higher than the R1 tariff. Since the R1 tariff is proposed to be set on the same basis as the old T1 tariff was set (ie. total target revenue divided by total forecast throughput[19]), if DBP can successfully argue that T1 should attract a premium above R1, it will effectively have achieved a tariff increase for the same T1 service. This is neither efficient nor fair.

(b) Second, the abolition of P1 means that there is now uncertainty as to how part-haul services are to be priced. Rio submits that for each part-haul shipper to be forced to negotiate its own cost-reflective non-reference tariff is inefficient and might lead to different shippers, with different bargaining powers, paying different tariffs for effectively the same service.

(c) Third, the replacement of T1 at the T1 tariff with R1 at (effectively) the same tariff could have adverse tariff implications under the 2004 Standard Shipper Contract. Rio is concerned that if in 2016 the only available reference service is less reliable and less flexible than the T1 service, then DBP will seek to argue that SSC T1 shippers should pay a premium above the R1 reference tariff, on the basis that the T1 service is a premium service.

15. Rio queries whether the proposed creation of a new reference service can in fact work, given the terms of T1 contracts now in existence. For example clause 3.2(b)(iv) of the current T1 reference service (and the SSC T1 service) contains an important protection for shippers, in that it makes it a breach of contract if DBP "oversells" capacity in the pipeline thus jeopardising the reliability of services for all existing shippers. That clause assumes that future sales of services will all be in the class of T1, P1 and B1. Rio submits that the solution may be for any appropriate changes to be made to the terms and conditions of the reference service (see discussion below) but that the main full haul firm service should continue to be called the T1 service. If the ERA permits a different outcome, it will be risking a range of unintended outcomes for shippers on both SSC T1 and reference service T1 contracts.

16. Rio observes that clause 2.4 of the T1 reference service terms and conditions would facilitate the proposal in the preceding paragraph, because it allows references to "T1 service" to include the same concept (note, not necessarily the identical terms and conditions) in other contracts. Thus, it is possible for the T1 service to change.

3.2 Removal of part-haul and back-haul reference services

17. As a substantial current and prospective user of part-haul capacity, Rio submits that:

(a) Rio and other miners in the Pilbara, Mid-West and Goldfields constitute a substantial part of the market, and have, and will continue for the foreseeable future to have, substantial need for part-haul gas transportation services; and

(b) accordingly the access arrangement should continue to provide a part-haul reference service.

18. Similar comments apply in respect of back-haul. In particular the arrival of Macedon gas will increase back-haul demand as shippers seek to transport that gas up to the Pilbara, or to Yarraloola for delivery into the GGP.

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[19] Since tariffs are proposed to be calculated on the assumption that all volume is sold under a single reference service (AAI cl. 14.2), and hence the single reference tariff will be set to recover all of the total revenue, then in general terms the same unit tariff will be calculated whatever the terms and conditions of the reference service.

19. If there is to be a part-haul and/or back/haul reference service, Rio submits that the ERA should closely scrutinise the allocation of total revenue between full-haul and part-haul/back-haul reference services, given that the bulk of the new capital expenditure has occurred downstream of the Pilbara and the GGP interconnect, and so brings no benefit to many part-haul or back-haul shippers. Rio submits that for part-haul or back-haul shippers to contribute to these costs would involve a cross-subsidy in favour of full-haul shippers and be inconsistent with NGR 95.

20. Rio would however welcome certain changes to the terms and conditions of any part-haul reference service from those set out in the current access arrangement, in particular:

(a) Rio submits that the part-haul and back-haul terms and conditions should allow shippers a right to relocate ("aggregate") capacity, subject to its operational feasibility for the pipeline operator. Rio accepts that lengthening haul (other than by a nominal amount – see comments on clause 14.2(d)(i) in the table at paragraph 50 below) has an increased operational impact for the pipeline operator and so will require negotiation or some form of formulaic adjustment, and that the pipeline operator should be kept whole in that instance, but submits that shortening haul should be permitted as of right (again, Rio accepts the established principle that shortening of haul should not reduce the pipeline operator's income). See also comments starting at paragraph 38 below.

(b) On the subject of imbalance, peaking and overrun charges, there is an argument that the full-haul charges could be unenforceable contractual penalties, because they are not linked to the costs DBP will suffer as a result of any imbalance, peaking excursion or overrun. Whether or not that is the case, Rio submits that the imposition of these charges at undiscounted full-haul rates to part-haul shippers is unjustified and potentially an unlawful contractual penalty, because it imposes penalties/charges on part-haul shippers which are proportionately between 10 and 50 times higher than the charges being imposed on full haul shippers. Rio submits that these charges do not appear to be cost based. It may have been a simple error that the part-haul penalties were applied as a percentage of the undiscounted T1 tariff rather than the distance-discounted P1 tariff, but in any event Rio asks the ERA to remedy these distorted charges.

3.3 Implementation problems with the R1 service

21. In addition to the points made above, if the R1 service is to be retained, then some of the proposed changes to the terms and conditions need to be re-examined. Specifically:

Clause	Comment on the treatment of legacy T1 capacity
1	Definition of **"B1 Service"** states that B1 rates equally with R1, but Schedule 9 shows B1 ranking ahead of R1. This confusion could have important implications because curtailment priority is a significant commercial issue for Rio and other shippers.
1	Definition of **"Contracted Firm Capacity"** needs to continue to include T1 capacity, to protect the rights of a shipper which has both T1 and R1 capacity under, eg. clauses 5.3(g) and 8.9(d). This is a significant commercial issue for Rio because if Rio requires new capacity in the near future it would likely be in a position to have both old T1 and new capacity. Rio asks that the terms and conditions be modified to clarify

	how they operate for such a shipper.
1	Definition of **"Overrun Gas"** should continue to recognise T1 capacity.
2.4	This needs to still refer to T1, P1 etc so that other provisions of this contract can work, in particular Schedule 9.
3.2(a)(i)	This suggests that R1 = P1 = B1, which is inconsistent with Schedule 9 which provides that T1 = P1 = B1 but that R1 is different.
30.1(a)(x)	Very significantly, this clause as now proposed to be drafted would have the effect of **prohibiting DBP from ever entering into another T1 contract**, even as a non reference service, because in Schedule 9 T1 ranks ahead of R1. Presumably this is simply a drafting oversight, and not an attempt to prevent or hinder shippers' continued access to T1 non-reference services.
Sched 9 Part B	The apportionment formula will not work if T1 is excluded

3.4 Other comments on the description of pipeline services in s3 PRAA

22. Section 3.1(b)(i) of the PRAA states that the non-reference services will be made available "subject to the availability of Capacity (as determined by Operator as a reasonable and prudent service provider)". Rio is concerned that this description:

    (a) either implies that the non-reference services cannot be made available out of developable capacity, which would very significantly limit their availability;

    (b) leaves it up to DBP's (reasonable) discretion to determine whether there is any available Capacity, which in view of s189 of the NGL might be seen as displacing the dispute resolution body's ability to form its own opinion in this regard.

    Rio requests that the ERA require amendments to the PRAA which clarify both of these points.

23. On a related point Rio submits that the words "(subject to the availability of Capacity)" in the first line of s3.2(a) of the PRAA are unclear and risky. The intention, presumably, is to say that DBP will only contract for the R1 service if there is spare or developable capacity available to be contracted. That is unobjectionable. The difficulty is that the PRAA as drafted includes this test *within the description of the service itself*, potentially cutting across all the sophisticated rules in the reference service terms and conditions about curtailment, refusals to deliver, etc. Rio requests that the drafting clarify that the availability of Capacity is a consideration in whether one gets the service, not an aspect of what the service comprises.

24. In relation to both of the above points Rio observes that the definition of "Capacity" in PRAA s15 looks only at capacity as at the commencement of the access arrangement period. Accordingly, both of the above uses of Capacity are incorrect because in both cases the demand for services might also be met out of developable capacity.

25. At s3.2(d) of the PRAA DBP proposes to increase the minimum term of a reference service for spare capacity from 2 years to 5 years. Rio submits that there is no good reason for this change to occur, and that there are good reasons why the term should be left at 2 years. It is quite common in the current gas market for customers to

contract to buy gas for relatively short periods of 1-5 years, and there does not seem any necessity for a shipper to be locked into a minimum term of 5 years, or alternatively be forced to negotiate and potentially pay a premium for a non-reference service, when contracting for spare capacity.

26. The final sentence of s3.6(c) of the PRAA needs to be clarified. Presumably a shipper who already has a haulage contract is not required to obtain a further one.

3.5 DBP's Submission 3

27. Rio notes the following about DBP's Submission 3:

(a) Rio submits that at para 4.5(b) of Submission 3 DBP misstates the test in the NGR. The test is simply whether a service is "likely" to be sought, not whether it is "highly probable" or "very probable" which is a significantly higher standard. Rio also submits that the NGR, appropriately, do not link the assessment to the particular access arrangement period. Access contracts tend to be planned and negotiated over several years. A central role of the access arrangement is to provide a benchmark for those negotiations. If a shipper was planning to enter into a contract in say 2016 or 2017 (in the next access arrangement period), its negotiations, and any necessary access dispute, would likely occur in the period 2011 to 2014, and so would be based on the benchmark provided by the access arrangement as approved in 2010.

(b) Rio submits that paragraph 4.5(d) of Submission 3 is incorrect. The NGR do not limit the demand for services to only spare uncontracted capacity. The linkage to the current access arrangement period is incorrect for the reasons given in paragraph 27(a).

(c) Paragraph 4.7(d)(i) of Submission 3 is based on a flawed premise. The extent to which a contractual right has been utilised is not a reliable indicator of the extent to which shippers might seek to have that right included in the reference service terms and conditions. For example, very few shippers would have used the force majeure rights in the same period, but Rio would expect all shippers to insist on the inclusion of a force majeure clause in a shipper contract because it is a standard commercial risk mitigation tool. The broader behavioural limits are likewise more about risk mitigation than day-to-day operational flexibility. See Rio's comments on the behavioural limits in the terms and conditions below. Paragraph 5.2(a) of Submission 3 is incorrect. It is possible that Rio could make a decision to expand operations within the 2013-2105 timeframe. This could potentially require additional gas transport capacity.

(d) Rio is also concerned by the fact that paragraph 5.2(a) of Submission 3 suggests that even if the DBP was fully contracted for T1 service (which presumably means that all TJ/d have been sold up to the 98% reliability cutoff), DBP would be at liberty to sell additional R1 service. There is only one pipe and one stream of gas. Rio does not understand how, if the pipe is fully contracted for T1, DBP would be able to sell additional firm capacity (under any name) without jeopardizing the reliability of services for everyone including existing T1 shippers, and asks the ERA to closely scrutinize DBP's proposals and pipeline modeling in this regard.

(e) Paragraph 5.3(a)(i) of Submission 3 is also based on a flawed premise, namely that a shipper might not seek the T1 service for developable capacity. In addition, there is always a risk that a contract may be terminated for breach or insolvency, thus both freeing up some uncontracted capacity and most likely creating an immediate demand for a new contract.

(f) Likewise paragraph 5.5 of Submission 3 disregards the fact that under the NGL DBP may be required to expand the DBNGP if someone seeks additional capacity.

28. Rio expresses no comment on the rest of Submission 3.

29. Rio is potentially disadvantaged by the wholesale reduction of Submission 3 after section 5.9, rendering Rio unable to correct any errors or make submissions in opposition to any assertions made by DBP in the redacted material. Rio asks the ERA to consider whether all of that material has been appropriately withheld.

4. The proposed revised terms and conditions

30. Rio agrees that the terms and conditions of the SSC and the 2005 T1 reference service can be improved, both in drafting and operation, and it welcomes many of DBP's endeavours in that regard.

4.1 Terms and conditions are at least as important as tariffs

31. Rio welcomes the ERA's close scrutiny of DBP's proposed changes to the terms and conditions. The terms and conditions for a reference service are vitally important for two reasons:

(a) first, the value of any service is determined by its terms and conditions, especially interruptability, risk allocation, and operational issues such as relocation (aggregation), pressure, quality and behavioural tolerances for peaking, balancing and overrun. Hence, whether a particular reference tariff represents fair value depends on the corresponding reference service terms and conditions; and

(b) second, the cost of a service is not the only significant factor for a shipper such as Rio. Reliability, predictability and appropriate operational flexibility are also critical, as is a bankable suite of risk allocation provisions. Indeed, such non-tariff issues can sometimes be more important for a miner than the tariff.

4.2 Headline issues for Rio

32. Note: The inclusion of some items under this "headline issues" heading does not imply that the points raised under subsequent headings are immaterial.

Changed treatment for planned maintenance

33. DBP has proposed to change the treatment of planned maintenance, by rolling it into the definition of "major works". This is a material commercial change which Rio opposes.

34. Previously, a curtailment for planned maintenance (old cl. 17.2(d)):

(a) did not come within the "no liability" provisions of cl. 17.3(b)(ii); and

(b) counted towards the 2% permissible curtailment limit because it was not listed as an exclusion in cl. 17.3(c)(i).

35. The old terms and conditions granted DBP additional leeway in respect of "Major Works" (as previously defined) because it was recognised that these were impossible to implement without disruption to other shippers, and also largely they were implemented in response to market demands for developable capacity and so in a

sense were outside DBP's control and also brought benefits to the marketplace. In contrast, DBP was expected to manage planned maintenance within the 2% curtailment limit.

36. This proposed amendment would mean that DBP could schedule planned maintenance in a way which created significantly more than 2% outages per year. Since every curtailment involves operational disruption, and potentially requires shippers to incur much more expensive costs for alternative fuels such as diesel, this change would materially degrade the reliability and value of the service.

37. Rio submits that there is no justification for this change and that it should be rejected.

Removal of short-term relocation (aggregation)

38. One of the significant changes proposed by DBP is to remove aggregation, which is the name given by the DBP contracts to the rules allowing a shipper to make short-term relocations of capacity by nominating at a point where it does not have contracted capacity, or by nominating in excess of its contracted capacity at an point, provided it makes an equivalent reduction in its nominations elsewhere so that it does not in aggregate exceed its total contracted capacity.

39. This is a very important risk-mitigation right for shippers, to allow them to mitigate:

    (a) the take-or-pay risk under their gas supply agreements – by allowing the shipper to sell the gas to another person at a different outlet point if their gas-consuming plant is down for any reason;

    (b) the curtailment risk under their gas supply agreements – by allowing the shipper to source gas from another supplier at a different inlet point if its normal supplier suffers an outage;

    (c) the risk of its operational fluctuations, in which different sites' consumption of gas or gas-fired electricity can vary from one day to the next for a range of reasons – by allowing the gas to be sent where it is needed; and

    (d) various other risks in the fuel or electricity supply chain – for example by enabling gas swaps, gas for oil swaps, gas storage swaps, and so on.

40. Many of these situations arise swiftly and are of short duration, so that the contractual variation mechanism in clause 14 is both far too slow[20] and too permanent to be appropriate.

41. A service without short-term relocation rights is much more rigid, materially less valuable and will operate far less efficiently than a service with those rights.

42. There can be no sensible operational risk for DBP in continuing to offer these rights because they are always limited by what is "Operationally Feasible", which is the broadest test in the contract, being subjective to DBP and taking into account the pipeline's configuration and status on the day in question. Likewise, even if the pipeline is now, as DBP contends, a very different thing to what it was in 2005, while that may affect the availability of these rights on a day-to-day basis, it should not preclude them being included in the contract.

[20] cl. 14.2(a) allows DBP up to 40 working days for an initial response to a relocation request. Most of the events described above are resolved within the first 72 hours.

43. The fact that short-term relocation is subject to the "Operationally Feasible" test also means that the inclusion of those rights in contracts places no restrictions on how in the future DBP engineers or operates its pipeline, or what services DBP can sell, because the relocation rights are always on that "only if it's possible" basis.

44. Rio submits that the removal of these rights is unjustified and is not consistent with the national gas objective, and requests their reinstatement.

Removal of the DBNGP trustee

45. Rio accepts that this simplification may be appropriate, and has no in-principle objection, but does not know enough about the structure of the DBP group to form a concluded opinion on this change.

46. To manage its commercial and operational risk, Rio is concerned to ensure that:

    (a) it is contracting with entities of substance both financially and technically;

    (b) it is contracting with entities who are in a position to deliver on commitments being made, and also with all entities in the DBP group who might be in a position to thwart the performance of those commitments, and hence Rio would normally expect to be contracting with all entities with effective control over the pipeline;

    (c) it is contracting with all entities which own and are in a position to dispose of the pipeline assets.

47. Rio submits that these are reasonable and common commercial objectives, and asks the ERA to investigate DBP's proposal to ensure that it is consistent with those objectives. Rio also asks the ERA to ensure that sufficient information is made public about the ownership structure and the internal arrangements between members of the DBP group to enable interested persons to understand the implications of this change which might or might not have serious commercial ramifications.

Removal of prohibition on over-selling

48. DBP has proposed the deletion of old clause 3.2(b)(iv) of the reference service terms and conditions. Without this prohibition, DBP will be incentivised to sell too much capacity, and to deal with the consequences by pro-rated curtailments. Thus, DBP will get the benefit of additional revenue but all shippers will pay through reduced reliability. This clause is in fact the commercial underpinning of the entire concept of firm service (whatever it is named), and its removal is a material commercial risk for both new and incumbent shippers.

"Floating" tariffs

49. The proposed tariff escalation mechanism is commercially unattractive, because it exposes a shipper to the regulatory risk of having its tariff reset every 5 years. Rio submits that this is inefficient, a disincentive to use gas transport, and inconsistent with common practice[21] in shipper contracts to date which has been to strike a price and escalation path at the start of the contract, so that both parties have a predictable and "bankable" tariff path. Rio submits that that would be a preferable approach.

[21] The 2004 insolvency rescue deal is of course a notable exception. Rio is not aware of many other gas transportation agreements whose tariffs "float" on the regulatory outcome.

4.3 Other comments on DBP's proposed revisions to the terms and conditions

50. The following table addresses the points raised by the ERA in its Issues Paper, and also some other issues. For completeness Rio has included all of the ERA's table, even where it has no comment or objection.:

cl.	ERA Issues Paper Comment	Rio Comment
1	*[Not in Issues Paper]*	Definition of **"Capital Cost of the Expansion"** is not used, but if it is to be used it should be subject to a prudence test in accordance with NGR 79(1)(a), and perhaps also a justifiability test in accordance with NGR 79(1)(b).
1	*[Not in Issues Paper]*	No comment
2.6	*The quantity of gas delivered to the Burrup Extension Pipeline (BEP) Inlet Point is deemed to be no more than the BEP Inlet Point Capacity*	See comments and questions at heading 5 below.
2.7	*[Not in Issues Paper]*	Rio asks the ERA to consider whether the proposed contractual restriction on the parties' regulatory conduct is appropriate.
3.2	*Amendments to provisions for curtailment of the service under the Curtailment Plan*	• There seems no need or justification for the deletion of old cl. 3.2(a)(i) and Rio submits that it should be reinstated. If it is intended to increase the curtailability of the R1 service, Rio opposes it. • Deletion of old 3.2(b)(ii): Rio has no in-principle objection to DBP changing the basis on which it determines how much T1, R1 or other capacity it is able to sell. Rio does note that (contrary to DBP's submission) the drafting which is proposed to be deleted does not link to any particular methodology; it merely relates to the 2% permissible curtailment limit. • Deletion of old 3.2(b)(iii): DBP proposes to remove an important transparency measure, which requires it to calculate the maximum capacity of the pipeline whenever it materially changes. What justification can there be for this deletion? • Deletion of old 3.2(b)(iv): See comment at paragraph 48 above.
3.5	*Deletion of provisions for use of Spot Capacity*	No comment
4.3	*Provision of options for the shipper to renew the contract for two terms of five years, rather than two terms of 1 year under the 2005 to 2010 terms and conditions*	Rio welcomes this change.
4.5	*Shippers are required to give 30 months notice for renewal of contracts rather than the existing 3 months*	No comment
5.2(b)	*[Not in Issues Paper]*	This clause is too vague. It is no use to a shipper if DBP delivers the right amount of gas in total but at the wrong places. Rio submits that the clause should be expressed to say that DBP will deliver gas at the nominated outlet points in the quantities required by the shipper at each point, up to a maximum across all points of the Shipper's Contracted Capacity.
old 5.5 old 5.9	*[Not in Issues Paper]*	Rio submits that these clauses should be restored. There is no justification for DBP to unilaterally make itself less accountable in this fashion. If DBP is forced into a situation where it must refuse to receive or deliver gas for safety or MAOP reasons, and this situation has occurred as a result of DBP failing to act as a reasonable and prudent

		person, then that refusal should count towards the 2% permissible curtailment limit. ' Rio is not aware of anything which would justify a change to this established balance of risks.[22] Removing these clauses removes an incentive for DBP to operate the pipeline efficiently.
5.6 5.9	*an obligation on a shipper to pay capacity related transmission charges in certain events where the operator refuses to deliver gas*	Rio understands that these are purely for clarification and do not change the previous contractual position, and so has no objection.
5.10	*more detailed terms relating to the shipper's obligation to pay for system use gas*	Rio supports the introduction of greater clarity and has no in-principle objection to these changes, but notes three points of detail: • clauses 5.10(a) and (b) seem to leave a gap in respect of any SUG used to transport gas to points upstream of CS7; and • clause 5.10(a) should make it express that the cost of that provision is included in the tariff, and is not to be the subject of an additional charge; and • clause 5.10(a) needs to be broader, and oblige DBP to provide all SUG, not just the shipper's share.
5.11	*Additional rights of the operator to refuse to deliver or receive gas in circumstances of emergencies*	Rio does not object to the inclusion of the *Emergency Management Act 2005* in this clause.
5.12	*Obligations on the shipper to have gas installations and appliances inspected in accordance with the Gas Standards Act 1972 (WA)*	No comment
6.3(e)(ii)	*[Not in Issues Paper]*	No comment
6.4 6.5	*More detailed terms relating to operation of multi shipper agreements at inlet and outlet points*	Rio welcomes the clarification of these provisions.
6.6 6.7 6.8 6.10	*More detailed terms relating to design and installation of inlet stations, inlet point connection facilities, outlet stations and gate stations*	Rio has no in-principle objection to the changes and welcomes the clarification, but: • Rio submits that since all these assets form part of the DBNGP, the ERA must ensure that there are suitable safeguards against DBP double-recovering any money under these mechanisms and also through the regulated tariff. • Clauses 6.7, 6.8 and 6.11 should all include express references to the grandfathering in clause 6.13, in the same way that clause 6.12(c), (d) and (e) do. • Clauses 6.7, 6.8 and 6.11 should all include express references to dispute resolution in the same way that clause 6.12(b) does. • All clauses should impose a prudence test in accordance with NGR 79(1)(a), if not also a justifiability test in accordance with NGR 79(1)(b).
6.10	*More detailed terms relating to treatment of "notional gate points" for delivery of gas from the DBNGP to sub-networks*	No comment

[22] DBP has correctly noted that the form of shipper contract which emerged from the 2004 insolvency negotiations left a lot to be desired in structure and complexity. One of the undesirable aspects of the contract is the unnecessarily complex duality between curtailments on one hand, and refusals to accept or deliver gas on the other. However, given that DBP has (perhaps wisely) not sought to radically simplify the contract by merging these two concepts, old clauses 5.5 and 5.9 are an important link between the two, to ensure that DBP does not pass a curtailment off as a refusal and hence avoid the event counting towards the 2% limit.

6.12	*More detailed terms relating to maintenance charges for inlet stations, outlet stations and gate stations*	The comments made in relation to cll. 6.6 to 6.10 above apply also here. On a minor drafting note cl. 6.12(b) assumes that the Operator's calculations at the Capacity Start Date are a suitable benchmark. This is both vague and non-transparent.
7.2	*[Not in Issues Paper]*	DBP has sought to modify the industry standard test, which is based on AS 4564, by adding a subjective element ie. the words "as determined by the Operator". Rio submits that the test should be left objective, as it has been for a long time.
8.9 8.10	*More detailed terms dealing with allocation/scheduling of daily nominations*	As to the removal of aggregation rights from this process, see starting at paragraph 38 above.
8.15 8.16	*Deletion of terms relating to nominations for "aggregated" services*	See comments starting at paragraph 38 above
8.18	*Deletion of terms relating to use of a full haul service for delivery of gas at an outlet point upstream of compressor station 9*	If short-term relocation rights are reinstated, as Rio submits they should be, then presumably this would come back.
9, 10, 11	*[Not in Issues Paper]*	See comments at paragraph 20(b) above regarding the rates for part-haul peaking, balancing and overrun penalties.
9.4	*Changed terms for notification of imbalances to the shipper*	No comment
9.5 10.3	*Changed terms for dealing with accumulated imbalances in excess of the accumulated imbalance limit and hourly peaks in excess of hourly peaking limits*	DBP has made a range of amendments to these clauses which shift commercial and operational risk to shippers and value away from them. • The deletion of the opening half of clause 9.5(b) and 10.3(a) is difficult to justify. It moves the scheme from one in which DBP can only exercise the "behavioural controls" when there is an operational risk to the pipeline or other shippers, to one in which DBP can exercise these rights arbitrarily in respect of any excursion regardless of the impact it is having. Similarly the deletion of old clause 9.5(f), which struck a balance between the operational risk of the pipeline and shippers' operational risk, is also difficult to justify. DBP does not appear to have given any reason for these changes other than that it would be more convenient for DBP. Rio submits that the current balance should be retained. • Rio questions the removal of old clause 9.5(c) which required that shippers be treated equitably, and requests that this protection be retained. • The deletion of old cl. 9.5(c) and 10.3(c) is also hard to understand. That clause recognised the unavoidable practical reality that no shipper can instantaneously change its load profile without risking very serious commercial and safety consequences. In the absence of a deeming provision such as this, a shipper may be doing its utmost in good faith to respond swiftly to a notice, but still be penalised. This seems neither rational nor efficient. • What would now have been clause 9.5(d)(i) (no charges if the imbalance was caused by a curtailment) reflected another practical reality, ie. that an intra-day curtailment imposed on the shipper by DBP will necessarily cause an imbalance, even for a shipper who has acted entirely properly. Rio sees no reason for its deletion and requests that it be reinstated • As to the removal of the outer peaking and balancing limits, Rio refers to its comments at paragraph 27(c) above, submits that the current provisions strike a suitable balance between the operator's and shippers' interests, and requests that these limits be retained.

9.6 9.9	*Changed terms in relation to charges and cashing out imbalances*	Rio believes belives the current system is more efficient and objects to this change
10.3 10.4 10.6	*Changed terms for peaking including changes to hourly peaking limits and deletion of hourly peaking limits and permissible peaking excursions*	Rio repeats its above comments in relation to imbalances.
11.1(b)	*[Not in Issues Paper]*	The proposed more than fourfold increase in overrun charges is not justifiable. Rio submits that it should remain at the current percentage of, as applicable, the T1, P1 or B1 tariff
11.2(a)	*[Not in Issues Paper]*	As with peaking and balancing, for the reasons set out above Rio objects to the removal of the threshold test that overrun must be materially impacting on other shippers, and requests that the deleted words[23] be reinstated.
11.7(c)	*[Not in Issues Paper]*	By deleting the word "not", DBP appears to be proposing double jeopardy for the same offence. This is neither fair nor efficient. Rio requests that the word "not" be retained.
14.2(b)(i)(A)	*[Not in Issues Paper]*	The new words added on the end create a substantial and vague new limitation, which seems unnecessary in light of the already broad and subjective test in cl. 14.2(b)(ii). Rio asks that they be omitted.
14.2(d)(i)	*[Not in Issues Paper]*	DBP does not appear to have any sound basis for removing the 2 km flexibility. Rio accepts that a relocation which materially lengthens the haul should be treated as not Authorised and hence subject to negotiation, but the 2km allowance has been an established recognition of the fact that some relocations between adjacent points might otherwise be classified as not Authorised because they technically lengthen the haul, even if that's by as little as 100m or so, even though in practical terms there is no adverse impact on the pipeline. Permitting non-impacting relocations to proceed as of right is a significant contribution to shippers' efficient management of their gas and capacity portfolios as mines, markets and loads change. If DBP can show clear operational reasons why the 2km threshold is genuinely too large, then Rio suggests that the ERA examine the pipeline configuration to see what shorter distance could be set and still catch the various adjacent sets of points (eg. in the Pilbara).
15	*[Not in Issues Paper]*	Rio believes that the contract should not impose any more requirements on Shippers than are absolutely necessary.
15.4	*Inclusion of additional gas parameters in metering requirements*	• Clause 15.4(a)(i)(C) exposes the shipper to an indeterminate and open ended liability for upgrading the equipment. This is already regulated adequately in cl. 15.6, with an established apportionment of risk between DBP and the shipper. • Rio asks the ERA and DBP to consider whether the grandfathering rules in cl. 6.17 may need to be expanded or clarified, or have a new cut off date inserted, to ensure that the changes in clause 15.4(c) do not accidentally require the upgrade of all the existing facilities on the DBNGP.
15.16(d)	*[Not in Issues Paper]*	As a minor point, the charges under clause 6.12 should only apply in respect of new expenditure.
17.6	*Inclusion of additional terms for providing notice of curtailment*	Rio supports the redraft, but notes that the former requirement of "a reasonable period in advance", in addition to the minimum 1 hour, has

[23] ie. the words "but only to the extent that Shipper overrun will impact or is likely to impact on any other shipper's entitlement to its Daily Nomination for T1 Capacity, any Other Reserved Service ...". The words "or allocated Spot Capacity" would still be deleted.

		been left out of new cl. 17.6(b)(ii)(A), and requests that it be included.
old 17.8(f)	*[Not in Issues Paper]*	Rio questions the removal of the requirement that where possible curtailment occur by notice, not physically. Physical curtailment can pose safety and operational risks, and is something of a "nuclear" response. This test reflects operational practice and so would not seem much of an imposition on DBP.
17.9	*Changes to terms relating to priority of curtailment of services*	Most of the changes are consequential upon the proposed removal of aggregation, and will presumably be reversed if short-term relocation is retained.
17.10	*Changes to terms relating to apportionment of a shipper's curtailments across outlet points of curtailment of services*	Rio submits that the former regime was stricter on DBP and thus gave the shipper greater operational control in managing the challenges arising from a curtailment. For Rio to respond efficiently and effectively to a curtailment in a way which minimises the economic disruption and risk of mine shutdowns, it must be able to manage how any available gas is directed. In contrast the new clause would leave all of this to DBP's unguided reasonable discretion. Rio submits that old clause 17.10(b) gave DBP adequate protection, and that the proposed wholesale dilution of clause 17.10 is both unnecessary and inappropriate. As a compromise, and recognising that old clause 17.10 may be administratively burdensome for DBP, Rio suggests that new clause 17.10(b) be made bilateral, so that DBP can pro-actively come to shippers such as Rio asking them to sort out their curtailment priorities in advance.
20.5	*[Not in Issues Paper]*	See comments at paragraph 49 above.
22.9	*[Not in Issues Paper]*	Presumably this exclusion of indirect damages, which seems superfluous, should be subject to clause 23.2 and other liabilities incurred before the repudiation or disclaimer.
25.2	*[Not in Issues Paper]*	It is unrealistic and inefficient to expect parties to sign on to a tripartite deed which is determined solely in DBP's discretion. The standard and highly effective means of avoiding expensive and inefficient subsequent haggling is to settle a form of tripartite agreement and append it to the contract. The alternative approach carries a high risk that all parties will incur significant expense later on.
25.3 25.7	*Inclusion of more detailed terms for assignment*	• The terms are not only more detailed, they are also very one-sided. Rio objects to this unilateral shift in DBP's favour. As a benchmark for negotiation and arbitration, the reference service terms and conditions should present a "middle of the road" position and not an ambit claim by the pipeline operator. The shipper has just as much legitimate concern about the pipeline's solvency and technical capacity, as the pipeline has about the shipper's. These changes look at the issue solely from the pipeline's perspective. • Rio submits that the clause should be even-handed, and hence that the new insertions in clause 25.3(a) should be deleted. • The proposed deletion of old 25.3(d)(ii) is difficult is justify. A shipper has a clear and obvious interest in ensuring that DBP's proposed assignee has adequate funds and expertise. Deleting these words risks enabling an assignment to an inadequately resourced operator, which could lead to much greater disruption and inefficiency later on. • If changes are to be made to clause 25.4 they should be bilateral. • For the reasons given above clause 25.4(b)(ii) should detail the form of security to be given (by ***both*** parties' assignees) and append the necessary instrument A common approach is to say security in the form agreed by parties acting reasonably, but failing agreement

		a bank undertaking or parent company guarantee in the scheduled form. This allows flexibility to negotiate but provides a pre-agreed fall-back position if the parties cannot reach agreement.
26	*Deletion of terms for a general right of relinquishment by a shipper*	No comment
27.11 27.12	*Deletion of terms for the operator to carry out functions as a broker in transfer of contracted capacity*	No comment
28.2	*Inclusion of additional exceptions to requirements for confidentiality of information*	Rio supports the intent but believes that clause 28.2(k) is too narrow, because it relates only to mandatory disclosure. Rio suggests that an additional class of permitted disclosure be added, which enables parties to disclose information, perhaps on a confidential, aggregated or de-identified basis, to others such as customers and further downstream parties, to the extent reasonably necessary to assist all concerned to comply with their carbon reporting obligations.
28.10	*Deletion of audit requirements in relation to the ACCC Undertaking*	The audit commitment was retained in clause 5.4 of the ACCC undertakings when they were amended earlier this year. Shippers have a legitimate interest in seeing that this audit obligation is complied with.
30.1(a)(i) 30.4	*Deletion of warranties of the operator and DBNGP Trustees to the shipper*	Rio enquires what possible justification there can be for the deletion of cl. 30.1(a)(i), and submits that the warranty should be retained. It would be odd if DBP is not in a position to give this warranty.
31(b)	*Deletion of provision for the shipper to require the operator to provide information on planned expansions in capacity of the DBNGP*	No comment
38(b)	*Insertion of a new provision to limit amendments*	Rio does not object in principle but submits that the clause is not framed correctly because it is not clear that the shipper will ever be "entitled to additional Contracted Capacity under the access arrangement". Rio submits that the clause should instead say that an amendment to increase contracted capacity may not be made if doing so would be inconsistent with the access arrangement/queuing policy.
45	*Deletion of a non-discrimination clause relating to provision of information by the operator to shippers, and treating of all shippers on an arms" length basis*	• Rio welcomes the removal of clause 45.1. • In contrast, in view of the fact that two major shippers continue to be part owners of the pipeline, Rio submits that clause 45.2 imposes an appropriate discipline on DBP, and should be retained.
47	*Deletion of terms limiting liability of the DBNGP Trustee*	See paragraph 45 above.

4.4 Other matters in the proposed terms and conditions (ie. in areas where DBP has not proposed changes)

51. **The inlet point ownership fiction:** (Clauses 6.6 and 37 and elsewhere.) Rio submits that DBP and the ERA should seize the opportunity created by this redraft to address the fact that the contract's treatment of inlet stations has been wrong since 1995. The stations are neither owned nor operated by the shipper, they are owned and operated by the gas producers who liaise directly with DBP on operational matters. This is more than a legal oddity. The fiction maintained by this contract that the shipper has some control over what occurs at the inlet station creates risk for the shipper. That risk could be mitigated by redrafting the contract to recognise that although it is this shipper's, and not DBP's responsibility to ***procure*** that certain things occur, the assets in question are almost never the shipper's and the shipper almost never has direct rights of entry or control.

52. **Liability for out-of-specification gas:** One of the most significant commercial risks for DBNGP shippers lies in DBP's treatment of liability for out-of-specification (**"OOS"**) gas. The shipper contract follows normal industry practice in generally excluding the parties' liability for indirect damage,[24] with an exception for fraud.[25] There are two exceptions to this limitation: DBP can be liable for indirect damages for certain breaches of confidentiality,[26] and the shipper (but not DBP) can be liable for OOS gas.[27] Clause 7.8(c) exposes the shipper to an open-ended and unquantifiable risk, and Rio submits that there are three fundamental problems with this outcome:

(a) First, it is a basic commercial principle that contracts should allocate risks between parties primarily on the basis of which party is in a position to do something about the risk. If OOS gas is ever presented at an inlet point to the DBNGP, there is nothing the shipper can do about this because (ignoring the minority situation in which the shipper is a gas producer) the shipper neither controls the quality of gas being presented, nor controls the gas quality measuring equipment or any of the valves which control the flow of gas into the pipeline. In all likelihood it will be hours or even days before the shipper learns that an OOS gas event has occurred. In contrast the DBP control room has direct physical control over the valves and receives a direct feed of the gas quality data, and so is in a position to protect itself against any OOS gas. DBP is in a position to control this risk, the shipper is not, yet the contract places the risk on the shipper. This is illogical and inefficient.

(b) Second, the normal commercial response by a party, such as the shipper, when left with a risk such as this, is to pass it on up the line until eventually it reaches a party who will accept the risk because it is in a position to control it. In this instance, the logical thing for the shipper to do is to pass the shipper's exposure on to the gas producer, who is ultimately the other party at the inlet point in a position to do something about the OOS gas risk It is ironic that of the three parties involved in the delivery of gas at an inlet point, the risk of OOS gas is typically borne by the only one of the 3 who is ***not*** in a position to detect, control or mitigate the risk.

(c) Third, DBP's treatment of OOS gas at the inlet point is in stark contrast to the position at outlet points where there is no equivalent provision making DBP liable for indirect damage caused to the shipper by OOS gas. This is an indefensible contrast.

Rio submits to the Authority that this position, though long-standing, is both fundamentally inequitable and economically inefficient. It is a disincentive against buying and shipping natural gas. It does not incentivise the pipeline operator to prevent or mitigate OOS gas risk. Rio submits that this outcome is not consistent with the national gas objective because it does not promote the efficient use of natural gas services, and is not in the long term interests of gas consumers for either quality, safety, reliability or security of supply. Rio therefore proposes that the terms and conditions be modified to remove the shipper's liability for indirect damage caused by OOS gas.

53. **Pressures at relocated points:** As a minor improvement, now that clause 7.4(c) has been redrafted and clarified, Rio suggests that DBP should be required to apply the same principles when determining the pressures at a relocated inlet or outlet point under clause 14.8.

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[24] cl. 23.3(a)

[25] cl. 23.2

[26] cll. 28.7(c) & (e)

[27] cl. 7.8(c)

4.5 Typographical and drafting matters

54. Rio acknowledges and appreciates the effort that DBP has invested in improving the drafting of the terms and conditions, and in that spirit notes in the **Attachment** to this submission various typographical and minor drafting items.

5. The BEP arrangements

55. Rio has no in-principle objection to DBP using leased space in the BEP as an alternative to looping the first 23 km of the DBNGP, and indeed supports the initiative if it is more efficient.

56. However Rio wishes to ensure that the scheme does not:

(a) decrease the reliability of its existing and future gas transportation services on the DBNGP;

(b) expose it to additional commercial and operational risk;

(c) allow DBP to escape responsibility for curtailments or other defaults.

57. Rio is still endeavouring to understand how the BEP scheme is intended to operate in detail, and does not yet consider that DBP has fully explained what exactly is proposed and requests the ERA to publish more information from DBP on this proposal.

58. In the meantime, Rio asks the ERA to scrutinise the arrangements very carefully to ensure that the following questions are answered:

(a) Who will determine whether a shipper's gas is to be hauled through the steel DBNGP or the leased space in the BEP?

(a) Is DBP purporting to implement the BEP scheme in exercise of its rights under cl. 12.4 of the shipper contract?

(b) What happens if a shipper's upstream gas sale agreement specifies only inlet point I1-01?

(c) What level of reliability has DBP secured in its lease of capacity in the BEP? Ie. in what circumstances can Epic Energy curtail or interrupt DBP's capacity, or otherwise refuse to accept or deliver gas?

(d) What levels of operation and maintenance has Epic committed to undertake? What levels of outage are anticipated? Will the same rules apply to the BEP capacity as to steel DBNGP capacity in terms of BEP outages counting towards the 2% curtailment limit for DBNGP shippers?

(e) Can DBP confirm that it has secured the same level of access rights for the full gas flow from all relevant asset owners? That is, are there any assets in the chain which might be owned by people other than Epic with whom DBP will also need access agreements? It is no good if Epic has agreed to haul the gas down the BEP but some third party controls a key asset at the BEP-PEP-DBNGP interconnect and declines to grant access.

(f) Who puts the gas into the BEP and receives it out of the BEP – is it DBP or the shipper? Ie. who is actually dealing with Epic Energy in a legal sense? This then links to the question of whether a shipper whose gas has travelled

down the BEP is regarded putting its gas into the DBNGP at I1-01, or at MLV7?

(g) Is the leased BEP capacity to be fully transparently treated as DBNGP capacity for all purposes under the shipper contract? Eg is DBP under an obligation (which it will subcontract to Epic, obviously) to maintain the BEP capacity (cl. 12.3(a))? Will DBP be able to claim force majeure if Epic negligently fails to properly operate and maintain the capacity? (It should not.)

(h) Does DBP guarantee that gas transported down the BEP can be reinjected back into the DBNGP in all the same circumstances when gas would have been accepted into the steel DBNGP at I1-01? If not, then gas travelling through the BEP will be a "second class citizen" compared with gas which has arrived at MLV7 via the steel DBNGP.

(i) Can DBP confirm that there will be no pressure or quality issues preventing gas entering the DBNGP from the BEP? If it cannot, who takes the risk of these issues?

(j) Whose responsibility will it be to manage the meters and meter stations at the points where gas enters the BEP and leaves the BEP to enter the DBNGP? Are appropriate agreements and equipment in place to obtain and share metering data? Do the meter stations meet the requirements of the DBNGP shipper contract and if not what does DBP propose in terms of upgrade or grandfathering?

(k) What scrutiny does the ERA propose to undertake of DBP's costs under its lease? Rio submits that these should be scrutinised as rigorously as all other costs.

59. Rio submits that it is incumbent on DBP to publish detailed commercial and operational information about the proposal in order to enable affected shippers to assess, and if necessary make submissions regarding, the BEP proposal.

6. Queuing

60. **Pre commitment to application form:** Rio submits that the process in s5.3(d) of the PRAA is unclear. Is it intended that by submitting a signed access request form, the prospective shipper is in effect committing to an access contract at some indeterminate time in the future if or when DBP elects to countersign it? If so, this is commercially not workable. Rio accepts that DBP needs to be protected against time-wasters, but submits that a better mechanism is the use of a deposit which is not refundable if the applicant withdraws its application for no good reason, or the ability of DBP to invoice the applicant for its wasted time in that case. In practical terms it is difficult for a large corporation or joint venture to obtain Board or Management Committee sign-off for an application form, if that form is in effect a contingent liability for up to 15 years' capacity charges, at a time when the applicant has no clear idea of when or whether DBP will agree to grant access.

61. The practical effect of this approach is to force the applicant to always apply for a non-reference service on non-standard terms and conditions, in order to avoid this "sudden death" outcome, which is not efficient and is not how the access arrangement and reference service is intended to work.

62. **Service provider discretion:** Rio has other concerns with the queuing requirements. Rio appreciates that these rules need to balance applicants' needs with DBP's need to manage the queue efficiently and to deal with mischievous applicants. However

Rio submits that every grant of discretion and flexibility to a service provider in these procedures increases the service provider's already substantial bargaining power against an applicant. In that regard, Rio requests the ERA to re-examine the queuing rules as a whole in order to place some more objective parameters and process around the service provider's discretions. For example:

(a) PRAA s5.3(e)(iv) permits DBP to reject a request, thus losing the applicant's priority in the queue, when DBP subjectively determines that the applicant has not negotiated in good faith;

(b) PRAA s5.3(e)(vi) is a very broad, vague and subjective test which appears to ignore the possibility of developable capacity;

(c) PRAA s5.3(e)(vii) is no doubt intended to prevent priority gaming by applicants, but Rio observes that, taking itself as an example, it will likely always be seeking substantially the same service every time it applies, ie. part haul to its Pilbara power stations and the Yaraloola interconnect. If this provision is directed at gaming it is already covered by PRAA s5.3(e)(viii).

(d) PRAA s5.3(f) takes no account of how reasonable the service provider has been during the 20 day period, and so will place the applicant in a take-it-or-leave-it position.

(e) PRAA s5.4(f), resuming words, third line contains an unfettered discretion for DBP to determine whether the conditions are satisfied.

63. **Single queue:** Rio submits that while the single queue approach in PRAA s 5.4(b) is administratively convenient, it is not the most efficient or effective way to deal with the wide range of applications that DBP will encounter, and in Rio's submission is not necessarily best suited to the national gas objective. Rio acknowledges that this rule is mitigated by s5.4(g), but that mitigation is incomplete. For example, s5.4(g) may or may not allow a 10 TJ/d Pilbara part-haul application which can be accommodated within spare capacity or with minimal expansion, to bypass a 100 TJ/d application to the Mid-West which is awaiting a large increment of developable capacity.

64. Rio asks the ERA to consider whether the relatively small volume of applications which DBP receives permits it to adopt a more flexible approach, in which there can be more than one queue, and that only applications which are actually competing for comparable resources are queued against one another.

7. Extensions and expansions

65. Rio requests that s7.1(a) of the PRAA be amended to make it clear that it refers to "geographic range" on a macro scale, so that it does not accidentally rule out the addition of a new inlet or outlet station, which will typically involve taking additional land into the easement or licence area, and on a micro scale definitely expands the pipeline's geographic range.

66.

8. Tariffs and related matters

8.1 Opex

67. Rio supports the ERA's assessment that the information provided by DBP is inadequate.

8.2 Carbon pass-through

68. Rio has no in-principle objection to the inclusion of a carbon cost pass-through mechanism in the reference service terms and conditions.

69. However it is important that the clause be drafted in a way which is fair to both shippers and the pipeline operator, avoids and risk of double recovery, and places appropriate incentives on the pipeline operator to minimise costs for both itself and shippers. Rio's comments below are directed to these outcomes.

Definition of "Carbon Cost"

70. Carbon Cost means:

> "***Any*** costs arising in relation to the management of and complying with any obligations or liabilities that may arise under any Law in relation to greenhouse gas emissions insofar as the obligation or liability ***is connected to*** the DBNGP. For the avoidance of doubt, such costs may include the costs reasonably incurred by the Operator of actions taken by it to reduce greenhouse gas emissions or mitigate their effect and the costs incurred in acquiring and disposing of or otherwise trading emissions permits."[28]

71. The definition of Carbon Costs is very important as it determines the scope of the costs which DBP can pass through to shippers under the Tax Changes Variation limb of the Reference Tariff Variation Mechanism. It should not be too expansive. At present the definition is potentially too wide as it means ***any*** costs DBP may incur meeting its obligations under any greenhouse gas emissions legislation, to the extent that those obligations are connected to the DBNGP. This extends to indirect costs, which potentially captures a large range of unquantifiable costs. Rio submits that the definitions should be made narrower.

72. The definition also includes DBP's costs of acquiring, disposing of, or otherwise trading emissions permits but does not exclude any costs arising as a result of DBP's failure to surrender permits by the time prescribed under the relevant legislation for the purpose of complying with its obligations under that legislation.

73. DBP can also recover its costs reasonably incurred taking action to reduce or mitigate the effect of greenhouse gas emissions. Although these costs are not subject to a cap, DBP is required to act reasonably so there may be a sufficient incentive for DBP to ensure that the cost of its actions do not outweigh the Carbon Costs for which it would otherwise be responsible in the absence of taking such action. Rio submits that this should be made more explicit.

Obligation on DBP to minimise Carbon Costs

74. Except for the limitation on the costs DBP may recover for taking action to mitigate the effect of greenhouse gas emissions described in paragraph 73 above, the Tax Change Variation formula does not include any provisions requiring DBP to minimise the Carbon Costs that are passed through to shippers. Rio submits that the mechanism should require that:

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[28] Clause 15 (Definitions) of DBP's Revised Access Arrangement (emphasis added)

(a) DBP must use reasonable endeavours to minimise the Carbon Costs; and

(b) the Carbon Costs must be consistent with, and no greater than. those that would reasonably be incurred by a Reasonable and Prudent Person.

75. There is no requirement that any increase to the Reference Tariff to account for the Carbon Costs associated with DBP's activities must be spread equitably across all Shippers, either in proportion to their contracted capacities, or subject to the pipeline services they use. This may result in an unfair allocation of Carbon Costs between the shippers seeking access to DBP's pipeline services. Rio submits that this should be remedied.

Possible "double recovery" of Carbon Costs

76. Examples of Costs Pass Through Events which DBP can recover through the operation of this mechanism include:

(a) a Change in Law;

(b) unanticipated Tax Change that is not the subject of a variation to the Reference Tariff under the Tax Changes Variation mechanism; and

(c) additional costs not included in the forecasting expenditure and which arise from unanticipated increases in the price of System Use Gas purchased to meet DBP's obligations under any access contract for the Reference Service.[29]

77. As described in paragraph 76(b) above, DBP is precluded from recovering a Tax Change under both the Tax Changes Variation mechanism and the New Costs Pass Through Variation mechanism. However, to avoid doubt, the definition "Change in Law" should be amended to specifically exclude Tax Change so there is no possibility that, for example, the introduction of a carbon tax could be dealt with through both the Tax Changes Variation and the New Costs Pass Through Variation mechanisms.

78. As described in paragraph 76(c) above, any additional costs arising from unanticipated increases in the price of System Use Gas will be dealt with under the New Costs Pass Through Variation mechanism. It is uncertain from the drafting of the definition of "Carbon Costs", but DBP may be able to recover its increased costs of providing pipeline services arising from the introduction of a carbon tax or emissions trading scheme (such as increased SUG and steel costs) also under the Tax Changes Variation mechanism. DBP should not be permitted to recover its costs twice in this circumstance.

79. DBP may also achieve double recovery of Carbon Costs as the Reference Tariff is indexed to CPI (under the CPI Formula Variation mechanism at clause 11.2 of the PRAA), which will be affected by the imposition of a carbon price. As such, Rio submits that the shipper contract terms and conditions should specify the precedence of application of the CPI Formula Variation and the Tax Changes Variation mechanisms, and (as described in paragraph 77 and 78 above) possibly also the New Cost Pass Through Variation mechanism.

Independent audit and dispute resolution

80. The carbon costs pass through mechanism should be subject to independent audit. This may be achieved by the Tax Change Notice procedure, provided the ERA

[29] Clause11.4(b) of the PRAA

publishes its opinion regarding the consequential variation to the Reference Tariff. Shippers should also have recourse to the dispute resolution procedure under their shipper contracts if they disagree with the ERA's statement of opinion.

8.3 Other escalation

81. Rio asks the ERA to consider why PRAA s11.2 should escalate tariffs at 100% of CPI when the industry standard is 67% of CPI.

82. Rio submits that s12.4(b) should be upgraded from a discretion that DBP ***may*** impose a levy on the subsequent shipper to one in which DBP ***must*** both impose the levy and rebate that levy to the funding shipper.

9. Typographical

83. In passing Rio notes that:

(a) in PRAA s4.2, paras (b) to (d) should be sub-paras of para (a);

(b) in PRAA s5.2(c)(vii), paras (C) to (E) should be sub-paras of para (B);

(c) in PRAA s5.4(f), paras (iv) and (v) should be sub-paras of para (iii); and

(d) PRAA s8.2(c) should refer to clause 14 not 13 of the terms and conditions.

ATTACHMENT

MINOR TYPOGRAPHICAL AND DRAFTING COMMENTS ON THE PROPOSED AMENDED TERMS AND CONDITIONS

Clause	Typographical or drafting comment
1	Definition of **"Accurate"** deleted but the term is still used in cl. 15.9 and the definition of "Previous Verification"
1	Definition of **"Capital Cost of the Expansion"** is not used.
1	The definitions of **"Inlet Point"** and **"Outlet Point"** continue to try to do two separate jobs, ie. defining inlet points generally, and also in some instances this particular shipper's particular inlet points. They do this by the shorthand method of "where the context requires". Unfortunately, this means that every usage of the terms is uncertain. Rio appreciates DBP's efforts to clarify the language in this area, but submits that it should finish the job by specifically identifying the few places where "inlet point" and "outlet point" actually has the narrower meaning of just this shipper's contracted points.
1	Definition of **"Other Reserved Service"**: It would be helpful if this clarified that it now includes all services previously labeled "Interruptible Service".
1	Definition of **"Pipeline Zone 1"** is not used and also uses an undefined term "Dampier Inlet Point".
1	Definition of **"Pipeline Zone 2"** is not used.
1	The definition of **"Tp Service"** is not very helpful.
2.5(e)	The reference should now be to the NGL and NGR.
2.6	Typo: "I-1-01"
4.6 4.7	The drafting assumes that the contract term is 15 years, in fact it might be 5 years under cl. 3.2(d) of the PRAA (or 2 years on Rio's submission)
5.3(g)	Typo: stray ";" in the middle of the clause
5.9(a)	Says that the shipper's contracted capacity remains "as specified in the Access Request Form" but this needs to be subject to other provisions of this contract which change the contracted capacity, eg. cl. 17.7(e) and relocations.
5.10(c)	In the second last line Rio suggests that "if that cost" should be "to the extent that cost".
6.2	This was originally a grandfathering provision catching arrangements in place before 27 October 2004. Continuing to roll the grandfathering forward is likely to produce unintended consequences. If there is indeed an MSA at a point, it will not always be workable to simply deem the new shipper to be a party to that MSA. For example, the apportionment mechanism in that MSA may not work properly with the new shipper added in.

6.4(b)(ii)	Should the deeming in the last 3½ lines apply also in respect of clauses 6.4(b)(i) and 6.4(c)?
6.7(d)	Typo: Second last word "Outlet" should be "Inlet"
7.4(c)(ii)	Typo: "Receive" should be "Receives". Otherwise Rio welcomes the redraft of this clause which is a considerable improvement!
14	Rio suggests that it may be helpful to a later reader if this clause were to cross-refer to s8 of the access arrangement.
20.5	Circular reference: This clause refers to the Tariff Variation Mechanism in the PRAA which in turn includes in part clause 20.5 of the terms and conditions.
22.9	Typo: "repudiationor"
27.7(b)	The old clause contained a mistake. The amendment corrects the mistake, but Rio suggests that a better remedy might be to retain the deleted words and insert the word "modified" in front of them.