Submission to the Economic Regulation Authority
Regarding the Economic Regulation Authority's Draft Decision, dated 27 April 2006, on
DBNGP (WA) Transmission Pty Ltd's
Request under Section 8.21 in respect of the DBNGP

Submission on Economic Regulation Authority's Draft Decision in respect of DBP's Section 8.21 Request

15 May 2006

Contents

Definitions

References to "Section" in this submission are references to the Code, unless otherwise stated.

In this submission, the following defined terms are used (unless a contrary intention appears):

Code means the National Third Party Access Code for Natural Gas Pipeline Systems having effect under the *Gas Pipelines Access (Western Australia) Act 1998*;

DBNGP means the Dampier to Bunbury Natural Gas Pipeline;

DBP means DBNGP (WA) Transmission Pty Ltd;

DBP'S Request means the request by DBP dated February 2006, that the ERA agree, under section 8.21 of the Code, that DBP's proposed forecast NFI will meet the requirements of section 8.16(a);

DBP's Submission means the public version of the submission by DBP, dated February 2006, supporting DBP's Request;

ERA means the Economic Regulation Authority;

Existing Approval means the approved forecast NFI to 2010 (being Stages 5 to 7) of $537 million for a pipeline capacity expansion of 110TJ/d in the Revised Access Arrangement;

NFI means New Facilities Investment as defined in the Code;

Revised Access Arrangement means the Revised Access Arrangement in respect of the DBNGP drafted and approved by the ERA under section 2.42 of the Code on 15 December 2005;

Verve Energy means the Electricity Generation Corporation established on 1 April 2006 under the *Electricity Corporations Act 2005*, as successor to the Generation Business Unit of Western Power Corporation established under the *Electricity Corporation Act 1994*;

Verve Energy's Initial Submission means Verve Energy's submission to the ERA headed "Submission on DBP's Section 8.21 Request", dated 27 March 2006;

Verve Energy's Previous Submissions means Verve Energy's letter to the ERA dated 23 February 2006 and Verve Energy's Initial Submission.

Summary

Introduction

1. Verve Energy disagrees with the Draft Decision. The ERA appears willing to conduct a rushed and non-transparent s. 8.21 approval process without adequate public consultation. This has resulted in a flawed decision, based on highly questionable and still largely secret information. The ERA has also misinterpreted the relevant Code provisions.

2. Verve Energy supports timely expansion of the DBNGP on appropriate terms, and does not believe that this objective is inconsistent with due regulatory process. However, Verve Energy does not support expansion at any cost. In particular, Verve Energy does not support the expansion on the basis set out in the Draft Decision, nor an outcome in which DBP's control of the expansion timetable results in inadequate regulatory scrutiny.

Interpretation Issues

3. Verve Energy disagrees with the ERA's interpretation of sections 8.21, 8.16(a) and 8.15 of the Code.

4. The correct interpretation of these sections is as set out in Verve Energy's Previous Submissions, as expanded upon by this submission.

Failure to provide information

5. The ERA has failed to provide interested parties with much of the information the ERA relied upon in reaching its Draft Decision and has thus denied those parties the opportunity to express an informed view on the matters to be decided by the ERA.

6. It appears that the ERA intends to continue this approach, including allowing DBP to refine its Request without giving interested parties an opportunity to comment on these refinements.

7. The ERA should provide interested parties with all relevant information upon which the ERA intends to rely in making its Final Decision and provide those parties with an opportunity to comment on this information before the ERA makes its Final Decision.

Factual findings and conclusions

8. The ERA appears to have largely ignored Verve Energy's Previous Submissions, which, in Verve Energy's view, has resulted in the ERA making findings and reaching conclusions that are incorrect.

9. The ERA should review its key findings and conclusions in the Draft Decision in light of Verve Energy's Previous Submissions and this submission.

Part 1: General comments

Lack of information

10. Verve Energy re-iterates the submissions made in its letter dated 23 March 2006 regarding the ERA's obligation under section 8.21 to conduct a proper public consultation process.

11. It appears that, subsequent to DBP's Request and Submission, DBP has regularly provided the ERA with significant, relevant information and that the ERA has relied upon some or all of that information in reaching its Draft Decision.[1]

12. The ERA has again failed to make this information available to interested parties, thus depriving them of the opportunity to express an informed view on the matters to be decided by the ERA.

13. The ERA appears once again[2] to uncritically accept almost all of DBP's claims of confidentiality. In doing so it permits DBP to limit the scope of public scrutiny of DBP's proposals. The Code does not permit a secret approval process.

14. Further, the ERA appears to be allowing DBP to continue to refine its Request during the decision making process[3] and has apparently permitted DBP to have regular access to the ERA. This is to be contrasted with the ERA's treatment of Verve Energy.

15. In relation to DBP's attempts to refine the parameters of its Request, Verve Energy re-iterates paragraphs 58 to 70 of its Initial Submission[4].

16. To comply with the Code and the rules of procedural fairness, the ERA must, before it makes its Final Decision:

    (a) inform interested parties of material changes to DBP's Request;

    (b) provide interested parties with all relevant information provided by DBP to the ERA; and

    (c) give interested parties an opportunity to comment on the material changes and the information.

17. DBP has submitted that one reason it cannot disclose the information is because it is afraid, conveniently, that doing so may jeopardise its tendering process. The ERA's proposal to investigate (but not to impose any consequences on) how much of the proposed work is tendered suggests that the ERA may be sceptical about how much will be tendered. DBP has previously expressed[5] an emphasis on alliance contracting

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[1] For example see Draft Decision paragraphs 42, 68 and 70 to 80.

[2] In the 2005 revisions process, the ERA allowed the vast majority of DBP's submissions (of which there were at least 79) to remain secret. This seriously undermined the public consultation process.

[3] Draft Decision paragraphs 9 and 42.

[4] An example of the problems created by allowing such refinement appears at paragraph 11 of the Draft Decision where the ERA says Stage 4 will now provide 127 TJ/d instead of the expected 96 TJ/d. Verve Energy submits the ERA should not permit this to happen for either Stage 4 or 5 as manipulating capacity can inflate reference tariffs to achieve excess rates of return. DBP now has a reference tariff based upon recovering costs across 96 TJ/d that can be charged in respect of 127 TJ/d, thus more revenue (and hence costs) is recovered.

[5] For example see paragraphs 7.64 to 7.70 of DBP's Submission and paragraphs 7.4 to 7.25 of Annexure 3 to DBP's Further Amended Proposed Revised Access Arrangement Information, dated 12 June 2005.

rather than tendering. In any event, Verve Energy is willing to enter into any reasonable non-disclosure agreement with DBP and the ERA that will allow it, as an interested party, to scrutinise the information without jeopardising DBP's tendering.

Verve Energy's previous submissions

18. The ERA has, for the most part, ignored Verve Energy's Previous Submissions[6]. This is inconsistent with the Code and the rules of procedural fairness.

19. Verve Energy repeats its Previous Submissions in this submission and asks the ERA to take them into account and to address them.

Conditions imposed on agreement

20. Verve Energy re-iterates the submissions made in Part 4 of its Initial Submission.

21. The conditions proposed in the Draft Decision are ineffectual and are not a proper exercise of the ERA's discretion. They do not ensure that only NFI that is spent in a manner that satisfies sections 8.16(a)(i) and 8.16(a)(ii)(A) is considered eligible to be rolled into the capital base.

22. Condition 1 merely verifies the amount of NFI actually spent by DBP and the resulting capacity. It does not enable the ERA to verify that the NFI was expended in a manner that satisfies sections 8.16(a)(i) and 8.16(a)(ii)(B).[7]

23. Condition 2 is otiose because there are no consequences for DBP failing to meet it. Therefore, the rationale expressed at paragraph 42 of the Draft Decision for having this condition is not satisfied.

24. Condition 4 appears meaningless and unworkable. Is the ERA's agreement under section 8.21 conditional on the Gas Review Board proceedings not having any impact upon the design parameters of Stage 5? Who is to determine whether there is any such impact? What are the parameters and processes of such assessment? Is it a subjective assessment of the ERA with input only from DBP? If there is such an impact, is the ERA going to conduct another section 8.21 process? If not, what section of the Code does the ERA intend to apply?

Effect of agreement under section 8.21 and interaction with section 8.15

25. It appears that the Draft Decision determined that any agreement by the ERA under section 8.21 has the effect that the NFI agreed to will automatically be rolled into the capital base at the next review of the access arrangement, to the extent that the NFI was spent and the conditions of the agreement were met.

26. If this is the ERA's decision, Verve Energy disagrees.

27. In this respect, Verve Energy repeats paragraphs 52 to 56 of its Initial Submission.

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[6] For example, the issues regarding urgency in paras 25 to 29 of the Initial Submission; the issues regarding the Existing Approval in paras 35 to 45 of the Initial Submission; the impact of new facilities forecasts in paras 46 to 51 of the Initial Submission; the irrelevant considerations referred to in paras 71 to 76 of the Initial Submission; the issues raised in Part 2 of the Initial Submission.

[7] By way of a hypothetical example: Suppose DBP were able to secure a low-cost steel contract which saved it, say, $200m on its forecast costs. The Draft Decision agreement would allow DBP to waste the $200m saving in other areas, or even pay it to ANS as a bonus management fee, without scrutiny or restriction. This would pervert the intention of section 8.16(a)(i).

Part 2: The "prudence" test – ss. 8.16(a)(i) and 8.17

Introduction

28. Verve Energy disagrees with the ERA's interpretation of section 8.16(a)(i) and with the ERA's application of that interpretation.

29. In this respect, Verve Energy repeats paragraphs 91 to 94 and 104 to 115 of its Initial Submission.

30. Also, the ERA did not have any evidence for the factual findings it made in relation to the matters on which it relied to conclude that the test in section 8.16(a)(i) is met.

31. If the ERA did have any such evidence, it did not make that evidence available to interested persons. The ERA should immediately give any such evidence to interested persons and give interested persons an opportunity to comment upon it before making the Final Decision.

32. Even if the ERA had any such evidence, then for the reasons set out below the matters the ERA relied upon do not actually support a conclusion that the test in section 8.16(a)(i) is met.

33. Verve Energy considers it highly inappropriate for the ERA to be prepared to agree to the inclusion of approximately $1.5bn into the capital base (over 60% increase), subject only to these costs being incurred, without either an expert reviewing DBP's costings or further conditions directed at ensuring costs actually incurred reflect the prudent cost which would be incurred by a service provider acting efficiently in accordance with accepted and good industry practice**.**

34. It is common practice where significant capital expenditure is proposed by a service provider for a regulator to engage experts to critically review such proposals.

35. Whilst there are limited regulatory precedents available in respect of high pressure transmission pipelines, there are many examples of review by regulators of capital expenditure proposals by service providers for gas distribution and electricity distribution and transmission networks[8].

36. Verve Energy submits that if the ERA has not obtained an expert report analysing DBPs' proposal, it has not discharged its full regulatory obligations. If the ERA has obtained such a report, it should make it available to interested parties and give them an opportunity to comment on it prior to the Final Decision.

Lowest sustainable cost

37. The ERA does not appear to have given any real consideration as to whether the proposed NFI would achieve the lowest sustainable cost of providing services as required by section 8.16(a)(i).

[8] For example see IPART examination of AGL Gas Networks Access Arrangement – 2003, ACCC Examination of Transgrid Access Arrangement – 2005; ESC Examination of Gas Networks Access Arrangements – 2002.

38. Interested parties do not know the basis upon which the ERA has determined that the test in this section has been met. Verve Energy requests that the ERA:

(a) advise interested parties of the detail of any analysis the ERA has done of the information provided by DBP; and

(b) provide interested parties with any expert report obtained by the ERA analysing such information,

and in both cases give the interested parties an opportunity to comment before the Final Decision.

39. The ERA appears to have focused on the costing of DBP's proposed NFI and not considered any capacity issues. Verve Energy has made numerous submissions to the ERA in respect of the proposed Revised Access Arrangement[9] about the interdependence of cost and capacity and the requirement for the two to be considered together. For example, manipulating capacity can inflate reference tariffs to achieve excess rates of return. In this respect, Verve Energy re-iterates the comments at footnote 4 above.

40. At paragraph 60 of the Draft Decision, the ERA merely said that it was satisfied the proposed NFI achieves the lowest sustainable cost of providing services "based on the Authority's considerations under paragraphs 18 and 19 of [the Draft Decision]". The reference to those paragraphs appears to be an error, as they do not refer to this issue[10].

41. The only other consideration of "lowest sustainable cost" in the Draft Decision is at paragraph 64 in the context of section 8.17. There the ERA finds[11] that the DBNGP will be "expanded in a manner necessary to achieve the lowest sustainable cost of delivering services *in the future*" (emphasis added). Whilst lowest sustainable cost of providing future services is a relevant consideration for the purposes of section 8.17, section 8.16(a)(i) requires the ERA to consider the issue in present terms. The ERA did not do this.

42. Further, the ERA did not, but should have, considered whether DBP's use of the "very conservative approach" to gas quality was an approach that meets the test in section 8.16(a)(i). Verve Energy submits that, given the ERA's previous findings in its Final Decision and its Further Final Decision on DBP's proposed revisions to its Access Arrangement, that changes in gas specification would have an immaterial effect upon capacity, the ERA could not be satisfied that the very conservative approach meets the test in section 8.16(a)(i).

43. Finally, in considering this issue, the ERA did not, but should have, conducted an analysis of the extent to which the proposed Stage 5 costs are for capacity added only because of the change in the gas quality assumptions.

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[9] First submission dated 14 March 2005, at section 5.1, 5.2; second submission, dated 13 April 2005, at section 5.1, 5.2; Venture Associates Report dated 13 April 2005, at sections 4.2.2 and 4.3.2; submission dated 26 May 2005, at section 6.2, fourth submission, dated 24 June 2005, at sections 1.5 and 2.4.

[10] They merely refer to what the ERA considered its role in sections 8.21 and 8.16 to be.

[11] See paragraphs 65 to 67 below for Verve Energy's submissions on the ERA's treatment of section 8.17.

Higher tariff

44. At paragraph 54 of the Draft Decision, the ERA:

    (a) noted that DBP was making the Stage 5 expansion available to Users at a higher tariff; and

    (b) as such, found that there was a "willingness of Users to pay a higher tariff" for Stage 5; and

    (c) relied upon this finding to conclude that "the market for gas transmission on the DBNGP finds DBP's proposed Stage 5 expansion acceptable".

45. Verve Energy is unaware of any material before the ERA that would justify the ERA finding that Users are willing to pay a higher tariff for Stage 5[12].

46. Verve Energy agrees that DBP is, among other things, proposing that Users pay a higher tariff for Stage 5. However, Verve Energy submits that this is not evidence that Users are "willing to pay a higher tariff". Rather, it is merely evidence of a willingness on the part of DBP to use its monopoly power to extract monopoly rents.

47. In any event, whether or not users enter into contracts with DBP to pay a higher tariff for Stage 5 is not a relevant consideration for the purposes of section 8.16(a)(i). It is a commercial matter between the parties.

48. There are many reasons why users may do so, including: [13]

    (a) as acknowledged by the ERA, that some users may not have any alternative option but to pay the higher tariff (which is effectively DBP extracting monopoly rents);

    (b) entering into a contract which is on more favourable commercial terms than the existing contract;

    (c) resolving other existing commercial matters.

49. None of these matters are before the ERA and it should not make assumptions about these important issues, in the absence of the full facts. Indeed, the fundamental regulatory role for the ERA should be to protect users against the exercise of monopoly power.

50. Therefore, even if there is any evidence of these matters before the ERA, the ERA should not take them into account.

Procurement process

51. The ERA determined that it was "likely" DBP's proposed procurement process was "consistent" with a prudent service provider acting efficiently and with accepted good industry practice.

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[12] Verve Energy re-iterates its submission in paragraphs 30 to 32 above.

[13] Verve Energy would welcome an opportunity to discuss with the ERA some of the commercial realities facing shippers when confronted with DBP's willingness to exercise its monopoly power. Verve Energy awaits with interest the outcome of the ACCC's current investigations of DBP.

52. Verve Energy is not aware of any material before the ERA on which it could base such a finding[14].

53. Even if there was any such evidence, the ERA has not correctly applied section 8.16(a)(i), which requires the ERA to determine whether the procurement process actually (as opposed to "likely" or "consistent") resulted in an amount of NFI "*that would not exceed the amount that would be invested by a prudent service provider acting efficiently, in accordance with good industry practice,* ***AND*** *to achieve the lowest sustainable cost of providing services"*.

54. The "and" is emphasised because the ERA does not appear to have considered the second part of the test.

ANS management fee

55. At paragraph 56 of the Draft Decision, the ERA expressed concerns that the 3% ANS management fee (being approximately $45 million) appeared to exclude any performance or efficiency requirements on ANS for its management of the project.

56. However, despite the ERA's concern, it found that the fee met the requirements of section 8.16(a)(i). The only reason given was that there had been no comment on this matter received from public submissions.

57. There were no such submissions because, despite a specific request from Verve Energy[15], the ERA did not make available any information to the public about the fee, how it was calculated or its size. The ERA is also fully aware that DBP's relationship with ANS is a matter of great interest to Verve Energy.[16]

58. This is just one example of the impact of the ERA's failure to conduct a proper public consultation process.

59. The ERA has still not made available to interested parties any detail behind the proposed fee. Verve Energy strongly requests the ERA to provide interested parties with sufficient material regarding the proposed fee for interested parties to make informed submissions on it. For example, Verve Energy shares the ERA's concerns expressed at paragraph 56 of the Draft Decision. However, without any information, interested parties cannot make any meaningful submissions.

60. If DBP has not provided sufficient information, the ERA should not approve the fee.

61. In any event, the ERA has not properly considered the fee and has ignored best regulatory practice[17]. The Productivity Commission agreed that transfer pricing was a problem that merited expansion of regulators' information gathering powers. Despite this, the ERA does not appear to have even scrutinised the information that is available nor obtained any independent expert assessment of DBP's proposal.

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[14] Verve Energy re-iterates its submission in paragraphs 30 to 32 above.

[15] See paragraph numbered 3.7 of Verve Energy's letter to the ERA dated 23 March 2006.

[16] The ERA's statement disregards Verve Energy's several submissions on this subject in connection with 2005 Access Arrangement provisions, and Grounds 15 and 16 of Verve Energy's Gas Review Board appeal (No 1 of 2005).

[17] See, for example, Productivity Commission Report, Review of the Gas Access Regime, 10 August 2004, Part 10; ACCC's Final Decision in respect of the Moomba to Sydney Pipeline System Access Arrangement - 2 October 2003 (p151 et seq) where the ACCC examined the outsourcing arrangements put in place between the pipeline owner and Agility Management Pty Limited ("Agility"); The ACCC expressed fundamental concerns with the outsourcing arrangements and concluded that management fees payable to Agility under the "Pipeline Management Agreement" did not reflect the prudent cost which would be incurred by a service provider acting efficiently in accordance with accepted and good industry practice.

62. Based upon expert advice to Verve Energy, Verve Energy submits that any expert reviewing the proposed project overheads and the 3% ANS management fee in light of the test in section 8.16(a)(i), would certainly confirm, at the very least, that the fee does not reflect the prudent cost which would be incurred by a service provider acting efficiently in accordance with accepted and good industry practice, that the fee is unacceptable and that a portion of the proposed project overheads is excessive.[18]

Contingency sum

63. The ERA determined that the contingency sum proposed by DBP was reasonable when taken as a proportion of the estimated cost of investment.

64. Verve Energy was unaware that such a sum was proposed because it was not apparent from the information released by the ERA. Interested parties still do not know how much the sum is, let alone the terms on which it is payable. Therefore interested parties cannot make any informed submissions on the ERA's conclusion that the sum is reasonable. Verve Energy, again, requests that the ERA make all relevant information available and give interested parties an opportunity to comment on it before making a Final Decision.

Section 8.17

65. Verve Energy disagrees with the ERA's interpretation and application of section 8.17.

66. The Draft Decision, at paragraph 64, appears to indicate that, for the reasons in paragraphs 62 and 63 of the Draft Decision, the test in section 8.17 is met. Paragraph 62 appears to conclude that, at some point in time, Stage 5 "is expected to approach a point along the curve where a reduction in marginal cost occurs". It is not clear how the ERA determines that this conclusion meets the requirements of section 8.17. Paragraph 63 concludes that Stage 5 "does not itself demonstrate economies of scale" but then draws a conclusion about further expansions. Again, it is not clear how this conclusion meets the requirements of section 8.17.

67. Neither conclusion supports a determination that the requirements of section 8.17 have been met. In this respect, Verve Energy re-iterates paragraphs 116 to 133 of its Initial Submission, which the ERA appears to have ignored.

[18] Venture Associates has recently reiterated to Verve Energy its views on the ANS fee, which were expressed in its report of 13 April 2005 as annexed to Verve Energy's Second Submission on the Proposed Revised Access Arrangement dated 13 April 2005.

Part 3: Section 8.16(a)(ii)

Section 8.16(a)(ii)(A)

Interpretation

68. Verve Energy disagrees with the ERA's interpretation of section 8.16(a)(ii)(A) and with the ERA's application of that interpretation.

69. In this respect, Verve Energy re-iterates paragraphs 95 to 100, and 134 to 145 of its Initial Submission.

70. On Verve Energy's interpretation of section 8.16(a)(ii)(A), there will be some non-zero level of NFI that meets the test in that section. However, based upon the information made available by the ERA, Verve Energy is not able to assess what that level is. Whatever that level is, Verve Energy agrees with the ERA's apparent assessment that it is considerably less than $1.5 billion.

Lack of information

71. Verve Energy re-iterates its submissions in paragraphs 10 to 1716 above and stresses that it is critically important that interested parties have an opportunity to properly assess what is being proposed by DBP.

72. The importance is clearly demonstrated by what happened when the ERA investigated DBP's supporting material regarding the test in section 8.16(a)(ii)(A) following Verve Energy's Initial Submission[19]. It appears that as a result of that submission, the ERA:

    (a) sought further information from DBP; and

    (b) conducted its own analysis relying, at least in part, on the material submitted by Verve Energy[20].

73. The result was that DBP's calculations were found to be seriously deficient.

74. Interested parties still do not have sufficient information to make informed comment on what is being proposed[21]. The effect is that interested parties still cannot make informed submissions on the amount of proposed NFI that meets the test in section 8.16(a)(ii)(A). Further, DBP's calculations upon which the ERA has relied may be found to be seriously deficient if the ERA permitted public scrutiny of them.

75. The ERA is obliged to make this information available to interested parties before the ERA issues its Final Decision so they can properly comment on the amount of proposed NFI that meets the test in section 8.16(a)(ii)(A).

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[19] A portion of which appears at paragraph 91 of the Draft Decision.

[20] Verve Energy could not conduct its own detailed analysis because it did not, and still does not, have sufficient information.

[21] The most detailed cost data available is the table in paragraph 6.66 of DBP's Submission dated February 2006. This is totally insufficient for interested parties to make any qualitative comments and is equivalent to requesting comments a on a blank piece of paper. As noted in Verve Energy's letter to the ERA dated 23 March 2006, this lack of information is to be contrasted with the information provided by DBP in Annexure 3 to its Further Amended Proposed Revised Access Arrangement Information, dated June 2005.

Section 8.16(a)(ii)(B)

Interpretation

76. Verve Energy disagrees with the ERA's interpretation of section 8.16(a)(ii)(B). In particular, the system wide benefits test is not a wide test and does not include benefits to users of gas that rely upon the DBNGP and the greater public interest.

77. Further, to the extent that there are any system wide benefits, the ERA should have, but did not, conduct an assessment of whether these benefits justify all users paying a higher tariff.

78. There is no Australian regulatory precedent for the ERA's approach.

79. In contrast, the ERA should follow the regulatory precedents identified in paragraphs 146 to 173 of Verve Energy's Initial Submission. Verve Energy restates those paragraphs.

Application

80. Verve Energy submits for the reasons set out below that the ERA did not have any evidence for the factual findings it made in relation to the matters on which it relied to conclude that the test in section 8.16(a)(ii)(B) was met.

81. If the ERA did have any such evidence, Verve Energy re-iterates its submissions in paragraphs 31 and 32 above.

Willingness of Users to pay higher tariff

82. At paragraph 113 of the Draft Decision, the ERA found that:

> "*Users have… indicated that they consider the Stage 5 expansion necessary by their willingness to contract for it at tariffs which the Authority understands are generally above Reference Tariffs levels*".

83. The ERA apparently relied upon this finding, in part, to justify a conclusion that the alleged system wide benefits justified all Users paying a higher tariff. For the reasons set out below, Verve Energy submits that the ERA should not have done so.

84. Verve Energy is unaware of any material before the ERA that would justify the ERA finding that Users are willing to enter into new contracts for Stage 5 or that they are willing to pay a higher tariff [22].

85. Verve Energy agrees that DBP is, among other things, proposing that Users enter into new contracts for Stage 5, which involve users paying a higher tariff. However, Verve Energy submits that this is not evidence that Users are willing to enter into such contracts or to pay a higher tariff.

86. In any event, whether or not users are willing to, or indeed contract with DBP to pay a higher tariff for Stage 5 is not a relevant consideration for the purposes of section 8.16(a)(ii)(B).

87. In this respect, Verve Energy repeats its submissions in paragraphs 48 to 50 above.

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[22] Verve Energy re-iterates its submission in paragraphs 30 to 32 above.

Support for an expansion

88. At paragraph 113 of the Draft Decision, the ERA found that:

> "*The three public submissions received all supported the pipeline expansion*".

89. The ERA apparently relied upon this finding, in part, to justify a conclusion that the alleged system wide benefits justified all Users paying a higher tariff.

90. Verve Energy cannot see how this is relevant to whether the expansion has system-wide benefits or to whether any such benefits justify all users paying a higher tariff. The finding patently does not support either such matter.

91. Further, it is quite clear from Verve Energy's Initial Submission that Verve Energy's support for having the pipeline expanded is qualified. It is not appropriate for the ERA to rely on this matter as a basis for a conclusion that the expansion meets the test in section 8.16(a)(ii)(B).

Gas quality

92. At paragraph 115 of the Draft Decision, the ERA found that spare capacity may be available if the quality of gas delivered into the pipeline was of a higher specification than that assumed in the design used for Stage 5.

93. Verve Energy is unaware of any evidence before the ERA that this would be the case. If the ERA did have any such evidence, Verve Energy re-iterates its submissions in paragraphs 31 and 32 above.

94. It appears that DBP has ignored its own expert report by Kimber & Associates on this issue because the report does not support the most conservative approach proposed by DBP. The ERA has also ignored this report. It should not have.

95. In any event, the possibility of spare capacity does not mean DBP would make it available in such a way as to constitute a system-wide benefit, let alone a system-wide benefit that would justify all users paying higher tariffs. For example, DBP may only make any such spare capacity available on the spot market to generate a new stream of unregulated revenue.

96. Further, Verve Energy re-iterates its submission in paragraph 43. Without knowing such costs or such capacity, the ERA cannot make a qualitative assessment of any benefit to users, nor whether such benefit justifies all[23] users paying a higher tariff based upon NFI of $1.5 billion.

97. In view of the ERA's decision in December 2005 to approve a Revised Access Arrangement without a rebate mechanism, Verve Energy submits that the ERA should not have assumed, as it seems to, that the availability of any such spot capacity would benefit users (rather than DBP) or that such benefits would justify a higher tariff for all users.

98. There is a perverse incentive for DBP to adopt the most conservative specification because the costs of doing so will be bourne by all users and the consequence may be

[23] Not all users are likely to buy or benefit from spot capacity.

that DBP is able to obtain additional unregulated revenue. The ERA does not appear to have considered this.

99. The ERA should have considered the gas quality issue by subdividing the proposed NFI to identify the quantum of capacity allegedly needed as a result of the gas quality issue and the cost of the expansion needed to obtain such capacity, and then applying the Code tests to that cost (and to the other subdivisions of the total proposed NFI).

Curtailments

100. At paragraph 116 of the Draft Decision, the ERA appeared to find that, without the Stage 5 expansion, there would be an increase in the frequency of curtailments of all shippers and relied upon this finding to justify its conclusion that the Stage 5 expansion would "result in system-wide benefits by increasing the reliability of delivering services".

101. Verve Energy is unaware of any evidence before the ERA that this is in fact the case. An assertion by DBP that this would occur is not evidence capable of supporting any such finding of fact.

102. To the extent that there was any such evidence, Verve Energy re-iterates its submission in paragraphs 30 to 32 above.

103. In any event, Verve Energy submits that:

(a) for the reasons set out at paragraphs 148 to 153 of Verve Energy's Initial Submission, the proposed expansion will not result in an increase in the reliability of services; and

(b) for the reasons set out in paragraphs 170 and 171 of Verve Energy's Initial Submission, any reduction in curtailments by the proposed expansion is irrelevant.

104. The Draft Decision ignored these submissions. Verve Energy requests that the ERA address these submissions in its Final Decision.

Section 8.16(a)(ii)(C)

105. To the extent that the ERA intends to consider whether the NFI meets the requirements of section 8.16(a)(ii)(C), Verve Energy refers to, and incorporates, paragraphs 174 to 179 of its Initial Submission.