

NOTICE

Call for Submissions on Matters Relating to Western Power's Revised Proposed Access Arrangement for the South West Interconnected Network

The Economic Regulation Authority is currently assessing whether Western Power's revised proposed access arrangement for the South West Interconnected Network (SWIN) meets the requirements of the *Electricity Networks Access Code 2004* and has called for submissions on three matters:

1. a proposed provision (under the standard access contract for reference services) that will allow Western Power to unilaterally determine to reduce a network user's contracted capacity at a connection point;
2. the treatment of capital contributions under the proposed access arrangement; and
3. the ability of Western Power to require payment of capital contributions in the nature of "headworks" charges.

Each of these three matters is further addressed below.

The revised proposed access arrangement, which was submitted on 19 May 2006, is available on the Authority's [web site](#).

1 Reductions in Contracted Capacity

Western Power's proposed standard access contract for transmission and distribution services (the "electricity transfer access contract" provided as Appendix 4 of the revised proposed access arrangement) would allow Western Power to unilaterally decide to reduce a network user's contracted capacity at a connection point on the SWIN. This would be subject to specified conditions, including that the capacity becomes unused.

The relevant clause of the proposed electricity transfer access contract (under the revised proposed access arrangement) is clause 3.2, which states:

- 3.2 User must reasonably require Contracted Capacity
- (a) If, with regards to Contracted Capacity at a Connection Point:
 - (i) in the reasonable opinion of Western Power, that Contracted Capacity is not reasonably necessary to satisfy the User's actual requirements (or forecast actual requirements following a temporary disruption to the User's full use of the Contracted Capacity); and
 - (ii) that Contracted Capacity is the subject of an Application from an Applicant who is not the User,

then Western Power may determine that the User must reduce that Contracted Capacity, and if it so determines, must give notice to the User of its intention to reduce that Contracted Capacity (including the amount and timing of the reduction).

- (b) When making a determination under clause 3.2(a), Western Power must have regard to:
 - (i) the nature, condition and use of the Facilities and Equipment installed, or to be installed within a reasonable time, at the Connection Point; and
 - (ii) whether the User cannot use the Services because of a Force Majeure Event.
- (c) At least 30 Business Days after giving the User a notice under clause 3.2(a), Western Power must make a fresh determination, having regard to any submissions made by the User in response to the notice given under clause 3.2(a) and all relevant material including anything which has occurred, whether the test under clause 3.2(a) is satisfied, and if so, may, by notice to the User, decrease the Contracted Capacity accordingly.

The model standard access contract provided under the Access Code has no provision for a service provider to unilaterally decide to reduce the contracted capacity of a user. As such, the Authority is further considering whether clause 3.2 of the proposed Electricity Transfer Access Contract conforms to the relevant requirements under section 5.3 of the Access Code and the Code objective (at section 2.1 of the Access Code).

The requirements of section 5.3 of the Access Code are that a standard access contract must be:

- reasonable; and
- sufficiently detailed and complete to:
 - form the basis of a commercially workable access contract; and
 - enable a user or applicant to determine the value represented by the reference service at the reference tariff.

To be consistent with the Code objective, the clause should promote the economically efficient investment in, and operation and use of, the networks and services of networks in Western Australia in order to promote competition in markets upstream and downstream of the networks.

To help consider the matter, the Authority commissioned a report by Parsons Brinckerhoff Associates. The report focused on several key issues, namely:

- contract and market carriage models;
- international practice in third party access;
- proposed contracted capacity rights in the SWIN; and
- the proposed right of Western Power to unilaterally determine to reduce a network user's contracted capacity.

The Authority invites interested parties to make submissions on the Parsons Brinckerhoff Associates report which is available on the Authority's [web site](#).

The Authority is particularly interested in receiving submissions that address whether the right being sought by Western Power to unilaterally determine to reduce the contracted capacity of a network user under the proposed clause 3.2 is:

- reasonable; and
- consistent with the objective as set out in section 2.1 of the Access Code considering its impact on economically efficient investment in and operation of and use of networks and services of networks in Western Australia in order to promote competition in markets upstream and downstream of the networks.

Matters that interested parties may find relevant in making submissions are whether the proposed right of Western Power:

- would unreasonably constrain network users in managing contracts for network services. For example, while a network user may have no immediate or foreseeable need for unused but contracted capacity at a connection point, the user may wish to maintain the contractual entitlement to that capacity to have the option of using it in the future, noting that contractually tariffs in respect of any unused capacity would ordinarily still need to be paid on an ongoing basis.
- is necessary to prevent users holding unused capacity for the purposes of restricting competition in electricity markets. The Authority notes that a user holding unused capacity for this purpose may constitute hindering or preventing access and be unlawful under section 115 of the *Electricity Industry Act 2004*. Provisions of section 115 of the Act are as follows.

115. Prohibitions on hindering or preventing access

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

- (a) access by any person to services in accordance with the Code;
- (b) the making of access agreements or any particular agreement in respect of those facilities; or
- (c) the access to which a person is entitled under an access agreement or a determination made by way of arbitration.

Penalty: \$100 000.

Daily penalty: \$20 000.

(2) A person who has access to services under an access agreement, or an associate of the person, must not engage in conduct for the purpose of hindering or preventing access by another person to services of network infrastructure facilities covered by the Code.

Penalty: \$100 000.

Daily penalty: \$20 000.

(3) Without limiting subsection (1) or (2) —

- (a) a person is taken to engage in conduct for a particular purpose if —
 - (i) the conduct is or was engaged in for purposes that include, or included, that purpose; and
 - (ii) that purpose is or was a substantial purpose;
- (b) a person may be taken to have engaged in conduct for a particular purpose even though, after all the evidence has been considered, the existence of that purpose

is ascertainable only by inference from the conduct of the person or of any other person or from other relevant circumstances.

- (4) In this section —
- (a) a reference to engaging in conduct is a reference to doing or refusing to do any act and includes a reference to —
 - (i) making a contract or arrangement or giving effect to a provision of a contract or arrangement;
 - (ii) arriving at an understanding or giving effect to a provision of an understanding; or
 - (iii) requiring a covenant to be given or giving a covenant;
 - (b) a reference to refusing to do an act includes a reference to —
 - (i) refraining (otherwise than inadvertently) from doing the act; or
 - (ii) making it known that the act will not be done.
- (5) Subsection (1) or (2) does not apply to conduct in which a person engaged in accordance with an agreement, if the agreement was in force on 30 March 1995.
- (6) In this section —
- “associate”, in relation to a person, has the meaning it would have under Part 1.2 Division 2 of the *Corporations Act 2001* of the Commonwealth if sections 13, 14, 16(2) and 17 of that Act were repealed.

A user holding unused capacity for this purpose may also potentially be unlawful under Part IV of the *Trade Practices Act 1974*.

If neither section 115 of the *Electricity Industry Act 2004* or Part IV of the *Trade Practices Act 1974* are considered to effectively address the actions of parties preventing or hindering access, it would be open to the State Government to take alternative policy measures, such as providing for such behaviour to be referred to an independent body.

- is necessary to prevent inefficient investment in network capacity. If a user was to hold unused capacity, Western Power may need to augment the network to provide services to another user. If the first user was holding the unused capacity to hinder access by another user, the further investment would be inefficient. However, the user unlawfully holding on to capacity may be open to legal challenge as described above.

2 Treatment of Capital Contributions

A capital contribution is defined under the Access Code as a contribution made, or to be made, by a user for an augmentation. In practice, a capital contribution occurs where the cost of new facilities investment for an augmentation of the covered network is financed by a user paying a charge additional to those that would normally be payable for a service.

Western Power is seeking to establish treatment of capital contributions from commencement of the initial access arrangement period whereby (i) the amount of any new facilities investment financed by capital contributions is added to the capital base for the SWIN and reflected in transmission and distribution tariffs; and (ii) the amount of the capital contribution would be deducted from the approved total revenue for the SWIN in the year in which the capital contribution is made (clauses 5.29 to 5.43 of the revised proposed access arrangement).

Under this treatment of capital contributions, an increase in tariffs caused by addition of the value of new facilities investment to the capital base is offset, in present value terms, by the reduction in tariffs that results from the deduction of the value of capital contributions from the target revenue.

The Authority notes that, in some circumstances, this treatment of capital contributions may affect Western Power's investment in expansions of the SWIN.

An example of such a circumstance is where a large capital contribution is made as a single payment. In this situation, the deduction of this capital contribution from target revenue may significantly reduce Western Power's revenues in the year in which the capital contribution is made (or at least in the access arrangement period in which the capital contribution is made). However, Western Power is only compensated for this by a longer-term increase in revenues through depreciation and a return on the increment to the capital base. The reduction in revenues in the year in which the capital contribution is made may affect Western Power's financial capability to undertake the new facilities investment and, hence, Western Power's incentive to expand the SWIN in these circumstances.

The Access Code does not prevent alternative treatments of capital contributions, such as spreading the deduction of the value of the capital contributions from the approved total revenue over an extended period, rather than adjusting the total contribution in the period in which the capital contribution is received. Western Power's revised proposed access arrangement does not, however, provide for any alternative treatments.

The Authority invites interested parties to make submissions on Western Power's proposed treatment of capital contributions and the potential effect of this treatment, or of alternative treatments, on efficient investment in the SWIN.

3 *Headworks Charges*

The Authority has received a submission from the Office of Energy addressing capital contribution payments for certain extensions and expansions of the SWIN at regional locations on the extremities of the existing network.

The submission from the Office of Energy is on the Authority's [web site](#).

The Office of Energy submits that Western Power's proposed capital contributions policy may limit opportunities for extensions and expansions of the network by potentially requiring a large part of the cost of a network enhancement to be met, at least in the first instance, by the new electricity customer who triggers the need for enhancement. The Office of Energy submits that opportunities for network extensions and expansions may be increased if the access arrangement allowed for a capital contribution charge that was in the nature of a "headworks charge" payable by new users in particular locations or regions.

The Access Code does not explicitly contemplate capital contributions, as suggested by the Office of Energy, that are in the nature of the headworks charges. However, the Authority considers that there is nothing in either the Access Code or the capital contributions policy of Western Power's revised proposed access arrangement that would, in principle, prevent Western Power from levying such charges.

The Authority intends, in its Final Decision, to respond to the submission from the Office of Energy. Before it does so, the Authority invites interested parties to make submissions on the mechanism of headworks charges, as described in the Office of Energy submission.

Submissions

Submissions should be in both printed and electronic form and should be received by **4:00 pm Western Daylight Saving Time on Thursday 8 February 2007**, addressed to:

Mr Robert Pullella
Executive Director Competition, Markets and Electricity
Economic Regulation Authority
PO Box 8469
Perth BC WA 6849

Alternatively submissions can be sent to the email address:

public_consultation@era.wa.gov.au

Confidentiality

In general, all submissions from interested parties will be treated as in the public domain and placed on the Authority's web site.

Where an interested party wishes to make a submission in confidence, it should clearly indicate the parts of the submission for which confidentiality is claimed, and specify in reasonable detail the basis upon which the claim is made.

The receipt and publication of any submission on the Authority's web site shall not be taken as indicating that the Authority has knowledge, either actual or constructive, of the contents of a particular submission and, in particular, whether the submission in whole or in part contains information of a confidential nature and no duty of confidence will arise for the Authority in these circumstances.

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17 January 2007