22 August 2017

Australian Energy Market Commission

By email: Sherine.AlShallah@aemc.gov.au

Dear Madam

SUBMISSION TO THE REVIEW INTO THE SCOPE OF ECONOMIC REGULATION APPLIED TO COVERED PIPELINES – GPR0004

As the Western Australian Energy Disputes Arbitrator under the Energy Arbitration and Review Act 1998 (WA) I propose to lodge this submission only in relation to Question 14.

Question 14(A)

Your note to the comment that there is a perceived uncertainty in relation to arbitration by line users as mentioned on page 57 of the Issues Paper, my observations are as follows:

(a) In Western Australia energy users do avoid “rocking the boat” to protect broad and long term business interests with pipeline service providers. A number of arbitrations have been commenced but not proceeded with, since parties have reached an amicable arrangement. Effectively, the arbitration process is only in the background, in case agreement cannot be reached, so it constitutes a powerful incentive.

(b) The timeframe for dispute resolution should not be excessive. The Arbitrator can expedite the process with the assistance of the parties.

(c) The legal costs are or should not be prohibitive. Indeed, it is not always the case the parties are represented in an arbitration, since in many cases they can put forward their own case quite effectively.

(d) What should be avoided is any degree of uncertainty in the reference to arbitration. This can be overcome with appropriate amendments.

(e) Over a period of time, a body of practice will develop in which any uncertainty as to how the regulator will price a disputed service will be dissipated as experience accrues.

(f) Given arbitrators of reasonable competence, it should be possible for an arbitrator to make a decision as to the key parameters in light of the expert evidence provided by the parties.
Question 14(B)

Wherever possible, the arbitration framework should be standardised, such as to provide for the same rules and procedures in relation to pipeline arbitrations.

Question 14(C)

It follows from the previous answers that no pipeline services should be excluded, with all subject to arbitration if it is not possible for the parties to reach agreement.

Commercial pressures alone are not sufficient to achieve the objectives of the AEMC.

Our Teleconference of 21 August 2017

Further to our teleconference of 21 August, I attach the following examples of how disputes can be defined:

(a) Page 14 of the Electricity Networks Access Code 2004 (unofficial consolidated version) which includes a very detailed definition of access dispute;

(b) Page 19 of the Electricity Networks Access Code 2004, which includes a brief but effective definition of contractual dispute; and

(c) Pages 105-113 inclusive of the Electricity Networks Access Code 2004, which contains key provisions in 10.1 that a proceeding is not an arbitration within the meaning of the Commercial Arbitration Act 1985, provisions for expedited hearings and the jurisdiction of the Arbitrator and also a reference to contractual disputes in 10.53.

Under this Code, the Arbitrator can easily see whether he or she has jurisdiction or not. It serves as an example as to how a reference can be appropriately drafted. I hope this will be of some assistance to you, but as always, it needs to be taken to adapt whatever you draft to the actual situation in the particular industry.

Would you treat this letter as being in substitution for my submission of 17 August 2017.

Yours sincerely

Laurie James AM
Western Australian Energy Disputes Arbitrator
17 August 2017
(b) between a revisions commencement date and the next revisions commencement date.

"access arrangement start date" means the day on which an access arrangement (other than an interim access arrangement) takes effect, and is determined in accordance with 4.26.

(Note: See definition of "review" for access arrangement review.)

"access contract" has the same meaning as 'access agreement' does in Part 8 of the Act, and under section 13.4(d) includes a deemed access contract.

(Note: At the time this Code was made, the definition in section 103 of the Act was:

"access agreement" means an agreement under the Code between a network service provider and another person (a "network user") for that person to have access to services.

"access dispute" means a dispute, in connection with an access application, between the applicant and the service provider, including a dispute in relation to any one or more of the following (and the paragraphs of this definition do not limit each other).³

(a) whether the applicant or the service provider has complied with, or the manner in which the applicant or the service provider has purported to comply with, the applications and queuing policy; and

(b) the terms and conditions, including service standards, on which the applicant should be permitted to acquire covered services from the service provider; and

(c) whether work is required work and the terms and conditions applying, or proposed to apply, to any such work; and⁴

(cia) anything connected with or arising out of a proposed contribution; and⁵

(cb) a matter heard under section 15.7; and

(cc) anything connected with or arising out of Appendix 8; and

(cd) anything connected with or arising out of Appendix 9; and⁶

(d) whether the service provider should grant the applicant an exemption to the technical rules under section 12.34; and

(e) the arrangements which will apply in respect of a supplementary matter connected with the access application.

"access rights" means all or part of a user's rights under a contract for services to obtain a covered service.⁷

"additional revenue", when used in 6.41, has the meaning given to it in section 6.42.

³ Section 1.3 amended by WAGG No 180, 22 October 2008
⁴ Section 1.3 amended by WAGG No 180, 22 October 2008
⁵ Section 1.3 amended by WAGG No 180, 22 October 2008
⁶ Section 1.3 amended by WAGG No 180, 22 October 2008
⁷ Section 1.3 amended by WAGG No 137, 29 June 2007
⁸ Section 1.3 amended by WAGG No 180, 22 October 2008
"contract for services" means an agreement between a service provider and another person for the person to have access to services, and includes an access contract.

(Note: The expression "contract for services" is broader than "access contract", because it catches all such contracts and not merely those entered into under this Code. Hence it includes contracts entered into under the Electricity Transmission Regulations 1996 and the Electricity Distribution Regulations 1997.) 24

"contractual dispute" means a dispute between a service provider and a user that is not an access dispute and is referred to the arbitrator under a contract for services. 25

"contributing user" means a user that is or may be required to make a contribution. 26

"contribution" means a capital contribution, a non-capital contribution or a headworks charge. 27

"contributions policy" means a policy in an access arrangement under section 5.1(h) dealing with contributions by users. 28

"Coordinator" means the Coordinator of Energy referred to in section 4 of the Energy Coordination Act 1994.

"coverage applicant" means a person who lodges a coverage application.

"coverage application" means an application under section 3.8 requesting that the whole or part of a network be covered.

"coverage decision", for a coverage application for a network, means either or both of the draft coverage decision under section 3.17 by the Minister and the final coverage decision under section 3.21 by the Minister.

"covered", with regard to a network, means either:

(a) that the network is referred to in section 3.1, and the coverage has not been revoked under Subchapter 3.4; or

(b) that the Minister has made a final coverage decision that the network should be covered, and the coverage has not been revoked under Subchapter 3.4.

(Note: Among other things, coverage of a network means that the service provider must submit a proposed access arrangement under section 4.1.) 29

"covered network" means a network that is covered.

"covered service" means a service provided by means of a covered network, including: 30

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24 Section 1.3 amended by WAGG No 180, 22 October 2008
25 Section 1.3 amended by WAGG No 180, 22 October 2008
26 Section 1.3 amended by WAGG No 180, 22 October 2008
27 Section 1.3 amended by WAGG No 180, 22 October 2008
28 Section 1.3 amended by WAGG No 180, 22 October 2008
29 Section 1.3 amended by WAGG No 180, 22 October 2008
30 Section 1.3 amended by WAGG No 180, 22 October 2008
Chapter 10 – Dispute Resolution

Subchapter 10.1 – Introduction

Commercial Arbitration Act 1985 does not apply

10.1 A proceeding under this Chapter 10 is not an arbitration within the meaning of the Commercial Arbitration Act 1985.

Procedural rules

10.2 Appendix 5 applies in respect of an access dispute.

Subchapter 10.2 – Access Disputes

Notification of a dispute

10.3 An applicant or a service provider may notify the Authority in writing that an access dispute exists.

10.4 On receiving a notification under section 10.3, the Authority must give notice in writing of the access dispute to the other parties to the dispute.

10.5 An applicant or service provider who has given notice of an access dispute under section 10.3 may withdraw notification of the access dispute at any time by written notice to the Authority and all other parties to the access dispute.

10.6 If the notification of an access dispute is withdrawn under section 10.5, it is taken for the purposes of this Chapter 10 to never have been given.

Other parties joining

10.7 A person, other than a party to a dispute, may apply to the arbitrator to join and be heard in the proceedings.

10.8 The arbitrator:

(a) must allow a person applying under section 10.7 to join the proceedings if the person is affected by the proceedings unless the arbitrator determines that doing otherwise is necessary to justly dispose of the issues in the proceedings; and

(b) may make such orders concerning the joinder as the arbitrator considers appropriate.
10.9 The arbitrator may on its own initiative:

(a) direct a party to a dispute to provide it with sufficient information to enable it to identify other persons who might wish to apply under section 10.7 to join and be heard in the proceedings;

(Note: This may include information as to any (or any other) applicants and details of each applicant’s access application.)

(b) notify any person identified by it under section 10.9(a) that the dispute exists and the parties to the dispute.

10.10 The parties to a dispute must promptly comply with a direction under section 10.9(a).

**Conciliation and reference to arbitration**

10.11 On receiving a request to refer an access dispute to arbitration, the Authority must:

(a) subject to section 10.12 and if the parties to the dispute agree, attempt to settle the dispute by conciliation; or

(b) if the Authority does not attempt to settle the dispute by conciliation or conciliation fails to settle the dispute, refer the dispute to the arbitrator.

**Authority not required to conciliate**

10.12 The Authority is not obliged to attempt to settle the dispute by conciliation if the Authority is satisfied, on the application of a party to the access dispute, that there are good reasons why the dispute should not be settled by conciliation.

**Expeditied hearing of disputes under applications and queuing policy**

10.13 Section 10.14 applies in respect of an access dispute ("queuing dispute") relating to an interim or procedural matter under an applications and queuing policy, in respect of which either:

(a) the service provider and the applicant agree in writing to have the matter heard as a queuing dispute;

(b) where the arbitrator determines (on application by either party) that a speedy resolution of the queuing dispute may permit the access application to be further progressed and an access offer made without the parties having to resort to a lengthy, full-scale access dispute.

10.14 Unless the arbitrator considers that the Code objective or the just resolution of the queuing dispute require a queuing dispute to be dealt with in another way, when hearing a queuing dispute:

(a) the parties are to be restricted to one round of written submissions and one round of written submissions in reply (which may not be amended except by leave of the arbitrator); and

(b) the hearing is to be conducted without legal representation (but parties may obtain legal advice in preparing the written submission); and
(c) the arbitrator is to treat the objective of informality and expedition as paramount; and

(d) the arbitrator and the parties must endeavour to ensure that the queuing dispute is determined within 10 business days after notice of the queuing dispute is given.

Factors which the arbitrator must have regard to

10.15 In exercising its functions under this Chapter 10 the arbitrator must have regard to:

(Note: Section 2.2 requires the arbitrator to have regard to the Code objective when exercising its functions under this Chapter 10.)

(a) the geographical location of the network and the extent (if any) to which the network is interconnected with other networks; and

(b) contractual obligations of the service provider or other persons already using the covered network (or both); and

(c) the operational and technical requirements necessary for the safe and reliable operation of the covered network.

10.16 Section 10.15 does not limit the matters to which the arbitrator may have regard.

The arbitration

10.17 The arbitrator must make a decision on the matters the subject of the access dispute following the procedure prescribed in Appendix 5.

10.18 The arbitrator may at any time terminate an arbitration (without making a decision) if the arbitrator considers that:

(a) the subject matter of the access dispute is trivial, misconceived or lacking in substance; or

(b) the notification of the access dispute was vexatious; or

(c) the party who notified the access dispute has not negotiated in good faith or has notified the access dispute prematurely or unreasonably.

Arbitrated tariff to be guided by access arrangement and price list

10.19 Subject to section 10.20, if an access dispute relates to the tariff that should apply to a covered service, the arbitrator must set the tariff payable by the applicant under the award having regard to the access arrangement and price list and Chapter 7.

Arbitrated tariffs for reference services

10.20 If an access dispute relates to the tariff that should apply to a reference service, then an award must not:

(a) require the applicant to pay more than the reference tariff for the reference service, or
(b) require the service provider to accept less than the reference tariff for the reference service.

**Arbitrated terms for reference services**

10.21 Subject to section 10.22, the arbitrator must not make an award specifying the terms of an access contract for a reference service that is inconsistent with the standard access contract for the reference service set out in the service provider's access arrangement.

10.22 The arbitrator must, in an award specifying the terms of an access contract for a reference service, deal with each matter which in the standard access contract for the reference service in the access arrangement is left to be agreed by the parties or determined by the arbitrator in a manner which:

(a) has regard to the factors contained in section 10.15; and

(b) is consistent with:

(i) any instructions about the matter contained in the access arrangement; and

(ii) the Code objective.

**Arbitrated tariffs for non-reference services**

10.23 Where the arbitrator is setting the tariff payable by the applicant for a non-reference service, the award should endeavour to achieve the following objectives:

(a) when the awarded tariff is compared with the reference tariff for a comparable reference service (if any):

(i) if the non-reference service involves the provision of services to a higher standard, the differential between the awarded tariff and the reference tariff should reflect the increase in the service provider's incremental cost of service provision as a result of the provision of services to that higher standard;

and

(ii) if the non-reference service involves the provision of services to a lower standard, the differential between the awarded tariff and the reference tariff should reflect the amount of the service provider's avoided cost of service provision as a result of the provision of services to that lower standard;

and

(b) subject to the discount provisions in the service provider's access arrangement, other users should not pay individual reference tariffs for reference services that are higher as a result of the differential referred to in section 10.23(a).

10.24 Where the arbitrator is awarding the tariff payable by the applicant for a non-reference service, the award must have regard to Chapter 7 and the service
provider’s access arrangement including the standard access contract contained in the service provider’s access arrangement.

10.25 Section 10.24 does not limit the matters to which the arbitrator must or may have regard.

**Award by the arbitrator**

10.26 The arbitrator must make a written award on access to the network by the applicant.

10.27 The award referred to in section 10.26:

(a) must deal with the matter that was the basis for the notification of the dispute; and

(b) may, subject to section 10.28, deal with any other matter which a party has requested the arbitrator to deal with that the arbitrator considers expedient to justly dispose of any proceedings before it.

10.28 The arbitrator cannot make an award under section 10.26 that deals with a matter that is, by agreement between the parties, no longer a matter which is in dispute.

10.29 Without limiting the generality of section 10.24 and subject to section 10.32, the award may, without limitation, do any one or more of the following:

(a) specify the manner in which a party must comply with the applications and queuing policy; or

(b) deal with the costs, timing or performance of functions in relation to the undertaking of proposed work, and may require a party to undertake any such function in a specified manner; or

(c) require the service provider to provide access to a covered service requested by the applicant; or

(d) subject to section 10.35, require the applicant to accept, and pay for, access to a service; or

(e) specify the terms of the access contract including the discount to the reference tariff to which the user is entitled (if any) and the amount of any contribution and the terms on which it is to be provided; or

(f) require the service provider to undertake and fund any required work including to augment the network; or

(g) specify the extent to which the award overrides an earlier award or contract for services.\(^{172}\)

10.29A The paragraphs of section 10.29 do not limit each other.\(^{173}\)

10.30 Before making an award, the arbitrator must give a draft award to the parties to the arbitration and may have regard to representations that any of them may make on the proposed award.

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\(^{172}\) Section 10.29 amended by WAGG No 180, 22 October 2008

\(^{173}\) Section 10.29A inserted by WAGG No 180, 22 October 2008
10.31 When the arbitrator makes an award, the arbitrator must give the parties to the arbitration written reasons for the award.

Restrictions on access awards

10.32 The arbitrator cannot make an award that:

(a) would impede the right of a user under a contract for services to obtain services unless the user agrees or the arbitrator is satisfied that the user is or will be compensated on just terms for in respect of the impeded right; or

(b) is inconsistent with the access arrangement for the covered network; or

(c) requires the service provider to provide access to a service designated as an excluded service in the access arrangement; or

(d) affects an area of the State that is the subject of the exclusive license of another service provider; or

(e) requires the service provider or another person to engage in an act or omit to engage in an act which would contravene a written law or a statutory instrument. 174

Arbitrated award requiring work to be undertaken 175

10.33 The arbitrator may make an award that would have the effect of requiring the service provider to undertake work only where the arbitrator is satisfied that:

(a) the work is technically and economically feasible and consistent with the safe and reliable operation of the network; and

(b) in the case of a major augmentation, sections 10.40 to 10.43 have been complied with. 176

Effect of awards

10.34 Subject to section 10.35, an award is binding on the parties to the arbitration in which it is made.

10.35 An applicant may, within 5 business days after an award is made which orders the parties to enter into an access contract, elect not to enter into an access contract as specified by the award by giving written notice of the election to the arbitrator and the service provider, in which case (subject to any applications and queueing policy provisions about lapse of access applications due to passage of time) the applicant’s access application remains in effect.

10.36 Unless the applicant elects not to be bound by an award in accordance with section 10.35, if the award orders the parties to enter into an access contract then the service provider and applicant must enter into an access contract in the form specified in the award within 15 business days after it is made.

174 Section 10.32(a) amended by WAGG No 180, 22 October 2008
175 Heading to section 10.33 amended by WAGG No 180, 22 October 2008
176 Section 10.33 amended by WAGG No 180, 22 October 2008
Costs of arbitration

10.37 Subject to sections 10.38 and 10.39, the costs of an arbitration (including the fees and costs of the arbitrator, if the parties are required to pay the fees and costs) are to be determined in the discretion of the arbitrator who may:

(a) direct to and by whom and in what manner the whole or any part of the costs is to be paid; and

(b) fix or settle the amount of costs to be so paid or any part of the costs; and

(c) award costs to be fixed or settled as between party and party or as between solicitor and client; and

(d) award costs by reference to the Legal Practitioners (Supreme Court) (Contentious Business) Determination 2002 as amended or substituted from time to time.

10.38 The costs of complying with Subchapter 10.3 are to be borne equally by the parties unless the arbitrator considers there are compelling reasons to order otherwise.

10.39 If an award is made substantially in the form sought by an applicant, and the applicant elects under section 10.35 not to be bound by the award, then the fees and costs of the arbitrator, to the extent the parties are required to pay the fees and costs, are to be borne by the applicant unless the arbitrator considers there are compelling reasons to order otherwise.

Subchapter 10.3 – Application of the regulatory test in an arbitration

Arbitrator must make proposed award if award would require major augmentation

10.40 Before making an award under section 10.33 that would require a service provider to undertake a major augmentation, the arbitrator must:

(a) make and provide to the parties to the dispute a proposed award; and

(b) direct the service provider to apply the process outlined in section 10.41 in relation to the major augmentation in the proposed award and specify a time by which the service provider must complete each step in the process.

Service provider must consult and submit major augmentation report

10.41 The service provider must, within the time specified by the arbitrator:

(a) conduct a consultation process in respect of the major augmentation in the proposed award which complies with section 9.16(c); and

(b) then, submit a major augmentation report to the Authority that:

(i) demonstrates compliance with section 10.41(a); and
(ii) states whether, in the service provider's view, the major augmentation in the proposed award maximises the net benefit after considering alternative options.

10.42 The service provider must use its best endeavours to ensure that there are no unnecessary or unreasonable costs or delays in complying with section 10.41.

**Service provider's costs of compliance, if applicant withdraws**

10.43 If an applicant withdraws its notice of an access dispute under section 10.5 and the service provider:

(a) has complied with sections 10.41 and 10.42; or

(b) is in the process of complying with section 10.41 and 10.42,

then the applicant must indemnify the service provider for the service provider's costs of complying with sections 10.41 and 10.42 up to the date that the service provider receives the withdrawal notice.

**Authority must publish determination regarding major augmentation report**

10.44 The Authority must in respect of a major augmentation report make and publish a determination whether the test in section 10.46 is satisfied or is not satisfied, and must do so:

(a) if the Authority has consulted the public under section 10.45 — within 45 business days; and

(b) otherwise — within 25 business days,
after receiving the major augmentation proposal.

10.45 The Authority may consult the public under Appendix 7 before making a determination under section 10.44.

10.46 The test in this section 10.46 is satisfied if the Authority is satisfied that:

(a) the service provider's statement under section 10.41(b)(ii) is defensible; and

(b) the service provider has applied the regulatory test properly to the major augmentation in the proposed award:

(i) using reasonable market development scenarios which incorporate varying levels of demand growth at relevant places; and

(ii) using reasonable timings, and testing alternative timings, for project commissioning dates and construction timetables for the major augmentation and for alternative options;

and

(c) the consultation process conducted by the service provider under section 10.41(a) meets the criteria in section 9.16(c).
10.47 The Authority must make a determination under section 10.44 on the basis of all the material before it and must have regard to, but is not bound by, the service provider's view under section 10.41(b)(ii).

10.48 The Authority must give the arbitrator and the parties to the dispute a copy of its determination under section 10.44.

10.49 If the Authority is unable to make a determination under section 10.44 because the service provider has not provided adequate information (despite the Authority's having notified the service provider of this fact and given the service provider a reasonable opportunity, having regard to the time periods specified in section 10.44, to provide adequate information), then the Authority:

(a) must notify the arbitrator and the parties to the dispute of the fact and provide a description of the circumstances; and

(b) is not required to make a determination under section 10.44 in relation to the major augmentation in the proposed award.

Arbitrator must have regard to Authority's determination

10.50 In determining whether to make an award that would have the effect of requiring the service provider to undertake the major augmentation described in the proposed award or an augmentation of a different nature (whether a major augmentation or not) the arbitrator must have regard to, but is not bound by, the Authority's determination under section 10.44.

10.51 For the purposes of section 10.50, without limiting the matters to which the arbitrator must or may have regard, the arbitrator may have regard to the manner in which the service provider complied with sections 10.41 and 10.42.

Subchapter 10.4 – Contractual Disputes

Jurisdiction of arbitrator

10.52 The arbitrator has jurisdiction to hear a contractual dispute.

Procedural rules

10.53 Except to the extent that the contract for services provides otherwise, sections 10.3 to 10.6 and Appendix 5 apply to the arbitrator's hearing of a contractual dispute, with appropriate modifications including the substitution of "contractual dispute" for all references to "access dispute". 177

177 Section 10.53 amended by WAGG No 180, 22 October 2008
Chapter 11 – Service standards

Service provider must comply with service standards

11.1 A service provider must provide reference services at a service standard at least equivalent to the service standard benchmarks set out in the access arrangement and must provide non-reference services to a service standard at least equivalent to the service standard in the access contract.

Authority to monitor service standards

11.2 The Authority must monitor and, at least once each year, publish a service provider’s actual service standard performance against the service standard benchmarks.

11.3 The Authority may, acting reasonably, request a “service standard performance report” from a service provider for the purposes of monitoring the service provider’s actual service standard performance and the service provider must provide the Authority with a service standard performance report within the time specified by the Authority in its request, which time must not be less than 20 business days.

11.4 In a request under section 11.3 the Authority may specify:

(a) a period of time which must be covered in the service standard performance report; and

(b) criteria to be addressed in the service standard performance report; and

(c) the format required for the service standard performance report,

and the service provider must comply with the Authority’s specifications.

11.5 The Authority may from time to time, for the purposes of monitoring a service provider’s actual service standard performance:

(a) consult with users of the service provider’s network; and

(b) advertise a request for submissions from consumers supplied using the network.

Penalties for breach of service standards

11.6 If a service provider does not comply with section 11.1, then in order to minimise the likelihood of the service provider being excessively penalised for its failure to comply with section 11.1, the Authority must have regard to:

(a) any remedies awarded (or likely to be awarded) against the service provider under contracts for services in relation to the act or omission which resulted in the service provider not complying with section 11.1; and

(b) the service standards adjustment mechanism,