

# **Draft Decision**

## **Access Arrangement proposed by Duke Australia Operations Pty Ltd for the Wallumbilla to Gladstone via Rockhampton Pipeline System**

**Date: April 2001**

**File No:**

C2000/993

**Commissioners:**

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## Abbreviations and glossary of terms

ACCC	Australian Competition and Consumer Commission
Access Arrangement	Arrangement for third party access to a pipeline provided by a pipeline owner/operator and submitted to the relevant regulator for approval in accordance with the Code.
Access Arrangement Information	Information provided by a service provider to the relevant regulator pursuant to section 2 of the Code.
Bare Transfer	When the terms of a contract with a service provider are not altered as a result of transfer or assignment of capacity rights.
Code	<i>National Third Party Access Code for Natural Gas Pipeline Systems</i>
Contract carriage pipeline	A system of managing third party access whereby: <ul style="list-style-type: none"><li>▪ the service provider normally manages its ability to provide services by requiring Users to use no more than the quantity of service specified in a contract;</li><li>▪ users normally are required to enter into a contract that specifies a quantity of service;</li><li>▪ changes for use of a service are normally based at least in part upon the quantity of service specified in a contract; and</li><li>▪ a user normally has the right to trade its right to obtain a service to another User.</li></ul>
Commission	Australian Competition and Consumer Commission
Covered Pipeline	Pipeline to which the provisions of the code apply
Derogation	A legislative exemption from compliance with specified obligations set out in the Code.
Duke	Duke Operations Australia Pty Ltd
GJ	GigaJoule
GPAL or Law	Both terms refer to <i>Gas Pipelines Access (Queensland) Law</i> or <i>Gas Pipelines Access Law</i>
KPI	key performance indicator
Law or GPAL	<i>Gas Pipelines Access (Queensland) Law</i> or <i>Gas Pipelines Access Law</i>
MDQ	maximum daily quantity
NCC	National Competition Council
p.a.	per annum
PJ	PetaJoule (equal to 1 000 000 GJ)

Prospective User	A person who seeks or who is reasonably likely to seek to enter into a contract for a service and includes a User who seeks or may seek to enter into a contract for an additional Service.
QGP	Queensland Gas Pipeline
Queuing Policy	A policy for determining the priority that a prospective user has, as against any other Prospective User, to obtain access to Spare Capacity.
Reference Service	A Service which is specified in an Access Arrangement and in respect of which a Reference Tariff has been specified in that Access Arrangement.
Reference Tariff	A tariff specified in the Access Arrangement as corresponding to a Reference Service and which has the operation that is described in sections 6.13 and 6.12 of the Code.
Reference Tariff Policy	A policy describing the principles that are to be used to determine a Reference tariff.
Revisions Commencement Date	The date upon which the next revisions to the Access Arrangement are intended to commence.
Revisions Submission Date	The date upon which submissions to the revision of the Access Arrangement are due
Service	A Service provided by the means of a Covered Pipeline including: <ul style="list-style-type: none"> <li>▪ haulage services (such as firm haulage, interruptible haulage, spot haulage and backhaul);</li> <li>▪ the right to inter connect with a Covered Pipeline;</li> <li>▪ services ancillary to the provisions of such services,</li> </ul> but does not include the production, sale or purchasing of Natural Gas.
Services Policy	A policy detailing the Service or Services to be offered.
Services Provider	The person who is the owner or operator of the whole or any part of the pipeline or proposed pipeline.
TJ	Terajoule (equal to 1 000 GJ)

# Executive summary

## Introduction

On 17 August 2000 Duke Australia Operations Pty Ltd applied to the Australian Competition and Consumer Commission for approval of its proposed access arrangement for the Wallumbilla to Rockhampton via Gladstone pipeline system. This pipeline is also known as the Queensland Gas Pipeline. The application was made under section 2.2 of the *National Third Party Access Code for Natural Gas Pipeline Systems* (the Code).

The Commission has released its draft decision and invites submissions from the applicant and interested parties by 11 May 2001 to assist it in reaching a final decision.

QGP supplies gas from several sources. They include the Denison trough of the Surat Basin near Westgrove; coal seam methane near Rolleston and Moura; and via Epic Energy's Ballera to Wallumbilla pipeline. Inlet stations are at Wallumbilla, Westgrove, Rolleston and Moura with outlet stations at Larcom Creek, the Gladstone and Rockhampton City gates and QAL in Gladstone.

Duke's access arrangement outlines the terms and conditions for third party access to the pipeline. The Commission has assessed the arrangement against the Code's principles using information provided by Duke and interested parties and its own research.

## The draft decision at a glance

The Duke Queensland Gas Pipeline (QGP) is the subject of a Queensland Government Derogation, which prevents the Commission from reviewing the Reference Tariffs and related areas of the Access Arrangement until the Revisions Submission Date (2016). Therefore, the majority of the typically contentious aspects of an Access Arrangement are not open to Commission consideration. In particular, this draft decision contains no assessment of Reference Tariffs or Reference Tariff Policy.

Only one submission was made in response to the proposed Access Arrangement<sup>1</sup>. This submission raised a number of concerns, but only one of these related to a non-derogated aspect of the arrangement. This was a concern that Duke's proposed capacity trading policy appears to leave it to the Service Provider's sole discretion as to what constitutes 'reasonable commercial and technical grounds' for withholding consent to a capacity trade. An aggrieved User, however, would be able to seek commercial arbitration and/or court action under contract law if it believed Duke were withholding consent to a capacity trade on an unreasonable basis.

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<sup>1</sup> The submission is from Santos – which is not a shipper on the Pipeline, but its gas comprises the majority of gas transported.

Santos suggested a set of objective criteria to clarify what ‘reasonable’ meant, which Duke had some issues with. Duke agreed to consider an amendment to clarify what ‘reasonable commercial or technical grounds’ might be. The Commission believes that the inclusion of some objective criteria to address this uncertainty is desirable and should reduce the likelihood of disputes. However, the wording of this aspect of Duke’s original Trading Policy is consistent with the Code and the Commission cannot require Duke to include such additional criteria.

Duke’s trading policy also restricts ‘bare transfers’ of capacity to Users (where the original user remains fully liable to Duke for the capacity). This has the effect of restricting users to only offering bare transfers to other existing users of the pipeline. This is inconsistent with the Code, which requires a trading policy to permit bare transfers to ‘... any other persons’. Duke claim they did not intend to so restrict bare transfers. The Commission requires an amendment to rectify this issue.

Duke’s proposed queuing policy appears to only apply to spare capacity, whereas the Code requires a queuing policy to apply to spare and developable capacity. An amendment to this end is required.

Duke’s extensions policy is unclear as to how an applicable surcharge, if required, would be approved. The wording of the extensions policy implies that the surcharge may be covered by the Derogation. This was not Duke’s intention. Duke intend to bring any such surcharge to the ACCC for approval in accordance with sections 8.25 and 8.26 of the Code. An amendment clarifying this process is required.

Duke’s revisions commencement date is fixed in the derogation. However, s3.17 of the code allows review of the non-tariff elements of the code if a specific major event occurs. The Commission requires that Duke identify specific major events that will trigger such a review.

The remainder of Duke’s proposed Access Arrangement appears to be consistent with the Code.

### **Proposed amendments**

The Commission’s proposed amendments are as follows:

#### **Proposed Amendment A3.1**

In order for Duke’s proposed access arrangement to be approved, it must be amended to delete all references to the operations manual and to incorporate those provisions currently contained in the operations manual which are required to meet the code’s minimum requirements for access arrangements.

#### **Proposed amendment A3.2**

In order for Duke’s access arrangement to be approved, Duke must amend clause 10.1(a) to permit a User to effect a Bare Transfer to a User or Prospective User.

#### **Proposed amendment A3.3**



In order for Duke's access arrangement to be approved, the queuing policy must be amended to specifically apply to Developable Capacity, as defined in the code, as well as Spare Capacity.

#### **Proposed Amendment A3.4**

For Duke's access arrangement to be approved, the Extensions Policy must be amended so that should Duke elect to have a pipeline extension covered by this access arrangement, it will submit any proposed Applicable Surcharge to the Commission for approval in accordance with clause 12 of the access arrangement and sections 8.25 and 8.26 of the Code.

#### **Proposed Amendment A3.5**

For the access arrangement to be approved, the Commission requires Duke to include in the Access Arrangement a list of specific major events that will trigger a review of the non-tariff elements of the access arrangement.

# 1. Introduction

## 1.1 Invitation to make submissions

On 17 August 2000 the Australian Competition and Consumer Commission (Commission) received an application from Duke Operations Australia Pty Ltd (Duke) for approval of a proposed access arrangement for its Wallumbilla to Gladstone via Rockhampton pipeline, referred to as the Queensland Gas Pipeline (QGP).

The QGP supplies gas from several sources; from older fields which are in decline in the Denison Trough of the Surat Basin near Westgrove; some coal seam methane from near Rolleston and Moura; and from south-west Queensland fields, via Duke's Ballera to Wallumbilla pipeline. Most of the gas is used in Gladstone and Rockhampton and at QAL in Gladstone.

Duke Energy International Queensland Gas Pipeline Pty Ltd and Duke Queensland Pty Ltd own the 627km QGP. Duke Australia Pty Ltd operates the pipeline as the agent for the owners and is the service provider for the purposes of the proposed access arrangement.

The Queensland Government commissioned the QGP in December 1989, with the extension to Rockhampton included in 1991. Pacific Gas Transmission Australia Pty Ltd bought the QGP in July 1996, and sold it to Duke Energy in 1998.

This application was submitted under section 2.2 of the *National Third Party Access Code for Natural Gas Pipeline Systems* (the code). The derogation to the *Gas Pipelines Access (Queensland) Law* (GPAL) relating to this access arrangement explicitly releases Duke from the obligation to provide access arrangement information. The access arrangement describes the terms and conditions upon which Duke proposes to make access to services provided by the QGP available. The Commission has made a draft determination based on information supplied by Duke, submissions from interested parties and its own analysis. The Commission invites submissions in response to this draft decision.

Pursuant to section 2.13 of the Code, this draft decision states the amendments (or nature of the amendments) that would have to be made to the proposed access arrangement in order for the Commission to approve it. The draft decision identifies, for the benefit of the applicant and third parties, the issues that need to be resolved before the Commission makes a final decision whether to approve the access arrangement proposed by the applicant.

The Commission will consider carefully responses by the applicant and third parties, and may seek to follow up particular issues with the applicant and other interested parties during the remaining public consultation period. Contact details for enquiries to the Commission are given overleaf.

This introduction includes:

- a description of the current assessment process and of the steps to final approval of an access arrangement for QGP;
- a description of the regulatory framework for the Queensland gas industry;
- an outline of the access arrangement submitted for approval;
- a summary of the criteria for assessing an access arrangement under the code; and
- the Commission's draft decision.

### ***How to make submissions***

Please forward submissions to the Commission by close of business on 11 May 2001. To ensure that the Commission, Duke and interested parties have an adequate opportunity to consider the submissions only nominal extensions of time will be granted.

Please forward submissions in electronic and paper form to:

File reference: **C2000/993**

Ms Kanwaljit Kaur  
Acting General Manager  
Regulatory Affairs – Gas  
Australian Competition and Consumer Commission  
P O Box 1199  
DICKSON ACT 2602

e-mail submissions to: [david.hatfield@acc.gov.au](mailto:david.hatfield@acc.gov.au)

Enquiries: Mr David Hatfield

Tel: 02 6243 1266

Fax: 02 6243 1205

ACCC website: <http://www.accc.gov.au/gas>

Public submissions will be e-mailed to the applicant, Duke, for response. Submissions will be available on public register files maintained by the Code Registrar and the Commission. Once all submissions are received, public submissions will be available on the Commission's web-site.

If you include information that is of a **confidential** or **commercially sensitive** nature in your submission, it should be clearly marked as such. Under the code (section 7.12), the regulator (the Commission) must not disclose such information to any person nor to the Code Registrar. However, information may be disclosed if the regulator is of the opinion that disclosure would not be unduly harmful to the legitimate business interests of the service provider, a user or a prospective user. Therefore if you wish to claim confidentiality or commercial sensitivity, please explain your reasons and identify the legitimate business interests that would be harmed by public disclosure of the information.

If you claim confidentiality for part of a submission, please provide separate hard copies and electronic versions of the submission in ‘public’ and ‘confidential’ formats.

To name electronic documents a useful convention to follow would be:

Public [or Confid] company name [year month date].

For example: ‘Public Gasgen 010316.doc’.

To avoid potential confusion over the date of electronic versions of submissions and covering letters, please avoid using ‘fields’ that automatically update each time the document is opened.

## 1.2 Consultative process and relevant documents

The Code sets out a public consultation process that applies to the Commission as regulator. The Commission is required to:

- inform interested parties that it has received the access arrangement from Duke;
- publish a notice in a national daily paper which at least describes the covered pipeline to which the access arrangement relates; states how copies of the document may be obtained, and requests submissions by a date specified in the notice;
- after considering submissions received, issue a *Draft Decision* which either proposes to approve the access arrangement or not to approve the access arrangement and states the amendments (or nature of the amendments) which have to be made to the access arrangement in order for the Commission to approve it. Submissions will be sought again following release of the Commission’s draft decision;
- after considering any additional submissions, issue a final decision that either approves or does not approve the access arrangement (or revised access arrangement) and states the amendments (or nature of the amendments) which have to be made to the access arrangement (or revised access arrangement) in order for the Commission to approve it; and
- if the amendments are satisfactorily incorporated in a revised access arrangement, issue a final approval. If not, the Commission must draft and approve its own access arrangement.

It is important to note that under s.58 of the *Gas Pipelines Access (Queensland) Act 1998*, the Reference Tariffs and Reference Tariff Policy for these access arrangements have been determined by the Queensland Minister and cannot currently be reviewed in this process. This is discussed in more detail below.

In September 2000 the Commission published an advertisement in the Australian Financial Review to advise that it had received Duke’s proposed access arrangement.

The advertisement invited submissions from interested parties in response to an *Issues Paper* that it released at that time. Only one submission was received, from Santos. Santos is a major supplier of gas into the pipeline through its Denison Trough and Surat production facilities, and the SWQ Producers’ deliveries through the Epic/Duke interconnect.

Santos’ submission included the following concerns:

- the Duke pipeline is the most active pipeline in Queensland with regards to trading. Whilst in practice Duke's approach is to encourage trading Santos submits that its formal policy, and specifically the provision of additional receipt and delivery points, requires further development;
- to allow a service provider to withhold consent to the use of additional receipt and delivery points based solely on its own determination of reasonable commercial grounds may be inappropriate and creates a potential conflict of interest. Santos has proposed alternative wording of this section of the access arrangement;
- whilst acknowledging that Duke's Reference Tariffs are determined by Queensland legislation, Santos is concerned at the high cost of transportation in the Duke pipeline. For example, the combined reference tariffs for the Epic and Duke pipelines to transport Cooper Basin gas to central Queensland are more than twice the reference tariff for the Cooper Basin to Sydney pipeline and three times the Moomba to Adelaide tariff;
- given the capacity of the pipeline, the extent of revenue sharing proposed seems limited; and
- the SQP producers have committed to regular price reviews. In these circumstances, Santos submits that regular reviews of the reference tariff and non-tariff elements of the access arrangement are appropriate. Santos submits that there should be a trigger for review of the access arrangement when alternative forms of infrastructure development generate additional pipeline and producer competition. For example, the completion of the PNG gas pipeline should automatically trigger a review of the Duke Access Principles.

A number of these concerns relate to matters that have been derogated by the Queensland Government, therefore the Commission does not have the jurisdiction to require amendments to the access arrangement to address those concerns. However, the issues that Santos has identified that are within the scope of the Commission's assessment are discussed in the relevant sections below.

### **1.3 Regulatory framework**

The main legislation regulating access to gas transmission services in Queensland is outlined below.

#### ***Gas Pipelines Access (Queensland) Act 1998***

This Act is referred to as the *Gas Pipelines Access Law* (GPAL). The GPAL governs the conduct of pipeline service providers and other interested parties in respect of access issues and regulatory, dispute resolution and administrative processes. In addition, the GPAL amends the *Petroleum Act 1923* (Queensland) and the *Gas Act 1965* (Queensland) in an attempt to create a regulatory regime consistent with the Code.

#### ***Gas Pipelines Access (Queensland) Act 1998 – Derogations***

The GPAL establishes a number of derogations from the Code. In particular, section 58 of the Act provides that the Reference Tariffs for several transmission pipelines were to be approved and gazetted by the Queensland Minister for Mines and Energy rather than

complying with the access pricing principles – and related regulatory process – in the code. As a result the Reference Tariffs are non-reviewable for an extended period of time.

### ***The National Third Party Access Code for Natural Gas Pipeline Systems***

This is referred to as the code, and among other things requires transmission service providers to submit access arrangements to the Commission for approval. Pipelines that were covered by the code when it was implemented are obliged to lodge access arrangements. The QGP is a covered pipeline.

### ***Gas Pipelines Access (South Australia) Act 1997***

In accordance with the Natural Gas Pipelines Access Agreement, South Australia was the lead legislator in implementing the national gas access legislation. The GPA (Qld) Act applies the South Australian Act as a law in Queensland. Changes to the code are effected by amending the South Australian legislation. These changes then flow automatically through to the other jurisdictions' legislation.

### ***Regulatory institutions***

The regulatory institutions with responsibility for administering the Queensland legislation with respect to transmission pipelines are:

- the National Competition Council – coverage advisory body;
- the Commonwealth Minister – coverage decision maker;
- the Commission – relevant regulator and relevant arbitrator;<sup>2</sup>
- the Australian Competition Tribunal – merits review body; and
- the Federal Court – judicial review body.

The Queensland Competition Authority<sup>3</sup> (QCA) is regulator and arbitrator in Queensland with respect to distribution (reticulation) pipelines.

#### **1.3.1 Certification of the Queensland Gas Access Regime**

On 25 September 1998, the Queensland Premier applied to the National Competition Council (NCC) to certify the 'effectiveness' of the Queensland Third Party Access Regime for Natural Gas Pipelines (the Queensland Regime). If a service is certified as effective, it cannot be declared for access under Part IIIA of the *Trade Practices Act 1974*.

#### ***National Competition Council Process***

The Competition Principles Agreement lays down principles against which the NCC must assess the effectiveness of an access regime. Following extensive consultation, the NCC makes a recommendation as to whether the access regime should be certified as effective to the relevant Commonwealth Minister. The Commonwealth Minister is the decision maker.

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<sup>2</sup> The Commission is also regulator and arbitrator with respect to transmission pipelines in the other States and Territories with the exception of Western Australia.

<sup>3</sup> *Queensland Competition Authority Act 1997*

With respect to the Queensland Government's application for certification of the Queensland regime, the NCC made its recommendation to the Commonwealth Minister in February 2001 but has not revealed the content of that recommendation publicly. The Commission understands that the Commonwealth Minister is still considering the recommendation.

If the Commonwealth Minister does not certify the Queensland Regime as effective it would not affect the Commission's consideration of the derogated pipelines' access arrangements. However, such a decision would expose those pipelines to the possibility of declaration under Part IIIA of the *Trade Practices Act 1974*. Were this to occur, unsatisfied access seekers may notify access disputes to the Commission for binding arbitration. In arbitrating such an access dispute, the Commission would not be bound by the Reference Tariffs established by the Queensland Minister in the derogations. The Commission would operate under Part IIIA of the TPA rather than the Gas Code to determine a tariff in these circumstances.

#### **1.4 Period of QGP access arrangement**

As established in the derogation, the submission date for review of Duke's access arrangement is the earlier of 31 August 2016, or six months before the date that Duke reasonably expects the pipeline capacity to exceed its nominal configuration (as specified in schedule 1 to the licence). The revisions commencement date is the earlier of the date when the capacity of the pipeline is greater than the nominal capacity of the pipeline, or the date when the regulator approves revisions to the access arrangement.

#### **1.5 Criteria for assessing an access arrangement**

The Commission may only approve a proposed access arrangement if it is satisfied that it is consistent with the principles set out in sections 3.1 to 3.20 of the code. Those principles are summarised below. The regulator cannot reject a proposed access arrangement on the basis that the arrangement does not address a matter that section 3 of the code does not require it to address. Otherwise, the Commission has broad discretion within the terms of the code to assess an access arrangement.

An access arrangement must include a policy on the service or services to be offered, which includes a description of the service(s) to be offered. The policy must include one or more services that are likely to be sought by a significant part of the market and any service(s) that, in the Commission's opinion, should be included in the policy. To the extent practicable and reasonable, users and prospective users must be able to obtain those portions of the service(s) that they require, and the policy must allow for a separate tariff for an element of a service if so requested.

An access arrangement must contain one or more reference tariffs. A reference tariff operates as a benchmark for the negotiation of terms of supply of a particular service and provides users with a right of access to the specific service at that tariff. In the event that an access dispute goes to arbitration the reference tariff will apply.

An access arrangement must include the following elements:

- terms and conditions on which the service provider will supply each reference service;



- a statement as to whether a contract carriage or market carriage capacity management policy is applicable;
- a trading policy that enables a user to trade its right to obtain a service (on a contract carriage pipeline) to another person;
- a queuing policy to determine users' priorities in obtaining access to spare and developable capacity on a pipeline;
- an extensions/expansions policy to determine the treatment under the code of an extension or expansion of a pipeline;
- a date by which revisions to the arrangement must be submitted; and
- a date by which the revisions are intended to commence.

In considering whether an access arrangement complies with the code, the regulator must (pursuant to section 2 of the code) take into account:

- the legitimate business interests and investment of the service provider;
- firm and binding contractual obligations of the service provider or other persons (or both) already using the covered pipeline;
- the operational and technical requirements necessary for the safe and reliable operation of the covered pipeline;
- the economically efficient operation of the covered pipeline;
- the public interest, including the public interest in having competition in markets (whether or not in Australia);
- the interests of users and prospective users; and
- any other matters that the Commission considers are relevant.

## **1.6 Draft decision**

The Commission proposes not to approve the access arrangement for the QGP Pipeline.

Pursuant to section 2.13, the proposed amendments that must be incorporated in a revised access arrangement for it to be approved (under section 2.16) are set out in the relevant sections of this draft decision and are brought together in the Executive Summary.

Chapter 2 describes the reference tariffs as determined by the Queensland Minister. Chapters 3 and 4 set out the Commission's analysis of:

- the non-tariff elements of service, that is, the service provider's proposed access policies, terms and conditions of service and arrangements for review of the access arrangement (chapter 3); and
- information provision and performance indicators (chapter 4).

Chapter 5 re-states the Commission's draft determination on the basis of the analysis preceding that chapter.

## **2. Reference tariff elements**

The reference tariffs for this pipeline have been derogated by the Queensland Government. The reference tariffs as set out in the derogation are included as schedule five to the access arrangement, and summarised in this chapter. As described earlier, these tariffs are not subject to review by the Commission in its consideration of this access arrangement.

### **Firm forward haul service**

The tariff for firm forward haul service (FFH) consists of the Capacity Reservation Rate multiplied by the user's MDQ, plus the Distance Reservation Rate multiplied by the Distance Component multiplied by the user's MDQ.

The Capacity Reservation Rate is \$0.50 per GJ. This amount may be increased by not more than \$0.04 on the first day of July in 2001, 2006, 2011, 2016, 2021, 2026 and 2031.

The Distance Reservation Rate is \$0.000943 per GJ per kilometre. This rate will increase to \$0.000660 on and from the Expansion Date (see 3.6.3 for a description of the Expansion Date). The Distance Component is the distance between the relevant receipt and delivery points on the pipeline.

### **Backhaul service**

The backhaul tariff is the Backhaul Rate of \$0.40 per GJ multiplied by the user's MDQ. This amount may be increased by not more than \$0.03 on the first day of July in 2001, 2006, 2011, 2016, 2021, 2026 and 2031.

### **As available service**

The as available tariff is 1.25 times the tariff for FFH.

The derogation also provides for overrun and imbalance charges and a charge for new taxes, duties or charges imposed by any government or other regulatory authority. Where Duke constructs, operates and maintains capital improvements that service a specific user or group of users, clause 2.4 of the derogation provides for a User Specific Facility Charge to cover the costs incurred in providing the additional service. This is described in greater detail at 3.6.3.

### **3. Access policies, terms and conditions and review of arrangement**

In this chapter the mandatory non-tariff elements of the proposed access arrangement for the QGP are assessed for compliance with the code. The code requirements are outlined for each mandatory element followed by a summary of the service provider's proposal. Where relevant these are followed by a summary of submissions received in respect of that element and any amendments that the Commission proposes be made for the access arrangement to be approved. All amendments are replicated in the executive summary.

Section 3 of the code establishes the minimum content of an access arrangement, which includes the following non-tariff mandatory elements:

- a services policy that must contain at least one service that is likely to be sought by a significant part of the market;
- terms and conditions on which the service provider will supply each reference service;
- a capacity management policy to state whether the covered pipeline is a contract carriage or market carriage pipeline;
- in the case of a contract carriage pipeline, a trading policy which refers to the trading of capacity;
- a queuing policy which defines the priority that users and prospective users have to negotiate capacity where there is insufficient capacity on the pipeline;
- an extensions/expansions policy which determines whether an extension or expansion of a covered pipeline is or is not to be treated as part of the covered pipeline for the purposes of the code; and
- a review date by which revisions to the access arrangement must be submitted and a date on which the revisions are intended to commence.

#### **3.1 Services policy**

##### **3.1.1 Code requirements**

Sections 3.1 and 3.2 of the code require an access arrangement to include a services policy, which must include a description of one or more services that the service provider will make available to users and prospective users. The policy must describe any services likely to be sought by a significant part of the market, and any that in the relevant regulator's opinion should be included.

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<sup>4</sup> Pursuant to section 8.19, the part of the investment that is of a speculative nature is to be held in a speculative investment fund and may be added to the asset base at a later date when it meets the section 8.16 criteria.

When practicable and reasonable, a service provider should make available those elements of a service required by users and prospective users and, if requested, apply a separate tariff to each.

### **3.1.2 Duke's proposal**

Duke's proposed Services Policy comprises the following three reference services:

- Firm Forward Haul Service – firm transportation of an amount equal to the final nominated receipt quantity for that day from the receipt point to any delivery points on the pipeline system. The priority number for this service is 1.0, the highest rank for a service. This service is subject to curtailment but not any other interruption;
- Backhaul Service – backhaul transportation in the opposite direction of the physical flow of natural gas that is subject to curtailment or interruption when supplies of natural gas to an agreed Backhaul Service user are inadequate. The priority number for this service is 2.0, the second highest rank for a service; and
- As Available Service – as available transportation is subject to interruption when capacity is required to provide Firm Forward Haul Service or pipeline capacity is curtailed. The priority number for this services is 3.0, the third highest rank for a service.

#### ***Firm Forward Haul service***

This haulage service can be summarised as follows:

- Duke requires that at least 10 days prior to the start of each month users submit a monthly nomination form detailing delivery location(s), MDQ and quantity of gas they wish to have transported. In addition, users are required to submit a weekly nomination form for delivery location(s). Duke will then confirm the nomination or curtail capacity as required. Users may request that nominations be altered at any time: Duke will inform users if that is possible.
- A contract for this service is for a minimum term of ten years. This minimum term is fixed in the derogation at clause 2.1(11) and is not subject to review by the Commission in this process. A contract can be extended by written notice to Duke one year prior to the date specified in the terms sheet.<sup>5</sup> The new contract will contain the same provisions as the existing agreement.

#### ***Backhaul service***

A contract for this service has no minimum term.

#### ***As Available service***

A contract for As Available service has no minimum term. If the As Available Service has not been used for three consecutive months, then Duke may give written notice to the user requiring that the service be used within 14 days and if at the end of that period the service has not been used, Duke may terminate the agreement.

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<sup>5</sup> The Terms Sheet specifies the commencement and end dates for transmission services, along with the quantum of natural gas to be transmitted.

### ***Priority of service***

The following priorities were set out in the proposed access arrangement and prevail when there is insufficient gas to deliver all nominated quantities. If there is not enough capacity to transport of all the gas nominated by all the users, Duke will curtail the services of some users according to the priority number of each service. The lower the priority number the higher the priority. A negotiable service may have a priority number in between the priority number of two reference services. Therefore, if curtailment of services were necessary they would be reduced in the following order:

1. Negotiable services, if applicable.
2. Priority number 4.0 services, overrun services, would be curtailed.
3. Negotiable services, if applicable.
4. Priority number 3.0 services, as available services, would be curtailed on the basis of the service charge per GJ that provides for the highest economic values.
5. Negotiable services, if applicable.
6. Priority number 2.0 services, backhaul services, would be curtailed.
7. Negotiable service if applicable.
8. Priority number 1.0 services would be curtailed.

Duke has devised a process for choosing between users that have the same priority number when the total quantity of natural gas that users have nominated cannot be transported. In relation to Firm Forward Haul Services, Duke will reduce proportionately the quantities of gas in the ratio that the MDQ specified bears to the aggregate of the MDQ for the service.

#### **3.1.3 Submissions by interested parties**

Santos submits that firm forward, backhaul and as available services encompass a significant part of market requirements. Given that any ancillary service which is not gazetted under the GPAL can be reviewed by the ACCC if referred for arbitration by either participant, Santos considers Duke's approach to be appropriate.

#### **3.1.4 Commission's considerations**

##### ***Firm Forward Haul service***

The ten year minimum contract period for this service forms part of the derogation. The Commission understands that this is a term that has suited the market because it provides security of supply for large industrial customers. In discussions with the Commission, Duke indicated that it considers a proposal for FFH for less than ten years would be a different service to that currently proposed in the access arrangement. Duke has told the Commission that it is willing to enter into negotiations for shorter term contracts as required. If negotiation were unsuccessful, the third party access seeker would have recourse to the dispute resolution processes under Section 6 of the Code.

On this basis, the Commission considers that the Firm Forward Haul service proposed by Duke meets the requirements of section 3.2 of the code.

### ***Backhaul service***

The Commission understands that this is a service that is currently utilised on the pipeline, and that the service is meeting the needs of the market. The Commission has not received any submissions that request changes to the proposed backhaul service and considers that the service is consistent with section 3.2 of the code.

### ***As Available service***

Provisions for non-specified, excluded or negotiated services are a common element in recent access arrangements and proposed access arrangements. Duke's proposed As Available service is no different in that respect. It enables service providers to accommodate any special requirements of a user or potential user, at additional cost to the user.

The Commission considers that the As Available service proposed by Duke meets the requirements of users and potential users under section 3.2 of the code.

## **3.2 Terms and conditions of service**

### **3.2.1 Code requirements**

Section 3.6 of the code requires that an access arrangement include the terms and conditions on which a service provider will supply each reference service. These terms and conditions must be reasonable according to the relevant regulator's assessment.

### **3.2.2 Duke's proposal**

Apart from some terms and conditions specific to each reference service, Duke's terms and conditions are contained in Schedule 4 to the access arrangement. Other technical documents associated with service provision are also included as schedules to the proposed access arrangement, as follows:

Schedule 1	Firm Forward Haul Service Access Agreement and Terms Sheet
Schedule 2	Backhaul Service Access Agreement and Terms Sheet
Schedule 3	As Available Service Access Agreement and Terms Sheet
Schedule 4	Duke's Standard Terms and Conditions of Service
Schedule 5	Reference Tariffs for the Duke Queensland Gas Pipeline: Pipeline License Number 30 [the Derogation]

The schedules to the access arrangement constitute part of the access arrangement and cannot be varied without the regulator's approval.

Derogations to the GPAL do not permit review of the access arrangement until 2016. Once the Commission has approved this access arrangement the terms and conditions will be fixed until 2016, unless Duke proposes revisions. Therefore, if interested parties perceive any potential problems with the proposed terms and conditions of service, including those

contained in schedules 1-4, it is important that they take this opportunity to submit those concerns to the Commission.

Clauses of Schedule 4 that were the subject of submissions by interested parties and other clauses that the Commission considers must be reviewed are outlined below. Clauses that fall within specific code obligations for an access arrangement, e.g. trading policy, queuing and extensions and expansions policy are dealt with later in this chapter.

### **3.2.3 Operations manual**

Clause 3.3 of Schedule 4 to the access arrangement (Duke's standard terms and conditions of service) requires users of the pipeline to 'observe and carry into effect the instructions and procedures in the Operations Manual as in force for the time being.'

Currently the Operations Manual can be amended at any time at Duke's sole discretion. Given that clause 3.3 of Schedule 4 gives the Operations Manual binding effect under the access arrangement, the Commission was concerned that the clause would enable Duke to make changes to the access arrangement without the Commission's consent, or alternatively that any change to the Operations Manual would require Duke to apply for a review of the entire access arrangement. The Commission raised these concerns with Duke and received the following response in a letter of 22 March 2001:

'DEI [Duke] proposes to delete all references to the operations manual in the access arrangement and to incorporate in the access arrangement those provisions of the operations manual which are not already incorporated in the access arrangement but which are required to meet the code's minimum requirements for access arrangements.'

The Commission considers that this revision will achieve compliance with the code and requires the amendment as proposed by Duke.

#### **Proposed Amendment A4.1**

In order for Duke's proposed access arrangement to be approved, it must be amended to delete all references to the operations manual and to incorporate those provisions currently contained in the operations manual which are required to meet the code's minimum requirements for access arrangements.

## **3.3 Capacity management policy**

### **3.3.1 Code requirements**

Section 3.7 of the code requires that an access arrangement include a statement that the covered pipeline is either a contract carriage pipeline or a market carriage pipeline.

### **3.3.2 Duke's proposal**

Section 4.1 of the proposed access arrangement states that QGP is a contract carriage pipeline.

### 3.3.3 Commission's considerations

As the proposed access arrangement includes a statement that QGP is a contract carriage pipeline, it satisfies the requirements of section 3.7 of the code.

## 3.4 Trading policy

### 3.4.1 Code requirements

If a pipeline is a contract carriage pipeline, the access arrangement must include a trading policy that explains the rights of a user to trade its right to obtain a service to another person. The trading policy must, among other things, allow a user to transfer capacity:

- without the service provider's consent, if the obligations and terms under the contract between the user and the service provider remain unaltered by the transfer; and
- with the service provider's consent, in any other case.

Consent may be withheld only on reasonable commercial or technical grounds and the trading policy may specify conditions under which consent will be granted and any conditions attached to that consent.

### 3.4.2 Duke's proposal

Section 12 of Duke's proposed access arrangement permits users to trade capacity rights in two ways, either a 'bare transfer' or an 'assigned capacity transfer'.

#### *Bare transfer*

A bare transfer enables a User to trade all or some of its capacity to another User. However:

- The original User would remain responsible for the entire maximum daily quantity (MDQ). The User's obligations remain in full force with Duke for the duration of the transfer and the User's original agreement with Duke is not changed as a consequence of the agreement. Duke requires prior notice of an intent to arrange a bare transfer.
- To facilitate bare transfers Duke will permit Users to post offers to buy or sell traded capacity on Duke's website.
- Clause 10.1 of the access arrangement provides that a User may effect a bare transfer to a User who requires that capacity be provided between a different receipt and/or delivery point to those of the first User. Duke must give its consent in writing.
- Clause 10.2 of the access arrangement provides that a User may propose to change the delivery and receipt points by providing Duke with at least 30 days written notice (or such shorter period as Duke may consent to). Duke does not have to agree to a variation under this clause more than once every three months.

#### *Assigned capacity transfer*

Assigned capacity transfer occurs when a user assigns some or all of its capacity to a Prospective User. This amends the access agreement between Duke and the User and creates a new agreement between Duke and the assignee of the contracted capacity. Duke requires that a User comply with a number of principles in assigning some or all of its capacity:



- a User must negotiate in good faith with a Prospective User who has been notified to Duke;
- Duke must consent to the assignment;
- a Prospective User must agree to assume the rights and responsibilities of the User in relation to the assigned capacity;
- a Prospective User would have to enter into an access arrangement for the assigned capacity on at least the same terms and conditions as the original User (although receipt and delivery points may be varied under clause 10);
- a User may propose to change the delivery and receipt points by providing Duke with at least 30 days written notice. Duke does not have to agree to change receipt and delivery points more than once every three months;
- the Prospective User must comply with the credit worthiness criteria of Duke's standard terms and conditions; and
- a User may assign part of its contracted capacity for a path, or its total contracted capacity for part of a path.

### ***Giving consent***

Under clause 10.3 of the access arrangement Duke may withhold consent to an assigned capacity transfer on reasonable technical or commercial grounds. Duke may make its consent subject to conditions (which will be terms of the of the new access agreement and the amended access agreement), so long as they are imposed for reasonable technical or commercial reasons and are consistent with Duke's standard terms and conditions of service.

It is a reasonable commercial condition for Duke to ensure that its revenue after assignment of capacity is not less than it was before the assignment.

### ***Changing the delivery or receipt points when trading or assigning capacity***

Capacity can be traded or assigned to a user who requires that the capacity be provided between a different receipt and/or delivery point to those of the first user. However, such trades are not effective until Duke has granted consent in writing.

A proposal to vary receipt and delivery points must be made in writing at least 30 days in advance (or such shorter period as Duke may agree). Duke does not have to agree to a variation under this clause more than once every three months.

Duke may withhold consent on reasonable technical and commercial grounds including, but not limited to:

- if the reduction in the amount of service provided to the original delivery point will not result in a corresponding increase in Duke's ability to provide the service to the alternative delivery point;
- a requirement that Duke receive the same revenue as it would have received prior to the capacity trade.

Duke may also impose conditions on its consent, based on reasonable technical and commercial grounds.

### 3.4.3 Submissions from interested parties

Santos submitted that Duke's trading policy needs further development with respect to the provision of additional receipt and delivery points. Santos proposed the following mechanism to provide an equitable basis for determining what are 'reasonable commercial or technical grounds', rather than the judgement being at the sole discretion of the Service Provider:

The Service Provider shall provide access to an additional receipt or delivery point without consent being required where the shipper satisfies the following conditions:

- (i) The aggregate of the varied receipt or delivery point maximum daily quantities (MDQs) does not exceed the aggregate of the shipper's receipt or delivery point MDQs prior to the inclusion of the additional receipt or delivery point.
- (ii) It is technically feasible, within the constraints of the Service Provider's contractual obligations to receive or deliver the varied MDQs at the specified receipt/delivery Points.
- (iii) The shipper makes all appropriate arrangements with its customers as a result of the variation nominated.
- (iv) The Service Provider will not, as a result of such a variation, incur any additional capital cost which it would not otherwise have incurred, or will be required to advance the time at which capital costs would otherwise have been required. In the event that a new receipt or delivery point is required, an agreement by the requesting party to indemnify the service provider for the additional costs (both capital and operating) will suffice to ensure that the service provider will not incur any additional capital costs.
- (v) As a result of the variation, and where the transportation distance is equal to or less than previously provided under the shipper's transportation contract, the shipper will pay the same amount of revenue to the Service Provider. Where the transportation distance is increased, the shipper will provide additional revenue in accordance with the Service Provider's Access Arrangement to satisfy the incremental transportation distance.

In circumstances where the shipper does not satisfy all of the above requirements, then consent will be required by the Service Provider based on reasonable commercial and technical grounds. The ACCC should adjudicate any situation where the user believes the Service Provider has rejected its request on unreasonable grounds.

### 3.4.4 Commission's considerations

#### *Provision of additional receipt and delivery points*

The Commission discussed Santos' proposal with Duke. Duke understood the rationale behind Santos' proposal, but was concerned that attempting to define 'reasonable commercial or technical grounds' may limit desirable flexibility in the future. Duke was also concerned at the wording of Santos' proposal regarding the requirement to advance the time at which capital costs would otherwise have been required (Santos submission, p.3, point (iv)). The Commission sought clarification of Santos' intention in point (iv) of its proposal. Santos confirmed that it meant that the service provider not be required to advance capital expenditure as a result of a variation in receipt or delivery points:

'The intention of 3(iv) of Santos' submission was to state that the service provider should not have to accept a change in receipt/delivery points if it causes the service provider to incur additional capital costs or accelerate capital expenditure. The user can however reimburse the service providers any legitimate additional costs it incurs, associated with additional receipt/delivery points.' (E-mail from Santos, 15 March 01)

The Commission agrees with Santos that, 'To allow the service provider to withhold consent based solely on its own determination of reasonable commercial grounds may be

inappropriate, and creates a potential conflict of interest for the service provider' (Santos submission, p.2). The Commission believes, however, that the current arrangements do not leave it to the sole discretion of the Service Provider.

A Trading Policy must enable prospective users to enter into transportation contracts that allow the user to transfer capacity in the circumstances set out in s 3.10 of the code. Where the service provider's consent is required, s 3.10 provides that the service provider may only withhold consent on 'reasonable commercial and technical grounds.' Once the Service Provider and the User enter into a transportation contract that includes these terms, the User will be able to enforce its rights under the contract if it believes that a service provider has unreasonably withheld its consent (this is discussed further below). The Commission sees merit in Santos' proposal and believes that it has the potential to reduce future disputes. In a follow-up letter to its meeting with the Commission, Duke made the following points:

- the service provider must be the final adjudicator as to whether it is technically feasible, within the constraints of its contractual obligations, to receive or deliver to the varied receipt or delivery points;
- Duke maintains that under the proposed condition (iv) the service provider could be required to incur capital expenditure without any guarantee of an additional increase in capacity;
- the proposed condition (v) appears to be contrary to the derogated indicative tariff schedule of the access arrangement, which prevents the service provider from charging anything above the maximum tariff for a particular service.

The Commission considers that it is in the interests of Duke and prospective and current users to describe in some detail the proposed interpretation of 'reasonable commercial and technical grounds.' Although the parties currently have the option of seeking commercial arbitration or taking legal action, the Commission considers that costly disputes could be avoided by setting out objective criteria in the access arrangement by which the service provider will be bound when deciding whether to consent to a proposal to vary receipt and delivery points.

The Commission welcomes Duke's consideration of Santos' proposal and encourages further communication with Santos and the Commission on this issue, with a view to inserting some criteria into the access arrangement.

### ***Arbitration under the code***

The Commission is also concerned that there is some misunderstanding of its powers under the code to arbitrate disputes. Section 6.1 of the Code provides that:

If a Prospective User and a Service Provider are unable to agree on one or more aspects of access to a Service the Prospective User or Service Provider may notify the Relevant Regulator in writing that a dispute exists. A Prospective User or Service Provider may not give a notice to the Relevant Regulator under this section unless an Access Arrangement has been accepted by the Relevant Regulator (or the Relevant Regulator has drafted and approved its own Access Arrangement) with respect to the Covered Pipeline concerned.

Part Four of the GPAL sets out procedures for the conduct of an arbitration that is notified under the code. Section 6.1 is the only provision of the code that authorises parties to notify a dispute to an arbitrator.

Under section 6.1 of the code, only Prospective Users that have the power to notify a dispute under the code. In the specific context of the proposals for arbitration put by Santos and Duke, this means that a dispute could only be notified where a Prospective User was unable to obtain access to a pipeline on terms and conditions that include those terms and conditions set out in the Trading Policy. A User of a pipeline under a contract will not be able to notify a dispute under section 6 of the code where the dispute relates to an alleged breach of that contract. Rather, the User would be able to seek remedies through the normal avenues for breach of contract.

This highlights that it is important for users to ensure that their contracts for access to services contain all of the necessary terms and conditions, including those provisions of the Access Arrangement relating to their rights to trade capacity. While the access arrangement sets out the minimum terms and conditions upon which Prospective Users are entitled to access, it is up to the User to ensure that the relevant provisions of the access arrangement are incorporated into their contract and are therefore enforceable through the usual legal avenues.

### *Transfers of capacity*

Though Duke requires prior notice of a bare transfer of capacity no other details need be supplied, in accordance with the code. Duke's decision to enable buyers and sellers to post bids on Duke's website should facilitate the trade in capacity by providing a central point of contact for market participants. In addition Duke has disclosed the criteria by which it will assess 'bare' and 'assigned' trades; this initiative should ensure that users and prospective users have a clear understanding of Duke's trading policy.

However, the code requires that:

s. 3.9 ... a [Trading] policy ... explains the rights of a user to trade its right to obtain a service to another person...

The phrase 'to another person' does not differentiate between Users and Prospective Users. In contrast, Duke's proposed trading policy provides that Users may only trade with Users for 'bare transfers'. Duke's proposed trading policy would impose a restriction upon a User's ability to offer capacity trades and is inconsistent with the code. This restriction in the proposed trading policy is not in the interests of Users or Prospective Users.

While Duke's policy with respect to assigned transfers of capacity appears to similarly restrict such transfers only to prospective users, Duke's definition of a Prospective User includes Users seeking additional capacity.

The Commission raised its concerns with this clause in a meeting with Duke on 5 March 2001. In a letter dated 22 March 2001 Duke stated that it is prepared to allow bare transfers to both users and prospective users, but only if the following condition were inserted into clause 9.2 of the access arrangement and clause 12.2 of the general terms and conditions:

The user pays to the service provider the reasonable additional costs to be incurred by it as a result of the bare transfer. The service provider will notify the user of these costs within a reasonable time of being notified of the bare transfer.

The Commission considers that the pass-through of costs as a result of a bare transfer is not allowed for under section 3.10 of the code. This is because under a bare transfer as defined in the code there is no alteration of the terms of the original contract between the service

provider and the transferor, hence there should be no additional costs to the service provider. The service provider may choose to communicate directly with the transferee with respect to nominations etc., but this arrangement is undertaken at the election of the service provider.

If Duke wishes to communicate directly with a transferee and in doing so would incur additional costs, it may negotiate to do so with the transferee and may come to an agreement about costs. However, this agreement would be made independently of the general terms and conditions of the access arrangement. Under the terms of the access arrangement, Duke must not require additional charges to be paid to it by either the transferor or the transferee for a bare transfer of capacity.

The Commission requires that Duke amend its access arrangement to allow bare transfers of capacity to users, at no additional cost to either the transferor or the transferee.

### **Proposed amendment A3.2**

In order for Duke's access arrangement to be approved, Duke must amend clause 10.1(a) to permit a User to effect a Bare Transfer to a User or Prospective User at no additional cost to either the transferor or the transferee.

## **3.5 Queuing policy**

### **3.5.1 Code requirements**

Sections 3.12 to 3.15 set out the code's requirements for a queuing policy. An access arrangement must include a queuing policy for determining the priority that a prospective user has, as against any other prospective user, to obtain access to spare capacity and developable capacity where the provision of the service sought by the prospective user may impede the ability of the service provider to provide a service that is sought or which may be sought by another prospective user.

A queuing policy must be set out in sufficient detail to enable users and prospective users to understand in advance how it will operate. It must also, to the extent reasonably possible, accommodate the legitimate business interests of the service provider, of users and prospective users, and must generate economically efficient outcomes.

### **3.5.2 Duke's proposal**

Section 11 of Duke's access arrangement sets out its proposed queuing policy.

Where there is insufficient capacity to satisfy a service request, Duke will form a queue to allocate capacity. Duke is not required to follow clauses 11.2 – 11.8 of its queuing policy if capacity is reserved through a renewal or extension of the term of an access arrangement or if Developable Capacity is reserved through an access arrangement.

As part of the queuing policy Duke will, from time to time, write to those on the queue enquiring whether they wish to remain on it. Users must advise Duke within 14 days if they wish to retain their place in the queue.

Available Capacity will be offered, by written notice, regardless of whether it is insufficient or surplus to the needs of the prospective user. In addition, available capacity will be offered

even if the proposed commencement date differs from the date requested by the prospective user.

A prospective user may offer to renegotiate Duke's original terms and conditions. Duke must be notified within 14 days of the prospective user's intent to either accept or reject the offer of available capacity. If Duke receives no response, the prospective user's place in the queue will be lost unless a dispute is notified in accordance with the code. If a dispute is notified, the service request will retain its priority in the queue until a resolution has been reached as required by the code.

Duke asserts it is under no obligation to provide a service to a prospective user unless:

- it has signed the access arrangement for the service;
- it has made appropriate provision for the delivery and receipt of natural gas at the agreed locations; and
- it meets the credit worthiness requirements of clause 21 of Duke's standard terms and conditions of service.

### ***Reallocation of released or surrendered capacity***

Duke proposes that from time to time it may attempt to reorganise capacity on the QGP. As part of the process:

- Duke would write to users requesting they assign any unused contracted capacity that they no longer require;
- users are to reply within 30 days nominating the quantum and receipt and delivery point of any spare contracted capacity;
- upon receipt of users' replies Duke will post information regarding available spare contracted capacity on its website and provide the users with contact details of those in the queue;
- Duke requires users to negotiate in good faith for the allocation of spare contracted capacity; and
- if Duke is of the opinion that available capacity will become, or is likely to become available, that capacity will be offered by written notice to each prospective user in the queue in the order of their place in the queue.

### **3.5.3 Commission's considerations**

The Commission considers that there is good sense in an access arrangement providing for relinquishment and reallocation of capacity. In a competitive transmission market any capacity released or surrendered by a shipper will be available for resale by the service provider (if the shipper itself does not deal with it). Duke's trading policy (discussed in section 3.4.2 of this chapter) provides for the reallocation of capacity in cases where an existing user does not require it.

Duke's proposed access arrangement is set out in sufficient detail to enable users and prospective users to understand how the queuing policy will operate. The proposed queuing policy provides sufficient information about the processes and time limits governing the policy.

The queuing policy accommodates to a reasonable extent the legitimate business interests of QGP by ensuring the orderly allocation of capacity in a proscribed and transparent manner.

The requirement for third parties to negotiate in good faith accommodates the legitimate business interests of users and prospective users, ensuring the timely resolution of contractual negotiations. Further, users' rights to capacity are protected by a requirement in the queuing policy that pre-existing agreements for extending or renewing capacity not be overturned. The interests of QGP, users and prospective users are accommodated by the use of Duke's website to inform third parties about the availability and allocation of capacity.

However, Duke's queuing policy only refers to available capacity and does not include a process for allocating developable capacity as required by section 3.12 of the code.

Duke defines 'available capacity' in its access arrangement as:

Spare capacity or capacity that becomes available but that is not reserved through renewal, or extension of the term of an access arrangement.

Duke defines 'spare capacity' by reference to the code, that is:

- (a) in relation to a Covered Pipeline described in the access arrangement as a Contract Carriage Pipeline:
  - (i) the difference between the capacity and the Contracted Capacity plus:
  - (ii) the difference between the Contracted Capacity and the Contracted Capacity which is being used.

Duke defines 'developable capacity' in its access arrangement as:

The extra capacity that would be available if additions of plant were made to bring the pipeline to full capacity in accordance with the licence,

whereas 'developable capacity' is defined in section 10(8) of the code as:

The difference between the capacity and the capacity which would be available if additions of plant and/or pipeline were made, but does not include any extension of the geographic range of a Covered Pipeline.

The GPAL derogation provides that the proposed access arrangement can only be reviewed in 2016 or on the date 6 months before Duke reasonably expects capacity to exceed nominal capacity (52 PJ p.a.), unless Duke proposes revisions voluntarily. Because of this time frame, it is crucial that the QGP provide a clearly defined process for allocating developable capacity amongst third parties.

### **Proposed amendment A3.3**

In order for Duke's access arrangement to be approved, the queuing policy must be amended to specifically apply to Developable Capacity, as defined in the code, as well as Spare Capacity.

## **3.6 Extensions and expansions policy**

### **3.6.1 Code requirements**

The code requires an access arrangement to have an extensions/expansions policy (section 3.16). The policy is to set out the method to be applied to determine whether any extension to or expansion of the system's capacity will be treated as part of the covered pipeline. A service provider is required to specify the impact on reference tariffs of treating an extension or expansion as part of the covered pipeline.<sup>6</sup> In addition, an extensions and expansions policy must outline the conditions upon which the service provider will fund new facilities and provide a description of those new facilities.

### **3.6.2 Duke's proposal**

#### ***Extensions Policy***

Extensions to the QGP (adding to the length of the pipeline) will not be covered by the code or the access arrangement unless Duke writes to the Commission specifying that they be covered. Were this to happen, the reference tariffs for the various services would not change. Instead, Duke may levy a surcharge on users of the extension.

#### ***Expansions Policy***

The code and the access arrangement will cover expansions of the QGP. In making a decision whether to expand the pipeline, Duke will consider the following issues:

- whether enough spare capacity exists to meet the demand by prospective users for firm forward haul services;
- whether a reorganisation of contracted capacity would satisfy demand; or
- whether the expansion is technically feasible and commercially viable and would result in a level of investment that is efficient and in accordance with good industry practice while achieving the lowest sustainable cost of providing services.

The reference tariffs established by the GPAL derogations will be charged for reference services as Duke expands the capacity of the Wallumbilla to Gladstone City Gate and Gladstone gate to Rockhampton sections of the pipeline up to the configurations specified in Schedule 1 of the Licence.

#### ***User Specific Facility Charges***

Duke will not pay for capital improvements at a receipt point unless it is satisfied that the improvement is commercially viable having regard to the quantities of natural gas at the receipt point, and there is a commitment to transport commercially viable quantities of natural gas. Duke will not make capital improvements at a delivery point unless it is satisfied there is sufficient long-term demand for natural gas at that delivery point.

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<sup>6</sup> For example, reference tariffs may remain unchanged, but a surcharge may be levied on incremental users.



Where Duke decides not to make a capital contribution it is entitled to levy a user specific facility charge from a user. The user specific facility charge recovers the costs of constructing, operating and maintaining capital improvements that a prudent service provider, acting efficiently in accordance with industry practice and aiming to achieve the lowest sustainable cost, would incur. Duke may recover costs if it determines that to deliver or receive contracted gas under a user's access agreement it is necessary to:

- change capacity at an existing receipt or delivery point;
- add an additional receipt or delivery point; or
- install additional metering equipment.

In accordance with sections 8.23 and 8.24 of the code, Duke may agree with a user to levy a charge that exceeds the charge that would apply under a reference tariff for a reference service in any circumstance. This may include, among other costs, the excess paid in respect of the funding of a new facility or expansion required for the provision of the service under an access arrangement.

### **3.6.3 Commission's considerations**

#### ***Extensions and Reference Tariffs***

Clause twelve of Duke's access arrangement outlines the effect on reference tariffs of an extension of the pipeline. Duke may write to the Commission proposing to include an extension as part of the pipeline for the purposes of the access arrangement. In this case, the reference tariffs for the existing services will not change. However, users of the extension to the pipeline would be required to pay an Applicable Surcharge.

The applicable surcharge is defined as a user specific facility charge, which is defined in section 2.4 of the Reference Tariffs Schedule [the derogation]. The Commission considers that the derogation was not intended to cover geographical extensions to the pipeline, but that the current wording of Duke's extensions policy may have the effect of restricting the Commission's assessment of any applicable surcharge for an extension of the pipeline by referencing section 2.4 of the derogation.

Following a discussion with the Commission, Duke has indicated that were it to elect not to apply for coverage of the extension, it would submit a proposed applicable surcharge to the Commission for approval in compliance with sections 8.25 and 8.26:

A decision to levy an applicable surcharge will only be made following an NPV analysis of revenue and costs. If the capital and operating costs of the extension plus a surcharge exceed the proposed revenue, then an applicable surcharge will be levied. The amount of the surcharge will be such as to ensure that the NPVs of the costs and surcharge equal the NPV of the revenue.

This should meet the requirements of sections 8.25 and 8.26 of the Code.

After having reviewed the access arrangement, we also propose to amend the definition of Applicable Surcharge to mean a charge that is calculated in accordance with clause 12 of the Access Arrangement and that the Service Provider is authorised to charge under section 8.25 of the Code. (letter from Duke, 22 March 01)

The Commission considers this proposal is consistent with the code and requires an amendment to define 'applicable surcharge' as a charge that is calculated in accordance with

clause 12 of the access arrangement and that the Service Provider is authorised to charge under section 8.25 of the Code.

#### **Proposed Amendment A3.4**

For Duke's access arrangement to be approved, the Extensions Policy must be amended so that should Duke elect to have a pipeline extension covered by this access arrangement, it will submit any proposed Applicable Surcharge to the Commission for approval in accordance with clause 12 of the access arrangement and sections 8.25 and 8.26 of the Code.

#### ***Expansions and Reference Tariffs***

Duke's access arrangement provides that reference tariffs will continue for reference services for expansions along Wallumbilla to Gladstone City Gate and the Gladstone City Gate to Rockhampton branches of the QGP. This is consistent with the code. The derogations provided by the GPAL prohibit the Commission assessing reference tariffs and the reference tariff policy.

The distance reservation rate is \$0.000943 per GJ per kilometre. Clause 2.1(3) of Schedule 5 to the access arrangement provides for a reduction in the distance reservation rate to \$0.00066 per GJ per kilometre, on and from the expansion date. The expansion date is defined in Clause 1 of Schedule 5 as the date upon which the service provider commences transportation under an agreement for more than 25 PJ per annum.

The capacity reservation rate is \$0.50 per GJ. Clause 2.5(1) of Schedule 5 allows for annual escalation of this rate by not more than \$0.04 on 1 July 2001, 2006, 2011, 2015, 2021, 2026 and 2031.

### **3.7 Review and expiry of the access arrangement**

#### **3.7.1 Code requirements**

Section 3.17 of the code requires an access arrangement to include a date upon which the service provider must submit to the regulator a revised access arrangement (revisions submission date) and a date upon which the revisions are intended to commence (revisions commencement date).

In deciding whether these two dates are appropriate, the regulator must have regard to the objectives contained in section 8.1 of the code. Having done so, the regulator may require an amendment to the proposed access arrangement to include earlier or later dates. The regulator may also require that specific major events be defined as a trigger that would oblige the service provider to submit revisions before the revisions submission date (section 3.17(ii)).

An access arrangement period may be of any duration. However, if the period is greater than five years the regulator must consider whether mechanisms should be included to address the potential risk that forecasts, on which terms of the proposed access arrangement are based, subsequently prove to be incorrect (section 3.18 of the code). The code provides examples of such mechanisms for guidance. Thus a regulator could consider triggers for early submission of revisions based on:

- divergence of the service provider's profitability or the value of services reserved in contracts from a specified range; or
- changes to the type or mix of services provided.

The regulator could require a service provider to return to users some or all revenue or profits in excess of a certain amount.

Finally, the revisions commencement date is not a fixed date. The date is subject to variation at the time the regulator approves the revisions pursuant to section 2.48 of the code. This section states in part:

Subject to the Gas Pipelines Access Law, revisions to an access arrangement come into effect on the date specified by the Relevant Regulator in its decision to approve the revisions (which date must not be earlier than either a date 14 days after the day the decision was made or ... the Revisions Commencement Date).

### **3.7.2 Duke's proposal**

In its access arrangement Duke stated that the revisions submission date has been determined in the derogated Tariff Arrangement. It is defined as:

- 31 August 2016; or
- the date being six months before the date when Duke reasonably expects the capacity of the pipeline will be greater than the nominal capacity of the pipeline.

The Revisions Commencement Date means the date by which the revisions are deemed to commence once approved by the Commission, being:

- in relation to revision submitted on 31 August 2016 – the date on which the Commission approves the revisions; or
- in relation to revisions under subparagraph (b) the definition of the revisions submission date – the date when the capacity of the pipeline is greater than the nominal capacity of the pipeline when the configuration is as specified in the Schedule to the Licence.

### **3.7.3 Submissions by interested parties**

Santos submitted that, given that the South West Queensland Producers have committed to regular price reviews (in some cases for periods shorter than five years) under a number of gas sales contracts, it is appropriate that regular reviews are undertaken of both the reference tariff and non-tariff elements of the access arrangement.

Santos further submitted that it would be inappropriate that regulation assisted a non review of the reference tariff when alternate forms of infrastructure development resulted in additional pipeline and producer competition. For example, the completion of the PNG gas pipeline or other major market development should automatically trigger a review of the Duke access arrangement.

### **3.7.4 Commission's considerations**

The Commission has received legal advice that the effect of s58(4) of the GPAL is that the Revisions Submission Date and the Revisions Commencement Date for the access

arrangement are the dates contained in the tariff arrangement approved by the Queensland Minister. This means that the Commission is unable to review these dates under the code.

Section 3.18 provides for review of the access arrangement if the forecasts on which terms of the proposed access arrangement are based, subsequently prove to be incorrect. However, the Commission has received legal advice that since the ACCC's approval will not be based on any forecasts, s3.18 does not apply.

However, section 2.28 of the code makes provisions for revisions to be lodged in other circumstances. Therefore, if the access arrangement makes provision for submissions to be submitted in relation to non-tariff matters at an earlier date, s2.28 requires those revisions to be submitted. Section 3.17(ii) contains such a provision, whereby the Commission can require a service provider to specify in the access arrangement events that will trigger a review of the non-tariff elements, prior to the Revision Submission Date.

The Commission believes it is appropriate to make provision for early review of the non-tariff elements should there be a material change in circumstances because of the uncertainty associated with the extended regulatory period. If the current non-tariff elements are operating effectively when a major event triggers a review, Duke may re-submit its current access arrangement to the Commission. However, the Commission wishes to reserve this option to review in the event of a trigger event occurring, in case modifications to the arrangement are necessary.

The Commission requires Duke to include in the access arrangement a list of specific major events that it considers should trigger a revision of the non-tariff elements. The Commission proposes that this list include the interconnection of another pipeline with the QGP, and the introduction of a significant new gas supply source to one of the QGP's markets.

### **Proposed Amendment A3.5**

For the access arrangement to be approved, the Commission requires Duke to include in the arrangement a list of specific major events that will trigger a review of the non-tariff elements of the access arrangement.

## **3.8 Miscellaneous changes**

In a meeting with Duke on 5 March 2001, the Commission queried a number of provisions in the proposed access arrangement. In response, Duke proposed to make a number of changes to the proposed access arrangement. The Commission supports these changes, which are outlined below.

### **3.8.1 Proposed amendments**

#### ***Confidentiality: clause 32.2 of Schedule 4 to the access arrangement***

Duke proposes to amend clause 32.2 of Schedule 4 by inserting the words 'subject to section 4.1(g) of the code' at the beginning of the clause. This is to clarify that the confidentiality provisions extend to Duke's servants, consultants, independent contractors and agents.

***Changing schedules: clause 6.3 of Schedule 4 to the access arrangement***

According to Duke, clause 6.3 of Schedule 4 is inserted to deal with situations where the parties wish to agree to a late change in scheduling and it is not necessary to issue an operational flow order (OFO) pursuant to clause 10. It is included because a user is not bound by any nominations over and above its MDQ.

To avoid any potential concerns that this clause operates to reinforce the OFO provisions, Duke will amend it so schedules can only be changed if the parties agree to it.

***Interest on overdue amounts: clause 22.4 of Schedule 4 to the access arrangement***

The Commission queried the purpose of paragraph 3 of this clause, which reads:

Duke can charge interest back to the day the original amount became due and payable, even if there is a court judgement against you for what you owe under this agreement.

Duke proposes to delete this paragraph.

## **4. Information provision and performance indicators**

### **4.1 Information provision**

#### **4.1.1 Code requirements**

In conjunction with its proposed access arrangement, a service provider is required to submit access arrangement information in accordance with the criteria established in Attachment A of the Code. The service provider's access arrangement information must contain information that, in the opinion of the relevant regulator, is sufficient to enable users and prospective users to:

- understand the derivation of the elements in the proposed access arrangement described in sections 3.1 to 3.20 of the code; and
- form an opinion as to the compliance of the access arrangement with the provisions of the code (section 2.6).

However, the Queensland government (via the derogation) has exempted Duke from the requirement to provide access arrangement information that is related to tariffs. Therefore, the derogation exempts Duke from the requirement to provide information relating to categories one to four of the access arrangement information (as set out in Attachment A to the code), and some elements of the information required for categories five and six.

#### **4.1.2 Duke's Proposal**

##### ***Category 5 – capacity and volume assumptions***

Duke has provided some information that allows interested parties to form an opinion as to the compliance of the access arrangement with the code in its proposed access arrangement. Other information is available on Duke's website at [http://www.duke-energy.com.au/locations/qld\\_pipeline/home.asp](http://www.duke-energy.com.au/locations/qld_pipeline/home.asp).

##### ***Category 6 – key performance indicators***

Category 6 of Attachment A to the code requires the disclosure of key performance indicators (KPIs). The KPIs given as examples include:

- industry KPIs used by the service provider to justify 'reasonably incurred' costs; and
- the service provider's KPIs for each pricing zone, service or category of asset.

Duke has not provided KPIs in its access arrangement.

#### **4.1.3 Commission's considerations**

Information provided with respect to Category 5 is consistent with respect to Duke's obligations under the Code (as derogated).

The Commission believes that the provision of KPIs is important to create a database for benchmarking across pipelines and for inter-period benchmarking on any given pipeline. However, Section 8.6 of the code allows the regulator to 'have regard to any financial and operational performance indicators it considers relevant in order to determine the level of

costs within the range of feasible outcomes under section 8.4 that is most consistent with the objectives contained in section 8.1.’ The Commission considers that the core use of KPIs is as tariff related information and therefore the requirement to provide such indicators has been derogated by the Queensland Government.

The Commission has agreed to discuss with Duke the provision of KPIs for the purposes of industry benchmarking in the near future, but considers that this may more appropriately be done outside the access arrangement approval process.

## **5. Draft decision**

Pursuant to section 2.13(b) of the code, the Commission proposes not to approve Duke's proposed access arrangement in its present form.

The amendments or the nature of amendments that would have to be made in order for the Commission to approve the proposed access arrangement are recorded in this draft decision.