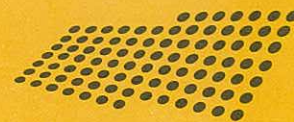


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EnergyAustralia[®]

10 November 2009

Mr Mike Buckley
General Manger
Network regulation North Branch
Australian Energy Regulator
GPO Box 3131
Canberra ACT 2601

Via email: nswactgas@aer.gov.au

Dear Mr Buckley,

**EnergyAustralia's Submission on Jemena Gas Networks' Access Arrangement Proposal
2010 to 2015**

EnergyAustralia welcomes the opportunity to comment on Jemena Gas Networks' Access Arrangement Proposal 2010 to 2015 and their proposed Reference Services Agreement.

EnergyAustralia's submission focuses on three main areas, the Reference Services Agreement, liability under the Reference Services Agreement, and the Reference Tariff Policy.

We trust our submission will assist the AER in making their draft decision on Jemena's proposal. If you have any queries regarding this submission please contact Catherine Marshall, Executive Manager – Energy Pricing on (02) 9269 7256.

Yours sincerely

Mike Bailey
Executive General Manager Retail



EnergyAustralia[®]

**EnergyAustralia Retail
Jemena Gas Networks (NSW) Ltd's
Proposed 2010 – 2015
Access Arrangement & Reference Services Agreement**

November 2009

Submission on JGN's Proposed Access Arrangement

November 2009

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1 Executive Summary

EnergyAustralia welcomes the opportunity to make the following submission to the Australian Energy Regulator (AER) in response to Jemena Gas Networks (NSW) Ltd (JGN) Access Arrangement Proposal for 2010 to 2015.

EnergyAustralia is a substantial retailer of gas to large and small customers in NSW and a significant User of the services provided by JGN via its NSW gas network. Therefore AER's review of JGN's Access Arrangement proposal in the context of its impact on EnergyAustralia and our gas customers is a key process for EnergyAustralia to engage in.

The Access Arrangement proposal, Access Arrangement Information and Reference Services Agreement (Agreement) outline the Haulage Services and the terms and conditions in which JGN propose to provide those services for the next 5 years. These Services differ from the Services provided under the current Access Arrangement. EnergyAustralia is pleased to see that JGN has sought to simplify their service offering and reduce administration. However, EnergyAustralia does see a number of potential issues in what has been proposed.

The Reference Services Agreement

EnergyAustralia is pleased to see that JGN have included the Agreement as part of the Access Arrangement. In an effort to ensure a fair and reasonable Agreement for Users EnergyAustralia is seeking a number of amendments to the agreement.

One significant area of concern with the Agreement is the numerous liability and indemnity provisions in the proposed Agreement. The Agreement as currently proposed by JGN effectively seeks to exclude virtually all liability of the Service Provider for everything (including that which is in its control) and impose liability for everything on the User (including that which is squarely not in the User's control).

This is unreasonable and imposes an unmanageable level of financial risk on Users such as EnergyAustralia. This potentially puts at risk the level of ongoing competition in the retail gas market, to the detriment of gas consumers throughout NSW.

It is therefore most important that the AER require JGN to amend its Agreement to make the indemnity and liability risk provisions reflect the following key principles:

- Neither party should be responsible for risks which that party is not in a position to manage or control.
- A commercially reasonable level of liability limitation and exclusion should be allowed to each party for those risks which that party is able to manage or control. This is because neither party has the capacity or means (either by insurance or from its own means) to manage or cover unlimited liabilities. To expose either party to this unlimited financial risk potentially undermines the security and viability of the competitive gas market.
- The level of liability limitation and exclusion afforded to each party under the Agreement should be consistent and reciprocal.

As part of this submission EnergyAustralia has provided marked up changes of the liability and indemnity provisions of the Agreement which we believe achieve the above key principles.

In addition to amendments to the liability and indemnity provisions of the Agreement, EnergyAustralia also seeks changes to a number of other clauses in the Agreement.

Reference Tariff Policy

When compared to the current Access Arrangement JGN have proposed a number changes. Some of these changes are positive as they reduce the administrative burden for both Users and JGN. However, a number of changes will result in increased costs for customers.

EnergyAustralia does not support the introduction of a minimum aggregate charge for demand customers. JGN justifies its introduction on the basis of a “perverse pricing incentive” caused by the disconnect between different pricing methodologies. The result of the proposed minimum aggregate charge which JGN proposed is a real “perverse pricing incentive” as opposed the one that JGN perceives exists.

The timeframes proposed by JGN for amendments to both the Reference Services Agreement and Haulage Reference Tariffs, Haulage Reference Components and Tariff Classes are insufficient. As the Agreement is written changes can be made to the Reference Services Agreement without the requirement for negotiation with the User. The timeframe JGN affords the AER to approve the amendment is insufficient to allow it adequate consultation with users. EnergyAustralia also believes JGN should be required to give

additional notice beyond that currently allowed for when making structural changes to its tariffs in order to ensure Users have an adequate lead time to reflect these changes.

JGN have proposed significant changes to their Tariff Variation Mechanism. The use of a weighted average price cap (WAPC) formula as the basis for the tariff variation is consistent with that used in other jurisdictions. Included as part of the price cap within the WAPC formula are the UAG adjustment, a weather adjustment as well as pass through events. JGN's proposal around the UAG adjustment requires modification as the proposal allows them cost recovery for a 10% increase in UAG levels from historic levels.

For the purposes of this submission, capitalised terms have the same meaning as they are given in the Access Arrangement and in the Agreement.

2 The Reference Services Agreement

EnergyAustralia wishes to ensure that the service terms and conditions offered by JGN as a Service Provider under its Access Arrangements are fair and reasonable for Users such as EnergyAustralia.

A particular area in which this is important is in the Service Provider's allocation of liability risks between itself and Users under its terms and conditions of access. The allocation of liability risk to Users needs to be of a scope and magnitude which Users can in fact reasonably control and manage (for example by having appropriate and commercially feasible risk management systems and insurances in place).

This is fundamentally important to enable Users to continue participating in the retail gas market and provide competitive retail gas services for the benefit of gas consumers throughout NSW.

EnergyAustralia's comments on the proposed Reference Services Agreement have been split into two Sections. Section 2 deals with general comments on the Agreement while Section 3 deals specifically with the liability and indemnity issues within the Agreement.

Clause 1.4 Amendments to this Agreement

The amendment clause proposed by JGN allows it to unilaterally make amendments to the agreement without any consultation with the User. The timeframe JGN have given the AER to approve amendments is, in EnergyAustralia's opinion, insufficient to allow adequate consultation with the other parties to the agreement. Further the application of changes effective two Business Days from the date of the written notice is also insufficient especially when changes may impact on customer agreements.

Clause 4.2 MDQ and MHQ

While JGN has sought to simplify the charging mechanism, they have introduced a degree of complexity that may leave Users exposed to overruns. Charges are calculated based on the Chargeable Demand which automatically ratchets up if the customer uses more. The Capacity Entitlement, and therefore overrun liability, is based on the MDQ for a Delivery Point. In order to reduce the administrative burden increases (and decreases) in MDQ should be aligned with increases in the Chargeable Demand.

Clause 4.5 Chargeable Demand

JGN have sought to expand the application of the ten times rule¹ beyond its current application to new Delivery Points². Under the proposed Reference Services Agreement the ten times rule will now apply to existing Volume Delivery Points which become a Demand Delivery Point and to any Demand Customer which has varied its MHQ (up or down) since the commencement of the current Access Arrangement on 1 July 2005. This potentially penalises Users for past actions during the current Access Arrangement when they could not have had any idea of the future consequences in the next Access Arrangement of increasing or decreasing the MHQ. EnergyAustralia believes the application of the ten times rule should continue to be limited to new Delivery Points.

Clause 4.6 Increase in Chargeable Demand

As currently drafted Clause 4.6(b) gives JGN the ability to increase the Capacity Demand to be equal to the "ninth-highest actual Quantity of Gas withdrawn at the Delivery Point in any one Day over any 12 month period" regardless of when the said 12 month period took place. For example, under the Agreement the 12 month period may have been four years prior. The Clause should be redrafted to refer to "ninth-highest actual Quantity of Gas withdrawn at the Delivery Point in any one Day in the preceding 12 month period".

Clause 4.7 Decreases in Chargeable Demand

The basis of charging is asymmetrical in that increases to the Chargeable Demand are automatic (the customer is charged at their ninth highest withdrawal in a historic 12 month period) while reductions are difficult for Users to access. JGN have achieved this through a multifaceted mechanism:

1. A reduction in Chargeable Demand will not be contemplated unless it is greater than 10%. This means that a customer may be overcharged up to approximately 10% on an ongoing basis with no ability to redress this. And
2. Any reductions in Chargeable Demand do not take effect until at least 12 months after they have been requested.

Further the decision to accept a reduction in Chargeable Demand appears to be solely at JGN's discretion with no justification of refusal required.

¹ The requirement that the MDQ be at least ten times the MHQ for that Delivery Point.

² JGN, Access Arrangement, 2005, p3

EnergyAustralia believes the proposed reset mechanism for reductions in Chargeable Demand is flawed and the Chargeable Demand and MDQ should ratchet up and down such that it is always set at the ninth highest withdrawal in any one Day in the preceding 12 months. This would reduce administration for all parties and also be fairer to customers.

Clause 6.1 Unauthorised Overruns

As proposed the Access Arrangement requires a User to pay for demand without an automatic change in the Capacity Entitlement. Clause 6.1(b) then gives the Service Provider the right to install at the User's expense equipment which would restrict withdrawals to the Capacity Entitlement. EnergyAustralia does not believe JGN should have the right to restrict withdrawals under such wide conditions. As drafted JGN could restrict withdrawals after a single withdrawal in excess of the Capacity Entitlement.

Clause 7.4 Gas Balancing under an arrangement approved by the Service Provider

Clause 7.4(b)(ii) specifies the conditions upon which network may not approve the STTM balancing mechanism or any other new approved scheme. One of these conditions is the circumstance where the new mechanism is not "reflected in" the "service agreements" for each Network User. What are the "service agreements" referred to in this clause?

EnergyAustralia believes if there is a balancing mechanism provided by the AEMO or a relevant industry scheme then JGN should not have what amounts to a power of veto over that scheme. Clauses 7.4b(ii) should be amended to require the Service Provider to approve such a scheme.

Clause 7.5 User to provide Service Provider with Forecast of Withdrawals

This clause appears to apply to all network sections, not just Wilton, which at first pass, is additional to current practice for the "non-coastal" network sections.

The reference in Clause 7.5(c) to Clause 7.5(a) is incorrect and should refer to Clause 7.4(b).

In the first instance the timetable for Forecast Withdrawal submission should align with that of the industry scheme. EnergyAustralia believes that Clauses 7.5(c) – (f) should only apply if a timetable is not given within the scheme.

EnergyAustralia also notes that the treatment of "matched allocations" is not mentioned in the Access Arrangement or Reference Services Agreement. For completeness this should be covered.

Clause 9.1 Warrants and Indemnities

Contrary to the view put forward by JGN in the Access Arrangement Information, EnergyAustralia does not believe Clause 9.1(b) works in a Short Term Trading Market environment and believes it should be deleted. The clause requires the User to warrant that it has the "legal right and full power and capacity to deliver in aggregate a Quantity of Gas to a Network Section equal to the aggregate withdrawals of Gas by the User." This is not consistent with the Short Term Trading Market arrangements where a User can simply buy gas from the Short Term Trading Market at the Hub.

Clause 9.5 Unaccounted for Gas

In order to ensure the lowest cost to end-users EnergyAustralia believes JGN's ability to source gas directly from the Short Term Trading Market under Clause 9.5(e)(ii) should be limited to where it is cheaper than utilising an open tender process.

Clause 11.4 Transfer of Legacy Reference Service Delivery Points at commencement of 2010 Access Arrangement

Is the reference to 1 July 2009 in Clause 11.4(c)(v) correct? Should it be 1 July 2010 instead?

Clause 15.6 Basic Metering Equipment Downgrade at existing Delivery Station

JGN's ability to downgrade Basic Metering Equipment at its own discretion should be subject to any future change in load or pattern of usage by the User's customer. If the User's customer is intending on increasing load and/or changing the pattern of usage then JGN should not be able to downgrade the Basic Metering Equipment.

Clause 16.1 Safe Access to Measuring Equipment

The proposed clause 16.1(b) has increased the User's obligation to ensure that any area surrounding the Measuring Equipment is "safe" in addition to the continuing obligation to ensure that it complies at all times with applicable regulations, standards and Gas-fitting rules.

The assessment of "safe" is subjective and clause 16.1(c) provides the Service Provider with an unfettered right to alter, move or install additional Measuring equipment at the User's Cost. The clause does not provide for any process of notice to the User nor any process for

addressing the issue of concern held by the Service Provider. The clause should be amended to provide a process for notification and reasonable time frames for the rectification of concerns.

Clause 16.7 Quantity of Gas if Measuring Equipment Fails

Clause 16.7 provides for estimation in accordance with Clause 16.7(b) unless otherwise agreed between the parties. This proposal varies from the existing provisions which provide for agreement and then where no agreement exists, the process for estimation is outlined. The proposed clause 16.7(a) should be amended to replace the word “otherwise” with “previously”.

Clause 16.8 Right to alter Measuring Equipment

Clause 16.8 is a proposed additional clause which appears to be a catch-all to provide the Service Provider with the ability (at its absolute discretion and at the User’s cost) to install control flow mechanisms and alter or make additions to the Measuring equipment. The proposal should be justified and where justified, at the very least, should provide for written justification for each circumstance, notification periods and cost estimates, and processes for rectification.

Clause 17.5 No warranty

The Service Provider proposes, via Clause 17.5, that it make no warranty, representation, statement, covenant, agreement, indemnity or undertaking as to:

- (a) the accuracy or quality of meter data at the Delivery Point, or
- (b) the condition or fitness for purpose of the Measuring Equipment.

The Service Provider is the owner of the Measuring Equipment and should be prepared to make some warranties rather than disclaim all as is proposed.

Clause 22.1 Service Provider to issue invoice

EnergyAustralia believes that the billing frequency should be stated or at a minimum a maximum and minimum frequency should be provided rather than JGN having absolute discretion.

Clause 22.8 Overcharging and undercharging

As currently drafted Clause 22.8(c) is inconsistent with the Network Code for Small Retail Customers. While JGN are obviously aware of it and have used Clause 22.8(d) to clarify it, EnergyAustralia believes the Agreement should be drafted to be consistent with the Network Code.

Clause 24.1 Suspension at User's Request

The inclusion of this sub-clause 24.1(c) does not appear to be necessary as this is provided for in Clause 20.

Clause 24.2 Suspension by the Service Provider

Clause 24.2 has been amended to no longer relate to acts of the particular User. It no longer operates under the precondition that the User has not, for example, delivered sufficient gas to the Receipt Point to meet a User's withdrawal requirements. For example, it operates where the Service Provider receives Out-of Specification Gas from another User. The proposed amendments do not appear reasonable and do not associate cause with effect.

Clause 25.2 Scheduled Interruptions

The proposed Clause 25.2(c)(i) provides for either the User or the Customer to be notified of a scheduled interruption. This proposed amendment to existing arrangements (where both are notified) should be rejected and the current process retained.

The proposed Clause 25.2(d) should be rejected as unnecessary as the requirement to notify the Customer and the User should be retained.

Clause 26 Force Majeure

It is noted that the definition of Force Majeure has been amended (indirectly) through the altered wording of Clause 26.1(b)(iv) "except where these affect the operation of the Network" for changes in market conditions for transportation and/or the purchase and sale of Gas. Justification for this amendment is sought.

Clause 27 Termination or Cessation

It is noted that there is no obligation on the Service Provider to recommence Services following cessation of Services. The proposed Agreement should provide for these circumstances.

Clause 29.2 No Assignment without Consent

This clause should be amended so that the Service Provider's written consent to the assignment, transfer or novation of the Agreement must not be unreasonably withheld or delayed.

Clause 30 Security and Financial Standing

EnergyAustralia believes the Service Provider should have the obligation to review and adjust the amount of Security required from the User at the request of the User.

Definitions

Alternate Gas Balancing Arrangement is capitalised but is not a defined term.

3 Liability under the Reference Services Agreement

EnergyAustralia has some particular concerns with the numerous liability and indemnity provisions currently contained in the Agreement.

These provisions (as currently drafted) fall broadly into three categories:

- (1) Specific liability exclusions and indemnities applicable to specific, identified events or circumstances. There are 14 of these. All of them exclude liability for the Service Provider, while imposing unlimited indemnity liability upon the User, for all Damages and claims resulting from the specific events or circumstances identified.
- (2) General liability limitations and indemnities for negligence and breach of Agreement. These are dealt with in one place, namely Clause 28 of the Agreement. Under subclauses 28.2, 28.4 and 28.5 they are apparently applied reciprocally, for the benefit of both the Service Provider and the User. However they are then substantially excluded from benefiting the User, by subclause 28.6.
- (3) An exclusion of any warranties implied by law (to the extent permitted by law).

EnergyAustralia's concerns arise with the first two of the above categories. Our concerns with each of these are set out below in Sections 3.1 and 3.2 of this submission.

In Attachment 1 to this submission we have reproduced and marked up our suggested changes to the liability and indemnity clauses from the Agreement referred to in the first category above. These changes reflect our preferred position for these clauses, as outlined in section 3.1 below.

In Attachment 2 EnergyAustralia sets out an alternative set of marked up changes to the same clauses, to reflect the alternative position outlined in Section 3.1 below.

In Attachment 3, we have reproduced and marked up our suggested changes to Clause 28 of the Agreement (referred to in the second category above). These changes reflect the position outlined in Section 3.2 below.

3.1 Specific liability exclusions & indemnities applying to specific identified events or circumstances

There are 14 separate clauses in the Agreement which identify specific events or circumstances for which the liability of the Service Provider is excluded and the User must indemnify the Service Provider.

For each of the 14 identified events or circumstances, the scope of the Service Provider liability exclusion and User indemnity is identical and is summarised in Section 3.1.1 below.

The 14 identified events and circumstances themselves (and their respective clauses) are summarised in Section 3.1.2 below.

In Section 3.1.3 below, the problems with these provisions are highlighted and changes to address them proposed.

3.1.1 Scope of the Service Provider liability exclusion and User indemnity

For each the 14 different events and circumstances summarised under Section 3.1.2 below, the scope of the liability exclusion given to the Service Provider and the indemnity liability imposed on the User is as follows:

- (a) All liability of the Service Provider for "Damages" or claims is excluded.
- (b) The User indemnifies the Service Provider against all liability for "Damages" or claims effectively incurred by (or brought against) the Service Provider.

"Damages" (for the purposes of both (a) and (b) above) is defined very broadly. It essentially includes all direct, indirect, general, special, consequential, physical, economic and other losses or damages that could possibly arise as a result of the event or circumstance specified in each clause.

3.1.2 The events and circumstances to which this Service Provider liability exclusion and User indemnity apply

The particular circumstances and events for which the above Service Provider liability exclusion and User indemnity will apply (and their relevant clauses), are as follows:

- (i) Where the Service Provider revokes an authorised overrun (Clause 5.6 (b)).
- (ii) Where an unauthorised overrun occurs (Clause 6.2).

- (iii) Where the Service Provider commingles gas received at a Receipt Point or delivered at a Delivery Point (Clause 9.2(b)).
- (iv) Anything arising or done with respect to gas prior to its receipt into (or after its delivery from) the Network by the Service Provider (Clause 9.4(b)).
- (v) Delivery into a network Receipt Point of Gas which does not meet the gas quality Specification (Out-of-Spec Gas) (Clause 10.1(e)).
- (vi) Cessation of delivery of Out-of-Spec Gas or failure of the User to comply with a direction to cease delivery of Out-of-Spec Gas into the network (regardless of whether that Out-of-Spec Gas is in fact being delivered for or on behalf of the User) (Clause 10.3(c) & (d)).
- (vii) Failure of the User to comply with gas testing obligations imposed on the User by the Service Provider for gas delivered to a network Receipt Point (Clause 10.10(i)).
- (viii) Delivery into a network Receipt Point of gas which does not meet the Service Provider's gas pressure specifications (Clause 14.9(b)).
- (ix) The Service Provider decommissioning a Delivery Station (or disconnecting or reconnecting supply at a Delivery Point), at the request of the User (Clause 15.12).
- (x) The installation, operation, maintenance or removal by the User (or its agent) of any measuring equipment, meter reading or communications facilities or connections installed at a Delivery Point (Clause 18.5).
- (xi) The Service Provider suspends delivery of gas to a Delivery Point (effectively for any reason and whether at the User's request or at the Service Providers own volition) (Clause 24.3).
- (xii) Load Shedding by the Service Provider in good faith in accordance with the principles set out in Clause 25.4 (Clause 25.4(k)).
- (xiii) The Service Provider interrupting gas delivery or Load Shedding for any User or Customer in accordance with the principles in Clause 25 (except for Scheduled Interruptions where the Service Provider hasn't notified the User as early as reasonably possible before the interruption) (Clause 25.7(a) & (b)).
- (xiv) Failure of the User or any of its Customers to comply with the Load Shedding or supply interruption requirements of Clause 25 (Clause 25(c)).

3.1.3 Changes proposed by EnergyAustralia Changes to the Service Provider's liability exclusion

EnergyAustralia has no objection to a gas network Service Provider seeking to reasonably exclude and limit its liability.

In EnergyAustralia's view it is only reasonable for such a Service Provider to seek to:

- (i) Exclude liability for anything which is beyond its own control or which is caused by the User or other parties using the Service Provider's Network.
- (ii) Limit its liability to a reasonable level, even for liabilities resulting from its own breach of the Agreement or negligence. This is because the large number of potential claimants (and the sheer size of total claims) to which a network Service Provider is potentially exposed poses a financial risk of a magnitude which is beyond that which a network business can actually manage and cover by insurances available in the market. This therefore poses a risk of business failure to an essential infrastructure Service Provider, which could potentially undermine security of gas supply and therefore the financial viability of the competitive gas market.

However, the liability exclusion included in the Agreement for the 14 categories of events and circumstances summarised above go well beyond this. They effectively seek to exclude all Service Provider liability to the User for a range of events and circumstances which cover virtually the whole gas delivery process, regardless of whether these events or circumstances arise from matters within the Service Provider's control or not.

EnergyAustralia therefore submits that a change needs to be made to each of the 14 clauses which confer this blanket liability exclusion on the Service Provider, so as to reflect the principles outlined in (i) and (ii) above.

This can in fact be relatively easily accommodated by simply:

- (A) Making each of these 14 clauses expressly subject the general exclusions and limitations in Clause 28. Marked up changes to this effect are included in each of Attachment 1 and Attachment 2.
- (B) Deleting those words in Clause 28 which effectively sought to exclude the other 14 clauses from the operation of Clause 28. Marked up changes to this effect are included in Attachment 3.

Changes to the User indemnities

The indemnity liability imposed on the User for many of the 14 events and circumstances identified above applies even where they arise from matters which have not been caused by the User and are completely outside the User's control (e.g. where another User's gas is the cause of the problem). It is simply unreasonable to impose any liability on the User for something it did not cause and for which it has no way of managing or limiting its risk.

Even where the User's gas (or how its delivered to or taken from the Network) is the cause of a problem, or where the User has itself caused the problem in some way, it is unreasonable for the Service Provider to impose full and unlimited indemnity liability on the User for all direct and consequential economic loss that might conceivably result. This is because:

- (i) It exposes the User to unlimited and substantial claims of a size and scope that the User simply cannot cover with insurance or manage, any more than they can be by the Service Provider.
- (ii) The User's ability to contractually pass on this indemnity liability (upstream or downstream) is very limited. The upstream pipeline operator EnergyAustralia contracts with is a monopoly business and the down stream retail market is extremely competitive for large customers and heavily regulated for small customers (and will be even more so under the proposed National Energy Customer Framework legislation, which tightly subscribes the content of liability provisions in retail contracts). Consequently EnergyAustralia's upstream and downstream counterparties simply will not accept anything like the liability indemnities that the Service Provider is seeking to impose on EnergyAustralia under this Agreement.
- (iii) It goes well beyond what would ordinarily be recoverable for breach of contract or negligence by the User under the general law of damages in contract and in tort. Under the general law, important principles of remoteness are applied to prevent the recovery of losses which are considered too remote and for which it would be unreasonable to make a defendant liable. The indemnity proposed by the Service Provider effectively circumvents how these principles would otherwise have applied at general law and imposes strict pecuniary liability on the User for all conceivable losses however remote they may be.

EnergyAustralia therefore submits that:

- All of the indemnity liabilities imposed on the User in the 14 clauses of the Agreement identified above should be deleted from those clauses. We have marked up our suggested changes to achieve this (in addition to the change referred to in Section 3.1.3 (B) above) in Attachment 1.
- The User should only be exposed to liability for the User's own breach of the Agreement or for negligence, with the same reasonable limitations on the scope of that liability as are afforded to the Service Provider under Clause 28.4 and Clause 28.5. To that end, it would be reasonable to make the User subject the User indemnity (for breach of Agreement and negligence) in Clause 28.2(a), provided that this indemnity is limited to capped Direct Damages in the same way as is the Service Provider's corresponding indemnity under Clause 28.2(b). Our suggested changes to

achieve this are marked up in Attachment 3 and discussed more fully in Section 3.2.2 below.

If the position outlined in Attachment 1 is not accepted by the AER, then EnergyAustralia submits that (at the very least) changes need to be made to each of the 14 clauses which impose this unlimited indemnity on the User, so as to ensure that:

- the User does not have to indemnify the Service Provider for things specified in these clauses where they are not caused by the User, the User's Customers or the delivery of the User's gas; and
- any indemnity that is imposed on the User is made subject to the same reasonable limitations as apply to the Service Provider's indemnity under Clause 28. There is no reason to apply a different level of liability to each of them as the risks to which they are exposed (and their limited capacity to deal with them) are the same.

We have marked up our suggested changes to achieve this alternative position (in addition to the change referred to in Section 3.1.3 (B) above) in Attachment 2.

3.2 General liability limitations and indemnities for negligence and Agreement breach (Clause 28 of the Agreement)

In essence Clause 28 seeks to impose some indemnity liability obligations on each party for its own negligence or breach of the Agreement.

These are expressed to operate in addition to and without limiting the scope of the separate User indemnities and Service Provider liability exclusions provided for elsewhere in the Agreement (i.e. those identified in 3.1 above)³.

3.2.1 The key provisions of Clause 28 in outline

The additional indemnity liability obligations imposed under Clause 28 can be summarised as follows:

- (a) Under Clause 28.2, each party indemnifies the other against all "Damages" suffered or incurred by the other party, arising from any:
- (i) personal injury, death or damage to the property of the other party caused by the first party's negligence; or
 - (ii) any breach of the Agreement by the first party.

³ See clauses 28.1, the first line of each of Clauses 28.2(a) & (b) and Clause 28.6(a)(vi).

However, this is all made subject to Clause 28.4, 28.5 and 28.6 (described below).

- (b) Clauses 28.4 and 28.5 then effectively seek to:
 - (i) limit each parties liability to the other to Direct Damages (which for the Service Provider are then capped at the amount the Service Provider is able to recover under any insurance it has in place, plus any deductible or excess);
 - (ii) exclude all liability to each other for Consequential Damages (except to the extent that a party is indemnified for it under a policy of insurance).

However, this is in turn subject to Clause 28.6.

(c) Clause 28.6(a) then provides that the above Direct Damage limitation and Consequential Damage exclusion will not apply to any liability of the User arising as a result of:

- (i) an unauthorised overrun;
- (ii) delivery of Out-of-Spec Gas or gas of incorrect pressure to a Receipt Point;
- (iii) failure to ensure cessation of gas at a Delivery Point, as required under the Agreement;
- (iv) aggregate deliveries of all users into the network not being equal to aggregate withdrawals; or
- (v) any of the separate indemnities already imposed on the User elsewhere in the Agreement (i.e. those imposed on the User as set out in Section 3.1 above)⁴.

(d) By contrast, Clause 28.6(b) provides that the only circumstance when the Direct Damage limitation and Consequential Damage exclusion will not apply to the Service Provider, is for a liability arising as a result of delivery of Out-of-Spec Gas to a Delivery Point, where caused by the negligent or wilful default of the Service Provider (unless the delivery would not have occurred but for Out-of-Spec Gas having been delivered into the Network).

(e) Lastly, Clause 28.9 requires the User to include in its customer supply agreements liability exclusion or limitation provisions (to the extent reasonably practicable) in relation to any services provided by the Service Provider and to its operation of the Network.

⁴ Note that the User indemnity under Clause 28.2(a) is expressed to be "subject to this clause 28", whereas none of the other 14 specific User indemnities found elsewhere in the Agreement are made subject to clause 28 (and clause 28.1 makes it clear that they cannot be). This means that the only User indemnity that is expressly subject to the liability limitations and exclusions in 28.4 and 28.5 is the User indemnity under Clause 28.2(a), with the result that (under Clause 28.6(vi), to which Clauses 28.4 & 28.5 are subject) no User indemnity under the Agreement obtains the benefit of the liability limitations and exclusions in 28.4 and 28.5, except for the Clause 28.2(a) User indemnity.

3.2.2 Summary of Clause 28 provisions

Clause 28 therefore appears intended to impose indemnities on each party for "Damages" and claims incurred by the other party as a result of:

- personal injury, death or property damage caused by the first party's negligence; or
- breach of Agreement by the other party.

At first glance, these indemnities appear to be even-handed, in that:

- they are imposed on both parties (on the face of Clauses 28.2(a) & (b)); and
- they are then limited for both parties to capped Direct Damages (with Consequential Damages excluded) ,under Clauses 28.4 and 28.5.

However, that Direct Damage cap and Consequential Damage exclusion is then removed for the User in relation to the occurrence of a broad range of circumstances (i.e. those identified in Section 3.2.1 3.1(c)(i) to (iv) above) which would cover virtually any breach of Agreement or negligence by the User.

The effect of this is therefore to take away substantially all of the Direct Damage limitation and Consequential Damage exclusion that is supposedly being granted to the User under Clauses 28.4 and 28.5.

3.2.3 Changes proposed by EnergyAustralia

As indicated elsewhere in this submission, EnergyAustralia has no problem with the Service Provider seeking to reasonably limit its liabilities for breach of the Agreement and negligence.

EnergyAustralia considers that the limitation (via Clauses 28.4 and 28.5) of the Service Provider's liability to a capped level of Direct Damages (with Consequential Damages excluded) is reasonable.

However, setting the "cap" for Direct Damages by reference to the amount recovered by the Service Provider under its insurance policies is uncertain, in the absence of a clear obligation on the Service Provide to obtain insurances in appropriate amounts.

EnergyAustralia also considers that the User should be entitled to the same liability limitation protections as the Service Provider for the User indemnity under Clause 28.2 (as well as any

other User indemnities under the Agreement, if they are not deleted as we recommend above) for the reasons outlined in Section 3.1.3(b) above.

Lastly, the User's obligation in Clause 28.9 to impose liability limitations on its Customers should be:

- changed to an obligation to use reasonable endeavours to do this, given the User's limited ability to impose such an obligation on Customers in a highly competitive retail gas market, as outlined in Section 3.1.3(b) above; and
- subject to any regulatory requirements imposed on the User, given that the content of what Users may put in their retail gas supply contracts is heavily regulated (and will be even more so under the proposed National Energy Customer Framework legislation).

We have marked up our suggested changes to Clause 28 to achieve these outcomes in the Attachment 3.

It should be noted that in our marked up changes to Clause 28.4(b)(i) we have left blank the dollar amounts for the insurances to be obtained by the Service Provider. This is because EnergyAustralia does not have access to information from JGN about its insurance risk profile, its current insurances or what other insurances might reasonably be available to JGN at reasonable cost. EnergyAustralia submits that this is information which the AER is in a position to require JGN to provide to it, so that the AER can then assess the appropriate amounts for JGN to include in Clause 28.4(b)(i).

4 Reference Tariff Policy

4.1 Minimum Aggregate Charge

EnergyAustralia does not agree with the introduction of a minimum aggregate charge on demand customers and believes it should be removed.

JGN justify the introduction of a minimum charge to demand customers on the basis of a “perverse pricing incentive whereby some customers who moved from the volume to the demand market initially experienced a significant price reduction despite the increase in their capacity requirements”⁵.

While recognising that customers can receive a significant saving moving from volume to demand, EnergyAustralia questions whether this is a perverse pricing incentive or whether it is actually the disconnect between the postage stamp volume based pricing system that applies to volume customers and the user pays capacity based pricing system which applies to demand customers. Given the nature of the demand charges they should be a truer reflection of the costs customers impose on the system than the postage stamped volume costs. Therefore, the logic of applying a minimum bill on the demand customers due to the level of volume charges is, in EnergyAustralia’s opinion, flawed.

EnergyAustralia notes that in the absence of staging some locations (eg DC-6) the proposed minimum charge will apply to customers up to approximately 110TJ (assuming a 60% load factor⁶). This means that in that location a 10TJ customer will be paying the same network charges as a 100TJ customer despite the latter customer having demand requirements which are ten times greater than the former⁷. This, rather than the disconnect argued by JGN, is a clear example of a “perverse pricing incentive”.

4.2 Terms and Conditions

As previously covered in Section 2, JGN should not be able to make unilateral changes to the terms and conditions in the Reference Services Agreement without adequate negotiation with the counterparties to those Agreements.

⁵ JGN, Access Arrangement Information, 2009, p185

⁶ If the load factor is better than 60% then the customer can be larger and subject to a minimum charge.

⁷ Assuming the same load factor applies.

4.3 Variation of a Tariff Classes

JGN should be required to give additional notice of any variation in structure (ie a new Haulage Reference Tariff, new Haulage Reference Component or withdrawal of a Tariff Class or introduction of a new Tariff Class). At present JGN propose to submit their Annual Variation 30 Business Days prior to commencement regardless of whether or not major changes are included. This may not provide sufficient time for Users to make the necessary changes to their systems to be able to accommodate the structural changes.

Further JGN should be required to notify Users of the proposed Reference Tariffs under its Annual Variation of Reference Tariffs or Tariff Classes within 2 Business Days of submission to the AER and notify Users of the approved Reference Tariffs within 2 Business Days of receiving approval from the AER.

4.4 Annual Tariff Variation Mechanism

Clarification is needed of the proposed tariff variation formula. It is not clear what the reference year is and there appears to be inconsistencies in the reference year. For example p_{t-1}^{xy} and q_{t-2}^{xy} both refer to the year being the “Financial Year after the Financial Year ending 30 June 2010” when logically you would expect q_{t-2}^{xy} to refer to the Financial Year ending 30 June 2010.

4.5 Calculation of UAG Adjustment

UAG Tolerance

JGN have introduced the concept of a UAG Tolerance which effectively gives them a 20% range for UAG. This UAG Tolerance level represents a 10% increase on the current reported UAG levels. The introduction of the UAG Tolerance is justified on the basis of a confidential Appendix (Appendix 6.8). EnergyAustralia does not believe that JGN should be allowed to introduce a UAG Tolerance at a level which is 10% above average historic levels. If a UAG Tolerance level is to be introduced it should be set at 2.4% rather than 2.7%.

Carbon Permit Costs

EnergyAustralia notes that an assumed benchmark of 2.4% for UAG leakage from large pipelines has been used as the basis for calculating Carbon Permit Costs. EnergyAustralia believes the actual UAG leakage between the UAG Target of 2.1% and the amended UAG Tolerance of 2.4% (assuming the tolerance is applied) should be used in determining the Carbon Permit Costs to make the Carbon Permit Costs consistent with the UAG calculations.

For the purposes of tariff resetting and transparency, the costs of UAG and carbon emissions certificates should be separated out.

4.6 Calculation of Weather Variation Adjustment

EnergyAustralia believes the application of the Weather Variation Adjustment effectively amounts to a “weather derivative” as part of the Tariff Variation formula. Its introduction significantly reduces the revenue risks that a normal gas (or for that matter electricity) business would face through temperature variations.

If the Weather Variation Adjustment is to be included EnergyAustralia trusts that the AER will review the basis of 17,100GJ/HDD for α in the formula as no justification of this value is supplied in the Access Arrangement Information.

4.7 Calculation of Other Events Adjustment

The pass through of costs relating to Other Events should be limited to reasonable costs. Even though the adjustment is being applied as part of the annual tariff approval process EnergyAustralia also believes some level of materiality should apply to the adjustment. Any savings to JGN relating to Other Events should be passed through to Users subject to the same materiality threshold.

5 Other

5.1 Volume Forecasts

EnergyAustralia notes that JGN has submitted forecasts prepared by NIEIR.

While recognising that we are in a period of economic uncertainty EnergyAustralia is of the view that NIEIR have taken an overly pessimistic view of the economic future. For example, under the heading of the exchange rate in Section 2.2.2 NIEIR comment that the “Australian exchange rate could collapse at any time. That is, fall to the 30 to 40 cents range.” It goes on to further say “In any case, the exchange rate will go to relatively low levels. That is, to the 50 to 60 cents range”. If the volume and/or demand forecasts have been prepared on the basis of the economic view put forward by NIEIR as part of their report, it should be updated in light of more recent information.

At a high level EnergyAustralia agrees with the approach taken by JGN to forecast volumes in the tariff market. However, EnergyAustralia has attempted to reconcile the volume forecasts presented by NIEIR and is unable to do so. The information presented in the tables is confusing. It is not clear whether the information is being presented on a calendar year or financial year basis or whether the customer numbers are average customer numbers or a point in time customer number (and if they are a point in time what that point in time is). Further it appears that the reduction in average usage for existing customers shown in Table 5.2 does not reconcile with the information provided in Section 4 of the NIEIR Report as the reduction appear greater than those explained. EnergyAustralia also questions the calculation of the reduction figures quoted, however, in the absence of full information is unable to verify them.

EnergyAustralia notes that the AER has indicated that they have engaged consultants to review JGN’s proposal including their demand forecasts and presumably customer numbers and volumes for volume customers. We trust that this review will cover a full review of the assumptions that JGN has made in determining the volume forecasts from both a load perspective and a customer number perspective.

5.2 The Short Term Trading Market

The Access Arrangement and Reference Services Agreement appear to be largely silent on JGN's and users obligations and requirements for the Short Term Trading Market. This may be addressed in the NSW and ACT Market Procedures (currently under development).

EnergyAustralia expects that the Access Arrangement and Reference Services Agreement

terms and conditions will not either intentionally or unintentionally create any conflicting rights and obligations for the network operator and market participants. In order for this not to occur, clarification on the precedence of documentation needs to be defined.

6 Attachment 1 Preferred position on special liability & indemnity clauses extracted from the Agreement

5.6 Revocation of authorisation

- (a) Where the Service Provider has approved an Authorised Overrun for a Specified Period, the Service Provider may by notice to the User revoke such approval (in whole or in part) at any time and for any length of time if, in the Service Provider's reasonable opinion, the capacity in the Network is insufficient to allow the Service Provider to transport the Authorised Overrun Quantity. The Service Provider will use reasonable endeavours to provide the User with as much notice of such revocation as is possible in the circumstances.
- (b) Subject to clause 28, ~~the Service Provider will not be liable for, and the User will indemnify and hold the Service Provider harmless from and against,~~ any and all Damages or claims in connection with or arising as a result of the revocation by the Service Provider of an approval (in whole or in part) of an Authorised Overrun pursuant to clause 5.6(a).

6.2 Liability for Damages arising from Unauthorised Overruns

Subject to clause 28, ~~if an Unauthorised Overrun occurs, the Service Provider is not liable for, and the User will indemnify and hold the Service Provider harmless from and against,~~ any and all Damages or claims in connection with or arising as a result of that Unauthorised Overrun.

9.2 Right to commingle

- (a) The Service Provider has the right to:
- (i) commingle the Gas delivered to any Receipt Point with other Gas in the Network; and
 - (ii) deliver Gas in a commingled state to the Delivery Point.
- (b) Subject to clause 28, ~~the Service Provider will not be liable for, and the User will indemnify and hold the Service Provider harmless from and against,~~ any and all Damages or claims in connection with or arising as a result of the commingling of Gas or delivery of Gas in a commingled state pursuant to clause 9.2(a).

9.4 Responsibility for Gas

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(b) Subject to clause 28, The Service Provider will not be liable for, ~~and the User will indemnify and hold the Service Provider harmless from and against,~~ any and all Damages or claims in connection with or arising as a result of any matter or thing which may be done, happen or arise with respect to Gas prior to the receipt of Gas by the Service Provider at a Receipt Station or after its delivery at a Delivery Station at a Delivery Point.

10.1 Specification Gas

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(e) Subject to clause 28, The Service Provider will not be liable for, ~~and the User will indemnify and hold the Service Provider harmless from and against,~~ any and all Damages or claims in connection with or arising as a result of the delivery of Gas at any Receipt Point which does not meet the Specification.

10.2 Service Provider's rights in relation to Out-of-Specification Gas at Receipt Point

If the Service Provider reasonably believes that Gas which does not comply with the Specification (**Out-Of-Specification Gas**) is being or may be delivered to any Receipt Point, whether the Out-Of-Specification Gas is being delivered by or on behalf of the User or otherwise, then the Service Provider may:

- (a) direct the User (in the case of gas delivered for or on behalf of the User) or any other person to cease or cause the cessation of the delivery of Gas to the Receipt Point or to cease or cause the cessation of the delivery of Gas to any pipe or system of pipes through which Gas is delivered to the Receipt Point; and/or
- (b) without prior notice to the User, cease to accept all or any portion of Gas being delivered to that Receipt Point and notify the User as soon as reasonably practicable thereafter of its actions.

10.3 Consequences of the Service Provider exercising rights under clause 10.2

(a) On receipt of a direction under clause 10.2(a), the User must immediately cease or cause the cessation of the delivery of Gas to the Receipt Point or the delivery of Gas to any

pipe or system of pipes through which Gas is delivered by or on behalf of the User to the Receipt Point.

(b) If the Service Provider issues a direction under clause 10.2(a) or ceases to accept Gas under clause 10.2(b), then:

(i) if Gas delivered [for or on behalf of the User](#) to any Receipt Point was Out-Of-Specification Gas, the User will not be relieved of its obligation to pay any Charges under this Agreement; or

(ii) if Gas delivered to all Relevant Receipt Points did meet the Specification, then to the extent that the Service Provider was unable to deliver a Quantity of Gas equal to the MDQ at a particular Demand Customer Delivery Point for any period in excess of one Day, the Demand Charge for that Delivery Point for that period will be calculated by reference to the actual amount withdrawn at the Delivery Point on each Day during that period, rather than by reference to the Chargeable Demand for that Delivery Point.

(c) [Subject to clause 28, T](#)he Service Provider is not liable to the User or to the User's Customers for any Damage if it directs the User to cease the delivery of Gas, or if it ceases to take delivery of Gas, under clause 10.2.

(d) [Subject to clause 28, T](#)he Service Provider will not be liable for, ~~and the User will indemnify and hold the Service Provider harmless against,~~ any and all Damages or claims in connection with or arising as a result of the giving of direction or the cessation of Gas delivery under clause 10.2 or any failure of the User to comply with a direction issued under clause 10.2.

10.10 Gas Testing by User

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(i)- [Subject to clause 28, T](#)he Service Provider will not be liable for, ~~and the User will indemnify and hold the Service Provider harmless from and against,~~ any and all Damages or claims in connection with or arising as a result of the failure of the User to comply with its obligations under this clause 10.10.

14.9 Pressure at Receipt Point

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(b) Subject to clause 28, The Service Provider is not liable for, ~~and the User will indemnify and hold the Service Provider harmless from and against,~~ any and all Damages or claims in connection with or arising as a result of Gas being delivered through any Receipt Point which does not comply with the minimum and maximum pressure specifications in accordance with this clause 14.

15.12 No liability for disconnection

(a) Subject to clause 28, The Service Provider is not liable to the User or to the User's Customers for any Damage if a Delivery Station is decommissioned pursuant to clause 15.8 or supply is disconnected or reconnected pursuant to clause 15.9.

(b) Subject to clause 28, and Wwithout limiting clause 15.12(a), the Service Provider is not liable for, ~~and the User will indemnify and hold the Service Provider harmless from and against,~~ any and all Damages or claims in connection with or arising as a result of the Service Provider's actions pursuant to clause 15.8 or 15.9.

18.5 Liability

Subject to clause 28, notwithstanding the fact that a party other than the Service Provider may be providing the Meter Data Service and except to the extent that such Damage is caused by the negligence, wilful misconduct or breach of this Agreement by the Service Provider, the Service Provider is not liable for, ~~and the User will indemnify and hold the Service Provider harmless from and against,~~ any and all Damages or claims in connection with or arising as a result of the installation, operation, maintenance or removal by the User, its agent or other person authorised by the User of any Measuring Equipment, Daily Meter Reading Facilities, Communications Facilities, Additional Measuring Equipment or any connections installed or being installed at the Delivery Point.

24.3 No Liability

(a) Subject to clause 28, The Service Provider is not liable to the User or to the User's Customers, employees, agents or contractors for any Damage if it suspends delivery of Gas under this clause 24.

(b) Subject to clause 28 and Wwithout limiting clause 24.3(a), the Service Provider is not liable for, ~~and the User will indemnify and hold the Service Provider harmless from and against,~~ any and all Damages or claims in connection with or arising as a result of the Service Provider's actions pursuant to this clause 24.

25.4 Load Shedding

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(k) Subject to clause 28, ~~the Service Provider will not be liable for, and the User will indemnify and hold the Service Provider harmless from and against,~~ any and all Damages suffered or incurred by the User and/or the User's Customers in connection with or arising as a result of Load Shedding, provided that the Service Provider acts in accordance with the principles of this clause 25.4 in good faith.

25.7 Service Provider not liable

(a) Subject to clause 28, ~~if~~ the Service Provider:

- (i) interrupts, curtails or reduces Services;
- (ii) implements Load Shedding; or
- (iii) requires a reduction or cessation of Load from any User or Customer,

in accordance with the principles of this clause 25, the Service Provider will not be liable for, ~~and the User will indemnify and hold the Service Provider harmless from and against,~~ any and all Damage or claims in connection with or arising as a result of that Load Shedding, interruption, curtailment, reduction or requirement (including any reduction in supply to Customers as a result).

(~~b~~c) The Service Provider may not rely on clause 25.7(a) or clause 25.7(b) to the extent that the Damage or claim was caused by:

- (i) an interruption, curtailment or reduction in Services which occurred solely as a result of a scheduled interruption under clause 25.2; and
- (ii) the Service Provider has failed to notify the User as early as reasonably practicable prior to the interruption, curtailment or reduction of Services.

(c) Subject to clause 28, ~~W~~without limiting clauses 25.4(k) and 25.7(a), the Service Provider is not liable for, ~~and the User will indemnify and hold the Service Provider harmless from and against,~~ any and all Damages or claims in connection with or arising as a result of:

- (i) the User's failure to comply with clause 25; or
- (ii) a failure by a User's Customer to act in accordance with the instructions or requests received from the Service Provider or the User under clause 25.4.

7 Attachment 2 Alternative position on special liability & indemnity clauses extracted from the Agreement

5.6 Revocation of authorisation

- (a) Where the Service Provider has approved an Authorised Overrun for a Specified Period, the Service Provider may by notice to the User revoke such approval (in whole or in part) at any time and for any length of time if, in the Service Provider's reasonable opinion, the capacity in the Network is insufficient to allow the Service Provider to transport the Authorised Overrun Quantity. The Service Provider will use reasonable endeavours to provide the User with as much notice of such revocation as is possible in the circumstances.
- (b) Subject to clause 28, ~~the Service Provider will not be liable for, and the User will indemnify and hold the Service Provider harmless from and against,~~ any and all Damages or claims in connection with or arising as a result of the revocation by the Service Provider of an approval (in whole or in part) of an Authorised Overrun pursuant to clause 5.6(a).

6.2 Liability for Damages arising from Unauthorised Overruns

Subject to clause 28, ~~if an Unauthorised Overrun occurs, the Service Provider is not liable for, and the User will indemnify and hold the Service Provider harmless from and against, any and all Damages or claims in connection with or arising as a result of that Unauthorised Overrun.~~

9.2 Right to commingle

- (a) The Service Provider has the right to:
- (i) commingle the Gas delivered to any Receipt Point with other Gas in the Network; and
 - (ii) deliver Gas in a commingled state to the Delivery Point.
- (b) Subject to clause 28, ~~the Service Provider will not be liable for, and the User will indemnify and hold the Service Provider harmless from and against,~~ any and all Damages or claims in connection with or arising as a result of the commingling of Gas or delivery of Gas in a commingled state pursuant to clause 9.2(a).
- (c) Subject to clause 28, the User will indemnify and hold the Service Provider harmless from and against any and all such Damages or claims to the extent that they result from any act or omission of the User (or its employees, agents or contractors), a

Customer of the User or any person delivering gas into the Network for or on behalf of the User.

9.4 Responsibility for Gas

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(b) Subject to clause 28, ~~the~~ the Service Provider will not be liable for, ~~and the User will indemnify and hold the Service Provider harmless from and against,~~ any and all Damages or claims in connection with or arising as a result of any matter or thing which may be done, happen or arise with respect to Gas prior to the receipt of Gas by the Service Provider at a Receipt Station or after its delivery at a Delivery Station at a Delivery Point.

(c) Subject to clause 28, the User will indemnify and hold the Service Provider harmless from and against any and all such Damages or claims to the extent that the Gas in respect of which the Damages or claim arises is Gas delivered into the Network for or on behalf of the User or is taken out of the Network by a Customer of the User.

10.1 Specification Gas

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(e) Subject to clause 28, ~~the~~ the Service Provider will not be liable for, ~~and the User will indemnify and hold the Service Provider harmless from and against,~~ any and all Damages or claims in connection with or arising as a result of the delivery of Gas at any Receipt Point which does not meet the Specification.

(f) Subject to clause 28, the User will indemnify and hold the Service Provider harmless from and against any and all such Damages or claims to the extent that the Gas in respect of which the Damages or claim arises is Gas delivered into a Receipt Point for or on behalf of the User.

10.2 Service Provider's rights in relation to Out-of-Specification Gas at Receipt Point

If the Service Provider reasonably believes that Gas which does not comply with the Specification (**Out-Of-Specification Gas**) is being or may be delivered to any Receipt Point, whether the Out-Of-Specification Gas is being delivered by or on behalf of the User or otherwise, then the Service Provider may:

- (a) direct the User (in the case of gas delivered for or on behalf of the User) or any other person to cease or cause the cessation of the delivery of Gas to the Receipt Point or to cease or cause the cessation of the delivery of Gas to any pipe or system of pipes through which Gas is delivered to the Receipt Point; and/or
- (b) without prior notice to the User, cease to accept all or any portion of Gas being delivered to that Receipt Point and notify the User as soon as reasonably practicable thereafter of its actions.

10.3 Consequences of the Service Provider exercising rights under clause 10.2

- (a) On receipt of a direction under clause 10.2(a), the User must immediately cease or cause the cessation of the delivery of Gas to the Receipt Point or the delivery of Gas to any pipe or system of pipes through which Gas is delivered by or on behalf of the User to the Receipt Point.
- (b) If the Service Provider issues a direction under clause 10.2(a) or ceases to accept Gas under clause 10.2(b), then:
 - (i) if Gas delivered for or on behalf of the User to any Receipt Point was Out-Of-Specification Gas, the User will not be relieved of its obligation to pay any Charges under this Agreement; or
 - (ii) if Gas delivered to all Relevant Receipt Points did meet the Specification, then to the extent that the Service Provider was unable to deliver a Quantity of Gas equal to the MDQ at a particular Demand Customer Delivery Point for any period in excess of one Day, the Demand Charge for that Delivery Point for that period will be calculated by reference to the actual amount withdrawn at the Delivery Point on each Day during that period, rather than by reference to the Chargeable Demand for that Delivery Point.
- (c) Subject to clause 28, ~~the~~ the Service Provider is not liable to the User or to the User's Customers for any Damage if it directs the User to cease the delivery of Gas, or if it ceases to take delivery of Gas, under clause 10.2.
- (d) Subject to clause 28, ~~the~~ the Service Provider will not be liable for, ~~and the User will indemnify and hold the Service Provider harmless against,~~ any and all Damages or claims in connection with or arising as a result of the giving of direction or the cessation of Gas delivery under clause 10.2 or any failure of the User to comply with a direction issued under clause 10.2.
- (e) Subject to clause 28, the User will indemnify and hold the Service Provider harmless from and against any and all such Damages or claims to the extent that the Out-of-Specification Gas (which gave rise to any such direction or cessation) was Gas being delivered for or on behalf of the User.

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10.10 Gas Testing by User

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(i)- Subject to clause 28, The Service Provider will not be liable for, and the User will indemnify and hold the Service Provider harmless from and against, any and all Damages or claims in connection with or arising as a result of the failure of the User to comply with its obligations under this clause 10.10.

14.9 Pressure at Receipt Point

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(b) Subject to clause 28, The Service Provider is not liable for, ~~and the User will indemnify and hold the Service Provider harmless from and against,~~ any and all Damages or claims in connection with or arising as a result of Gas being delivered through any Receipt Point which does not comply with the minimum and maximum pressure specifications in accordance with this clause 14.

(c) Subject to clause 28, the User will indemnify and hold the Service Provider harmless from and against any and all such Damages or claims to the extent that they arise as a result of such Gas being delivered for or on behalf of the User.

15.12 No liability for disconnection

(a) Subject to clause 28, The Service Provider is not liable to the User or to the User's Customers for any Damage if a Delivery Station is decommissioned pursuant to clause 15.8 or supply is disconnected or reconnected pursuant to clause 15.9.

(b) Subject to clause 28, and Wwithout limiting clause 15.12(a), the Service Provider is not liable for, and the User will indemnify and hold the Service Provider harmless from and against any and all Damages or claims in connection with or arising as a result of the Service Provider's actions pursuant to clause 15.8 or 15.9.

18.5 Liability

Subject to clause 28, nNotwithstanding the fact that a party other than the Service Provider may be providing the Meter Data Service and except to the extent that such Damage is caused by the negligence, wilful misconduct or breach of this Agreement by the Service

Provider, the Service Provider is not liable for, and the User will indemnify and hold the Service Provider harmless from and against, any and all Damages or claims in connection with or arising as a result of the installation, operation, maintenance or removal by the User, its agent or other person authorised by the User of any Measuring Equipment, Daily Meter Reading Facilities, Communications Facilities, Additional Measuring Equipment or any connections installed or being installed at the Delivery Point.

24.3 No Liability

(a) Subject to clause 28, ~~T~~the Service Provider is not liable to the User or to the User's Customers, employees, agents or contractors for any Damage if it suspends delivery of Gas under this clause 24.

(b) Subject to clause 28 and ~~W~~without limiting clause 24.3(a), the Service Provider is not liable for, ~~and the User will indemnify and hold the Service Provider harmless from and against,~~ any and all Damages or claims in connection with or arising as a result of the Service Provider's actions pursuant to this clause 24.

(c) Subject to clause 28, the User will indemnify and hold the Service Provider harmless from and against any and all such Damages or claims to the extent that they result from any act or omission of the User (or its employees, agents or contractors), a Customer of the User or any person delivering gas into the Network for or on behalf of the User.

25.4 Load Shedding

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(k) Subject to clause 28, ~~T~~the Service Provider will not be liable for, and the User will indemnify and hold the Service Provider harmless from and against, any and all Damages suffered or incurred by the User and/or the User's Customers in connection with or arising as a result of Load Shedding, provided that the Service Provider acts in accordance with the principles of this clause 25.4 in good faith.

(l) Subject to clause 28, the User will indemnify and hold the Service Provider harmless from and against any and all such Damages or claims to the extent that they result from any act or omission of the User (or its employees, agents or contractors), a Customer of the User or any person delivering gas into the Network for or on behalf of the User

25.7 Service Provider not liable

(a) Subject to clause 28, ~~I~~ if the Service Provider:

- (i) interrupts, curtails or reduces Services;
- (ii) implements Load Shedding; or
- (iii) requires a reduction or cessation of Load from any User or Customer,

in accordance with the principles of this clause 25, the Service Provider will not be liable for, ~~and the User will indemnify and hold the Service Provider harmless from and against~~ any and all Damage or claims in connection with or arising as a result of that Load Shedding, interruption, curtailment, reduction or requirement (including any reduction in supply to Customers as a result).

(b) Subject to clause 28, the User will indemnify and hold the Service Provider harmless from and against any and all such Damages or claims to the extent that they result from any act or omission of the User (or its employees, agents or contractors), a Customer of the User or any person delivering gas into the Network for or on behalf of the User.

(bc) The Service Provider may not rely on clause 25.7(a) or clause 25.7(b) to the extent that the Damage or claim was caused by:

(i) an interruption, curtailment or reduction in Services which occurred solely as a result of a scheduled interruption under clause 25.2; and

(ii) the Service Provider has failed to notify the User as early as reasonably practicable prior to the interruption, curtailment or reduction of Services.

(c) Subject to clause 28, ~~W~~without limiting clauses 25.4(k) and 25.7(a), the Service Provider is not liable for, and the User will indemnify and hold the Service Provider harmless from and against, any and all Damages or claims in connection with or arising as a result of:

(i) the User's failure to comply with clause 25; or

(ii) a failure by a User's Customer to act in accordance with the instructions or requests received from the Service Provider or the User under clause 25.4.

8 Attachment 3 Changes required to the general liability & indemnity in clause 28 of the Agreement

28. Liability

28.1 General Provision

~~Without limiting the scope of the express provisions on liability and the indemnities in this Agreement,~~ This clause 28 shall, to the extent permitted by law, regulate all **remaining** liabilities of the Service Provider and the User, including liability arising out of or in connection with:

- (a) this Agreement ~~(and all other liability and indemnity provisions in this Agreement are accordingly subject to this clause 28).~~;
- (b) the use of the Network by the User;
- (c) the provision of Services by the Service Provider; or
- (d) the provision of information by the Service Provider permitted under clause 31.

28.2 Indemnity

(a) ~~Without limiting the scope of any other express provisions in this Agreement and~~ Subject to this clause 28, the User must indemnify and hold the Service Provider and its directors, officers, employees, agents and contractors harmless from and against any and all Damage suffered or incurred by the Service Provider or any of its directors, officers, employees, agents or contractors in connection with or arising as a result of:

- (i) any personal injury or death caused by the negligent acts or omissions of the User, or the User's directors, officers, employees agents or contractors;
- (ii) any damage to the property of the Service Provider caused by the negligent acts or omissions of the User, or the User's directors, officers, employees agents or contractors; or
- (iii) any breach of the provisions of this Agreement (including any warranty given by the User under this Agreement).

(b) ~~Without limiting the scope of any other express provisions in this Agreement and~~ Subject to this clause 28, the Service Provider must indemnify and hold the User and its directors, officers, employees, agents and contractors harmless from and against any and all Damage suffered or incurred by the User or any of its directors, officers, employees, agents or contractors in connection with or arising as a result of:

- (i) any personal injury or death caused by the negligent acts or omissions of the Service Provider, or the Service Provider's directors, officers, employees agents or contractors;
 - (ii) any damage to the property of the User caused by the negligent acts or omissions of the Service Provider, or the Service Provider's directors, officers, employees, agents or contractors; or
 - (iii) any breach of the provisions of this Agreement (including any warranty given by the Service Provider under this Agreement).
- (c) Each indemnity in this Agreement is a continuing obligation, separate and independent from the other obligations of the parties, and survives termination, completion or expiration of this Agreement.
- (d) Nothing in this clause prevents any other provision of this Agreement, as a matter of interpretation, also surviving the termination of this Agreement.
- (e) It is not necessary for a party to incur expense or make any payment before enforcing a right of indemnity conferred by this Agreement.
- (f) Despite clauses 28.2(a) and 28.2(b), each party must mitigate any liability or costs, losses and damages the subject of the indemnity provided to that party.

28.3 Exclusion of warranties

All express or implied warranties, representations or covenants which are not contained in this Agreement are excluded to the maximum extent permitted by law. If a condition or warranty is implied into this Agreement under the *Trade Practices Act 1974* (Commonwealth) or any equivalent State or Territory legislation that cannot be excluded, then the Service Provider's liability to the User for breach of the condition or warranty is limited to (at the Service Provider's option):

- (a) the re-supply of the relevant service under this Agreement; or
- (b) the payment of having the relevant service re-supplied.

28.4 Scope of Liability

(a) ~~Subject to clause 28.6, t~~he liability of a Party (the **First Party**) to the other Party (the **Second Party**) (whether under this Agreement (including under an indemnity) or, to the extent permitted by law, otherwise) is limited to Direct Damage arising from:

- (i) personal injury or death caused by the negligent acts or omissions of the First Party or the First Party's directors, officers, employees, agents or contractors;

(ii) any damage to the property of the Second Party or to property for which the Second Party is responsible under this Agreement which is caused by the First Party's directors, officers, employees agents or contractors; or

(iii) any breach of the provisions of this Agreement (including any warranty) by the First Party, including where caused by or arising out of the First Party's negligence.

(b) The aggregate liability of the ~~Service Provider~~First Party to the ~~User~~Second Party, its directors, officers, employees and agents, whether by way of indemnity, by statute (to the extent that it is possible to limit or exclude such liability) in tort (for negligence or otherwise) or on any basis at law or in equity is limited to the sum of:

(i) the amount which, but for this clause 28, is recoverable and which, in fact, is recovered under the ~~Service Provider~~First Party's policies of insurance (provided that the First Party obtains policies of insurance covering \$xx per claim and \$yy in the aggregate for all claims for Direct Damage of the kind described in clause 28.4(a) above); and

(ii) any uninsured retentions (such as deductibles or excesses).

28.5 Exclusion of Consequential Damage

(a) Subject to clauses 28.5(b) ~~and 28.6~~, the First Party is not liable for, and does not indemnify the Second Party in respect of, any Consequential Damage howsoever caused (including but not limited to, by the negligence of the First Party), suffered by the Second Party in connection with this Agreement.

(b) Clause 28.5(a) does not limit a party's liability in respect of liability to the extent that, ignoring the application of clause 28.5(a), the party is indemnified for that liability under a policy of insurance.

~~28.6 Circumstances in which limitations and exclusions do not apply~~

~~(a) The limitations of liability referred to in clauses 28.4 and 28.5 do not apply in respect of the User's liability for the Damage in connection with or arising as a result of:~~

~~(i) an Unauthorised Overrun;~~

~~(ii) delivery of Gas into the Network which does not meet the Specification;~~

~~(iii) delivery of Gas to a Receipt Point which does not comply with the minimum and maximum pressure specifications for that Receipt Point set out in Annexure 6;~~

~~(iv) the failure by the User to ensure the cessation of the delivery, withdrawal or taking of Gas as required under this Agreement;~~

~~(v) the aggregate deliveries from the User and all other Network Users on a Day to a Network Section not being equal to the aggregate withdrawals by the User and all other Network Users on that Day from that Network Section; or~~

~~(vi) the indemnities provided by the User under this Agreement (unless otherwise provided).~~

~~(b) The limitations of liability referred to in clauses 28.4(a) and 28.5 do not apply in respect of the Service Provider's liability for Damage caused by the delivery to a Delivery Point of Gas which does not meet the Specification where that delivery was caused by the negligence or wilful default of the Service Provider unless the delivery of that Gas would not have occurred (whether or not contributed to by the comingling of Gas in the Network) but for the delivery of Gas which does not meet the Specification to a Relevant Receipt Point.~~

28.7~~6~~ Contribution to loss or damage

~~(a) This clause 28.7 does not apply to liabilities where the User has provided an indemnity under this Agreement.~~

(b) The liability of a Party for Damage, howsoever caused (including, but not limited to, by the negligence of that Party), suffered by the other Party in connection with this Agreement is reduced to the extent that the negligent or unlawful act or omission of the other Party caused that Damage.

28.8 Civil Liability Act

(a) To the extent permitted by law, Part 4 of the Civil Liability Act 2002 (NSW) (and any other equivalent statutory provisions in any other state or territory) is excluded from applying to any right, obligation or liability of either Party under this Agreement whether in contract, tort or otherwise in an action for damages.

(b) All other rights, obligations and liabilities (including those relating to proportionate liability) of each Party are preserved and are as specified in or by this Agreement whether in contract, tort or otherwise in an action for damages.

28.9 User's supply arrangements

Subject to the requirements of any relevant Law, the User must use reasonable endeavours to include in all its supply arrangements with persons who are provided with Gas from or in the Network, a provision that limits or excludes the User's liability to those persons, to the extent reasonably practicable, and in particular in relation to transportation of Gas, the operation of the Network and any Services provided by the Service Provider (whether under this Agreement or otherwise).