

Final Decision

Access Arrangement proposed by the Carpentaria Gas Pipeline Joint Venture for the Ballera to Mount Isa Pipeline

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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 and/or 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
Access arrangement period	The period from when an access arrangement or revisions to an access arrangement takes effect (by virtue of a decision pursuant to section 2) until the next revisions commencement date
the Act	<i>Gas Pipelines Access (Queensland) Act 1998</i>
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
BHP	BHP Minerals Pty Ltd
CGP	Carpenter Gas Pipeline
CGPJV	Carpentaria Gas Pipeline Joint Venture
Code	<i>National Third Party Access Code for Natural Gas Pipeline Systems</i>
Commission	Australian Competition and Consumer Commission
Contract carriage pipeline	A system of managing third party access whereby: <ul style="list-style-type: none">■ 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;■ users normally are required to enter into a contract that specifies a quantity of service;■ changes for use of a service are normally based at least in part upon the quantity of service specified in a contract; and■ a user normally has the right to trade its right to obtain a service to another user.
Covered pipeline	Pipeline to which the provisions of the Code apply
CPI	Consumer Price Index

CS Energy	CS Energy Limited
Derogation	A legislative exemption from compliance with specified obligations set out in the Code
End user	A person who acquires or proposes to acquire natural gas from a user or prospective user
Epic Energy	Epic Energy Queensland Pty Ltd and Epic Energy South Australia Pty Ltd
Ergon	Ergon Energy Gas Pty Ltd
GJ	Gigajoule
MCPS	Mica Creek Power Station
MDQ	Maximum daily quantity
MHQ	Maximum hourly quantity
MIM	MIM Holdings Limited
NCC	National Competition Council
PJ	Petajoule (equal to 1 000 000GJ)
PCML	Pasminco Century Mine Ltd
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
QCA	Queensland Competition Authority
Queuing policy	A policy for determining the priority that a prospective user has, as against any other prospective user, to obtain access to spare and developable 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 an access arrangement as corresponding to a reference service and which has the operation that is described in sections 6.13 and 6.18 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 on which the next revisions to the access arrangement are intended to commence
Revisions submissions date	The date on which the service provider must submit revisions to the access arrangement
Santos	Santos Ltd
Service	A service provided by means of a covered pipeline including: <ul style="list-style-type: none"> (a) haulage services (such as firm haulage, interruptible haulage, spot haulage and backhaul); (b) the right to interconnect with a covered pipeline; and (c) services ancillary to the provisions of such services, but does not include the production, sale or purchasing of natural gas
Services policy	A policy detailing the service or services to be offered
Service provider	The person who is the owner or operator of the whole or any part of the pipeline or proposed pipeline
Shipper	An alternative term generally used in this Final Decision to describe an existing user of the CGP
SWQ	South west Queensland
SWQP	South West Queensland Pipeline
TJ	Terajoule (equal to 1 000 GJ)
TPA	<i>Trade Practices Act 1974</i>
User	a person who has a current contract for a service or an entitlement to a service as a result of an arbitration

Executive Summary

Introduction

On 3 November 2000 the Carpentaria Gas Pipeline Joint Venture (CGPJV) submitted its proposed access arrangement for the Ballera to Mount Isa Pipeline, commonly known as the Carpentaria Gas Pipeline (CGP), to the Australian Competition and Consumer Commission (the Commission) for approval. The application was made under section 2.2 of the *National Third Party Access Code for Natural Gas Pipeline Systems* (the Code). The access arrangement describes the terms and conditions on which CGPJV proposes to make access to services provided by the CGP available to third parties.

Under section 58 of the *Gas Pipelines Access (Queensland) Act 1998* (the Act), some elements of the access arrangement, notably the reference tariff and reference tariff policy, reference service and review date, have been determined by the Queensland Government for the initial access arrangement period and cannot be reviewed by the Commission. Consequently, the Commission has jurisdiction to require amendments to the access arrangement with respect to the other non-tariff elements only.

The Commission does not approve CGPJV's access arrangement for the CGP in its present form. Pursuant to section 2.16 of the Code, this Final 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 required amendments are brought together at the end of this Executive Summary.

Reference tariff and reference tariff policy

The reference tariff and reference tariff policy for the CGP access arrangement have been derogated by the Queensland Government. Consequently, they are not subject to review by the Commission in its consideration of this access arrangement. The Tariff Arrangement approved by the Minister (derogated tariff arrangement) contains one reference tariff for one reference service and applies up to the first 175TJ/day of capacity.

As well as the derogated tariff arrangement, CGPJV is proposing to include in the reference tariff policy additional provisions relating to adjustment of the capital base to take account of new facilities investment. Legal advice provided to the Commission, however, indicates that the derogated tariff arrangement represents the reference tariff policy in its entirety. Therefore CGPJV is unable to add to the reference tariff policy in the manner proposed. Accordingly, the Commission proposed an amendment in its Draft Decision that the additional clauses be deleted. CGPJV has informed the Commission that it has no objection to the amendment.

Services policy

CGPJV proposes to offer two transportation services: a reference service; and a negotiated service. The reference service, a non-interruptible transportation service, is described in the derogated tariff arrangement. The Queensland derogation prevents the

Commission from approving additional reference services, which have been requested by some interested parties. The Commission would, however, be entitled to require the services policy to include additional, non-reference services if it considered it appropriate to do so.

Nevertheless, the Commission does not require CGPJV to amend its access arrangement to include in its services policy any additional services. Since these services could only be included as non-reference services, some negotiation between CGPJV and the prospective user as to the terms and conditions would be necessary. Any additional services required by prospective users, such as backhaul or an interruptible service, could be settled with CGPJV as a negotiated service, as contained in the access arrangement. In the event of a dispute, the prospective user has recourse to the dispute resolution provisions of the Code.

Terms and conditions

The proposed access arrangement states that CGPJV will provide services on the terms and conditions set out in its standard Access Agreement for the service from time to time. The standard Access Agreement does not form part of the proposed access arrangement.

The Commission is concerned that these provisions would effectively allow CGPJV to make unilateral changes to its standard Access Agreement, and hence the approved non-tariff terms and conditions of access, without reference to the Commission. In the event of a dispute the Commission would be bound by the provisions of CGPJV's standard Access Agreement as it exists from time to time, even though the Commission would not have had the opportunity to review any changes to the document. In its Draft Decision the Commission proposed an amendment, that either CGPJV submit its Standard Access Agreement as part of the access arrangement, or alternatively that it be made clear that users have a right to access the reference service subject only to the terms and conditions contained in the access arrangement.

CGPJV did not agree with this amendment. CGPJV proposed that, in the event of any discrepancy between its standard Access Agreement and the access arrangement, the terms and conditions of the access arrangement would prevail. This proposal, however, would still not overcome the underlying problem of the standard Access Agreement being changed without reference to the Commission and the Commission being bound by the changes in the event of a dispute. To protect the integrity of the access arrangement process, the Commission requires an amendment to the access arrangement that all references to CGPJV's standard Access Agreement be deleted from the access arrangement. CGPJV has indicated to the Commission that it has no objection to this amendment.

The Commission requires a further amendment to CGPJV's terms and conditions to the effect that the access arrangement must clarify that CGPJV is obliged to transport and deliver gas up to a user's maximum daily quantity (MDQ), subject to other provisions of the access arrangement.

Trading policy

Some interested parties have requested that CGPJV specify the ‘reasonable commercial and technical grounds’ on which it would withhold its consent to the transfer (other than a ‘bare transfer’) of contracted capacity to another user. However, CGPJV’s proposal essentially mirrors the provisions of the Code, and accordingly the Commission considers that CGPJV’s proposal complies with the Code.

Queuing policy

Confirmation of gas supplies

One provision of CGPJV’s queuing policy is that a prospective user in a queue must demonstrate that it will have access to a supply of gas at the time it is anticipated that access to the service will be offered. The Commission considers that the requirement to demonstrate sufficient gas supplies as proposed by CGPJV may force prospective users to unnecessarily reveal commercially sensitive information. This concern is heightened because the South West Queensland Gas Producers have a significant ownership stake in the CGP and would have access to this information.

In its Draft Decision the Commission proposed that written confirmation from a prospective user that it has made arrangements for the supply of gas should be sufficient. CGPJV objected to this amendment, but stated that it would not object to an amendment that clarified that the prospective user must demonstrate the matter to CGPJV’s ‘reasonable satisfaction’. This raises the issue of what constitutes CGPJV’s ‘reasonable satisfaction’ and whether any commercially sensitive information would be required.

The Commission’s concerns were raised with CGPJV who subsequently proposed that any commercially sensitive information could be provided to an independent person nominated by CGPJV and who would undertake to keep the information confidential. The Commission requires an amendment to this effect, but subject to the independent person being mutually agreed by the service provider and prospective user, and the prospective user bearing the independent person’s costs.

Priority of services

CGPJV’s proposed access arrangement provides for a request for a reference service to have priority over a request for a negotiated service. The Commission has some sympathy with the view that a prospective user’s position in the queue should not be placed in jeopardy if the prospective user wishes to negotiate a service other than the reference service. Accordingly, in the Draft Decision the Commission proposed an amendment that the reference service and negotiated services should have equal priority, subject to the condition that CGPJV would not be deprived of the right to provide the reference tariff at the reference service. The Commission considers it particularly relevant in this instance as the proposed access arrangement contains only one specific service, the reference service, and hence negotiated services may conceivably become quite common.

In its response, CGPJV stated that it would have no objection to an amendment which states that the reference service and negotiated services have equal priority unless the

only issue of contention is the tariff, in which case the reference service would have priority. In other words a prospective user seeking the reference service at the reference tariff would have priority over a prospective user seeking the reference service at a discount. This is in accordance with the intent of the Commission's Draft Decision. Accordingly, the Commission requires an amendment to this effect.

Extensions and expansions policy

CGPJV's proposed access arrangement provides that CGPJV would consult with the Commission regarding whether or not an extension of the CGP, or expansion beyond capacity of 175TJ/day, would be treated as part of the covered pipeline. However, there would be no obligation on the part of CGPJV to seek the Commission's consent.

For expansions up to 175TJ/day, CGPJV would require evidence of sufficient proven reserves before committing to expanding the pipeline.

In its Draft Decision the Commission proposed some amendments to CGPJV's extensions and expansions policy. Firstly, the Commission proposed an amendment that CGPJV should seek the consent of the Commission to include an extension as part of the covered pipeline. CGPJV objected to this proposal. The Commission has reconsidered its position and agrees that CGPJV's original proposal is reasonable and consistent with the Code. This is in line with other recent decisions of the Commission on this matter.

Secondly, the Commission proposed that CGPJV should specify how an extension that is to be treated as part of the covered pipeline will affect reference tariffs. CGPJV indicated that it has no objection to this proposal. However, the derogation is framed in such a manner that only the reference tariff can apply to extensions which are commissioned while the capacity of the pipeline is below the nominal capacity¹ of 175TJ/day. In other words the derogation prevents CGPJV from applying a surcharge to incremental users. CGPJV's extensions policy should reflect this position.

Thirdly, CGPJV proposed that it would expand the pipeline up to 175TJ/day subject to certain conditions, including that it would satisfy itself of the adequacy of reserves. Some interested parties objected to this proposal on the basis that prospective users may be required to reveal commercially sensitive information about their gas supply arrangements. In its Draft Decision the Commission proposed an amendment that CGPJV could not require a prospective user to provide any information that the prospective user reasonably believes may be commercially detrimental to it to reveal. CGPJV has now proposed that such information could be submitted an independent person nominated by CGPJV and who would undertake to keep the information confidential. The Commission requires an amendment to this effect, but subject to the independent person being mutually agreed between the service provider and prospective user, and the prospective user bearing the independent person's costs.

Fourthly, the Commission proposed an amendment that CGPJV should specify objective thresholds at which it would expand capacity up to 175TJ/day. CGPJV has

¹ The capacity to which the derogation applies.

indicated that it prefers to reserve its judgment and make a commercial decision at the appropriate time. CGPJV is reluctant to make any commitment in advance given the level of expansion involved and the long lead time until review of the access arrangement (May 2023). The Commission also notes that since release of the Draft Decision, CGPJV has publicly announced its plans to expand the capacity of the pipeline through the installation of a compressor. The Commission has now decided not to require CGPJV to make the amendment.

Fifthly, the Commission proposed an amendment that any expansion of capacity beyond 175TJ/day would to be considered as part of the covered pipeline unless the Commission agreed otherwise. This proposed amendment is consistent with the approach adopted by the Commission in its Final Decision on the Moomba to Adelaide pipeline. In that decision the Commission noted the potential for market power when capacity is full and the opportunity for monopoly rents to be extracted if the expansion is unregulated. In its Final Decision on Epic Energy's Ballera to Wallumbilla Pipeline, the Commission took a different approach and concluded that the derogation diminished significantly Epic Energy's ability to exert market power. The Commission has adopted a similar approach with respect to the CGP. The Commission notes that the current capacity of the pipeline is well below the nominal capacity of 175TJ/day.

Section 3.16(b) of the Code provides that the extensions and expansions policy should specify how any extension or expansion that is to be treated as part of the covered pipeline will affect reference tariffs. One option proposed by CGPJV for expansions beyond 175TJ/day is that the reference tariff will remain unchanged but a surcharge will be levied on incremental users. The Commission has received legal advice that the reference service cannot apply to expansions beyond 175TJ/day. Therefore, the option proposed by CGPJV is inconsistent with the derogation and should be deleted from the access arrangement, as it implies that the reference service would be available.

Review and expiry of the access arrangement

As the revisions submission date, 1 November 2022, and the revisions commencement date, 1 May 2023, are prescribed in the derogation the Commission has no ability to review these dates. A further consequence of the derogation is that, having approved the non-tariff elements of the access arrangement in this process, the Commission will not then be entitled to review the non-derogated elements of the access arrangement again prior to the revisions submission date.

Given the uncertainty arising from the extended duration of the access arrangement period, the Commission requires that specific major events be defined in the access arrangement which would trigger a review of the access arrangement prior to the revisions submissions date. While an early review would have no implications for the derogated reference tariff and reference tariff policy, since the Commission has no power to review these prior to the year 2023, the Commission would not be similarly constrained with respect to the non-tariff elements that have not been derogated.

Amendments

The Commission requires the following amendments to the access arrangement.

Amendment A2.1

In order for CGPJV's access arrangement for the CGP to be approved, the additions to the reference tariff policy must be removed so that it accurately reflects the Tariff Arrangement approved by the Minister.

Amendment A3.1

In order for CGPJV's access arrangement for the CGP to be approved, CGPJV's access arrangement must be amended by deleting all references to its standard Access Agreement.

Amendment A3.2

In order for CGPJV's access arrangement for the CGP to be approved, CGPJV must amend its terms and conditions to state that, subject to other provisions in the access arrangement, CGPJV will be obliged to transport and deliver gas nominated by the user on each day up to the user's MDQ.

Amendment A3.3

In order for CGPJV's access arrangement for the CGP to be approved, section 6.5 of the proposed queuing policy must be amended such that CGPJV, in seeking that a prospective user demonstrate that it will have access to a supply of gas at the time it is anticipated it will be offered access to the service, cannot require a prospective user to divulge to CGPJV to any commercially sensitive information (such as location of the gas supply or the identity of the supplier). CGPJV may require that such information be provided to an independent person mutually agreed to by the CGPJV and the prospective user and who undertakes to keep the information confidential. The independent person's costs shall be borne by the prospective user.

Amendment A3.4

In order for CGPJV's access arrangement for the CGP to be approved, CGPJV must amend its queuing policy to provide that the reference service and negotiated services have equal priority, subject to a prospective user seeking the reference service at the reference tariff having priority over a prospective user seeking the reference service at a tariff less than the reference tariff.

Amendment A3.5

In order for CGPJV's access arrangement for the CGP to be approved, section 7.1 of the proposed extensions and expansions policy must be amended to state that, while the capacity of the pipeline is below 175TJ/day, the service provider cannot levy a surcharge on incremental users on an extension that is to be considered part of the covered pipeline.

Amendment A3.6

In order for CGPJV's access arrangement for the CGP to be approved, section 7.2 of the proposed extensions and expansions policy must be amended such that CGPJV, in seeking to satisfy itself that sufficient proven reserves exist to cover the economic life of the expanded pipeline, cannot require a prospective user to divulge to CGPJV any commercially sensitive information. CGPJV may require that such information be provided to an independent person mutually agreed to by the CGPJV and the prospective user and who undertakes to keep the information confidential. The independent person's costs shall be borne by the prospective user.

Amendment A3.7

In order for CGPJV's access arrangement for the CGP to be approved, CGPJV must amend section 7.3 of its extensions and expansions policy by deleting the clause that reads:

that the expansion will form part of the covered pipeline and that Reference Tariffs will remain unchanged but a Surcharge will be levied on Incremental Users as permitted under the Access Code.

Amendment A3.8

In order for CGPJV's access arrangement for the CGP to be approved, the Commission requires CGPJV to include a list of specific major events that will trigger a review of the non-tariff elements of the access arrangement that do not form part of the Tariff Arrangement approved by the Minister, such as the interconnection of another pipeline with the CGP and the introduction of a significant new gas supply source to one of the CGPJV's markets.

Pursuant to section 58 of the *Gas Pipelines Access (Queensland) Act 1998*, and for so long as that section remains in effect, a review of this access arrangement as a result of one of these major events occurring cannot result in revisions to those parts of the access arrangement that are taken to be approved under that section.

1. Introduction

1.1 Background

On 3 November 2000 the Carpentaria Gas Pipeline Joint Venture (CGPJV)² submitted its proposed access arrangement for the Ballera to Mount Isa Pipeline, commonly known as the Carpentaria Gas Pipeline (CGP), to the Australian Competition and Consumer Commission (the Commission) for approval. The application was made under section 2.2 of the *National Third Party Access Code for Natural Gas Pipeline Systems* (the Code).

The CGP transports gas from the fields at Ballera in south west Queensland to Mount Isa in north west Queensland. It was constructed to meet the energy needs of the mining industry in north west Queensland and carries gas to mines and power generation facilities. Construction of the CGP commenced in 1997 following a bidding process and was completed in 1998. AGL was successful in obtaining the development rights for the pipeline through Roverton Pty Ltd, at that time a subsidiary of AGL and now owned by the Australian Pipeline Trust (APT).

On 13 June 2000, AGL floated its gas pipeline assets through the APT, which owns 70 per cent of the CGP and 100 per cent of the lateral to Cannington. The other parties to the joint venture are the South West Queensland (SWQ) Producers.³

The access arrangement describes the terms and conditions on which CGPJV proposes to make access to services provided by the CGP available to third parties. On 15 August 2001 the Commission made its Draft Decision and proposed not to approve the proposed access arrangement as submitted.

The Commission has now made a Final Decision⁴ not to approve CGPJV's proposed access arrangement. This Final Decision sets out the amendments (or nature of the amendments) that CGPJV would have to make in order for the Commission to approve the access arrangement.

Under section 58 of the *Gas Pipelines Access (Queensland) Act 1998*, some elements of the access arrangement, notably the reference tariff and reference tariff policy, reference service and review date, have been determined by the Queensland

² Comprising: Roverton Pty Ltd; Santos Ltd; Delhi Petroleum Pty Ltd; Boral Energy Resources Ltd; Vamgas Pty Ltd; Australian Hydrocarbons Ltd and Oil Company of Australia. Roverton is the operator of the CGP.

³ APT offer document, *Buried Treasure*, May 2000, p. 33. The 'SWQ Producers' is a reference to the producers of gas in the Cooper Basin of south west Queensland.

⁴ The proposed access arrangement initially lodged by CGPJV and placed on the Commission's website contained errors in the numbering of provisions. An amended version of the proposed access arrangement has subsequently been placed on the Commission's website, however many submissions referred to provisions that had incorrect numbering. References in the Commission's Final Decision are to the amended version. For amended version of the access arrangement, please refer to: <http://www.accc.gov.au/gas/fs-gas.htm>

Government for the initial access arrangement period and cannot be reviewed by the Commission. Consequently, the Commission has jurisdiction to require amendments to the access arrangement with respect to the other non-tariff elements only. Many of the issues raised in the submissions related to matters over which the Commission currently has no jurisdiction as a result of the derogation imposed by the Queensland Government. The Queensland Government would have to amend its legislation before the Commission would have any authority to require amendments to the access arrangement in relation to the derogated elements.

The remainder of this introduction includes:

- a description of the current assessment process and the steps to final approval of an access arrangement for the CGP;
- a description of the regulatory framework for the Queensland gas pipeline industry;
- a summary of the criteria for assessing an access arrangement under the Code; and
- the Commission's Final Decision.

1.2 Consultative process and relevant documents

The Code sets out the following public consultation process applicable to the Commission as regulator. The Commission must:

- inform interested parties that it has received the access arrangement;
- publish a notice in a national daily newspaper that describes the covered pipeline to which the access arrangement relates, states how copies of the application documents can be obtained and requests submissions by a date specified in the notice;
- publish notices in a national daily newspaper of extensions to the date by which a final decision on the access arrangement is due;
- after considering submissions received, issue a draft decision that either proposes to approve the access arrangement or proposes not to approve the access arrangement. The Commission must state the amendments (or the nature of the amendments) that have to be made to the access arrangement in order for the Commission to approve it. The Commission must seek submissions following release of the draft decision;
- after considering any additional submissions and a revised access arrangement (if submitted), 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) that 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 for the CGP.

In November 2000 the Commission published an advertisement in the Australian Financial Review to advise that it had received CGPJV's proposed access arrangement. The advertisement invited submissions from interested parties in response to an issues paper released at that time. Submissions were received from Agility Management Pty Ltd (Agility) on behalf of CGPJV, BHP Minerals Pty Ltd (BHP), CS Energy Limited (CS Energy), Ergon Energy Gas Pty Ltd (Ergon), MIM Holdings Limited (MIM), Pasminco Century Mine Ltd (PCML), Santos Ltd (Santos) and the Queensland Office of Energy. The submissions raised many issues including the following concerns:

- the access arrangement offers only one reference service, although many other services may be demanded between now and the end of the access period;
- the service provider may withhold consent in response to a request by a user to change receipt or delivery points on 'reasonable commercial or technical grounds', but these are not specified in the access arrangement;
- the service provider may elect whether an expansion of capacity beyond 175TJ/day or an extension is treated as part of the covered pipeline;
- there are no stated threshold levels of capacity that trigger the installation of compressors on the CGP up to capacity of 175TJ/day; and
- the access arrangement expires in 2023, an excessive period of time, and there are no triggers for a review of either the tariffs or the non-tariff elements of the access arrangement.

The Commission's Draft Decision proposed ten amendments to the access arrangement. The Commission invited submissions in response to its Draft Decision and received submissions from CGPJV, BHP and the Queensland Government.

1.3 Regulatory framework

1.3.1 Relevant legislation

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

Gas Pipelines Access (Queensland) Act 1998

The *Gas Pipelines Access (Queensland) Act 1998* (the Act) governs the conduct of pipeline service providers and other interested parties in respect of access and regulatory issues, dispute resolution and administrative processes. In addition, the Act 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 Act 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. Consequently, the reference tariffs are non-reviewable for an extended period of time – in the case of the CGP in excess of 20 years.

The National Third Party Access Code for Natural Gas Pipeline Systems (the Code)

The Code requires, among other things, service providers of gas transmission to submit access arrangements to the Commission for approval. Owners of pipelines that were covered by the Code when it was implemented are obliged to lodge access arrangements. The CGP came into operation after the Code was implemented and is deemed to be a covered pipeline under the Code pursuant to section 57 of the Act.

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.

Regulatory institutions

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

- the National Competition Council (NCC) – coverage advisory body;
- the Commonwealth Minister – coverage decision maker;
- the Commission – relevant regulator and relevant arbitrator;⁵
- the Australian Competition Tribunal – merits review body; and
- the Federal Court – judicial review.

The Queensland Competition Authority⁶ (QCA) is regulator and arbitrator in Queensland with respect to distribution (reticulation) pipelines.

1.3.2 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 regime 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 recommends to the relevant Commonwealth Minister whether the access

⁵ The Commission is also regulator and arbitrator with respect to transmission pipelines in the other States and territories with the exception of Western Australia.

⁶ *Queensland Competition Authority Act 1997*.

regime should be certified as effective. The Commonwealth Minister is the decision maker.

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 recently notified the NCC that he had received a substantial amount of new material from the Queensland Government and the owners of four gas pipelines subject to derogations under the Queensland regime. The Minister has sought the NCC's advice as to whether this material raises new issues of relevance to his consideration of the 'effectiveness' of the Queensland gas pipeline access regime.

To ensure that all relevant material is properly reflected in its advice to the Minister, the NCC has withdrawn its February 2001 recommendation and will forward a fresh recommendation once it has given full consideration to the submission from the Queensland Government and the joint submission from major pipeline companies.

Given that considerable time has elapsed since interested parties had an opportunity to provide views on the effectiveness of the Queensland Regime, the NCC considers it appropriate to release a draft recommendation for comment prior to forwarding its final recommendation to the Minister.

If the Commonwealth Minister does not certify the 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. 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 rather than the Code to determine a tariff in these circumstances.

1.4 Duration of CGP access arrangement

As established in the derogations, the revisions submission date for the review of CGPJV's access arrangement is 1 November 2022.

1.5 Criteria for assessing an access arrangement

The Commission may approve a proposed access arrangement only if it is satisfied that it contains the elements and satisfies 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 in approving an access arrangement.

An access arrangement must include a policy on the service or services to be offered, including 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 other 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 only those elements of a service that they require, and the policy must allow for a separate tariff for an element of a service so requested.

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

An access arrangement must also include the following elements:

- terms and conditions on which the service provider will supply each reference service;
- a statement of 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 a user's priority in obtaining access to spare and developable capacity on a pipeline;
- an extensions and 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 Final decision

Pursuant to section 2.16 of the Code the Commission does not approve the access arrangement for the CGP submitted by CGPJV in its current form. The 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 Final Decision and are brought together in the Executive Summary.

CGPJV must submit a revised access arrangement to the Commission by 28 February 2002 that substantially incorporates these amendments or otherwise addresses to the Commission's satisfaction the issues that gave rise to the amendments. Chapter 2 of this Final Decision describes the reference tariff and reference tariff policy that has been determined by the Queensland Minister.

Chapter 3 set outs the Commission's analysis of the mandatory non-tariff elements of the access arrangement, including: the services policy; terms and conditions; capacity management policy; trading policy; queuing policy; extensions and expansions policy; and review and expiry of the access arrangement.

Chapter 4 examines the provision of access arrangement information.

Chapter 5 states the Commission's Final Decision.

2. Reference tariff elements

2.1 Reference tariff and reference tariff policy

2.1.1 Code requirements

Sections 3.3 to 3.5 of the Code require an access arrangement to include a reference tariff for at least one service that is likely to be sought by a significant part of the market and other services for which the Commission considers a reference tariff should be included. An access arrangement must also include a policy describing the principles that are to be used to determine a reference tariff (a reference tariff policy). The reference tariff and reference tariff policy should comply with the reference tariff principles in section 8 of the Code.

The reference tariff and reference tariff policy for the CGP, however, have been derogated by the Queensland Government. Consequently, they are not subject to review by the Commission in its consideration of CGPJV's proposed access arrangement.

2.1.2 CGPJV's proposal

CGPJV is proposing a reference tariff for one service (non-interruptible forward haul) in accordance with the Tariff Arrangement approved by the Minister (derogated tariff arrangement). The reference tariff is described in section 1 of Schedule A of the proposed access arrangement and does not apply to capacity beyond 175TJ/day. Where the term of an access agreement for a reference service extends beyond the revisions commencement date, the tariffs payable under the access agreement will be the reference tariff then payable for a comparable service, or as otherwise agreed.

The Base Tariff Rates are set out in Schedule A – Attachment A1 and replicated in Table 2.1 of this Final Decision. Under the terms of the derogated tariff arrangement, the Base Tariff Rates increase each quarter by 75 per cent of the Consumer Price Index (CPI) (clause 1.2.4).

The derogated tariff arrangement provides for an adjustment to tariffs for contracts with a term of less than 15 years. For these users, tariffs will increase by two per cent for each year that the term of the contract is less than 15 years.

The derogated tariff arrangement also provides that if a user takes delivery of less than the Minimum Quantity⁷ in any year, the service provider will be entitled to charge the reference tariff as if the user had taken delivery of the Minimum Quantity in that year (clause 1.2.5(a)). Clause 1.2.5(a) does not apply to the Principal Foundation User in relation to its Initial Capacity Reservation. In the event that the Principal Foundation User takes delivery of less than 17PJ in any year, the service provider will be entitled to

⁷ Minimum Quantity is defined as the higher of 90 per cent of the contracted quantity or 90 per cent of the Highest Average Quantity of Gas (Schedule A – Attachment A3).

charge the reference tariff as if the Principal Foundation User had taken delivery of 17PJ in that year (clause 1.2.5(b)).

The derogated tariff arrangement also provides for an adjustment to tariffs in accordance with a user's load factor. A user's tariff in any quarter will be determined in accordance with the following formula:

$$\text{Arq} = \text{Rq} \times \frac{\text{Load Factor}}{1.2}$$

where:

Arq = the tariff rate for the relevant quarter

Rq = the adjusted base tariff rate for the relevant quarter, and

Load Factor is defined as the average of the three highest quantities of gas delivered to the user during the year divided by the Average Daily Quantity of Gas for that year.

Under this formula users with poor load factors will pay higher tariffs relative to users with efficient load factors. The formula, therefore, acts as an incentive to encourage users to improve their load factors, which in turn would lead to a more efficient use of the pipeline.

The structure of the reference tariff is often referred to as a 'postage stamp' tariff, in that the tariff is not distance-based. A user at Mt Isa will pay the same tariff as a user along the pipeline and closer to the receipt point (given the same volume assumptions).

The derogated tariff arrangement (clause 1.3.5) provides that the service provider is not entitled to recover from users by way of charges:

- the cost of constructing any capital improvements to the pipeline to increase capacity up to 175TJ/day; or
- the cost of compressor fuel used in the operation of the pipeline except where gas is delivered into the pipeline by or on behalf of a user at a pressure less than 14 800kPa.

The derogated tariff arrangement also includes provisions for overrun charges and imbalance charges. These provisions are discussed in section 3.2, 'Terms and conditions', of this Final Decision.

As well as the derogated tariff arrangement, CGPJV is proposing to include in the reference tariff policy additional provisions relating to adjustment of the capital base to take account of new facilities investment (Clause 4 of the access arrangement).

Table 2.1: Base tariff rates for the CGP as at 30 September 1994

Access Agreement	Amount
(a) Access Agreements between the Service Provider and the Principal Foundation User entered into prior to completion.	80 cents/GJ The Principal Foundation User may take delivery of up to 105% of the Initial Capacity Reservation at a Base Tariff Rate determined in accordance with this paragraph (a). If the Principal Foundation User takes delivery of more than 105% of the Initial Capacity Reservation, the Base Tariff Rate of 96 cents/GJ will apply in relation to the excess.
(b) Access Agreements entered into prior to Completion other than those referred to in paragraph (a) of this Attachment where the User elects to be treated as a Foundation User	Between 86 cents and 96 cents/GJ with the precise Base Tariff Rate being determined by the formula: Base Tariff Rate - $[96 - (F-25)/2]$ cents/GJ Where: F = the number of petajoules of gas transported through the Pipeline in a particular Year for all Users PROVIDED THAT if less than 25 petajoules of gas are transported through the Pipeline in a particular Year for all Users, F will be 25 for the purpose of calculating the Base Tariff Rate and if more than 45 petajoules of gas are transported through the Pipeline in a particular Year for all Users, F will be 45 for the purpose of calculating the Base Tariff Rate. The User may take delivery of up to 105% of the User's Contracted Annual Quantity at a Base Tariff Rate determined in accordance with this paragraph (b). If the User takes delivery of more than 105% of the Users Contracted Annual Quantity, the Base Tariff Rate of 96 cents/GJ will apply in relation to the excess.
(c) All other Access Agreements	96 cents/GJ

Source: Access arrangement, p. 23.

2.1.3 Submissions by interested parties

CS Energy raised some concerns that the reference tariff policy may place some users at a competitive disadvantage. CS Energy's concerns include:

- lower tariffs for foundation users place subsequent users at a disadvantage;
- higher tariffs for shorter term contracts (less than 15 years) disadvantage smaller users; and
- the lack of reference services (only one reference service with one reference tariff) will mean greater reliance on negotiated services at potentially lower tariffs, which would disadvantage users of reference services.

CS Energy proposed that all negotiated services should be reviewed by an independent third party for their impact on the forecasted revenue that served as the basis for the regulated tariffs. Additionally, CS Energy proposed that a profit sharing policy be implemented so that the revenue from negotiated services does not lead to a windfall for the service provider.

PCML questioned why CGPJV should be entitled to earn additional revenue from negotiated services or other reference services. According to PCML the setting of the reference tariff should provide CGPJV with a full and adequate return on its investment.

CS Energy proposed that zonal pricing be implemented to assist each user to calculate its cost and benefit for trading a contracted service to another user. CS Energy stated that different tariffs between mainline and laterals would assist in a proper allocation of costs to the appropriate end user. CS Energy noted that, as the costs of the Cannington lateral are unknown, a third party would not be able to effectively cost the use of that lateral.

While recognising that review of reference tariffs is outside the Commission's jurisdiction, PCML expressed the view that the adjustment to tariffs for contracts of less than 15 years duration was onerous. Furthermore, without being specific, PCML suggested that some overlap existed between clause 1.2.5 (tariffs calculated on Minimum Quantity) and clause 1.2.6 (adjustment for load factor) which could lead to unintended results.

2.1.4 Commission's considerations

Due to the derogation by the Queensland Government for this pipeline's access arrangement, the Commission is unable to review the reference tariff until the end of the access arrangement period, which is given as the revisions commencement date of 1 May 2023. Consequently, the issues raised by interested parties in relation to the reference tariff and reference tariff policy are outside the Commission's jurisdiction for the initial access arrangement period.

With regard to the additional provisions proposed by CGPJV in relation to new facilities investment, legal advice provided to the Commission indicates that the derogated tariff arrangement represents the reference tariff policy in its entirety. The Commission understands, therefore, that CGPJV is unable to add to the reference tariff policy in the manner proposed. The proposed provisions themselves are not inconsistent with the Code. Nevertheless, because CGPJV does not have the power to modify the reference tariff policy, the Commission requires an amendment that the additional provisions be removed from the access arrangement. In any case these provisions would unlikely have any practical effect. They relate to adjustments to the capital base to take account of new facilities investment, yet a value for the initial capital base has not been established for the initial access arrangement (it does not form part of the derogated tariff arrangement). In effect, a value for the capital base will not be established until the commencement of the next access arrangement period in 2023.

In its Draft Decision the Commission proposed an amendment that would remove the additional clauses from CGPJV's access arrangement. In its response to the Draft Decision CGPJV indicated that it has no objection to the amendment.

Amendment A2.1

In order for CGPJV's access arrangement for the CGP to be approved, the additions to the reference tariff policy must be removed so that it accurately reflects the Tariff Arrangement approved by the Minister.

CS Energy's proposal for zonal pricing is inconsistent with the 'postage stamp' tariff described in the derogated tariff arrangement, which the Commission has no authority to review for the initial access arrangement period. A user may negotiate with CGPJV for a distance-based tariff as part of a negotiated service, however CGPJV is under no obligation to agree to such a request.

The Commission notes the comments by CS Energy and PCML regarding tariffs and revenue relating to negotiated services and CS Energy's proposal for a profit-sharing mechanism. The derogated tariff arrangement contains no provision for a profit-sharing mechanism and the Commission has no power under the derogation to require an amendment to the access arrangement to include such a mechanism.

CS Energy expressed concern that the negotiation of tariffs (under a negotiated service) less than the reference tariff would place users of the reference service at a competitive disadvantage. The Code, however, envisages that some users will negotiate terms and conditions (including tariffs) outside the provisions of the Code. The Code does not limit the terms and conditions on which a service provider and user may reach agreement.

Some interested parties proposed that the access arrangement should contain other reference services for which a reference tariff would be charged. However, due to the nature of the derogation which prohibits any modifications to the reference tariff policy, the Commission is unable to require the inclusion of additional reference services. This issue is discussed in detail in Chapter 3 of this Final Decision under 'Services policy'.

3. Non-tariff elements

In this chapter the mandatory non-tariff elements of the proposed access arrangement for the CGP 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, the issues raised in submissions, CGPJV's response to submissions and the Commission's considerations. Where relevant these are followed by amendments that the Commission requires to 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 mandatory non-tariff 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 and expansions policy which determines whether or not an extension or expansion of a covered pipeline would 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 contain one or more services which are likely to be sought by a significant part of the market, and any service or services that in the relevant regulator's opinion should be included in the services policy.

To the extent that it is 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 CGPJV's proposal

CGPJV proposes to offer two transportation services under its access arrangement:

- a reference service: non-interruptible transportation service for gas delivered into the pipeline by or on behalf of the user through any length of the pipeline in the direction from south west Queensland to Mount Isa, including an overrun service; and
- a negotiated service: agreements negotiated to meet the needs of a user that differ from those in the reference service.

Reference service

The reference service for the pipeline is described in the derogated tariff arrangement and is offered for capacity up to the first 175TJ/day of the pipeline.

Negotiated service

Where a prospective user has special needs that differ from those which would be satisfied by the reference service, the prospective user may seek to negotiate different terms and conditions with CGPJV, hence as a negotiated service. Should a dispute arise, it would be resolved in accordance with the dispute resolution procedures in the Gas Pipelines Access Law and the Code, unless the parties agree otherwise.

Access and requests for service

Clause 1.3 of the proposed access arrangement outlines the procedures for a user or prospective user to request or gain access to a service from CGPJV. For a prospective user to obtain access to a service a request must be lodged and the prudential requirements set by CGPJV must be met. The prudential requirements are listed below. The prospective user may have only one active request for a given tranche of capacity to a particular delivery point, with the minimum level of detail required in this request being that which is detailed in Schedule E of the access arrangement. Should the request be incomplete, CGPJV will advise the prospective user of the deficiency. If the request is amended within seven days, the priority of this request will depend on the date on which CGPJV first received the request. Otherwise, the priority will depend on the date on which CGPJV receives the completed request.

CGPJV proposes that within 30 days of receiving a completed request it will advise the prospective user whether capacity is available, whether there is a queue for that capacity and the price. There will be no queue if there is sufficient capacity to meet a request for service. Should there be insufficient capacity to satisfy a request, a queue will be formed and the queuing policy (outlined in section 6 of access arrangement) will apply. A request will lapse unless the prospective user has either entered into an access agreement for a reference service or a negotiated service, or commenced bona fide negotiations, within 30 days of CGPJV advising that capacity is available.⁸

⁸ A request for service will not lapse in the event of a dispute being notified under the Code until that dispute has been resolved in accordance with the Code.

Prudential requirements

CGPJV proposes that its prudential requirements must be met in order for a prospective user to obtain a service from CGPJV. These prudential requirements, which are listed in clause 1.3 of the proposed access arrangements, are:

- the prospective user must be a resident in, or have a permanent establishment in, Australia;
- the prospective user must not be under external administration as defined in the Corporations Law or under any similar form of administration in any other jurisdiction; and
- the prospective user may be required to provide reasonable security in the form of a parent company guarantee, a bank guarantee or similar security. The nature and extent of the security will be determined having regard to the nature and extent of the obligations of the prospective user under the access arrangement.

3.1.3 Submissions by interested parties

Many submissions stated that is inappropriate for CGPJV to offer only a single reference service. Given that the proposed access arrangement will result in there being no ability to require another reference service or reference tariff until the year 2023, the following suggestions for additional reference services have been proposed:

- pressure service: a mechanism that sets a tariff for a pressure service should be included, which takes into consideration the obligations of CGPJV to expand the pipeline under the proposed access arrangement;
- CS Energy suggested that the access arrangement should declare how it will treat requests for pressure exceeding its declared minimum and the impact that this service could have on users and prospective users. Additionally, it should indicate how such a pressure service could impact on the queuing policy, the timing of any compressor installations or looping and the treatment of pressure service costs;
- interruptible service: a transparent interruptible service should be made available given that this service is available on most pipelines;
- backhaul service: a tariff should be published for this service due to the real possibility of alternative gas supplies from the Timor Sea and PNG;
- a per kilometre service: both BHP and CS Energy suggested a per kilometre service. CS Energy proposed that the tariff could be structured to give a capacity reservation charge for a firm forward haul relative to the distance from receipt and delivery points with a separate throughput charge based on distance transported;
- spot tariff: in CS Energy's opinion spot tariffs should be allowed as a regulated tariff as there could be more gas producers and more gas pipeline users in the future, thus more flexible tariffs would decrease the costs for the end user; and
- overrun and imbalance policy: designated for an 'essential service' user.

3.1.4 Commission's considerations

In light of the comments from interested parties regarding the provision of additional services and given that the access arrangement cannot be reviewed until 2023 – an extensive period of time in which many new developments could take place – the Commission sought legal advice as to whether the Commission can require the inclusion of additional reference services.

The Commission has received legal advice that it cannot require the inclusion of additional reference services. Of relevance is section 58(3) of the Act, which states:

The approved tariff arrangement is taken to be approved under the Gas Pipeline Access Law as the reference tariff and the reference tariff policy for the access arrangement to be submitted under the law for the pipeline until the revisions commencement date for the access arrangement.

As the derogated tariff arrangement provides for only one reference service and reference tariff, any amendment to the access arrangement that required CGPJV to include additional reference services, with associated reference tariffs, would appear to contravene section 58(3) of the Act. The Commission, however, would be entitled to require the services policy in the access arrangement to describe additional services, but these would have to be included as non-reference services, as no additional reference tariff can be set for a pipeline that is subject to a derogated tariff arrangement under the Act.

In discussion with users, they indicated their preference for the Commission to act upon this advice. That is, to require the inclusion in the access arrangement of additional services as non-reference services.

In view of the legal advice provided to the Commission, the Commission sought the advice of the Queensland Government on possible options to address the limitations of the derogated tariff arrangement. The Queensland Office of Energy replied that it did not consider that additional reference services were required. It noted that the access arrangement provides for a 'negotiated service' which would cover any additional services sought by users. The Office of Energy also noted that in the event of a dispute over terms and conditions, a prospective user has recourse to the dispute resolution provisions of the Code. The Office of Energy stated that it does not consider that it would be appropriate for the Queensland Government to amend the derogation. It stated that:

... it was intended that the derogations would preserve the outcomes of effective regulatory processes undertaken at the time of granting pipeline licences.⁹

CGPJV's service policy satisfies section 3.2 of the Code as it contains one service that is likely to be sought by a significant part of the market. The Commission does not require CGPJV to amend its access arrangement to include in its services policy any additional services. Since these services could only be included as non-reference services, some negotiation between CGPJV and the user as to terms and conditions would still be necessary. Any additional services required by users, such as backhaul or an interruptible service, could be settled with CGPJV as a negotiated service, as

⁹ Queensland Office of Energy letter to the Commission, 25 June 2001, p. 1.

contained in the access arrangement. In the event of a dispute, the prospective user has recourse to the dispute resolution provisions of the Code.

Moreover, the Commission does not consider that the inclusion of additional non-references services is an imperative at the current time. This may change over time, however, as new developments in the gas industry occur, such as a pipeline from Timor Sea to Mt Isa. This may become a crucial issue with respect to the CGP access arrangement, particularly as the derogation provides that the access arrangement will not be reviewed until the year 2023. For this and other reasons the Commission requires an amendment to the access arrangement to the effect that CGPJV must specify major events that will trigger a review of the non-tariff elements of the access arrangement. This proposal is considered in more detail in section 3.7 of this Final Decision.

With respect to BHP's and CS Energy's proposal for a 'per kilometre service' with an accompanying distance based tariff, such a tariff would be inconsistent with the 'postage stamp' tariff provided for in the derogated tariff arrangement. The addition of a per kilometre service would essentially be a variation to the reference tariff which, because of the derogation, is outside the jurisdiction of the Commission.

3.2 Terms and conditions

3.2.1 Code requirements

Section 3.6 of the Code requires an access arrangement to 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 CGPJV's proposal

CGPJV proposes that it will provide services on the terms and conditions set out in its standard Access Agreement for the service from time to time. CGPJV also proposes that the terms and conditions of Access Agreements will be consistent with the access arrangement, including the derogated tariff arrangement in Schedule A and the terms and conditions described in Schedule C. The terms and conditions contained in Schedule A form part of the derogation and therefore the Commission has no ability to review those terms and conditions. The remaining terms and conditions, which are set out in Schedule C, are subject to approval by the Commission in accordance with the Code.

In its proposed access arrangement, CGPJV submits that it will not discriminate between prospective users in the provision of services on the basis of:

- past transactions or relationships with any one or more of the owners of the pipeline;
- the identity of the prospective user; or
- the prospective user being a related party of any one or more of the owners of the pipeline.

Following is a summary of the key aspects of the terms and conditions covered in Schedule A (the derogated tariff arrangement) and Schedule C of the access arrangement.

Overrun charges (Schedule A, clause 1.3.7)

Overrun charges may apply if on any day a user takes delivery of a quantity of gas that exceeds the user's contracted capacity. Authorised overruns will be charged at the same rate as the Base Tariff Rate, whereas unauthorised overruns will be charged at twice the Base Tariff Rate. No overrun charges will apply if:

- the total quantity of gas transported for all users is less than 82TJ/day, in which case no overrun charges will be levied; or
- the overrun was caused by CGPJV without the user's prior approval.

Imbalance charges (Schedule A, clause 1.3.8)

CGPJV and the user are obliged to cooperate in good faith to minimise or eliminate any imbalance. Should an imbalance exist at the end of any given month, the user must rectify the imbalance in the subsequent month. If the user fails to take corrective action during that month, the service provider may adjust the user's receipts and deliveries over that subsequent month. If an imbalance still remains at the end of that subsequent month, the service provider may charge the user an imbalance charge pursuant to clause 1.3.8.4.

Conditions relating to gas (Schedule A, clause 2.2.1)

The reference service is subject to the conditions that (a) the gas entering the pipeline must conform to specifications in Attachment 2, (b) CGPJV has the right to commingle gas, (c) users must deliver gas into the pipeline at the receipt location at a pressure of 14 800kPa and (d) the service provider will provide a minimum pressure of 2000kPa at the inlet to delivery locations.

Linepack (Schedule A, clause 2.2.3)

CGPJV shall provide a fixed quantity of gas to form part of the linepack and users shall supply the remainder of the linepack at their own cost. CGPJV shall determine as necessary the quantity of gas required for the linepack and then advise users of the quantity of gas that they will be required to supply. A user's share of linepack is the ratio of the user's contracted quantity to total contracted quantity multiplied by the total quantity of linepack less the quantity supplied by CGPJV.

Obligation to transport (Schedule C, clauses 3 and 9)

CGPJV's obligation to transport gas will consist of the receipt of gas at a user's receipt point(s) and delivery of an equivalent quantity of gas to the user's delivery point(s), net of the user's share of linepack. CGPJV is under no obligation to receive or deliver gas on any day in excess of a user's MDQ.

Nominations and variations (Schedule C, clauses 37 and 38)

Where a user requests in advance an increase (decrease) in the quantity of gas to be delivered from a delivery point, CGPJV will increase (decrease) the quantity of gas to be delivered from that point provided that:

- it does not impact on the receipt or delivery of gas for or on behalf of other users; and
- the linepack supplied by the user does not fall below (exceed) that linepack which CGPJV reasonably determines is the minimum (maximum) linepack required to be supplied by the user during that day for the pipeline.

Liabilities and indemnities (Schedule C, clause 24)

Liability will be limited to actual damages and will not extend to consequential or indirect loss except for delivery of non-specification gas to a receipt point, or due to negligence or wilful default of CGPJV. If the quantity withdrawn at a delivery point is greater than MHQ in any hour, or greater than MDQ in any day where the circumstances outlined in 1.3.7.1 (a) of Schedule A apply, then liability does include consequential or indirect loss.

Interruptions and curtailments (Schedule C, clause 26)

When emergency repairs or maintenance are required, or when necessary to protect the operational integrity or safe operation of the pipeline, CGPJV can curtail or interrupt receipts and deliveries without incurring liability.

3.2.3 Submissions by interested parties

Both Ergon and PCML's submissions indicated that the access arrangement does not clearly identify the relevant terms and conditions, which would enable prospective users to be sufficiently well informed before making a specific access request.

Ergon noted that the format of the access arrangement, whereby terms and conditions are dispersed throughout the numerous schedules, means that it is difficult to fully assess the requirements and obligations of a user or prospective user. Ergon suggested a comprehensive 'terms and conditions' schedule, which incorporates all necessary aspects of an access arrangement within the one document.

Conditions relating to gas

Both MIM and PCML found it unsatisfactory that a minimum delivery pressure of 2000kPa should be provided for in the derogated tariff arrangement. The major delivery point at the Mica Creek Power Station (MCPS), where 67 per cent of the capacity is disposed, requires a minimum pressure of 3000kPa. They stated that if the pressure at the MCPS delivery point falls from 3000kPa to 2000kPa then the capacity of the pipeline increases by only 2TJ/day. According to MIM and PCML this gives much scope for confusion and obfuscation when the pipeline is close to maximum capacity. CS Energy stated that if a pressure service were part of the access arrangement then this contractual ambiguity would not occur.

Linepack

CS Energy stated that a lack of information makes it unclear what detailed terms and conditions will apply for the day to day administration of the pipeline. For example, the method to be used by CGPJV for determining the amount of linepack to be provided is not stated or how the day-to-day administration of linepack is to be effected, creating uncertainty and potential conflict between users and CGPJV.

BHP stated that Schedule C implies that users are to provide linepack. According to BHP, the means by which the provisions are to be implemented should be clarified, to the effect that:

- differences between nominations, scheduled deliveries and receipt point allocations do not affect the transporter's firm obligation to transport gas up to the MDQ; and
- differences between nominations and deliveries are managed by the shipper to ensure that linepack is maintained against the target linepack.

Liability and indemnities

BHP noted what it considers to be an inconsistency in clause 24 of Schedule C, 'Liability and Indemnities'. This clause specifies that there is no limitation upon consequential loss in the case of delivery of non-specification gas to a receipt point, however, in the case of a delivery point, liability only applies to CGPJV where there has been negligence or wilful default by CGPJV.

Interruptions and curtailments

BHP submitted that the rights to interrupt and curtail should be expressed in such a manner that it may not be construed as relieving the transporter from liability where the interruption or curtailment constitutes a breach of the transporter's obligation to transport.

3.2.4 Commission's considerations

The proposed terms and conditions of access can be found in two sections of the access arrangement: included in the provisions that form part of the derogation; and as part of those provisions that are subject to approval by the Commission in the normal course of its assessment of the access arrangement under the Code. While the Commission considers that structuring the terms and conditions in this manner is a sensible policy for regulatory purposes, a comprehensive schedule of terms and conditions may be more useful for users and prospective users. CGPJV has agreed to produce such a document.

Some of the concerns raised by interested parties, such as MIM and PCML's comments that a minimum pressure of 2000kPa is inadequate, relate to matters contained in the derogation and are not subject to review by the Commission. Moreover, the minimum pressure at individual delivery points would seem to be essentially a contractual matter between the parties involved.

The proposed access arrangement states that CGPJV will provide services on the terms and conditions set out in its standard Access Agreement for the service **from time to**

time. The standard Access Agreement does not form part of the proposed access arrangement. The Commission is concerned that this provision may effectively allow CGPJV to make unilateral changes to its standard Access Agreement, and hence to the approved non-tariff terms and conditions of access, without reference to the Commission.

To protect the integrity of the access arrangement process, the Commission proposed in its Draft Decision an amendment to the access arrangement. The Commission proposed that:

- CGPJV either submit its standard Access Agreement as part of the access arrangement; or alternatively
- that it be made clear that prospective users have a right to access the reference service subject only to the terms and conditions contained in the access arrangement (this would not prevent prospective users voluntarily agreeing to variations to these terms and conditions).

In its response to the Commission's Draft Decision CGPJV submitted that in reality the second option would be no different to the first. For completeness CGPJV would have to include all the provisions of its standard Access Agreement as part of the terms and conditions of the access arrangement.

CGPJV does not support the amendment as proposed in the Draft Decision for several reasons. CGPJV notes that the amendment would require all changes to its standard Access Agreement to be submitted to the Commission, even those of a technical or operational issue. CGPJV can see no reason for the Commission's involvement in such matters as it would require the Commission to reach a conclusion on detailed commercial and operational issues. Moreover, CGPJV considers that such involvement would be contrary to the concepts of 'light-handed regulation and the underlying principles on which the Code was founded.' Furthermore, CGPJV states that the Code does not mandate regulatory approval of the contracts through which a reference service is provided.¹⁰

CGPJV's preferred approach is for the access arrangement to set out the minimum terms and conditions with detailed contractual terms negotiated with individual users. CGPJV states that if the proposed amendment were adopted any variation to the standard Access Agreement with an individual user would constitute a 'negotiated service', rather than a reference service, even though fundamentally it would be the same as the reference service. CGPJV considers that this would be a 'perverse outcome.'¹¹

CGPJV submitted that it would have no objection to an amendment that requires the terms and conditions of the access arrangement to take precedent over the standard Access Agreement in the event of any inconsistency.

¹⁰ CGPJV submission 8 October 2001, p. 2.

¹¹ CGPJV submission 8 October 2001, p. 2.

The Commission does not consider that the amendment proposed by CGPJV still adequately addresses the issue of the standard Access Agreement being amended without reference to the Commission. As long as the standard Access Agreement as it exists from time to time forms part of the terms and conditions of access, under section 6 of the Code the Commission would be bound by the provisions of that document in the event of a dispute between CGPJV and a prospective user, even though the provisions, and any changes to them, would not have been reviewed by the Commission.

The Commission's preferred approach is to delete the references to the standard Access Agreement from the access arrangement and for all relevant provisions relating to access to be incorporated in the terms and conditions of access. In this manner, minor variations to CGPJV's standard Access Agreement that do not affect access to the pipeline and detract from the value of the reference service would not have to be submitted to the Commission as a review of the access arrangement. This approach was adopted by the Commission in the recent final decisions on the access arrangements for Duke Energy's Queensland Gas Pipeline and Epic Energy's South West Queensland Gas Pipeline. CGPJV was made aware of the Commission's concerns and has advised that it has no objection to the Commission's approach.

Amendment A3.1

In order for CGPJV's access arrangement for the CGP to be approved, CGPJV's access arrangement must be amended by deleting all references to its standard Access Agreement.

Overrun and imbalance charges

These provisions form part of the derogated tariff arrangement and are therefore not subject to review by the Commission.

Linepack

While the derogated tariff arrangement requires that CGPJV provide a fixed quantity of linepack, and users provide the remainder, no guidance is provided as to the method for calculating CGPJV's proportion of linepack. As the linepack provisions are contained in the derogated tariff arrangement, the Commission is not entitled to require CGPJV to make any amendments. Nevertheless, the Commission encourages CGPJV to clarify how it intends to implement in practice its obligations under the derogated tariff arrangement with respect to the supply of linepack.

Some interested parties proposed that CGPJV be required to include provision in its trading policy for the trading of linepack. The Commission considers that it cannot require such an amendment to the trading policy for reasons set out in section 3.4 of this Final Decision. Nevertheless, the Commission considers that, given each user is required to supply a portion of the linepack, the inclusion of a mechanism in the terms and conditions allowing users to trade linepack could assist in the management of nominations and imbalances, and allow users to minimise imbalance charges. CGPJV has indicated to the Commission that the provisions of the access arrangement do not

prevent the trading of linepack. On the other hand, users maintain that nothing in their contracts allows them to do so.

Nominations and variations

In its Draft Decision the Commission stated that it did not support either of the two amendments proposed by BHP with respect to the nominations and variations provisions. Firstly, BHP suggested that the provisions be clarified so that differences between nominations, scheduled deliveries and receipt point allocations should not affect the transporter's firm obligation to transport gas up to the MDQ. The Commission noted that one of the conditions on which CGPJV will agree to any variation in quantities delivered is that the receipt or delivery of gas on behalf of other users is unaffected. The Commission did not consider that the access arrangement provisions relieved CGPJV of any obligations under existing contracts. If a dispute arose, it would be a contractual matter between the parties involved.

In its submission in response to the Draft Decision BHP acknowledged that the access arrangement does not relieve CGPJV of its contractual obligations under existing contracts. However, BHP's concern is with future contracts. BHP contends that Schedule C is worded in such a way that while it protects CGPJV from any obligation to transport gas beyond a user's MDQ, it does not give users the right to require transportation of gas up to a user's MDQ. CGPJV has informed the Commission that its obligation to deliver gas up to a user's MDQ is more implicit in the proposed access arrangement than explicit and that it would not object to an amendment clarifying the position. Accordingly, the Commission requires an amendment to clarify that CGPJV is obliged to deliver gas up to a user's MDQ.

Amendment A3.2

In order for CGPJV's access arrangement for the CGP to be approved, CGPJV must amend its terms and conditions to state that, subject to other provisions in the access arrangement, CGPJV will be obliged to transport and deliver gas nominated by the user on each day up to the user's MDQ.

Secondly, BHP suggested that differences between nominations and deliveries should be managed by CGPJV to ensure that linepack is maintained against the 'target' linepack. In its Draft Decision the Commission noted that the access arrangement provides for use of linepack to accommodate variations provided that linepack is maintained within a 'reasonable' range.

In response BHP stated:

... without the specification of some objective criteria, the unilateral ability of the CGPJV to determine the 'reasonableness' of a range within which line pack is to be maintained is undesirable.¹²

¹² BHP submission, 14 September 2001, p. 4.

Accordingly, BHP suggested that a range of ten per cent would be reasonable ‘to enable this to be properly and transparently operated.’¹³

Commission staff raised this issue with CGPJV who stated that the imposition of some arbitrary range would be too restrictive and limit CGPJV’s ability to manage linepack on a day-to-day basis. CGPJV considers that the access arrangement as proposed already imposes a degree of control on the service provider in relation to determining quantities of linepack and in requiring CGPJV to act reasonably. According to CGPJV, prescribing a specific level is not necessary to ensure CGPJV does not act unfairly or improperly, and that references to a ‘reasonable’ range recognise both the need for CGPJV to have flexibility in the operation of the pipeline and the need for users to be protected from capricious or discriminatory behaviour. The Commission agrees with CGPJV that it requires flexibility in the management of linepack and the imposition of some arbitrary range for linepack may restrict that flexibility.

Liabilities and indemnities

BHP suggested that there is a lack of symmetry in liability between users and CGPJV with respect to consequential loss due to the use of non-specification gas. No limitations are placed on users delivering gas into the pipeline at a receipt point, yet CGPJV’s liability for delivery of non-specification gas at a delivery point is limited to negligence or wilful default of CGPJV. In its Draft Decision the Commission noted that CGPJV’s proposal reflects the lack of control that CGPJV, as the transporter but not the owner of the gas, has over gas entering the pipeline.

In its response to the Draft Decision, BHP reiterated its objection to the proposed provisions of the access arrangement. BHP considers that it is more efficient for liability for consequential loss to be excluded for all parties, except in the case of negligence or wilful default. BHP stated:

A party is able to and probably already does insure to the extent it believes appropriate for business interruption of its own operations, but has limited liability to assess and limited ability to insure against the consequential losses of another business for which it may become liable.¹⁴

Furthermore, BHP submitted that in practice a shipper has no more control than the pipeline owner over the specification of gas entering the pipeline on behalf of the shipper. BHP stated that the pipeline owner, rather than the shipper, is in a better position to monitor the specification of gas entering the pipeline.

The Commission considers that the management of the risk associated with consequential loss as a result of non-specification gas entering the pipeline is essentially a matter between the user and its gas supplier and that such risk should not be borne by the pipeliner (except in the case of its own negligence or wilful default).

¹³ BHP submission, 14 September 2001, p. 4.

¹⁴ BHP submission, 14 September 2001, p. 5.

Interruptions and curtailments

In its Draft Decision the Commission did not agree with BHP's assertion that the provisions relating to interruptions and curtailments could be construed as relieving CGPJV of any contractual obligations to deliver gas. Clauses 25 to 27 of Schedule C of the proposed access arrangement describe quite specific conditions under which an interruption to, or curtailment of, services may take place. Those conditions are planned work on the pipeline, protection of the integrity or safe operation of the pipeline, compliance with any applicable laws and regulations, emergency situations and as a result of force majeure provisions. Failure of CGPJV to fulfil its obligations under any contract is a contractual matter between the parties involved.

In its response to the Draft Decision BHP suggested that clauses 25 to 27 (Schedule C) of the proposed access arrangement as currently worded would entitle CGPJV to curtail or interrupt services, without liability for losses, in order to protect the integrity or safe operation of the pipeline even if the need arose because of poor maintenance practices on the part of CGPJV. To overcome this, BHP suggested that the proposed access arrangement should be amended to the effect that clauses 25 to 27 should not relieve CGPJV of any liability for losses in the event of curtailment or interruption when the curtailment or interruption is a result of negligence, breach of law, or breach of contract on the part of CGPJV.

This issue was raised by Commission staff with CGPJV who noted that clause 22 of Schedule C of the proposed access arrangement imposes on all parties an obligation to maintain and operate their facilities. It is CGPJV's view that it cannot be construed from the provisions of the proposed access arrangement that CGPJV could avoid liability if an interruption or curtailment arose as a result of CGPJV's wilful default or negligence. The Commission agrees with this interpretation.

In its response to the Draft Decision the Queensland Government proposed that Schedule C of the access arrangement should be amended to make it clear that interruptible, spot or other like services should be fully terminated before firm uninterruptible services are reduced. Or as an alternative, the Queensland Government suggested that users could pay a premium for priority rights in the event of an interruption.

Interruptible and spot services are not included in the services policy, but users may negotiate such service as negotiated services. By definition, it would be expected that users of interruptible services would have their gas supplies curtailed before reference service users. Given that apart from the reference service the only other service on offer is a 'negotiated service' which could have terms and conditions different to the reference service, including those relating to interruptions and curtailments, it does not seem practical to implement the Queensland Government's proposal to prioritise services beyond what is contained in the access arrangement.

The reference service is described as a 'non-interruptible gas transportation service' in the approved tariff arrangement. The Commission considers that the Queensland Government's proposal of users opting to pay a premium for priority rights in the event of an interruption would devalue the reference service to other users. Moreover, the

Queensland's Government proposal would seem to be an addition to the tariff policy, which is not permitted under the terms of the derogation.

Services to which the terms and conditions apply

The Queensland Government proposed that the word 'Reference' should be deleted from the heading of Schedule C. In other words the terms and conditions of Schedule C would apply to all services, not just reference services. The only other service being offered is a negotiated service, which conceivably could have terms and conditions different to Schedule C. Moreover, the Code requires an access arrangement to describe the terms and conditions of reference services only. Accordingly, the Commission does not support the Queensland Government's proposal.

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 CGPJV's proposal

CGPJV submits that for the purpose of section 3.7 of the Code, the pipeline is a contract carriage pipeline.

3.3.3 Submissions by interested parties.

No comments were received on this issue.

3.3.4 Commission's considerations

As the access arrangement includes a statement that the CGP 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

Sections 3.9 to 3.11 of the Code set out the requirements for a trading policy. If a pipeline is a contract carriage pipeline, which CGPJV proposes for the CGP, 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 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 (a bare transfer);

- with respect to a bare transfer, the trading policy may require the transferee to notify the service provider prior to utilising the traded portion of the contracted quantity and of the nature of the contracted quantity, but not require any other details; and
- with the service provider's consent in any other case (including a change of receipt or delivery point by a user). 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 CGPJV's proposal

The proposed trading policy submitted by CGPJV permits a bare transfer without the consent of CGPJV, provided that prior to utilising it, the transferee notifies CGPJV of the portion of contracted capacity subject to the bare transfer and of the nature of the contracted capacity subject to the bare transfer.

A user may only transfer or assign all or part of its contracted capacity other than by way of a bare transfer, or vary a receipt or delivery point, with the prior consent of CGPJV. CGPJV may withhold its consent on reasonable commercial or technical grounds only, and may give its consent subject to reasonable commercial or technical conditions.

3.4.3 Submissions by interested parties

In their submissions, interested parties raised the following broad issues, which are discussed in detail below, in respect of CGPJV's trading policy:

- notifying CGPJV of the portion and nature of a bare transfer;
- withholding of consent on reasonable commercial and technical grounds, which may be given subject to reasonable commercial or technical conditions; and
- changing of receipt and/or delivery points with the consent of CGPJV.

Ergon queried why a transferee must reveal commercially sensitive information to the service provider regarding the portion and nature of the contracted capacity that is subject to a bare transfer.

Several submissions stated that it is unreasonable to have a requirement that consent may be withheld on reasonable commercial or technical grounds without prescribing any objective criteria for those grounds. PCML and CS Energy contended that CGPJV should only withhold consent on reasonable **technical** grounds and conditions, and not on **commercial** grounds or conditions, whether reasonable or otherwise. MIM proposed that consent may only be withheld by CGPJV for proven technical reasons and/or if the assignee does not display the technical or financial capability in assuming the user's obligations. BHP submitted that the commercial grounds on which consent may be withheld should relate only to the prospects for satisfactory financial and other performance of contractual obligations by a prospective user to whom an assignment is sought. Santos contended that it is inappropriate for the service provider to be the sole adjudicator of 'reasonable commercial grounds' on trading issues, especially where the

service provider's return may be maximised by refusing a shipper's trading request. Such a situation places the service provider in a clear conflict of interest.

MIM stated that a user should be able to transfer contracted capacity at a receipt point or delivery point without the prior consent of CGPJV provided the terms are unaltered by the assignment. PCML considers that a user should be free to access uncontracted, or unused, capacity at alternative receipt points or delivery points. Moreover, a user should be free to transfer contracted capacity at a receipt point or delivery point to other users. Santos argued that to encourage free and open access, CGPJV should not be entitled to impose charges for additional receipt points, or restrict a shipper's utilisation of its full MDQ capacity. CS Energy stated that the trading of a delivery or receipt point should be subject to a specific test or require a published mechanism as it can have serious effects on other users and the ability of the service provider to meet its physical transportation needs.

According to Santos, a competitive trading policy must provide current and new shippers the ability to:

- receive gas through any producer inlet run, which supports the principle of shippers being able to receive gas from multiple sources of production;
- undertake linepack transfers between any shipper in the CGP, without consent being required;
- automatically deliver gas to any delivery point while the shipper is within its MDQ, provided it does not put at risk other shippers' deliveries; and
- follow an agreed mechanism that permits shippers to incorporate additional receipt and delivery points under their gas transportation agreements, including those cases where the revised transportation route is longer.

All of the above suggestions are intended to enhance competition and reduce the service provider's ability to increase revenue by reducing and/or eliminating trading in the pipeline.

Santos¹⁵ and BHP¹⁶ proposed the following amendments to the trading policy:

- A. Permit a line pack transfer between shippers by way of notice to the Service Provider, without consent being required. As a result of this transaction, no shipper shall fall below 90% of its target line pack. The shipper's own line pack in the CGP and trading line pack is a book adjustment at no cost to the Service Provider.
- B. The Service Provider shall provide access to additional Receipt or Delivery Points without consent being required, where the shipper satisfies the following conditions:

¹⁵ Santos submission for the Roma to Brisbane Pipeline, 29 January 2001, pp. 5-6.

¹⁶ BHP and Santos propose similar amendments to the trading policy, however the wording does differ slightly between submissions. The wording quoted here is that as proposed by Santos. Refer to BHP submission, 29 January 2001, p. 4.

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

3.4.4 Commission's considerations

CGPJV's trading policy is consistent with the Code and the wording of its trading policy broadly follows the wording of the Code.

Bare transfer

The Commission notes the concerns of CS Energy that the requirement that users notify CGPJV of the portion and nature of the capacity to be traded may result in the provision of commercially sensitive information. While the wording of the access arrangement mirrors the Code provisions, the Code goes on to state that the trading policy must not require any other details regarding the transaction to be provided to the service provider. This implies that while some basic information should sensibly be provided to the service provider to enable it to meet the transportation needs of the transferee, there is a presumption that the amount of information the service provider may seek is limited.

The Commission considers that the concern arises primarily due to potential differences in interpretation of the word 'nature' in the Code. While the Code provides no guidance as to what constitutes the 'nature' of the capacity transfer in this context, the Commission interprets this to mean the type of service, level of capacity traded and the relevant receipt and delivery points.

Other transfers

The Commission noted in its Draft Decision the proposals from some interested parties that CGPJV should detail its 'reasonable commercial and technical grounds'. The Commission stated, however, that CGPJV's proposal mirrors the provisions of the

Code, and there is no obligation on the part of the service provider to include additional criteria specifying what constitutes ‘reasonable commercial and technical grounds’.

In its response to the Draft Decision BHP, while recognising that CGPJV’s proposed trading policy mirrored the wording of the Code, stated that it does not believe that the regulator is precluded from requiring the service provider to specify its ‘reasonable commercial and technical grounds’. BHP reiterated its position that the only grounds on which CGPJV would be entitled to withhold its consent is the unsatisfactory ‘financial and other performance of contractual obligations by a prospective user to whom assignment is sought.’¹⁷

Notwithstanding BHP’s comments, however, the Commission considers that CGPJV’s proposal complies with the Code and the Commission does not require CGPJV to amend its access arrangement to specific objective criteria defining ‘reasonable commercial and technical grounds’. Moreover, CGPJV’s proposal is similar to the provisions of other access arrangements that have been considered by the Commission. Nevertheless, the Commission considers that it is in the interests of CGPJV and prospective and current users to describe in some detail their proposed interpretation of ‘reasonable commercial and technical grounds’. While the Commission cannot require CGPJV to specify its ‘reasonable commercial and technical grounds’, it encourages CGPJV to do so.

In its response to the Draft Decision BHP reiterated its position with respect to the changing of receipt and delivery points under section 3.10(c) of the Code. BHP proposed that a shipper should be able to change receipt of delivery points and CGPJV’s consent would be given provided the shipper satisfied certain conditions (listed in section 3.4.3 above). Section 3.10(c) of the Code states that the trading policy may specify conditions in advance under which consent will or will not be given. Thus, while there is the option of specifying certain conditions, the Commission considers that CGPJV’s proposal complies with the Code.

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.

The Commission has received legal advice to the effect that, as section 6.1 of the Code only refers to prospective users, it is only prospective users that have the power to notify a dispute under the Code. This means that a user of a pipeline under a contract will not be able to notify a dispute under section 6 of the Code where a dispute arises between the user and the service provider in the context of that contract.

¹⁷ BHP submission 14 September 2001, p. 7.

This highlights the importance for users to ensure that their contracts for access to services contain all of the necessary terms and conditions, including those relating to their rights to trade capacity. Although the access arrangement sets out the minimum terms and conditions upon which prospective users are entitled to access, the user has the right to waive these rights or vary them by agreement with the service provider. It is the user's responsibility to ensure that the provisions of the access arrangement that operate to their benefit are incorporated into their contract and are therefore enforceable through the usual commercial avenues.

Linepack trading

The provisions of the Code relating to a service provider's trading policy do not specifically require that an access arrangement include a policy in relation to the trading of linepack. The Commission has some doubts that it can require a service provider to amend the access arrangement to include such a policy. It is doubtful under the circumstances that linepack would be classified as a service provided by the service provider under the Code. Moreover, the Commission may not require an access arrangement to address a matter which the Code does not require the access arrangement to address (section 2.24 of the Code).

Nevertheless, as discussed earlier in section 3.2.4 of this Final Decision, the Commission notes CGPJV's comment that the proposed access arrangement does not preclude linepack trading and the Commission encourages CGPJV to facilitate such trading as appropriate.

3.5 Queuing policy

3.5.1 Code requirements

Sections 3.12 to 3.15 set out the Code requirements for a queuing policy. An access arrangement must include a queuing policy that determines the priority given to users and prospective users for obtaining access to a covered pipeline and for seeking dispute resolution under section 6 of the Code. The purpose of a queuing policy is to allocate spare capacity and developable capacity where there is insufficient capacity to satisfy the needs of all users and potential users that have requested capacity.

A queuing policy must contain 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 CGPJV's proposal

CGPJV proposes that where there is insufficient capacity to satisfy all requests for service, a queue will be formed. The queue will include all relevant requests that cannot be satisfied. Where an offer has been made in response to a request received prior to formation of the queue, that request will take first position in the queue.

At the time a request is placed in a new or existing queue, CGPJV will advise the prospective user of:

- its position in the queue;
- the aggregate capacity sought under requests which are ahead of it on the queue;
- its estimate of when capacity may become available; and
- the amount of any surcharge levied for developable capacity, if applicable.

The prospective user may reduce, but not increase, the amount of capacity sought in a request that is in a queue. Also, upon request from CGPJV, a prospective user in a queue must demonstrate that it will have access to a supply of gas at the time it is anticipated that access to the service will be offered. When the position of a request changes in a queue or where the timing of availability of a new tranche of developable capacity changes, CGPJV will provide revised information to the prospective user.

To ensure that requests are managed effectively, CGPJV may once every three months seek confirmation from a prospective user that it wishes to continue with its request in the queue. If a prospective user fails to respond within 14 days the request will lapse. A prospective user should advise CGPJV if it does not wish to proceed with the request, which will then lapse. Any lapsed request will be removed from the queue and priority will be lost. However, in the event of a dispute being notified under the Code, a request will not lapse and will retain its priority in a queue until that dispute has been resolved in accordance with the Code.

A prospective user may only assign a request on a queue to a bona fide purchaser of the prospective user's business and/or assets, subject to CGPJV's prudential requirements. A request may lapse if, on assignment of a controlling interest in the shares of the prospective user, the assignee fails to provide a guarantee as required by CGPJV or to meet CGPJV's prudential requirements.

When capacity becomes available that capacity will be progressively offered to each prospective user in the queue in order of priority (notwithstanding that such capacity is not sufficient to meet the needs of that prospective user). CGPJV will advise each of those prospective users of its plans to make capacity available, and the terms and conditions on which the capacity will be available.

A prospective user has 30 days after an offer is made to enter into an access agreement which may be conditional on CGPJV entering into access agreements with other prospective users. Failing this, the request will lapse or lose priority to those entering into such an access agreement (upon that agreement becoming unconditional).

The priority date of a request is the date a completed request is received by CGPJV. Where CGPJV determines that two or more requests relate to the same tranche of capacity for the same delivery point, all those requests will have the priority date of the earliest request.

Priority of services

CGPJV's proposed access arrangement provides for a request for a reference service to have priority over a request for a negotiated service.

3.5.3 Submissions by interested parties

In their submissions Ergon and BHP opposed the inclusion of clause 6.5 which requires a prospective user to demonstrate, upon request, that it has agreements in place for access to a supply of gas at the time it is anticipated that access to the service will be offered. According to Ergon this information is commercially sensitive. Additionally, Ergon stated that it can see no public benefit in such a requirement to provide this information to a service provider.

MIM and BHP stated that the policy of a reference service having priority over a negotiated service is too restrictive given that there is only one reference service offered for such a long-term access arrangement. BHP asserted that this priority could lead to serious distortions in future utilisation of the CGP. MIM proposed that a discretionary element be introduced which addresses the relative merits, and time frames, of each requested service. According to CS Energy, CGPJV should be required to justify the priority of the reference service over negotiated services. CS Energy stated that a prospective user who is prepared to pay for increased line pressure should be able to maintain its position in the queue. Thus, as long as the same opportunities are available for all potential users, there is no need for this restrictive provision.

Ergon asserted that competition can be stifled if a pipeline's capacity is fully contracted yet not fully utilised. To ensure that available capacity can be accessed, it is their view that the queuing policy should include a mechanism whereby users who do not fully utilise their contracted capacity sufficiently should be required to surrender that capacity if there are prospective users queuing to obtain access.

3.5.4 Commission's considerations

Confirmation of gas supplies

In its Draft Decision the Commission stated that the requirement to demonstrate sufficient gas supplies as currently worded is likely to force prospective users unnecessarily to reveal commercially sensitive information. This concern is heightened because the SWQ Producers have a significant ownership stake in the CGP and would have access to this information. In its Draft Decision the Commission proposed an amendment to the effect that written confirmation from a prospective user that it has sufficient gas supplies available should be sufficient for the service provider and that CGPJV could not require a prospective user to divulge commercially sensitive information.

CGPJV does not support the amendment proposed by the Commission. In its response to the Draft Decision, CGPJV stated that, in responding to a request for service, it will incur costs in investigating availability of capacity and the prospective user's requirements, and developing the details of the service to be offered. Accordingly, a service provider needs a level of satisfaction that a prospective user has the necessary underlying arrangements in place prior to the service provider expending time and costs responding to a request, and prior to the service provider making an offer which will preclude offers being made to others in the queue. CGPJV also noted that revenue from a reference service is a function of both capacity and throughput. Thus CGPJV would forego some revenue in the event that gas transported is less than contracted quantities.

CGPJV also expressed the view that the amendment is unnecessary as the Code ringfencing requirements would prevent CGPJV from disclosing or improperly using information provided by a user.

The Code recognises that the service provider, through its normal business activities, is in a position to gain commercially sensitive information about users or prospective users. Thus the ring fencing provisions of the Code are designed to protect the misuse of this information and to ensure that a service provider does not favour the interests of an associated company over the interest of other users or prospective users.

CGPJV stated it is reasonable for a service provider to have a level of satisfaction that a user has in place arrangements for the supply of gas. According to CGPJV, the amendment proposed by the Commission if implemented would expose CGPJV to the risk of relying on an unsubstantiated assurance by the prospective user and fails to recognise the legitimate business interests of CGPJV. CGPJV also stated that the provisions of the proposed access arrangement could be satisfied without the need for users to disclose commercially sensitive information. Nevertheless, as an alternative to the amendment proposed by the Commission in its Draft Decision, CGPJV has proposed an amendment to the effect that a prospective user must demonstrate that it has access to a supply of gas 'to CGPJV's reasonable satisfaction.'¹⁸

In its response to the Draft Decision, BHP indicated its support for the Commission's proposed amendment, but suggested that it did not go far enough as a prospective user would be unable to join a queue until it could demonstrate that it had supply arrangements in place. BHP stated:

On reflection BHP Billiton believes that prospective users should be entitled to join a queue in advance of having supply arrangements finalised but any such prospective users should rank in the queue behind those who can confirm that they have the necessary supply arrangements in place.¹⁹

In other words, prospective users who could demonstrate that they have supply arrangements in place would advance their position in the queue ahead of those prospective users who were unable to do so.

From discussions between Commission staff and CGPJV, the Commission understands that CGPJV's main concern relates to the pre-contractual stage of negotiation. The Commission understands that the main purpose of CGPJV's requirement that prospective users must demonstrate that they have access to gas supplies is to reduce the likelihood of CGPJV investigating requests that are unrealistic or purely speculative in nature.

Nevertheless, the Commission has some concerns with CGPJV's proposed amendment that the user must demonstrate that it has made arrangements for the supply of gas to CGPJV's 'reasonable satisfaction.' What constitutes CGPJV's 'reasonable satisfaction' is problematic. If the provision of commercially sensitive information, such as the source of the prospective user's gas supply, would constitute CGPJV's

¹⁸ CGPJV submission 8 October 2001, p. 3.

¹⁹ BHP submission 14 September 2001, p. 10.

‘reasonable satisfaction’ then the problem identified by the Commission remains unresolved.

The Commission welcomes CGPJV’s comments that the proposed access arrangement as worded would not necessarily require a prospective user to reveal commercially sensitive information. In response to concerns raised by Commission staff concerning CGPJV’s proposal, CGPJV suggested that the matter could be resolved by prospective users providing the relevant information to an independent person nominated by CGPJV and who undertakes to keep the information confidential. The Commission agrees with the proposal that the information could be provided to an independent person if the prospective user has some concerns about revealing commercially sensitive information. The Commission considers, however, that CGPJV’s proposal that it nominate the independent person allows it too much discretion. Instead the Commission considers that the independent person should be mutually agreed to by the service provider and prospective user. As the prospective user has the option of providing the information directly to CGPJV or to an independent person, the Commission considers that the prospective user should pay the independent person’s costs. In the event that the parties are unable to agree on the independent person and the prospective user’s place in the queue is jeopardised, the prospective user has recourse to the dispute resolution procedures of the Code.

CGPJV takes a contrary position to that proposed by BHP. In its response to the Commission’s Draft Decision CGPJV states that the queuing policy as originally proposed does not contain any obligation on the part of a prospective user to demonstrate its bona fides in lodging a request for service or entering into negotiations with CGPJV. CGPJV states that the proposed queuing policy provides no protection for CGPJV or other prospective users against a party who lodges a request without any real likelihood of fulfilling the project. In CGPJV’s opinion the existence of speculative requests on a queue, as well as causing misunderstanding or confusion among genuine prospective users, will present significant difficulties to CGPJV in developing responses. Accordingly, CGPJV flagged its intention to amend the proposed access arrangement to address this issue. The Commission supports the position of CGPJV rather than BHP for the reasons stated by CGPJV.

Amendment A3.3

In order for CGPJV’s access arrangement for the CGP to be approved, section 6.5 of the proposed queuing policy must be amended such that CGPJV, in seeking that a prospective user demonstrate that it will have access to a supply of gas at the time it is anticipated it will be offered access to the service, cannot require a prospective user to divulge to CGPJV to any commercially sensitive information (such as location of the gas supply or the identity of the supplier). CGPJV may require that such information be provided to an independent person mutually agreed to by the CGPJV and the prospective user and who undertakes to keep the information confidential. The independent person’s costs shall be borne by the prospective user.

Priority of services

The Commission considers that CGPJV's proposal that the reference service has precedent over a negotiated service is consistent with the broad intent of the Code if the only issue for negotiation is the price of access. A service provider is entitled to receive, and a prospective user is entitled to pay, the reference tariff for a reference service. The service provider should be under no obligation to offer the reference service to a prospective user at a tariff less than the reference tariff. Similarly, a prospective user should not be entitled to 'jump the queue' by offering to pay a tariff higher than the reference tariff. While offering scarce capacity to the highest bidders would be an effective means of clearing the queue, it may result in monopoly rents to the service provider and be inconsistent with the Code's pricing principles.

The situation is not as straight-forward where a prospective user genuinely wishes to negotiate some variation to the terms and conditions contained in the access arrangement that may also justify a variation in price. CS Energy for one is concerned that a prospective user's position in the queue may be placed in jeopardy if the prospective user wishes to negotiate a service other than the reference service. The Commission has some sympathy with this viewpoint and in its Draft Decision proposed that the reference service and negotiated services have equal priority. The Commission considers it particularly relevant in this instance as the proposed access arrangement contains only one specific service, the reference service, and hence negotiated services may conceivably become quite common.

The amendment proposed by the Commission in its Draft Decision would not deprive CGPJV of the right to provide the reference service at the reference tariff. In the event of a dispute either party, CGPJV or a prospective user, may refer the matter to the Commission for arbitration. If the sole subject of a dispute is the tariff, the Commission must determine that the reference tariff will apply (subject to sections 6.18 to 6.21 of the Code).

In its response to the Draft Decision CGPJV stated that it has no objection to an amendment provided that:

- CGPJV is entitled to give priority to the user seeking the reference service where the only issue of contention is the tariff; and
- otherwise, the priority of a request for service will depend on its priority date under clause 6.4 of the proposed access arrangement. (Clause 6.4 states that the priority date of a request is the date a completed request is received by CGPJV).

In other words a prospective user seeking the reference service at the reference tariff will have priority over a prospective user seeking the reference service at a discount. This is consistent with the intent of the amendment proposed in the Draft Decision.

In its response to the Draft Decision, BHP expressed concern that 'prospective users queuing for services other than a Reference Service could effectively have their places in the queue reversed by the offer of different terms and conditions [to those

required].²⁰ That is, terms and conditions that would be acceptable to a prospective user further down the queue. In BHP's opinion, the queuing policy should be made more transparent to alleviate the possibility of queue jumping. The Commission, however, does not consider that further amendment to the access arrangement is warranted. If the service provider and prospective user are unable to agree on terms and conditions and a dispute is notified, then pursuant to section 6.25 of the Code the prospective user's priority right would not be altered while the dispute is being resolved.

Amendment A3.4

In order for CGPJV's access arrangement for the CGP to be approved, CGPJV must amend its queuing policy to provide that the reference service and negotiated services have equal priority, subject to a prospective user seeking the reference service at the reference tariff having priority over a prospective user seeking the reference service at a tariff less than the reference tariff.

The Commission notes Ergon's submission in regard to establishing a mechanism in the queuing policy whereby existing users would surrender their contracted, but unused, capacity should a prospective user in a queue require access. 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 would be available for resale by the service provider (if the shipper itself does not deal with it).

The Commission does not consider it appropriate, however, that the access arrangement should provide for the mechanism described by Ergon. While the Code requires a user to make details available about the quantity, type and timing of unutilised contracted capacity to any person who requests this information, the Code imposes no obligation on the part of the user to relinquish any unutilised contracted capacity.

CGPJV's proposed access arrangement does provide some safeguards to ensure the bona fides of prospective users and to discourage hoarding of capacity. Firstly, prospective users are required to provide confirmation that they have access to a supply of gas. Secondly, CGPJV is entitled to levy tariffs on 90 per cent of the contracted quantity, even if actual throughput is below this level. The underlying rationale is that it costs a great deal to reserve pipeline capacity but not use it, creating a significant incentive for shippers to relinquish or trade unused capacity. In the event that a shipper contracted for capacity that it did not intend to use, the pipeline company could sell that capacity on an interruptible basis anyway. Further, such conduct would likely be in breach of the hindering access prohibition described in section 13.1 of Schedule 1 of the Act.

²⁰ BHP submission 14 September 2001, p. 11.

3.6 Extensions and expansions policy

3.6.1 Code requirements

Section 3.16 of the Code requires an access arrangement to have an extensions and expansions policy. The policy is to set out the method to be applied to determine whether any extension to or expansion of the capacity of the pipeline will be treated as part of the covered pipeline. A service provider is also required to specify the impact on reference tariffs of treating an extension or expansion as part of the covered pipeline.²¹ In addition, an extensions and expansions policy must outline the conditions on which the service provider will fund new facilities and provide a description of those new facilities.

3.6.2 CGPJV's proposal

Extensions of the pipeline

In the event that CGPJV undertakes a geographical extension to the pipeline it will elect, after consultation with the Regulator, whether the extension forms part of the pipeline for the purposes of the access arrangement.

Expansion of capacity up to 175TJ/day

CGPJV will undertake an expansion of capacity up to a maximum capacity of 175TJ/day upon the request of a user or prospective user if:

- there are, in the reasonable opinion of CGPJV, sufficient proven reserves to cover the economic life of the expanded pipeline; and
- the user or prospective user commits to the use of the expanded capacity at the reference tariff.

The reference tariff for the pipeline will apply for all capacity up to 175TJ/day. Under the terms of the derogated tariff arrangement (clause 1.3.5(a)), CGPJV is not entitled to recover from users by way of charges the cost of constructing any capital improvement to the pipeline to increase the capacity of the pipeline up to 175TJ/day.

Expansion of capacity beyond 175TJ/day

In the event that CGPJV expands the capacity of the pipeline in its present geographical location above 175TJ/day, CGPJV will elect after consultation with the Commission how to treat the expansion. For example, CGPJV may elect that:

- the expansion will not be treated as part of the covered pipeline;
- the expansion will form part of the covered pipeline and that the reference tariff will remain unchanged but a surcharge will be levied on the incremental users as permitted under the Code; or

²¹ For example, reference tariffs may remain unchanged, but a surcharge may be levied on incremental users.

- CGPJV will submit revisions to the access arrangement pursuant to section 2.28 of the Code.

3.6.3 Submissions by interested parties

Whether an extension/expansion forms part of the covered pipeline

CS Energy noted that there is no definition of the term ‘geographic extension to the pipeline’, thus the circumstances in which CGPJV would be required to refer the issue to the regulator may be unclear.

Ergon is concerned that CGPJV has the option, after consultation with the Commission, to elect not to treat any geographical extension or an expansion beyond 175TJ/day as part of the covered pipeline, potentially allowing the service provider to set unregulated tariffs. According to Ergon this could prevent access to some key infrastructure from being subject to Code requirements. Ergon asserted that the access arrangement should require coverage of each extension and expansion to be considered on a case-by-case basis and that the methodology by which coverage is determined be clearly specified and subject to public consultation. PCML stated that the consent of the Commission should be required before CGPJV elects to not have an extension or expansion treated as part of the covered pipeline. BHP has a different interpretation of the Code, suggesting that the Code requires that consent from the regulator must be sought for extensions or expansions beyond 175TJ/day.

Further, Ergon proposed that there should be greater detail provided on how CGPJV would determine the impact that an extension or expansion would have on the reference tariff. For example, an ‘economic feasibility test’ could be applied to determine if the prevailing tariff structure will apply to an extension or whether a surcharge will be levied on incremental users.

Expansion of capacity up to 175TJ/day

BHP disputed that an obligation to undertake an expansion should be dependent upon demonstration of proven reserves to cover the economic life of the expanded pipeline, as stipulated by clause 7.2(2) of the access arrangement. BHP stated that CGPJV has an unsatisfactory record in servicing its customers due to contracted capacity being at full capacity. BHP suggested that the terms and conditions of service be amended to require that the transporter install additional compression (at its own expense, but only up to a maximum capacity limit of 175TJ/day), if during any four days in any month, the transporter has been required to deliver in excess of 95 per cent of the installed capacity of the CGP.

MIM and PCML submitted that CGPJV appears to be seeking to substantially qualify its obligation under the derogated tariff arrangement, pursuant to Section 7.2 of the proposed access arrangement. MIM submitted that Section 7.2(2) should be deleted and replaced with:

CGPJV will undertake an expansion of capacity of the Pipeline up to a maximum capacity of 175TJ/day on the request of a User or Prospective User if that User or Prospective User commits, or

has committed, to the use of capacity in excess of the current capacity of the pipeline at the Reference Tariff.²²

CS Energy expressed the view that allowing CGPJV to have sole discretion to determine how and when to expand the capacity of the pipeline may result in CGPJV extracting monopoly rents, cause disruption to the smooth functioning of the pipeline and cause gas customers financial and/or operational difficulties.

CS Energy understands that CGPJV intends to increase capacity up to 175TJ/day in stages by adding five compressors progressively, but noted that the access arrangement provides no guidance as to the threshold levels that would trigger installation of each compressor. In CS Energy's opinion, the criteria for triggering an expansion of capacity should be explicit in the access arrangement. CS Energy stated:

The Service Provider should declare the impact of one compressor on the capacity of the Pipeline or the increase in capacity for each of the declared compressors that would be contemplated in setting the overall Revenue targets for the pipeline. It is desirable that this be incorporated into the Access Principles to stop the possibility of over-contracting of pipeline capacity by the CGPJV based on optimum usage or diversification of maximum loads rather than peak demands.²³

CS Energy also suggested that, when setting the threshold quantities, consideration should be given to factors such as variations in load, worst conditions in terms of cleanliness, and highest expected gas temperatures. Further, CS Energy proposed that penalties should apply if CGPJV does not install new compressors when demand exceeds capacity.

MIM and PCML have interpreted clause 1.3.5(a) of the derogated tariff arrangement as implying that CGPJV will automatically expand the capacity of the pipeline, in increments and by the addition of compression, up to 175TJ/day as and when that capacity is required.

It is unclear to both MIM and PCML that CGPJV has discharged its obligations to expand the capacity of the pipeline with their apparent reluctance to install the first compressor on the pipeline. 'This is despite a general view among the current users of the pipeline that the contracted capacity is now at or greater than pipeline capacity.'²⁴ MIM and PCML listed the incidents that are the foundation of their concern:

- on a number of occasions distillate has had to be used at the MCPS at significant cost to the shippers and other power offtakers although total deliveries from the pipeline appear to be less than 96TJ/Day;
- the failure to receive gas at Ballera within contract limits has led to a reduction in individual shippers' linepack and the threat of curtailment of deliveries; and
- at least one shipper appears to have incurred costs due to the inability of the pipeline to receive gas at Ballera within contract limits.

²² MIM submission, 29 January 2001, p. 6.

²³ CS Energy submission, 29 January 2001, p. 11.

²⁴ MIM submission, 29 January 2001, p. 5.

MIM, PCML and Santos are of the view that the reference tariff and the 175TJ/day limit have been set with the intention of compressors being installed. Therefore they believe that it would be inappropriate for CGPJV to seek additional capital contributions from shippers in relation to the service. The parties desire that the precise terms on which CGPJV committed to the addition of compression in discussion with the Queensland Government be clarified.

According to Santos, under CGPJV's access arrangement and pipeline licence with the Queensland Government, CGPJV is obliged to pay for additional compression expansion as required by the market. To be consistent with the Roma to Brisbane Pipeline, Santos stated that CGPJV should be obliged to install additional capacity when contracted capacity for firm transportation service exceeds the current capacity of the pipeline.

3.6.4 Commission's considerations

BHP has interpreted the Code as requiring a service provider to seek the regulator's approval whether to include or exclude and extension or expansion as part of the covered pipeline. While this is included in the Code as an example of a 'method' for the purposes of section 3.16(a), it is by no means exhaustive – alternative 'methods' may be approved by the regulator as appropriate.

Extensions to the pipeline

Although the proposed access arrangement provides that CGPJV would consult with the Commission regarding whether or not an extension of the CGP would be treated as part of the covered pipeline, there is no obligation on the part of CGPJV to seek the Commission's consent. Hence under CGPJV's proposal, it would not be obliged to act on the advice of the Commission, but for all intents and purposes would have sole discretion to determine in the first instance whether an extension should form part of the covered pipeline. In its Draft Decision the Commission proposed an amendment that, in the event that CGPJV elects that an extension would be part of the covered pipeline, it would be required to seek the Commission's approval to do so.

In its response to the Draft Decision, CGPJV raised objection to the proposed amendment on the basis that it is inconsistent with the Code which, according to CGPJV, permits the service provider to elect voluntarily whether an extension should form part of the covered pipeline.

In its response to the Draft Decision BHP indicated its support for the Commission's proposed amendment.

The amendment proposed by the Commission in its Draft Decision would have required the Commission's approval only to include an extension as part of a covered pipeline. CGPJV would have the discretion to exclude an extension without the Commission's consent. In the event that CGPJV elects not to include an extension as part of the covered party, any person can apply to the NCC (under sections 1.2 and 1.3 of the Code) to have the pipeline declared a covered pipeline under the Code.

The Commission does not agree with CGPJV that the Code allows the service provider sole discretion to determine whether an extension should be treated as part of the

covered pipeline. While the Code does permit the service provider to nominate a method for determining whether an extension or expansion will be covered, the regulator must assess whether the method is consistent with the principles outlined in section 2.24 of the Code.

Nevertheless, the Commission has reconsidered its position and concluded that CGPJV's original proposal (that CGPJV may elect, after consultation with the Commission, whether an extension is to be treated as part of the covered pipeline) is reasonable and consistent with the Code. This approach is consistent with other recent decisions made by the Commission on this issue. The Commission can see no basis on which it would refuse a request by CGPJV to include an extension as part of the covered pipeline. Under the derogation, if CGPJV elects that an extension would be covered, the reference tariff would apply (CGPJV would not be able to levy a surcharge). If an extension is excluded, one scenario is that CGPJV might charge the reference tariff to the off-take point and then an additional charge for the extension²⁵, whereas if the extension is covered only the derogated reference tariff would apply.

Section 3.16(b) of the Code requires a service provider to specify how an extension that is to be treated as part of the covered pipeline will affect reference tariffs. This issue was not addressed by CGPJV in its proposed access arrangement. In response to the Draft Decision, CGPJV stated that it has no objection to an amendment to the access arrangement to address this issue. The derogation is framed in such a manner that the reference service for any extension to the pipeline which is commissioned while the capacity of the pipeline is below 175TJ/day and which is to be treated as part of the covered pipeline can be offered at the reference tariff only. In other words the derogation prevents CGPJV from applying a surcharge to incremental users. CGPJV's extensions policy should reflect this position.

Amendment A3.5

In order for CGPJV's access arrangement for the CGP to be approved, section 7.1 of the proposed extensions and expansions policy must be amended to state that, while the capacity of the pipeline is below 175TJ/day, the service provider cannot levy a surcharge on incremental users on an extension that is to be considered part of the covered pipeline.

CS Energy noted that no definition of the term 'geographic extension' is provided in the access arrangement. Although no definitions of 'extension' and 'expansion' of a pipeline are listed in the Code, the Commission interprets a geographic extension as any new section of a pipeline that enables gas to be delivered to a location to which gas had not previously been delivered via that pipeline. With respect to the CGP this would include an extension beyond Mt Isa, and any spur and lateral off the CGP. The Commission interprets the addition of compressors and looping of a pipeline as expansions of capacity.

²⁵ This would not preclude CGPJV and the prospective user negotiating terms and conditions, including tariffs, different to the access arrangement, nor would it preclude the prospective user applying for coverage if agreement cannot be reached.

Expansion of capacity up to 175TJ/day

Under the derogated tariff arrangement CGPJV is unable to recover the costs of expansions up to 175TJ/day²⁶ through a surcharge on incremental users or by way of capital contributions. CGPJV's proposal that it will expand capacity if in its opinion sufficient reserves exist to cover the economic life of the expanded pipeline (at reference tariffs) reflects this restriction.

Nevertheless, some interested parties have questioned the legitimacy of this proposed provision, suggesting instead that the derogated reference tariff was predicated on the premise that the pipeline would be expanded when demand requires it.

In its Draft Decision the Commission expressed two concerns with CGPJV's proposed policy. Firstly, the Commission was concerned that, in seeking to satisfy itself that sufficient reserves exist, CGPJV may require prospective users to unnecessarily reveal commercially sensitive information regarding gas supplies. A feasible option may be for CGPJV to obtain confirmation of the adequacy of reserves from an independent expert, without the unnecessary disclosure of any information which may have the potential to be commercially harmful to the prospective user.

To address this issue the Commission proposed an amendment in the Draft Decision that CGPJV, in seeking to satisfy itself that sufficient proven reserves exist to cover the economic life of the expanded pipeline, could not require the prospective user to provide any information that the prospective user reasonably believes may be commercially detrimental to it to reveal.

In its response to the Draft Decision CGPJV raised objection to the Commission's proposed amendment on the following grounds:

- the Code ringfencing provisions would prevent CGPJV from disclosing or improperly using information;
- CGPJV will bear the risk of expending a substantial amount of capital based on unsubstantiated assurances from prospective users, which represents a failure to recognise CGPJV's legitimate business interests;
- in considering the detriment to users from disclosing information and the possible detriment to CGPJV from expending substantial amounts of capital which it may not recover, the Commission considers all of the risk should be borne by CGPJV;
- the provisions of the access arrangement as originally proposed do not necessarily require prospective users to reveal commercially sensitive information – the provisions already accommodate circumstances where the user, for example, could provide evidence such as an independent expert's report.

The issue is similar to that discussed earlier in section 3.5.4 of this Final Decision. The Commission has similar concerns with CGPJV's proposed expansions policy that in

²⁶ CGPJV states that the current maximum delivery capability is 98TJ/day (access arrangement information p. 5).

satisfying itself that sufficient reserves exist CGPJV may require prospective users to reveal commercially sensitive information. The Commission welcomes, therefore, CGPJV's comments that the provisions of the access arrangement as originally proposed would not necessarily require prospective users to reveal commercially sensitive information. Accordingly, the Commission requires an amendment similar to Amendment A3.3, which provides for commercially sensitive information to be provided to an independent person who undertakes to keep the information confidential.

Amendment A3.6

In order for CGPJV's access arrangement for the CGP to be approved, section 7.2 of the proposed extensions and expansions policy must be amended such that CGPJV, in seeking to satisfy itself that sufficient proven reserves exist to cover the economic life of the expanded pipeline, cannot require a prospective user to divulge to CGPJV any commercially sensitive information. CGPJV may require that such information be provided to an independent person mutually agreed to by the CGPJV and the prospective user and who undertakes to keep the information confidential. The independent person's costs shall be borne by the prospective user.

The Commission's second concern was that the provision does not adequately reflect the commitment made in the Access Principles (submitted to the QLD Government as part of the tender process) that the pipeline would be expanded as required. Accordingly, in its Draft Decision, the Commission proposed an amendment that CGPJV should set objective criteria that would trigger expansion of the pipeline up to 175TJ/day.

In its response to the Draft Decision CGPJV objected to the Commission's proposed amendment on the basis that it is inconsistent with the derogated tariff arrangement approved by the Minister. CGPJV stated:

The proposed access arrangement reflects that CGPJV as owner of the pipeline should have discretion in making decisions as to the manner in which capacity will be provided to satisfy contractual demands for capacity. Additionally, it reflects the nature of the derogated access principles, which recognised this discretion and did not mandate the timing of the installation of compression.²⁷

In response to the original submissions received from interested parties CGPJV stated:

Suggestions that the pipeline should be compressed when contracted capacity is greater than pipeline capacity contribute nothing to the resolution of the matter as they ignore fundamental issues such as diversity of load profiles etc. Similarly a number of users have alleged certain matters against CGPJV in relation to their view of CGPJV's satisfaction of contractual obligations and the timing of installation of a compressor on the pipeline. CGPJV submits that these submissions either misunderstand the framework for approval of an access arrangement, or are seeking to use the Commission's current process as a means of furthering their position in relation to their current contractual rights and obligations. CGPJV submits that such submissions do not contribute to the Commission's assessment of the proposed access arrangement and does not believe it is appropriate

²⁷ CGPJV submission 8 October 2001, p. 6.

to debate these matters in the context of the Commission's review of the proposed access arrangement.²⁸

In its response to the Commission's Draft Decision, BHP indicated its support for the proposed amendment and reiterated that the thresholds should be those proposed by BHP in its original submission (that is, if during four days in any month CGPJV had been required to deliver gas in excess of 95 per cent of capacity).

The Commission notes that since the release of the Draft Decision APT has publicly announced its intention to install a compressor on the CGP. The compressor will increase the capacity of the pipeline by approximately ten per cent and APT anticipates that the compressor will be installed by the fourth quarter of 2002.²⁹ The installation of the compressor and accompanying increased capacity should allay the concerns of current users who allege that the pipeline is over-contracted and state that they have had to use alternative fuels on occasions.

In recent discussions with Commission staff, CGPJV stated that it is reluctant to prescribe in advance any objective criteria at which it may be committed to expanding the capacity of the pipeline, particularly in view the long duration of the access arrangement period. CGPJV would prefer to reserve its judgment and to retain the flexibility of being able to make a commercial decision at the appropriate time. APT disagrees with suggestions in submissions that would require expansion of the pipeline as soon as full capacity is reached. In view of the capital expenditure involved in installing a compressor APT stated that it would be unlikely to commit to the capital expenditure in the absence of demand (or expected growth in demand) for the additional capacity.

In its response to the Draft Decision, CGPJV asserts that the Commission's proposed amendment is inconsistent with the derogation. The Commission does not consider that this is the case as CGPJV's extensions and expansions policy is covered in the non-derogated provisions of the proposed access arrangement. While CGPJV's proposed access arrangement addresses section 3.16 (c) of the Code,³⁰ if the Commission does not consider the proposal to be properly detailed or precise enough to reflect the interests of users or prospective users (section 2.24 (f) of the Code), the Commission can require further detail.

Nevertheless, the Commission has decided not to proceed with the amendment proposed in the Draft Decision. The installation of a compressor, as recently announced by APT, should allay the concerns of current users. With regard to future expansions, CGPJV's comments that expansion of capacity is essentially a commercial decision of the service provider at the appropriate time has some merit. For example, the expansion may be in response to a specific request from a prospective user for

²⁸ CGPJV submission 8 October 2001, p. 6.

²⁹ APT media release *Expansion of Carpentaria Gas Pipeline Announced by Australian Pipeline Trust*, 14 November 2001.

³⁰ Section 3.16 (c) states that if the service provider agrees to fund new facilities if certain conditions are met, the extensions/expansions policy requires a description of those facilities and the conditions on which they will be funded.

additional capacity, or alternatively with the objective of stimulating the market. In its media release, APT stated that one of the reasons for its decision on this occasion to install a compressor was because some existing users have identified strong potential for future load growth. Expansion of a pipeline, however, is not totally at the discretion of the service provider. If CGPJV and prospective users cannot reach agreement, prospective users may notify a dispute under the dispute resolutions of the Code. Pursuant to section 6.22 the Commission may require CGPJV to expand the capacity of the pipeline.

Expansion of capacity beyond 175TJ/day

For expansions of capacity beyond 175TJ/day, CGPJV proposes that it would consult the Commission whether the expansion should be treated as part of the covered pipeline. However, CGPJV would be under no obligation to follow the Commission's advice.

In the event that CGPJV elected not to treat an expansion as part of the covered pipeline, application could be made to the NCC by any person (under sections 1.2 and 1.3 of the Code) for the expansion to be declared a covered pipeline under the Code. Nevertheless, the fact that a pipeline requires expansion to satisfy demand may be an indication that the service provider has market power and the opportunity to extract monopoly rents if unregulated. These circumstances would be inconsistent with section 2.24(d) of the Code³¹ (the economically efficient operation of the covered pipeline), section 2.24(e) (the public interest) and section 2.24(f) (the interests of users and prospective users). Accordingly, in its Draft Decision the Commission proposed an amendment to the access arrangement to the effect that any expansion of capacity beyond 175TJ/day is to be considered part of the covered pipeline unless the Commission agrees otherwise.

In its response to the Draft Decision, BHP indicated its support for the Commission's proposed amendment that all expansions beyond 175TJ/day should form part of the covered pipeline unless the Commission agrees otherwise. On the other hand, in its response CGPJV objected to the proposed amendment, stating that the provisions of the access arrangement as originally proposed were consistent with the Code. According to CGPJV the Code recognises that the service provider is entitled to discretion in the manner in which the access arrangement treats extensions and expansions.

CGPJV notes that if a service provider elects not to treat an expansion as part of the covered pipeline, any person may apply to the NCC for the expansion to be covered. According to CGPJV, the amendment proposed by the Commission in its Draft Decision is inconsistent with the Code, as, in the absence of voluntary coverage, the decision regarding coverage is vested in the Minister, not the Commission.

The Commission does not agree with CGPJV that the Code allows the service provider sole discretion to determine whether an expansion should be treated as part of the covered pipeline. While the Code does permit the service provider to nominate a method for determining whether an extension or expansion will be covered, the

³¹ Section 2.24 of the Code sets out the factors that the Commission must take into account in assessing a proposed access arrangement.

regulator must assess whether the method is consistent with the principles outlined in section 2.24 of the Code.

The amendment proposed by the Commission in its Draft Decision is consistent with the amendment required by the Commission in its recent Final Decision on Epic Energy's proposed access arrangement for the Moomba to Adelaide Pipeline. In supporting that amendment, the Commission argued:

Owing to the excess demand that is present in the market, Epic may be able to exercise a degree of market power in setting the terms and conditions, including tariffs, for an expansion. This is because it is not constrained by competition or regulation (if Epic were to elect that new facilities would not be covered). Potentially, Epic could be in a position to extract monopoly rents by pricing expansions at just below the point where it would no longer be commercially viable for a prospective user to continue with its proposal.³²

This contrasts with the position taken by the Commission with respect to Epic Energy's proposed access arrangement for the Ballera to Wallumbilla Pipeline System, also known as the South West Queensland Pipeline (SWQP). In its Final Decision the Commission stated:

With respect to the SWQP, however, Epic's ability to exert market power is significantly diminished due to the derogation. Under the derogation, the Queensland Government has pre-determined the reference tariff for all expansions of capacity on the SWQP up to 110PJ/year (ie 8 compressors). For this reason the Commission believes that Epic's proposed expansions policy (with the variation Epic have submitted) is consistent with the Code.³³

The Commission has decided to adopt a similar approach with respect to the CGP in recognition that the derogation diminishes the ability of CGPJV to exert market power. In this regard it is relevant that current capacity of the pipeline is well below the nominal capacity of 175TJ/day. The Commission concludes, therefore, that CGPJV's proposed policy pursuant to section 3.16(a) of the Code – that after consultation with the Commission CGPJV will decide whether or not to treat an expansion beyond 175TJ/day as part of the covered pipeline – is consistent with the Code.

Section 3.16(b) of the Code provides that the extensions/expansions policy should specify how any extension or expansion that is to be treated as part of the covered pipeline will affect reference tariffs. One option proposed by CGPJV for expansions beyond 175TJ/day is that the reference tariff will remain unchanged but a surcharge will be levied on incremental users. Given that the reference service does not apply to expansions beyond 175TJ/day, this provision is inconsistent with the derogation, as it implies that the reference service would be available, and should be deleted from the access arrangement.

³² ACCC, Final Decision, *Access Arrangement proposed by Epic Energy South Australia Pty Ltd for the Moomba to Adelaide Pipeline System*, 12 September 2001, pp. 171-2.

³³ ACCC, Final Decision, *Access Arrangement proposed by Epic Energy Queensland Pty Ltd for the Ballera to Wallumbilla Pipeline System*, 28 November 2001, p. 23.

Amendment A3.7

In order for CGPJV's access arrangement for the CGP to be approved, CGPJV must amend section 7.3 of its extensions and expansions policy by deleting the clause that reads:

that the expansion will form part of the covered pipeline and that Reference Tariffs will remain unchanged but a Surcharge will be levied on Incremental Users as permitted under the Access Code.

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 on 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 would normally 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 triggers that would oblige the service provider to submit revisions before the revisions submission date (section 3.17(ii)).

An access arrangement period accepted by the regulator may be of any duration. However, if the period is greater than five years, the regulator would normally 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 CGPJV's proposal

The revisions submission date, 1 November 2022, and revisions commencement date, 1 May 2023, are prescribed in the derogation. In its access arrangement CGPJV proposes that the revisions will commence from the revisions commencement date or the date on which the approval of the regulator to the revisions to the access arrangement takes effect, whichever is the later.

3.7.3 Submissions by interested parties

Several interested parties raised concerns about the duration of the access arrangement period and that the provisions of the access arrangement, including the non-derogated elements, would not be reviewed before 1 May 2023.

PCML stated that should the review date not be changed from 1 May 2023 then it be imperative that major events trigger revisions to the proposed access arrangement. Several submissions listed specific major events that could trigger an obligation on the service provider to submit revisions prior to the revisions submission date. They include:

- development of a new pipeline as an alternative or complement to the existing pipeline;
- variation (from forecast) in revenue from the pipeline of more than 10 per cent;
- variation (from forecast) in total gas demand of more than 10 per cent;
- a new receipt point on the CGP;
- a significant 'negotiated service', for example, pressure service, backhaul arrangement;
- interconnection with a covered pipeline;
- aggregate contracted MDQs reaching 140TJ/day (80 per cent of 175TJ/day). This would provide time for users to canvass and discuss a new access arrangement to be submitted by CGPJV to cover expansions beyond 175TJ/day;³⁴
- gas becoming available on the CGP at receipt points (including Mount Isa) other than Ballera;
- demand exceeding 175TJ/day;
- oscillation between the physical flow direction along the CGP, leading to the need to stabilise tariffs between forward haul and backhaul tariffs; and

³⁴ To ensure this, MIM submitted that clause 7.3 of the access arrangement should be amended to give the Commission the discretion as to the treatment of the expansion as a covered pipeline or otherwise. Furthermore, MIM submitted that clause 7.3 (second dot point) should be deleted and that in accordance with clause 7.3 (third dot point) CGPJV should submit revisions to the access arrangement pursuant to section 2.28 of the Code.

- any substantial demand for a service other than a reference service.

Ergon proposed that the conditions should specify (in accordance with clause 3.18 of the Code) that any excess revenue or profit would be returned to users.

As the reference tariff is fixed by the derogated tariff arrangement, BHP does not support the inclusion of a trigger to address the risk of forecasts being incorrect. However, upon inclusion of additional reference services, either now or upon revision, the reference tariff determined for these services should be reviewed at least every five years to address the risks of the forecasts on which they were based proving incorrect. BHP stated that the existing derogation would not inhibit such a provision, so long as the provision does not apply to the existing, derogated reference service.

3.7.4 CGPJV's response to the issues paper

CGPJV submitted that requiring the inclusion of trigger events, or an adjustment mechanism, would be inappropriate:

- if the nature of the revisions arising from a trigger event were such that the derogation would be maintained, or if the adjustment mechanism did not operate to revise tariffs during the period of the derogation, there would appear to be little benefit in undertaking a review. In this case, CGPJV submits that such a requirement would be inappropriate and contrary to the public interest; or
- alternatively, if the Commission sought to require inclusion of a trigger event or an adjustment mechanism which resulted in revisions to the tariffs prior to November 2022, the Commission would be seeking to act in a manner inconsistent with the Act. The intent and effect of the derogations is clearly identified in the Intergovernmental Agreement:

...the tariff and tariff-related sections of the existing access principles for the [pipelines] are to be rewritten as reference tariffs (and reference tariff policy) for reference services to conform, as close as possible to the National Access Code, while preserving the existing tariff principles embodied in the original access arrangements.

...

reference tariffs (and reference tariff policy) will be those taken from the existing access principles... These will not be subject to public and ACCC scrutiny until the nominated review date expressed in the individual access arrangements.

(Intergovernmental Agreement, Annexure I).³⁵

CGPJV contended that if the Commission believes that the possibility of change to the derogation warrants inclusion of a trigger event or similar, this is inconsistent with the Commission's role in approving the derogated access arrangement under the Act. Since any change to the derogation could only be effected by legislation, any change to the derogated tariff arrangement should be effected through clear legislative intent,

³⁵ Agility Management Pty Ltd's response, on behalf of CGPJV, to the *Issues Paper*, 31 January 2001, p. 2.

rather than by artificial means such as inclusion of a review event or adjustment mechanism.

3.7.5 Commission's considerations

Section 58(4) of the Act states:

The revisions submission date and the revisions commencement date mentioned in the reference tariff policy are taken to be the revisions submissions commencement date for the access arrangement to be submitted under the Gas Pipelines Access Law for the pipeline.

As the revisions submissions date and revisions commencement date have been derogated by the Queensland Government, the Commission has no ability to review these dates under section 3.17(i) of the Code.

One effect of the derogation is to remove the ability of the Commission to review the derogated tariff arrangement prior to the revisions commencement date. A further consequence of the derogation, and perhaps unintended, is that the non-tariff elements of the access arrangement which are subject to approval by the Commission, would also not be reviewed again until the revisions commencement date, 1 May 2023.

In Annex 1 to the 1997 *Natural Gas Pipelines Agreement*, which relates to jurisdictional derogations, the provisions in relation to Queensland, state:

The Access Arrangement including the rewritten tariff and tariff-related sections of the existing access principles will be submitted to the ACCC, in accordance with the Code, under the following conditions:

- reference tariffs (and reference tariff policy) will be those taken from the existing access principles and will be included in the deeming provision of the Queensland Access Legislation. These will not be subject to public and ACCC scrutiny until the nominated review date expressed in the individual access arrangements
- non-tariff related matters will be submitted to the ACCC for consideration by the ACCC in the normal matter
- other derogations required to achieve these outcomes will be included in the Queensland Access legislation.

From this extract it is clear that it was the intention of the Queensland Government that the reference tariff and reference tariff policy would not be subject to scrutiny by the Commission, but the same cannot be said for the non-tariff elements that are subject to approval by the Commission 'in the normal manner'. Normally this would mean that the Commission would have the right to approve or not approve the revisions submissions date. However, the way in which the derogation is framed prevents the Commission from approving a submissions revisions date for the non-derogated elements that is different to the revisions submission date that forms part of the derogation.

Although the revisions submission date is set in accordance with the derogation, section 2.28 of the Code makes provision for revisions to be lodged in other circumstances. Application for an early review of an access arrangement may be made pursuant to sections 3.17(ii) and 3.18 of the Code. Those provisions enable the

Commission to require an access arrangement to provide for early revision by defining certain mechanisms that would trigger a review of the access arrangement prior to the revisions submission date.

Given the uncertainty arising from the extended duration of the access arrangement period, in its Draft Decision the Commission proposed that CGPJV include in the access arrangement for the CGP a list of specific major events that it considers should trigger a revision of the non-tariff elements of the access arrangement that do not form part of the derogated tariff arrangement. The Commission considered that this list should include the interconnection of another pipeline with the CGP, and the introduction of a significant new gas supply source to one of the markets served by the CGP.

A possible outcome of a future review may be that circumstances have not changed materially since the access arrangement was first approved and revisions to the non-tariff elements may not be warranted. There is a significant period of time to the revisions submission date in 2023, however, during which time circumstances may change significantly to justify revisions to the non-tariff elements. CGPJV expressed the view to the Commission that trigger mechanisms are unnecessary because users enter into long term contracts. In these circumstances a review of the access arrangement would not affect existing contracts. While the Commission acknowledges this viewpoint, it also notes that new contracts would be affected by any revisions to the access arrangement.

In its response to the Draft Decision CGPJV reiterated its objection to the proposed amendment on the grounds that:

- the Commission does not have the power to require the inclusion of trigger events; and
- the inclusion of trigger mechanisms would create uncertainty.

With regard to the first objection, CGPJV contends that trigger events only arise in the context of the regulator's determination of the revisions submission date and revisions commencement date. According to CGPJV, since the Commission has no role in this instance in reviewing these dates, it follows that the Commission does not have the ability to require the inclusion of trigger mechanisms. Furthermore, CGPJV argues that trigger mechanisms only have a role in relation to forecast volumes, which in turn are one of the determinants of reference tariffs. However, in the case of the CGP access arrangement the CGPJV notes that the Commission has no role in determining reference tariffs.

Regarding the second objection, according to CGPJV uncertainty would arise with respect to the Commission's role in reviewing tariffs in the event that a trigger occurs. CGPJV stated that such a situation would be contrary to the intent of the derogations and the provisions of the Act.

In its response to the Commission's Draft Decision BHP indicated its support for the proposed amendment and reiterated that the appropriate triggers should be those outlined in its original submission.

In light of the breadth of the derogation the Commission sought legal advice on the applicability of sections 3.17 (ii) and 3.18 with respect to the proposed access arrangement for the CGP. Section 3.18 of the Code provides for a review of the access arrangement if the forecasts on which the terms of the proposed access arrangement are based subsequently prove to be incorrect. Counsel has advised the Commission that, since the Commission's approval will not be based on any forecasts, section 3.18 does not apply.

Section 3.17(ii) allows the Commission to require that the access arrangement define specific major events that trigger an obligation on the service provider to submit revisions prior to the revisions submission date. Counsel has advised the Commission that the derogation, while preventing the Commission from exercising its power under section 3.17(i) of the Code, does not have the effect of displacing the whole of section 3.17(ii). In its response to the Commission's Draft Decision on the Wallumbilla to Gladstone pipeline, the Queensland Government argued that section 3.17(ii) only relates to reference tariffs and reference tariff policy. Therefore, according to the Queensland Government, section 3.17(ii) has no relevance to the derogated Queensland pipelines. The Queensland Government's conclusion is based on the requirement in section 3.17 that the Commission must have regard to the objectives set out in section 8.1 of the Code (which relates to reference tariffs and reference tariff policy) when considering inclusion in an access arrangement of specific events triggering a review. Council has advised the Commission, however, that the objectives are so generic in their content (with one exception) that they can be readily applied to elements in the access arrangement other than the reference tariff and reference tariff policy. The Commission would be within its rights to require specific major events to be defined in the access arrangement which would trigger a review of the access arrangement prior to the revisions submissions date.

It is important to note that such a review would have no implications for the derogated reference tariff and reference tariff policy, since the Commission has no power to review these prior to the year 2023. The Commission, however, would not be similarly constrained with respect to the non-tariff elements which have not been derogated. The Commission does not share CGPJV's concern that a review triggered by a specific major event will lead to uncertainty as to whether the tariff elements would be subject to review. The Commission accepts that it has no ability under the derogation to review the reference tariffs and tariff policy for so long as section 58 of the Act remains in its current form.

The Commission maintains its requirement that CGPJV amend its access arrangement to include specific major events that would trigger a review of the non-derogated elements of the access arrangement. The Commission proposes that the specific major events should include the interconnection of another pipeline with the CGP and the introduction of a significant new gas supply source to one of the CGPJV's markets.

Similar amendments were required by the Commission with respect to the access arrangements for Duke Energy's Wallumbilla to Gladstone pipeline (also known as the Queensland Gas Pipeline) and Epic's Ballera to Wallumbilla pipeline. In the case of the Wallumbilla to Gladstone pipeline Duke Energy failed to submit a revised access

arrangement in accordance with the Commission's final decision. Consequently, the Commission was required to draft and approve its own access arrangement.³⁶ Following is an extract from the access arrangement for the Wallumbilla to Gladstone pipeline:

Duke is required to submit revisions to this access arrangement within one month of receiving written notification by the Commission that one of the following major events has occurred:

- (a) the interconnection of another pipeline with the QGP; or
- (b) the introduction of a significant new source of gas supply to one of the QGP's markets;

that substantially changes the types of Services that are likely to be sought by the market or has a substantial effect on the direction of the flow of natural gas through all or part of the pipeline.

Pursuant to section 58 of the *Gas Pipelines Access (Queensland) Act 1998*, and for so long as that section remains in effect, a review of this access arrangement as a result of one of these major events occurring cannot result in revisions to those parts of the access arrangement that are taken to be approved under that section.

Amendment A3.8

In order for CGPJV's access arrangement for the CGP to be approved, the Commission requires CGPJV to include a list of specific major events that will trigger a review of the non-tariff elements of the access arrangement that do not form part of the Tariff Arrangement approved by the Minister, such as the interconnection of another pipeline with the CGP and the introduction of a significant new gas supply source to one of the CGPJV's markets.

Pursuant to section 58 of the *Gas Pipelines Access (Queensland) Act 1998*, and for so long as that section remains in effect, a review of this access arrangement as a result of one of these major events occurring cannot result in revisions to those parts of the access arrangement that are taken to be approved under that section.

³⁶ Duke Energy has appealed against the Commission's decision to the Australian Competition Tribunal.

4. Information provision

4.1 Information provision

4.1.1 Code requirements

In conjunction with its proposed access arrangement, a service provider would normally be required to submit access arrangement information containing at least the categories of information described in Attachment A to the Code (a summary of which is shown in Box 4.1).

The access arrangement information should contain sufficient information that, in the opinion of the relevant regulator, would 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
- to form an opinion as to the compliance of the access arrangement with the provisions of the Code (section 2.6).

Box 4.1: Summary of Attachment A information

The information required is divided into six categories:

Category 1: access and pricing principles

Tariff determination methodology; cost allocation approach; and incentive structures.

Category 2: capital costs

Asset values and valuation methodology; depreciation and asset life; committed capital works and planned capital investment (including justification for); rates of return on equity and debt; and debt/equity ratio assumed.

Category 3: operations and maintenance costs

Fixed versus variable costs; cost of services by others; cost allocations, for example, between pricing zones, and cost categories.

Category 4: overheads and marketing costs

Costs at corporate level; allocation of costs between regulated and unregulated segments; cost allocations between pricing zones, services or categories of asset.

Category 5: system capacity and volume assumptions

Description of system capabilities; map of piping system; average and peak demand; existing and expected future volumes; system load profiles and customer numbers.

Category 6: key performance indicators

Indicators used to justify 'reasonably incurred' costs.

In the case of the CGP, the derogated tariff arrangement states that:

For so long as the Service Provider's Service Policy consists of the Reference Service described herein, and the Reference Tariff described herein continues to apply to that Reference Service, the Service Provider shall not be required to prepare an Access Arrangement Information in connection with the Access Arrangement under which the Reference Service and Reference Tariff are offered.

4.1.2 CGPJV's proposal

CGPJV has submitted access arrangement information with respect to Category 5 of Attachment A to the Code, but has refrained from submitting any information with respect to Categories 1 to 4 and Category 6.

4.1.3 Submissions by interested parties

A theme of the submissions is that the information disclosed by CGPJV in their access arrangement information is insufficient to users and prospective users to understand how reference tariffs were initially derived and how negotiated services will be priced in future.

BHP noted that under section 2.7 of the Code, the categories of information described in Attachment A to the Code must be made available, but Attachment A does not limit what information is to be made available. In its submission BHP disputed the legal basis for the claim that CGPJV is exempted from the requirements of the Code in this regard. MIM contended that as the derogated tariff arrangement cannot be reviewed until 2023, it would not be unreasonable for CGPJV to be required to make disclosure of all categories in Attachment A.

With only one reference service, for which a postage stamp tariff is offered, and a revisions commencement date of 1 May 2023, BHP stated that it is impossible to be confident that the categories of information described in Attachment A to the Code will remain sufficient. Due to this length of time, BHP proposed that CGPJV should be obliged to make available in future further information which is determined as appropriate by the Commission having regard to the circumstances prevailing at that time.

4.1.4 Commission's considerations

CGPJV's proposal is in accordance with the derogation which exempts CGP from providing access arrangement information in relation to the reference tariff. The information described in Categories 1 to 4 and Category 6 of Attachment A to the Code is of a financial nature and would normally be used by the Commission and interested parties to assess compliance of the reference tariff with the principles outlined in section 8 of the Code. The Commission also considers that there is significant merit in the provision of access arrangement information to enable more informed negotiation for non-reference services. In this case, however, the CGPJV has an explicit exemption from the obligation to submit most of the access arrangement information described in Attachment A.

In its response to the Draft Decision BHP reiterated the position it adopted in its original submission. That is, CGPJV should submit access arrangement information as provided for in the Code, particularly in view of the extended time period before review

of the access arrangement. As mentioned above, however, because CGPJV is specifically exempt under the terms of the derogation from submitting access arrangement information, the Commission cannot require it to do so.

5. Final decision

Pursuant to section 2.16 of the Code, the Commission does not approve CGPJV'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 Final Decision.

A revised access arrangement must be submitted to the Commission on or before 28 February 2002.

Appendix A: Submissions

In response to the issues paper

Pasminco Century Mine Ltd, 22 January 2001

Ergon Energy Gas Pty Ltd, 29 January 2001

BHP Minerals Pty Ltd, 29 January 2001

CS Energy Limited, 29 January 2001

MIM Holdings Limited, 29 January 2001

Agility Management Pty Ltd (on behalf of CGPJV), 31 January 2001

Santos Ltd, 2 February 2001

Queensland Office of Energy, 25 June 2001

In response to the Draft Decision

BHP Minerals Pty Ltd, 14 September 2001

Carpentaria Gas Pipeline Joint Venture, 8 October 2001

Queensland Deputy Premier, Treasurer and Minister for Sport, 5 December 2001