Final Approval

Access Arrangement for the Ballera to Wallumbilla Pipeline System (South West Queensland Pipeline)

Date: 4 June 2002

File No:
C2000/1161

Commissioners:
Fels
Martin
Bhojani
Cousins
Jones

Contents

1. Background

Epic Energy Queensland Pty Ltd (Epic) applied to the Australian Competition and Consumer Commission (the Commission) for approval of its proposed access arrangement for the Ballera to Wallumbilla Pipeline System on 17 August 2000. This pipeline is also known as the South West Queensland Pipeline (SWQP). 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 sets out the policies and terms and conditions on which Epic proposes to make access to the SWQP available to third parties.

The SWQP is the subject of a Queensland Government derogation that prevents the Commission from reviewing the reference tariffs and related areas of the access arrangement until the revisions submissions date. Therefore, a significant proportion of the typically contentious aspects of an access arrangement were not open to Commission consideration. In particular, the Commission was constrained from any assessment of reference tariffs or reference tariff policy.

The Commission's assessment of the proposed access arrangement has been conducted in accordance with the requirements set out in the Code and has been based on information provided by Epic and interested parties. The consultation and assessment process undertaken by the Commission has included:

- Release of the *Draft Decision* (pursuant to s. 2.13 of the Code) on the proposed access arrangement on 13 June 2001, in which the Commission proposed ten amendments to be made in order for the access arrangement to be approved;

- Release of the *Final Decision* (pursuant to s. 2.16 of the Code) on 28 November 2001, assessing Epic's proposed access arrangement, in which the Commission required eight amendments to be made in order for the access arrangement to be approved.

The *Final Approval* relies in part upon the facts and analysis set out in the *Final Decision* and should be read in conjunction with that decision.

2. Epic's revised access arrangement

The Commission's *Final Decision* required eight amendments to Epic's access arrangement.

In response to the Commission's *Final Decision,* Epic submitted a revised access arrangement dated 8 February 2002. Epic also submitted a further submission to the Commission on 12 March 2002. This document mainly discussed the Commission's decision to include in its access arrangement specific major events that would trigger an early review of the non-tariff elements.

In its revised access arrangement, Epic made three of the eight amendments required by the *Final Decision*. Epic also made a fourth amendment that it believes addresses

the Commission's concerns. Epic declined to comply with the four remaining amendments.

2.1 Assessment

Having received the revised access arrangement, the Commission is obliged under section 2.19 of the Code to issue a further final decision (which is this *Final Approval*). If the Commission is satisfied that the revised access arrangement either substantially incorporates the amendments specified or otherwise addresses to the Commission's satisfaction the matters identified in the *Final Decision* as being the reasons for requiring those amendments, it must approve the revised access arrangement.

In any other case, the Commission must not approve the revised access arrangement and must draft and approve its own access arrangement. This is the course adopted by the Commission in the present instance.

2.1.1 Services Policy

In its *Final Decision* the Commission required three amendments to the Services Policy proposed in Epic's access arrangement.

The amendments were as follows:

Amendment 3.1

The Commission requires Epic to include all of the reference services established in the Queensland Government's derogation as reference services in the access arrangement.

Amendment 3.2

The Commission requires Epic to reduce the minimum term for a contract for FH1 service to one or two years.

Amendment 3.3

The Commission requires Epic to add the following wording to the end of clause 6.3 of the access arrangement:

> 'provided that Epic Energy provides the Shipper with prior notice at a time and in a manner that is reasonable under the existing conditions, and should that prior notice be verbal, it will be confirmed in writing as soon as is reasonably practicable.'

Amendment 3.1

The Queensland Government's derogation requires the Service Provider to offer the following six types of reference services:

- Class FH-1 – Forward Haul Service;

- Class BH-1 – Back Haul Service;
- Class IT-1 – Interruptible Transportation Service;
- Class FZ1 - Forward Part Haul Service (Zonal);
- Class BZ1 – Back Part Haul Service (Zonal); and
- Class IZ1 - Interruptible Part Haul Service (Zonal).

In its access arrangement of 17 August 2000, Epic proposed to offer only the Forward Haul as a reference service.[1] Epic has made the point on several occasions that the other five services described in the derogation, referred to as AFT Services, are not services that are sought by a significant part of the market, and should therefore not be included in the services policy[2]. In its *Final Decision*, the Commission required Epic to include all six services described in the derogation as reference services.[3]

The Commission took the view in its *Final Decision* that the Queensland Government derogation has deemed the listed services to be Reference Services for the purposes of the access arrangement under the Code.[4] The Commission noted:

> For this reason the Commission believes that under the derogation these services are as a matter of law reference services for the purposes of the code. The Commission agrees it is possible not to require Epic to list the AFT services as Reference Services in its Services Policy. This would not, however, change the fact that they are Reference Services. To not include them in the Services Policy would then be potentially misleading for access seekers and would not be appropriate.[5]

Epic declined to comply with Amendment 3.1 in its revised access arrangement of 8 February 2002. Epic maintained its proposal of offering a Full Forward Haul service as a reference service, and the remaining services described in the derogation as non-reference services.

The Commission maintains the view it expressed in the *Final Decision* in relation to this matter. Accordingly, the Commission considers that Epic has not complied with Amendment 3.1, and has not satisfied its concerns in relation to this matter.

In its access arrangement, the Commission has listed the six services mentioned in the Queensland Government derogation as Reference Services.

---

[1] Epic access arrangement 17 August 2000, clause 6.1 at 7.

[2] Epic submission 9 April 2001 at 6; Epic submission 16 October 2001.

[3] ACCC *Final Decision* on SWQP 28 November 2000 (*Final Decision*) pp. 14-15.

[4] *Final Decision* p. 11.

[5] *Final Decision* p. 11.

Amendment 3.2

In relation to this amendment, Epic continues to propose a minimum term of five years for Full Forward Haul service in its revised access arrangement.[6]

In its *Final Decision*, the Commission took the view that a five-year minimum term would be onerous to prospective users, and might hamper the development of a more dynamic gas market in Queensland. [7]

Epic declined to comply with Amendment 3.2. Since the Commission maintains the view it held in the *Final Decision*, it considers that Epic has not complied with Amendment 3.2, and has not satisfied its concerns in relation to this matter.

In its access arrangement, the Commission has provided for a two-year minimum term for Full Forward Haul service.

Amendment 3.3

Epic amended its revised access arrangement to comply with this amendment.

2.1.2 Terms and Conditions of service

In its *Final Decision* the Commission proposed the following amendments to Epic's proposed Terms and Conditions of service:

Amendment A3.4

Epic must amend clause 10 in the following manner:

(i) by deleting from 10.1 the words "as amended or varied from time to time in accordance with Paragraph 10.3";

(ii) by deleting from 10.2 the words "At the date of this access arrangement,";

(iii) by deleting 10.3 and 10.4 in their entirety.

In its revised access arrangement, Epic declined to amend clause 10 as proposed by the Commission. Epic did, however, insert the following subclause:

> If Epic Energy amends the Gas Transportation Agreement Terms and Conditions pursuant to this clause 10, it must display on its web site, a copy of the terms and conditions highlighting the amendments made.[8]

[6] Epic revised access arrangement 8 February 2002 clause 6.2(b).

[7] *Final Decision* p. 13.

[8] Epic revised access arrangement 8 February 2002, clause 10.5.

The Commission accepts that it is desirable for users to be informed of any changes to the terms and conditions through their display on its website. However, the main concern expressed by the Commission in its *Final Decision* was that clause 10 gave Epic too broad a discretion to change the terms and conditions. The Commission wished to avoid approving in advance any changes made by Epic to the terms and conditions.

The potential detriment to users resulting from changes to the terms and conditions would be ameliorated only slightly were users informed of these changes via Epic's website.

Accordingly, the Commission considers that Epic has not complied with Amendment 3.4, and has not satisfied its concerns in relation to this issue.

The Commission has amended clause 10 in its access arrangement to comply with Amendment 3.4.

2.1.3 Queuing Policy

In its *Final Decision*, the Commission proposed the following amendment to the Queuing Policy in Epic's revised access arrangement:

Amendment A3.5

Epic must amend the access arrangement to delete clause 5.3(b) and must submit a Gas Transportation Guide that the Commission determines is reasonable.

In response to this proposed amendment, Epic deleted clause 5.3(b) from its access arrangement. Epic also submitted a Gas Transportation Guide to the Commission for its consideration. The Commission considers that the Gas Transportation Guide submitted by Epic is reasonable, and is consistent with the access arrangement.

2.1.4 Extensions and Expansions Policy

In its *Final Decision*, the Commission required Epic to make the following amendment to its access arrangement:

Amendment A3.6

For the access arrangement to be approved, the Commission requires that Epic replace clause 12.1 with the following:

> 12.1 Epic Energy will enhance or expand the Capacity of the SWQP to meet the gas transportation needs of Prospective Shippers where Epic Energy believes the tests in sections 6.22(b) and (c) have been met. However, nothing in this access arrangement compels Epic Energy to fund all or part of the expansion or extension to the SWQP

In response, Epic inserted the following provision into its revised access arrangement:

12.1 Epic Energy will enhance or expand the Capacity of the SWQP to meet the gas transportation needs of Prospective Shippers where Epic Energy believes the tests in Sections 6.22(b) and (c) of the Code have been met. However, nothing in this access arrangement compels Epic Energy to:

(1) fund all or part of the expansion of or extension to the SWQP;

(2) extend the geographical range of the SWQP;

(3) make a Prospective Shipper become the owner of the SWQP or a part of the SWQP, or any extension to or expansion of it; or

(4) fund part or all of an expansion or extension.

The Commission considers that Epic has substantially complied with the requirements of Amendment A3.6. The Commission is also satisfied that the additional amendments made by Epic are reasonable, as they mirror the provisions of the Code. However, in its access arrangement, the Commission has deleted subclause (4) of Epic's proposed clause 12.1 to avoid repetition.

2.1.5 Review and Expiry of the access arrangement

In its *Final Decision*, the Commission required Epic to make the following amendments to the access arrangement in relation to the review and expiry of the access arrangement:

Amendment 3.7

The Commission requires that Epic amend its proposed revisions dates to be consistent with the dates set out in the derogation.

Amendment 3.8

The Commission requires Epic to include in the access arrangement a list of specific major events that will trigger a review of the non-tariff elements of the access arrangement, such as the interconnection of another pipeline with the SWQP, and the introduction of a significant new gas supply source to one of the SWQP's markets.

The revisions dates proposed by the Queensland derogation are as follows:

"Revisions Submission Date" means:

(a) for revisions relating to AFT services:

(i) 11 June 2004; or

(ii) such earlier date as is agreed to by the service provider and the relevant regulator;

(b) for all other revisions to the access arrangement:

(i) 30 June 2016; or

(ii) such earlier date as is agreed to by the service provider and the relevant regulator.

In its revised access arrangement of 8 February 2002, Epic proposed the following revisions dates:

> (a) The Revisions Submission Date is 30 June 2016.
>
> (b) The Revisions Commencement Date is 30 December 2016.[9]

The *Final Decision* commented:

> The Commission has received legal advice that the effect of s58 (4) of the QGPAL is that the Revisions Submission Date and the Revisions Commencement Date for the access arrangement are the dates contained in the tariff arrangement approved by the Queensland Minister. This means that the Commission is unable to review these dates under the code.[10]

The Commission considers that there is some inconsistency in Epic's approach towards Amendments 3.1 and 3.7 on the one hand, and 3.8 on the other. In relation to the former amendments, Epic has advanced the view that the access arrangement need not comply with the terms of the derogation. It has suggested, in effect, that the relevant sections of the derogation do not comply with the Code and, alternatively, that to implement them would not be in the interests of users. This appears to be at odds with what Epic submitted on 12 March 2002 in relation to the Commission's proposed trigger mechanism.

In that submission, Epic contends:

> The Regulator's argument ignores an important piece of information which points to the proper interpretation of both section 58 of the Act and section 3.17 of the Code being that it was the intention of the Queensland parliament that section 3.17 of the Code had no role to play in the Regulator's assessment of the access arrangements for the derogated pipelines (including the SWQP).[11]

The thrust of Epic's argument appears to be that section 58 of the Gas Pipelines Access (Queensland) Act has the effect of entirely displacing the Commission's power to insert a trigger mechanism under section 3.17 of the Code. If this is correct, the Commission has no power to depart from the revisions submission dates and revisions commencement dates set out in the derogation, since the Commission's discretion to approve or reject the proposed revisions submission dates and revisions commencement dates arises only under section 3.17 of the Code.

Applying this reasoning to the services policy and also to the revisions submissions and revisions commencement dates, it must follow that the derogation removes the Commission's discretion as to whether it can accept or reject the relevant provisions of the derogation as part of the access arrangement.

The Commission remains of the view that section 58(4) of the Gas Pipelines Access (Queensland) Act requires that the revisions submissions and revisions

---

[9] Epic revised access arrangement 8 February 2002 p. 15.

[10] *Final Decision* at 25.

[11] Epic submission 12 March 2002 p. 5.

commencement dates contained in the derogation be the revisions submission dates and revisions commencement dates for the access arrangement.

Epic declined to amend its access arrangement in accordance with Amendment 3.7. The Commission maintains the position it took in the *Final Decision*, and considers that Epic has not addressed its concerns in relation to this matter.

Accordingly, the Commission has incorporated the revisions submission dates and revisions commencement dates provided in the derogation into its access arrangement.

Epic also declined to enumerate a specific list of major events triggers in the access arrangement, as required by Amendment 3.8.

Prior to the *Final Decision*, Epic made several submissions to the Commission on the issue of the proposed trigger mechanism. The submissions stated Epic's view that the Commission does not have the power to insert a review trigger into the access arrangement.[12]

In its *Final Decision* the Commission referred to legal advice it had sought from Gageler SC in relation to Duke's Queensland Gas Pipeline. In that advice, the view was expressed that the Commission does have the power to require a major events trigger in relation to non-derogated matters such as terms and conditions, services policy etc.[13]

In its submission of 12 March 2002, Epic again argued that the Commission lacks the power to require the insertion of the trigger mechanism. Epic also submitted that even if the Commission did possess this power, it should not exercise it. Epic submitted that Amendment 3.8 would not be in the legitimate business interests of either the service provider or prospective users.[14]

The issue of whether the Commission is empowered to require Amendment 3.8 has been clarified by the Australian Competition Tribunal's decision of 10 May 2002 in *DEI Queensland Pipeline Pty Ltd v ACCC*.[15]

In that case, the Tribunal considered whether the Queensland Government derogation deprived the Commission of the power under s. 3.17 of the Code to insert a major events trigger relating to non-derogated matters into Duke Energy's access arrangement. The major events trigger that the Commission included in Duke's access arrangement was expressed in similar terms to Amendment 3.8.

The Tribunal affirmed the Commission's decision to draft and approve an access arrangement for the Queensland Gas Pipeline. In doing so it ruled that the

---

[12] Epic submission 9 April 2001 pp. 2-3; Epic submission 13 July 2001, p. 3; Epic submission 16 October 2001 p. 12-15.

[13] *Final Decision* pp. 27-28.

[14] Epic submission 12 March 2002 p. 9.

[15] [2002] ACompT 2.

Commission retained the power to insert a major events trigger relating to non-derogated matters into Duke's proposed access arrangement.

Epic submitted that the Commission should have given greater weight to the submission of the State of Queensland in considering whether to insert a trigger mechanism into the access arrangement.[16] Epic argued:

> That is the State of Queensland, in its submission to the Regulator, confirms that it was not the intention that section 3.17 of the Code had a role to play in the Regulator's assessment of the access arrangement.[17]

The Commission noted the view of the Queensland Government in its *Final Decision*.[18] However, the Commission chose to rely on its legal advice to the effect that it did in fact possess the power to require the major events trigger.[19]

The Commission takes the view that while the Queensland Government is able to provide some guidance to the meaning of the derogation, the correct method for construing the derogation is to ascertain the intention of the Queensland Parliament. Epic acknowledges this when it states:

> While it is accepted that a submission can not ordinarily be used as a tool for statutory interpretation purposes, it offers an invaluable insight into the State's intentions.[20]

It is clear from the Tribunal's recent ruling in *DEI Queensland Pipeline Pty Ltd v ACCC* that the words of the derogation permit the Commission to require the insertion into the access arrangement of a review trigger relating to non-derogated matters.

Accordingly, the Commission considers that it has given appropriate weight to the view of the Queensland Government.

The merits of requiring a review trigger

Epic argues that a trigger mechanism is both unnecessary and undesirable for the SWQP.[21]

Epic's first argument stems from its contention that the only possible new sources of gas are the Cooper Eromanga basin, the Timor Sea, the Surat basin and Papua New Guinea. In the case of the first two sources, Epic reasons that gas from these sources would use existing interconnections to the SWQP at Ballera, and would take the reference tariff for a forward haul service.

In relation to the latter two sources, Epic submitted:

---

[16] Epic submission 12 March 2002 p. 5.

[17] Epic submission 12 March 2002 p. 5.

[18] *Final Decision* p. 27.

[19] *Final Decision* pp. 27-8.

[20] Epic submission 12 March 2002 p. 5.

[21] Epic submission 12 March 2002 pp. 9-10.

> In the case of Surat Basin gas or PNG gas, this would most likely reverse the flow and in such an instance, the financial pressures on Epic Energy would be such that it would reverse the flow.[22]

The Commission's view of these matters is that while these are the most likely sources of gas, in the next 14 years, other events may potentially arise that would satisfy the review triggers.

Considering the first two scenarios - Timor Sea or Cooper Eromanga Basin gas being introduced - there are other considerations besides the tariff that users would pay to transport this gas. Since the Commission has no power to review tariffs, this is irrelevant to the Commission's considerations in any case. The Commission is concerned about how the introduction of new sources of gas would affect non-tariff elements of the access arrangement.

The Commission considers that in the case of the introduction of gas into Queensland from the Surat Basin or from Papua New Guinea, Epic may reverse the flow of the pipeline in response to commercial considerations. Again, the Commission's concerns are primarily directed towards the effects such a reversal, or some other event, might have on the non-tariff elements of the access arrangement.

The Potential Effects of a Reversal of Flows

One aspect of the access arrangement that might be reconsidered in the event of a reversal of flows is the extensions and expansions policy contained in section 12 of the access arrangement. At this stage the Commission has accepted Epic's proposal that extensions or expansions are to become part of the covered pipeline unless Epic elects otherwise. However, a reversal of flows may lead to the demand for significant extension of the pipeline. The nature of such proposals may necessitate the re-examination of Epic's discretion as to the inclusion of extensions or expansions to the covered pipeline.

It might also be necessary to re-examine the queuing policy contained in section 5.3 of the access arrangement. At present this is essentially first come first served, subject to the qualification that Epic Energy may deal with Gas Transportation Requests out of order provided those that were first in time are not ultimately disadvantaged.[23]

In relation to the meaning of the phrase 'ultimately disadvantaged', Epic submitted on 16 October 2001:

> Epic Energy believes that it is inappropriate to define when someone will be "ultimately disadvantaged" under clause 5.3. To do so would require Epic Energy to predict the unknown and it would also reduce the requisite flexibility that is required of a queue that deals with a variety of Services.
>
> In addition, given that the queue (incorporating the amendment referred to above [ie the proposed deletion of 5.3(b)]) will truly be a "first come, first served" queue, a First Prospective Shipper will be "ultimately disadvantaged" if it loses the

[22] Epic submission 12 March 2002 p. 10.

[23] Revised access arrangement p. 6.

> opportunity of securing capacity on the SWQP at the expense of Prospective Shipper lower down in the queue.[24]

The first thing that should be noted in this regard is that this interpretation of the relevant phrase does not form part of the access arrangement, and therefore cannot be accepted as the definitive meaning of the phrase. Additionally, there might arise circumstances associated with a future reversal of flows where this formulation required further consideration. If the flow on the SWQP were reversed, it might be necessary to revisit the queuing policy to clarify how the interests of forward haul and back haul users are to be balanced.

It may also be necessary to revisit a number of other provisions in Annexure B (Additional Terms and Conditions) to the access arrangement in the event of a reversal of flows on the SWQP. The provisions that might be affected include:

- Gas Quality – clause 7;
- Receipt and Delivery Pressures – clause 8;
- Flexibility of Receipt and Delivery Points – clause 12.6;
- Scheduling Priorities – clause 13.2;
- Curtailment of Receipts and Deliveries – clause 14; and
- Flow Devices, Pressure and Energy and Relative Density – Schedule Part 1.

These are merely examples of issues that might arise in relation to the non-derogated aspects of the access arrangements if the flow on the SWQP were reversed. The length of the period of the access arrangement – around 14 years for Firm Forward Haul – means that it is impossible to predict all the circumstances that might satisfy the triggers proposed. This uncertainty provides a strong additional argument for the inclusion of a review trigger.

Epic also raised the argument that transportation contracts from these new sources of gas might well be contracts in excess of five years. Epic submitted that these contracts would prejudice Epic because of the revenue sharing mechanism contained in the derogation.[25]

The Commission notes the inconsistency between this argument, and Epic's insistence on a five-year minimum term for FH1 service. Epic included this provision in both versions of its access arrangement submitted to date, and made submissions to the Commission supporting its inclusion.[26] In making these arguments Epic did not express concerns about prejudice that it might incur as a result of the operation of the revenue sharing mechanism.

---

[24] Epic submission 16 October 2001 pp. 6-7.

[25] Epic submission 12 March 2002 p. 10.

[26] Epic submission 16 October 2001, pp. 6-7.

The Commission considers that Epic would have the option to sign contracts for less than five years if it were particularly concerned about the impact of the revenue sharing principles. Furthermore, while the legitimate business interests of the service provider are a relevant matter for the Commission to consider under s. 2.24, the Commission must also consider other matters, including the interests of users and prospective users.

Another consideration is that the revenue sharing mechanism applies only to Class FH1 Service. Since Class FH1 is defined as the transportation of gas from Ballera to Wallumbilla, the revenue sharing mechanism would not apply to users shipping gas westwards in the event of a reversal of flows.

The Commission considers that a review trigger is important to protect the interests of existing and new users should events such as a reversal of the flow of the SWQP occur.

Accordingly, the Commission considers that it has the power under section 3.17 of the Code to include a provision in the access arrangement that would trigger revisions in relation to non-derogated matters upon the occurrence of a defined major event. Furthermore, the Commission considers that such a trigger mechanism is in the interests of users and prospective users, and should be included in the access arrangement.

3. Final Approval

For the reasons expressed in this Approval and in the *Final Decision*, pursuant to section 2.19 of the Code, the Commission does not approve Epic's revised access arrangement.

As a result of this decision, section 2.20 of the Code now requires the Commission to draft and approve its own access arrangement for the SWQP.

3.1 Commencement Date

Section 2.26 of the Code provides that decisions made by the Commission under section 2.20(a) are subject to review by the Australian Competition Tribunal under the Gas Pipelines Access Law. For this reason, an access arrangement drafted and approved by the Commission cannot commence for at least 14 days after the decision to approve it is made.

Subject to the Code and the Gas Pipelines Access Law, the Commission's decision to draft and approve the access arrangement for the SWQP has effect from 18 June 2002.

4. The ACCC's access arrangement for the SWQP

As required by section 2.20(a) of the Code, the Commission has drafted its own access arrangement for the SWQP. In doing this, the Commission has sought to maintain the access arrangement as proposed by Epic to the greatest extent possible,

while including in it those amendments, specified in the *Final Decision*, with which Epic has not complied.

The Commission's access arrangement for the SWQP is available from the Commission's website: http://www.accc.gov.au