Final Decision

Access Arrangement proposed by Epic Energy Queensland Pty Ltd for the Ballera to Wallumbilla Pipeline System

Date: 28 November 2001

File No:

C2000/1161

Commissioners:

Fels
Cousins
Martin
Jones

Contents

Abbreviations and glossary of terms

ACCC	Australian Competition and Consumer Commission
Access Arrangement	An arrangement for third party access to a pipeline, that a pipeline owner/operator submits to the relevant regulator for approval in accordance with the Code.
Access Arrangement Information	Information a service provider provides to the relevant regulator pursuant to section 2 of the Code.
Bare Transfer	When a transfer or assignment of capacity rights does not result in an alteration to the terms of a contract with the service provider.
Code	*National Third Party Access Code for Natural Gas Pipeline Systems*
Contract carriage pipeline	A system of managing third party access whereby: ▪ 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; ▪ service charges 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.
Commission	Australian Competition and Consumer Commission
Covered Pipeline	Pipeline to which the provisions of the code apply
Derogation	A legislative exemption from compliance with specified obligations set out in the Code.
Epic	Epic Energy Queensland Pty Ltd
GJ	GigaJoule
GPAL	*Gas Pipelines Access (Queensland) Law*
KPI	key performance indicator
Law	*Gas Pipelines Access (Queensland) Law*
MDQ	maximum daily quantity
NCC	National Competition Council
p.a.	per annum
PJ	PetaJoule (equal to 1 000 000 GJ)
Prospective User	A person who seeks or who is reasonably likely to seek to enter into a contract for a service and includes a user who seeks or may seek to enter into a contract for an additional service.

Queuing Policy	A policy for determining the priority that a prospective user has, as against any other prospective user, to obtain access to spare capacity.
Reference Service	A service for which the service and its tariff are specified in an access arrangement.
Reference Tariff	A tariff specified in the Access Arrangement as corresponding to a Reference Service and which has the operation that is described in sections 6.13 and 6.12 of the Code.
Reference Tariff Policy	A policy describing the principles that are to be used to determine a Reference tariff.
Revisions Commencement Date	The date upon which the next revisions to the Access Arrangement are intended to commence.
Revisions Submission Date	The date upon which submissions to the revision of the Access Arrangement are due.
Service	A Service provided by the means of a Covered Pipeline including: ▪ haulage services (such as firm haulage, interruptible haulage, spot haulage and backhaul); ▪ the right to inter connect with a Covered Pipeline; ▪ 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.
SWQP	South West Queensland Pipeline (Ballera to Wallumbilla pipeline)
TJ	Terajoule (equal to 1 000 GJ)

Executive summary

Introduction

On 17 August 2000 Epic Energy applied to the Australian Competition and Consumer Commission for approval of its proposed access arrangement for the Ballera to Wallumbilla pipeline system. The application was made under section 2.2 of the *National Third Party Access Code for Natural Gas Pipeline Systems* (the Code).

This pipeline supplies gas from the Cooper Basin in south-west Queensland; it is also known as the South West Queensland Pipeline (SWQP). The pipeline is 756 kilometres long, with a diameter of 406mm and operating pressure of 15Mpa. It was constructed in 1996 by Tenneco Gas Australia and is now operated by Epic Energy (Queensland) Pty Ltd.

The shareholders in Epic are El Paso Energy (30 per cent), Consolidated Natural Gas Company Inc (30 per cent), AMP Asset Management Australia Limited (10 per cent), Axiom Funds Management Limited (10 per cent), Hastings Funds Management Limited (10 per cent) and Allgas Energy Ltd (10 per cent).

The Commission released a draft decision on 13 June 2001 that proposed not to approve Epic's proposed Access Arrangement. The draft decision set out ten proposed amendments.

Since the draft decision was released, the Commission has received submissions from Epic and the Queensland Government. The content of these submissions is discussed in the body of this final decision. Commission staff have also met with Epic and discussed concerns arising from the draft decision.

The final decision at a glance

The SWQP is the subject of a Queensland Government derogation, which prevents the Commission from reviewing the reference tariffs and related parts of the access arrangement until the revisions submission date (2016). Therefore, the majority of the typically contentious aspects of an access arrangement are not able to be considered by the Commission. In particular, this final decision contains no assessment of reference tariffs or the reference tariff policy.

Only one submission was made in response to the proposed access arrangement[1]. Santos' submission raised a number of concerns, but only one of these related to a non-derogated aspect of the arrangement. This was a concern that Epic's proposed capacity trading policy appears to leave it to the service provider's sole discretion as to what constitutes 'reasonable commercial and technical grounds' for withholding consent to a capacity trade.

[1] The submission is from Santos – which is the shippers' representative for the South West Queensland Gas Producers under a long term gas transportation contract with Epic. The Producers' agreement is the pipeline's only firm forward haul agreement and represents over 95% of pipeline revenue.

Santos suggested a set of objective criteria to clarify what 'reasonable' meant and Epic agreed to include these criteria in an attachment to the access arrangement. The Commission believes that the inclusion of criteria to address this uncertainty is desirable and should lower the likelihood of future disputes.

The Commission requires Epic to include as reference services in the Access Arrangement all of the services determined to be reference services by the Queensland Government in the derogation. Epic proposed to only offer a single full forward haul reference service and provide the other derogated reference services as 'non-reference services'. The Commission also requires Epic to reduce the minimum term for a contract for full forward haul service from five years to one or two years.

The Commission considers that Epic's reservation of the right to restrict upstream deliveries 'in its absolute discretion without liability to the shipper' is too broad. The Commission requires Epic to consult with users in the event that it wishes to cease backhaul services.

The proposed queuing policy does not make it clear how Epic will determine priority in the queue. The Commission asked Epic to develop its policy further. In response, Epic proposed to delete clause 5.3(b) to clarify that its queue will operate as 'first come first served'.

Epic specified submission and commencement dates for revisions that are inconsistent with the derogation. The Commission requires Epic to change the access arrangement so that the dates reflect those determined in the derogation.

Epic's revisions commencement date is fixed in the derogation. However, s3.17 of the code allows for review of the non-tariff elements of the access arrangement if a specific major event occurs. The Commission requires Epic to identify specific major events that will trigger such a review. Epic and the Queensland Government made submissions asserting that the Commission did not have the power to require the specification of major events that would trigger a review. The Commission sought external legal advice from Mr Stephen Gageler QC. This advice confirmed the Commission's earlier internal legal advice that the amendment is legally valid.

Final decision

Having considered all the issues raised in submission and in discussions with interested parties, the Commission's final decision, pursuant to s.2.16 of the National Third Party Access Code for Natural Gas Pipeline Systems (the Code) is to not approve in its present form Epic's proposed Access Arrangement for the Ballera to Wallumbilla Pipeline. The amendments (or, as appropriate, the nature of amendments) that would have to be made in order for the Commission to approve the proposed Access Arrangement are set out in this Final Decision and reproduced below.

Epic is now required to submit a revised access arrangement by 18 January 2002.

Amendments

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 3.4

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,"; and

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

Amendment 3.5

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.

Amendment 3.6

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

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.

1. Introduction

1.1 Approval process

Epic submitted an access arrangement for the Ballera to Wallumbilla pipeline to the Commission on 17 August 2000. The application was submitted under section 2.2 of the *National Third Party Access Code for Natural Gas Pipeline Systems* (the code). The Commission is required to assess this arrangement for compliance with the code and approve or reject the arrangement on this basis.

The access arrangement describes the terms and conditions upon which Epic proposes to make access to the SWQP's services available. The Commission made a draft determination based on information supplied by Epic, submissions from interested parties and its own analysis. The draft decision set out ten proposed amendments. The Commission invited submissions in response to the draft decision. Submissions were made by Epic and by the Queensland Government.

Pursuant to section 2.16 of the code, the Commission has now made a final decision not to approve Epic's proposed Access Arrangement. 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. Epic is required to submit a revised Access Arrangement by 18 January 2002 that substantially incorporates these amendments or otherwise addresses to the Commission's satisfaction the issues that gave rise to the amendments.

If Epic fails to submit a revised Access Arrangement by 18 January 2002, or submits a revised Access Arrangement that does not meet the above test, the Commission must draft and approve its own Access Arrangement.

1.2 Regulatory framework

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

Gas Pipelines Access (Queensland) Act 1998

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

Gas Pipelines Access (Queensland) Act 1998 – derogations

The GPAL derogates a number of issues from the code. In particular, section 58 of the Act provides that the Reference Tariffs for several transmission pipelines were to be approved and gazetted by the Queensland Minister for Mines and Energy rather than complying with the access pricing principles – and related regulatory process – in the code. As a result the Reference Tariffs are non-reviewable for an extended period of time.

The National Third Party Access Code for Natural Gas Pipeline Systems

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

Gas Pipelines Access (South Australia) Act 1997

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

Regulatory institutions

The regulatory institutions that administer the Queensland legislation with respect to transmission pipelines are:

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

The Queensland Competition Authority[3] (QCA) is regulator and arbitrator in Queensland with respect to distribution (reticulation) pipelines.

1.2.1 Certification of the Queensland Gas Access Regime

On 25 September 1998, the Queensland Premier applied to the National Competition Council (NCC) to certify the 'effectiveness' of the Queensland Third Party Access Regime for Natural Gas Pipelines (the Queensland Regime). If a 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 whether the access regime should be certified as effective to the relevant Commonwealth Minister. 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

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[2] The Commission is also regulator and arbitrator with respect to transmission pipelines in the other States and Territories with the exception of Western Australia.

[3] *Queensland Competition Authority Act 1997*

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 TPA. 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.

In its submission of 16 October 2001, Epic expressed concern that the Commission raised the certification of the Queensland regime in its Draft Decision and stated:

> … Epic Energy believes that caution should be exercised in referring to the certification process for the following reasons:
>
> (1) The NCC's recommendation to the Minister has recently been withdrawn and the NCC has undertaken to recommence its consideration of the Qld Act, which will involve a detailed public consultation process.
>
> (2) The derogations were expressly included in the 1997 Council of Australian Governments Intergovernmental Agreement on Natural Gas Pipelines. In that agreement, it is stated quite clearly what aspects of the access arrangement will be able to be assessed by the ACCC (pp. 16-17).

The Commission has included an updated description of the certification process because it believes that it is relevant factual background information.

The Commission notes that the section which deals with derogations in the Intergovernmental Agreement to which Epic refer also contains the following clause:

> The Parties note that the specification of transitional arrangements and derogations in Annex H, Annex I and the Access Legislation of a particular jurisdiction … does not limit the discretion of the Commonwealth Minister to certify or not certify the access regime embodied in a jurisdiction's Access legislation (including the Code) as an effective access regime under section 44N of the Trade Practices Act or the National Competition Council's discretion under section 44M of the Trade Practices Act (Cl. 12.1).

1.3 Period of SWQP access arrangement

As established in the Queensland Minister's Approved Tariff Arrangement (the derogation) and discussed below at 3.7, the submission date for review of Epic's access arrangement is:

- for revisions relating to AFT services, 11 June 2004; and
- for all other revisions to the access arrangement, 30 June 2016.

In either case, the Service Provider and the Commission may agree to an earlier revisions submission date.

1.4 Criteria for assessing an access arrangement

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

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

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

An access arrangement must include the following elements:

- the service provider's terms and conditions for the supply of 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 to determine users' priorities in obtaining access to spare and developable capacity on a pipeline;
- an extensions/expansions policy to determine the treatment under the code of an extension or expansion of a pipeline;
- a date by which revisions to the arrangement must be submitted; and

- a date by which the revisions are intended to commence.

In assessing a proposed access arrangement, section 2.24 of the code requires the Commission to take the following into account:

- the service provider's legitimate business interests and investment in the pipeline;
- the 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.

1.5 Final decision

The Commission does not approve the proposed access arrangement for the SWQP.

Pursuant to section 2.16, the required amendments are set out in the relevant sections of this final decision and are brought together in the Executive Summary.

Chapter 2 describes the reference tariffs as determined by the Queensland Minister.

Chapters 3 and 4 set out the Commission's analysis of:

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

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

Any inquiries with respect to this Final Decision should be directed in the first instance to:

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2. Reference tariff elements

The Queensland Government has derogated the reference tariffs for this pipeline. The derogated reference tariffs are included as Annexure A to the access arrangement, and summarised in this chapter. However, of the reference services in the derogation, Epic proposed to only offer one of those services as a reference service. This service is the Firm Forward Haul Service.

Epic proposes to provide the other services established in the derogation as non-reference services. For a discussion of this proposal see 3.1.4 below.

As outlined earlier, these tariffs are not subject to review by the Commission in its consideration of this access arrangement.

Full forward haul service (FH1)

The service, described in section 3.1 of the Access Principles, is comprised as follows:

(a) the receipt by the service provider at the receipt point(s) at Ballera of quantities of gas nominated by the user in an amount not exceeding the aggregate of the receipt point MDQs plus any system use gas;

(b) the transportation of the gas on a firm basis and without interruption except as is expressly excused under any access arrangement; and

(c) delivery at Wallumbilla by the service provider, to the user or to another person for the user's account, of the quantities of gas (in GJs) in aggregate equivalent to the quantity of gas (in GJs) that the service provider received for the user's account at the receipt point(s), less any system use gas, in an amount not exceeding the aggregate of the delivery point MDQs.

Section 6.2(b) of the access arrangement states that, unless Epic in its absolute discretion allows otherwise, prospective shippers must nominate a minimum term of five years as the gas transportation agreement period, when applying for full forward haul service. This requirement is discussed below at 3.1.4.

The FH1 service tariff consists of:

a) a monthly reservation charge equal to the monthly reservation rate multiplied by the user's MDQ multiplied by 30.42; and

b) a throughput charge equal to the throughput rate multiplied by each GJ transported to or for the account of the user.

The throughput rate for an individual user will be adjusted based on the user's load factor, and shall equal the throughput rate multiplied by the user's load factor divided by 1.2.

The monthly reservation rate at 1 July 1997 was $0.5092 per GJ and the throughput rate was $0.1513 per GJ. These rates are indexed as follows.

In the derogation the relevant rates are expressed in 1 January 1995 terms and vary quarterly in accordance with the CPI on the following basis:

a) from 1 January 1995 – 1 January 1997, 100% of the relevant rate varies with the movement in the CPI; and

b) from 1 January 1997 until the earlier of the expiration of the Licence or the Revisions Commencement Date, 75% of the relevant rate determined by (a) varies with the movement in the CPI.

Further details on the authorised overrun rate and the daily variance rate are at section nine of Annexure A to the access arrangement.

Back Haul Service (BH1)

The monthly reservation rate for the BH1 service is derived by:

a) dividing the throughput rate by 1.2 (load factor adjustment); and

b) adding the throughput rate to the monthly reservation rate, then halving this amount.

All other relevant rates are 50% of the FH1 rates.

Interruptible Transportation Service (IT1)

The IT1 service is only available to the extent that Epic determines it can receive, transport and deliver gas for the user without causing any interruption of service to users under firm gas transportation agreements.

The tariffs for IT1 are derived as follows:

a) the throughput rate is derived by adding the monthly reservation and throughput rates for FH1 service;

b) the authorised overrun rate is equal to the BH1 rate (ie. 50% of the FH1 rate);

c) other relevant rates are the same as for FH1 service (see section nine of Annexure A to the access arrangement).

Forward Part Haul Service (Zonal) (FZ1)

The forward part haul service (zonal) provides for the transportation of gas through fewer than eight zones, without interruption except as is expressly excused under any access arrangement.

The tariffs for this service are derived by dividing the reference tariffs for FH1 service by 8 then multiplying by 1.1.

Back Part Haul Service (Zonal) (BZ1)

This service is identical to the FZ1 service, except that is it only available on a firm basis to the extent that sufficient forward haul transportation services are being performed on that day to permit a back haul transportation service.

The tariffs for FZ1 service are derived by dividing the relevant BH1 tariff by 8 and multiplying by 1.1.

Interruptible Part Haul Service (Zonal) (IZ1)

The interruptible part haul service (zonal) provides for the transportation of gas through fewer than eight zones without interruption, except as is expressly excused under any access arrangement. The service is only available to the extent that Epic determines it can receive, transport and deliver gas for the user without causing any interruption of service to users under firm gas transportation agreements.

The throughput rate for this service is derived by adding the monthly reservation rate to the throughput rate for FH1 service, dividing the result by 8 and multiplying by 1.1.

Other rates for this service are derived by dividing the rates for FH1 service by 8 and multiplying by 1.1.

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

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

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

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

3.1 Services policy

3.1.1 Code requirements

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

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

3.1.2 Epic's proposal

Epic proposes one reference service, a forward haul service. The derogation for the SWQP sets out a number of other reference services, which Epic proposes to offer as non-reference services. These are:

- Class BH1 - Back Haul Service
- Class IT1 - Interruptible Transportation Service
- Class FZ1 - Forward Part Haul Service (Zonal)
- Class BZ1 - Back Part Haul Service (Zonal)
- Class IZ1 - Interruptible Part Haul Service (Zonal)

3.1.3 Submissions by interested parties

Santos made the following submission with respect to Epic's services policy:

> Santos understands the firm forward service is the only arrangement which has been developed as a reference service. This service accounts for over 95% of pipeline revenue. In this instance, Santos accepts that the other non-reference services are not sought by a significant part of the market. Any ancillary service which is not gazetted as a reference service under the Gas Pipelines Access (Queensland) Act 1998 can be reviewed by the ACCC, if either participant elects to refer the matter to the ACCC for authorisation. Under this circumstance, Santos considers Epic's approach to be appropriate.

3.1.4 Commission's considerations

Reference and non-reference services

Section 58 of the *Gas Pipelines Access (Queensland) Act 1998*, provides that the Minister may approve a tariff arrangement and that the approved tariff arrangement is taken to be approved under the Gas Pipelines Access Law as the reference tariff and reference tariff policy. Section 3 of Annexure A of Epic's proposed access arrangement lists the reference services described above. However, Epic has only proposed to offer the full forward haul service as a reference service, classifying the remainder of the services listed in the tariff arrangement as non-reference services. Epic does not consider that section 58 of the GPAL requires it to include as reference services all services approved under previous legislation.

Epic wrote to the Commission as follows on 9 April 2001:

> The only service that meets the criteria for inclusion as a Reference Service under the Code is the Full Forward Haul Service. This service provides in excess of 90% of the Epic Energy transportation market on the SWQP. Section 3.3 of the Code quite clearly intends that services that do not constitute a "significant part of the market" are not required to be included as a Reference Service and that a Reference Tariff need only apply to "at least one Service" that does. As with other Access Arrangement approvals by the ACCC, the Epic Energy Access Arrangement for the SWQP would clearly not normally be required to establish all or any of the AFT Services as Reference Services.
>
> Additionally, the definition of Reference Tariffs prior to the imposition of the Code as the national access regime and after its establishment are quite different and cannot be linked. The derogated version of Reference Tariffs, prior to the inception of the Code is a descriptive term without intended legal substance. No opportunity was offered to Epic Energy to revise the tariff arrangement made under the *Petroleum Act 1923*, given that it be subjected retrospectively to a different regime under

> the *Gas Pipelines Access (Queensland) Act 1998* and the legislation does not obligate Epic Energy to include them. Hence, as these services are not Reference Services, it is not necessary to include any reference to them and if not done the review date is irrelevant. It should also be made clear that the Code does not require the listing of all services that might be available, but simply provides for the relevant benchmarks around which negotiation could be conducted.

Epic argues in its additional submission of 16 October 2001 that:

> … the derogations in section 58 of the Qld Act relate only to the Reference Tariff, the Reference Tariff Policy and the Revisions Submissions and Revisions Commencement Dates. They do not in any way modify the requirements of the Code that set out what must be contained in the Services Policy of an access arrangement (p.2).

The Commission agrees that the derogation does not modify the Code's requirements regarding what must be contained in the Services Policy. Epic, however, go on to argue that:

> Therefore, in determining what must be included in a Services Policy for this access arrangement, the ACCC must only have regard to the requirements of sections 3.1 and 3.2 of the Code.
>
> While section 3.2 of the Code makes it clear that the ACCC can require an access arrangement to contain a description of the inclusion of any Service that it its opinion should be included in the Services Policy (and Epic Energy's Services Policy includes all the services mentioned in the approved tariff arrangement as "Services"), the remaining provisions of section 3.2 of the Code relate solely to Reference Services. They make it clear that a Service can only be required to be a Reference Service, and therefore a Reference Tariff can only be required to be provided (by virtue of section 3.3 of the Code), if the Service is likely to be sought by a significant part of the market. As mentioned in paragraph 6.4 of the previous submission, only the FH1 Service satisfies this criteria (p.2).

While Epic's descriptions about what Services can be required to be Reference Services under the Code is accurate, the Queensland Government has decided to circumvent the Code by passing legislative derogations – that deem all the listed services to be Reference Services for the purposes of this access arrangement under the Code.

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.

That these services are Reference Services is important in terms of determining tariffs for these services in the event of an access dispute. The Commission disagrees with Santos' view on this point and believes that the derogation has determined reference tariffs for AFT services which would bind an arbitrator in the event of a dispute. In a dispute over access to a reference service, the arbitrator is bound to apply the relevant reference tariff. For non-reference services, however, the arbitrator is not so bound.

Epic goes on to argue (in its submission of 16 October 2001) that it is not in the public interest nor in the Service Provider's legitimate business interests for the Commission to require the inclusion of the AFT Services as reference services. Epic's rationale is that:

> … the Code only requires an access arrangement to provide relevant benchmarks around which a negotiation could be conducted. However, to set such a variety of Services as Reference Services

> would lead to inflexibility because in the event of a dispute concerning access to one of the ACCC's proposed Reference Services, the arbitrator would be bound by the applicable Reference Tariff when making a decision in relation to the dispute (p.3)

Epic then recount the conclusion of the ACCC in a report to the National Competition Council that the derogated tariffs on the SWQP were likely to produce a rate of return on total funds employed that is higher than rates of return underlying recent pipeline access arrangements approved by the Commission. While Epic disputes the accuracy of the assumptions and findings of that report, it does question why the ACCC would seek to consider itself and an arbitrator and prospective users of the SWQP bound by such tariffs.

The simple answer is that the Commission is operating under the Queensland law and considers itself bound by it. Epic appears to be arguing that the Commission should only comply with the Queensland law to the extent that it believes it to be in 'the interest of prospective users of the SWQP'. By Epic's own reasoning, if this were an acceptable approach, the Commission should not consider itself bound by the tariffs set by the Queensland Government for firm forward haul either.

However, the clear intention of the Queensland Government in making the derogation was to deem all the listed Reference Services to be Reference Services under the Code for this access arrangement, with the corresponding Reference Tariffs. That the Queensland Government did not provide Epic with an opportunity to comment on the content of its derogation prior to making it is a matter Epic should take up with the Queensland Government.

For these reasons, the Commission continues to require Epic to define the services as described in the derogation as reference, rather than non-reference, services.

Five year minimum term for full forward haul service

As outlined in Chapter 2, Epic requires that prospective users nominate a minimum contract term of five years for FH1 service. The Commission queried Epic's reasons for this requirement, since other transmission pipelines typically have minimum terms of one or two years.

In its submission dated 13 July 2001, Epic stated that:

> In regard to the minimum contract of one year, Epic Energy has seen no evidence produced by the regulator substantiating that a minimum term of one or two years is 'typically' used in contracts available on other transmission pipelines, beyond the decision making of the regulator itself.

In response, the Commission would draw the minimum contract terms proposed in the following access arrangements and proposed access arrangements to Epic's attention:

Pipeline	Minimum contract term for firm reference services
Parmelia Pipeline	1 year
Moomba to Sydney Pipeline	1 year
Amadeus Basin to Darwin Pipeline	1 year
Goldfields Gas Pipeline	1 year
Central West Pipeline	1 year
Eastern Gas Pipeline	1 year
Roma to Brisbane Pipeline	No min term
Queensland Gas Pipeline	10 years [4]
Carpentaria Gas Pipeline	No min term[5]

The Commission considers that a five year minimum term is potentially onerous on users and is not suitable for the market particularly as it develops. Epic argued that the gas market in Queensland is not as well developed as the south eastern markets and that a longer minimum contract term is justified on that basis. However, this access arrangement will run for 15 years, as determined by the Queensland Government. The Commission believes that a five year minimum term may in fact hamper the development of a more dynamic gas market in Queensland over that time. The Commission does recognise that this pipeline is operating in a less than mature market. For this reason it is requiring the minimum term proposed by Epic to be reduced to one or two years, rather than just one year.

In its submission of 16 October 2001, Epic states:

> The most comparable pipeline to the SWQP is the Queensland Gas Pipeline for which a contract has been set at 10 years for a similar firm forward haul service to the FH1 Service proposed by Epic Energy. It is noted that the ACCC has not required the duration of contracts for this Service to be reduced when issuing its final decision on the access arrangement for this pipeline. To now require something different for the SWQP shows an inconsistency which would not be in the public interest (p.4).

In terms of consistency, the Commission did express similar concerns to Duke regarding the length of the proposed minimum term for firm forward haul early in its consideration of that access arrangement. Duke responded that the ten year minimum term was set in the derogation – which it is. Further, Duke assured the Commission that it was willing to negotiate with prospective users seeking firm forward haul for lesser terms – and that Duke would submit to dispute resolution should those negotiations break down.

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[4] In the case of the QGP, while there is a 10 year minimum contract term, Duke has indicated its willingness to negotiate shorter contract terms and has recognised that a prospective user is able to notify an access dispute under the Code if it is dissatisfied with negotiations with Duke over a firm forward haul service for less than 10 years.

[5] While the CGP has no minimum term, the tariffs are based on a 15 year contract, with the price increasing by 2 per cent for each year, or part thereof, a proposed contract is less than 15 years.

The Commission can find no reference to Epic's proposed 5 year minimum term for firm forward haul in the SWQP derogation.

Epic went on to argue:

> Finally, the access arrangement does not preclude Prospective Shippers from negotiating a contract of a duration of less than five years. To mandate a specific minimum term for a contract seems overly intrusive and contrary to the Code requirements (p.5, submission of 16 Oct 01).

It is also the case that a minimum contract term for firm forward haul of one or two years would not preclude Prospective Shippers and Epic negotiating a contract of longer duration. In requiring this amendment, the Commission is not mandating a specific minimum term for a contract, rather it is reducing the duration of the specific minimum term that Epic proposed.

The Commission considers that the proposed minimum term of 5 years is an unreasonable addition to the conditions already in the derogation and requires that Epic reduce this minimum term to one or two years.

Limitation on Upstream Delivery Points

The Commission recognises the merit in providing for the cessation of backhaul services, on days when forward haul services are insufficient to maintain this service without reversing the flow of gas in the pipeline. However, the Commission queries whether this term may be more suitably incorporated into the terms and conditions for backhaul service. The Commission suggests that Epic review the clause with a view to incorporating it into the terms and conditions for the relevant service.

The Commission considers that Epic's reservation of the right to restrict upstream deliveries 'in its absolute discretion without liability to the shipper' is too broad. In its Draft Decision, the Commission proposed to require Epic to set out a more specific test that involves consultation with affected users before it elects to cease backhaul services.

Epic responded to the proposed amendment in the Draft Decision in its 16 October 2001 submission, by proposing to add the following wording to the end of clause 6.3 of its 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.'

The Commission considers that this amendment satisfactorily addresses the concern raised in the Draft Decision.

Amendment A3.1

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 A3.2

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

Amendment A3.3

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.'

3.2 Terms and conditions of service

3.2.1 Code requirements

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

3.2.2 Epic's proposal

The terms and conditions upon which Epic will provide full forward haul service are set out in the gas transportation agreement terms and conditions. Epic proposes that it may vary the gas transportation agreement terms and conditions without the consent of the user or the Commission except for those terms and conditions relating to:

- reference tariffs;
- overrun quantities;
- imbalance;
- liability;
- curtailment and interruption;
- force majeure;
- assignment; and
- shared revenue.

Epic proposes that it may only amend the gas transportation agreement terms and conditions if that amendment (when taken with other amendments) does not in aggregate detract from the value of the Reference Service to the user (cl. 10.4).

3.2.3 Commission's considerations

In the Draft Decision, the Commission expressed concern that section 10 of the access arrangement appeared to grant too broad a discretion to Epic to vary the terms and

conditions set out in the access arrangement. The Commission considers it is inappropriate for Epic to be able to make unilateral determinations as to whether the aggregate effect of changes to the terms and conditions is to increase or decrease the value of a service to a user. The Commission proposed to require that Epic make an amendment to the effect that it would seek the approval of the Commission for proposed revisions to the terms and condtions.

In its submission of 16 October 2001, Epic responded that:

> The very nature of clause 10 is such that the changes that Epic Energy could make are only insubstantial changes. For Epic Energy to be required to seek the ACCC's approval to such amendments would create unnecessary cost to both Epic Energy and Users not mention unacceptable regulatory risk given that the ACCC is required under sections 2.28 and 2.29 of the code to review the entire revised access arrangement once it is submitted for approval (pp 5-6).

The Commission does not want to have to consider and approve every minor addition to or variation of Epic's terms and conditions. Nevertheless, the Commission remains concerned that Epic's proposed clause 10 if approved would grant too broad a discretion to Epic and that the Commission would effectively be pre-approving any changes Epic made over time to the terms and conditions. As a result, if the current wording were approved, any changes Epic made to the terms and conditions (that met the two-part test set out above) would not be challengeable by future access seekers through the dispute resolution provisions of the Code – since they would form part of the approved access arrangement.

The Commission's concerns are lessened by Epic's proposals that users ('shippers') would have grounds to challenge a proposed change by Epic to the gas transportation agreement if they believed a change decreased the value of the service and Epic's list of areas that it would be excluded from making changes.

However, the Commission believes that in the absence of regulatory scrutiny, both users and prospective users must have the right to challenge any changes to the terms and conditions by Epic if they believe it has decreased the value of a service. This concern is primarily due to the 15 year duration of this access arrangement. The long period between reviews creates the possibility that Epic may make changes to the approved terms and conditions that do not concern existing users, but may be of concern to (prospective) users at some time in the future.

The Commission is concerned that Epic's proposed clause 10 would enable Epic to make changes to the terms and conditions that would, in aggregate, detract from the value of a Reference Service to a future Prospective User.

The Commission believes a more appropriate approach would be for the access arrangement to contain a minimum set of terms and conditions that are approved. If Epic wishes to add to, subtract from or vary those terms and conditions over time, it is free to do so through commercial negotiations with users and prospective users. If a prospective user does not agree with a variation to the approved terms and conditions, it would be able to notify a dispute under section 6 of the Code. The Commission requires Epic to amend clause 10 of the proposed access arrangement to this effect.

This issue also arose in the Commission's consideration of Duke Energy's Queensland Gas Pipeline access arrangement. In response to similar concerns raised by the Commission, Duke Energy proposed to have the minimum terms and conditions set out in the access arrangement, and to negotiate with prospective users any additions to or variations from those minimum terms and conditions.

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.

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 Epic's proposal

Clause 14 of the proposed arrangement states that the pipeline is a contract carriage pipeline.

3.3.3 Commission's considerations

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

3.4 Trading policy

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

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

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

Section 3.10(c) provides that, where technically and commercially reasonable, a user must be permitted to change the delivery or receipt point from that specified in a contract of service, with the prior written consent of the service provider.

3.4.1 Epic's proposal

Epic permits a bare transfer without its consent provided the transferee notifies Epic of the portion of contracted capacity subject to the bare transfer and of the nature of the contracted capacity subject to the bare transfer. For any other form of transfer the user is required to seek Epic's consent. Epic may withhold consent on reasonable commercial or technical grounds.

3.4.2 Submissions from interested parties

Santos made the following submission:

> 'A flexible trading environment should provide mechanisms for shippers to utilise additional receipt and delivery points. To allow the Service Provider to withhold consent based solely on its own determination of reasonable commercial grounds may be inappropriate, and creates a potential conflict of interest for the Service Provider. In making this comment Santos believes that, to date, Epic has approached all requests on a reasonable basis.
>
> Nevertheless, Santos proposes the following mechanism to provide an equitable basis for determining what are "reasonable commercial or technical grounds," rather than the judgement being at the sole discretion of the Service Provider.
>
> The Service Provider shall provide access to an additional receipt or delivery point without consent being required where the shipper satisfies the following conditions:
>
> (i) The aggregate of the varied receipt or delivery point maximum daily quantities (MDQs) does not exceed the aggregate of the shipper's receipt or delivery point MDQs prior to the inclusion of the additional receipt or delivery point.
>
> (ii) It is technically feasible, within the constraints of the Service Provider's contractual obligations to receive or deliver the varied MDQs at the specified receipt/delivery points.
>
> (iii) The shipper makes all appropriate arrangements with its customers as a result of the variation nominated.
>
> (iv) The Service Provider will not, as a result of such a variation, incur any additional capital cost which it would not otherwise have incurred, or will be required to advance the time at which capital costs would otherwise have been required. In the event that a new receipt or delivery point is required, an agreement by the requesting party to indemnify the service provider for the additional costs (both capital and operating) will suffice to ensure that the service provider will not incur any additional capital costs.
>
> (v) As a result of the variation, and where the transportation distance is equal to or less than previously provided under the shipper's transportation contract, the shipper will pay the same amount of revenue to the Service Provider. Where the transportation distance is increased, the shipper will provide additional revenue in accordance with the Service Provider's Access Arrangement to satisfy the incremental transportation distance.
>
> In the circumstances where the shipper does not satisfy all of the above requirements, then consent will be required by the Service Provider based on reasonable commercial and technical grounds. The ACCC should adjudicate any situation where the user believes the Service Provider has rejected its request on unreasonable grounds.

3.4.3 Commission's considerations

Provision of additional receipt and delivery points

The Commission discussed Santos' proposal with Epic. Subsequently, Epic made an additional submission on 9 April 2001 in which it proposed to incorporate Santos' submission in Annexure B to the access arrangement.

The Commission welcomes this proposal and further suggests that, for clarity, section (iv) of Santos' proposal should be expressed as follows:

> (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, ***nor*** will it be required to advance the time at which capital costs would otherwise have been required. [emphasis added]

Arbitration under the code

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

> If a prospective user and a service provider are unable to agree on one or more aspects of access to a service, the prospective user or service provider may notify the relevant regulator in writing that a dispute exists. A prospective user or service provider may not give a notice to the relevant regulator under this section unless an access arrangement has been accepted by the relevant regulator (or the relevant regulator has drafted and approved its own access arrangement) with respect to the covered pipeline concerned.

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

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

Therefore, the Commission recommends that in adopting Santos' proposal, the last sentence referring to arbitration by the Commission be omitted.

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

3.5 Queuing policy

3.5.1 Code requirements

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

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

3.5.2 Epic's proposal

Epic proposes that for a prospective user to obtain access it must follow the procedures set out in the gas transportation guide. The gas transportation guide was not provided with the access arrangement; the Commission understands that Epic is still developing the guide and will release it shortly. A prescribed fee must be paid when a gas transportation request is made.

Epic will ascribe priority to gas transportation requests in the order in which they are received, however a request for a reference service will always rank ahead of a request for a non-reference service. Epic also proposes that it may deal with requests out of order provided that the requests which were first in time are not ultimately disadvantaged.

If a gas transportation request is rejected, that request's priority is lost.

3.5.3 Commission's considerations

The Commission requested that Epic clarify its queuing policy because it did not consider that it explained how priority would be determined. Epic stated that the policy was essentially 'first come, first served', however, Epic reserved the right to move requests up the queue, for instance in response to an order under the state's emergency powers. Epic stated that in this situation it would consult with prospective users and make arrangements so that they were not 'ultimately disadvantaged.' If a prospective user thought it had been disadvantaged it could appeal the decision under this clause.

In its Draft Decision, the Commission commented that Epic's queuing policy was not 'first in, first served' because section 5.3(b) states that requests for reference services will always have priority over requests for non-reference services. The Commission questioned the rationale underlying this restriction, especially if the request is for a negotiated service with additional features or flexibility for which the user will pay more than the reference tariff for the most similar reference service.

In its submission of 16 October 2001, Epic proposes deleting clause 5.3(b) to clarify how priority in the queue is determined. The Commission believes this would be an improvement.

In its Draft Decision, the Commission proposed to require Epic to clarify what test it intended to use to determine whether a user is 'ultimately disadvantaged'.

In its submission of 16 October 2001, Epic responded that:

> 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 opportunity of securing capacity on the SWQP at the expense of Prospective Shipper lower down in the queue.
>
> A Prospective Shipper has recourse to the dispute resolution procedures of section 6 of the Code in the event of a dispute arising about whether it has been "ultimately disadvantaged". That alone should act as a sufficient deterrent to ensure that Epic Energy does not act to the detriment of any prospective user. (pp. 6-7)

The Commission agrees that if a Prospective User believes that is has been 'ultimately disadvantaged', it can notify an access dispute under section 6 of the Code. For this reason, and with the amendment Epic proposes to its queuing policy, the Commission considers that the resultant queuing policy would be consistent with the Code's requirements.

The Draft Decision also proposed to require Epic to state in the access arrangement the amount of the prescribed fee that must be paid when a gas transportation request is made. Epic noted that the 'prescribed fee' is defined in Annexure C to the access arrangement as "the non refundable amount of $5000, plus any applicable GST or other Supply Tax as may be levied from time to time". Epic further proposed, to maintain consistency with the Gas Transportation Guide, to make this fee refundable at Epic's sole discretion.

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.

3.6 Extensions and expansions policy

3.6.1 Code requirements

The code requires an access arrangement to have an extensions/expansions policy (section 3.16). The policy must set out the method to be applied to determine whether any extension to or expansion of the system's capacity will be treated as part of the covered pipeline. A service provider is required to specify the impact on reference tariffs of treating an extension or expansion as part of the covered pipeline.[6] In addition,

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

an extensions and expansions policy must outline the conditions upon which the service provider will fund new facilities and provide a description of those new facilities.

3.6.2 Epic's proposal

Epic proposes to enhance or expand the capacity of the SWQP where it ' … believes the tests in Section 6.22 of the Code have been satisfied, and Epic Energy may otherwise enhance or expand the capacity of the SWQP to meet the needs of prospective shippers'.

Epic proposes that, unless it elects otherwise, any extension or expansion of the SWQP will become part of the covered pipeline.

If an extension or expansion of the SWQP becomes part of the covered pipeline, Epic propose that the reference tariff will be unaffected before the next revisions commencement date - 2016 or 2004 (see section 3.7).

From time to time, Epic may seek surcharges or capital contributions from prospective users in respect of new facilities investment.

Except where Epic imposes a surcharge or seeks a capital contribution, shippers using incremental capacity will pay the reference tariff.

3.6.3 Submissions from interested parties

Santos made the following submission:

> Santos understands any extension or expansion of pipeline capacity will not affect the Reference Tariff established prior to the upgrade. It is reasonable for the Service Provider to receive an acceptable rate of return on investment associated with the capacity expansion. This may require the user to pay for a capital contribution or additional surcharge. However, it seems the minimum charge payable by a new user is equal to the current Reference Tariff which may alter the overall return on investment of the pipeline. It is assumed that any overly positive impact on the rate of return is partially returned to the shippers via the revenue sharing mechanism. The exact impact of the additional capital surcharge payments on the revenue sharing mechanism is unclear. In particular, if a capital contribution or surcharge payment includes a return on investment component, how is this revenue treated with regards to the revenue sharing mechanism? Alternatively, how is the split between capital contribution and revised Reference Tariff determined and what are the implications on the sharing mechanism? It would be helpful if Epic could provide further detail on this issue.

3.6.4 Commission's considerations

In the Draft Decision, the Commission proposed to require that Epic specify the test it will use to determine whether to enhance or expand capacity on the pipeline and describe how it will determine tariffs for any extensions/expansions.

Epic opposed the proposed amendment, stating (in its submission of 16 October 2001) that:

> … Epic contends that neither the Code nor the Qld Act gives the ACCC the statutory power to either compel the Service Provider to include such an amendment or withhold its approval of the AA for failing to include the amendment (pp. 7-8)

Having described a number of the relevant provisions of the Code, Epic went on to argue:

> A Service Provider will only commit to incur New Facilities Investment and therefore fund the expansion costs if it is economically feasible to do so (as determined by the

> Service Provider). If it is not economically feasible for the Service Provider to fund the expansion costs, then a Prospective User must pay either a surcharge or a capital contribution which would represent the costs over and above those that the Service Provider considers it is economically feasible to fund itself. The Service Provider has an unfettered discretion in this regard.
>
> Epic Energy contends therefore that clause 12 of the proposed access arrangement is consistent with the intent and requirements of the Code. If a prospective user is unable to agree on the terms of access to capacity on the SWQP, it can have recourse to the dispute resolution provisions in section 6 of the Code. …
>
> Notwithstanding the above comments, however, in an attempt to provide some degree of clarity for the ACCC, Epic Energy is prepared to amend clause 12.1 of the access arrangement to read as follows:
>
> *"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."* (p.9)

The Commission believes that Epic's proposed amendment does clarify its proposed policy.

In the period of time between the Draft Decision and the Final Decision, the Commission has had the opportunity to consider these and related issues on other access arrangements as well.

In its recent Final Decision on Epic's proposed access arrangement for the Moomba to Adelaide Pipeline, Epic proposed a very similar extensions and expansions policy. In that instance, the Commission required Epic to amend its expansions policy to the effect that all expansions will be covered unless the Commission agrees otherwise.

In supporting that required 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.[7]

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.

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[7] ACCC, Final Decision – Access Arrangement proposed by Epic Energy South Australia Pty Ltd for the Moomba to Adelaide Pipeline System, pp. 171-2

Capital contributions and surcharges

The Commission believes that there would be merit in Epic addressing the issues raised by Santos in its submission by clarifying in its access arrangement how capital contributions and surcharges affect the revenue sharing mechanism. However, this is a matter that is dealt with in the derogation and is hence beyond the Commission's power to require any specific amendments.

The Commission requires the following amendments to made in respect of the extensions/expansions policy.

Amendment A3.6

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

> 12.2 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

3.7 Review and expiry of the access arrangement

3.7.1 Code requirements

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

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

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

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

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

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

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

3.7.2 Epic's proposal

Section 3.17 of the code states that an access arrangement must include a revisions submission date and a revisions commencement date. Epic proposes:

- the Revisions Submission Date is 30 June 2016; and
- the Revisions Commencement date is 30 December 2016

3.7.3 Submissions by interested parties

Santos made the following submission with respect to the duration of the access arrangement:

> Under its access arrangements, Epic has proposed an effective reference tariff review date of February 2017. It is understood this date has been established through legislation in Queensland. Although Epic has questioned the legitimacy of the ACCC to review non-tariff elements every five years… , Santos is supportive of this proposed shorter review time. Substantial changes to the gas industry are anticipated in the coming years, which are likely to affect elements of Epic's non-tariff access arrangement. For example, the market requirements for queuing and trading policies are likely to change over time, and a shorter review time of non-tariff elements would be advantageous to reflect market developments.
>
> It should be noted that the Producers have committed to regular price reviews (in some cases for periods shorter than five years) under a number of gas sales agreements. This ensures gas pricing continues to be reflective of market conditions. It is also appropriate for the industry to be reactive to changing market conditions, and we are not convinced that this should not regularly include reviewing reference tariff pricing or non-tariff elements.

3.7.4 Commission's considerations

Derogated Submission Dates

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.

The relevant dates are set out in section one, the definitions section, of the derogations:

> **"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.

The revisions commencement dates are six months after the relevant revisions submission dates. The Commission requires that Epic amend its proposed revisions dates to be consist with this provision of the derogation.

Major Event Triggers

Section 2.28 of the code requires revisions to an Access Arrangement to be lodged at the Revisions Submission Date or '… as otherwise required'. So if the access arrangement provides for revisions to be submitted in relation to non-tariff matters at an earlier date, section 2.28 requires those revisions to be submitted. Section 3.17(ii) contains such a provision, whereby the Commission can require a service provider to specify in the access arrangement events that will trigger a review of the non-tariff elements prior to the revision submission date.

The Commission believes it is appropriate to use this provision for early review of the non-tariff elements because of the uncertainty associated with the extended regulatory period. If the current non-tariff elements are operating effectively when a major event triggers a review, Epic may re-submit its current access arrangement to the Commission. However, the Commission reserves the option to review the non-tariff elements if a trigger event occurs, in case modifications to the arrangement are appropriate.

In the draft decision, pursuant to section 3.17(ii) of the Code, the Commission proposed (proposed amendment A3.10) to require Epic to include in the access arrangement a list of specific major events that it considers should trigger a revision of the non-tariff elements of the access arrangement. The Commission proposed that this list include 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.

With respect to proposed amendment A3.10 Epic submitted that the Commission does not have the appropriate power to define "trigger events" nor to construct a mechanism to reopen the Access Arrangement within the derogated Access Arrangement Period.

Epic argued as follows:

> Section 3.17(ii) of the code simply cannot be read in isolation or out of context of the sentence of which it is a part. Therefore, the meaning of s.3.17(ii) is quite specific:
>
> > *In **approving** (bolding added) the Revisions Submission Date and Revisions Commencement Date, the Relevant Regulator … may in making its decision on an Access Arrangement …*
> >
> > *(ii) require that specific major events be defined that trigger an obligation on the Service Provider to submit revisions prior to the Revisions Submission Date.*
>
> The ACCC has already acknowledged in its Draft Decision that it does not have the power to approve a Revisions Submission Date or a Revisions Commencement Date, as this is derogated as part of the reference tariff policy by s58 of the Queensland Gas Pipelines Access Law. Therefore, as the ACCC is not approving these dates, it is inconceivable that 3.17(ii) can be applied to overturn the derogations, regardless of whether it is a tariff or non-tariff event.

In quoting s3.17 of the Code, Epic chose to omit a phrase that materially changes its interpretation. The relevant part of Section 3.17 is reproduced below in full:

> In approving the Revisions Submission Date and Revisions Commencement Date, the Relevant Regulator must have regard to the objectives in section 8.1, and may in making its decision on an Access Arrangement (or revisions to an Access Arrangement), if it considers it necessary having had regard to the objectives in section 8.1:
>
> (i) require an earlier or later Revisions Submission Date and Revisions Commencement Date than proposed by the Service Provider in its proposed Access Arrangement;
>
> (ii) require that specific major events be defined that trigger an obligation on the Service Provider to submit revisions prior to the Revisions Submission Date.

Epic's selective quotation of s3.17 makes it appear that subsection 3.17(ii) follows from the opening statement, 'In approving the Revisions Submissions Date and Revisions Commencement Date …'. The Commission has acknowledged that the derogation prevents it from approving either the Revisions Submission Date or Revisions Commencement Date in this instance.

However, subsection 3.17(ii) in fact follows from the phrase, 'and may **in making its decision on an Access Arrangement** …' (emphasis added). Clearly here the Commission is making a decision on an Access Arrangement.

Queensland Government submission

The Queensland Government, in its submission, also did not agree with proposed amendment A3.10. The Queensland Government interpreted s.3.17 in the same way Epic did as described above.

The Queensland Government also argued that:

> … a further aspect of section 3.17 which indicates that the ACCC is not able to act under the section, in this case, is the obligation on the Relevant Regulator to "*have regards to the objectives in section 8.1*" when approving the Revisions Submission Date and the Revisions Commencement Date.
>
> Section 8.1 (General principles of reference tariffs and reference tariff policy) sets out the objectives which are to be met in designing reference tariffs and reference tariff policies. It can be argued that, except for the revisions dates, section 3.17 does not deal with anything but tariff related matters. It is Queensland Treasury's contention that, having derogated the reference tariff and the reference tariff policy for the access arrangement, the objectives of section 8.1 are not a functional part of the National Gas Access Code because of the derogation for the pipeline.
>
> Since section 3.17 can only function after having regard to the objectives of section 8.1, the non-application of section 8.1 to the current situation further strengthens the position that section 3.17 is not able to be applied in this case.

Legal advice

These issues (amongst others) arose in the Commission's consideration of Duke Energy's proposed Access Arrangement for the Queensland Gas Pipeline. In response to these concerns, the Commission sought advice from Gageler QC. Gageler's advice was, in part, as follows:

> I see no basis for concluding that the specification as part of a "tariff arrangement" under section 58 of the Revisions Submission Date for a listed pipeline excludes the whole of the power of the Commission under section 3.17(ii) to require that specific major events be defined that trigger an obligation on the service provider to submit revisions prior to the revisions submission date. Were such a result intended to follow from the operation of section 58 of the Queensland Act, it could easily have been expressly provided for.

> I have no doubt that, consistently with subsection (2) of section 58 of the Queensland Act, a service provider can be subjected to no obligation to submit revisions concerning a reference tariff or reference tariff policy prior to the revisions submission date…
>
> But there is no reason why the service provider ought not to be placed under an obligation upon the happening of a specific major event to submit revisions to an access arrangement dealing with matters other than a reference tariff or reference tariff policy.
>
> The power conferred by section 3.17(ii) of the code is to be exercised having regard to the objectives set out in section 8.1 (for which I read section 8.1A). These objectives, although framed as objectives to be achieved in designing a reference tariff and a reference tariff policy, are with one exception generic in their content so as to be readily applied to designing other aspects of the access arrangement. The one exception is section 8.1A(e) which can be ignored as otherwise inapplicable. It follows that I do not agree with the argument put on behalf of the Queensland Government that:
>
> > "In relation to (ii), by referring specifically to section 8.1 of the code, the wording of clause 3.17 suggests the 'specific major events' must be events, and only such events, which will have an impact on the reference tariffs and reference tariff policy, thus requiring a review of the reference tariffs."
>
> I also do not agree with the assertion by Duke that the power conferred by section 3.17 of the code arises only where the Commission has the power to decide on the proposed revisions submission date and proposed revisions commencement date. The power conferred by section 3.17(ii) is separate from the power conferred by section 3.17(i). Both are discretionary powers conferred on the Commission "in making its decision on an access arrangement." Section 3.18 places an additional obligation on the Commission to consider the exercise of the power conferred by section 3.17(ii) where it approves an access arrangement for a period of more than five years. But section 3.18 does not limit the nature of the discretion conferred by section 3.17(ii).

The Commission believes this legal advice is directly applicable to the concerns raised by Epic and the Queensland Government with respect to this Access Arrangement. As a result, the Commission maintains its requirement for Epic to include in the access arrangement a list of specific major events that it considers should trigger a revision of the non-tariff elements. The Commission proposes that this list include the interconnection of another pipeline with the SWQP, and the introduction of a significant new gas supply source to one of the SWQP's markets.

The Commission understands from discussions with Epic and its submission of 16 October 2001 that its key concern with this amendment is that a review triggered by the occurrence of a defined 'major event' might somehow, as a result of s.58(4) of the QGPAL, lead to a review of the tariffs as well as the non-tariff elements of the Access Arrangement – even though this is explicitly not the Commission's intention.

The Commission does not agree that s.58(4) might have this effect. Nevertheless, to allay Epic's concerns, the Commission commits to not review the tariff elements of this Access Arrangement in any review triggered by a defined major event for so long as s.58 of the QGPAL remains in its current form.

Revenue sharing mechanism

Whenever an Access Arrangement Period is over 5 years (as it is in this case as a result of the derogation), section 3.18 of the Code requires the Commission to consider whether mechanisms should be included in a proposed Access Arrangement to address the risk of forecasts on which the terms of the Access Arrangement were based and approved proving to be incorrect.

The Commission has received legal advice that as a result of the derogation, section 3.18 is excluded from the current consideration of this Access Arrangement.

Nevertheless, the Commission notes that Epic's Access Arrangement contains a revenue sharing mechanism, which provides that users with gas transportation agreements with primary terms in excess of 5 years will receive a revenue credit not less than 40 per cent of the revenue received by Epic in any year in excess of defined 'threshold revenues'.

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.

4. Information provision and performance indicators

4.1 Information provision

4.1.1 Code requirements

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

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

4.1.2 Epic's Proposal

The following extract from Epic's additional submission of 9 April 2001 describes Epic's view with respect to the provision of access arrangement information:

> Epic Energy has a responsibility under the code for the provision of an access arrangement, supported by an access arrangement information. In accordance with the introductory words of section 2 and subsequently section 2.6 of the code, the access arrangement information "…should enable users…to understand the derivation of the elements of the proposed access arrangement and form an opinion as to the compliance of the access arrangement with the code." Section 2.7, specifying the information required, must be read under section 2.6.
>
> In relation to the SWQP, the access arrangement has been determined in accordance with the derogations embodied in section 58 of the Qld Act and the supporting access arrangement information need only constitute information relevant to the SWQP access arrangement in order to comply with the code, ie. in the case of the reference tariff, where that tariff was derived from. Epic Energy has provided all pertinent information to allow the ACCC to exercise its regulatory oversight, as varied by the derogations.

4.1.3 Commission's considerations

The Commission considers that Epic is under an obligation to provide certain categories of access arrangement information. Unlike the other three covered pipelines in Queensland, Epic does not have an exemption from the obligation to provide access arrangement information. Epic has provided some access arrangement information, but the Commission considers that the information provided may not be sufficient to meet Epic's obligations under the Code.

However, given that there have been no requests from interested parties for additional access arrangement information, the Commission proposes to not require Epic to release additional information at this time.

In 2004, pursuant to the derogation, Epic is required to submit revisions to the Access Arrangement with respect to the AFT services. Epic has indicated it expects that in

2004 (as is the case now), none of the AFT services are 'likely to be sought by a significant part of the market' – one of the criteria for reference services in s.3.3 of the Code. Because of this, Epic does not anticipate proposing that any of the AFT services be reference services.

If, however, one or more of the AFT services is sought by a significant part of the market in 2004, the Commission will consider whether additional access arrangement information should be released to enable proper consideration of proposed reference tariffs.

5. Final Decision

Pursuant to section 2.16 of the code, the Commission does not approve Epic's proposed access arrangement in its present form.

The amendments or the nature of amendments that 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 18 January 2002.