

# **Final Decision**

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

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**File No:**  
C2000/993

**Commissioners:**  
Bhojani  
Cousins  
Martin  
Jones



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## Introduction

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

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

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

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

Santos suggested a set of objective criteria to clarify what 'reasonable' meant, however, after some consideration Duke elected to maintain its current wording. This wording is consistent with the code and the Commission cannot require any amendment. Duke has added a statement to the Trading Policy in its revised access arrangement that further explains its interpretation of 'reasonable'.

This final decision outlines the process to final approval of the proposed access arrangement. The first section contains a discussion of the draft decision, in which the Commission recommended five amendments to the proposed arrangement to meet the criteria for approval outlined by the code. The second section contains a summary of the submissions in response to the draft decision and Duke's subsequent amendments to the arrangement. The third and final section contains the Commission's final assessment of the revised access arrangement and describes the two amendments that must be made for the arrangement to be granted final approval.

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

# 1. Draft decision

The Commission released its draft decision in April 2001. The Commission made the following comments on the proposed access arrangement:

## *Operations Manual*

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

The operations manual is intended to be a day-to-day guide to the service provider's operations. However, the Commission was concerned that any changes introduced to the operations manual could result in a change to the terms and conditions of access that was not approved by the ACCC. Commission staff raised these concerns with Duke, who proposed to remove all references to the operations manual from the access arrangement and incorporate relevant provisions from the operations manual into the access arrangement itself. The Commission considers that this proposal would address its concerns about the operations manual and recommended an amendment to that effect.

## *Trading Policy*

If a pipeline is a contract carriage pipeline (which the QGP is), sections 3.9 and 3.10 of the Code require that 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 (this is a 'Bare 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 12 of Duke's proposed access arrangement permitted users to trade capacity rights in two ways, either a 'bare transfer' or an 'assigned capacity transfer'.

Under Duke's proposal, a bare transfer enabled a User to trade all or some of its capacity to another User. However, the original User would remain responsible for the entire Maximum Daily Quantity (MDQ). The User's obligations remained in full force with Duke for the duration of the transfer and the User's original agreement with Duke was not changed as a consequence of the agreement. Duke required prior notice of an intent to arrange a bare transfer.

An Assigned Capacity transfer occurs when a User assigns some or all of its capacity to a Prospective User. This would amend the access agreement between Duke and the User and create a new agreement between Duke and the assignee of the contracted capacity. Duke required that a User comply with a number of principles in assigning some or all of its capacity. The Commission considered that the principles Duke proposed were reasonable.

The issue arose from Duke's definitions of User and Prospective User and the limitation on Users to only make Bare Transfers to Users. This restriction was not consistent with the Code, which requires a Trading Policy to allow Users to make Bare Transfers to '... any other person'.

Commission staff discussed with Duke whether it had intended to exclude prospective users from being recipients of Bare Transfers, and Duke responded that it had not. Nevertheless, the wording of the Access Arrangement had the effect of excluding Users from entering into Bare Transfers with Prospective Users. The Commission required an amendment to enable such a transfer of capacity to occur.

While Duke's policy with respect to Assigned Transfers of capacity appeared to similarly restrict such transfers only to Prospective Users, Duke's definition of a Prospective User included Users seeking additional capacity.

#### *Flexible receipt and delivery points*

Clause 11 of Duke's proposed arrangement set out the User's right to extend or shorten their transmission path. The request had to provide at least 30 days notice, or less if Duke permitted. Duke did not have to consent to changes more than once every three months. Duke would assess the proposed variation on reasonable technical and commercial grounds.

Santos submitted that although Duke's approach has been to encourage trading, its formal policy, in particular the provision of additional receipt and delivery points, required further development. Santos' principal concern was that Duke could refuse to allow Users to change receipt or delivery points whenever it believes it is not 'commercially reasonable' to do so and that the determination of what is commercially reasonable was left solely to Duke to determine.

Santos proposed a test it considered would 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.

Commission staff discussed Santos' proposal with Duke. Duke understood the rationale behind Santos' proposal, but was concerned that attempting to define 'reasonable commercial or technical grounds' may limit desirable flexibility in the future.

The Commission agrees with Santos that to allow the Service Provider to withhold consent based solely on its own determination of reasonable commercial grounds may be inappropriate, and create a potential conflict of interest for the Service Provider. However, where a User believes that a Service Provider has withheld consent on unreasonable grounds, it can pursue that matter under contract law – typically through commercial arbitration in the first instance, with recourse to court action if necessary.

The Commission saw merit in Santos' proposal, and believed that it had the potential to reduce future disputes. However, the wording of this aspect of Duke's original Trading Policy was consistent with the Code and the Commission could not legally require Duke to include such additional criteria.

### *Queuing Policy*

Section 3.12 of the Code requires that Access Arrangements 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 that 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.

Duke's proposed queuing policy was set out in Clause 11 of the Access Arrangement. Duke set out a process for the orderly allocation of Available Capacity – a non-Code term which Duke defined as:

Available Capacity means Spare Capacity or Capacity that becomes available but that is not reserved through the renewal, or extension of the terms of an Access Agreement (AA p.3)

While the Commission had no concerns regarding Duke's proposed queuing process, the use of the term Available Capacity was confusing and appeared to exclude Developable Capacity from the operation of the queue.

The Commission required an amendment to Duke's queuing policy to ensure that it addresses Developable Capacity (as defined in the code) as well as Spare Capacity.

### *Extensions Policy*

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

Duke proposed that extensions to the QGP (adding to the length of the pipeline) would not be covered by the Code or the access arrangement unless Duke writes to the Commission specifying that they be covered. If Duke were to elect that an extension be included in the AA, the reference tariffs for the various existing services would not change. Instead, Duke might levy an Applicable Surcharge on users of the extension.

Duke defined an Applicable Surcharge as "a User Specific Facility Charge", which in turn was defined as:

a charge imposed pursuant to Clause 2.4 of the Reference Tariffs Schedule [the derogation] in respect of constructing, operating and maintaining capital improvements that Service a specific User or group of Users (AA p.10)

Clause 2.4 of the Reference Tariffs Schedule is as follows:

The Service Provider is entitled to recover from an applicable User or group of applicable Users (in the proportion agreed) the costs of:

- (a) constructing capital improvements for additional Receipt Points or Delivery Points or constructing capital improvements to increase or decrease Capacity at existing Receipt Points or Delivery Points, as specifically required to deliver Natural Gas to or receive Natural Gas from that User or group of Users; and
- (b) operating and maintaining the capital improvements referred to in clause 2.4(a) above.

It appears that Clause 2.4 of the Reference Tariffs Schedule is designed to deal with costs arising from construction of new receipt or delivery points or upgrades to existing receipt or delivery points, rather than for geographical extensions to the pipeline.

The Commission believes that the Derogation was not intended to cover geographical extensions to the pipeline, but that the wording of Duke's Extensions Policy could have had the effect of restricting the Commission's assessment of any Applicable Surcharge for an extension of the pipeline by referencing Clause 2.4 of the Derogation.

In discussions with Commission staff, Duke agreed that the current definition of Applicable Surcharge could have that effect, but that this was not Duke's intention. Duke's intention, were it to extend the pipeline and elect to bring that extension under the Access Arrangement, is to submit a proposed Applicable Surcharge to the Commission for approval in compliance with sections 8.25 and 8.26 (the sections of the Code that deal with Surcharges).

That process would be consistent with the Code and would address the concerns the Commission had with the current wording of Duke's Extensions Policy. Therefore, the Commission required an amendment to Duke's Extensions Policy to this effect.

#### *Revisions submission date*

Due to the derogations, the ACCC is unable to require that the access arrangement be submitted for review before 2016 except in one instance. Section 3.17(ii) of the code enables the Commission to require that the access arrangement include a list of specific major events that will trigger a review of the non-tariff elements. The Commission consider that this would address some of the risk arising from the long regulatory period provided for in the derogation. The Commission recommended that Duke be required to identify in the access arrangement specific events that will trigger a review.

#### *Miscellaneous Revisions*

The Commission identified a number of minor drafting and consistency issues within the proposed access arrangement. Following a meeting with the Commission, Duke proposed a number of revisions to address these concerns. The Commission considered that these changes were consistent with the Code and that Duke should be encouraged to carry out the proposed revisions to the access arrangement.



In summary, the draft decision proposed the following five amendments to the access arrangement:

<b>Proposed Amendment A3.1</b>
In order for Duke's proposed access arrangement to be approved, it must be amended to delete all references to the operations manual and to incorporate those provisions currently contained in the operations manual which are required to meet the code's minimum requirements for access arrangements.
<b>Proposed amendment A3.2</b>
In order for Duke's access arrangement to be approved, Duke must amend clause 10.1(a) to permit a User to effect a Bare Transfer to a User or Prospective User.
<b>Proposed amendment A3.3</b>
In order for Duke's access arrangement to be approved, the queuing policy must be amended to specifically apply to Developable Capacity, as defined in the code, as well as Spare Capacity.
<b>Proposed Amendment A3.4</b>
For Duke's access arrangement to be approved, the Extensions Policy must be amended so that should Duke elect to have a pipeline extension covered by this access arrangement, it will submit any proposed Applicable Surcharge to the Commission for approval in accordance with clause 12 of the access arrangement and sections 8.25 and 8.26 of the Code.
<b>Proposed Amendment A3.5</b>
For the access arrangement to be approved, the Commission requires Duke to submit a list of specific major events that will trigger a review of the non-tariff elements of the access arrangement.

## **2. Submissions to the Draft Decision**

The Commission received two submissions in response to the draft decision, from Duke and from the Queensland Treasurer, the Hon Terry Mackenroth. The following section outlines the submissions received by these two parties.

### **2.1 Submission from Duke**

Duke responded to each of the proposed amendments in turn:

#### *Operations Manual*

In its submission to the draft decision, Duke confirmed the proposal it had made to the Commission on 22 March 2001. That is:

‘.. the manual was originally intended to clarify certain provisions of the access arrangement relating to the day to day operations of the pipeline.

However, to allay any of the ACCC concerns [that Duke has a unilateral right to change the operations manual in the proposed arrangement] Duke proposes to delete all references to the operations manual in the access arrangement and to incorporate in the access arrangement those provisions of the operations manual which are not already incorporated in the access arrangement but which are required to meet the code’s minimum requirements for access arrangements.’

### *Trading policy*

Duke’s trading policy restricted users to only making ‘bare transfers’ of capacity to other existing users (where the original user remains fully liable to Duke for the capacity). This was inconsistent with the code, which requires a trading policy to permit bare transfers to ‘... any other persons’.

In its letter to the Commission of 22 March 2001, Duke undertook to amend the clause as suggested by the Commission but reserved the right to charge users for reasonable additional costs incurred by Duke as a result of the bare transfer.

In it’s submission to the draft decision, Duke stated:

Duke believes that the ACCC’s proposed amendment does not encourage efficiency in operations nor does it reflect the commercial realities relating to bare transfers by a user to several users.

However, Duke accepts that it is bound by the Code to make the ACCC’s proposed amendment.

As discussed below, however, in the revised access arrangement Duke does not propose to impose additional charges on users who trade capacity to other users (see heading *Trading policy* in part 3 below).

### *Queuing policy*

Duke made the following response to the Commission’s proposed amendment:

While Duke now accepts that the Code requires the queuing policy of an access arrangement to apply to both spare capacity and developable capacity, Duke questions how the queuing policy of this access arrangement can apply to the developable capacity of the QGP given that the service provider will be required to lodge a review of it with the ACCC as soon as the Nominal Capacity of the QGP is reached.

The Commission believes that Duke’s question arises because of some confusion about the definition of terms used in the Code and the access arrangement. In the revised access arrangement Duke defined available capacity (to which the queuing policy relates) to include developable capacity (as defined in the code). Therefore the queuing policy in the revised access arrangement meets the requirements of the code.

### *Extensions/Expansions policy*

Duke agreed to make the amendment proposed by the Commission.

### *Specific major events trigger*

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

With respect to proposed amendment A3.5 Duke submitted that the Commission does not have the power to require an amendment relating to the timing of the review of any aspect of the access arrangement.

Duke argued as follows:

The tariff arrangements approved by the Minister under section 58(2) of the Act contain the revisions submission date and the revisions commencement date. Section 58(4) of the Act requires that these dates will be the revisions submissions date and revisions commencement date for the purpose of the access arrangement to be submitted for QGP.

Section 58 of the Act therefore operates to prevent the ACCC from having the power to approve the revisions submission date or commencement date for QGP or even consider whether they are appropriate when considering whether to approve the access arrangement for QGP.

Section 2.28 of the code does not override the effect of section 58 of the Act. That section requires the service provider to lodge revisions to an access arrangement at the revisions submission date (or as otherwise required by an access arrangement). However it does not authorise the ACCC to require Duke to include in the QGP access arrangement an obligation to lodge revisions to the access arrangement at any time other than at the revisions submission date.

Accordingly Duke believes that the ACCC cannot rely on clause 2.28, the second paragraph of section 3.17 or section 3.18 of the code to enable it to either bring forward the revisions submission date or revisions commencement date or to require an earlier review of any aspect of the access arrangement. The ACCC can only avail itself of these provisions when it has the power to approve the revisions submission date and the revisions commencement date in the access arrangement. As stated above, section 58 of the Act does not give the ACCC this power.<sup>2</sup>

Duke also argued that the provisions relating to an early review of the access arrangement require consideration of all aspects of the access arrangement including financial arrangements. Duke argued that there is no authority in the Code or the Act for the Commission to nominate an alternative early review trigger but limit the issues that it can consider as part of that review. Therefore, a complete review as required by section 2.46 of the code would be inconsistent with section 58 of the Act and the derogations.

## **2.2 Submission from the Queensland Government**

The Queensland Government only commented on the proposed amendment A3.5, arguing the ‘specific major events’ in the code only referred to those events that would have an impact on reference tariffs and reference tariff policy. Therefore, the Queensland Government argued that a trigger to review non-tariff elements is likely to contravene the code.

The Queensland Government made the following submission:

In relation to 3.17(ii) by referring specifically to section 8.1 of the Code. The wording of clause 3.17 suggests that “specific major events” must be events, and only such events, which will have an impact on the reference tariffs and reference tariff policy, this requiring a review of the reference tariffs. Accordingly the proposed requirement for inclusion events to trigger a review of non-tariff matters is likely to contravene the code, certainly the derogation of the reference tariffs and reference tariff policy under section 58(4) of the Act would render inappropriate any requirement to include events which would trigger a review of the reference tariffs and reference tariff policy.

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<sup>2</sup> Duke, Response to Draft Decision on access arrangement for Queensland Gas Pipeline, 11 May 2001.

Leaving aside the issue of the legality of requiring the identification of events which would trigger a review of the non-tariff elements, there is a question as to the nature of any review in response to the to the events proposed by the Commission ie. the interconnection of another pipeline with the Queensland Gas Pipeline, and the introduction of a significant new gas supply source to one of the Pipelines markets.

The prospect of additional competition from new infrastructure or new gas supplies would raise the question of whether lesser regulatory requirements, or revocation of coverage, would be appropriate if there would be sufficient market discipline placed on the owner of the subject pipeline to curb any misuse of market power. This potential outcome would need to be considered in view of the recent decision by the Australian Competition Tribunal in relation to the Eastern Gas Pipeline (EGP). In this decision, the tribunal considered code coverage of the EGP was not necessary given the level of competition the owners faced from alternative gas supplies and pipelines.<sup>3</sup>

## 2.3 Legal advice received by the Commission

In response to these arguments 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 (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).

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<sup>3</sup> Letter from the Hon Terry Mackenroth MP, Treasurer, 30 May 2001.

### 3. Duke's revised access arrangement

On 5 July 2001 the Commission received a revised access arrangement from Duke, dated 28 June 2001. Section 2.15A of the Code requires the Commission to make a final decision based on this revised access arrangement. Duke's revisions to the access arrangement and the amendments the Commission requires before it will grant final approval are outlined in this section.

Duke has incorporated the majority of the Commission's proposed amendments in its response to the draft decision and in the revised access arrangement. However, Duke has not made the amendment that the Commission proposed with respect to the major events trigger and additional minor amendments are required to make Duke's trading policy consistent with the code.

#### *Operations manual*

Duke made a significant revision to the access arrangement, removing all references to the operations manual as recommended in the draft decision. Duke also incorporated a substantial amount of operating information in schedule 8 to the access arrangement. The Commission welcomes the addition of this information to the access arrangement, believing that it will be of benefit to prospective users.

#### *Trading policy*

Duke amended clause 10.1(a) as required in the draft decision, however there are still some references in clause nine that do not make it clear that a user may make a bare transfer to any other person. Therefore, the Commission requires that for consistency clause 9 must be amended at 9.1(a), 9.2 and 9.3 so that it is clear that a user can effect a bare transfer to both users and any other persons.

Duke also inserted a new paragraph into clause 10.3 that states:

It is not a reasonable commercial reason to withhold consent under clause 10.1(a) if the transferee or the transferor of the Bare Transfer refuses to pay any costs and charges over and above those which can be levied by Duke under the Access Agreement to which the capacity that is the subject of the Bare Transfer relates.

The Commission believes this clarification of Duke's position with respect to the trading policy for the QGP is a helpful addition to the access arrangement.

#### **Amendment 1**

For the access arrangement to be approved, the Commission requires Duke to amend clause 9 so that it is clear that a user can effect a bare transfer to both users and prospective users.

#### *Queuing policy*

Duke's proposed queuing policy appeared to only apply to spare capacity, whereas the code requires a queuing policy to apply to spare and developable capacity. Duke's revised access arrangement now applies explicitly to developable capacity as well as spare capacity and is consistent with the code's requirements.

### *Extensions policy*

Duke's extensions policy was unclear as to how an applicable surcharge, if required, would be approved. The wording of the extensions policy implied that the surcharge may be covered by the derogation. Duke has amended the access arrangement to clarify that it will submit any proposed applicable surcharge to the Commission for approval in accordance with sections 8.25 and 8.26 of the code.

### *Major events review trigger*

The Commission believes that, because of the uncertainty associated with the extended regulatory period, it is appropriate to make provision for early review of the non-tariff elements if there is a material change in circumstances. If the current non-tariff elements are operating effectively when a major event triggers a review, Duke may re-submit its current access arrangement to the Commission. However, the Commission wishes to reserve the option to review the non-tariff elements in the event of a trigger event occurring in case modifications to the arrangement are appropriate. Given these considerations and in light of its legal advice, the Commission continues to require the following amendment (formerly amendment A3.5) to Duke's proposed access arrangement.

#### **Amendment 2**

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

## **4. Final decision**

Pursuant to section 2.16(b) of the code, the Commission does not approve Duke's access arrangement for the Queensland Gas Pipeline. In order for the Commission to grant approval, the amendments (or the nature of the amendments) specified in this final decision must be made to the access arrangement. A revised access arrangement must be submitted to the Commission on or before 24 August 2001.

#### **Amendment 1**

For the access arrangement to be approved, the Commission requires Duke to amend clause 9 so that it is clear that a user can effect a bare transfer to both users and prospective users.

#### **Amendment 2**

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