AUSTRALIAN ENERGY REGULATOR

Round-table discussion of Jemena's access arrangement revision proposal (2010-2015): terms & conditions

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Location:	ACCC, Level 7, 123 Pitt Street, Sydney
Date:	Friday, 27 November 2009
Chair:	Mike Buckley

Attendees:

George Foley (GF)	AGL
Meng Goh (MG)	AGL
Jenny Hart (JH)	AGL
Irene Tanty (IT)	AGL
Marc Flynn (MF)	EnergyAustralia
Peter Limbers (PL)	Middeltons, representing EnergyAustralia
Catherine Marshall (CM)	EnergyAustralia
Tom Walsh (TW)	EnergyAustralia
Steven Macmillan (SMO)	Origin Energy
Danielle Beinart (DB)	Jemena
Mark Edler (ME)	Jemena
Scott Martin (SMJ)	Jemena
Alf Rapisarda (AR)	Jemena
Mike Buckley (MB)	Australian Energy Regulator
Shane Adams (SA)	Australian Energy Regulator
Sonja Eibl (SE)	Australian Energy Regulator
Matthew Le Cornu (ML)	Australian Energy Regulator

1. Introduction

MB: The purpose of today's round-table is to discuss the substantive issues raised in submissions regarding certain terms and conditions set out in:

(i) Jemena's access arrangement revision proposal (AA)
(ii) the reference services agreement which forms schedule 3 of the access arrangement (RSA).

I note that the previous AA did not incorporate the reference services agreement. Jemena has stated that its:

> current AA contains a description of the minimum terms and conditions for access to the network. These are 'policy based' and interspersed throughout the AA as high level principles for the basis of contract negotiation.

The reference services agreement, the subject of your submissions, sets out the proposed terms and conditions in contractual form for all prospective users who seek access to Jemena's reference services. As this is in a contractual form, it is generally sensible for the terms and conditions to be settled between the parties through commercial negotiation. However the AER understands that sometimes parties can have trouble getting access when contractual terms cannot be agreed.

The review of these types of terms and conditions is not normally one of the core activities undertaken by the AER and its regulatory team. Therefore, we want to use this opportunity to present our understanding of your submissions so that we can be sure that we have correctly understood them before asking you to present your particular submissions. We will then ask you to speak to your submission before asking Jemena to respond.

We can take account of comments from this discussion in the draft decision.

I invite you to clarify your submissions regarding those terms and conditions set out in the agenda with Jemena today. Let's make a start with the first of those terms and conditions.

2. Terms & conditions

2.1 Amendments to the Agreement (clause 1.4, RSA, page 15, which cross-references clause 2.2 section C of the AA)

MB: Jemena states that it will provide written notice to users when amendments are made to the reference services agreement. This clause provides that the amendments will take effect two business days from the date of the written notice. We understand that there is some concern that this timeframe is too short.

SA: EnergyAustralia and AGL Energy have expressed concern that where the AER approves amendments to the reference services agreement according to clause 2.2, section C of the access arrangement, the amendments will take effect just two business days after Jemena provides written notice to users.

SMJ: The main reasons for these provisions in the access arrangement and the RSA are in an effort to lower administrative costs of users and JGN arising from maintaining contracts and also to create consistency between new and existing contracts. There are two general circumstances where changes to RSAs may be required - first, during the larger process of an access arrangement review where changes to the RSA will be dealt with using the same processes and timelines that apply for any changes to the access arrangement, and the second circumstance is where changes are required to be made to RSA during the term of the access arrangement. In this second circumstance, it is the standard form of RSA which is being changed and the other provisions of the AA (such as service descriptions) are not changing and therefore the types of changes in this circumstance are likely to be limited to more minor amendments such as due to changes in the law which impact on the reference services agreement. In such cases as changes in law, it is worthwhile to make changes as fast as possible.

An extended notification period does not achieve much as people will be aware of changes to the law in advance. Therefore, the prior knowledge that legislation is going to change at a set date in the future is sufficient time for users to prepare for changes.

GF: AGL still needs more than two days notice to go through processes such as contract sign off and other internal changes. Two days is not enough.

CM: I also agree that any change will need to be reflected in customer contracts which will take time to prepare. We can't make changes to contracts retrospectively.

TW: It is not possible for EA to simply go and unilaterally change the contracts as there is a sign off process and other procedures to follow. Also, if the change was due to an amendment of the law, the short time frame may be able to be justified, but not in other circumstances.

AR: If it is through an AER process, presumably there will be a consultation process.

JH: Not until we see the final words of a notice to implement will we know what the final outcome is.

MB: Aren't these minor within the period?

SMJ: To change the terms and conditions, Jemena will have to put the proposal forward to the AER. The AER approval process then becomes the means through which specific changes are determined that will be applied for all users' RSA contracts.

MB: The AER will consider the proposed changes, and release a decision. The process may take longer than two days as the AER will need time to review the proposal and related issues before reaching a decision.

SMJ: Jemena are seeking to create a framework where changes to the RSA (as originally established and approved as part of the access arrangement) can be made under a process of AER approval. We are trying to move towards a standard agreement which will protect users and JGN and create efficiency and transparency. But, where necessary, we also need to be able to change the terms and conditions at times during the five year period, rather than only at the end.

CM: The reference services agreement states 20 business days notice to the AER or it is a deemed change. What is stated in the Reference services agreement does not limit the types of changes to changes in the law.

SE: Why has Jemena chosen this approach instead of relying on Division 10 of the National Gas Rules?

SMJ: We need a mechanism to reflect the fact that we need to make minor changes without going through a full costly and involved process. For example gas quality specification changes. It is a means of applying an AER approval process as a control for modifying terms of the standardised form of RSA which applies to all users that have signed up to the standard form (in the knowledge that their specific contract will vary from time to time through the AER approval process described in the access arrangement).

SMJ: We are looking for a practical and streamlined process for developing new versions of JGN's standard form of RSA for the minor issues which occur during an AA period rather than creating a big issue such as a re-opener or revision of an access arrangement decision.

TW: If there is a significant impact on contracts then there is an issue. Streamlining makes logical sense but EA would like it reworded. There are time constraints if customer contracts need to be changed.

SMJ: When the AER is going through its assessment of the change, then if an amount of time is needed for users to prepare for the contractual change then the AER may be able to state a timeframe for an implementation date in its written approval statement.(ie updated version of RSA approved to take effect from some future date chosen for the specific circumstances).

TW: Granted but we do not want to be talking to customers about changes that may not even happen.

AR: There are separate contracts between service providers and users and between users and customers. This is only talking about notification of the change and does not directly affect your contracts with customers.

MB: The AER will not waste resources on minor issues. Therefore if it is a minor matter it will be a quick decision. If it is a more complex change, the timeframe will be longer. If variations are of a minor nature the two day period recognises that the AER undertakes a consultation process prior to it taking effect. If the AER consults and there are no issues raised by users, then it would be done on an expedited process. If there are issues then it would not be expedited.

GF: This is fine as far as it goes, but two days is not enough in relation to our customer contracts.

MB: We recognise that and would expect parties to note in submissions that they have no concerns about the substantive amendment but that they need more time than that proposed.

AR: It is just an amending notice.

GF: But we need to accommodate the notice.

JH: The deemed approval should be taken out.

SMJ: The benefit of having these new contracts in the access arrangement in a complete form is that it will allow all users to shift over to the new contracts efficiently so as to facilitate access to the new and changed reference services from day one of the access arrangement and also to facilitate the introduction of the STTM by ensuring there are contracts available to users which are consistent with the new market structure (as opposed to the existing forms of contracts which are not suitable for STTM operation and will require modification if they are not able to be replaced with the new contracts).

MB: I believe that the NGR already accommodates this.

2.2 MDQ, MHQ and Chargeable Demand (clause 4, RSA, pages 18-22)

MB: I note that Jemena has moved away from the previous arrangement regarding overruns and have introduced a new parameter called chargeable demand. It appears from the numerous submissions on this issue that there is concern and uncertainty amongst users as to how this clause will operate and there are several amendments that they would like to make.

SE: Chargeable demand refers to the quantity of gas used to determine demand charges. Clause 4.5(c) refers to the fact that chargeable demand must be greater than the larger of the MDQ for that delivery point and 10 times the MHQ for that delivery point.

EnergyAustralia submits that clause 4.5 expands the application of the ten times rule–that MDQ must be at least 10 times MHQ for a delivery point–beyond new delivery points as provided for in the current access arrangement and that this may penalise users for their past actions during the current access arrangement period.

Origin submits that clauses 4.5(c) and 4.5(d) of the reference services agreement state that chargeable demand should be greater than MDQ/MHQ. And all of the parties here today appear to share the view that MDQ should be aligned with chargeable demand and users should not be charged above their MDQ.

CM: This makes sense but how can it be translated into 'normal speak' so that customers can understand it? There are also concerns regarding customers being hit with the ten times rule, and the difficulty customers will have in accessing reductions. There are a number of terms with different meanings. I had difficulty understanding the wider application of the ten times rule. If a customer decreased MHQ on 15 July 2005, it can now, years later, be hit with the ten times rule which will significantly increase their bill.

SMO: Origin has concerns about the complexity of the drafting and can't understand why it has been drafted in this manner. Is there a clearer way of drafting chargeable demand, MDQ and MHQ?

SMJ: With respect to the clarity of the drafting of clause 4.5(c) and 4.6(e) there are two separate points that the drafting is making. Firstly, the contract states the requirement of chargeable demand being the greater of MDQ/MHQ, and the second point is to set out the process of changing chargeable demand in that circumstance (ie that the service provider is responsible for making the change). Clause 4.5(c) sets out the requirement, whereas clause 4.6(e) gives the service provider the power to make the change to meet the stated requirement.

With respect to the difference between MDQ and chargeable demand, presently the contractual MDQ of a service is used for two purposes – the first is that MDQ and MHQ are used to describe a user's contractual capacity rights under a service - and the second is that MDQ is used for determining some network tariff charges. Under capacity reservation services in JGN's current AA services the retailer chooses the required MDQ that applies for a fixed term and annual overrun charges are applied (retrospectively for the entire term) to adjust the charges if the withdrawals at the site exceed the MDQ more than nine times per annum.

Under the proposed future reference haulage service the relationship between MDQ, MHQ and contractual capacity entitlement is still the same as existing. These parameters continue to be used in the RSA as a statement of a user's contractual capacity rights, and are still required by JGN to manage capacity of the network and also to assess new requests for service and to apply the queuing policy.

MDQ will no longer be used as the charging parameter for capacity based tariff charges – instead chargeable demand will be this parameter. We have dropped the fixed term and retrospective annual overrun charges of our current capacity reservation services, and replaced it with a low administration mechanism for increasing chargeable demand, where necessary so that charges for capacity remain commensurate with utilisation (these adjustments to capacity charges are now forward looking only).

JGN still expects people to request reasonable MDQs and to manage their contractual overrun exposures, but where people don't request a reasonable MDQ and pay less than they should, then the appropriate level of charge is automatically adjusted through the changes made to chargeable demand.

At the moment, terms are 12–24 months. MDQ is fixed for the period. If consumption is greater, then overrun charges apply. If there are more than nine overruns then annual overrun charges apply. These are retrospective charges which applied back from the start of the term when the MDQ was set. We are moving away from the concept of a term and retrospective overrun charges. However the concept of basing forward looking charges on chargeable demand as a long term indicator of actual/booked utilisation remains an appropriate approach as it reflects the nature of costs of providing the assets for that capacity. This provides a fair and equitable basis for charges.

Users are still able to manage liabilities arising from overruns on MDQ or MHQ in exactly the same way that they do now by either making a request to increase their contracted capacity or by requesting overruns to be authorised. Chargeable demand is separate from capacity management and we've retained the cost reflectivity concept.

JH: We will still have to keep the same system. Why can't there be an automatic MDQ increase if the gas is available? We want MDQ to track chargeable demand. For 99 per cent of customers, if they need extra MDQ it's there. If it is not there, there are negotiated services. We don't understand why there would not be an automatic MDQ increase. If the level of MDQ is not available after a period, for example in a summer tranche scenario, the user should not be charged for it.

SMJ: Automatically increasing contractual MDQ to match actual withdrawals would mean that contractual capacity rights would no longer be set by the level of capacity in a request made by a user – this is not consistent with JGN's approach to capacity management and prioritising requests and queuing. Chargeable demand is intended to replace current annual overrun charge concepts where increases are triggered by the ninth highest overrun quantity but there is no alteration to the capacity entitlement for a site (a request is always required to do that).

AR: Chargeable demand replaces overruns. The capacity management framework lies underneath. This has not changed.

SMJ: In making the change from fixed terms with annual overrun charges to continuous services with forward adjustments to chargeable demand the same principles apply for capacity management.

MB: People are paying on a capacity basis above contract MDQ even if they are not using it?

SMJ: JGN acknowledges that MHQ is the more sensitive factor than MDQ for capacity management, however we are not proposing to change the way that capacity is managed and both MDQ and MHQ are being retained as contractual definitions of capacity entitlement. We are proposing to introduce chargeable demand for operational and administrative convenience.

CM: It is no more convenient as we still have the same regulatory and administrative requirements. You are getting rid of backdating but you will still need to keep putting in MDQ requests.

SMJ: We want to move away from high levels of administration of MDQ changes.

CM: But this will maintain administrative issues.

SMJ: There will be no incentive for people to drop their MDQ each term anniversary to optimise their commercial position (though capacity needs have not changed). In the short term I would agree. However in the longer term it should ratchet up and then remain stable.

CM: Customers constantly change what they do. We still need extra tranches. Customers are still going to vary so it will never achieve stability.

SMJ: Jemena disagrees.

JH: It will cap out in a cold winter and in times of economic prosperity and then that's where it will stay.

MB: Jemena is moving away from retrospective to forward looking charges.

JH: There is paperwork with the current overrun process, but also paperwork with the new procedures.

CM: We agree that it is a sensible approach.

MB: So in summary, the parties doubt that there is a saving in administration but that the forward looking basis of the charge is sensible and it is just the detail that needs to be sorted out.

JH: Yes.

CM: Yes.

TW: We are happy with the forward adjustments. It is what we have with Victorian DBs.

2.3 **Increases in Chargeable Demand** (clause 4.6, RSA, page 20)

SE: Clause 4.6 concerns increases in chargeable demand. It refers to the service provider being able to increase chargeable demand applicable to a delivery point to equal the ninth highest quantity of gas withdrawn at that delivery point in any one day over any 12 month period.

AGL was interested in obtaining clarification of how chargeable demand is reset and what the relevant process is. It had questions such as "does it happen every month, once a year, or some other way? Can a customer receive an increase in one month and then again in the next month if the ninth highest is higher than the new chargeable demand?"

SMJ: You need to read clauses 4.6(b) together with 4.6(d). The change in demand will occur immediately after the month has occurred. It was put together as a rolling 12 month period. It will shift every month if there is a change in chargeable demand. It will occur on the first calendar month after the period.

AR: This is largely similar to overruns–right Scott?

SMJ: If demand changes, for example from 12 March then you'll see that in the 1 April billing period and you will receive the bill with the increased demand charge in May.

JH: People are reading it differently. Maybe it needs to be re-drafted to be clearer.

GF: AGL had interpreted this differently. Is there the same sort of notification before getting the network charge?

SMJ: It will be the same as it is at the moment. Users will still have access to the downloads of daily data through CABS and will of course continue to receive invoices. You can see the data of users' demand.

CM: EA thinks it is misleading to refer to it as a rolling 12 months. We see it going up but not coming down.

SMJ: Jemena is now trying to base demand around customer characteristics. The reason for increases under 4.6 and decreases under 4.7 is to get away from retailer behaviour. In terms of decreases, we are looking for permanent reductions–permanent or material change. If there are no such circumstances, there should not be a reduction.

2.4 **Decreases in Chargeable Demand** (clause 4.7, RSA, pages 20–22)

MB: If observed behaviour (i.e. ninth highest) is used for increases, why not also use this for decreases?

AR: The allocation of costs is based on the demand profile over the last 12 months. You have a capacity entitlement for a site. If they haven't used their full entitlement in the last 12 months they shouldn't receive a reduction.

MB: If you increased charges to a user then presumably the charge to others would go down.

SMJ: In the long term the quantity parameters for demand charges will be stable. It goes up to a stable level which will reflect utilisation. It only changes when you have a new customer or where there are material and permanent changes in the capacity needs of a customer. If we automatically change chargeable quantities up and down then that will create a very high rate of transaction costs because every time the charge for a service changes all parties (JGN, retailers, customers) will be checking, verifying and possibly querying the change, and such up and down adjustments could potentially have to be made each year for every demand capacity tariff site. Our proposal is for a longer term stable form of setting chargeable quantities with low levels of transaction activity. Short term increases or reductions in charges would not affect other users' charges unless included in demand forecasting. The stability is created through controls such as the reduction in chargeable demand custom. There has to be a material reduction of more than 10 per cent, and that reductions should be demonstrated to be permanent through an actual history of reduced utilisation before the reduction takes effect.

CM: But a decrease is in the interest of the customer.

SMJ: If the reduction is meaningful in allocating and recovering costs.

AR: Jemena doesn't want to be processing thousands of requests for small variances.

CM: Why not ratchet down automatically. If a customer is using MDQ of 1000 and drops to 901, they are still paying for 1000. It's not just the symmetrical issue.

SMJ: The increases and decreases would increase transaction costs. There is a pot of revenue to be recovered amongst the 450 large end users. A temporary drop by 100 gigajoules is not meaningful and it doesn't set proper price controls. We need to look at the level of capacity installed and allocate charges fairly amongst customer groups.

MB: Charges on customers are set to recover efficient costs. If that's the way it works that is correct. Under this regime charges go up, and therefore revenue overall will go up.

AR: Users can also request a reduction.

MB: And if a customer departs the market, the cost is shared?

AR: No, there is a volume forecast risk for Jemena.

SE: A concern raised is that it will be effective twelve months after the application is made.

GF: It is unfair to charge an incoming user based on the same characteristics of the previous user of that site if they have different criteria to the existing customer.

SMJ: If there is a walk in–walk out, then historical data is a fair reflection–a bakery is a bakery. Jemena would say that the new user's needs are the same. The exception to this would be if the site had been decommissioned when the previous user left, and the meter was removed. Then there would be a new request for a service and a new delivery point.

GF: I'm not thinking of a decommissioning. For example, a change of appliances and the user requests for the service to decrease.

CM: They would still have to wait 12 months and have more than a 10 per cent reduction.

SMJ: If there was a change of customer and at the same time there was material change in the appliances installed then a refit of some degree would have occurred and the circumstances would not be a 'walk in – walk out'. In that circumstance surely the retailer would be decommissioning and then asking for a new request for service when the new customer moved in – and the history of the previous occupant would not apply to the new customer.

CM: Why incur the expense. If you know someone is moving in, why decommission and remove a meter.

AR: The obligation is on a user for a request for service if something changes. This is not Jemena's responsibility.

CM: If there is an old customer and a new customer, how do you get MDQ changed other than by decommissioning?

SMJ: If there is a smooth transition between customers at the site it is fair to use historical information. If there is a termination of a customer and a gap in time between customers, it will be a separate service request.

CM: How can you base new customer demand on old customers just because the meter hasn't been removed? This issue needs better sorting out.

AR: This issue only relates to the largest 450 customers in NSW (of which there isn't many) and as such is not a very common occurrence. I question whether this is an issue.

JH: I don't understand why it can't go straight into decrease. It's an unfairly long time frame.

AR: It would put us into the process of going up and down with transactions.

JH: So once the application has been submitted, there is an assessment period of twelve months before the reduction is applied? Why can't it be dropped straight away then the normal resets be applied from that point forward. So if it's dropped too low – it will be fixed correctly quickly?

SMJ: This is not inconsistent with the current terms and other service providers are also doing it this way. It is based on actual data and not speculative requests. The request is verified with historical data and there is more predictability.

JH: If they request a reduction of 15 per cent and it only drops by 12 per cent at the end of the twelve months are we back to square one or does it stay at 12 per cent?

AUSTRALIAN ENERGY REGULATOR

SMJ: It would go to 12 per cent. If immediate reductions are allowed from the time of a change, then capacity charges could be avoided for part of the year if a site has a short term shut down or a seasonal load pattern. This is not possible under the current 12-24 month terms. With the twelve month reduction request period there would not be that volatility and it would be similar to current annual capacity charges. Without the 12 month verification period we have an immediate loss of revenue.

CM: The twelve month term gives the opportunity for reductions, but with ratcheting up we lose that.

SMJ: Now it is contractual MDQ specification purely by agreement. We are stepping away from a contractual approach towards an approach based on customer characteristics. Even with present fixed one to two year terms there is an ability to adjust the MDQ up but MDQ can only decrease on the term's anniversary. Individual circumstances are going to vary.

JH: You have to have MDQ for 24 months, 12 months of the reset date and then 12 months for the decrease request. Twenty four months seems a long time to wait. Customers who have a significant change should have it linked back to 3 months. Look at three months of demand. Users could request a reduction and look at three months of actual usage and then apply.

AR: Three months doesn't capture the usage profile of 12 months.

2.5 Gas balancing under an arrangement approved by a Service Provider (clause 7.4(b)(ii), RSA, page 26)

MB: EnergyAustralia submits that Jemena will be able to veto gas balancing schemes under clause 7.4(b)(i) of the Reference services agreement. It also asks what the 'service agreements' referred to in clause 7.4(b)(ii) of the reference services agreement are.

SM: 'Service agreements' refers to transportation contracts. All JGN's current transportation contracts have clauses which reflect the current gas balancing arrangements. If market balancing arrangements are changing then it is reasonable that such a change also ensures that necessary contractual changes are made to reflect the new arrangements.

TW: It is more about new balancing arrangements.

MF: It is a timing issue.

SMJ: Our considerations need to be taken into account before switching across. It is being transparent about the need to make contract changes.

TW: So does 'approve' mean more like implement?

MF: Is 'approve' something more than implement?

ME: Approved in terms of for the purpose of the contract.

MF: It could be a misunderstanding – clarification could be provided.

GF: I had the same impression as Mark – but then I dismissed it because the STTM provisions will be in the NGR, and Jemena's access arrangement cannot override the gas rules?

AR: Whether it's the STTM or some other scheme, if we feel it's sufficient for us to step back and not manage the network then that's okay. We have to make our own assessment as to whether it meets the operational needs of the network. We retain the right to operate the network including operational balancing. The STTM does not have accountability to balance the network. Jemena have the responsibility to safely manage the network. If this means balancing the network, this is what we have to do. If operational balancing does not work we need the ability to introduce something that will.

SMJ: Jemena needs a contractual means to deal with scenarios related to the safety and reliability of the network. The three possible scenarios are the STTM will operate, things will continue as they are or the STTM does not meet the needs of operational requirements, in which case we will need to take action.

GF: What does Jemena contemplate it will do if balancing arrangements don't work?

SMJ: Go back to contractual obligations on individual users to balance daily deliveries and withdrawals as we do now.

AR: The design of the STTM is not tested and may fail. If it does we will need to go back to the contractual measures to ensure the right quantity is delivered each day. We are comfortable that the STTM will work but we need a contingency. We retain the right to operate the network including operational balancing. Ideally there will be no issues. This clause deals with the scenario where the market solution does not meet the needs of the network operator in relation to safety and reliability.

SMJ: There will be no forward planning by AEMO to ensure supply. AEMO has no accountability for safety and reliability of the network; JGN needs the contractual means to meet those requirements if it becomes necessary.

MB: If the STTM is introduced will changes be required to this reference services agreement or will this document still operate?

SMJ: This has been written based on the STTM and will therefore still operate.

SA: It would be a matter of using the AER's process if changes are required.

ME: We will need to wait until the new rules have been released to be completely sure that it will not change.

2.6 Commingling, custody, control, responsibility and warranty: warranty and indemnity (clause 9.1, RSA, page 29)

MB: EA has identified what it considers to be an inconsistency in the warranty and indemnity clause in relation to a user warranting that it has the legal right, power and capacity in relation to gas in an STTM environment.

MF: Given this reference services agreement covers a number of network sections, it is not consistent with the STTM section. I see this clause as a problem in terms of inconsistency. The nature of the STTM is that a user with load could elect to take all of their gas from the market. This clause seems to be inconsistent with this as it puts users on a path not allowing the STTM to do for them what it should.

SMJ: There is a principle and a legal technicality. On the matter of principle the STTM does not change the responsibility of the retailer to be responsible for the gas that they deliver to a network section. But if you are asking more technically, can a retailer comply with the clause if they are buying off the spot market when a retailer withdraws from the STTM, then f they are participating in the STTM then presumably they will have a 'legal right and full power and capacity to deliver' the gas coming into the STTM network section.

Also, the STTM is using a users' withdrawals from the network section as an input to calculate the quantity of gas being 'withdrawn' from the STTM (ie: delivered at the injection points to the network section) by that user. By definition, gas being injected into the network from the STTM should be the same as the user takes out of the STTM network section. What a retailer withdraws from the market they have full power over in regard to gas coming in.

MF: I looked at this from a black letter point of view. If a retailer took gas all off the spot market, they are not in breach of the clause.

TW: If as a retailer they took all gas off spot, they are not in breach?

AR: The STTM does what it should. As the retailer you would have to make the decision yourself. The STTM needs to replace the warranty on gas title. I understand the STTM does that.

MF: I still consider that it is inconsistent. The concern is that the STTM has features of choosing who they get to bring gas to the STTM from upstream.

SMJ: If they have a right to withdraw from the STTM, then they have title.

MF: Regarding the 'network section' are you talking about just the STTM? I thought it meant all the way up the chain. We will need to get some advice around this.

2.7 Transfer of legacy agreements (clause 11.4, RSA, pages 38-40; clause 2.4(c), AA, pages 8-9)

MB: In the reference services agreement Jemena have set out a process for users to transfer all of their legacy reference services over to the new reference services for the access arrangement period. Origin has raised several issues in relation to the relevant transfer clause in the reference services agreement and the pricing associated with legacy services in the access arrangement. I will hand over to Steve to present Origin's submission.

SMO: We just wanted to understand the 40 per cent increase. Is it punitive? What proportion of customers do Jemena think will move across and why? What are the consequences for tariffs?

SMJ: The proposed access arrangement is a significant change from the services described by existing contracts. There will be contract transitioning. In terms of transitioning between the old and new contracts, the old contracts are standalone from changes made to the access arrangement and will always stand until they are terminated in accordance with their terms. The reference services agreement requires a bulk transfer of delivery points from the old contracts to the new contracts to facilitate the removal of all services from the old contracts and replacement with new access arrangement services under the new contracts. In regard to pricing, there is a clause in the access arrangement that can be applied to the old contracts. This is only a contingency in case people do not move across but we are expecting everyone to move. Whether we can put sunset clauses in existing contracts, we are open to suggestions. But it's my understanding that the AER cannot approve a clause in an access arrangement to override existing contracts. The parties must agree.

The 40 per cent is made up of the following:

- 34 per cent is the average underlying price change in the 2010–15 period. It is the changing cost of the service.
- The other 5–6 per cent is an incentive and reflective of additional costs and inefficiencies that Jemena will bear to keep old contracts going. The costs would relate to having to maintain two different approaches for billing and charging, two approaches to administration of contracts and tariffs, plus the need to continue to modify and maintain the old form of contracts using legal resources and other administrative resources rather than simply replacing them. It is basically an incentive to get people to move.

MB: But this will only be for 12 months?

SMJ: 12 month terms apply to each delivery point under the old contracts. However, users have an option of extending for another term at each expiry date. The contracts remain on foot until all delivery points have been deleted (or the agreements otherwise terminated) – hence they are evergreen contracts.

JH: Don't you have the right to terminate?

SMJ: The principle of the old contracts is that the user has the right to extend their capacity entitlement for another term on expiry.

GF: We don't agree with the 34 per cent but that is a debate for another day.

MB: The 34 per cent is something that we will look at in the access arrangement revision. Another issue is the structure of the tariffs. 34.3 per cent is a separate issue for the AER to go through in relation to capex, opex and cost of capital. We need a bit more time to consider this before we can discuss this at a roundtable.

2.8 **Liability** (clause 28, RSA, pages 76–79)

MB: I note that in the most recent IPART review, EA raised a number of liability issues in the consultation process with the IPART's consultants, Allen Consulting Group. Ultimately, the majority of issues raised by EA were not taken on board by ACG or the IPART and were found to be reasonable under the Gas Code. However, it appears that the issues raised by EA in relation to liability and indemnity in the reference services agreement are broader than in the previous review and that these relate to the general drafting of the clauses by Jemena. I note that AGL has also raised issues in regard to the drafting of the liability and indemnity clauses which they consider are weighed unreasonably in Jemena's favour.

PL: There are a lot of liability indemnity clauses in this reference services agreement which are one-sided in the service provider's favour. It is expected for Jemena to have some level of protection. But EA disagrees with the extent to which the protection goes. The two categories of concern are:

1. Specific indemnities. For most of the 14 clauses the service provider excludes liability for all damages whatsoever and the user indemnifies the service provider for all damages. EA has indicated that this should be limited to where EA has caused the issue (by bringing their own gas into the system, etc). If there has to be an indemnity, it should only be to the extent that EA has caused it. EA suspects that this is the intention, it's just the drafting.

2. Clause 28 is reasonable on its face, but when you get to 28.6 it excludes EA's indemnities in the 14 specific areas which remain uncapped. EA should not be indemnifying for things that have nothing to do with them, and if they are, there should be a reasonable cap.

ME: This is similar to how we approached it last time around. The most efficient way to manage a risk is to pass it to whoever can best manage it.

In relation to the 14 issues raised by EA, we can't deal with those. Risk is best dealt with by users who have dealings with customers who buy the gas. The network operator does not have daily contact with customers the way users do and cannot mitigate the risk.

We started with the current terms and conditions. There is recognition that there is a class of issues of unlimited liability events like off-spec gas and overruns. Jemena does not see how continuing this approach should cause problems.

As an example of the user being the party most able to effectively mitigate risk in relation to the issues raised by EA, consider, clause 5.6(b) dealing with the revocation of authorised overruns. We need to ensure continuity of supply to other users. We need to be able to revoke without liability. The risk or cost of that decision is really at the end customer level. The user is in the best situation to communicate to the customer, to educate the customer, about what this is and the fact that it can be revoked. The user can inform the customer that they need to be aware that it can be revoked. By having that discussion you can remove the risk of the customer improperly relying on an overrun amount. If a similar risk analysis was done for each of the 14 it would similarly show that in each case the risk is best dealt with at the user level rather than by the service provider.

PL: Capping of liabilities is another issue.

ME: The efficient operation of the network depends on users managing customer relationships. Jemena are trying to look, in the longer term, at what opportunities are available to minimise cost and minimise risk to the market. If users do not have an uncapped obligation to manage this risk, the market would miss out on the opportunities that users have to mitigate and avoid those risks. The network operator would be the risk insurer for the market. This is not efficient or cost effective. The risk is best dealt with by users.

PL: What about the comingling of gas?

MF: Why is the risk with the users?

ME: We cannot control comingling. Therefore we need to look at the most efficient way of managing it. Users as opposed to the network are better placed to manage risk.

This relates to events carried out potentially by multiple users. A number of users could have brought gas in and the network should not bear the risk. Users have interaction with the end customer. It is not the service provider's gas, and because there are a number of users the risk is spread – effectively diluting the risk effect across the market, rather than having it sit with the network.

SMJ: All comingled gas is coming in at a single receipt point and therefore Jemena is not able to determine exactly where the gas came from.

CM: How can you manage risk that another producer is putting in off spec gas?

SMJ: Jemena won't know who put the gas in. The users are buying gas in the market and therefore they should ensure its quality.

PL: In regards to clause 28, users are competing and therefore do not want to be held responsible for the actions of other users. We don't have a problem with the network limiting liability for direct damage, just the degree. We don't think it is fairly reflected in the reference services agreement.

It is true that a user is in a relationship with upstream suppliers and downstream customers. But one user cannot be held responsible for others. If we have to indemnify the service provider, put it on the user actually responsible. EA does not have access to other users' customers or suppliers. A user should only be on the hook if it relates to their customer. This should be stated in the clause. EA does not have the ability to manage upstream risk, the monopoly provider sheets home risk to the user as well. The National Energy Customer Framework will also bring responsibility on the user to manage risk.

Re the cap, where Jemena is in breach or negligent it should accept responsibility under its insurance. It should have an obligation to have insurance to reflect the risk.

ME: There are three issues that I would like to start with. The first point is that looking only to contractual passing of risk from users to customers through back-to-back indemnities is a very narrow way of looking at risk mitigation. For example, using authorised overruns described earlier, this is a risk that can be managed outside contracts by users. The issue is where the risk should sit.

GF: That's not the point. A user cannot be held responsible for actions by another user or customer. You are tarring us all with the one brush.

ME: That's another point I'll get to: events that can be caused by multiple users, for example off-spec gas being delivered into the network. A number of users will have brought that gas in. How do you best deal with the risk? If the network operator deals with it, the network operator is the insurer for the market and is not able to mitigate the risk to the market. Or the risk sits with the users. After all, it is the users' gas and they are best place to utilise the market mechanisms to manage the quality of gas coming into the network. If you have multiple users, you have multiple users who can manage the risk. Spreading the risk across the users is more efficient and in line with the NGO.

We also have a licence requirement to have prudent insurance. Capping user's liability would not be efficient as it isolates the user's ability to manage risk at their customer level and does not make that accessible to the market.

AF: If there is commingling, all users are responsible for off spec gas.

MB: Are you saying that both pipelines are bringing in off-spec gas?

SMJ: No, under the STTM the AEMO will not tell Jemena who has put gas in. There is not a path of fault that Jemena can follow to track where the gas has come from. There are multiple receipt points and in the new STTM, everybody is bringing gas into the market. There is no allocation between a shipper and user. The ownership and allocation will be coming to all users.

CM: What happens for example if coal seam methane gas is coming in–a user brings it in? How does EA stop another producer putting in off spec gas?

SMJ: We don't know in the STTM who puts it in. The shipper brings it to market and the market delivers it to the user, Jemena does not know who is at fault.

PL: So you exclude liability to Jemena. What is the scope of liability of the network? In relation to the 14 clauses, clause 28 is subject to the 14. The only scope is breach of the agreement. Regardless of the reason for it, the user must indemnify Jemena. Whatever is left over, clause 28 operates. Under the 14 clauses you are entitled to 'stuff up'? Regardless of the reason for comingling, the user must indemnify them completely. This is the opposite of what Jemena are saying – users are indemnifying the service provider.

The AER needs its own legal advice, is EA's approach correct? EA has done as much as it can.

MB: How is this different to how the liability is now? We observe in the market place that you have already accepted this under contract.

PL: I have not gone back and looked at that for the purpose of today. But I think it goes further to what is already there. It is a regulatory failure. It didn't get looked at last time. IPART was focused on pricing terms.

AR: That's not correct, during the IPART process in the past Jemena went through a rigorous review.

MB: People aren't saying that the market is failing. Is this currently stopping people from entering the market? Would people be discouraged from operating in the market? What we are concerned about is whether it is going to discourage entry.

PL: It is putting users in a position that they cannot manage the risk.

MB: You are probably already accepting it. Jemena is saying that even if you are not capable, you are the best person. If the market is efficient it would be reflected in the market price.

PL: What has changed is that users try and pass on this in their contracts with customers, but get push-back from large customers. This will change with the NECF and their ability to pass through. One way is about to be taken out through the NECF. It creates a different environment.

AR: Users are able to better mitigate risks by talking to customers and educating them. Jemena cannot do this. We need to think beyond contractual relationships. You have the relationships with the customers and can best reduce the risk through those relationships.

GF: You cannot put it on all users collectively. Security and quality can be managed by putting chromatographs on inlets.

MB: What happens if users can demonstrate that all their gas was on spec? How would Jemena deal with it?

SMJ: If gas went off spec after being comingled in an upstream transmission pipeline, then, Jemena will see the comingled off spec gas being delivered to the network receipt point by all those users. The appropriate place for allocating fault is in the transmission pipeline haulage contracts with the shippers. In NSW each user has management practices in place to keep it in spec. Users have relationships with shippers and are best able to deal with it. The point of control is at the injection point to the transmission system. If management of the risk is transferred to the network service provider they would need to halt supply at the network receipt point which wouldn't be an efficient way to run the market, resulting in market failure.

GF: We have gas specs in our contracts.

SMJ: You are best placed to be responsible for it, not the network. Therefore you should bear the risk.

GF: It is the commingling of liabilities that I have difficulty with.

PL: Nobody but Jemena can control what goes into the network and what comes out. Clause 14 should be made subject to clause 28.

ME: Have a look at clause 28.6(b); it says Jemena does take responsibility for negligent conduct. Jemena has liability here.

PL: That's only one out of 14.

AR: But that is the only one that is relevant.

PL: But with some of the others you can go through it.

3. Concluding comments

MB: Thankyou to everyone for your input.

The AER now has a better understanding of the proposed reference services and the perceived issues from the interested parties. This will assist in our evaluation of the reference services agreement for our draft decision.

The process from here is as follows:

- release of the draft decision in early February 2010
- forum on draft decision to be held late February 2010
- Jemena's revised proposal is due in March 2010
- submissions are invited and will need to be submitted by the end of April 2010
- the draft decision will be released at the end of May.

There being no further business the roundtable was declared closed.