



Our Ref: D78582

Date: 2 March 2012

MCE Secretariat  
Department of Resources, Energy and Tourism  
GPO Box 1564  
Canberra ACT 2601

Dear Sir, Madam

## REVISED ACCESS ARRANGEMENT FOR THE DAMPIER TO BUNBURY NATURAL GAS PIPELINE: DECISION MADE OUT OF TIME

The Economic Regulation Authority (**Authority**) must report on decisions made out of time to the Ministerial Council of Energy (**MCE**) under rule 14(1) of the National Gas Rules (**NGR**).

On 1 April 2010, DBNGP (WA) Transmission Pty Limited (**DBP**) submitted its proposed revised access arrangement under the *National Gas Access (Western Australia) Act 2009* (**NGL**). On 31 October 2011, the Authority issued its final decision not to approve the revised access arrangement proposal. Under rule 64 of the NGR, the Authority delivered a revised access arrangement for the Dampier to Bunbury Natural Gas Pipeline (**DBNGP**) within two months of making the final decision, on 22 December 2011.

Under rule 13(1) of the NGR, there is an absolute overall time limit of 13 months between the date on which a proponent submits a full access arrangement proposal for the Authority's approval and the date the Authority makes a final decision on the proposal. When a decision maker does not meet the requirements under rule 13(1), it is required to report to the MCE in accordance with rule 14, and specifically under rule 14(2), this report must address the following issues:

- 1 the extent the decision was out of time (r. 14(2)(a));
- 2 the handling of the proposal (r. 14(2)(b)); and
- 3 reasons for the decision maker's failure to make the decision within the relevant time limit (r. 14(2)(c)).

These issues are addressed in corresponding order, below.

### 1. The extent the decision was out of time

The DBNGP access arrangement took 19 months (**402 business days**) to complete. This was 6 months (**133 business days**) over the overall time limit of 13 months (**269 business days**) set out in rule 13(1) of the NGR. Although the NGR specifies an overall time limit to complete an access arrangement and gives statutory timelines for some tasks it does not prescribe time limits for specific events.

On 16 May 2008, the Authority released guidelines setting out the process it would follow in revising the access arrangements for the three principal covered gas pipelines in Western Australia. The Authority's guidelines anticipated an indicative timeline for making a final decision on the DBNGP access arrangement of nine months (**172 business days**).

This letter and Table 1 (**Attachment 1**) compares the actual time it took to make a final decision on the DBNGP access arrangement with the statutory timelines and the 13 month time limit set out under rule 13(1) of the NGR. Where there are no statutory timelines the actual time is compared to the Authority's indicative nine month timetable in its guidelines. Please also note it is not possible to attribute the overall time delay to specific events as not all events have statutory timelines and the timing of events sometimes overlap.

## **2. Handling of the proposal**

The Authority's guidelines<sup>1</sup> for its process and indicative timeline for the DBNGP access arrangement are consistent with the timelines under part 8 Division 8 of the NGR.

### *Pre-submission conference*

The DBNGP pre-submission consultation commenced on 1 July 2009 and continued until lodgement of the access arrangement revision proposal on 1 April 2010.

### *Notification of submission of full access arrangement proposal for approval*

On 1 April 2010, DBP submitted its proposed revisions to the DBNGP access arrangement and the Authority published its notice and an invitation for written submissions on 15 April 2010. On 7 May 2010, the Authority published an issues paper to assist interested parties in preparing submissions on the proposed revised access arrangement for the DBNGP and on 2 June 2010 the Authority published a notice extending the time to make submissions.

### *Access arrangement draft decision*

The Authority published three disclosure notices relating to submissions made by DBP and issued two notices explaining the calculation of disregarded time under rule 11 of the NGR. On 14 March 2011, the Authority issued its draft decision not to approve the access arrangement proposal.

### *Revision of access arrangement proposal in response to draft decision*

On 18 April 2011, DBP responded to the draft decision and provided revisions to its access arrangement proposal. Interested parties were invited to make submissions by 20 May 2011.

### *Access arrangement final decision*

The Authority published a further four disclosure notices relating to submissions made by DBP and reprinted the draft decision to include information previously contained in a confidential appendix. On 5 May 2011 the Authority published a corrigenda to the draft decision to correct typographical errors. On 31 October 2011, the Authority issued its final decision to not approve DBP's revised access arrangement proposal.

## **3. Reasons for decision out of time**

### *Pre-submission conference*

During the pre-submission process, the Authority issued DBP with a Regulatory Information Notice pursuant to sections 48(1) and 52 of the NGL to obtain supporting information.

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<sup>1</sup> <http://www.erawa.com.au/cproot/6578/2/20080516%20Authority%20Guidelines%20-%20Gas%20Access%20Arrangement%20Revision%20Process.pdf>

### *Notification of submission of full access arrangement proposal for approval*

After DBP submitted its access arrangement proposal, it made a number of corrections to its submission including to its financial model with corrections and updates received by the Authority up until 14 April 2010. This added approximately **10 business days** to the process. Subsequently, minor wording updates and public versions of confidential submissions continued to be received until 7 May 2010.

Rule 58(1)(a) of the NGR permits at least 20 days for written submissions on the proposal from the date of the notice. Due to the complexity of the information received, the Authority allowed for 40 business days from 15 April 2010 to 11 June 2010, adding **20 business days** to the process.

The Authority received four requests from third parties to extend the public submission period on the grounds that they had inadequate time to reply, due to the complexity of information, including corrections, submitted by DBP. The Authority issued a notice on 2 June 2010 to extend the period by four weeks from 11 June 2010 to 9 July 2010. This added **20 business days** to the process.

### *Access arrangement draft decision*

The Authority took 172 business days to consider submissions from DBP and third parties and to prepare the draft decision. This was **132 business days** longer than the Authority's anticipated timeline. The key reasons for this were:

- difficulty obtaining sufficient information;
- difficulty settling the correct information; and
- disclosure of information.

DBP made 45 submissions between submitting its original access arrangement proposal in April 2010 and the Authority publishing the draft decision. The submissions were a combination of supporting documents for its access arrangement proposal corrections and clarifying information in response to requests from the ERA (Secretariat). The submissions consisted of 28 submissions to the Authority, 14 clarifying emails to the Secretariat and 3 letters to the Chairman.

During the writing of the draft decision the Secretariat and its consultants experienced difficulty in obtaining supporting information from DBP. DBP took up to a month to reply to many of the clarification requests from the Secretariat. On 16 June 2010 the Authority wrote to DBP to clarify issues with information requests. On 16 November 2010, the Authority issued DBP with an information notice pursuant to section 42 of the NGL, as implemented by the *National Gas Act (WA) 2009*, which required DBP to provide information on the Burrup Extension Pipeline Lease Agreement. The process took **17 business days** to complete.

Of the 45 submissions received from DBP, confidentiality was claimed on 30 submissions. Section 329 of the NGL provides for the Authority to disclose confidential information if the detriment does not outweigh the public benefit. DBP's extensive use of generic confidentiality claims and its failure to provide clear and specific reasons meant that the Authority had to issue DBP with four separate disclosure notices in order to make the information public. This process took **80 business days** to complete.

The Authority also undertook public consultation on a discussion paper, "Measuring the Debt Risk Premium: A Bond-Yield Approach" which took **25 business days** to complete.

### *Revision of access arrangement proposal in response to draft decision*

The draft decision required 109 revisions to the access arrangement proposal. Under rule 59 of the NGR, at least 15 business days are necessary for revision of the proposal and at least 20 business days are necessary for written submissions on the proposal. The Authority allowed for 25 and 21 business days respectively adding **11 business days** to the process.

DBP submitted 10 additional supporting submissions on the last day of the public submission period. Several third parties sought an extension to the submission period as a result of DBP's approach. The Authority wrote to DBP expressing its concern about its approach, and accordingly allowed a further 21 business days for third parties to consider DBP's supporting submissions and 21 business days for the expected time of two disclosure processes, as DBP claimed confidentiality on five of the submissions. The process took **42 business days** longer than anticipated in the guidelines.

### *Access arrangement final decision*

The Authority took 71 days to consider submissions from DBP and third parties and draft the final decision, **31 business days** longer than anticipated in the guidelines.

Key reasons for this delay were the same as previously identified in relation to the draft decision. DBP made a further 26 submissions following submission of its revised access arrangement proposal in April 2011. It submitted 4 different models with varying financial information in the period between submitting its revised access arrangement proposal in April 2011 and the Authority publishing its final decision in October 2011. The Authority was also required to issue a further two disclosure notices bringing the total number of disclosure notices to eight. The disclosure process took a further **42 business days** to complete.

### **Conclusion**

The Authority notes that it has not had issues to the same extent with other service providers. The Authority will consider measures to improve the management of the access arrangement process generally and specifically in relation to DBP.

However, the Authority's ability to improve the timeliness of assessments is limited given the processes prescribed in the National Gas Rules as they are currently drafted. The Rules make disclosure of information, which is claimed by a service provider to be confidential, an administratively burdensome and time-consuming process. In the absence of a corresponding obligation on the service provider to establish a claim of confidentiality over information the assessment and consultation processes become less effective and less meaningful. Ensuring relevant information is available in a timely manner is important particularly when the assessment timeframes for considering complex issues are limited.

Once an assessment process has commenced a regulator is limited in its ability to manage a service provider's behaviour in providing meaningful and timely information.

The Authority is supportive of rule changes to improve the management of information collection to facilitate effective and meaningful public consultation. It should be noted that the Authority made a submission to the Australian Energy Market Commission in December 2011 in support of the Australian Energy Regulator's proposed rule changes particularly on improving the regulatory process so that service providers are precluded from making submissions on their own proposals.

In the absence of rule changes that address the abovementioned concerns, the Authority will seek to strengthen compliance with information requirements through developing more prescriptive regulatory information instruments under the law.

Yours sincerely



**LYNDON ROWE  
CHAIRMAN**

## ATTACHMENT 1:

**Table 1: Actual DBNGP access arrangement compared to the anticipated access arrangement revision process times<sup>2</sup>**

	Expected Dates	DBNGP Actual Dates	Anticipated Time (Business Days)	DBNGP Actual Time (Business Days)
<b>STAGE 1</b>				
Pre – submission conference				
<b>STAGE 2</b>				
Lodgement of AA, AAI and other docs.	1-Apr-10	1-Apr-10	1	1
Authority publishes initiating notice inviting public submissions, AA and AAI.	7-Apr-10	14-Apr-10	5	10
First Round of Public Submissions.	24-May-10	11-Jun-10	30	40
Optional clock stopping if further information is required		9-Jul-10	0	20
Authority considers submissions and drafts Draft Decision	22-Jul-10	14-Mar-11	40	172
Authority issues Draft Decision and notice inviting public submissions	23-Jul-10	14-Mar-11	1	0
<b>STAGE 3</b>				
Second Round of Public Submissions. Service Provider may submit revised Access Arrangement to the Authority <sup>1</sup>	12-Aug-10	18-Apr-11	15	25
Authority publishes the service provider's revised Access Arrangement	12-Aug-10	19-Apr-11	0	1
Remainder of public submission period	9-Sep-10	20-May-11	20	20
Optional clock stopping if further information is required		20-Jul-11	0	42
Authority considers submissions, and Authority holds discussions with the service provider and submitting parties if required	5-Nov-10		40	71
Optional clock stopping if further information is required			0	0
Service provider may submit a further revised Access Arrangement	12-Nov-10		5	0
Authority drafts and issues Final Decision	4-Dec-10	31-Oct-11	15	0
<b>TOTAL STAGES</b>			<b>172</b>	<b>402</b>

<sup>2</sup> The anticipated timing in the table is based on estimates of the time periods required for each part of the revision process and does not take account of matters which could arise during the revision process resulting in these periods being longer, such as the issuing of regulatory information notices by the Authority.