IN THE WESTERN AUSTRALIAN ELECTRICITY REVIEW BOARD

Application No. 1 of 2010

Re	Application for review of the decision by the Western Australian Economic Regulation Authority published on 5 August 2010 to approve its own revised Access Arrangement for the Goldfields Gas Pipeline
Applicant	**BHP Billiton Nickel West Pty Ltd (ABN 76 004 184 598)**
First Respondent	**Southern Cross Pipelines Australia Pty Ltd (ABN 64 084 521 997)** **Southern Cross Pipelines (NPL) Australia Pty Ltd (ABN 99 085 991 948)** **Alinta DEWAP Pty Ltd (ABN 78 058 070 689)** **Goldfields Gas Transmission Pty Ltd (ABN 87 004 273 241)**
Second Respondent	**Economic Regulation Authority of Western Australia**

Application No. 2 of 2010

Re	Application under section 39(1) of Schedule 1 of the *Gas Pipelines Access (Western Australia) Act 1998* (which provision continues to apply by reason of section 28(4) of Schedule 3 of the *National Gas Access (WA) Act 2009)* for a review of the decision of the Economic Regulation Authority to draft and approve revisions of the access arrangement to apply to the Goldfields Gas Pipeline in place of the access arrangement revisions submitted for approval by Goldfields Gas Transmission Pty Ltd on behalf of the Goldfields Gas Transmission Joint Venture
Applicant	**Southern Cross Pipelines Australia Pty Ltd (ABN 64 084 521 997)** **Southern Cross Pipelines (NPL) Australia Pty Ltd (ABN 99 085 991 948)** **Alinta DEWAP Pty Ltd (ABN 78 058 070 689)** **Goldfields Gas Transmission Pty Ltd (ABN 87 004 273 241)**
First Respondent	**BHP Billiton Nickel West Pty Ltd (ABN 76 004 184 598)**
Second Respondent	**Economic Regulation Authority of Western Australia**

Members Messrs DS Ellis (Presiding), GA Mathieson and EA Woodley

Date 22 November 2011

Place Perth

Summary of Decision

1 These proceedings concerned the terms and conditions upon which third parties may obtain access to the Goldfields Gas Pipeline. Those terms and conditions were determined by the Further Final Decision of the Economic Regulation Authority of Western Australia dated 5 August 2010 to draft and approve its own Access Arrangement and Access Arrangement Information. The Further Final Decision was made under s 2.42 of the *National Third Party Access Code for Natural Gas Pipeline Systems.*

2 Two applications were made to the Western Australian Electricity Review Board, both dated 19 August 2010, to have the Further Final Decision reviewed:

(a) Application No. 1 of 2010 brought by BHP Billiton Nickel West Pty Ltd; and

(b) Application No. 2 of 2010 brought by Southern Cross Pipelines Pty Ltd, Southern Cross Pipelines (NPL) Australia Pty Ltd, Alinta DEWAP Pty Ltd and Goldfields Gas Transmission Pty Ltd.

3 Both applications contended that the Further Final Decision was wrong and subject to review under s 39 of Schedule 1 of the *Gas Pipelines Access (Western Australia) Act 1998* as it stood prior to 1 January 2010, although each complained of different aspects of that decision.

4 The Board considered that the Further Final Decision was incorrect within s 39(2)(a) of Schedule 1 in that the Economic Regulation Authority:

(a) adopted an incorrect construction of s 3.16(a) of the Code when assessing the extension/expansion policies submitted by the Service Provider and when drafting and approving its own extension/expansion policy.

However, on a correct construction of s 3.16(a), the extension/expansion policies submitted by the Service Provider did not comply with the Code;

(b) failed to give reasons for adopting 10.48% as the Rate of Return. However, the Board considers that the mid-point of the range of reasonable values adopted by the Authority, i.e. 10.48%, is the appropriate Rate of Return, having proper regard to the relevant factors; and

(c) erred in determining the Reference Tariff. The Authority wrongly used forecasts of costs and gas throughput volumes to derive Total Revenue for the period 1 January 2010 to 31 December 2014, rather than for the Access Arrangement Period, which was 20 August 2010 to 31 December 2014.

5 The Board otherwise rejected both applications.

6 The Board prepared a draft extensions/expansions policy which it considered complied with the Code and decided that:

(a) the Service Provider should have the opportunity to submit a further draft extensions/expansions policy, if it chooses. If a further draft is submitted, the other parties should then have an opportunity to make submissions on it, prior to a final decision by the Board; and

(b) the calculation of the Reference Tariff should be rerun using forecasts for the actual Access Arrangement Period.

7 The Board listed the matter for further directions.

Reasons for Decision

1. Background

1.1 General

8 These proceedings reviewed the decision by the Economic Regulation Authority of Western Australia ("Authority") dated 5 August 2010 ("Further Final

Decision") to draft and approve its own Access Arrangement and Access Arrangement Information ("2010 Access Arrangement") in respect of the Goldfields Gas Pipeline ("Pipeline")[1]. The Further Final Decision was made pursuant to s 2.42 of the *National Third Party Access Code for Natural Gas Pipeline Systems* ("Code"). The 2010 Access Arrangement sets out the terms and conditions upon which third parties are entitled to have gas transported through the Pipeline during the period from 20 August 2010 until the expiry of the 2010 Access Arrangement, which is nominally on 31 December 2014.

9 Two applications for review of the Further Final Decision were made on 19 August 2010 pursuant to s 39 of Schedule 1 ("Schedule 1") to the *Gas Pipelines Access (Western Australia) Act 1998* ("1998 Act"):

(a) Application No. 1 of 2010 by BHP Billiton Nickel West Pty Ltd ("BHPB"); and

(b) Application No. 2 of 2010 by Southern Cross Pipelines Pty Ltd, Southern Cross Pipelines (NPL) Australia Pty Ltd, Alinta DEWAP Pty Ltd and Goldfields Gas Transmission Pty Ltd (together "GGT").

10 Although not formally consolidated, the two proceedings were heard together. GGT was joined as a respondent to Application No. 1 and BHPB was joined as a respondent to Application No. 2. The Authority was added as the second respondent to both applications.

11 The Pipeline is the gas pipeline system the subject of Western Australian pipeline license WA:PL24, issued under the *Petroleum Pipelines Act 1969 (WA*). It runs some 1378km from Yarraloola, in the Pilbara, to Kalgoorlie. Its diameter ranges from 400 to 350 mm.

12 The Pipeline is owned by an unincorporated joint venture comprising Southern Cross Pipelines Pty Ltd, Southern Cross Pipelines (NPL) Australia Pty Ltd and

[1] Unless specifically defined in these reasons, capitalized expressions have the meanings identified in section 10 of the Code.

Alinta DEWAP Pty Ltd. Goldfields Gas Transmission Pty Ltd is the operator of the Pipeline, on behalf of the joint venture, and is, together with the three owners, a Service Provider under the Code[2].

13 BHPB is a user of the Pipeline pursuant to a contractual agreement with GGT, under which BHPB pays a tariff equivalent to the Reference Tariff[3].

14 The Authority is a body corporate established under s 4 of the *Economic Regulation Authority Act 2003*. It is the "Relevant Regulator" under the Code for Western Australia.

1.2 Jurisdiction

15 The process for revision of the Access Arrangement was initiated by the submission of proposed revisions by GGT on 23 March 2009. The proposed revisions were to the Access Arrangement and Access Arrangement Information ("2005 Access Arrangement") which were operating at that time. While the revision process was still on foot, the 1998 Act was substantially amended by the *National Gas Access (WA) Act 2009* ("2009 Act"). The 2009 Act became effective on 1 January 2010. The 2009 Act, amongst other things, changed the name of the Board from the Western Australian Energy Review Board to its present title and the name of the 1998 Act to the *Energy Arbitration and Review Act 1998*. The 2009 Act applies the *National Gas Access (Western Australia) Law 2009* ("2009 Law") as a law of Western Australia[4]. However, s 29(2) of Schedule 3 of the 2009 Law required the Authority to continue to deal with GGT's application as if the Code had continued to apply. Section 29(4) of Schedule 3 of the 2009 Law provides that s 39 of Schedule 1 applies to the decision "as if a reference in that section to a decision of the relevant Regulator under the Gas Code were a reference to a full access arrangement decision of the" Australian Energy Regulator.

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[2] GGT Application at [1] and [10].

[3] BHPB Statement of Facts, Issues and Contentions at [5].

[4] Section 7.

16 Section 39 of Schedule 1 provides for appeals to the "relevant appeals body". Section 2 of Schedule 1 defines "relevant appeals body" to mean the "local appeals body" in respect of appeals from the local Regulator, which was in turn defined to mean the Authority[5]. Regulation 15 of the *National Gas Access (WA) (Part 3) Regulations 2009* defines the "local appeals body" to mean the Board established under s 49 of the *Energy Arbitration and Review Act 1998*, that is this Board.

1.3 Section 39 of Schedule 1

17 The two applications were made pursuant to s 39 of Schedule 1.

18 The grounds upon which this Board may review decisions of the Authority are limited by s 39(2) of Schedule 1. It provides:

> (2) An application under this section –
>
> (a) may be made only on the grounds, to be established by the applicant –
>
> (i) of an error in the relevant Regulator's finding of facts; or
>
> (ii) that the exercise of the relevant Regulator's discretion was incorrect or was unreasonable having regard to all the circumstances; or
>
> (iii) that the occasion for exercising the discretion did not arise;
>
> and
>
> (b) in the case of an application under subsection (1), may not raise any matter that was not raised in submissions to the relevant Regulator before the decision was made.

19 In *East Australian Pipeline Pty Limited v Australian Competition and Consumer Commission*[6] the High Court said that an "incorrect" exercise of the discretion encompassed the types of error described in the well known passage from *House v The King*[7]:

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[5] Section 11 of the 1998 Act.

[6] (2007) 233 CLR 229; [2007] HCA 44 ("*East Australian*") at [13], [78], [79] and [80].

[7] (1936) 55 CLR 499 at 500.

> The manner in which an appeal against an exercise of discretion should be determined is governed by established principles. It is not enough that the judges composing the appellate court consider that, if they had been in the position of the primary judge, they would have taken a different course. It must appear that some error has been made in exercising the discretion. If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution for his if it has the materials for doing so.

20 An "unreasonable" decision within s 39(2)(ii) is one where the failure to properly exercise the discretion may be inferred from the unreasonable or plainly unjust character of the result in the circumstances of the case, in accordance with the following passage from *House v The King:*

> It may not appear how the primary judge has reached the result embodied in his order, but, if upon the facts it is plainly unreasonable or plainly unjust, the appellate court may infer that in some way there has been a failure to properly exercise the discretion which the law reposes in the court at first instance. In such a case, although the nature of the error may not be discoverable, the exercise of the discretion is reviewed on the ground that a substantial wrong has in fact occurred.

Section 39(2)(ii) of Schedule 1 is not directed to whether the exercise of the discretion was so unreasonable that no reasonable decision maker could have come to it[8]. This sort of unreasonableness does not form a ground of review under s 39(2).

21 Section 39(6) of Schedule 1 provides that the provisions of s 38, other than subsections (1) and (13), apply to applications under s 39. Section 38(9) provides that the Board may make an order setting aside the decision under review immediately, or as from a future date. The Board may exercise the same powers with respect to the subject matter of the dispute as the original decision maker. In exercising the Authority's powers, the Board's powers are subject to the same limitations and must be exercised according to the same principles as the

[8] *East Australian* at [79].

Authority.

1.4 Procedural history

22 The 2005 Access Arrangement commenced on 14 July 2005. It was amended once on 17 December 2008 with the approval of the Authority. The amendment was to clause 10 of the 2005 Access Arrangement, which related to the extensions/expansions policy.

23 The term of the 2005 Access Arrangement expired on the "Revisions Commencement Date", which was defined as the latter of 1 January 2010 and the date a revised Access Arrangement approved by the Authority came into effect[9]. Clause 3.2(a) of the 2005 Access Arrangement identified the date by which GGT was required to submit revisions to the 2005 Access Arrangement as 1 April 2009[10].

24 On 23 March 2009 GGT submitted proposed revisions to the 2005 Access Arrangement ("Proposed Revisions") pursuant to s 2.28 of the Code and in accordance with the requirements of the 2005 Access Arrangement.

25 On 9 October 2009 the Authority issued its Draft Decision pursuant to s 2.35 of the Code. The Draft Decision proposed not to approve GGT's Proposed Revisions and required various amendments pursuant to s 2.35(b) of the Code.

26 On 22 April 2010 GGT submitted an amended version of its Proposed Revisions ("Amended Proposed Revisions"), together with submissions addressing the Draft Decision.

27 On 13 May 2010 the Authority issued its Final Decision. The Final Decision did not approve GGT's Amended Proposed Revisions and required a number of amendments pursuant to s 2.38(b)(ii) of the Code.

28 On 4 June 2010 GGT submitted a further version of the Amended Proposed

[9] 2005 Access Arrangement, clause 3.2(b).

[10] 2005 Access Arrangement, clause 3.2(a) and section 3.17 of the Code.

Revisions ("Further Proposed Revisions"), together with "Supporting Documents"[11] containing:

(a) a confidential document entitled "Response to Final Decision of Proposed Revisions to Access Arrangement" which contained:

(i) submissions on amendments required by the Final Decision;

(ii) additional submissions, identified as "Attachment 1 which were in support of the Extensions/Expansions Policy contained in the Further Proposed Revisions,"; and

(b) a confidential report from NERA Economic Consulting entitled "Economic Impact of Proposed Expansion Policy dated 4 June 2010" ("NERA Report").

29 On 5 August 2010 the Authority issued its Further Final Decision. The Further Final Decision did not approve GGT's Further Proposed Revisions. The Authority drafted and approved its own revisions to the Access Arrangement and Access Arrangement Information pursuant to s 2.42 of the Code[12]. The 2010 Access Arrangement and the 2010 Access Arrangement Information were Appendix 2 and 1, respectively, of the Further Final Decision.

30 The 2010 Access Arrangement took effect from 20 August 2010, in accordance with clause 3.1 of the 2010 Access Arrangement, s 2.48 of the Code and [131] of the Further Final Decision. Clause 3.2 of the 2010 Access Arrangement states that the intended date for commencement of the next revised Access Arrangement is 1 January 2015.

2. Areas of Dispute

31 At the hearing, the parties challenged the following aspects of the Further Final

[11] Also referred to by the Authority as GGT's "Confidential Response".

[12] Further Final Decision at [126]-[131].

Decision.[13]

32 GGT challenged:

(a) the extensions/expansions policy ("EEP") in clause 10 of the 2010 Access Arrangement and the Authority's consideration of the EEPs submitted by it; and

(b) the determination of the Rate of Return, which is a key component in calculating the Reference Tariff.

33 BHPB challenged:

(a) the Authority's allocation of costs across services in determining the Total Revenue and hence the Reference Tariff ("Allocation of Costs of Services"); and

(b) the failure of the Authority, in calculating the Reference Tariff, to take into account the higher 2005 Access Arrangement Reference Tariff that applied in the period from 1 January 2010 to 20 August 2010 ("True Up").

It is convenient to consider each of these four areas of controversy in this order. It is the order in which they were addressed at the hearing.

3 Extensions/Expansions Policy

3.1 Summary

34 The Board reached the following conclusions in respect of this area of dispute.

35 The Authority adopted an incorrect construction of s 3.16(a) of the Code in assessing the extension/expansion policies submitted to it by GGT and in drafting and approving its own EEP.

36 On a proper construction of s 3.16(a) of the Code, an EEP must set out a method to be applied by which Coverage of an extension to, or an expansion of the

[13] BHPB did not pursue ground 2 of its application at the hearing. GGT did not pursue its ground relating to non-capital costs.

Capacity of, a Covered Pipeline is evaluated by reference to the policies and objectives of the Code ("the Code Criteria"), which include the factors referred to in s 2.24(a) to (g). That evaluation requires consideration of the particular circumstances of each extension or expansion, at the time the extension or expansion is proposed. An EEP which involves the application of a fixed rule to all future extensions or expansions does not therefore comply with the Code. The EEP ultimately included by the Authority in its 2010 Access Arrangement was incorrect in this respect. Consequently, ground 13(b)(i) of GGT's application is upheld.

37 The Authority wrongly gave inappropriate weight to the possible degree of market power which might be exercised by GGT in rejecting GGT's EEP submitted on 23 March 2009 ("EEP I") and GGT's EEP submitted on 22 April 2010 ("EEP II").

38 Nevertheless, those two EEPs did not comply with s 3.16(a) of the Code. Both EEPs permitted GGT to determine Coverage having regard to its own interests, rather than for Coverage to be evaluated by reference to the Code Criteria. Additionally, neither EEP I nor EEP II had an extensions policy and therefore did not comply with s 3.16 of the Code for that reason. The Authority's Final Decision was correct in rejecting EEP II, as was its Draft Decision in rejecting EEP I.

39 However, because the Authority's Final Decision was affected by the errors referred to above, GGT was not given an effective opportunity to respond to a required amendment that was compliant with the Code. The Final Decision required GGT to amend its EEP into a form which did not comply with the Code. Consequently, GGT should have the opportunity to put forward an EEP for consideration by the Board.

40 The Board has drafted a possible replacement for clauses 10.2 and 10.3 of the

Access Arrangement[14]. GGT is, however, invited to re-submit an alternative EEP for the Board's consideration. If GGT does submit an alternative EEP, BHPB and the Authority will be given the opportunity to make submissions, prior to the Board making a final decision.

41 The Board considers that the Authority was not obliged to consider the Supporting Documents submitted by GGT after the Final Decision. Accordingly, that material should not be taken into account by the Board either.

3.2 Background

42 The following matters provide a context for consideration of the issues in relation to the EEP.

43 The terms "extension" and "expansion" are not defined by the Code. However, it can be presumed that an extension of a Pipeline occurs when the Pipeline is either lengthened into new territory or a new lateral or branch line is added. This would involve the establishment of one or more additional Receipt Points or Delivery Points at some distance from existing Receipt and Delivery Points.

44 An expansion of the Capacity of a Pipeline would involve an increase in Capacity within the existing geographical reach of the Pipeline. "Capacity" is defined in s 10.8 of the Code to mean "the measure of the potential of a Covered Pipeline as currently configured to deliver a particular Service between a Receipt Point and a Delivery Point at a point in time." Expansions of Capacity may occur in two ways:

(a) through the installation of compressors the pressure of gas in the Pipeline can be increased so more gas can be stored in the Pipeline and more gas can be moved through the Pipeline, although the physical volume of the Pipeline is not altered; or

(b) by building an additional section of Pipeline which runs parallel to the

[14] At [112].

existing Pipeline for part or all of its length (termed "looping"). The additional Pipeline is treated as part of the original Pipeline.

45 Whilst the choice of the appropriate term, extension or expansion, for a particular alteration to a Pipeline will often be self-evident, there may be situations where actions of a Service Provider result in both an extension of the Pipeline and an expansion of the Capacity of the Pipeline. If, for example, a Pipeline gains a significant new customer it may be necessary to lengthen the Pipeline to reach the new customer and also to expand the upstream Capacity of the Pipeline, in order to allow gas to be delivered to the new customer.

46 The 2005 Access Arrangement contained the following EEP at clause 10:

> 10.1 EXTENSIONS/EXPANSION POLICY
>
> 10.1 Extensions/Expansions
>
> Other than as required under the Code or the GGP Agreement[15], GGT will not incur capital to expand the capacity of the Pipeline unless a User:
>
> (a) satisfies GGT of the existence of reserves and demand for the economic life of the expansion;
>
> (b) demonstrates to GGT that the User has the financial capability to pay the costs of the provision of services provided through expanded capacity; and
>
> (c) commits to a Service Agreement sufficient to ensure the payment to GGT [of] all costs incurred by GGT in expanding the capacity and the provision of Services through that expanded capacity.
>
> …
>
> 10.3 Application of Arrangement to Pipeline Extension/Expansion
>
> If GGT expands the capacity of the Pipeline, GGT will elect:
>
> (a) that the expanded capacity will be treated as part of the Pipeline for the purposes of the Access Arrangement and GGT will exercise its discretion to submit proposed revisions to the Access Arrangement under Section 2 of the Code; or
>
> (b) that the expanded capacity will not be treated as part of the Pipeline for the purposes of this Access Arrangement

[15] This is a reference to the *Goldfields Gas Pipeline Agreement Act 1994*.

and that GGT will lodge a separate Access Arrangement for such expanded capacity; or

(c) that the expansion will not be covered, subject to GGT notifying the Regulator of this fact prior to the expansion coming into operation.

GGT may at any time, change an election made under clause 10.3(c) to an election made under clause 10.3(a)".

Clause 10.2 dealt with investigations relating to Developable Capacity while Clause 10.4 went on to provide that extensions or expansions would result in no change to the Reference Tariff.

47 GGT's Proposed Revisions, submitted on 23 March 2009, contained an EEP ("EEP I") that made relatively minor changes to the then existing EEP in the 2005 Access Arrangement. EEP I read as follows[16]:

10.1 EXTENSIONS/EXPANSION POLICY

10.1 Extensions/Expansions

Other than as required under the Code or the GGP Agreement, GGT will not incur capital to expand the Cecapacity of the Covered Pipeline unless a User:

(a) satisfies GGT of the existence of reserves and demand for the economic life of the expansion;

(b) demonstrates to GGT that the User has the financial capacity to pay the costs of the provision of services provided through expanded capacity; and

(c) commits to a Negotiated Service a Agreement sufficient to ensure the payment to GGT of all costs incurred by GGT in expanding the capacity and providingthe provision of Services through that expanded capacity.

10.310.2 Application of Arrangement to Pipeline Extension/Expansion

If GGT expands the Capacity of the Covered Pipeline, GGT will elect:

(a) that the expanded capacity will be treated as part of the Covered Pipeline for the purposes of the Access Arrangement and GGT will exercise its discretion to submit proposed revisions to thise Access Arrangement under Section 2 of the Code; or

[16] Track-changes from the 2005 Access Arrangement are shown as they appear in the original.

(b) that the expanded capacity will not be treated as part of the Covered Pipeline for the purposes of this Access Arrangement and that GGT will lodge a separate Access Arrangement for such expanded capacity; or

(c) that the expansion will not be covered, subject to GGT notifying the Regulator of this fact prior to the expansion coming into operation.

GGT may at any time, change an election made under clause 10.2~~3~~(c) to an election made under clause 10.2~~3~~(a)".

10.3 Pipeline Extension/Expansion and Tariffs

(a) Pipeline extensions or expansions which GGT elects to cover under clause 10.2 will result in no change to the Reference Tariff applied to a User when those extensions or expansions have been fully funded by that User's capital contributions except to contribute to GGT's non-capital costs in connection with those extensions and expansions. Any change to Reference Tariffs may only occur pursuant to the process in Section 2 of the Code for revisions to Reference Tariffs.

(b) Incremental Users as defined in the Code which have not made capital contributions towards Incremental Capacity as defined in the Code which they use and which has been funded by others will be liable to pay for surcharges as allowed for in Section 8 of the Code.

(c) Pipeline extensions or expansions funded by GGT and which GGT elects to cover under clause 10.2 may result in the application of surcharges as allowed for in ~~section~~Section 8 of the Code subject to GGT providing written notice to the Regulator, and the Regulator approving the same, in accordance with Section 8.25 of the Code.[17]

48 The Authority considered EEP I in its Draft Decision. The Authority concluded[18] that EEP I did not comply with s 3.16 of the Code because it dealt only with expansions and did not deal with extensions at all, notwithstanding the references to extensions in the headings to the sections.

49 The Authority concluded that "a method should be included in the Access Arrangement to determine whether any future extension will be treated as part of

[17] Tracked changes are from the 2005 Access Arrangements and are in the original.

[18] At [1201].

the Covered Pipeline, and that it would be appropriate for that method to provide for GGT to elect either that the extension will be treated as part of the Covered Pipeline or, subject to notification to the Authority, that the extension not be treated as part of the Covered Pipeline"[19].

50 The Authority then proceeded to consider expansions at [1206] to [1210]. At [1209], the Authority said:

> In particular, the Authority considers that this is a case in which the pipeline is operating at or near capacity and the service provider may, in the absence of regulation and competition, be able to extract monopoly rents by pricing expansion just below the point where it would no longer be commercially viable for a user or prospective user to continue with its proposal.

51 At [1210] the Authority went on to say:

> …In the circumstances, the Authority is not satisfied that it is appropriate, having regard to the factors in section 2.24 of the Code, to accept GGT's proposal that it continue to have the discretion to elect whether or not future expansions of capacity (as opposed to extensions) are or are not to be treated as part of the Covered Pipeline.

52 At pages 206 and 207 of the Draft Decision, the Authority set out Required Amendment 44, which required that clauses 10.2 and 10.3 of EEP I be deleted and replaced with clauses 10.2 to 10.4. Required Amendment 44 had the following effect:

(a) clause 10.2 enabled GGT to elect whether an extension was covered by the Code or not;

(b) clause 10.3 provided that any expansion would be treated as part of the Covered Pipeline; and

(c) clause 10.4 dealt with the impact of extensions or expansions on the Reference Tariff.

[19] At [1205].

53 In its Response to the Draft Decision[20], GGT dealt with the amendments required by the Authority to Clause 10, at pages 60 to 65. GGT stated that "the current and proposed EEP[21] does not deal with extensions" and indicated that GGT would adopt the Authority's amendments in relation to extensions[22]. However, it disputed the Authority's Clause 10.3 and its automatic Coverage of expansions, giving reasons.

54 GGT submitted EEP II on 22 April 2010. It was identical to the earlier EEP I, apart from deleting the marking up. Inexplicably, EEP II did not include a policy for extensions, despite GGT's earlier acknowledgment of this omission in EEP I.

55 The Final Decision dealt with EEP II at [618] to [634]. The Authority summarised the arguments put by GGT in its Response to the Draft Decision but adhered to the view it had expressed in the Draft Decision.

56 At page 113 of the Final Decision, the Authority set out Required Amendment 18, which replaced clauses 10.2 and 10.3 of GGT's EEP II. Required Amendment 18 is practically the same as the Authority's previous Required Amendment 44 of the Draft Decision and reads:

> **10.2 Application of Arrangement to Pipeline Extension**
>
> If GGT extends the Pipeline, GGT will elect:
>
> (a) that the extension will be treated as part of the Covered Pipeline for the purposes of this Access Arrangement and GGT will exercise its discretion to submit proposed revisions to the Access Arrangement under Section 2 of the Code; or
>
> (b) that the extension will not be treated as part of the Covered Pipeline for the purposes of this Access Arrangement and that GGT will lodge a separate Access Arrangement for such extension; or
>
> (c) that the extension will not be covered, subject to GGT notifying the Regulator of this fact prior to the extension coming into operation.

[20] GGT Response to Draft Decision to Proposed Revisions to Access Arrangement Public Submission 18 December 2009 (Errata 19 February 2010).

[21] i.e. EEP I.

[22] At [337].

10.3 Application of Arrangement to Pipeline Expansion

If GGT expands the Capacity of the Pipeline the expanded Capacity will be treated as part of the Covered Pipeline for all purposes under the Code.

57 On 4 June 2010, GGT submitted its Further Proposed Revisions in response to the Final Decision, which included a Further Proposed Revised EEP ("EEP III"). It reads:

10 Extensions/expansions policy

10.1 Coverage of extensions and expansions

(a) GGT will notify the Regulator if it undertakes an extension or expansion of the Pipeline, prior to that extension or expansion coming into operation.

(b) That extension or expansion will be part of the Covered Pipeline unless:

(1) The Regulator does not consent to it being covered. The Regulator will be deemed to have given its consent if it does not make a decision within 30 days from the date the notice referred to in clause 10.1(a) is given; or

(2) GGT notifies the Regulator in writing that it has reached agreement with the Proposed User/s of a majority of the incremental services as to the terms on which the incremental service will be provided and that such terms include a term recognizing that the extension or expansion will not be treated as part of the Covered Pipeline. A "Proposed User" is any user which is negotiating to use the incremental services or has contracted to use the incremental services should the extension or expansion be undertaken. "Incremental services" means the services which can be provided by means of the extension or expansion.

(c) Other than as required under the Code or the GGP Agreement, GGT will not incur capital to expand the Capacity of the Covered Pipeline unless a User:

(1) satisfies GGT of the existence of reserves and demand for the economic life of the expansion;

(2) demonstrates to GGT that the User has the financial capability to pay the costs of the provision of Services provided through expanded Capacity; and

(3) commits to a Negotiated Service Agreement sufficient to ensure the payment to GGT of all costs (including an acceptable rate on capital) incurred by GGT in expanding the capacity and providing of Services through that expanded capacity.

10.2 Treatment of extensions or expansions forming part of the Covered Pipeline.

Where an extension or expansion is to be treated as part of the Covered Pipeline pursuant to clause 10.1(b) above, GGT must make an election under either clause 10.2(a) or 10.2(b) as follows:

(a) *Election for negotiated Service* – GGT may elect that access to the incremental services will be offered as a Negotiated Service at a negotiated tariff. Where GGT elects to provide the incremental services as a Negotiated Service:

(1) the incremental costs and forecast usage derived from that extension or expansion and the revenue derived from the incremental services will not be taken into account in determining the Reference Tariffs;

(2) the provisions of the Access Arrangement will apply to the extension or expansion other than those terms solely relating to the Reference Service; and

(3) the incremental services may be the subject of an access dispute under the Code or Chapter 6 of the National Gas Law as applicable.

(b) *Election for Reference Service* – GGT may elect that access to the incremental services will be offered as a Reference Service, in which case GGT must elect that there be either:

(1) a single Reference Service for the whole of the Covered Pipeline, for which a single Reference Tariff applies. The Reference Tariff will reflect the costs and forecast usage of the whole of the Covered Pipeline.

(2) a separate Reference Service for the incremental services, for which a separate Reference Tariff applies. The separate reference Tariff will reflect the costs and forecast usage of the extension or expansion, together with the risks associated with the provision of the incremental

service and the extent of risk sharing between GGT and Users.

10.3 Impact on Reference Tariffs

(a) Pipeline extensions or expansions which form part of the Covered Pipeline pursuant to clause 10.1(b) will result in no change to the Reference Tariff applied to a User when those extensions or expansions have been fully funded by that User's capital contributions except to contribute to GGT's non-capital costs in connection with those extensions and expansions.

(b) Any change to Reference Tariffs or the establishment of new Reference Tariffs for separate Reference Services may occur only pursuant to the process in Section 2 of the Code for revisions to Reference Tariffs.

(c) Incremental Users as defined in the Code which have not made capital contributions towards Incremental Capacity as defined in the Code which they use and which has been funded by others will be liable to pay for surcharges as allowed for in Section 8 of the Code, and similarly in relation to Users of extensions which form part of the Covered Pipeline.

(d) Pipeline extensions or expansions funded by GGT and which form part of the Covered Pipeline pursuant to clause 10.1(b) may result in the application of surcharges as allowed for in Section 8 of the Code subject to GGT providing written notice to the Regulator, and the Regulator approving the same, in accordance with Section 8.25 of the Code.

(e) References to provisions in the Code in this clause 10.3 are taken to be references to provisions with substantially equivalent effect in the National Gas Law once it has application to the Access Arrangement in place of the Code.

10.4 Fixed Principles

The principles set out in this clause 10 (including all matters set out in those paragraphs) to the extent permitted are each Fixed Principles (under section 8.47 of the Code and/or rule 99 of the Rules) for the period commencing on the date on which the extension or expansion comes into operation and ending on the expiration of three subsequent Access Arrangement periods. To the extent that it is a requirement that any Fixed Principle be provided for in the Reference Tariff Policy, this paragraph should be considered to be a part of the Reference Tariff Policy in this Access Arrangement.

58 The Authority dealt with EEP III at [65] to [68] of its Further Final Decision. The Authority noted that GGT had not incorporated Required Amendment 18 into the Further Proposed Revisions and had substantially modified Clause 10. The Authority stated it "is not satisfied the proposal in GGT's Further Proposed Revision substantially incorporates Amendment 18 or otherwise addresses the reasons for Amendment 18"[23].

59 The Authority incorporated its Clause 10 ("Authority's EEP"), as set out in Required Amendment 18, in the 2010 Access Arrangement.

3.3 Preliminary

60 Resolution of this area of controversy depends upon a proper understanding of the scope and effect of s 3.16(a) of the Code. This issue was addressed by the parties in the context of the drafting and adoption by the Authority of the Authority's EEP, but not in the specific context of the Authority's assessment of EEP I and EEP II. It is convenient to deal first with the construction of s 3.16(a) before addressing more specifically the Authority's decision-making process.

3.4 Section 3.16(a) of the Code

61 Section 3.16 of the Code provides:

> ***Extensions/Expansions Policy***
>
> 3.16 An Access Arrangement must include a policy (an ***Extensions/Expansions Policy***) which sets out:
>
> (a) the method to be applied to determine whether any extension to, or expansion of the Capacity of, the Covered Pipeline:
>
> (i) should be treated as part of the Covered Pipeline for all purposes under the Code; or
>
> (ii) should not be treated as part of the Covered Pipeline for any purpose under the Code;
>
> (for example, the Extensions/Expansions Policy could provide that the Service Provider may, with the Relevant Regulator's consent, elect at some point in time whether

[23] At [68].

or not an extension or expansion will be part of the Covered Pipeline or will not be part of the Covered Pipeline);

(b) specify how any extension or expansion which is to be treated as part of the Covered Pipeline will affect Reference Tariffs (for example, the Extensions/Expansions Policy could provide:

(i) Reference Tariffs will remain unchanged but a Surcharge may be levied on Incremental Users where permitted by sections 8.25 and 8.26; or

(ii) specify that a review will be triggered and that the Service Provider must submit revisions to the Access Arrangement pursuant to section 2.28);

(c) if the Service Provider agrees to fund New Facilities if certain conditions are met, a description of those New Facilities and the conditions on which the Service Provider will fund the New Facilities.

The Relevant Regulator may not require the Extensions/Expansions Policy to state that the Service Provider will fund New Facilities unless the Service Provider agrees.

62 Paraphrasing s 3.16(a) slightly, a complying EEP sets out a "method to be applied to determine whether any extension to, or expansion of the Capacity of, the Covered Pipeline … should … or …should not be treated as part of the Covered Pipeline for any or all the purposes under the Code". If a proposed EEP does not fall within this language, it is not an EEP within s 3.16 of the Code.

63 GGT submitted that a "method" "is a mode of procedure, especially an orderly or systematic mode, for doing something, such as attaining an objective"[24]. GGT supported this proposition by reference to the definition of "method" in the Macquarie Dictionary which is as follows:

> *noun* 1. a mode of procedure, especially an orderly or systematic mode: *a method of instruction.* 2. a way of doing something, especially in accordance with a definite plan. 3. order or system in doing anything: *to work with method.* 4. orderly or systematic arrangement. …

64 BHPB contended that a "method" need only set out a rule which identifies

[24] GGT Submissions at [7.28].

whether an expansion of the Capacity of a Pipeline will be covered or not[25].

65 The Board accepts GGT's submission that the use of the word "method" ordinarily carries with it an element of process.

66 However, the word "method" is merely one word in s 3.16(a). The function of the "method" required by s 3.16(a) is to "determine" whether an extension to, or expansion of the Capacity of, a Pipeline "should" or "should not" be Covered. The decision on whether or not any particular extension or expansion is Covered may have significant consequences for the Service Provider, Users and Potential Users, and the public. For example, whether an extension or expansion is Covered or not may impact upon the ability of a Service Provider to improperly exercise market power. Questions of Coverage are also dealt with in s 1 of the Code and are determined at a political level by the relevant Minister, after receipt of a recommendation from the National Competition Council. These matters suggest that whether an extension or expansion should or should not be Covered ought ordinarily to involve active consideration of the relevant elements of the Code in the context of the particular circumstances of each case, rather than merely a mechanical application of a fixed rule.

67 Further, s 3.16(a) uses the expressions "should" and "should not". "Should" denotes duty, propriety or expediency[26]. To say that something "should" be done, is, generally, to suggest that there are objective reasons for carrying out that action, which frequently, but not necessarily, include reasons of a moral nature. The use of the words "should" and "should not" in s 3.16(a) import an evaluative element into the decision making process[27]. "Should" and "should not" lead to the conclusion that the "method" and the "determination" contemplated by s 3.16(a) involve evaluation of the question of Coverage by applying general considerations to the particular circumstances of the case. The use of the

[25] Transcript at p70.

[26] Macquarie Dictionary

[27] See Authority's Further Submissions dated 12 August 2011.

expression "should" may, in some contexts, merely connote contingency i.e. that the outcome of the application of the method set out in the EEP is not predetermined and that alternative outcomes are possible. However, the expression "should" is used in s 3.16 instead of the expression "if", as pointed out by the Authority[27]. If mere conditionality were intended, "if" would have been appropriate.

68 The evaluation of a particular extension or expansion should be undertaken in light of the prevailing circumstances of each case, as they exist at the time the extension or expansion is proposed, rather than at the time the revised Access Arrangement is proposed. This approach facilitates the proper application of the Code Criteria to the extension or expansion and follows from the nature of the task which is before the Regulator. The task before the Regulator under s 2.24 is to assess the scope and operation of a proposed Access Arrangement, rather than to directly assess questions of Coverage. Also, the use in s 3.16(a) of the expression "method to be applied" and of the word "any" to qualify the expression "extension to, or expansion of the Capacity" are apt to describe determinations that are made on a case-by-case basis at some future point in time.

69 The effective operation of the Code is not furthered by the application of a fixed rule formulated before, possibly long before, an extension or expansion arises for consideration. Application of a fixed rule about Coverage prevents consideration by the Regulator of circumstances specific to the extension or expansion at the time, which may not have been foreseen and which may have significant bearing on whether or not it is appropriate that the extension or expansion be Covered. It might be argued that this construction of s 3.16(a) subverts the role of the Minister and the National Competition Council ("NCC") under s 1 of the Code[28]. The Board does not accept this argument. Section 3.16(a) clearly provides an alternative mechanism by which Coverage of extensions and expansions may be

[28] See section 6.5 of GGT's Response to Draft Decision to Proposed Revisions to Access Arrangement dated 18 December 2009 (Errata 19 February 2010).

determined.

70 Section 7 of the Appendix to Schedule 1 requires the Board to prefer the interpretation of the Code, which will best achieve the purpose or object of the 1998 Law. In the Board's opinion, the purposes and policy of the Code will be best achieved by giving "should" and "should not" substantive effect, so as to require that a method which complies with s 3.16(a) is a process providing for the substantive evaluation of the question of Coverage at the time the question of Coverage arises, rather than at the time revisions to the Access Arrangement are proposed. If a proposed method does not provide a process for substantive evaluation of the appropriateness or otherwise of Coverage at the time of the extension or expansion, it is not a method which determines whether an extension or expansion "should" or "should not" be Covered. Evaluation of Coverage should be carried out by reference to the Code Criteria. Mr Zelestis QC submitted on behalf of GGT that "the ultimate decision that's being made in relation to Coverage has to be informed by the s 1.9 criteria and also by the s 2.24 criteria"[29]. The Board agrees with this proposition, although the importance of specific factors will depend on the circumstances of the case.

71 A complying method need not be elaborate. Section 3.16(a) of the Code is instructive. It provides: "for example, the Extensions/Expansions Policy could provide that the Service Provider may, with the Relevant Regulator's consent, elect at some point in time whether or not an extension or expansion will be part of the Covered Pipeline or will not be part of the Covered Pipeline". This example provides for the evaluation of the question of Coverage of any extension or expansion at the point in time by requiring the consent of the Relevant Regulator. That consent would, of course, be given or withheld by the Regulator having regard to the Code Criteria.

[29] Transcript at p15.

3.5 GGT's Grounds of Review

3.5(a) Ground 13(b)(i)

72 Ground 13(b)(i) of GGT's Application asserts that the Authority's EEP does not comply with the Code because it does not set out a method to be applied to determine whether any expansion of the Capacity of the Pipeline should or should not be treated as part of the Covered Pipeline under s 3.16(a) of the Code.

73 The Board's construction of s 3.16(a), outlined earlier, has the effect that an EEP which involves the application of a fixed rule, in this case a rule requiring all expansions to be Covered, does not comply with the Code because it does not involve an evaluation of Coverage of any proposed extension or expansion by reference to the Code Criteria at the time the relevant expansion or extension is proposed. This has the consequence that Required Amendment 18 and the Authority's EEP are not EEPs within s 3.16(a) of the Code.

74 The Board acknowledges that there have been instances where Regulators have approved EEPs which involve the application of a fixed rule requiring all expansions to be Covered[30]. However, the Board is not persuaded that those decisions legitimate the application of such a fixed rule. Also, those decisions do not appear to have considered the meaning of s 3.16(a) in depth. In many of those instances it was the Service Provider that proposed such a fixed rule[31]. GGT argued that an EEP involving a fixed rule complied with the Code where the EEP was proposed by the Service Provider, but did not comply where the Regulator imposed the EEP on the Service Provider[32]. However, s 3.16 does not differentiate between an EEP proposed by a Service Provider and an EEP imposed by the Regulator. It is also noted that the Australian Consumer and Competition

[30] See the examples identified by the Authority in its "Information Requested by the Board at the Hearing of the Applications" provided by the Authority dated 12 May 2011, at section 4.

[31] See GGT's "Written Comments on Issues Raised in Response to questions asked by the Electricity Review Board" dated 18 May 2011 at section 4.

[32] GGT's undated "Written comments on issues raised in the response of the Economic Regulation Authority to questions asked by the Electricity Review Board" delivered 18 May 2011, at section 4.

Commission considers that expansions to pipeline capacity should usually be covered where the pipeline is operating at or near capacity[33]. In the case of the Pipeline, Coverage of all expansions may in fact be the outcome which would be reached by a proper consideration on a case-by-case basis at the relevant point in time over the 2010 Access Arrangement Period. However, an EEP which mandates this outcome at the outset does not comply with s 3.16(a) of the Code and therefore ground 13(b)(i) is upheld.

3.5(b) Grounds 20 and 21

75 The Board also considers that there is substance to grounds 20 and 21 of GGT's application. Grounds 20 and 21 of GGT's Application provide:

> 20 The exercise of the [Authority's] discretion was incorrect and/or was unreasonable having regard to all the circumstances, in the respects set out below.
>
> 21 The [Authority]:
>
> (a) adopted an extreme and unreasonable position in relation to extensions and expansions that made no allowance for any relevant circumstances that may arise in the future in relation to proposed or contemplated extensions or expansions of the Pipeline; and
>
> (b) drafted and approved the [Authority's] EEP based on this unreasonable approach;
>
> (c) adopted an extensions and expansions policy which arose from attributing paramount significance to the possible degree of market power which might be exercisable by GGT in the future, when there was not sufficient evidence to support that conclusion;
>
> (d) unreasonably failed to provide for proposed or contemplated extensions or expansions to be assessed on a case by case basis in the future according to prevailing circumstances; and
>
> (e) unreasonably assumed that future circumstances, over the entire 5 years (unless revised earlier) would necessarily justify coverage of expansions of the Pipeline.

76 There are two aspects to grounds 20 and 21.

[33] See Draft Decision at [1206].

77 First, GGT contended that the Authority wrongly adopted a "method" which required that all extensions to and expansions of the Capacity of the Pipeline be Covered. The Board upholds this aspect of ground 21 with respect to expansions for the reasons set out above[34]. As indicated in section [3.4], the Board considers that s 3.16(a) requires that a complying EEP involve evaluation of Coverage of extensions to and expansions of the Capacity of a Pipeline, by reference to the Code Criteria on a case-by-case basis at the time the extension or expansion is proposed. The approach taken by the Authority in the Final Decision was to lay down a fixed rule to be applied to expansions irrespective of the particular circumstances of the case. This aspect of the Authority's exercise of its discretion was incorrect within s 39(2) of Schedule 1.

78 The second aspect of these grounds relates to the weight given by the Authority to the possible degree of market power said to have been enjoyed by GGT. The Board considers that, in rejecting GGT's EEP, the Authority wrongly gave inappropriate weight to the Code Criteria and, in particular, to the possible exercise of market power by GGT. The Board's reasons for this conclusion are set out below.

79 The assessment of proposed revisions to an Access Arrangement is governed by s 2.46 of the Code:

> 2.46 The Relevant Regulator may approve proposed revisions to an Access Arrangement only if it is satisfied the Access Arrangement as revised would contain the elements and satisfy the principles set out in sections 3.1 to 3.20. The Relevant Regulator must not refuse to approve proposed revisions to the Access Arrangement solely for the reason that the Access Arrangement as revised would not address a matter that sections 3.1 to 3.20 do not require an Access Arrangement to address. In assessing proposed revisions to the Access Arrangement, the Relevant Regulator:
>
> (a) must take into account the factors described in section 2.24; and

[34] With respect to extensions the Authority effectively adopted GGT's clause 10.2 of EEP II, so it appears that the inclusion of extensions in GGT's ground 21(a) was erroneous.

(b) must take into account the provisions of the Access Arrangement.

Section 2.24 reads:

> 2.24 The Relevant Regulator may approve a proposed Access Arrangement only if it is satisfied the proposed Access Arrangement contains the elements and satisfies the principles set out in sections 3.1 to 3.20. The Relevant Regulator must not refuse to approve a proposed Access Arrangement solely for the reason that the proposed Access Arrangement does not address a matter that sections 3.1 to 3.20 do not require an Access Arrangement to address. In assessing a proposed Access Arrangement, the Relevant Regulator must take the following into account:
>
> (a) the Service Provider's legitimate business interests and investment in the Covered Pipeline;
>
> (b) firm and binding contractual obligations of the Service Provider or other persons (or both) already using the Covered Pipeline;
>
> (c) the operational and technical requirements necessary for the safe and reliable operation of the Covered Pipeline;
>
> (d) the economically efficient operation of the Covered Pipeline;
>
> (e) the public interest, including the public interest in having competition in markets (whether or not in Australia);
>
> (f) the interests of Users and Prospective Users;
>
> (g) any other matters that the Relevant Regulator considers are relevant.

80 The process of assessment of a proposed Access Arrangement under s 2.24 was considered in *Re Dr Ken Michael AM; ex parte Epic Energy (WA) Nominees Pty Ltd* (*Re Michael*)[35]. Parker J said[36]:

> **Code Section 2.24 – First and Third Sentences**
>
> [57] Contrary to the submissions of Epic and the Regulator, Alinta contends that the first sentence of s 2.24 stands apart from, and is to be

[35] [2002] WASCA 231; 25 WAR 511.

[36] At [58].

applied independently of, the third sentence and pars (a)-(g). As I understand the submission, Alinta reads the first three sentences as though they were independent and in effect sequential in their commands to the Regulator. On this view, by the first sentence, the Regulator must first consider ss 3.1-3.20. Only if the Regulator is satisfied that the Access Arrangement contains the elements and satisfies the principles in ss 3.1-3.20 need the Regulator proceed any further. If the Regulator is so satisfied and continues on to consider the other aspects of the proposed Access Arrangement (other than the ss 3.1-3.20 elements and principles), it is then that the command of the second sentence of s 2.24 applies to preclude a refusal of approval solely for the reason indicated. Having satisfied the command of the first sentence, and heeding that of the second, the Regulator may be called on, in Alinta's submission, to exercise discretion as to whether or not to approve the proposed Access Arrangement. It is in the exercise of the Regulator's discretion in this general respect that the factors in pars (a)-(g) are to be taken into account by the Regulator. The effect of this submission is that the factors in s 2.24(a)-(g) are never to be taken into account by the Regulator as he considers ss 3.1-3.20 for the purposes of the first sentence.

[58] In my view this is a strained approach to the construction of s 2.24 and it gives rise to difficulty. As a matter of ordinary construction of the language of the section there is no reason to treat the three sentences as dealing with distinct processes or involving sequential stages. On its most natural reading, in my view, the section is dealing with a single process to be undertaken by the Regulator to decide whether or not to approve a proposed Access Arrangement. The process appears to be naturally and sensibly described as an "assessment" as indicated by the third sentence. In carrying out that assessment process the Regulator may only approve if certain matters are satisfied (first sentence), may not refuse approval solely because of other matters (second sentence), and must take into account factors (a) to (g) (third sentence). No obvious difficulty is presented by such a construction.

[59] A significant difficulty presented by Alinta's contended construction, however, arises from the content of s3.1 to s3.20. Many of these subsections require evaluation, the exercise of judgment, the formation of opinion, or other exercises of discretion by the Regulator. Examples include what is practicable and reasonable (s 3.2); whether the terms and conditions of an Access Arrangement are reasonable (s 3.6); the duration of the Access Arrangement (s 3.18); whether mechanisms to address the risks of incorrect forecasts should be included where the duration is more than 5 years; and, if so, what mechanisms (s3.18). In the exercise of such discretions it is clear the Regulator needs policy guidance. An obvious purpose and function of s 2.24(a) to s 2.24(g) is to provide that guidance. Yet on Alinta's submission that could not occur and the Regulator would be forced to resort to such guidance as he could glean from the scope and objects of the Act.

> [60] Section 3.13 provides that a Queuing Policy *inter alia* "must accommodate, to the extent reasonably possible, the legitimate business interests of the Service Provider and of Users and Prospective Users, and generate, to the extent reasonably possible, economically efficient outcomes". Section 3.14 further enables the Regulator to require the Queuing Policy to deal with any other matter the Regulator thinks fit "taking into account the matters listed in s 2.24". It is submitted that this offers support for Alinta's submission that the s 2.24 factors have no application to s3.1 to s3.20, because otherwise the express reference to s 2.24 in s 3.14 would be unnecessary and s 3.13 overlaps with s 2.24(a) and s 2.24(f). To the extent that this is the case I do not see this to be a telling consideration. Section 3.13 in particular is modifying the emphasis of s 2.24 in respect of Queuing Policy, and s 3.14 is reaffirming that s 2.24, without that modification, applies to the discretion to be exercised under s 3.14.
>
> [61] In my view, contrary to Alinta's submission, the legislative intention appears to be clear that in assessing a proposed Access Arrangement, which includes the consideration of s 3.1 to s 3.20 for the purposes of the first sentence of s 2.24, the Regulator is required to take into account, in the sense indicated earlier, the factors set out in s 2.24(a) to s 2.24(g).
>
> [62] It does not follow from this, however, that those factors are intended to be, or are capable of being, applied to every issue presented by s 3.1 to s 3.20. The precise nature of the elements and principles set out in s 3.1 to s 3.20 will determine whether there is scope for the application of the s 2.24(a) to s 2.24(g) factors to guide the exercise of discretion by the Regulator in his assessment.

Malcolm CJ and Anderson J agreed with Parker J's judgment[37].

81 It is clear that a Regulator must take into account the s 2.24 factors in assessing proposed revisions to an Access Arrangement under s 2.46. The question for the Regulator is whether it is satisfied that the proposed revisions "contain the elements and satisfy the principles set out in ss 3.1 to 3.20" and it is in forming this opinion that the Regulator must, as part of a single assessment process, take into account the factors in s 2.24(a) to (g)[38]. The factors described in s 2.24(a) to (g) are not criteria which operate independently of, and subsequent to, consideration of the first and second sentences of s 2.46. The Regulator is not

[37] At [1] and [2].

[38] The Regulator must, of course, also heed the second sentence of s 2.46 in carrying out the assessment process. This aspect of s 2.46 was not raised in these proceedings.

entitled to first ascertain whether proposed revisions to an Access Arrangement contain the elements and satisfies the principles set out in ss 3.1 to 3.20 and then to consider whether or not to approve the proposed Access Arrangement having regard to the s 2.24 factors.

82 The extent to which the s 2.24(a) to (g) factors are applicable to any particular issue which arises during the assessment process will depend upon the nature of the issue[39]. Parker J noted in *Re Michael*[40] that Regulators need policy guidance in the exercise of discretions under the Act and that an "obvious purpose and function of s 2.24(a) to (g) is to provide that guidance." For example, an area where the s 2.24(a) to (g) factors clearly have substantial application is in assessing the reasonableness of the terms and conditions on which each Reference Service is to be supplied, as required by s 3.6 of the Code. The interests of Users and Potential Users will be directly relevant to whether such terms and conditions are "reasonable". Conversely, the s 2.24(a) to (g) factors will have little bearing on whether a queuing policy is set out in sufficient detail to enable Users and Prospective Users to understand in advance how the Queuing Policy will operate, within s 3.13(a) of the Code. Whether a proposed policy is comprehensible does not depend on whether or not it is fair to Users, for example[41].

83 The Authority's assessment of EEP II appears at [628] to [634] of its Final Decision, which read:

> 628. Section 3.16 of the Code requires an Access Arrangement to include an Extensions/Expansions policy which sets out a method to be applied to determine whether an extension or expansion should be treated as part of the Covered Pipeline.
>
> 629. The Authority may only approve an Access Arrangement if it is satisfied that the Access Arrangement would contain the elements and satisfy the principles set out in sections 3.1 to 3.20 of the Code.

[39] *Re Michael* at [62].

[40] At [61].

[41] The interests of Users, and the other s 2.24(a) to (g) factors become relevant under s 3.13(b) and (c) and s 3.14.

630. This means that the Authority is required to consider whether the method proposed by GGT is appropriate and in doing so must make a judgment guided by the section 2.24 factors. The Authority considers that it is appropriate and necessary for it to consider whether the method proposed by GGT is appropriate and, if not, to consider what other method would be appropriate.

631. The Authority does not, therefore, accept the submissions made by GGT and APIA to the effect that it is not within the Authority's legal power to require GGT's expansions policy to provide for all such expansions to be covered. In the Authority's view, if it is satisfied that the method proposed by the service provider is not appropriate having regard to the section 2.24 factors, the Authority has a duty to require a revision which will provide an appropriate method to determine coverage.

632. The Authority maintains its position, for the reasons set out in paragraphs 1192 to 1213 of the Draft Decision, that [EEP II] is not appropriate, having regard to the section 2.24 factors and, that a method whereby all expansions during the forthcoming Access Arrangement Period are covered would be appropriate.

633. The Authority notes that although GGT has accepted (refer paragraph 621 above) part of Amendment 44 of the Draft Decision relating to its Extensions Policy, GGT's Amended Proposed Revisions have not incorporated this requirement.

Final Decision

634. The Extensions/Expansions Policy in GGT's Amended Proposed Revisions[42] providing for GGT to elect whether or not extensions or expansions during the forthcoming Access Arrangement period will be covered does not meet the requirements of Amendment 44 of the Draft Decision and is therefore not approved by the Authority. The Authority requires that GGT's Amended Proposed Revisions be amended in accordance with the requirements set out in Amendment 18 of this Final Decision.

84 Paragraph [632] states that the Authority maintained its position for rejecting EEP I, given at [1192] to [1213] of its Draft Decision, for rejecting EEP II[43]. The Authority there concluded that EEP I was not "appropriate" because GGT might be able to extract monopoly rents. EEP II was not materially different from EEP I.

[42] i.e. EEP II.

[43] Extracts from [1209] and [1210] of the Draft Decision are set out at [50] and [51] above.

85 The Authority described EEP II as "the method proposed by GGT"[44]. This use of the expression "method" is a shorthand reference to the fuller paraphrase of the requirements of s 3.16(a) at [628] of the Final Decision. The Authority appears, therefore, to have accepted that EEP II was a "method" falling within s 3.16. The task to which the Authority's attention was primarily directed was ascertaining whether GGT's proposed method was or was not "appropriate" and having assessed it as inappropriate, considered that it ought to be rejected. The appropriateness or otherwise of the "method" was ascertained by the Authority taking into account the s 2.24(a) to (g) factors.

86 The Board considers that Authority's assessment of EEP II was incorrect and gave inappropriate weight to the s 2.24(a) to (g) factors.

87 First, the approach adopted by the Authority appears to reflect that proposed by Alinta in *Re Michael*[45] and rejected by the Court in that case. The Authority's approach involves first ascertaining whether the proposed EEP contains a "method" within s 3.16 and then, subsequently, considering the exercise of a discretion to reject the method on the basis that it is not "appropriate", having regard to the s 2.24(a) to (g) factors. The proper role of the s 2.24(a) to (g) factors, in the present context, is to guide the Regulator, to the extent that they are applicable, in ascertaining, as part of a single assessment process, whether or not a proposed EEP is a "method" at all, or, to express the question more fully, whether or not the proposed EEP falls within s 3.16 of the Code. Once it is determined that a proposed EEP complies with s 3.16(a), the assessment of the proposed EEP has been completed and the s 2.24(a) to (g) factors have no further part to play. Because the Authority's approach apparently enables the Regulator to reject a proposed EEP which it otherwise considers to be a "method", the Authority's approach may be said to have incorrectly given the s 2.24(a) to (g) factors inappropriate weight.

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[44] At [632].

[45] At [57].

88 Second, the Board considers that the s 2.24(a) to (g) factors do not have application to the specific issue of determining whether a proposed EEP satisfies the requirements of s 3.16(a).

89 It is necessary to consider the language of s 3.16(a) to work out how much scope there is, if any, for the application of the s 2.24(a) to (g) factors in assessing whether proposed revisions to an Access Arrangement contain the element described by s 3.16(a). The components of s 3.16(a) may be identified as follows:

(a) the proposed EEP must set out a "method";

(b) application of the method must result in a "determination";

(c) the determination must be of Coverage; and

(d) the determination must be made by reference to whether the extension or expansion "should" or "should not" be Covered.

Section 3.16(a) does not set out any policies which must be satisfied over and above these components. None of the other policies in ss 3.1 to 3.20 affect s 3.16(a), although they may affect s 3.16(b) and (c).

90 The components of s 3.16(a) do not call for or permit the exercise of broad normative judgment, the exercise of discretion or the formation of an opinion. Examples of sections in the Code which do are s 3.6, s 3.14 and the second paragraph of s 3.17. Section 3.16(a) is more closely analogous to s 3.13(a) or s 3.7 than it is to s 3.6, s 3.13(c) or s 3.17. Whether a proposed EEP contains the elements identified above involves a degree of "judgment", but it is a narrow judgment directed solely at the meaning of the words used in s 3.16(a) and the proposed EEP. Whether the word "method" may legitimately be used in respect of a proposed EEP is determined by examining the proposed EEP, ascertaining the meaning of "method" in s 3.16(a) and comparing the two. This assessment is not affected by whether a Service Provider might be able to exercise market power. A similar comment may be made in respect of each of the other components of s 3.16(a). Whether a proposed EEP contains each of the required

components of s 3.16(a) is, fundamentally, a matter of objective determination having regard to the language of the proposed EEP. The task required of the Authority in assessing a proposed EEP is the task carried out by the Board at section 3.4 and at [73], [107] and [108] of this decision. Of course, the s 2.24(a) to (g) factors remain of fundamental importance in assessing a proposed Access Arrangement as a whole. But in relation to the specific issue of whether a proposed EEP complies with s 3.16(a), the s 2.24(a) to (g) factors have no apparent application. The Authority concluded in its Final Decision that EEP II did not comply with the Code having regard to the s 2.24(a) to (g) factors. In reaching this conclusion, the Authority gave inappropriate weight to the s 2.24(a) to (g) factors and, in particular, to the potential for exercise of market power by GGT.

91 By letter dated 5 August 2011, the Board sought submissions from the parties as to the scope, if any, for the application of the s 2.24(a) to (g) factors in assessing whether proposed revisions to an Access Arrangement contain the elements and satisfy the principles relevant to s 3.16(a) of the Code. Each of the parties endorsed the general approach of the Authority to this question and said that the s 2.24(a) to (g) factors were relevant. For the reasons given above, the Board does not agree that the Authority's approach was correct. The parties also raised a number of specific arguments in support of the Authority's approach.

92 GGT argued[46] that the Regulator's task included determining whether a proposed EEP was "appropriate". It identified Policies within ss 3.1 to 3.20 that an Access Arrangement had to include. These were a Services Policy (s 3.1), a Reference Tariff (s 3.3), a Capacity Management Policy (s 3.7), a Trading Policy (s 3.9), a Queuing Policy (3.12), an EEP (s 3.16) and a Revisions Commencement Date (s 3.17). The mandatory requirements also included provisions such as s 3.8 and s 3.15. GGT went on to argue:

> … so long as the defined elements of an Access Arrangement exist and

[46] Letter from GGT's solicitors dated 12 August 2011.

> whenever an exercise of judgment is called for, a Regulator is required to assess the proposed revisions to that Access Arrangement taking into account the factors in section 2.24 of the Code. That is, the assessment of the detail of the various Policies required to be contained in an Access Arrangement is to be performed by reference to the section 2.24 factors. It is at this level that the factors in section 2.24 operate. For example, the method to be applied to determine whether any extension to, or expansion of the Capacity of, the Covered Pipeline, requires the exercise of evaluation and judgment to choose an appropriate method.

93 It may be accepted that the s 2.24(a) to (g) factors apply to considering the detail of most issues arising in the assessment of Policies in an Access Arrangement. However, this occurs because there are many provisions in s 3.1 to 3.20 which give rise to broad normative judgments, the exercise of discretion or the formation of an opinion to which the s 2.24(a) to (g) factors are relevant. In *Re Michael*, Parker J gave a number of examples of such provisions. It is not an exhaustive list. Provisions of this nature may be found in sections of the Code dealing with the Services Policy, the Reference Tariff, the Terms and Conditions, the Trading Policy, the Queuing Policy and the Revisions Commencement Date.

94 The Queuing Policy is an example. A Regulator's assessment of a proposed Queuing Policy will require application of the s 2.24(a) to (g) factors in order to assess whether the proposed Queuing Policy:

(a) accommodates, to the extent reasonably possible, the legitimate business interests of the Service Provider and of Users and Prospective Users[47];

(b) generates economically efficient outcomes, to the extent reasonably possible[48]; and

(c) whether the Queuing Policy should deal with any other matter[49].

From the range of clauses which are Queuing Policies within s 3.12, the Regulator is entitled to reject some proposed clauses because they do not satisfy ss 3.13(b) or

[47] s 3.13(b).

[48] s 3.13(c).

[49] s 3.14.

3.13(c) and is entitled to require changes to a Queuing Policy to deal with other matters by virtue of s 3.14. Whether these provisions of the Code have been complied with might be said, loosely, to require a Regulator to form an opinion whether the Queuing Policy is "appropriate" having regard to the s 2.24(a) to (g) factors. However, the Authority's ability to conduct this type of assessment stems from the presence of general discretionary provisions in ss 3.13 and 3.14 which are relevant to ascertaining whether the proposed Access Arrangement complies with the Code in respect of this Policy.

95 Further, not all aspects of the assessment of a Queuing Policy have a discretionary character. Whether a proposed Queuing Policy fits within s 3.12 at all, is a matter of construction of s 3.12 and the proposed Policy, about which the s 2.24(a) to (g) factors have no application. Assessment of the issue whether a proposed Queuing Policy falls within s 3.12 does not involve considering whether the Queuing Policy is "appropriate".

96 The Board has identified the components of s 3.16(a) at [89] above. There are no provisions in s 3.16(a) which are similar to ss 3.13(b), 3.13(c) or 3.14. Because the components of s 3.16(a) do not involve broad normative judgments, the exercise of discretion or the formation of an opinion, assessment of a proposed EEP against s 3.16(a) will not involve a detailed evaluation of whether the proposed EEP is "appropriate" by applying the s 2.24(a) to (g) factors. If a proposed EEP does not contain the various components of an EEP, it does not comply with s 3.16(a). The converse is also true.

97 BHPB argued that the elements and principles in s 3.16 require evaluation, the exercise of judgment and the formation of opinions. It pointed to s 3.16(b) and argued:

(a) s 3.16(b) recognises that an EEP has the ability to result in changes to Reference Tariffs that are fundamentally inconsistent with Reference Tariff Principles;

(b) consequently, the Regulator must have a discretionary ability to reject an EEP under s 3.16(b); and

(c) the position must be the same under s 3.16(a)

98 Section 3.16(b) merely requires the existence of provisions which deal with the subject matter specified therein. The language of s 3.16(b) is mandatory and straightforward. The Board does not accept that the possible adverse effects of a proposed EEP on the Reference Tariff support the existence of a discretion under s 3.16(b) to reject a proposed EEP which contains a provision of the type required by s 3.16(b). The Regulator has a express power under s 3.17 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. This power is to be exercised having regard to the Reference Tariff Principles and would entitle the Regulator to define extensions or expansions as trigger events requiring the early submission of revisions to the Access Arrangement if it appeared that a proposed EEP might adversely affect the appropriateness of the Reference Tariff. The Reference Tariff would be recalculated, thus avoiding potential adverse consequences of the EEP flowing from provisions directed to s 3.16(b)[50].

99 The Authority also made submissions on the scope for application of the s 2.24(a) to (g) factors in assessing compliance with s 3.16(a)[51]. The Board agrees with the submission at [28] that it is necessary, as a preliminary step, to ascertain the nature and extent to which there is scope to apply the s 2.24(a) to (g) factors. The Authority pointed out that the use of the expressions "should" and "should not", rather than "if", imports an evaluative element[52]. The Authority argued that this meant that the Regulator was required to substantively evaluate proposed EEPs submitted to it and needed policy guidance in carrying out that task. The Board

[50] In its Final Decision at [655] , the Authority required that an increase in the throughput be defined as a trigger event under s 3.17. The Authority there referred to the possibility that an unexpected expansion might render existing Reference Tariffs materially different to the underlying cost of service.

[51] Authority's Further Submissions dated 12 August 2011.

[52] This submission was referred to earlier at [67].

accepts that the expressions "should" and "should not" import an evaluative element. However, the expressions "should" and "should not" refer to assessment of whether particular extensions or expansions should be covered. "Should" and "should not" do not refer to or govern the Regulator's assessment of proposed EEPs.

100 The Authority was concerned by the possibility that the Regulator might have no ability to reject an EEP proposed by a Service Provider if the s 2.24(a) to (g) factors did not apply to this issue, and that this might result in the approval of EEPs without an evaluative assessment of the content or the likely effects of the application of the proposed EEP[53]. While, in the view of the Board, the s 2.24(a) to (g) factors do not apply to the assessment of a proposed EEP, this does not have the consequence that particular extensions or expansions will not be evaluated by reference to the Code Criteria, including the s 2.24(a) to (g) factors. In order to comply with s 3.16(a), a proposed EEP must provide for substantive assessment by reference to the Code Criteria. Because an EEP must contain a method for determining Coverage by reference to the Code Criteria, there is no need to directly apply the s 2.24(a) to (g) factors in deciding whether a proposed EEP itself complies with the Code. The ability of a Service Provider to exercise substantial market power falls within the scope of ss 2.24(d), (e) and/or (f). If GGT was in a position to exercise substantial market power, that is a matter to be taken into account when a determination of Coverage is made under a complying EEP. In appropriate circumstances, it may result in a determination under the EEP that the extension or expansion should not be Covered.

101 The Board notes that Mr Woodley does not agree with the reasoning set out in this section of the Reasons. Mr Woodley considers that the assessment of the EEP by the Regulator is subject to all the elements of s 2.24 of the Code (including taking the s 2.24(a) to (g) factors into account). He concurs with the Authority's assessment of the expansion component of EEP I and EEP II for the reasons given

[53] At [34].

by it. He also considers that the Authority's EEP is not compliant with the Code on a proper consideration of the s 2.24(a) to (g) factors, particularly by not allowing for possible unforeseen circumstances at the time of any expansion or extension. Thus, while Mr Woodley does not agree with all aspects of the Reasons on the issue of the EEP, the Board is unanimous in its Decision and in its views of the appropriate remedy in relation to the EEP.

102 Grounds 20 and 21 are upheld. The Authority's evaluation of EEP II was incorrect.

3.5(c) Other grounds

103 Ground 12 of GGT's application covers the assessment of EEP I as well as EEP III. The complaint made in ground 12 is that the Authority failed to identify the range of elements which would have complied with s 3.16 and failed to allow GGT to choose an EEP from within that range, instead proceeding on the basis that only a single uniquely correct policy could satisfy the Code. The Authority did not identify the need for substantive evaluation of Coverage at the time as a component of a complying EEP and so did not correctly identify the range of elements that would comply with clause 3.16(a) of the Code. The range of complying EEP is narrower than was contemplated by the Authority. However, the Authority's error in assessing GGT's EEPs is more appropriately identified by reference to grounds 20 and 21 of GGT's application.

104 Ground 13(b)(ii) to (iv) dealt with the Authority's EEP. It is not necessary for the Board to express a conclusion about these parts of Ground 13 because the Authority's EEP did not comply with s 3.16(a) for the reasons given earlier.

3.6 What are the consequences of the Authority's errors?

105 It is now necessary to consider the consequences of the errors identified in the Authority's assessment process.

106 GGT argued that the Authority should have approved EEP I and EEP III. It did not specifically address EEP II in its submissions, although, as noted earlier, EEP

II is practically identical to EEP I.

107 The Board considers that each of EEP I and EEP II do not comply with s 3.16(a). This is because both EEP 1 and EEP II do not provide for substantive evaluation of Coverage by reference to the Code Criteria. Both EEP I and EEP II confer on GGT the determinative role in deciding whether an expansion should or should not be covered. It is inevitable that GGT would carry out that role having regard to its own interests, rather than by reference to all the relevant Code Criteria, which include the public interest and the interest of Users and Prospective Users.

108 In addition, neither EEP 1 nor EEP II dealt with extensions. Both EEPs dealt only with expansions. GGT suggested that EEP I was merely unclear about the treatment of extensions and, perhaps by implication that it was open to the Authority to conclude that EEP I and EEP II also applied to extensions of the Pipeline[54]. Although the heading of clause 10.2 of both EEP I and EEP II was "Application of Arrangement to Pipeline Extension/Expansion", there was no reference to extensions of the Pipeline in the operative provisions of clause 10.2. A heading is not enough to persuade the Board that the following clause was meant to deal with extensions, when extensions were not specifically mentioned. It is noted that GGT acknowledged that EEP I did not deal with extensions and stated that it would adopt the Authority's amendments in relation to extensions in EEP II, but failed to do so.

109 The Authority correctly rejected EEP 1 and EEP II, albeit for reasons with which the Board does not entirely agree.

110 However, Required Amendment 18 required GGT to amend its EEP into a form which did not comply with s 3.16(a). Further, the Authority gave reasons for requiring an amendment which did not reflect a proper construction of s 3.16(a) of the Code. Had the Authority adopted a proper construction of s 3.16(a), and required a replacement EEP that was compliant with the Code, GGT would then

[54] Transcript at page 18.

have had the opportunity to respond by submitting amended revisions under s 2.40 which did comply with s 3.16(a). It is implicit in the operation of s 2.41 that a Service Provider may choose to submit amended revisions which do not incorporate precisely or substantially the amendments required by a Regulator under s 2.38 but which address the reasons for requiring the amended revisions and which the Service Provider considers preferable. However, GGT did not have the opportunity to submit amended revisions which addressed a proper construction of s 3.16(a).

111 Accordingly, the Board considers that the appropriate course of action is for the Board to identify the amendments which it considers would have to be made to the Amended Proposed Revisions, containing EEP II, in order for the proposed revised Access Arrangement to be compliant with the Code. GGT should be provided with the opportunity to respond to the Board's proposed amendments.

112 In the Board's opinion, a replacement clause 10.2 along the lines of the following clause would contain the elements and satisfy the principles identified in s 3.16 of the Code:

> 10.2 GGT may, with the Authority's consent, elect at some point in time whether or not a proposed extension to, or expansion of the Capacity of, the Covered Pipeline should be treated as part of the Covered Pipeline for all purposes under the Code or should not be treated as part of the Covered Pipeline for any purpose under the Code.

Clause 10.3 of the 2010 Access Arrangement would then be deleted and clause 10.4 renumbered 10.3.

113 Although GGT could simply accept the amendment proposed by the Board above, GGT should have the opportunity to submit some other proposed EEP, if it chooses, consistent with s 2.41 of the Code. If GGT submits a replacement clause, BHPB and the Authority will be given the opportunity to make submissions on that clause.

114 The Board notes that the requirements of s 3.16(a) discussed by the Board in section 3.4 apply with equal force to extensions and expansions. Both EEP III

and the draft EEP included in BHPB's submissions[55] deal with extensions and expansions. The Board has adopted a similar course of action in formulating the draft clause set out at [112].

3.7 Failure to consider EEP III and Supporting Documents

115 Because the Board may need to assess a further EEP submitted by GGT it is necessary for the Board to reach a conclusion about whether the Authority wrongly failed to consider the Supporting Documents submitted by GGT on 4 June 2010 after the Final Decision. GGT's ground 17 covers this issue.

116 At [7.31] of its Outline of Written Submissions, GGT argued that "the Authority did not consider the merits of EEP III, effectively because "it was submitted after the Authority's Final Decision". This contention is not supported by the Further Final Decision, which states that the Authority "is not satisfied the proposal in GGT's Further Proposed Revision substantially incorporates Amendment 18 or otherwise addresses the reasons for Amendment 18"[56]. No reasons are given for this conclusion but the statement could not have been made unless the Authority had considered EEP III.

117 However, in so far as GGT's Supporting Documents are concerned, it is correct that they were not considered at all. In its Further Final Decision, the Authority said[57]:

> The Authority has considered the extent to which it may or ought to have regard to GGT's Confidential Response. It is noted that the Code explicitly obliges the Authority to invite and consider submissions prior to both the draft and final decisions but does not contain an equivalent obligation to invite and consider submissions prior to a further final decision. After appropriate consideration the Authority has resolved not to consider the Confidential Response before making this Further Final Decision or for the purpose of the drafting and approval by the Authority of a revised Access Arrangement for the GGP.

[55] BHPB Outline of Reply Submissions at [68].

[56] Further Final Decision at [68].

[57] At [8].

118 Whether the Authority was correct involves consideration of the proper construction of s 2.41 of the Code.

119 Section 2.41 comes into operation in the circumstances contemplated by s 2.40 of the Code:

> 2.40 If the Relevant Regulator decides not to approve the revisions to the Access Arrangement under section 2.38(a)(ii) or (b)(ii) the Service Provider must, if the revisions it proposed were proposed as required by the Access Arrangement, submit amended revisions to the Relevant Regulator by the date specified by the Relevant Regulator under section 2.38(a)(ii) or (b)(ii).

120 Section 2.41 provides:

> 2.41 If the Service Provider submits amended revisions to the Access Arrangement by the date specified by the Relevant Regulator under section 2.38(a)(ii) or (b)(ii) then the Relevant Regulator must issue a further final decision that:
>
> (a) if the Relevant Regulator is satisfied that the amended revisions to the Access Arrangement incorporate the amendments specified by the Relevant Regulator in its final decision under section 2.38(a)(ii) or (b)(ii), approves the amended revisions to the Access Arrangement; or
>
> (b) if the Relevant Regulator is satisfied that the amended revisions to the Access Arrangement either substantially incorporate the amendments specified by the Relevant Regulator or otherwise address to the Relevant Regulator's satisfaction the matters the Relevant Regulator identified in its final decision as being the reasons for requiring the amendments specified in its final decision under section 2.38(a)(ii) or (b)(ii), either approves or does not approve the amended revisions to the Access Arrangement (in the Relevant Regulator's discretion); or
>
> (c) in any other case, does not approve the amended revisions to the Access Arrangement.

121 Under s 2.41(b), the Authority must consider whether the amended revisions either "substantially incorporate the amendments specified by the Relevant Regulator" or "otherwise address to the Relevant Regulator's satisfaction the matters the Relevant Regulator identified in its final decision as being the reasons for requiring the amendments specified in its final decision". This might, in

particular cases, be a complex task. It can be argued that the evaluation of the relationship between the Service Provider's further proposed revisions and the reasons for requiring further amendments could better, and should properly, be undertaken if informed by substantive submissions and material about the merits of the amendments and the Regulator's reasons for requiring them. It can be argued that the Regulator should not be required to perform this task based only on a consideration of the bare terms of the further proposed revisions themselves.

122 The Authority considered that further submissions could not properly be provided because s 2.41 did not expressly contemplate the provision of submissions, as set out in the Further Final Decision[58]. Section 2.40 imposes a requirement on a Service Provider to provide "amended revisions", which must then be considered under s 2.41. There is no reference to submissions or other material in s 2.41, only to "amended revisions".

123 At earlier stages of the decision making process, submissions are contemplated. For example, s 2.31 requires the Relevant Regulator to publish a notice in a national daily newspaper requesting submissions. Section 2.34 obliges the Regulator to consider timely submissions and entitles the Regulator to consider late ones. Section 2.36 requires the Regulator to request submissions on its Draft Decision from persons to whom the Draft Decision is provided. Section 2.37 imposes an obligation and entitlement similar to that under s 2.34 in respect of submissions received in response to the Draft Decision. Section 2.43 sets out time limits for certain stages of the process.

124 The effect of this process is to give the parties an opportunity to comment on the views of the Regulator and the submissions and materials provided by other interested parties, including the Service Provider, prior to the Final Decision being made. The parties affected by the Access Arrangement have the opportunity to put before the Regulator matters that are relevant and to rebut materials provided by other persons, within the constraints of the process. Parties interested in the

[58] At [8].

Access Arrangement, such as BHPB, have the opportunity to respond to the Draft Decision and materials submitted by the Service Provider.

125 In the present case, for example, the Authority's concerns about the exercise of monopoly power were raised in its Draft Decision[59]. GGT had the opportunity after the Draft Decision to provide submissions to the Authority in response disputing the Authority's conclusions, and did so. BHPB, and other interested parties, had the opportunity to put submissions as well.

126 Further, the result of the process under s 2.38 of the Code is described as a Final Decision, which suggests that it is the end of the substantive inquiry. If the Service Provider were permitted to put substantive submissions after the Final Decision, the other interested parties would not have the opportunity to comment on or rebut those submissions. This would create an element of unfairness, which persuades the Board that substantive submissions should not be considered after the Final Decision. The purpose of s 2.41 is not to re-agitate the substantive issues decided in the Final Decision. The purpose of s 2.41 is to enable the outstanding issues to be tidied up in the Further Final Decision. The need for substantive submissions ought not to be great at this stage of the process.

127 For these reasons, the Board considers that:

(a) the Code does not contemplate the Service Provider being permitted to make substantive submissions after the Final Decision has been made; and

(b) the Authority was obliged to consider only the Further Proposed Revisions, not the Supporting Documents, as it did.

4. Rate of Return

4.1 Summary

128 The next area of controversy involves the Authority's determination of the

[59] At [1206] to [1209].

nominal pre-tax rate of return ("Rate of Return"). The Rate of Return[60] is a key component in determining the Reference Tariff payable by Users of the Covered Pipeline for the Reference Service. The methodology used by GGT to determine the Rate of Return was a weighted average cost of capital ("WACC") approach based on the capital asset pricing model ("CAPM")[61].

129 As stated by GGT[62], "the determination of an appropriate rate of return is probably the most critical outcome for the whole regulation process. It governs whether a Service Provider will be able to conduct a viable business and whether consumers are adversely affected by the operation of a monopoly asset".

130 In its Further Final Decision the Authority chose a Rate of Return[63] of 10.48%, which was the mid-point of the reasonable range of values it had determined of 9.62% to 11.34%.

131 The grounds identified by GGT in its Application in respect of the Rate of Return may be summarised as follows:

(a) the Authority should have accepted the Rate of Return proposed by GGT in its Further Proposed Revisions, which was 11.3%, because it was within the applicable range of proper outcomes on a proper construction and application of the Code[64];

(b) the Authority failed to take into account or have proper regard to:

(i) the risks associated with errors in estimating the Rate of Return[65]; and

[60] It is noted that the terms "Rate of Return" and "Weighted Average Cost of Capital", or "WACC", are used interchangeably, even though strictly the WACC is a methodology for determining the Rate of Return.

[61] GGT Outline of Submissions at [9.7].

[62] GGT Outline of Submissions at [8.4].

[63] All Rates of Return quoted in this Decision are on a nominal pre-tax basis.

[64]GGT Application Ground 18.

[65] GGT Application Ground 23(a).

(ii) the risks associated with provision of the Reference Service[66], in deciding not to adopt a Rate of Return at the upper end of the reasonable range of values; and

(c) the occasion for exercising the power under s 2.42 of the Code to draft and approve its own Access Arrangement incorporating a Rate of Return of 10.48% did not arise because the 11.3% rate proposed by GGT was within the reasonable range of Rates of Return[67].

132 GGT again argued that the Authority wrongly failed to consider GGT's Supporting Documents[68], submitted after the Final Decision. This issue has been considered by the Board in the context of the EEP in section [3.7] above. For the reasons given earlier, the Board considers that the Authority acted correctly in that it was obliged to consider only the Further Proposed Revisions, not the Supporting Documents.

133 The Board considers that:

(a) in making the Further Final Decision the Authority was not obliged to accept the Rate of Return submitted by GGT of 11.3%, even though it fell within the reasonable range of values identified by the Authority in its Final Decision;

(b) no reviewable error was made by the Authority in deciding not to adopt a Rate of Return at the upper end of the reasonable range of values;

(c) the Authority failed to comply with the Code by not giving reasons for requiring GGT to amend its proposed Access Arrangement to adopt a nominal pre-tax Rate of Return of 10.48%. The Further Final Decision was incorrect for this reason, within the meaning of that expression in s 39(2)(b) of Schedule 1; but

[66] GGT Application Ground 23(b).

[67] GGT Application Ground 27(a).

[68] GGT Application Ground 19.

(d) 10.48% is the appropriate Rate of Return, so that no order should be made in respect of this aspect of the Further Final Decision.

134 The Board will consider in greater detail each of the grounds identified in [131 above, after outlining the background to this area of contention.

4.2 Background

135 An Access Arrangement must contain a Reference Tariff for each Reference Service that is likely to be sought by a significant part of the market and for which the Regulator considers a Reference Tariff should be included[69]. Section 3.4 of the Code states that the Reference Tariff "must, in the Regulator's opinion, comply with the Reference Tariff Principles described in section 8".

136 Section 8.1 of the Code identifies a number of objectives which "the Reference Tariff and Reference Tariff Policy should be designed with a view to achieving". The final sentence of s 8.1 provides:

> To the extent that any of these objectives conflict in their application to a particular Reference Tariff determination, the Relevant Regulator may determine the manner in which they can best be reconciled or which of them should prevail.

Where it is necessary to reconcile these objectives, the Regulator should have regard to the factors identified at s 2.24(a) to (g)[70].

137 Section 8.2(a) requires the Regulator to be satisfied that the Total Revenue should be established consistently with the principles and according to one of the methodologies contained in s 8 of the Code when determining to approve a Reference Tariff and Reference Tariff Policy. "Total Revenue" means "the revenue to be generated from the sales (or forecast sales) of all Services over the Access Arrangement Period"[71].

138 The Code identifies three methodologies in s 8.4 by which the Total Revenue may

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[69] Section 3.3 of the Code.

[70] *Re Michael* at [85].

[71] Section 8.2(a) of the Code.

be calculated. The "Cost of Service" methodology was adopted in this case. Section 8.4 defines the "Cost of Service" methodology as follows:

> **Cost of Service**: The Total Revenue is equal to the cost of providing all Services (some of which may be the forecast of such costs), and with this cost to be calculated on the basis of:
>
> (a) a return (***Rate of Return***) on the value of the capital assets that form the Covered Pipeline or are otherwise used to provide Services (***Capital Base***);
>
> (b) depreciation of the Capital Base (***Depreciation***); and
>
> (c) the operating, maintenance and other non-capital costs incurred in providing all Services (***Non-Capital Costs***).

139 Sections 8.30 and 8.31 deal specifically with the Rate of Return:

> **Rate of Return**
>
> 8.30 The Rate of Return used in determining a Reference Tariff should provide a return which is commensurate with prevailing conditions in the market for funds and the risk involved in delivering the Reference Service (as reflected in the terms and conditions on which the Reference Service is offered and any other risk associated with delivering the Reference Service).
>
> 8.31 By way of example, the Rate of Return may be set on the basis of a weighted average of the return applicable to each source of funds (equity, debt and any other relevant source of funds). Such returns may be determined on the basis of a well accepted financial model, such as the Capital Asset Pricing Model. In general, the weighted average of the return on funds should be calculated by reference to a financing structure that reflects standard industry structures for a going concern and best practice. However, other approaches may be adopted where the Relevant Regulator is satisfied that to do so would be consistent with the objectives contained in section 8.1.

140 The facts relevant to this issue can be briefly stated. In determining the Rate of Return, GGT continued with the "ranges approach", applied in the 2005 Access Arrangement[72]. That is to say, GGT set out to identify parameters for components of the Rate of Return.

141 GGT submitted a range of values for the Rate of Return in its Proposed Revisions.

[72] GGT Outline of Submissions at [9.8].

The range was 11.0 to 13.5%, from which it nominated a value for the Rate of Return of 13.5%[73].

142 In its Draft Decision the Authority proposed a range of 9.34 to 11.22% and adopted the mid-point value of 10.28%[74].

143 In its Amended Proposed Revisions GGT submitted a range of 11.9-15.1% and nominated a value of 14.3%[75].

144 In its Final Decision, the Authority updated its views on the range and value for the Rate of Return. It said:

> 328. Based on the parameter values set out in Table 7, and using the approach for calculation of a reasonable WACC range outlined in the Draft Decision, the Authority considers that a reasonable range of values for the nominal pre-tax Rate of Return is 9.62 to 11.34 per cent.
>
> 329. For the purpose of this Final Decision, the Authority believes that the mid-point of this range, being a nominal pre-tax Rate of Return of 10.48 per cent, provides GGT with a return which is commensurate with the prevailing conditions in the market for funds and the risk involved in delivering the reference service.

Required Amendment 7 reflected this passage and required GGT to amend its Amended Proposed Revisions to adopt a nominal pre-tax Rate of Return of 10.48%.

145 After the Final Decision, GGT submitted its Further Proposed Revisions and Supporting Documents. Without agreeing with the reasoning in the Final Decision, GGT adopted the values of the WACC parameters set out in the Final Decision. Adoption of those values gave a range for the pre-tax nominal Rate of Return of 9.62 to 11.34%[76]. GGT proposed a Rate of Return of 11.3%[77].

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[73] GGT Supporting Information to Proposed Revisions to Access Arrangement dated 7 April 2009, pp 24–25.

[74] Draft Decision [537]–[547].

[75] GGT Response to Draft Decision, p 98-99.

[76] After removal of the lower and upper 10% of values.

[77] GGT Response to Final Decision, p7.

146 In its Further Final Decision the Authority said:

> 99. GGT has not complied with Amendment 7.
>
> 100. On page 10 of the Further Amended [Access Arrangement Information] GGT nominated 11.3 percent as the nominal pre-tax rate of return to use in determining total revenue, which is within the reasonable range adopted by the Authority in the Final Decision.
>
> 101. However, the Authority has adopted a nominal pre-tax rate of return of 10.48% in accordance with Amendment 7.
>
> 102. The Authority requires GGT to amend the Further Amended [Access Arrangement Information] to comply with Amendment 7.

4.3 Complying rate

147 GGT argued that the Authority made an error falling within s 39(2)(b) of Schedule 1 by not accepting the rate of 11.3% proposed by GGT in its Further Proposed Revisions and Supporting Documents because that rate complied with the Code. GGT argued that its rate complied with the Code because it fell within the reasonable range of values identified by the Authority in its Final Decision[78].

148 GGT referred the Board[79] to a statement which had previously been made by the Authority in its "Final Decision on the Proposed Access Arrangement for the Goldfields Gas Pipeline", dated 17 May 2005 at page 63:

> The Authority accepts that its task is to consider whether the Rate of Return used for the derivation of Reference Tariffs in the revised Access Arrangement falls within the range of rates commensurate with the prevailing market conditions and the relevant risk. The Rate of Return will comply with the Code if the value used is within the range of values that different minds acting reasonably might attribute to the Rate of Return, applying the methodology of the CAPM that was chosen by GGT. In undertaking this task, the Authority has given consideration to the range of values within which the Rate of Return might be supported by reasonable minds as being commensurate with prevailing conditions in capital markets.

[78] GGT Outline of Submissions at [10.2].

[79] GGT Outline of Submissions at [9.8].

GGT also referred to the decision of the Australian Competition Tribunal in *Application by GasNet Australia (Operations) Pty Ltd*[80], where the Tribunal said:

> Where the Reference Tariff Principles produce tension, the Relevant Regulator has an overriding discretion to resolve the tensions in a way which best reflects the statutory objectives of the Law. However, where there are no conflicts or tensions in the application of the Reference Tariff Principles, and where the AA proposed by the Service Provider falls within the range of choice reasonably open and consistent with Reference Tariff Principles, it is beyond the power of the Relevant Regulator not to approve the proposed AA simply because it prefers a different AA which it believes would better achieve the Relevant Regulator's understanding of the statutory objectives of the Law.

These passages suggest that the primary role of the Regulator in determining the Rate of Return is to ascertain "compliance" with the Code, rather than to evaluate the substantive merits of the Access Arrangement proposed by the Service Provider.

149 GGT's argument is supported by the language of s 8.30 of the Code. That section provides that the Rate of Return "should provide a return which is commensurate with prevailing conditions in the market and the risk involved in delivering the Reference Service". "Commensurate" suggests something less than exact equality, so that a variety of rates of return within a range might be regarded as "commensurate" with market conditions and risk.

150 The Board does not accept GGT's position set out at [147]. Applying *GasNet*, the Authority is only obliged to accept provisions proposed by a Service Provider where the Reference Tariff Principles do not "produce tension". Determination of a Reference Tariff is a matter which inevitably produces or is subject to tension between the Reference Tariff Principles.

151 In *Re Michael* at [185], Parker J said:

> …there is also the tension of potentially conflicting considerations or objectives. The nature of that potential for conflict remains generally consistent, although given more particular and precise expression in the

[80] [2003] A Comp T 6 at [29] ("*GasNet*").

> differing contexts of those provisions. In my view, the scheme of the Act and the Code is to leave this potential conflict which, in part, is between the interests of a service provider in achieving a return on its investment in the pipeline and the interests of users or consumers in achieving a lower price and indeed, perhaps, in the achievement in the public interest of greater competitiveness or the effects of competition, to be resolved by the Regulator in accordance with the Act and the Code and the circumstances of each particular case.

The Reference Tariff is perhaps the most readily apparent area of application of the conflict to which Parker J referred. The tensions in this area arise from the operation of ss 8.1(a), 8.1(b), 8.1(e) and 8.1(f) of the Code, together with the inherent tensions between the s 2.24 factors.

152 Section 8.1(a) sets out the objective of "providing the Service Provider with the opportunity to earn a stream of revenue that recovers the efficient costs of delivering the Reference Service over the expected life of the assets". In *Re Michael*, Parker J said:

> [142] In their submissions the Regulator and Alinta seemed to regard s 8.1(a) as fixing a ceiling on the revenue stream that might be earned. In my view, it would distort the words used to engraft the sense of "*no more* than the efficient costs" into s 8.1(a). Similarly, there would be a misconception to engraft "*at least* the efficient costs" into the provision. Each of these would add an emphasis not contemplated by the language of s 8.1(a).

This suggests that mere identification of the upper and lower bounds is not a complete performance of the Authority's role in determining an appropriate Reference Tariff. It might be argued that, the higher the Rate of Return, the more likely it is that the Reference Tariff will achieve the objective of providing the Service Provider with the opportunity to recover the efficient costs of delivering the Reference Service but of course, to the possible detriment of the objective of considering the interests of Users and the public. The use of the expression "efficient costs" limits the opportunity to an opportunity to recover costs that are appropriate.

153 Section 8.1(b) sets out the objective of "replicating the outcome of a competitive market". In the present case the lower boundary of the reasonable range of values

determined by the Authority in its Final Decision was 9.62% and the upper boundary 11.34%. The Authority found, and GGT did not dispute, that 9.62% was a reasonable rate of return. In essence, GGT's argument on this point was that the Authority should have adopted a Rate of Return more towards the upper boundary of 11.34%, which is 1.72% more than the lower boundary of the reasonable range of 9.62%. The fact that a rate at the upper boundary (i.e. 11.3%) has been put forward by GGT would not be regarded by participants in a competitive market as a sufficient reason to adopt that rate, rather than some other rate closer to the lower, but still "reasonable", boundary rate of 9.62%. A competitive market would operate to drive the Reference Tariff towards a rate somewhere between the upper and lower bounds of the reasonable range of values.

154 Section 8.1(e) refers to "efficiency in the level and structure of the Reference Tariff". In *Re Michael* at [156], Parker J indicated that "efficiency" in s 8.1(e) "appears to reflect the concept of economic efficiency". The concept of economic efficiency was discussed at some length in *Re Michael*[81]. It appears that the idea of enabling services or goods to be provided to consumers at least cost is a component of this notion[82].

155 Section 8.1(f) refers to "providing an incentive to the Service Provider to reduce costs and to develop the market for Reference and other Services".

156 Setting a Rate of Return is affected by each of the principles discussed in the preceding paragraphs. Given the existence of tension in the operation of the s 8.1 objectives, the Regulator is obliged to reconcile the conflict or tension as best it can. The Regulator must also have regard to the factors identified in s 2.24 in reconciling this conflict or tension. Relevant s 2.24 factors are the legitimate business interests and investment of the Service Provider in the Pipeline (s 2.24(a)), the public interest (s 2.24(e)) and the interests of Users and

[81] See at [91] to [99], [111] to [120] and [137] to [141].

[82] See *Re Michael* at [91], [137] to [144].

Prospective Users (s 2.24(f)).

157 The Authority was obliged to determine whether or not the 11.3% rate proposed by GGT otherwise addressed the matters identified in its Final Decision as being the reasons for requiring the amendment, but it was not obliged to simply accept GGT's proposal because it fell within the reasonable range of values. This ground of GGT's application fails.[83]

4.4 Failure to take matters into consideration

158 GGT argued that the Authority wrongly failed to take into account or have proper regard to the risks associated with errors in estimating the Rate of Return and the provision of Reference Services, in deciding not to adopt a Rate of Return at the upper end of the reasonable range of values.

159 GGT argued that there were two relevant matters that supported the selection of a value for the Rate of Return at the top of the reasonable range of values. The matters were identified in the grounds and written submissions as follows:

(a) the Authority selected values for three important parameters which tended unreasonably to cast on GGT the burden of any inaccuracy in the estimates in calculating the rate of return ("Risk of Estimation"). The parameters are equity beta, market risk premium and gamma[84] (collectively "Parameters"); and

(b) the consequences of selecting a rate which was too low were greater than the consequences of selecting a rate that was too high. This was referred to as "asymmetry of risk" in GGT's submission[85].

160 GGT's oral submissions focused largely on the question of the inaccuracy of

[83] BHPB argued that the Authority was not obliged to consider the rate proposed in the Further Proposed Revisions and Supporting Documents at all, because it was submitted after the Further Final Decision and did not address the amendment required by the Authority in the Further Final Decision. This issue is addressed at [193] below.

[84] Ground 23(b) of GGT's application.

[85] Ground 23(a) of GGT's application,

estimation but the two are distinct though related points, and were dealt with separately in GGT's submissions to the Authority.

161 At this point, it is necessary to explain the significance of the three Parameters in the calculation of the Rate of Return.

162 Section 8.31 identifies one approach to setting the Rate of Return used in determining the Reference Tariff, which is on the basis of the weighted average of the return applicable to each source of debt and equity funds, or the "Weighted Average Cost of Capital" ("WACC"). This was the method chosen by GGT. The formula for calculating the WACC is set out in the report of Frontier Economics Ltd[86]:

$$WACC_{\text{Pre-tax nominal}} = r_e\left[\frac{1}{1-T\times(1-\gamma)}\right]\frac{E}{V} + r_d\frac{D}{V}$$

The parameters in this equation represent:

r_e: equity holders' required rate of return (the total return that equity holders require, on average, in order to commit the required amount of equity capital to the firm;

r_d: the debt holders' required rate of return (the total return that debt holders require in order to commit the required amount of debt capital to the firm);

E/V and *D/V*: the estimated proportion of equity and debt capital in the capital structure of the capital structure of an efficiently financed firm.

T: the corporate tax rate; and

[86] "Review of Weighted Average Cost of Capital estimate proposed by Goldfields Gas Transmission", Frontier Economics Ltd ("Frontier"), 6 Aug 2009.

γ: the estimated value of a dollar of imputation credits, or what the market is prepared to pay for a $1 imputation credit at the time it is created via the payment of Australian corporate tax (also known as "gamma").

163 GGT had proposed that the required rate of return on equity (r_e) should be estimated using the Capital Asset Pricing Model as contemplated in s 8.31 of the Code. The applicable formula for this model is:

$$r_e = r_f + \beta_e (r_m - r_f)$$

where:

r_f is the risk free interest rate;

β_e is the equity beta; and

r_m - r_f is the market risk premium.

Frontier noted that the market risk premium is the compensation required by investors for bearing the systematic risk associated with the entire market.

164 It will be apparent from these formulas that the WACC increases as the equity beta and the market risk premium increase, and as the gamma decreases.

165 The process adopted by the Authority to determine the WACC was to ascertain a reasonable range of values for some of the Parameters (equity beta, market risk premium and gamma) and a single value for the other parameters used in the calculation, based on the material before it.

166 In its Draft Decision and its Final Decision, the Authority required GGT to adopt the values it identified for these parameters.

167 Section 2.6 of the Code requires that "the Access Arrangement Information must contain such information as in the opinion of the Regulator would enable Users and Prospective Users to understand the derivation of the elements in the proposed Access Arrangement and to form an opinion as to the compliance of the Access Arrangement with the provisions of the Code". The Access Arrangement

Information must include at least the categories of information identified in Attachment A to the Code[87]. Attachment A includes all of the parameters used within the WACC formula.

4.4(a) Risk of estimation

168 GGT argued that the Authority ought to have chosen a value at the top of the reasonable range for the Rate of Return because the "balance of risk" in the selection of values for the Parameters lay on the low side in the case of the equity beta and the market risk premium, and on the high side in the case of the gamma.

169 In oral submissions, GGT took the Board through the extensive material dealing with the values for the Parameters including:

(a) GGT's various submissions to the Authority and the reports from Synergies Economic Consulting ("Synergies") which supported GGT's submissions;

(b) a report from Frontier Economics Ltd of 6 May 2009, which was commissioned by the Authority, dealing with the equity beta; and

(c) the Draft Decision, the Final Decision and the Further Final Decision.

170 The purpose of this analysis was to establish that the Authority, in its Draft Decision and its Final Decision, had adopted a range of values for each of the Parameters which was different from the range of values for the Parameters submitted by GGT and was less favourable to GGT than the ranges which GGT submitted.

171 It is not necessary for the Board to consider whether the range of values for each of the Parameters, or the resultant range of values for the Rate of Return, adopted by the Authority in its Final Decision was correct or not, because GGT adopted those values[88] and did not challenge them at the hearing before the Board

[87] Section 2.7 of the Code.

[88] GGT "Response to Final Decision on Proposed Revisions to Access Arrangement", 4 June 2010 at [17].

(although GGT did not agree with the reasoning used by the Authority to arrive at those values). The Board must, therefore, take the range of values adopted by the Authority in its Final Decision for the Parameters and for the Rate of Return as correct i.e. neither too high, nor too low, but in each case entirely appropriate. Further, the Authority provided evidence to support its views in its Final Decision[89].

172 Proceeding on the basis that the range of values for each of the Parameters and for the Rate of Return were correct, the question arises as to whether particular values within the ranges were more appropriate than others. At one point, GGT's argument was expressed in terms of "confidence". It said that the Authority or the Board could be more confident that a value at the upper end of the range of the Rate of Return was "correct", because material submitted by GGT to the Authority had proposed values for the Parameters which resulted in a higher range of values for the Rate of Return than the range adopted by the Authority. On the assumption that the range of reasonable values chosen by the Authority was correct, the fact that the Authority rejected GGT's (incorrect) range of values provides no basis for preferring any particular values or range of values in the range chosen by the Authority.

173 The submissions to the Authority dealing with the ranges of values of the Parameters did not express an opinion about the "real" or most likely value of a Parameter within the range proposed. For example, Synergies proposed a range for the equity beta of 1.0 to 1.8[90] and suggested that the point estimate be chosen from the upper half of this range, that is a figure between 1.4 and 1.8. However, it did so by reference to generally identified considerations, such as the asymmetric consequences of error, which is dealt with below, rather than an objective probabilistic analysis of outcomes. The difficulty of carrying out such an analysis was acknowledged by GGT when it stated that the Authority "set ranges for

[89] See [175]-[329] of the Final Decision.

[90] Synergies' Report of March 2009 entitled "Equity Beta Analysis".

parameters where these parameters are not readily observable and empirical evidence is uncertain"[91].

174 In the absence of an objective probabilistic analysis having been carried out, there was no basis for the Authority to have concluded that one value within the reasonable range for each of the Parameters was more probably "correct" than any other.

175 There is therefore no basis to conclude that the "risk of estimation" should have led the Authority to preferentially adopt a value for the Rate of Return that was at the upper end of the reasonable range of values rather than near the mid-point of the range.

4.4(b) Asymmetry of risk

176 GGT also contended[92] that the Authority failed to take into account or have proper regard to the risks associated with provision of the Reference Service in deciding not to adopt a Rate of Return at the upper end of the reasonable range of values.

177 In its written and oral submissions, GGT focused on the asymmetry of the consequences that might flow from an error in identifying the appropriate Rate of Return. GGT argued that the consequences of setting the Rate of Return too low were worse than the consequences of setting the Rate of Return too high so that, for safety's sake, a higher rate should have been adopted. GGT referred to a passage from the report of Synergies entitled "Goldfields Gas Pipeline Access Arrangement 2009: Equity Beta Analysis, March 2009, p14[93], which provided an extract from a Productivity Commission Report[94]. The full passage in the original is as follows:

Asymmetry in the consequences of regulatory pricing errors

[91] GGT Submissions at [9.9(d)].

[92] Ground 23(b) of GGT Application.

[93] GGT Submissions at [10.4].

[94] Review of the National Access Regime, Report No 17 (28 September 2001) at p82.

Regulators must operate with limited information and imperfect regulatory tools. This implies that precise delineation after the event between genuine monopoly rents and balancing upside profits on successful projects will be well nigh impossible. Accordingly, even an 'unbiased' regulator could sometimes allow a service provider to retain an element of rent, and sometimes truncate balancing upside profits. (As discussed in section 4.5, service providers argued that a range of factors are likely to encourage regulators to err on the side of users.) Some participants, including the NECG, argued that there is an asymmetry in the consequences of the two types of error, with under-compensation for service providers likely to be more costly for the community than over-compensation. In essence, the underlying proposition was that the cost conditions for natural monopoly facilities are such that the prospect of under-compensation can lead to non-provision of services. In contrast, over-compensation reduces, but does not eliminate, use of those services. Specifically, the NECG commented that:

> In using their discretion, regulators effectively face a choice between (i) erring on the side of lower access prices and seeking to ensure they remove any potential for monopoly rents and the consequent allocative inefficiencies from the system; or (ii) allowing higher access prices so as to ensure that sufficient incentives for efficient investment are retained, with the consequent productive and dynamic efficiencies such investment engenders.
>
> There are strong economic reasons in many regulated industries to place particular emphasis on ensuring the incentives are maintained for efficient investment and for continued productivity increases. The dynamic and productive efficiency costs associated with distorted investment incentives and with slower growth in productivity are almost always likely to outweigh any allocative efficiency losses associated with above-cost pricing. (sub. 39, p. 16)

For the reasons outlined above, the Commission does not subscribe to the view that, in a regulated environment, the community faces a choice between incurring the allocative efficiency costs of over-compensation and (more serious) dynamic costs of under-compensation. Both types of error are likely to influence investment outcomes and therefore have dynamic efficiency implications.

Nonetheless, the Commission accepts that there is a potential asymmetry in effects:

- Over-compensation may sometimes result in inefficiencies in the timing of new investment in essential infrastructure (with flow-ons to investment in related markets), and occasionally lead to inefficient investment to by-pass parts of a network. However, it will never preclude socially worthwhile investments from proceeding.

- On the other hand, if the truncation of balancing upside profits is expected to be substantial, major investments of considerable benefit to the community could be forgone, again with flow-on effects for investment in related markets.

In the Commission's view, the latter is likely to be a worse outcome. Accordingly, it concurs with the argument that access regulators should be circumspect in their attempts to remove monopoly rents perceived to attach to successful infrastructure projects.

178 A similar discussion occurs in *Re Michael* at [144] to [145]:

> [144] In particular, at the time of the Hilmer Report, it was recognised that economic theory offered no clear answer to how best to resolve many competing considerations, including how to achieve the most appropriate balance between the interests of consumers in obtaining low prices and the service provider in receiving higher prices, including monopoly rents, that might otherwise be obtainable (Hilmer p253). It was noted, however, (Hilmer p269) that where the conditions for workable competition are absent, firms may be able to charge prices above the efficient level for periods "beyond those justified by past investments and risks taken", it being a primary goal of competition policy to increase competitive pressures in such situations. It appears to be inherent in this that in a workably competitive market past investments and risks taken may provide some justification for prices above the efficient level.
>
> [145] The evidence before this Court does not establish that by December 1997, or even today, economic theory had resolved these competing considerations, or has come to a settled view as to the most appropriate balance. Indeed the expert evidence, including the supportive expert writings, suggested a growing awareness of the long term disadvantages of striking the balance with too great an emphasis on the interest of consumers in securing lower prices, and without due regard to the interest of the service provider in recovering both higher prices and its investment.

179 This passage suggests that Regulators should not to seek to eliminate monopoly rents too vigourously. It suggests that the Regulator should be cautious in selecting a value towards the lower bound of the reasonable range of values for the Rate of Return because of the consequences that might ensue. This passage does not on the other hand warrant arbitrary selection of a value at the top of the reasonable range of values. A Regulator must steer a course between the Scylla of under-compensation and the Charybdis of over-compensation.

180 In its Final Decision, the Authority did not explicitly refer to the issue as expounded in the passage from the Productivity Commission Report above. However, in its various decisions the Authority referred to the issues concerning the selection of the reasonable ranges of the parameters. It also reduced the risk of both under-compensation and over-compensation, by eliminating from consideration the upper and lower 10% of possible values for the Rate of Return[95].

181 In summary, the Board is not satisfied that the Authority failed to have appropriate regard to any asymmetry of risk issue as contended by GGT.

4.5 Occasion for exercising discretion under s 2.42 did not arise

4.5(a) Summary

182 GGT contended that the Authority erred in adopting and approving a Rate of Return under s 2.42 of the Code when the occasion for doing so had not arisen. GGT relied[96] on the assertion that its proposed 11.3% rate complied with the Code because 11.3% was within the reasonable range of values identified by the Authority in its Final Decision and therefore the Authority was obliged to accept 11.3% as the value for the Rate of Return. The Board rejects this argument for the reasons set out in section 4.3 above. However, the Authority's assessment process did not comply with ss 2.38 and 2.41 of the Code because the Authority did not give reasons for adopting 10.48% as the Rate of Return.

4.5(b) Consideration

183 Sections 2.38, 2.41 and 2.42 of the Code outline the specific approaches to be taken by the Regulator at the various stages of the review process.

184 Under s 2.38 the role of the Regulator, after the Draft Decision, is to consider whether the subsequent Amended Proposed Revised Access Arrangement complies with the Code.

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[95] Final Decision at [328], Draft Decision at [543].

[96] GGT Submissions at [10.26]-[10.30] of its Submissions.

185 When the Regulator has made its Final Decision and is fulfilling its role under s 2.41, the exercise of the Regulator's discretion is constrained. Section 2.41 requires the Regulator to consider whether the amended revisions to the Access Arrangement (i.e. in this case the Further Proposed Revisions):

(a) incorporate the amendments specified by the Regulator; or

(b) substantially incorporate the amendments specified by the Regulator; or

(c) otherwise address to the Regulator's satisfaction its reasons for requiring the specified amendments.

It is implicit in s 2.41 that a Service Provider may submit amended revisions which neither incorporate nor substantially incorporate the amendments specified by the Regulator but which otherwise address the reasons for the amendments. A Service Provider would reasonably expect that amendments would be accepted which actually did address the reasons for the requirements of the Regulator. This means that the Regulator must give reasons for any amendments which it requires as part of its Final Decision. A similar obligation arises from ss 2.35(b) and 2.37A in respect of the Draft Decision. Additionally, s 2.30 requires the Regulator to give reasons whenever it requires changes to the Access Arrangement Information.

186 Finally, when fulfilling its role under s 2.42 of the Code, if the Regulator is not satisfied that the Further Proposed Revisions meets any one of the 3 criteria in s 2.41, the Regulator must draft and approve its own amended revisions to the Access Arrangement, instead of approving the Further Proposed Revisions submitted by the Service Provider.

187 In the present case, the Authority required in its Final Decision that the Access Arrangement Information be amended to reflect the Parameter values it had determined[97] and a Rate of Return of 10.48%[98]. It is plain and was not disputed

[97] Final Decision at [318] – Required Amendment 6.

[98] Final Decision at [329] – Required Amendment 7.

that the subsequent Further Proposed Revisions submitted by GGT did not incorporate or substantially incorporate all the amendments specified by the Regulator. GGT did adopt the Authority's values for the Parameters and the reasonable range of values for the Rate of Return, but did not adopt the Authority's actual value for the Rate of Return (of 10.48%).

188 Accordingly, the issue for the Authority to consider in its Further Final Decision was whether GGT's proposed 11.3% Rate of Return "otherwise addressed" to the Authority's satisfaction the reasons given in its Final Decision for Required Amendment 7. Paragraphs [328] and [329] of the Final Decision deal with the selection of the value for the Rate of Return:

> 328. Based on the parameter values set out in Table 7, and using the approach for calculation of a reasonable WACC range outlined in the Draft Decision, the Authority considers that a reasonable range of values for the nominal pre-tax Rate of Return is 9.62 to 11.34 per cent.
>
> 329. For the purpose of this Final Decision, the Authority believes that the mid-point of this range, being a nominal pre-tax Rate of Return of 10.48 per cent, provides GGT with a return which is commensurate with the prevailing conditions in the market for funds and the risk involved in delivering the reference service.
>
> Required Amendment 7
>
> GGT's Amended Proposed Revisions should be amended to adopt a nominal pre- tax Rate of Return of 10.48%.

The Authority did not provide any specific reason in its Final Decision why the mid-point was chosen from amongst the other values within the reasonable range which also satisfied s 8.30. For example, the Authority did not say why the mid-point was a preferable Rate of Return to a rate of say, 10% or 11%. The Authority merely repeated the operative phrase of s 8.30 of the Code at [329], without providing any specific reason for choosing the mid-point.[99]

189 The Draft Decision also selected the mid-point of the reasonable range of values but again, no light was thrown on why the mid-point was preferable to other

[99] Section 8.30 is set out above at [139].

values within the range. The only reference to the selection of the mid-point in the Draft Decision is made at [547]:

> 547. The Authority considers that a reasonable range of values for the Rate of Return is 9.34% to 11.22%. For the purpose of this Draft Decision the Authority adopts the mid-point of this range, being a nominal pre-tax Rate of Return of 10.28%.

190 The Board cannot go behind the Final Decision and the Draft Decision. The Board cannot guess at the Authority's reasons for selecting the mid-point in the Final Decision (and the Draft Decision). In its oral submissions, GGT attacked the Authority's selection of the 10.48% rate as "arbitrary"[100]. In view of the lack of reasoning provided by the Authority in both the Final Decision and the Draft Decision, this characterisation is appropriate.

191 In these circumstances, the process under s 2.41 was flawed because the Authority did not in its Final Decision identify its reasons for requiring GGT to adopt 10.48% as the Rate of Return.

192 For the reasons given above, the Final Decision did not comply with the process contemplated by the Code because the Authority did not give reasons for choosing 10.48% as the Rate of Return over other rates within the reasonable range. GGT was deprived of the opportunity of submitting amended revisions which addressed the Authority's reasons for requiring the amendment. Another way of looking at the situation is to say that the Authority could not form an opinion about whether GGT's amended revisions satisfied the reasons for requiring the amendment to the Rate of Return because it had not identified any specific reasons for requiring the amendment.

193 BHPB argued that GGT was stuck with the Authority's decision to reject 11.3% because it failed to submit a proposed Rate of Return which fell within the reasonable range of values before the Final Decision. It argued that, after the Final Decision, it was too late for GGT to submit a rate which complied with the reasonable range of values identified in the Final Decision. In general terms, this

[100] Transcript p39, line 40.

argument has merit. However, the application of this argument depends upon the Final Decision complying with the process contemplated by the Code.

4.5(c) Conclusion

194 The Board considers that the exercise of the Authority's discretion under s 2.42 was incorrect within s 39 of Schedule 1 in relation to setting the Rate of Return. Its exercise of that discretion was vitiated by its failure to give reasons for selecting 10.48% as the Rate of Return.

4.6 Relief

195 GGT proposed that the Board should, in effect, hold a further inquiry in the event that the Board accepted that the Authority's decision was incorrect. However, GGT's arguments have been rejected. GGT had the opportunity during the course of the hearing before the Board to make submissions as to the appropriate rate, which it took advantage of. Also, s 39(5) of Schedule 1 does not permit a fresh inquiry to be held.

196 The Board considers that the preferable approach is to grant no relief in respect of this aspect of GGT's application for the following reasons:

(a) there was no challenge to the reasonable range of values for the Rate of Return adopted by the Authority; and

(b) the mid-point of the reasonable range of values for the nominal pre-tax Rate of Return, being 10.48%, is the appropriate value because:

(i) the matters identified and discussed at section 4.3 above mandate a balance between considerations which favour a higher Rate of Return, such as ss 8.1(a) and 2.24(a) of the Code, and considerations which favour a lower rate, such as ss 8.1(b) and 2.24(d), (e) and (f);

(ii) the Board considers that 10.48% balances the interests of Users, Potential Users and the public in having a low Reference Tariff and

in economic efficiency being achieved, against the interest of the Service Provider in recovering the efficient costs of delivering the Reference Service over the life of the assets applied. It thereby best reconciles the various Reference Tariff Principles and s 2.24 factors;

(iii) being well above the lower bound of the reasonable range of values, it mitigates against the danger of not providing an incentive to GGT to reduce costs and develop the market for Reference and other Services (s 8.1(f)) and will "provide a return which is commensurate with prevailing conditions in the market for funds and the risk involved in delivering the Reference Service", pursuant to s 8.30;

(iv) a rate at the mid-point mitigates the risk of either under-compensation or over-compensation and best addresses the objective of replicating the outcome of a competitive market, pursuant to s 8.1(b); and

(v) there was no information or analysis presented to the Authority that justified the selection of some other specific value between the mid-point and either boundary of the reasonable range of values of the Rate of Return;

197 In reaching this decision, the Board has considered the arguments put by GGT for adopting a value at the higher end of the range of values. The Board is also aware of values at the higher end of the range being adopted in other jurisdictions. Likewise, the Board has considered the support by BHPB for 10.48%, together with the analysis in the Authority's Decisions and reports from various consultants.

5 Allocation of Costs of Services

5.1 Summary

198 BHPB objected to the Authority's decision to:

(a) calculate the Reference Tariff on the basis that the capital costs, operating costs and Capacity of only the Covered Pipeline should be brought to account in determining the Total Revenue; and

(b) determine that the Services to be provided using only the Covered Pipeline (i.e. the Reference Service) should be used to derive a Reference Tariff for the Pipeline.

BHPB contended that the effect of these decisions is that the whole of the cost of assets that are used jointly to provide the Reference Service and Additional Services would be recovered from only Users of the Reference Service[101].

199 This issue turns on whether the services associated with the uncovered capacity of the Pipeline are "Services" within the meaning of that expression in ss 8.2 and 8.38 of the Code.

200 The Board considers that the services associated with the uncovered capacity of the Pipeline are not "Services" within ss 8.2 and 8.38 of the Code and accordingly, that the Authority was right to exclude them from the cost allocation process under s 8.38 of the Code.

5.2 Background

201 The factual background to this issue is as follows.

202 When the Pipeline was completed in 1996 it incorporated two compressor stations. One was at Yarraloola and the other at Ilgarari. A further compressor was installed in 2000 – 2001 at Wiluna and another at Paraburdoo in 2003 - 2004. These four compressors (together the "Initial Compressors") were operating when

[101] BHPB Outline of Submissions [13]-[14].

the 2005 Access Arrangement was approved. At that time, the Initial Compressors serviced the entire capacity of the Pipeline, which was some 109 TJ/day and was all Covered.

203 After the 2005 Access Arrangement commenced GGT installed additional compressors at Paraburdoo (second compressor) in 2006, Wyloo West in 2009 and Ned's Creek in 2009. As a result of the installation of these three compressors (together the "Additional Compressors"), the Pipeline was able to transport an additional 49 TJ/day of gas. GGT made elections pursuant to the EEP in the 2005 Access Arrangement that each of these additional tranches of capacity would not be Covered.

204 GGT entered into contractual arrangements with users to transport or haul gas utilising the new uncovered capacity of the Pipeline. BHPB referred to the services provided pursuant to these arrangements as "Additional Services" in its submissions[102]. The Additional Services were in a physical sense the same as the Reference Service provided under the Access Arrangement. The gas the subject of the Additional Services and the gas the subject of the Reference Service were both transported using the same physical infrastructure, that is the pipeline itself, the compressors (both Initial and Additional) and the related control systems, etc. Gas was only allocated to particular customers and particular services on delivery.

205 The Authority's views on the treatment of the costs associated with the two types of service reversed between its Draft Decision and its Final Decision. Its views are summarised at [54] to [60] of the Final Decision:

> 54. In its Draft Decision the Authority reasoned that while the additional compressors do not form part of the Covered Pipeline and the Services that are available as a result of the additional capacity created by those compressors do not form part of the Access Arrangement, the capital costs, operating costs and capacity of the GGP as a whole should be brought to account in determining the Total Revenue and the Services to be provided using the GGP as a whole should be used to derive a Reference Tariff for the Reference Service to be provided using the

[102] E.g. BHPB Submissions at [18].

Covered part of the GGP (**Covered GGP**).

55. The Authority's revised view, following its consideration of the public submissions on the Draft Decision, is that there appears to be an insufficient basis under the Code to support the position set out in the Draft Decision on this issue.

56. The Authority's view is that an alternative interpretation of the Code, which limits the operation of an Access Arrangement to that part of a pipeline which is the Covered Pipeline, appears to be more consistent with the relevant Code provisions.

57. In forming its view, the Authority has examined the context in which the term "Service" is used in the Code on the basis that it believes this to be an important issue in reaching a view on how the Expansions of Capacity should be treated in calculating a Reference Tariff for the GGP, as the Total Revenue for the Covered GGP is required to be equal to the cost of providing "all Services". The Authority considers, after reviewing relevant sections of the Code which use the term "Services", that the use of this term is consistent with an interpretation that Services relate only to those Services provided by means of the Covered GGP. Further, the Code as a whole, including the provisions which use the concept of Services, adopts a consistent approach that confines the Authority to considering the price and terms of access required for the Covered GGP only.

58. Accordingly, based on this revised view, the Authority considers that the approach adopted in the Draft Decision, which considered the definition of the term "Service" to include any service provided by means of the GGP as a whole on the basis that such services could not be supplied without the existence of the Covered GGP, is inconsistent with the Code.

59. Consequently, the Authority considers that the Code provisions require that the capital costs, operating costs and Capacity of only the Covered GGP should be brought to account in determining the Total Revenue and that the Services to be provided using only the Covered GGP should be used to derive a Reference Tariff for the GGP.

60. The Authority considers that the Expansions of Capacity which GGT has elected, under the current Access Arrangement, to exclude from coverage do not form part of the Covered GGP and the Authority considers that the Code does not provide it with the jurisdiction to determine a Reference Tariff for the GGP on the basis of the provision of access to the GGP as a whole.

206 BHPB had supported the Authority's Draft Decision, but objected to its Final Decision. It now wishes to effectively have the Draft Decision reinstated in this respect, although it proposes a methodology for allocating costs different to that initially used by the Authority in its Draft Decision.

5.3 Consideration

207 The starting point is s 8.2 of the Code. Section 8.2(a) and (b) provide:

> 8.2 The factors about which the Relevant Regulator must be satisfied in determining to approve a Reference Tariff and Reference Tariff Policy are that:
>
> (a) the revenue to be generated from the sales (or forecast sales) of all Services over the Access Arrangement Period (the Total Revenue) should be established consistently with the principles and according to one of the methodologies contained in this section 8;
>
> (b) to the extent that the Covered Pipeline is used to provide a number of Services, that portion of Total Revenue that a Reference Tariff is designed to recover (which may be based upon forecasts) is calculated consistently with the principles contained in this section 8;
>
> …

208 Section 8.38 of the Code provides:

> **Allocation of Revenue (Costs) between Services**
>
> 8.38 Subject to sections 8.40 and 8.43, to the maximum extent that is commercially and technically reasonable, the portion of the Total Revenue (referred to in section 8.4) that a Reference Tariff should be designed to recover (which may be based on forecasts) should include:
>
> (a) all of the Total Revenue that reflects costs incurred (including capital costs) that are directly attributable to the Reference Service; and
>
> (b) a share of the Total Revenue that reflects costs incurred (including capital costs) that are attributable to providing the Reference Service jointly with other Services, with this share to be determined in accordance with a methodology that meets the objectives in section 8.1 and is otherwise fair and reasonable.

209 BHPB's argument may be summarised as follows:

(a) the expression "directly attributable" in s 8.38(a) means "solely or exclusively attributable", so that only the costs of infrastructure used solely or exclusively for providing the Reference Service fall within s 8.38(a);

(b) only the costs associated with the Initial Compressors fall into this category of costs as only they are used exclusively for providing the Reference Service;

(c) the Additional Services are "Services" within the meaning of that expression in s 8.38 (and s 8.2), so that infrastructure used for providing the Reference Services and the Additional Services fall within s 8.38(b); and

(d) the costs associated with the Pipeline fall within s 8.38(b) because they are attributable to providing the Reference Service jointly with the Additional Service.

210 This has the consequence that:

(a) the Reference Tariff should be designed to recover the whole of the costs of the Initial Compressors but only a share of the costs of the Pipeline, rather than all of the costs of the Pipeline; and

(b) the remaining part of the costs of the Pipeline should be attributed to the Additional Services and should not be recovered by the Reference Tariff.

This would significantly reduce the Reference Tariff.

211 The "pipeline assets" that BHPB contends are used jointly for both the Additional Services and the Reference Service comprise the pipeline itself, the main line valve and scraper stations, receipt and delivery point facilities, SCADA and communication facilities, cathodic protection and the maintenance bases and depots.

212 A preliminary issue which arises is the meaning of the expression "directly attributable" in s 8.38(a). The Board accepts BHPB's contention that it means "solely or exclusively attributable". This is because of the structure of s 8.38. Paragraph (a), which uses "directly attributable", is clearly intended to cover costs which are not covered by paragraph (b). Paragraph (b) refers to costs that are attributable to the joint provision of the Reference Service and other Services.

Hence, paragraph (a) must have the meaning for which BHPB contends.

213 The issue of the meaning of "Services" in s 8.38 is less straightforward. The expression is defined in s 10.8 of the Code:

> 10.8 The following definitions apply unless the context otherwise requires:
>
> …
>
> ***Service*** means:
>
> (a) a service provided by means of a Covered Pipeline (or when used in section 1 a service provided by means of a Pipeline) including (without limitation):
>
> (i) haulage services (such as firm haulage, interruptible haulage, spot haulage and backhaul); and
>
> (ii) the right to interconnect with the Covered Pipeline, and
>
> (b) services ancillary to the provision of such services,
>
> but does not include the production, sale or purchasing of Natural Gas.

214 BHPB supported the proposition that the Additional Services fell within the definition of "Service" on a number of grounds.

215 First, BHPB argued that the Additional Services were "services", within the ordinary meaning of that expression, and that they were provided by means of a "Covered Pipeline", namely the Goldfields Gas Pipeline. BHPB pointed out that the expression "by means of" in paragraph (a) of the definition does not require that the service be provided exclusively by means of the Covered Pipeline. If a service is provided by means of the Covered Pipeline, along with other items of equipment, such as the Additional Compressors, it is still provided "by means of" the Covered Pipeline. BHPB contended that, in the present context, "Covered Pipeline" means the system of pipes for transporting natural gas from Yarraloola to Kalgoorlie and any tanks, reservoirs, machinery or equipment directly attached to the system of pipes, citing s 2 of the 1998 Act[103]. It pointed out that gas

[103] BHPB Submissions at [22].

appropriated to the Additional Services could not be delivered to customers using the Additional Compressors on a standalone basis. Such services require the use of the whole of the infrastructure of the Pipeline.

216 Second, BHPB argued that the definition of "Service" is broad and inclusive, supporting this by reference to *Duke Eastern Gas Pipeline Pty Ltd*[104] ("*Duke*") at [70]. BHPB also referred to *Alinta Asset Management Pty Ltd v Essential Services Commission* [2008] VSCA 273; (2008) 22 VR 275 ("*Alinta*") at [141] (Dodds-Streeton JA) and [188] (Hansen AJA).

217 Third, BHPB put forward the argument that the Additional Services were "ancillary to" the other services provided by means of the Pipeline.

218 Fourth, BHPB pursued a broader argument that its construction of "Services" was consistent with and furthered the purposes of the Code. The purposes of the Code include preventing abuse of monopoly power and promoting a competitive market for gas on terms that are fair and reasonable. This appears from paragraphs (b), (c) and (d) of the Introduction to the Code, and ss 2.24 and 8.1. Section 10.5 allows regard to be had to the Introduction to confirm meaning or where a provision is ambiguous or absurd. If the "Additional Services" were "Services" within the definition of that term, then the Reference Service would not have to bear the whole of the cost of the pipeline assets through the Reference Tariff, when GGT uses the Pipeline to earn income through the Additional Services as well. BHPB argued that the approach of the Authority in its Final Decision allowed GGT to make windfall profits from the supply of the Additional Services, which was not fair or reasonable. BHPB supported its position by referring to the NERA Report, which states that the incremental costs of the Additional Compressors are below the Reference Tariff and yet the charges for Additional Services are higher than the Reference Tariff[105].

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[104] [2001] A Comp T 2; 162 FLR 1.

[105] NERA Economic Consulting report "Economic Impact of Proposed Expansion Policy" dated 4 June 2010, at p7.

219 Turning to BHPB's first argument, the Board accepts that the Additional Services are "services" within the ordinary meaning of that word. However, the Board does not accept that the Additional Services are "services provided by means of a Covered Pipeline" within the definition of "Services" in s 10.8 of the Code.

220 Section 10.8 contains a definition of "Pipeline", which merely refers back to the meaning given to the expression in the 1998 Law. However, there is no definition of "Pipeline" in Schedule 1, only a definition of "pipeline". The Board assumes therefore that the following definition of "pipeline" from the 1998 Law is that which applies to the term "Pipeline" throughout the Code:

> ***pipeline*** means a pipe, or system of pipes, or part of a pipe, or system of pipes, for transporting natural gas, and any tanks, reservoirs, machinery or equipment directly attached to the pipe, or system of pipes, but does not include …

This definition of "pipeline" has the emphasis on the physical pipeline and associated equipment, as stressed by BHPB.

221 There is also a definition of "Covered Pipeline" in s 10.8 of the Code:

> ***Covered Pipeline*** means, subject to sections 2.3 and 2.4, the whole or a particular part of a Pipeline or proposed Pipeline which is Covered and any extension to, or expansion of the Capacity of, that Covered Pipeline which is to be treated as part of the Covered Pipeline in accordance with the Extensions/Expansions Policy contained in the Access Arrangement for that Covered Pipeline and any expansion of that Covered Pipeline required to be installed under section 6.22.

This definition of "Covered Pipeline" reflects the definition of "Coverage/Covered" in s 10.8:

> ***Coverage/Covered*** means, in relation to a Pipeline or part of a Pipeline, that that Pipeline or part of a Pipeline is subject to the provisions of this Code pursuant to sections 1.1, 1.13, 1.20 or 1.21.

222 The definitions of "Covered Pipeline" and "Coverage/Covered" distinguish between the physical pipeline and the Covered Pipeline. They recognise that parts or aspects of a pipeline, its facilities or its use may not be Covered and, in particular, that an extension to, or expansion of the Capacity of, the Pipeline may

not be Covered under the Code. Uncovered extensions and expansions of a "Pipeline" do not form part of the "Covered Pipeline" even though an uncovered extension or expansion of a Pipeline will inevitably require the use of some of the physical components making up the pipeline infrastructure to transport gas. Consequently, the distinction between the Covered Capacity of a Pipeline and the uncovered capacity of a Pipeline does not depend on which assets are used in respect of that capacity. It is not, therefore, correct to equate "Covered Pipeline" with the physical assets by which gas is transported or to equate the "Covered Pipeline" in this case with the physical assets making up and associated with the pipeline from Yarraloola to Kalgoorlie.

223 The definition of "Service" in s 10.8 of the Code uses the expression "Covered Pipeline" rather than "Pipeline", in the first phrase of that definition. This use must be deliberate because the expression "Pipeline" is used without "Covered" in the next phrase, "(or when used in s 1 a service provided by means of a Pipeline)". The Code could have used the expression "Pipeline" throughout had it been intended to emphasize the physical assets making up the Pipeline, and to include within the definition of "Service" all services provided by means of the physical assets making up the Pipeline. The use of the expression "Covered Pipeline" rather than "Pipeline" in the definition of "Service" shows that paragraph (a) of the definition of "Service" is not directed to the relationship between a service and the physical pipeline but to the relationship between that service and the "Covered Pipeline", i.e. that part of the capacity of the physical pipeline that is Covered Capacity. There is no relevant relationship between the Additional Services and the Covered Pipeline because the uncovered capacity is not subject to regulation under the Code (apart from the possibility of an application for Coverage under s 1) and the Additional Services only utilise or form part of the uncovered capacity. The Additional Services are not provided by means of the Covered Pipeline and do not, therefore, fall within paragraph (a) of the definition of "Service" in s 10.8.

224 BHPB asserted that this approach effectively creates a notional pipeline, over and above the physical pipeline. However, the idea that part of the capacity of the pipeline and part of the activities of the Service Provider in relation to the pipeline may not be subject to regulation under the Code is implicit in s 3.16, which is a mandatory element of any Access Arrangement under the Code, and in the definitions of "Covered Pipeline" and "Coverage/Covered". In addition, the Introduction to s 1 of the Code states:

> An extensions/expansions policy in the Access Arrangement for a Covered Pipeline will define when an extension to, or expansion of the Capacity of, a Covered Pipeline will be treated as part of the same Covered Pipeline and when that extension or expansion is to be regarded as a separate Pipeline which may be the subject of a separate Coverage application.

This passage contemplates that an extension or expansion of the Capacity of a Pipeline may be treated as a separate Pipeline under the Code, even though it uses the same physical components as a Pipeline which is already subject to coverage under the Code. The Board considers that reference to the Introduction to s 1 is permitted by s 10.5 of the Code, being either to confirm that the ordinary meaning applies, or to deal with ambiguity or obscurity.

225 Nor does the Board accept that the Additional Services are "services ancillary to the provision of such services" within paragraph (b) of the definition of "Service". The word "ancillary" suggests services which are linked with the services falling within paragraph (a), but which are subordinate and supplementary to the principal services within paragraph (a) of the definition. Meter reading and telemetric monitoring and management of remote unmanned compressors are examples of ancillary services. The Additional Services are independent, substantive services and do not fall within paragraph (b) of the definition of Service.

226 There are remarks in *Alinta* which suggest that an essentially factual approach is appropriate to identifying whether services are provided "by means of" a pipeline. In *Alinta*, the Court was considering whether the appellant was a "Service

Provider" within the meaning of s 22 of the *Gas Industry Act 2001* (Vic), which depended ultimately upon whether the appellant provided a "Service" within the definition of that expression in the Code applicable in Victoria at that time. The definition of "Service" considered in *Alinta* is set out at [123] of that decision. It is not significantly different from the definition set out at [213] above. In particular, it refers to services provided by means of a *Covered* Pipeline. Justice Hansen said:

> [253] In undertaking that task concerning s 22(1) the trial judge sought to identify the meaning of the several words and expressions in s 22(1). In doing so her Honour concluded that the expression "by means of" meant "use" or "using". That may be correct, but I tend to doubt that "using" is in every respect synonymous with "by means of". In my view, the expression "by means of" speaks for itself, and the danger in seeking another word whereby to represent the meaning of the expression is the risk of the possible alteration of meaning and thus application of s 22(1). As to this sort of risk in interpreting a statute, see *K & S Lake City Freighters Pty Ltd v Gordon & Gotch Ltd*.
>
> [254] In my view, the expression "by means of" requires no such explanation. I read it as an expression carefully chosen to enable the licensing requirement to engage in the appropriate case. That is when the services are provided "by means of" the distribution pipeline. Whether it can be said of services that they are so provided will turn on the nexus or relationship between the provision of those services and the pipeline. That will be determined upon the evidence.

Justice Dodds-Streeton said:

> [188] The natural and ordinary meaning of the provision of services by means of a pipeline in my view encompasses the supply or furnishing of services by means of a pipeline (most obviously, the haulage and distribution of gas) in a wider sense. It extends beyond a disposition of legal rights to encompass the supply of services in other ways, including, relevantly, the control of operation of the pipeline system to enable gas to enter, be transmitted or hauled through the pipes, and to exit at the relevant exit point.

227 Justice Ashley endorsed both judgments[106].

228 Neither Hansen AJA nor Dodds-Streeton AJ used the expression "Covered Pipeline". At [141], Dodds-Streeton JA quoted a portion of the definition of

[106] *Alinta* at [5].

"Service" but omitted "Covered" and did not capitalise "Pipeline". No doubt the ellipsis of "Covered" was because the issue with which *Alinta* was concerned was unrelated to the question of Coverage. The result is that *Alinta* provides little guidance in the present case. The question in these proceedings is whether services are provided by means of a Covered Pipeline, not whether they are provided by means of a Pipeline. An inquiry directed primarily to factual matters is no doubt appropriate to the latter question.

229 *Duke* does not assist. That case was an application for review of a decision by the Minister that the Eastern Gas Pipeline should be Covered. The Court was concerned with whether the expression "services provided by means of the pipeline" should be defined by reference to questions of market definition and market power or by reference to the physical characteristics of the service. The case was not concerned with questions of Coverage of parts of the Pipeline. Paragraph [70] does not discuss whether a broad or narrow definition of "Service" is appropriate.

230 A significant difficulty with BHPB's construction of the definition of "Service" is that it is not capable of consistent application throughout the Code. GGT drew the Board's attention to s 3.1 of the Code. If the "Additional Services" were "Services", then s 3.1 would apply and it would be necessary for the Access Arrangement to include a policy on the Additional Services. If, as appears to be the case, a significant part of the market was likely to seek the Additional Services, then GGT would be obliged to include such services in its Access Arrangement as further Reference Services and determine Reference Tariffs for those services. This outcome would be inconsistent with the uncovered character of the Additional Services.

231 BHPB endeavoured to counter this argument by referring to the opening words of s 10.8, which permit a different meaning of a defined expression where the context requires. The Board considers that the context of the expression "Service" does not require a meaning other than the defined meaning given to

"Services" in s 8.38. Excluding the Additional Services from the scope of "Services" in s 8.38 of the Code does not lead to a result which the legislature did not intend[107]. The scheme of the Code is that Pipelines are regulated by the Code only to the extent that they are Covered.

232 It appears true that GGT is able to make greater profits from the Additional Services than it would if the Additional Services were taken into account under s 8.38 as BHPB contended. BHPB further contended that GGT makes windfall profits from the Additional Services and that the Reference Tariff "underwrites" the assets used in providing the Additional Services. However, the Reference Tariff is no higher than it would be if the Additional Services were not provided. A person paying the Reference Tariff is no worse off than if the capacity of the Pipeline had not been expanded and the Additional Services had not been supplied. Further, it remains open to BHPB or any other party, including the Authority, to seek Coverage of the additional capacity under s 1 of the Code. If successful, this would result in a revised allocation of costs across all Services.

233 During the course of the hearing an issue arose as to whether other gas pipeline Access Arrangements had allocated costs in the manner for which BHPB contended. The Board was referred to the following:

(a) the 2003 Access Arrangement and Access Arrangement Information for the Amadeus Basin to Darwin Pipeline ("Amadeus");

(b) the 2002 Access Arrangement and Access Arrangement Information for the Moomba to Adelaide Pipeline ("Moomba"); and

(c) the Jemena Gas Networks.

These examples did not assist the Board. Each involved services that utilised or formed part of the Covered Capacity of the respective pipelines. Those Access Arrangements are consistent with the approach taken by the Authority in this case.

[107] *Deputy Commissioner of Taxation v Mutton* (1988) 12 NSWLR 104 at 108 (Mahoney JA), *Melrose Farm Pty Ltd trading as Milesaway Tours v Milward* [2008] WASCA 175 at [54].

There was no real consideration of the meaning of "Services".

234 In response to a request by the Board, the Authority provided information about the approach to cost allocation taken by other regulators in Australia. In determining the price payable for regulated services, some regulators do adopt the practice of making an allowance for the use made of regulated assets to provide unregulated services. However, the regulators were operating under different regulatory regimes which, of course, determine the matters which they may take into account in determining tariffs. They do not assist the Board in its present deliberations. It appears, however, that some of these other arrangements represent commercial reality more closely than the situation that applies for the Pipeline. If, for example, another entity wished to connect additional pipes or compressors to the Pipeline to deliver gas to a third party, one would expect that GGT would ordinarily charge a service or fee to that entity for the use of its upstream pipeline assets.

5.4 Conclusion

235 The Board concludes the Additional Services are not a "Service" within the definition of that term in s 10.8 of the Code. Consequently, BHPB has not demonstrated that the Further Final Decision was incorrect or unreasonable in regard to the Allocation of Costs of Services.

6. True Up

6.1 Summary

236 BHPB contended that when making the Further Final Decision, the Authority erred in:

(a) failing to take into account the "over recovery" of revenue by GGT during the period from 1 January 2010 until 20 August 2010 that occurred because the Reference Tariff for the 2005 Access Arrangement was higher

than that for the 2010 Access Arrangement[108]; and

(b) using financial models which did not reflect the continued application of the 2005 Access Arrangement[109]

with the consequence that the Further Final Decision was incorrect or unreasonable.

237 BHPB contended that the Authority should have included a component in the Reference Tariff calculation which corrected the over recovery. It described this as a "True Up" mechanism. The mechanism BHPB proposed was re-setting the tariff applicable for the period from 20 August 2010 until 31 December 2014 so that the revenue for that period when combined with the revenue already earned during the period 1 January 2010 to 20 August 2010, recovered the costs of delivering the Reference Service over the period 1 January 2010 to 31 December 2014. BHPB estimated that this revised tariff would be 1.81% lower than the 2010 Reference Tariff set by the Authority[110].

238 The Board considers that the decision of the Authority was incorrect in that it failed to use the actual Access Arrangement Period in its financial models for the determination of Total Revenue and the Reference Tariff. However, the Board considers that the Authority was not entitled to adjust the Reference Tariff by reference to the sales of Services which occurred before the start of the 2010 Access Arrangement Period.

6.2 Background

239 What happened was this:

(a) the Authority determined the Reference Tariff in the 2010 Access Arrangement ("2010 Tariff") based on financial models covering the Cost of Services over the full five year period from 1 January 2010 until 31

[108] BHPB Application Ground 3.

[109] BHPB Application Ground 1(g) and 1(h).

[110] BHPB Submissions at [48].

December 2014. This is apparent from the spreadsheets used by the Authority in calculating the Total Revenue and the Reference Tariff;

(b) the 2010 Tariff did not come into effect until 20 August 2010, in accordance with the Further Final Decision and s 2.48 of the Code;

(c) the 2010 Tariff, with a Rate of Return of 10.48%, was lower than the Reference Tariff for the 2005 Access Arrangement ("2005 Tariff"), which had a Rate of Return of 10.6%[111]; and

(d) the 2005 Tariff continued to apply during the period from 1 January 2010 to 20 August 2010, when the 2010 Tariff took effect.

240 As a consequence, GGT received more revenue during the period 1 January 2010 to 20 August 2010 than it would have done had the 2010 Tariff come into effect on 1 January 2010. Other things being equal, GGT will receive more Revenue during the period 1 January 2010 to 31 December 2014 than the Total Revenue determined by the Authority when striking the 2010 Tariff.

241 BHPB argued that the Authority's calculation of the 2010 Tariff was inconsistent with s 8.1(a) of the Code because it would allow GGT to recover more than the efficient costs of delivering the Reference Service over the expected life of the assets used in delivering the Reference Service. The over recovery during the period 1 January 2010 to 20 August 2010 would be retained for the rest of the expected life of the assets, unless corrected.

242 BHPB calculated that the adjusted Reference Tariff should be 1.81% less than the 2010 Tariff over the entire period of the 2010 Access Arrangement to compensate for the over recovery. BHPB also contended that the Board should adopt a similar approach if it set aside the Further Final Decision, although the amount of the adjustment would need to be greater if the Board's decision applied from a date later than 20 August 2010 because there was less time remaining in the Access

[111] BHPB Reply Submissions at [79].

Arrangement Period to adjust for the over recovery[112]. For example, BHPB estimated a reduction of 2.36% should be applied if the adjusted Reference Tariff was to operate from 1 July 2011.

6.3 Consideration

243 GGT argued, as a preliminary point, that BHPB's Outline of Submissions did not address the question whether there was any reviewable error and therefore this review ground should not be allowed[113]. BHPB responded that GGT misstated BHPB's original review grounds 1(g), 1(h), 3 and 4, which in respect of the True-Up error, expressly included that "the Regulator erred in its findings of fact or the exercise of its discretion was incorrect or was unreasonable having regard to all the circumstances ..."[114]. The Board accepts BHPB's argument on this point.

244 Section 2.24 of the Code requires the Regulator to ensure that the Access Arrangement contains the elements and satisfies the principles set out in ss 3.1 to 3.20. Section 3.4 requires the Reference Tariff to comply with the Reference Tariff Principles described in s 8.

245 Section 8.1 provides that a Reference Tariff "should be designed with a view to achieving" a number of "objectives", including the following:

> (a) providing the Service Provider with the opportunity to earn a stream of revenue that recovers the efficient costs of delivering the Reference Service over the expected life of the assets used in delivering that Service;
>
> (b) replicating the outcome of a competitive market;
>
> …

246 Section 8.2 provides:

> 8.2 The factors about which the Relevant Regulator must be satisfied in determining to approve a Reference Tariff and Reference Tariff Policy are that:

[112] BHPB Submissions at [49].

[113] GGT Reply Submissions at [9]

[114] BHPB Reply Submissions at [25].

> (a) the revenue to be generated from the sales (or forecast sales) of all Services over the Access Arrangement Period (the Total Revenue) should be established consistently with the principles and according to one of the methodologies contained in this section 8;
>
> (b) to the extent that the Covered Pipeline is used to provide a number of Services, that portion of Total Revenue that a Reference Tariff is designed to recover (which may be based upon forecasts) is calculated consistently with the principles contained in this section 8;
>
> ...
>
> (e) any forecasts required in setting the Reference Tariff represent best estimates arrived at on a reasonable basis.

247 Section 8.4 provides that the Total Revenue should be calculated on the basis of one of three methodologies set out in that section. Each of the methodologies involves forecasting the costs involved in providing the services.

248 An essential feature of s 8.2(a) is that it is directed to ascertaining the revenue and costs for the Access Arrangement Period. The Access Arrangement Period is defined by s 10.8 to mean "the period from when revisions to an Access Arrangement or revisions to an Access Arrangement take effect … until the next Revisions Commencement Date". The Revisions Commencement date is "the date upon which the next revisions to the Access Arrangement are intended to commence"[115]. Section 2.48 lays down that revisions to an Access Arrangement come into effect on the date specified by the Regulator which must be not less than a date 14 days after the decision. The Board considers that the Authority acted incorrectly, within s 39(2)(a)(ii) of Schedule 1, in determining the 2010 Tariff.

249 Section 8.2(e) of the Code requires the forecasts used in setting the Reference Tariff to "represent best estimates". The forecasts applied by the Authority were for the full five-year period from 1 January 2010 to 31 December 2014. However, these estimates were applied when it was apparent that the 2010 Access Arrangement Period would not start on 1 January 2010, but would be delayed and

[115] Section 10.8 and 3.17 of the Code.

cover a shorter period of time than previously contemplated. The Further Final Decision was made on 5 August 2010. The Further Final Decision stipulated a commencement date of 20 August 2010. Therefore the Access Arrangement Period applicable for the 2010 Access Arrangement and the calculation of the 2010 Tariff was 20 August 2010 to 31 December 2014. The Authority should have reset the commencement date for its final financial modeling to match the commencement date for the 2010 Access Arrangement. Consequently, the forecasts applied were not "best estimates", contrary to s 8.2(e) of the Code. Further, the estimate of Total Revenue was not an estimate in respect of the actual Access Arrangement Period, but in respect of the longer period from 1 January 2010 to 31 December 2014.

250 The period from 1 January 2010 to 20 August 2010 did not form part of the 2010 Access Arrangement Period. Consequently, the revenue and costs associated with that prior period are not relevant to determining the Reference Tariff applicable for the 2010 Access Arrangement.

251 This conclusion may mean that the stream of revenue from the Pipeline is greater over the life of the Assets than the efficient costs of delivering the service, giving rise to some inconsistency between the operation of s 8.2(a) and (b) and 8.1.

252 Two comments may be made:

(a) the language of s 8.2 is imperative. Section 8.2 identifies factors "about which the … Regulator must be satisfied". On the other hand, s 8.1 is more aspirational – the policy "should be designed with a view to achieving" the "objectives" in paragraphs (a) to (f). In the event of an inconsistency, priority should be given to s 8.2; and

(b) it is inevitable that sometimes there will be imperfections in the operation of the Code. There may be other occasions where a Reference Tariff is not set until after the end of the previous Access Arrangement but the new Reference Tariff is higher than the existing one. There is no reason why

any delay in commencement of the Access Arrangement Period would necessarily advantage the Service Provider rather than the Users.

253 During the course of the hearing, the Board enquired whether there were instances where Reference Tariffs had been adjusted to take this issue into account. Some Access Arrangements have provided that new tariffs would come into operation on a date after the Access Arrangement as a whole came into force (see for example the MultiNet Further Final Decision of 19 May 2008). This does not address the issue raised in these proceedings. The 2003 Access Arrangement for GasNet appears closer to the mark. It incorporated transitional arrangements to take account of the fact that commencement of the 2003 Access Arrangement was delayed past 1 January 2003. The decision in that matter states:

> Although the revisions comprising this Access Arrangement came into effect on 1 February 2003, it is intended that GasNet and Users should be no worse off than if the revisions had commenced on 1 January 2003.

The Access Arrangement then goes on to provide for a one off "transition payment" calculated by reference to the difference between the charges that would have been payable under the former Reference Tariff and the charges payable under the new Access Arrangement. The reasoning of the Regulator in adopting this approach is not apparent from the decision. The result appears to have been reached with the agreement of the Service Provider. The Board is not persuaded by this example that its analysis of the operation of the Code is wrong.

6.5 Relief

254 The Board considers that the Authority was incorrect, within the meaning of that expression in s 39(2)(a)(ii) of Schedule 1, by not using forecasts in its financial modeling that reflected the actual period of the 2010 Access Arrangement – i.e. 20 August 2010 until 31 December 2014. As a result it did not correctly calculate the Total Revenue and Reference Tariff for the 2010 Access Arrangement Period.

255 Accordingly, the Board directs the Authority to rerun its financial model, using the estimates available at the time, for the period 20 August 2010 to 30 December

2014, to determine the Total Revenue for the 2010 Access Arrangement Period and calculate a new Reference Tariff.

256 Section 38(9) of Schedule 1 provides that the Board may make an order "varying immediately or at some future date" the decision under review. The future Reference Tariff would need to be calculated so that, during the period of operation between the date the future Reference Tariff comes into effect and 31 December 2014, it would make up for any over or under compensation during the period from the commencement of the Access Arrangement Period until the date the future Reference Tariff came into force.

7 Orders

257 The Board will list the matter for directions to enable the outstanding issues to be resolved.

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DS Ellis
Presiding Member