

Proposed Revisions DBNGP Access Arrangement

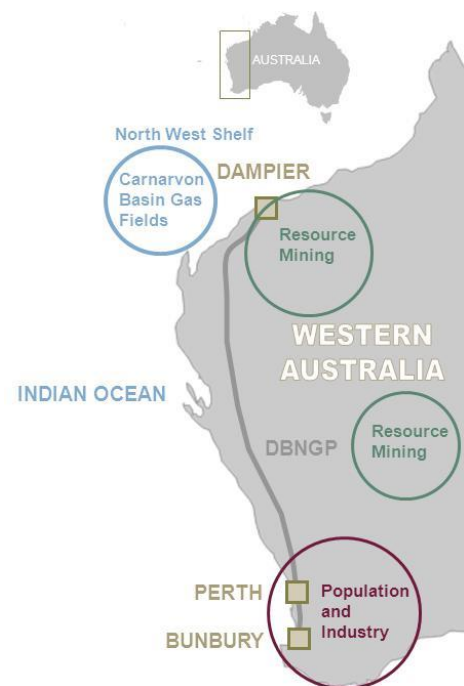
*2016 – 2020 Access Arrangement Period
Supporting Submission: 58
Response to Draft Decision Non Tariff Amendments*



Date Submitted: 22 February 2016

DBP Transmission (DBP) is the owner and operator of the Dampier to Bunbury Natural Gas Pipeline (DBNGP), Western Australia's most important piece of energy infrastructure.

The DBNGP is WA's key gas transmission pipeline stretching almost 1600 kilometres and linking the gas fields located in the Carnarvon Basin off the Pilbara coast with population centres and industry in the south-west of the State



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1. INTRODUCTION

- 1.1 On 22 December 2015, the Economic Regulation Authority (**ERA**) made its draft decision (**Draft Decision**) in relation to the full access arrangement proposal filed by DBNGP (WA) Transmission Pty Ltd (**DBP**) on 31 December 2014 (**Original AA Proposal**).
- 1.2 The Draft Decision indicates that the ERA:
 - (a) is not prepared to approve the Original AA Proposal; and
 - (b) requires 74 amendments to the Original AA Proposal in order to make the access arrangement proposal acceptable to the ERA.
- 1.3 The Draft Decision also fixes a period for amendment of and/or addition to the Original AA Proposal (**revision period**), which revision period expires on 22 February 2016.
- 1.4 On 22 February 2016, pursuant to Rule 60 of the NGR, DBP submitted the following documents which make up the amended access arrangement proposal (**Amended AA Proposal**):
 - (a) Amended Proposed Revised Access Arrangement; and
 - (b) Amended Proposed Revised Access Arrangement Information.
- 1.5 Rule 59(5)(c)(iii) of the NGR requires the ERA to allow at least 20 business days from the end of the revision period for submissions to be made (in relation to both the Draft Decision and the Amended AA Proposal). The ERA has advised that interested parties are able to make submissions on the ERA's Draft Decision up until 4:00pm (WST) 22 March 2016.
- 1.6 While DBP has submitted to the ERA that the Amended AA Proposal contains the information that the NGA (which includes the WA National Gas Access Law text (**NGL**) and the National Gas Rules (**NGR**) requires to be included in order to enable it to be approved by the ERA, DBP also advised that it will be filing the following supporting submissions that explain and substantiate the amendments and additions in the Amended AA Proposal that have been made to address various matters raised in the Draft Decision:
 - (a) Submission 50 – Amended AA Proposal
 - (b) Submission 51 – Response to Pipeline Services Amendments
 - (c) Submission 52 – Response to Terms and Conditions Amendments
 - (d) Submission 53 – Response to Opening Capital Base Amendments
 - (e) Submission 54 – Response to Forecast Capital Expenditure Amendments
 - (f) Submission 55 – Response to Forecast Operating Expenditure Amendments
 - (g) Submission 56 – Response to Rate of Return Amendments
 - (h) Submission 57 – Response to Other Tariff Related Amendments
 - (i) Submission 58 – Response to Other Non Tariff Related Amendments (this submission)
- 1.7 In this Submission, DBP:
 - (a) substantiates its amendments and additions made in the relation to certain non tariff elements of the Amended AA Proposal; and
 - (b) responds to the reasoning in the Draft Decision for the following Amendments relating to these elements:
 - (i) Amendment 8, inclusion of an operational expenditure KPI to support proposed operating expenditure;

- (ii) Amendment 67, regarding the drafting of clause 6.2(b) of the terms and condition relating to the transfer of a shipper's contracted capacity with the operator's consent; and
- (iii) Amendments 70, 71, 72, 73 and 74, regarding further drafting changes to the terms and conditions.

2. RESPONSE TO AMENDMENT 8 - KPIS

Amendment 8 and Reasons for Amendment

- 2.1 Draft Decision Amendment 8 requires the following amendment to be made to DBP's AA Proposal in order to make it acceptable to the ERA.

"DBP must include an operational expenditure KPI based on \$/km, or similar, to support its proposed operating expenditure forecast."

- 2.2 Paragraphs 143 to 147 of the Draft Decision contains what appears to be the ERA's deliberations in relation to the amendment, although these paragraphs do not actually contain any of the ERA's reasons for rejecting DBP's proposed KPI and requiring the above amendment as an alternative KPI. So, it is unclear just what are the ERA's reasons for this amendment.

- 2.3 However, in these paragraphs, the ERA does appear to summarise a report from EMCa (which DBP can only assume is the report entitled "Review of Technical Aspects of the Proposed Access Arrangement" and dated [September 2015] (**EMCa Report**), although there is no reference to the EMCa Report included in these paragraphs of the Draft Decision). The EMCa Report concludes that:

- (a) DBP has not provided a satisfactory "input" KPI to support whether its forecast expenditure is prudent and efficient; and
- (b) Publicly available information indicates that DBP is not efficient relative to other pipelines, although EMCa does acknowledge that a normalised benchmark is only a starting point for comparative assessment and there may be exogenous factors which explain DBP's apparently poor relative performance.¹

- 2.4 For the purposes of this submission, it is assumed that these are, in fact, the ERA's reasons for both rejecting DBP's proposed KPI and requiring the inclusion of the KPI referenced in amendment #8. DBP requests that the ERA advise DBP as soon as possible if the above are not, in fact, all of the ERA's reasons and if so, to:

- (a) provide DBP with the real reasons;
- (b) give DBP a reasonable opportunity to make submissions in response to these reasons; and
- (c) confirm that the ERA will consider DBP's responsive submissions.

Response to Reasons for Amendment 8

Overarching response

- 2.5 Before responding to each of the ERA's apparent reasons for amendment #8, there is one overarching issue that needs to be raised.

- 2.6 The ERA has not demonstrated, in the draft decision, why the proposed KPI referenced in Amendment 8 meets the NGL's criteria for KPIs, in particular that it is consistent with the NGO and the revenue and pricing principles of the NGL. Further, it is not apparent that the ERA has taken into account the specific circumstances of the Service Provider, the pipeline concerned or the pipeline services to be provided by the DBNGP in assessing whether the KPI referenced in Amendment #8 should be included in the AA. DBP requests that the ERA outline its reasoning in these respects as soon as possible and give DBP a reasonable opportunity to respond to this reasoning.

¹ EMCa, *Review of Technical Aspects of the Proposed Access Arrangement, Final Report, [September 2015], para 122*

Response to Reason #1 – DBP’s proposed KPI is not a satisfactory “input” KPI

- 2.7 Rule 72(1)(f) of the NGR requires an access arrangement information to contain “the KPIs to be used by the service provider to support expenditure to be incurred over the access arrangement period”.
- 2.8 As a result, it may be inferred that the KPIs are therefore focused on supporting expenditure levels that would be incurred by a prudent service provider acting efficiently, in accordance with accepted good industry practice, to achieve the lowest sustainable cost of delivering pipeline services.
- 2.9 DBP submits that there are a number of reasons why the ERA would be in error to rely on this reason for not only rejecting DBP’s proposed KPI but also for requiring Amendment #8.
- 2.10 Firstly, neither the ERA nor EMCa has provided any substantiation for reaching the conclusion that the KPI proposed by DBP is not a satisfactory “input” KPI.
- 2.11 Secondly, there is evidence, that has previously been accepted by the ERA, that DBP’s KPI is focused on supporting expenditure levels that would be incurred by a prudent service provider acting efficiently, in accordance with accepted good industry practice, to achieve the lowest sustainable cost of delivering pipeline services. The evidence is the contractual framework of DBP’s shipper contracts – the framework of both the Alcoa Exempt Contract and the Standard Shipper Contracts operate as a sufficient incentive to ensure operating expenditure is kept at efficient levels. This was recognised by the ERA itself in the ERA’s Final Decision for AA3². There have been no changes to the relevant contractual frameworks since that Final Decision that would make this evidence no longer applicable.
- 2.12 DBP can understand why the EMCa may have reached this view given that it was expressly asked by the ERA not to assess whether the contractual structure of the DBNGP standard shipper contract (in which DBP bears all of the risks of over expenditure) acts as a sufficient incentive to ensure operating expenditure is kept at efficient levels.³ However, the same can not be said for the ERA, given its conclusions in the Final Decision for AA3.
- 2.13 The third reason is that KPIs for gas transmission pipelines in Australia do not have the ability, of themselves, for assessing the efficiency of their operating expenditure, nor are they a useful starting point or a useful tool to enable comparisons to be made about the efficiency of transmission pipelines in Australia.
- 2.14 DBP acknowledges that, at paragraph 147 of the Draft Decision, while the ERA suggests that KPIs provide a valuable tool for assessing the efficiency of operation expenditure by enabling comparisons with similar companies and to measure ongoing performance, both it and the EMCa Report do condition this statement by recognising that such measures are only a starting point for assessment and other factors may need to be taken into consideration.
- 2.15 DBP does not agree with the ERA’s view that KPIs are a useful tool that enable comparisons in the context of transmission pipelines in Australia. As both EMCa and the ERA recognise, there are numerous factors that influence the costs on transmission pipeline and that affect performance particularly as there are no transmission pipeline with even remotely similar characteristics to the DBNGP in Australia.
- 2.16 DBP has in the past highlighted not only the difficulty of using such KPIs as hard benchmarks for measuring performance but also their relevance. This is because every transmission pipeline is different with different design, age, operating, and maintenance requirements that impact on expenditure levels. Furthermore, the sample set of pipelines to draw on in Australia is very small.
- 2.17 While not exhaustive, DBP outlines a number of reasons why a variety of input based KPIs can be misleading in the case of assessing the efficiency of gas transmission pipelines in Australia.

² Paragraph 276 of the ERA Final Decision 31 October as amended on 22 December 2011

³ EMCa Report, paragraph 183

Cost

- 2.18 The level of maintenance costs of a gas pipeline are predetermined largely by the way the pipeline is designed, constructed, and its specifications. But no two pipelines are designed and constructed in the same manner nor do they have the same or similar specifications. For instance, two pipelines can have the same length, diameter and capacity, but one may have more installed main line valves (MLVs) or extensive access roads requiring higher maintenance costs. The pipe material and coating can dictate the extent of maintenance work. The depth of cover and type of crossings can also result in totally different maintenance costs. The use of the cathodic protection, communications systems, and power supply (number of repeaters, height of towers etc.) can also result in drastically different maintenance costs.
- 2.19 Maintenance costs can also vary dramatically from one transmission pipeline to another depending on its location and other factors like environmental factors and the biological diversity of the terrain being traversed, particularly in a state as geographically diverse as Western Australia. For example, maintenance costs per km for a section of pipeline that is in good soil and a relatively accessible area will be very different to the maintenance costs per km for a pipeline of the same length in a flood prone and inaccessible area. The DBNGP runs through a number of differing land-uses such as rural/pastoral, broad rural/agricultural and suburban and metropolitan built up areas. These 'sections' of pipeline can be thought of as different pipelines all with very different pipeline maintenance needs, and hence different levels of maintenance costs.
- 2.20 Remoteness and availability of services also impact on the level of maintenance costs but can also vary widely within suburban areas depending on land use.
- 2.21 Some cost items are not costs over which DBP has control. Examples are pipeline licence fee and charges imposed by the Minister for access rights granted over the DBNGP corridor pursuant to section 34 of the Dampier to Bunbury Pipeline Act 1998. Shire rates and land related tax/fees are also costs over which DBP has no control and these too are included in 'Pipeline Maintenance Costs' and standing and specific fees charged by the ERA. Some of these fees such as the Access License Fee are unique to the DBNGP so it is extremely misleading and unhelpful to use this as part of a tool to compare the performance between pipelines.

Pipeline Parameters

- 2.22 DBP is the view that using pipeline parameters such as length and diameter can be misleading and unhelpful when used as a basis for assessing the efficiency of gas transmission pipelines in Australia.
- 2.23 Pipeline length, equivalent length or any related variation are misleading because it is not feasible to standardise a pipeline operation in respect to the length or equivalent length. It is not possible to say that a length related KPI such as \$5000 per kilometre is better than \$25,000 per kilometre as it is not transparent with the details and scope of work that underpins the KPI numbers. The \$25,000 per kilometre KPI result could be considered as a much more effective and highly performing operation as it may involve maintaining thousands of kilometres of access roads, and hundreds of MLVs in a flood or cyclone prone area.
- 2.24 Similarly, pipeline diameter or any related variation is not a good measure for KPIs. The maintenance cost for a small pipeline is nominally very similar to the larger diameter pipeline except when the reactive maintenance such as cut-out and hot-tap are performed. In that case, larger diameter pipelines will cost significantly more than the apparent ratio of the diameter. For instance, cut-out of an 8inch pipeline may cost more than 3 times of a 4inch pipeline depending on the wall thickness, materials and grade of pipe, and coating. Also larger pipe diameter will result in more MLV due to design for containment. The DBNGP has the most number of MLVs (157 in total) compared to any pipeline in Australia.

Compressor size and installed power

- 2.25 Using compressor size such as installed power as part of the KPIs also has a number of issues in assessing the efficiency of a transmission pipeline in Australia:
- (a) Installed power is not a useful indicator as it lacks the clarity on the configuration of the compressor station (duty/standby, series or parallel operation), it does not take into account the supporting infrastructure such as power generation, aftercoolers, scrubbers, reverse osmosis plants, accommodation, communications, metering, and station and/or emergency bypass. It is inaccurate and misleading to compare a pipeline that has 10MW installed power with other pipelines that have similar installed power if the setup, configurations, location, environmental and operating conditions are vastly different.
 - (b) Compressor size and installed power for a particular pipeline is also misleading because it does not take into account the actual number of the individual units to make up the total installed power. One pipeline may have 5 x 2MW, while the other may have 1 x 10MW, the scope of work for maintaining this will be vastly different.
 - (c) Part of the maintenance and operating costs for compressor stations are outside DBP's control. This includes the unexpected failure of the rotating equipment due to abnormal operating conditions or material failure due to aging, cleanliness of gas impacting on frequency of water wash (involving additional maintenance cost).

Capacity

- 2.26 In theory, capacity related indicators (contracted capacity, full haul, part haul, back haul and throughput) could be used as KPIs to measure the performance of the pipeline operator in delivering the capacity services. The measures can be simply expressed as either maintenance cost or operating cost per unit of capacity delivered. However, as discussed above, maintenance costs may not be used to reflect the true performance of the pipeline operator in the event of multiple failure events (that are outside the control of the pipeline operator) causing poor performance against the KPIs.
- 2.27 In practice however, capacity is a poor indicator to use as part of KPIs due to the different ways that a gas pipeline can be designed and constructed. A very short, big diameter high capacity pipeline with low maintenance requirements can have a misleadingly better \$ per TJ KPI than a smaller low capacity but longer gas pipeline.
- 2.28 Throughput or total gas delivered is also a poor indicator for any capacity related KPIs. The maintenance costs for an underutilised pipeline do not reduce proportionately against the throughput. This will result in the pipeline operator not meeting the \$ per TJ delivered KPI if the actual throughput is lower than contracted capacity.

Compressor fuel cost or total gas use

- 2.29 Using fuel gas cost can result in misleading performance measures for transmission pipeline operating below the design capacity. This is due to the fact that fuel does not have a linear relationship with capacity or throughput. In general, compressors are designed to operate most efficiently at the operating point that delivers the contracted capacity or throughput. At lower or higher capacities/throughput than the design operating point, the compressor will not operate in the most efficient manner.
- 2.30 In theory, a pipeline operator can target a KPI in respect to forecast throughput. However, it must be realised that failure to meet this theoretical KPI does not represent a poor performance as the throughput may be lower or higher than forecast causing compressors to operate in a sub-optimal efficiency region, resulting in higher relative fuel consumption.
- 2.31 During the day to day operations, other factors may also impact on the target KPIs that are outside the control of the pipeline operator. For instance, fuel gas usage increases due to shipper behaviour or change in demand, the operator is required to run compressors in an inefficient

configuration due to frequent start and stop, and changing configuration to match shipper behaviour.

- 2.32 Factors outside DBP's control that affects compressor fuel related KPIs can include the actual gas quality, ambient conditions, pipeline peaking conditions, linepack, unexpected equipment failure causing operation of less efficient compressor units or configuration.

Response to Reason #2 - Publicly available information indicates that DBP is not efficient relative to other pipelines

- 2.33 DBP submits that a conclusion that DBNGP is not efficient relative to other pipelines is unable to be made solely for the reason of the KPI information that is publicly available.

- 2.34 DBP also submits that the ERA would be in error to rely on this reason for requiring Amendment #8.

- 2.35 The following reasoning responds to both submissions made by DBP in paragraphs 2.33 and 2.34 above.

- 2.36 Firstly, the ERA and EMCa have relied on 5 year old data included in access arrangements for the Roma to Brisbane Pipeline and the Amadeus Gas Pipeline to make this conclusion. Were this data updated to reflect 2015 information expenditure, it would be likely to reveal a different story.

- 2.37 Secondly but most importantly, as the EMCa and the ERA themselves admit, this sort of indicator is only a starting point for comparative assessment and there may be exogenous factors which explain DBP's apparently poor relative performance. DBP submits that there are such factors present and accordingly, including an indicator of the kind required by Amendment 8 would be meaningless. They include the following:

- (a) The DBNGP has very different characteristics to the "comparator" pipelines referenced in the two access arrangements in relation to:
 - (i) pipeline distance
 - (ii) pipeline diameter
 - (iii) pipeline remoteness
 - (iv) pipeline age and condition
 - (v) operational characteristics such as the number of compressors, receipt points and delivery points
 - (vi) markets served
 - (vii) natural and man-made environment through which the pipeline passes.
- (b) There is a need to take account the following factors that impact expenditure and which are relevant to the DBNGP but not so to the other "comparator" pipelines:
 - (i) The DBNGP is the only pipeline in Australia where the operator is responsible for providing system use gas to shippers. This cost item represents on in excess of 30% of DBP's total forecast operating expenditure during the AA4 period. Furthermore, the amount of system use gas required is primarily a function of the level of throughput on the pipeline, a factor that is out of the pipeline operator's control.
 - (ii) The DBNGP has a unique land tenure system – the pipeline sits within a statutory corridor with respect to a part of which, DBP is given a right to access by the State in consideration for the payment of a licence fee to the State. Tenure for most pipelines is secured through privately negotiated easements with relevant landholders. Under these easements, a one off sum is normally provided as compensation.
 - (iii) The DBNGP is responsible for the costs of maintaining the entire DBNGP corridor.

- (iv) Operating cost items such as pipeline corridor aerial surveys (to monitor such matters as third party encroachments and ground condition) and vegetation management are significantly driven by both the length of the pipeline route and the nature of the environment through which the pipeline runs. The pipeline route of the DBNGP is one of the longest in the nation, resulting in an increased level of corridor management and maintenance, compared to other, shorter pipelines.
- (v) Maintenance costs can vary dramatically depending on location and other factors like environmental factors and the biological diversity of the terrain being traversed from the north to the south west of WA. For example, maintenance costs per km for a section of pipeline that is in good soil and readily accessible area is very different to the maintenance costs for a pipeline of the same length in a flood prone and inaccessible area. The DBNGP is a combination of rural [pastoral], broad rural [agricultural] and suburban [metropolitan built up areas] pipelines all with very different pipeline maintenance needs. The areas where maintenance costs are much more significant are in the suburban areas compared with broad rural and rural areas. Furthermore, the maintenance needs vary widely within suburban areas.
- (vi) Some operating cost items such as internal inspections (“pigging”) and cathodic protection are driven by the actual length of the pipe and the number of times it has been duplicated or looped.
- (vii) The DBNGP’s remote location, requiring fly-in/fly-out and remote accommodation arrangements, additional personnel costs arising from relevant employment conditions.

2.38 Thirdly, some of the cost items included in DBP’s forecast of operating expenditure are not costs over which DBP has any control. Examples of such cost items are the pipeline licence fee and charges imposed by the Minister for access rights granted over the DBNGP corridor pursuant to section 34 of the Dampier to Bunbury Pipeline Act 1998. The ERA’s charges, Shire rates and land related tax/fees are also costs over which DBP has no control and so it would be wrong to include these cost items in any KPI that is aimed at monitoring the efficiency of DBP’s operating expenditure.

DBP’s proposed amendment to the AA to address Amendment # 8

2.39 Notwithstanding the above submissions in relation to the ERA’s reasons for the amendment, DBP has included in its Amended AA Proposal (in the Access Arrangement Information Document) the following key performance indicator that it considers to be a satisfactory “input” KPI to support its forecast expenditure being prudent and efficient - a KPI that is calculated by dividing operating expenditure excluding fuel gas, GEA/turbine overhaul and reactive maintenance categories, over the total energy delivered each calendar year.

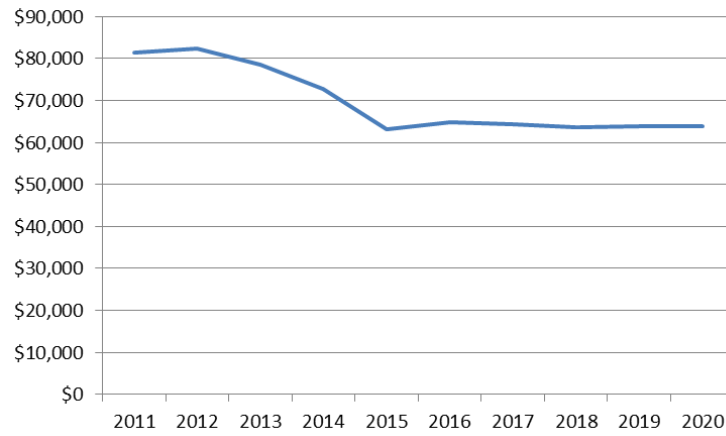
2.40 DBP maintains that it would not be appropriate to use this KPI to assess the efficiency of the DBNGP by comparing it with other pipelines within Australia for the reasons outlined earlier in this submission.

2.41 The reasons why DBP has chosen this KPI over other the KPIs referenced above are as follows:

- (a) To the extent that this sort of input KPI is to be used by the ERA to assess the efficiency of the forecast operating expenditure, DBP’s efficiency should only be measured by reference to expenditure that is routine and predictable for a normal gas transmission business with a configuration like the DBNGP;
- (b) Furthermore, it should not include expenditure with respect to which it has limited control over – this would include fuel gas costs (for the reasons outlined above), regulatory expenditure (given that DBP is unable to control the scope of the regulatory process) and taxes; and

- (c) The following graph shows how DBP's expenditure on these categories has trended, which is evidence of the focus by DBP management to reduce such expenditure while trying to deliver appropriate returns to its shareholders.

Figure 1: Key performance indicator



Source: App a of Submission 55

3. RESPONSE TO AMENDMENT #67 -

Amendment # 67 and Reasons for Amendment

- 3.1 Draft Decision Amendment #67 requires the following amendment to be made to DBP's AA Proposal in order to make it acceptable to the ERA:

Clause 6.2(b) of the proposed revised access arrangement, relating to the transfer of a shipper's contracted capacity with the operator's consent, should be amended to remove the words "Subject to any [Pre-existing Contractual Right]" and "prior written".

- 3.2 The ERA's reasons for requesting this amendment to the proposed Access Arrangement were that:

- (a) [paragraph 917] DBP has not provided any explanation as to why the drafting changes have been made and how the changes are consistent with NGR 105;
- (b) [paragraph 918] DBP has not defined what a "Pre-existing Contractual Right" is, so it is unclear what it is intended to cover;
- (c) [paragraph 919] NGR 105 does not expressly require the service provider's consent to a transfer of capacity to be "prior" or "written". Although these requirements could be a prudent approach, they could potentially prevent a shipper having the flexibility to obtain consent in some unwritten form and/or after the event.
- (d) [paragraph 919] the requirement for consent to be in writing is potentially inconsistent with clause 27.4(f) of the proposed terms and conditions, which allows for consent to be deemed (and therefore not in writing) where DBP does not give notice to reject a transfer request within the time limit set by clause 27.4(d) of the proposed terms and conditions.

- 3.3 DBP rejects the changes required by the ERA in Required Amendment #67 and responds to the matters raised by the ERA in reaching its decision below.

Response to Reasons for Amendment #67

Relevant provisions

- 3.4 Clause 6.2(b) of proposed Access Arrangement included in the Original AA Proposal provides:

6.2 A Shipper of any Haulage Service may:

- a) without the Operator's consent transfer by way of subcontract, all or any of the Shipper's contracted capacity to another Shipper in accordance with clause 27.2 of the Access Contract Terms and Conditions for each reference service.
- b) Subject to any [Pre-existing Contractual Right], with the Operator's prior written consent transfer all or any of the Shipper's contracted capacity to another (Third Party) in accordance with clauses 27.3 and 27.4 of the Access Contract Terms and Conditions for each reference service and clause 6.3.

- 3.5 As noted by the ERA, DBP's provisions facilitating transfers of capacity as between shippers closely follow NGR 105. NGR 105 provides:

105 *Capacity trading requirements*

(1) *Capacity trading requirements must provide for transfer of capacity:*

- (a) *if the service provider is registered as a participant in a particular gas market – in accordance with rules or Procedures governing the relevant gas market; or*
- (b) *if the service provider is not so registered, or the relevant rules or Procedures do not deal with capacity trading – in accordance with this rule.*

- (2) *A user may, without the service provider's consent, transfer, by way of subcontract, all or any of the user's contracted capacity to another (the third party) with the following consequences:*
 - (a) *the transferor's rights against, and obligations to, the service provider are (subject to paragraph (b)) unaffected by the transfer; but*
 - (b) *the transferor must immediately give notice to the service provider of:*
 - (i) *the subcontract and its likely duration; and*
 - (ii) *the identity of the third party; and*
 - (iii) *the amount of the contracted capacity transferred.*
 - (3) *A user may, with the service provider's consent, transfer all or any of the user's contracted capacity to another (the third party) with the following consequences:*
 - (a) *the transferor's rights against, and obligations to, the service provider are terminated or modified in accordance with the capacity trading requirements; and*
 - (b) *a contract arises between the service provider and the third party on terms and conditions determined by or in accordance with the capacity trading requirements.*
 - (4) *The service provider must not withhold its consent under subrule (3) unless it has reasonable grounds, based on technical or commercial considerations, for doing so.*
 - (5) *An adjustment of rights and liabilities under subrule (3) does not affect rights or liabilities that had accrued under, or in relation to, the contract before the transfer took effect.*
 - (6) *The capacity trading requirements may specify in advance conditions under which consent will or will not be given, and conditions to be complied with if consent is given.*
- 3.6 Clauses 27.3 and 27.4 of the Access Contract terms and conditions, together with paragraphs 6.2(b) through to 6.5 of the Access Arrangement, govern the circumstances where a Shipper intends to transfer part or all of their capacity under an Access Contract to a third party and the parties intend for the new third party to be primarily responsible for the rights and obligations under the Access Contract for the transferred capacity. That is, the parties intend for the new third party to take novation of the Access Contract terms and conditions and have a direct relationship with DBP. These clauses have not changed.
- 3.7 Clauses 6.2(b) to 6.5 of the proposed Access Arrangement are totally consistent with the provisions in NGR105(3) to NGR105(6). They are not identical however, as they provide some more detail and information by way of examples of what DBP can require a new party to comply with in order for DBP to provide its consent to the novation of the original Shipper's rights and liabilities going forward in respect of the transferred capacity.
- 3.8 As to the matters raised by the ERA in paragraph 917, DBP notes that in paragraph 4 of submission 5 (Non-tariff related matters) in the proposed access arrangement submissions, DBP did explain the reasons as to why the drafting changes were proposed (see paragraph 4.5 of submission 5). It is apparent from the Draft Decision that the ERA has not considered these submissions.
- 3.9 Further to the information provided in these submissions, DBP notes that:
- (a) Prior consent is required under the NGR: Where a third party wishes to replace the original Shipper as a party to the access contract and the original party wishes to "step out" of the contractual arrangements with DBP, so as to ensure that going forward from the date of the transfer of capacity the new shipper is primarily liable to DBP in terms of its rights and obligations under the shipper contract, then DBP's consent is required. This is consistent with NGR105(3) to NGR105(6) in that NGR 105(4) and NGR 105(6) have the effect that:
 - (i) No new contract can arise until consent is provided (NGR 105(4)); and
 - (ii) DBP may stipulate in advance conditions for provision of consent (NGR 105(6)).
 - (b) In the case of DBP, it has obligations under its financing documents to obtain the consent to these sorts of transactions in relation to key access contracts. Without the consent being

formalised, it will make it more difficult to obtain consent of DBP's financiers and, if DBP is required to re-finance any of its debt in circumstances where there is uncertainty about a change in shipper, DBP may not be able to re-finance its debt. The consequences for DBP and the pipeline, if this were to occur, are significant and would risk efficient investment in the pipeline.

- (c) If the submission in paragraph (b) is not accepted, consent in writing is preferable when the parties are effectively novating contractual rights and liabilities and DBP is entering into a new contract with the third party. Written consent crystallises effective dates for cessation of liability vis-a-vis DBP under the Access Contract in relation to the traded capacity for the exiting Shipper and commencement of rights and liabilities for the third party taking the transfer of that capacity;
- (d) the words "pre-existing contractual right" were intended to be a reference to "relevant protected contractual right" in section 321 of the NGL. This section of the NGL ensures that these contractual rights rank ahead of the capacity trading provisions of the AA. As such the inclusion of these words is consistent with the NGL and NGR. However, in the Amended AA Proposal, DBP has removed the brackets and included a definition in the definitions section of the Access Arrangement document. This is outlined in paragraph 3.14.

3.10 As to the matters raised by the ERA in paragraph 917, DBP refers to paragraph 3.9(d) above.

3.11 As to the matters raised by the ERA in paragraph 919, under the NGL prior consent is required for a transfer in the circumstances of paragraph 6.2(b) of the proposed access arrangement. Prior consent in writing is prudent given that the incoming shipper is creating a new contract with DBP. By the effective novation of rights and obligations with respect to the relevant capacity, as set out in paragraphs 3.9(a) and 3.9(b) above.

3.12 As to the ERA's reasoning that the requirement for consent to be in writing is potentially inconsistent with clause 27.4(f) of the proposed terms and conditions, DBP submits that the deemed approval available under clause 27.4(f) is just a fall-back position to ensure that DBP deals with such requests in a timely manner and gives shippers some comfort that a transfer of capacity can occur on existing terms if for some reason DBP is not efficient in dealing with the request for transfer. This is not inconsistent with the proposal to require prior written consent in paragraph 6.2(b) of the proposed access arrangement. Read together, in the event that DBP does not respond to the Request for Approval within 5 days, then approval is deemed to have been provided.

Further amendments to the proposed Access Arrangement

3.13 DBP submits that paragraph 6.2(b) of the proposed Access Arrangement should be further amended to insert the words "to 6.5" at the end of 6.2(b), as underlined below, to make it clear that clause 6.5 applies to a novation of part of all of an access contract as contemplated by NGR:

6.2 A Shipper of any Haulage Service may:

- a) without the Operator's consent transfer by way of subcontract, all or any of the Shipper's contracted capacity to another Shipper in accordance with clause 27.2 of the Access Contract Terms and Conditions for each reference service.
- b) subject to any Pre-existing Contractual Right, with the Operator's prior written consent transfer all or any of the Shipper's contracted capacity to another (Third Party) in accordance with clauses 27.3 and 27.4 of the Access Contract Terms and Conditions for each reference service and clauses 6.3 and 6.5 below.

3.14 DBP proposes to define "Pre-existing Contractual Right" to mean "relevant protected contractual rights in as defined in section 321 of the NGL."

4. RESPONSE TO AMENDMENTS #70, #71, #72 AND #73 – EXTENSIONS AND EXPANSIONS

Amendments # 70, #71, #72 and #73 and Reasons for Amendment

- 4.1 Draft Decision Amendment #70 requires the following amendment to be made to DBP's AA Proposal in order to make it acceptable to the ERA:

Clause 7.3 of the proposed revised access arrangement, relating to when an extension (or enhancement) or expansion is to become part of the covered pipeline, should remain as currently drafted in the access arrangement applying to the third access arrangement period (AA3).

- 4.2 Draft Decision Amendment #71 requires the following amendment to be made to DBP's AA Proposal in order to make it acceptable to the ERA:

Clause 7.3(a) of the proposed revised access arrangement, relating to when an extension (or enhancement) is to become part of the covered pipeline, should be amended to remove the reference to "expansion" as this clause only relates to extensions (or enhancements).

- 4.3 Draft Decision Amendment #72 requires the following amendment to be made to DBP's AA Proposal in order to make it acceptable to the ERA:

Clause 7.5(b) of the proposed revised access arrangement, relating to the submission of proposed revisions to the access arrangement when an extension, expansion or enhancement of the DBNGP becomes part of the covered pipeline, should be amended to remove the words "at any time".

- 4.4 Draft Decision Amendment #73 requires the following amendment to be made to DBP's AA Proposal in order to make it acceptable to the ERA:

Clause 7 of the proposed revised access arrangement, relating to extensions and expansions, should be amended to remove references to "enhancement".

- 4.5 DBP's Amended AA Proposal has accepted amendments #71 and #72 set out in the ERA's draft decision.

- 4.6 DBP's Amended AA Proposal has not however, accepted amendments #70 and #73 for the reasons set out in the initial submissions made in support of the Original AA Proposal and for the additional reasons below. Also, for the reasons set out below, it considers that the revisions to these clauses that were proposed by DBP in the Original AA Proposal should be accepted by the ERA.

DBP response to reasons for Amendment # 70

- 4.7 The changes to clause 7.3 of the proposed access arrangement in the Original AA Proposal:

- (a) provide clarity as to when an extension or enhancement of the DBNGP ("**Extension**") becomes part of the Covered Pipeline. The changes enable DBP to elect that the Extension becomes part of the Covered Pipeline as soon as DBP is granted consent to operate the Extension under the PPA;
- (b) provide that the Operator (DBP) may elect for an Extension to be not covered at some point in time, giving DBP flexibility as to when/if it makes a non-coverage election in relation to an Extension;

- (c) provide clarity as to when an expansion of the DBNGP (“**Expansion**”) becomes part of the Covered Pipeline. The changes provide that the Expansion becomes part of the covered pipeline as soon as DBP is granted consent to operate the Expansion under the PPA;
 - (d) provide that the Operator may notify the ERA that it wants the Expansion to not be covered, and then provides a timeframe for the ERA to respond to the non-coverage request.
- 4.8 The ERA’s reasons for requiring the amendment 70 (and therefore rejecting the above changes) are:
- (a) **No NGO justification by DBP** - DBP has not provided any statement of the rationale for its proposed changes with reference to the NGO and in particular how the changes further the NGO [paragraph 940];
 - (b) **Shipper based NGO justification given** - One shipper has provided a submission outlining two circumstances in which the proposed changes may undermine the gas access regime (including the NGO), although the ERA has not tested the legitimacy or likelihood of these circumstances. They are:
 - (i) By effectively reversing the default position that Extensions or Expansions will be covered unless DBP can show NGO justification as to why they should not be covered (DBP’s changes reverse the onus and require the ERA to show NGO justification as to why the Expansion or Extension should be covered), this is not furthering the NGO;
 - (ii) By allowing DBP to elect the timing for deciding that an extension or expansion is not covered, users face uncertainty and are channelled into contracting for a negotiated rather than a regulated service, thereby exposing them to monopoly rents.
 - (c) **Timing for decision making** - The time for the ERA to reach its decision on whether coverage should be required is too short (30 business days);
 - (d) **Drafting issues** - The amendment is poorly drafted and contains an error [942 and 943]

Response to “No NGO justification by DBP” reason

- 4.9 DBP is of the view that the proposed changes to clause 7.3 of the proposed access arrangement further the NGO by promoting the efficient operation and use of the DBNGP for the long term interest of gas consumers. In particular, (i) operational efficiency is facilitated, (ii) greater certainty is provided to customers in relation to the process, and (iii) administration of the reference service is streamlined by the proposed changes in that they:
- (a) provide clarity about when the extension or enhancement becomes party of the covered pipeline;
 - (b) implement a timetable for a review of a determination of whether the expansion is part of the covered pipeline;
 - (c) clarify what should be contained in a coverage notice;
 - (d) require the ERA to provide their reasons for a determination about coverage;
 - (e) remove uncertainty in the drafting.
- 4.10 DBP considers that the substantive effect of the changes proposed for clause 7.3 are not materially different from the AA3 access arrangement.
- (a) The intent of DBP’s proposed clause 7.3(a) is that there is a presumption that an Expansion is covered from the date it becomes licensed to operate under the PPA, unless DBP requests otherwise. Consistent with AA3 access arrangement, if DBP notifies the ERA that an Extension is not to become part of the covered pipeline, that Extension is excluded from coverage. DBP has clarified that it can elect to exclude the Extension at any time (before or after DBP is granted permission to operate under the PPA). The AA3 access arrangement did not specify when DBP could elect to exclude the Extension from coverage and the implication was that this could occur at any time – DBP’s amendments make this explicit.

Accordingly the proposed amendments to this clause clarify what was already in place in AA3.

- (b) The intent of DBP's clause 7.3(b) is that there is a presumption that an Expansion is covered from the date it becomes licensed to operate under the PPA, unless DBP requests otherwise. In respect of Expansions, the ERA has the option to reject an application from DBP for exclusion from coverage. The ERA can consider DBP's notice seeking exemption from coverage for an Expansion and either reject or accept it. It is implicit in the mechanism that DBP will have to provide justification as to why the Expansion should be excluded from coverage so that the ERA can reach a decision. DBP's proposed amendments require that the ERA provide its reasons for rejection of exemption from coverage and a time frame for doing so.
- 4.11 The amendments promote efficiency in operation of the pipeline and facilitate customer access and certainty where there is a request for an Expansion from a customer by ensuring that there is not an open-ended timetable for the ERA to review the application for non-coverage by DBP.

Response to "Shipper based NGO justification given" reason

- 4.12 The claims made by the shipper outlining two circumstances in which the proposed changes may undermine the gas access regime (including the NGO) are baseless and are contradicted by what has occurred in practice when there was in place extensions/expansions requirements that gave DBP even more flexibility and discretion about when an expansion or extension was part of the covered pipeline than what is in the current access arrangement.
- 4.13 What occurred in practice was as follows:
- (a) The decision by DBP to fund \$1.8 billion in expanding of the capacity of the DBNGP by almost 60% over a series of three expansion projects;
 - (b) In the timing of each expansion project was driven by the shippers' requirements, not DBP
 - (c) DBP elected to make each expansion part of the covered pipeline but the shipper still agreed to negotiate a tariff rather than pay the reference tariff.
 - (d) That election was made after the expansion was commissioned.
- 4.14 Without detracting from the above submissions, DBP concedes that the drafting in clause 7.3 could be improved and so has made the following changes in the Amended AA Proposal:
- (a) The word "expansion" has been removed from clause 7.3(a);
 - (b) "Coverage Criteria" has been defined in the definitions section to read – "means the criteria in section 15 of the NGL"; and
 - (c) Clause 7.3(b)(ii) has been modified to read as follows

*"within 30 Business Days of receiving the Expansion Non Coverage Request Notice, the Regulator advises the Operator by notice in writing that it is reasonably satisfied that application of the access arrangement to such expansion is consistent with the National Gas Objective and Coverage Criteria (**Coverage Notice**). The Coverage Notice must contain detailed reasons for why the Regulator is reasonably satisfied that the application of the access arrangement to such expansion is consistent with the National Gas Objective and Coverage Criteria. If the Regulator does not issue a Coverage Notice to the Operator under this clause within 30 Business Days of receiving the Expansion Non Coverage Request Notice, the Regulator will be deemed to have not been thus satisfied and the expansion will not be part of the Covered Pipeline."*

DBP response to reasons for Amendment # 73

- 4.15 The ERA seeks an amendment to remove references to “enhancement” from clause 7 of the access arrangement. This would have the effect that enhancements to the DBNPG that are not extensions or expansions may not be captured as part of the covered pipeline.
- 4.16 DBP often carries out capital works on the pipeline that enhance the operations of the pipeline but do not result in an expansion or an extension. Important examples of this are:
- (a) Upgrades to the SCADA system;
 - (b) Potential pipeline enhancements or works carried out that are required to maintain the integrity of the pipeline due to rezoning and urban sprawl.
- 4.17 The ERA has not indicated why it is consistent with the Coverage Principles for such pipeline improvements to be removed from this clause. Such works have always been considered to be within the scope of clause 7 of the access arrangement DBP considers that such works to the DBNGP should remain captured by that clause.