



FINAL DECISION: WAIVER OF RING FENCING OBLIGATIONS TUBRIDGI PIPELINE SYSTEM

Application Submitted by:

Origin Energy Resources Ltd

On behalf of:

SAGASCO South East Inc (ARBN: 002 382 023)

Origin Energy Petroleum Pty Ltd (ACN: 010 728 962)

Origin Energy Amadeus NL (ACN: 010 137 121)

Pan Pacific Petroleum NL (ACN: 000 749 799)

Tubridgi Petroleum NL (ACN: 076 850 881)

**INDEPENDENT GAS PIPELINES ACCESS REGULATOR
WESTERN AUSTRALIA**

21 November 2000



PREFACE

On the 31 March 2000, Origin Energy Resources Ltd (Origin Energy) made application for waivers of certain ring fencing obligations under section 4.15 of the *National Gas Pipelines Access Code for Natural Gas Pipeline Systems* (the Code). The application was lodged in respect of the Tubridgi Pipeline System (Pipeline Licence Numbers WA: PL 16 and WA: PL 19).

The procedures for considering the waiver of ring fencing obligations require that a Draft Decision be issued within 14 days after the last day of the first period of submissions and that a Final Decision be issued within 21 days after the last day of the second period of submissions. The Regulator has no discretion to extend the time for issuing these decisions.

Submissions were initially called on 7 April 2000 and closed on 8 May 2000. The Draft Decision was issued on 22 May 2000, which marked the commencement of the second public consultation period. The Draft Decision was to not grant the waiver.

There were, however, a number of issues that required additional information before all issues could be adequately addressed under the Code. The Code did not provide sufficient time for this information to be obtained and considered by the Regulator prior to issuing the Draft Decision. Accordingly, the required information was obtained after the Draft Decision was issued and made public in the Regulator's Notice dated 18 August 2000. An extended public consultation period to 31 August 2000 was provided to allow sufficient time for the required information to be obtained and considered.

On 31 August 2000, Origin Energy requested an Extension of Time to 31 October 2000 to enable changes to be made to the Tubridgi Joint Venture corporate structure to meet the requirements of separation of the pipeline activities from gas production and marketing activities. The Regulator granted an interim two-week extension and subject to further discussions with Origin Energy, granted a further extension of time to 31 October 2000.

On the basis of the available information, the Regulator assessed the application for waiver of ring fencing obligations against the requirements and principles of the *Gas Pipelines Access (WA) Law*, which includes the Code and the *National Gas Pipelines Access Agreement*. In addition, the Regulator sought to consider issues raised in submissions from the public. However, no submissions were received in response to the invitation issued on 7 April 2000. There were two submissions on the Draft Decision, from Origin Energy and Johnson Winter and Slattery, which have been considered by the Regulator in the preparation of this Final Decision.

Copies of the Final Decision are available from the Office of Gas Access Regulation by contacting Mr Mike Jansen on telephone +61 8 9213 1925 or facsimile +61 8 9213 1999, or from the Office's web site (www.offgar.wa.gov.au).

KEN MICHAEL
GAS ACCESS REGULATOR

FINAL DECISION

In accordance with section 4.23 of the Code, this Final Decision is that the Regulator intends to issue a notice under section 4.15 of the Code granting a waiver of the ring fencing obligations required by section 4.1(b) of the Code in respect of the Tubridgi Pipeline System.

This waiver, when issued, will be subject to conditions that, if realised, could cause the waiver to be revoked. The trigger that could result in the waiver being revoked is if any of the following events occur:

- Where an excess of realised gas throughput occurs over forecast gas throughput. The proposed Access Arrangement currently being assessed by the Regulator and for which a Draft Decision was issued on 7 August 2000, seeks a trigger for review of the Access Arrangement if the annual demand for the Tubridgi Pipeline System in 2003/04 or 2004/05 is likely to exceed, by 5000 TJ or more for either year, the forecast throughput used to determine the Reference Tariff. The Draft Decision envisages that an independent report on the forecast demand for the Tubridgi Pipeline System be completed by 31 March 2002. It is proposed that the waiver be reviewed by the Regulator if such a report concludes that the annual demand for the Tubridgi Pipeline System in 2003/04 or 2004/05 is likely to exceed, by 5000 TJ or more for either year, the forecast throughput used to determine the Reference Tariff. The purpose of the review is to determine whether the waiver should be revoked.
- A request is made by a Prospective User to the Regulator for the waiver to be revoked because the Prospective User is seeking access to the Tubridgi Pipeline System for the transport of natural gas.
- The Access Arrangement currently being assessed by the Regulator and after it is approved, becomes subject to review in accordance with the provisions of the *National Third Party Access Code for Natural Gas Pipeline Systems* (the Code).

With respect to the application for a waiver of the ring fencing requirements of sections 4.1(h) and 4.1(i) of the Code, the Regulator intends to issue a notice under section 4.15 of the Code granting the waiver. This waiver, when issued, will be under the same conditions as would apply to the waiver for section 4.1(b) of the Code.

To ensure that confidential information provided to the pipeline Service Provider by a Prospective User remains confidential to the Service Provider, Origin Energy has proposed a management agreement that will place the pipeline business with Origin Energy Asset Management Ltd (OEAM), which is a separate division of Origin Energy Ltd.

It is proposed that the management agreement between the Tubridgi Parties and OEAM be concluded and submitted to the Regulator for review by 21 February 2001 before the notice under section 4.15 is issued.

To provide the necessary time for the proposed management agreement to be concluded and reviewed by the Regulator, a further extension of time to 31 March 2001 is hereby granted under section 7.19 of the Code for Origin Energy to comply with the requirements of sections 4.1(b), (h) and (i) of the Code.

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1 INTRODUCTION

Origin Energy on behalf of SAGASCO South East Inc (SAGASCO) and the other Tubridgi Joint Venture Parties submitted an application for a waiver of certain ring fencing requirements for the Tubridgi Pipeline System on 31 March 2000. This application was made under *the National Third Party Access Code for Natural Gas Pipeline Systems* (the Code) to the Independent Gas Pipelines Access Regulator (the Regulator).

2 PROCEDURES FOR A WAIVER OF RING FENCING OBLIGATIONS

The Code (sections 4.16 to 4.24) sets out the procedures to be followed by the Regulator in considering a request for a waiver of ring fencing obligations. In this particular case the application was received on 31 March 2000, and the actions taken were:

- A notice was issued to interested parties on Friday 7 April 2000 and advertisements were placed in the *West Australian* and the *Australian* newspapers on Wednesday 12 April 2000. Included in the advertisements was a call for public submissions.
- The closing date for public submissions was set at 4pm WST Monday 8 May 2000.
- An Issues Paper to assist with the submissions was placed on the Office of Gas Access Regulation web site on 20 April 2000.
- No submissions were received in respect of this call for submissions.
- A Draft Decision was issued on 22 May 2000.
- Submissions were invited on the Draft Decision to be received by the Office of Gas Access Regulation (*OffGAR*) no later than at 4pm WST Thursday 31 August 2000.
- A Notice was issued on 18 August 2000, providing additional information on the issuing of a waiver of ring fencing obligations that is subject to specified conditions.
- An extension of time was granted on 31 August 2000 for submissions on the Draft Decision, with the new closing date being 5pm WST Thursday 14 September 2000.
- A further extension of time was granted on 14 September 2000 for submissions with the new closing date set for 5pm WST on Tuesday 31 October 2000.
- Two submissions were received on the Draft Decision. One from Johnson Winter and Slattery and the second from Origin Energy Resources Ltd.
- This Final Decision was issued on 21 November 2000.

3 THE OBJECTIVE OF RING FENCING REQUIREMENTS

A Service Provider of a gas pipeline “covered” under the provisions of section 1 of the Code is required to meet various obligations specified in the Code. If the pipeline Service Provider also participates in the production, trading or sale of gas, then the Code requires the Service Provider to meet certain obligations designed to separate the gas transmission/distribution

business activities from other activities and to maintain the confidentiality of information provided to the gas transport business from the other business activities of the Service Provider.

The purpose of these obligations is to ensure that commercially sensitive information provided to the pipeline Service Provider by a party seeking access to the pipeline is not available to a Related Business of the Service Provider. Otherwise, the Related Business would obtain a commercial advantage over its competitors.

4 CODE REQUIREMENTS

Section 4.1 of the Code sets out the minimum requirements for ring fencing.

- 4.1 A person who is a Service Provider in respect of a Covered Pipeline (regardless of whether they are also a Service Provider in respect of a Pipeline that is not Covered) must comply with the following (but in the case of paragraphs (a), (b), (h) and (i), as from the date that is 6 months after the relevant Pipeline became Covered):
- (a) be a legal entity incorporated pursuant to the Corporations Law, a statutory corporation, a government or an entity established by royal charter;
 - (b) not carry on a Related Business;
 - (c) establish and maintain a separate set of accounts in respect of the Services provided by each Covered Pipeline in respect of which the person is a Service Provider;
 - (d) establish and maintain a separate consolidated set of accounts in respect of the entire business of the Service Provider;
 - (e) allocate any costs that are shared between an activity that is covered by a set of accounts described in section 4.1(c) and any other activity according to a methodology for allocating costs that is consistent with the principles in section 8.1 and is otherwise fair and reasonable;
 - (f) ensure that all Confidential Information provided by a User or Prospective User is used only for the purpose for which that information was provided and that such information is not disclosed to any other person without the approval of the User or Prospective User who provided it, except:
 - (i) if the Confidential Information comes into the public domain otherwise than by disclosure by the Service Provider; or
 - (ii) to comply with any law, any legally binding order of a court, government, government or semi-government authority or administrative body or the listing rules of any relevant recognised Stock Exchange;
 - (g) ensure that all Confidential Information obtained by the Service Provider or by its servants, consultants, independent contractors or agents in the course of conducting its business and which might reasonably be expected to affect materially the commercial interests of a User or Prospective User is not disclosed to any other person without the approval of the User or Prospective User to whom that information pertains, except:
 - (i) if the Confidential Information comes into the public domain otherwise than by disclosure by the Service Provider; or

- (ii) to comply with any law, any legally binding order of a court, government, government or semi-government authority or administrative body or the listing rules of any relevant recognised Stock Exchange;
- (h) ensure that its Marketing Staff are not also servants, consultants, independent contractors or agents of an Associate that takes part in a Related Business and, in the event that they become or are found to be involved in a Related Business contrary to this section, must procure their immediate removal from its Marketing Staff; and
- (i) ensure that none of its servants, consultants, independent contractors or agents are Marketing Staff of an Associate that takes part in a Related Business and, in the event that any servants, consultants, independent contractors or agents are found to be the Marketing Staff of such an Associate contrary to this section, must procure their immediate removal from their position with the Service Provider.

5 PROVISIONS FOR THE WAIVER OF RING FENCING OBLIGATIONS

The legislation also recognised that the ring fencing obligations under the Code may not always be appropriate, either because of the particular circumstances of a given pipeline, or that the costs of meeting the ring fencing obligations outweigh the benefits. Provision was made by section 4.15 of the Code for the Regulator to waive certain of the ring fencing requirements as follows:

- 4.15 The Relevant Regulator may by notice to a Service Provider waive any of a Service Provider's obligations under:
- a) section 4.1(b) where the Relevant Regulator is satisfied that:
 - (i) either the Covered Pipeline is not a significant part of the Pipeline system in any State or Territory in which it is located or there is more than one Service Provider in relation to the Covered Pipeline and the Service Provider concerned does not have a significant interest in the Covered Pipeline and does not actively participate in the management or operation of the Covered Pipeline; and
 - (ii) the administrative costs to the Service Provider and its Associates of complying with that obligation outweighs any public benefit arising from the Service Provider meeting the obligation, taking into account arrangements put in place by the Service Provider (if any) to ensure that Confidential Information the subject of sections 4.1(f) and (g) is not disclosed to the Service Provider or is not disclosed to the servants, consultants, independent contractors or agents of the Service Provider who take part in a Related Business; and
 - (iii) an arrangement has been established between the Service Provider and the Relevant Regulator which the Relevant Regulator is satisfied replicates the manner in which section 7.1 would operate if the Service Provider complied with section 4.1(b); and
 - (b) sections 4.1(h) and (i) where the Relevant Regulator is satisfied that the administrative costs to the Service Provider and its Associates of complying with that obligation outweigh any public benefit arising from the Service Provider meeting the obligation.

In section 4.15(a)(iii) above, mention is made of Section 7.1 that reads:

- 7.1 A Service Provider must not enter into an Associate Contract without first obtaining the approval of the Relevant Regulator. The Relevant Regulator must not refuse to approve a proposed Associate Contract unless it considers that the contract would have the effect, or would be likely to have the effect, of substantially lessening, preventing or hindering competition in a market.

An “Associate Contract” is defined in Section 10.8 as:

- (a) a contract, arrangement or understanding between the Service Provider and an Associate in connection with the provision of a Service; or
- (b) a contract, arrangement or understanding between the Service Provider and any person in connection with the provision of a Service which provides a direct or indirect benefit to an Associate and which is not an arm's length transaction.

By only providing for waiver of the ring fencing obligations specified by sections 4.1(b), 4.1(h), and 4.1(i) the legislation intends that no waiver be available in respect of the following obligations:

- the requirements to be a legal entity (section 4.1(a));
- the requirements for separate accounts (sections 4.1(c), 4.1(d), and 4.1(e)); and
- the requirements for non-disclosure of Confidential Information (sections 4.1(f) and 4.1(g)).

6 ABILITY TO GRANT A CONDITIONAL WAIVER

At the time of the Draft Decision, the Regulator was seeking advice on whether a waiver, once given, could be revoked. If the Code did not provide for a waiver to be revoked or withdrawn, the Regulator would be required to take into account the potential as well as the present use of a pipeline in determining its significance.

The Regulator was also seeking advice on whether a waiver could be given subject to conditions which could terminate the waiver.

In the circumstances of the tests required by section 4.15 of the Code, the Regulator has discretion to grant a waiver of sub-sections 4.1(b), (h) and (i) if all of the tests set out in section 4.15 are met.

As there was not sufficient time to obtain the necessary advice in the time that the Draft Decision was required to be issued, the Regulator considered the application by Origin Energy on the basis that a waiver could not be made subject to conditions nor, once given, could be revoked or withdrawn. On this basis the Draft Decision concluded that:

- (i) the application by Origin Energy did not satisfy the tests of sub-section 4.15(a); and
- (ii) the administrative costs of complying with the Code did not outweigh the public benefit from the obligation to maintain separated staff.

Additional information received since the Draft Decision has indicated that a waiver can be given subject to specified conditions.

7 TESTS FOR CONSIDERING AN APPLICATION FOR A WAIVER

The waiver provisions of section 4.15 of the Code set out a series of tests for the Regulator to consider in assessing an application for a waiver of the ring fencing obligations.

For a waiver of section 4.1(b) (“not carry on a Related Business”) there are three separate tests required by section 4.15(a) of the Code, all of which must be met before the Regulator can approve a waiver of this requirement.

The first test, based on section 4.15(a)(i) of the Code and outlined in section 5 of this Final Decision, is whether the Pipeline is not a significant part of the Pipeline System in the State in which it is located or whether the Service Provider seeking the waiver does not have a significant interest in the Pipeline, and does not actively participate in the management or operation of the Pipeline.

The second test, specified by section 4.15(a)(ii) of the Code, is whether the administrative costs to the Service Provider and its Associates of complying with the obligation not to carry on a Related Business outweighs any public benefit arising from the Service Provider meeting the obligation. In making this judgement the Regulator is required to take into account any arrangements put in place by the Service Provider to ensure that Confidential Information is not disclosed to those in the Related Business.

The third test, based on section 4.15(a)(iii) of the Code, is whether an arrangement has been established between the Service Provider and the Regulator that satisfies the Regulator that the arrangement replicates the manner in which section 7.1 would operate if the Service Provider complied with section 4.1(b), the “not carry on a Related Business” requirement.

For a waiver of the separated staff requirement, sections 4.1(h) and 4.1(i) of the Code, there is only one test required by section 4.15(b) of the Code for the Regulator to consider and that is whether the administrative costs outweigh any public benefit from the obligation to maintain separated staff.

For the purposes of the above tests, the Code has not defined ‘significant’ or ‘public benefit’, leaving these to the judgement of the Regulator.

8 CONSIDERATION OF THE TESTS FOR THE TUBRIDGI PIPELINE SYSTEM

This section gives consideration to each of the tests set out in section 4.15 of the Code in the light of the claims made in the application by the applicant.

No submissions from the public were made in respect of this application. In addition to the original application, the applicant provided a submission in response to the Draft Decision.

8.1 THE “NOT CARRY ON A RELATED BUSINESS” REQUIREMENT

The “not carry on a Related Business” requirement is a provision of section 4.1(b) of the Code.

8.1.1 The First Test

The first test as specified in section 4.15(a)(i) of the Code is that the Pipeline is not a significant part of the Pipeline System in the State.

Origin Energy, in its application for waiver, indicated that the two pipelines that comprise the Tubridgi Pipeline System have a total capacity of 120TJ/day and on average transport 30TJ/day. The gas transported is claimed to represent only 5 percent of the total gas transported to the south-west of the State. Hence, the claim is made that the Tubridgi Pipeline System is insignificant on the basis of both capacity and throughput. Elsewhere in the application by Origin Energy for a waiver (page 6) it is indicated that 63TJ/day is the current capacity required to meet existing gas supply contracts.

Consideration of the Regulator in the Draft Decision

The Tubridgi Pipeline System is strategically located onshore at the south-west corner of the Carnarvon Basin. The Pipeline System transports gas for a number of current offshore and onshore gas producers, and is the means by which the gas is transported to the Dampier to Bunbury Natural Gas Pipeline (DBNGP) for delivery to major consumers in the south-west of the State and for gas storage at Dongara in the depleted Mondarra gas field.

In the same region, there have been other discoveries of natural gas, though as yet not developed, such as the Macedon/Pyrenees oil and gas field. The Western Australian Oil and Gas Review 1998 prepared by the State Department of Resources Development commented that (page 32):

The strategic position of the Tubridgi facilities and the substantial spare capacity may assist in the transport of gas from new offshore oil and gas fields in the highly prospective southern area of the Carnarvon Basin. The Tubridgi facilities are capable of delivering around 120TJ/d of gas to the Western Australian market, and further increases are possible with additional compression.

The fact that the pipeline is currently under utilised is not a consideration that gives rise to insignificance. The natural gas market and its associated institutional structures and practices in this State are still at what could be termed an immature level. The gas market has yet to develop comprehensive depth, in terms of the number of participants, and breadth in terms of the types of activities carried out in the market to meet the needs of consumers. Of particular significance for the Tubridgi Pipeline System is the possibility that in the future new discoveries of natural gas will increase demand for use of the pipeline to transport gas to the DBNGP. Potentially the Tubridgi Pipeline System could also be connected directly to the Goldfields Gas Pipeline.

In these circumstances, it would be unwise to assume that what is the case at present will continue indefinitely into the future. For the gas industry in Western Australia to mature, the appropriate institutional structures need to be in place to give confidence to gas producers, gas marketers and consumers that they will have access to the gas transport networks on fair and competitive terms. An important component of those structures is the isolation of the gas transport business from any gas marketing interests that may be associated with the owner/operator of the pipeline. Otherwise, there may be a deterrent to these future developments in the natural gas industry in Western Australia.

A further element of this first test, based on section 4.15(a)(i), is that the Service Provider concerned does not have a significant interest in the pipeline.

Origin Energy did not make a claim that the Service Provider does not have a significant interest in the pipeline. On the basis of ownership interest at least two of the Joint Venturer Parties (SAGASCO South East Pty Ltd and Pan Pacific Petroleum NL) have a significant interest in the pipeline. The other Joint Venture Parties may, however, be assessed as not having a significant interest.

Submission from Interested Parties

▪ Johnson Winter and Slattery

It is clear from the Regulator's Draft Decision that the Regulator accepts that the Tubridgi Pipeline System is currently insignificant. It is also clear that the Regulator found the first test not satisfied because of the possibility that the pipeline might become significant in the future.

In our view, the approach the Regulator has taken is clearly wrong as a matter of law. If the Regulator accepts that the Tubridgi Pipeline System is currently not a significant part of the pipeline system in Western Australia, then the first test is satisfied. It is not open to the Regulator to have regard to "possibilities" that may or may not eventuate. This follows as a matter of statutory interpretation.

It is our submission that the Regulator is required to assess whether the Tubridgi pipeline system satisfies the criteria outlined in section 4.15(a), including the significance of the pipeline, at or around the time when he makes his decision. Consideration of factors and circumstances that fall outside of the relevant period, in our submission, can be regarded as an irrelevant consideration, will infringe the fundamental principles of administrative law and will render the Regulator's decision *ultra vires*.

In our view, it is also unreasonable for the Regulator to decide that the Tubridgi Pipeline System is significant based on possible events that may or may not eventuate. No one, including the Regulator, can know whether there will be development of future new discoveries, when and how this development will occur or whether the Tubridgi Pipeline System will be important to the development. These are all matters of high speculation. It is impossible to say today that the Tubridgi Pipeline System will be important to the development and it would be unreasonable to deny a waiver, and impose ring-fencing obligations, because of circumstances that might never eventuate.

Our view of section 4.15 is that the Regulator has power to retract or revoke a waiver given today if, in the future, the tests in section 4.15 cease to be satisfied. In other words, if the Tubridgi Pipeline System becomes significant, any waiver that was given could be revoked at the appropriate time. In our submission, this ability to revoke a waiver in the future makes it more unreasonable for the Regulator to treat the Tubridgi Pipeline System as significant today based on mere possibilities that could be years away, assuming they ever come to fruition.

In the Draft Decision, the Regulator acknowledged that the present utilisation of the pipeline might give rise to a finding of insignificance. At that time, however, advice to the Regulator was that a waiver once given was irrevocable and could not be given on a conditional basis. In that situation the Regulator had to take into account the potential for strategic use of the pipeline in the event of further natural gas discoveries.

In their submission, Johnson Winter and Slattery have argued that the use of the word "is" in the phrase "is significant" means that the pipeline has to be significant at the present time because of the word is being in the present tense. The Regulator, however, has taken the view that significance does incorporate future possibilities. In particular, the pipeline is believed to be significant because it indicates to gas explorers and producers that if they find

new discoveries or decide to go ahead with production from existing discoveries, that infrastructure is in place to carry the gas to markets.

In any case the Regulator has since received advice that conditional waivers may be given. In that circumstance the Regulator could consider that the Tubridgi Pipeline System does pass the not significant test as long as the present circumstances prevail. That consideration would change, however, if new discoveries or new production did eventuate, and gave rise to the potential for new demands for access to the Tubridgi Pipeline System.

The Regulator has now determined that the Tubridgi Pipeline System passes the not significant test only as long as the present circumstances, with respect to the current utilisation of the Tubridgi Pipeline System, remain. The trigger that could reverse that finding, and hence any waiver made on that basis be revoked, would be if any of the following events were to occur:

- Where an excess of realised gas throughput occurs over forecast gas throughput. The proposed Access Arrangement currently being assessed by the Regulator and for which a Draft Decision was issued on 7 August 2000, seeks a trigger for review of the Access Arrangement if the annual demand for the Tubridgi Pipeline System in 2003/04 or 2004/05 is likely to exceed, by 5000 TJ or more for either year, the forecast throughput used to determine the Reference Tariff. The Draft Decision envisages that an independent report on the forecast demand for the Tubridgi Pipeline System be completed by 31 March 2002. It is proposed that the waiver be reviewed by the Regulator if such a report concludes that the annual demand for the Tubridgi Pipeline System in 2003/04 or 2004/05 is likely to exceed, by 5000 TJ or more for either year, the forecast throughput used to determine the Reference Tariff. The purpose of the review is to determine whether the waiver should be revoked.
- A request is made by a Prospective User to the Regulator for the waiver to be revoked because the Prospective User is seeking access to the Tubridgi Pipeline System for the transport of natural gas.
- The Access Arrangement currently being assessed by the Regulator and after it is approved, becomes subject to review in accordance with the provisions of the *National Third Party Access Code for Natural Gas Pipeline Systems* (the Code).

8.1.2 The Second Test

The second test is a provision of section 4.15(a)(ii), which raises the issue of whether the administrative costs to the Service Provider and its Associates of complying with the obligation not to carry on a Related Business outweighs any public benefit arising from the Service Provider meeting the obligation. In making this judgement the Regulator is required to take into account any arrangements put in place by the Service Provider to ensure that Confidential Information is not disclosed to those in the Related Business.

Origin Energy has argued that the “not to carry on a Related Business” requirement would force it to separate the gas production business from the gas transportation business, and that this would require renegotiation of existing contracts and a consequent set of new contracts. That, it was claimed would be costly and time consuming. Unbundling was also claimed to have adverse tax consequences.

As the current bundled gas sales contracts are due to expire in 2004, Origin Energy argued that there would be little public benefit from separation at this time.

Consideration of the Regulator in the Draft Decision

In the Draft Decision the Regulator indicated the difficulty of quantifying the public benefits of the ring fencing requirements in the same way that the costs of ring fencing may be quantified. The purpose of the ring fencing requirements is to put in place institutional structures that will deliver benefits through their potential to generate not only competition in the natural gas industry, but also the growth and development of that industry. As long as these outcomes are possible, the costs of ring fencing to a Service Provider would have to be demonstrated to be significant.

The costs indicated by Origin Energy were with respect to the assumed required renegotiation of existing contracts. This concern with existing contracts implies that the legislation is retrospective.

On the basis of additional information received since the Draft Decision, the Regulator has determined that the Code does not require bundled gas transport and gas supply contracts concluded prior to the operation of the Code to be unbundled to meet the ring fencing requirements. In other words, the Code is not retrospective. Therefore the costs claimed by Origin Energy are reduced significantly.

Nevertheless, the Regulator acknowledges that there are costs meeting this ring fencing requirement, and that the benefits of ring fencing in the present circumstances are minimal given the current use of the pipeline. This is not to say that if the usage were to change, then there would be the benefits of ring fencing as envisaged by the Code. In considering this test the Regulator is guided by the Code where section 4.15(ii) states that the Regulator is required to take into account:

arrangements put in place by the Service Provider (if any) to ensure that Confidential Information the subject of sections 4.1(f) and (g) is not disclosed to the Service Provider or is not disclosed to the servants, consultants, independent contractors or agents of the Service Provider who take part in a Related Business.

The Regulator has accepted that if the applicant for a waiver of the “not carry on a Related Business” requirement can demonstrate that the benefits are outweighed by the costs and that the confidentiality requirements of sections 4.1(f) and (g) are being met even when the Service Provider is carrying on a Related Business, then this second test could be considered to have been met.

Origin Energy, in its original application made a specific offer of an arrangement to provide a structure for the appropriate treatment of Confidential Information. Origin Energy proposed that of the two commercial staff in Adelaide, one would be responsible for gas production and gas trading matters and the other for gas transportation matters. Both of these staff report directly to the Manager, Exploration and Production (WA). Origin Energy claimed that Confidential Information provided by a User or Prospective User or any other Confidential Information obtained by the staff member responsible for gas transportation will therefore be separate from the information associated with the gas production and gas trading activities of the Tubridgi Pipeline.

A further component of the offer from Origin Energy was that the Manager, Exploration and Production (WA) who receives information from the two commercial officers in Adelaide would also be required to treat the information received on a confidential basis.

If the Adelaide-based officer responsible for gas transportation believes it is necessary for information regarding a User or Proposed User to be disclosed to other members of staff, or other participants in the Tubridgi Joint Venture, formal approval will first be sought from the User or the Proposed User prior to any disclosure.

The Regulator's concern expressed in the Draft Decision, however, was that in the arrangements proposed by Origin Energy, the Manager, Exploration and Production (WA) who receives information on gas transport will also receive information on gas marketing and will therefore be placed in a conflict of interest situation through the receipt of information from both gas marketing staff and gas transport staff. That outcome was considered in the Draft Decision not to sufficiently address the requirements of section 4.15(a)(ii).

Submission from Interested Parties

In the light of these views taken by the Regulator in the Draft Decision, Origin Energy has submitted a subsequent proposal to the Regulator that deals with this confidentiality requirement. The details are as follows:

▪ Origin Energy

SAGASCO believes it can use the natural separation that exists within different parts of the total Origin Energy organisation on behalf of all the Tubridgi Parties to achieve the required outcome.

Origin Energy's upstream oil and gas businesses are concentrated in one group reporting to the General Manager, Oil and Gas Production, who reports to the Managing Director of Origin Energy. Within the total Origin Energy organisation is another subsidiary company called Origin Energy Asset Management Limited (OEAM), a contracting company with significant experience in operating and managing downstream pipeline assets. This group reports through a different General Manager to the Managing Director. Amongst other things, OEAM is responsible for Envestra's gas distribution systems in South Australia, Queensland and Victoria, a role that requires it to have a detailed understanding of the Code as it applies to pipeline systems.

The Tubridgi Parties propose to contractually assign the administrative responsibility for the Tubridgi Pipeline System Access Arrangement to OEAM and believe the benefits in doing so include:

- (a) OEAM is a distinct operating unit from the upstream (gas production/gas trading) group of Origin Energy;
- (b) OEAM is familiar with the Code and the operation of Access Arrangements;
- (c) Management of the Tubridgi Pipeline System and the associated Access Arrangement would be consistent with other roles this group already performs;
- (d) OEAM has its own General Manager who separately reports to Origin Energy's Managing Director;
- (e) Information provided to OEAM by a Prospective Pipeline User would remain confidential from the Tubridgi Parties.

SAGASCO is in the process of drafting a Management Agreement as between the Tubridgi Parties and OEAM to govern the proposed arrangement.

SAGASCO believes a period of three months is required in order to complete the negotiations with the Regulator on the Access Arrangement, finalise the Management Agreement, and transfer responsibility to OEAM.

The Tubridgi Parties believe that by implementing the structure proposed above, Confidential Information, the subject of sections 4.1(f) and 4.1(g) of the Code, would not be disclosed to the servants, consultants, independent contractors of the Tubridgi Parties who take part in the business of Tubridgi gas production and gas trading.

Further Consideration of the Regulator

In the Draft Decision the Regulator acknowledged that there were costs associated with meeting the ring fencing requirement, and that the benefits of ring fencing in the present circumstances were minimal given the current use of the pipeline. However, Origin Energy's application did not satisfactorily address the issue of Confidential Information being quarantined from the Related Business.

In response to the Draft Decision, Origin Energy has submitted the above proposal to the Regulator to meet the requirements of the second test. The proposal in essence would place the pipeline business into a separate division of Origin Energy Ltd with the divisional manager reporting directly to the Chief Executive of Origin Energy Ltd.

The Regulator considers that Origin Energy has now offered an arrangement that could meet the requirements of section 4.15(a)(ii) with respect to the disclosure of Confidential Information when a Service Provider also carries on a Related Business. However, it is necessary for the Regulator to review a copy of the contractual arrangement between the Tubridgi Parties and OEAM to ensure that the proposed arrangement achieves the desired outcomes as outlined above.

Given the Regulator's view that the benefits of ring fencing in the present circumstances are small relative to the costs and the offer of a proposed administrative arrangement that will ensure the confidentiality of Confidential Information, the application for waiver of the ring fencing obligations is considered by the Regulator to pass the second test, subject to confirmation that the offer meets the necessary requirements.

8.1.3 The Third Test

The third test is a provision of section 4.15(a)(iii) of the Code relating to whether an arrangement has been established between the Service Provider and the Regulator that satisfies the Regulator that it replicates the manner in which section 7.1 would operate if the Service Provider complied with section 4.1(b).

If the Service Provider complied with section 4.1(b) and did not carry on a Related Business then all of the gas transport arrangements would be in the form of distinct contracts between business entities. Section 7.1 is designed to cover the situation where those contracts are with a business entity that is an Associate, and hence may have the potential to lessen, prevent or hinder competition in the market by offering terms and conditions not offered to third party users. Section 7.1 requires that a contract with an Associate of the transport Service Provider has the approval of the Regulator.

If the “not carry on a Related Business” requirement were to be waived for a Service Provider, the Code still seeks to ensure that the gas transport arrangements on behalf of the Related Business are carried on under terms and conditions that do not lessen, prevent or hinder competition in the market. In other words, an arrangement should be in place to provide for the Regulator’s approval of the gas transport terms and conditions for the Related Business.

Origin Energy in the original application proposed that it would provide the Regulator with evidence demonstrating that the Tubridgi Parties as gas shippers were not acting in an anti-competitive manner should the gas production or gas trading businesses of the Tubridgi Parties increase their capacity allocation on the Tubridgi Pipeline System. The Tubridgi Parties would, Origin Energy claims, not increase their own booked capacity in the pipeline system without justification for doing so, and hence could not be seen to be using this as a method of denying third party access.

Consideration of the Regulator in the Draft Decision

The Origin Energy proposal in the application for waiver was considered to fall short of an arrangement that would meet the requirements of section 7.1 as it only offered to provide information dealing with booked capacity. Section 7.1 envisages that the whole of the terms and conditions under which gas is transported in the Related Business should be subject to the approval of the Regulator.

Submission from Interested Parties

- **Origin Energy**

Under the proposed arrangement, OEAM would also be required to seek the approval of the Regulator before entering into an Associate Contract. Once a contract is entered into by OEAM for the provision of Pipeline Services, the Tubridgi Parties, who would continue to own and operate the Tubridgi Pipeline System, would be given a copy of the contract to allow administration of the arrangement.

Under the requirements of this section, OEAM would provide to the Regulator for approval any contract which it had negotiated with the Tubridgi Parties or any of them for the transportation of gas, in line with the requirements of section 7.1.

In response to the Draft Decision, Origin Energy has submitted the above proposal to the Regulator to meet the requirements of this third test. Origin Energy has now accepted that OEAM would submit all arrangements for the transport of gas on behalf of the Related Business to the Regulator for approval by the Regulator. As a result of this commitment given by Origin Energy to submit all arrangements for the transport of gas on behalf of the Related Business to the Regulator for approval, the application is considered by the Regulator to have passed the third test.

8.2 REQUIREMENTS RELATING TO MARKETING STAFF

In the application for waiver, Origin Energy also applied for a waiver of the requirements that the marketing staff of the Service Provider are not also in a Related Business and that the staff of the Service Provider are not in the marketing staff of the Related Business as required by sections (4.1(h)) and (4.1(i)) of the Code.

The only test in relation to section 4.15(b) is whether the administrative costs outweigh any public benefit from the obligation to maintain separated staff.

Origin Energy has argued that the relatively small size of the load carried through the Tubridgi Pipeline System means that there would be minimal, if any, public benefit from complying with the Code.

At the same time, the argument was made that the ring fencing requirements would involve each of the Tubridgi Parties having to employ an additional staff member, with all the associated costs that this would involve.

Consideration of the Regulator in the Draft Decision

The legislation intends that granting of a waiver of the ring fencing requirements should only occur where the circumstances meet the tests that are imposed. At the same time the legislation states that:

The objective of this Code is to establish a framework for third party access to gas pipelines that:

- (a) facilitates the development and operation of a national market for natural gas; and
- (b) prevents abuse of monopoly power; and
- (c) promotes a competitive market for natural gas in which customers may choose suppliers, including producers, retailers and traders; and
- (d) provides rights of access to natural gas pipelines on conditions that are fair and reasonable for both Service Providers and Users; and
- (e) provides for resolution of disputes.

The separation of marketing staff is considered to be an important requirement of the Code by assisting in the pursuit of objectives of the Code. The costs of compliance are required to outweigh the public benefit that may flow from the requirement before a waiver may be given. It is not sufficient to indicate that this requirement has a cost. It is also necessary to demonstrate that the cost outweighs the public benefit.

Origin Energy argued that the public benefit is small because the throughput of the Tubridgi Pipeline System is relatively small. The Regulator considered that low current throughput was not a sufficient argument to demonstrate that the public benefit is minimal. The Draft Decision considered that the Tubridgi Pipeline System is a significant pipeline as it has the potential to be associated with new developments in the gas industry in Western Australia. The public benefit was served by ensuring that the appropriate structures are in place to encourage these new developments.

Submissions from Interested Parties

▪ Origin Energy

Under the proposed arrangement, OEAM would have no obligation to comply with instructions or directions of Marketing Staff of the Tubridgi Parties. Prior to entering into a contract for the supply of Pipeline Services, OEAM would be required to obtain the approval of a nominated officer of each of the Tubridgi Parties who is not a member of the Marketing Staff.

Once again, the Tubridgi Parties believe the tests of this section are met through the current restructuring proposal.

Further Consideration of the Regulator

The draft decision by the Regulator to not grant a waiver of the requirements in sections 4.1(h) and 4.1(i) of the Code was based on the potential significance of the Tubridgi Pipeline System.

The effect of a waiver of the requirement of section 4.1(b) “not carry on a Related Business” is that it allows the Service Provider to also carry on the business of producing, purchasing or selling natural gas.

The requirements of sections 4.1(h) and (i) deal with the situation where an Associate takes part in a Related Business.

In that situation the Code seeks to ensure that the Marketing Staff of the Service Provider are not also servants, consultants, independent contractors or agents of an Associate that takes part in a Related Business (4.1(h)). The Code also seeks to ensure that none of the servants, consultants, independent contractors or agents of the Service Provider are Marketing Staff of an Associate that takes part in a related Business (4.1(i)).

The requirements of sections 4.1(h) and (i) do not apply when a waiver is granted of the “not carry on a Related Business” requirement and there is no Associate that takes part in the Related Business carried on by the Service Provider.

This means that the marketing staff of a Service Provider may participate in the activities associated with the Related Business. The objectives of the Code with respect to the accountability and confidentiality of information associated with the marketing operations of the Service Provider have to be met by the requirements of sections 4.1 (d)-(g) of the Code.

Where an Associate does take part in a Related Business carried on by a Service Provider the waiver given to the Service Provider to carry on a Related Business (with its implicit approval of the mixing of Marketing Staff of the Service Provider with the activities of the Related Business) does not carry over to an Associate unless an explicit waiver of sections 4.1(h) and (i) has been given.

Under the arrangements submitted, since the Draft Decision, by Origin Energy to support a waiver from the “not carry on a Related Business” requirement, the marketing of pipeline access will be undertaken by OEAM. The marketing of other services will be undertaken by Origin Energy. In this circumstance the Service Provider, SAGASCO, has a Related Business in which an Associate takes part, and as such the Code requirements of section 4.1(h) and section 4.1(i) would apply unless a waiver was granted.

SAGASCO has sought a waiver of the requirements of sections 4.1(h) and 4.1(i). The test for the Regulator is whether the cost of the obligation to maintain separated staff outweighs any public benefit from maintaining that obligation.

In the present circumstances of the Tubridgi Pipeline System, the Regulator has taken the view that there would be little public benefit from maintaining the separation of staff obligation. The Tubridgi Parties have already incurred costs involved in restructuring the pipeline operations to meet the requirements set by the Regulator for a waiver of the “not carry on a Related Business” requirement. It is not considered that there is a public benefit in imposing additional costs on the Tubridgi Pipeline System at this point in time.

In this circumstance, the Regulator is of the view that a waiver of the requirements of sections 4.1(h) and 4.1(i) may be granted in the context of the arrangements submitted by Origin Energy.

9 FINAL DECISION

In accordance with section 4.23 of the Code, this Final Decision is that the Regulator intends to issue a notice under section 4.15 of the Code granting a waiver of the ring fencing obligations required by section 4.1(b), of the Code in respect of the Tubridgi Pipeline System.

This waiver, when issued, will be subject to conditions that, if realised, could cause the waiver to be revoked. The trigger that could result in the waiver being revoked is if any of the following events occur:

- Where an excess of realised gas throughput occurs over forecast gas throughput. The proposed Access Arrangement currently being assessed by the Regulator and for which a Draft Decision was issued on 7 August 2000, seeks a trigger for review of the Access Arrangement if the annual demand for the Tubridgi Pipeline System in 2003/04 or 2004/05 is likely to exceed, by 5000 TJ or more for either year, the forecast throughput used to determine the Reference Tariff. The Draft Decision envisages that an independent report on the forecast demand for the Tubridgi Pipeline System be completed by 31 March 2002. It is proposed that the waiver be reviewed by the Regulator if such a report concludes that the annual demand for the Tubridgi Pipeline System in 2003/04 or 2004/05 is likely to exceed, by 5000 TJ or more for either year, the forecast throughput used to determine the Reference Tariff. The purpose of the review is to determine whether the waiver should be revoked.
- A request is made by a Prospective User to the Regulator for the waiver to be revoked because the Prospective User is seeking access to the Tubridgi Pipeline System for the transport of natural gas.
- The Access Arrangement currently being assessed by the Regulator and after it is approved, becomes subject to review in accordance with the provisions of the *National Third Party Access Code for Natural Gas Pipeline Systems* (the Code).

With respect to the application for a waiver of the ring fencing requirements of sections 4.1(h) and 4.1(i) of the Code, the Regulator intends to issue a notice under section 4.15 of the Code granting the waiver. This waiver, when issued, will be under the same conditions as would apply to the waiver for section 4.1(b), of the Code.

In recognition of the time required to conclude a management agreement between the Tubridgi Parties and OEAM for the management of the Tubridgi Pipeline System, it is proposed that the

arrangements be concluded and submitted to the Regulator for review by 21 February 2001 before the notice under section 4.15 is issued.

To provide the necessary time for the proposed management agreement to be concluded and reviewed by the Regulator, a further extension of time to 31 March 2001 is hereby granted under section 7.19 of the Code for Origin Energy to comply with the requirements of sections 4.1(b), (h) and (i) of the Code.

10 GLOSSARY

Terms used in the Final Decision have the meanings ascribed to them under the *Gas Pipelines Access (WA) Act 1998* or as otherwise defined in the documents pertaining to the application by Origin Energy for a waiver of ring fencing obligations. In order to assist understanding, summary definitions of several terms that may be relevant to this Final Decision are provided below.

Access Arrangement	A statement of policies and the basic terms and conditions that apply to third party access to a covered pipeline.
Access Arrangement Information	Additional and/or supplemental information pertaining to the Access Arrangement.
Access Request	A request for access to a Service made in accordance with the Access Arrangement.
Associate	Has the meaning given in the Gas Pipelines Access Law.
Capacity	The potential of a pipeline, as currently configured and operated in a prudent manner consistent with good pipeline industry practice, to deliver a particular service between a Receipt Point and a Delivery Point at a point in time.
Code	The <i>National Third Party Access Code for Natural Gas Pipeline Systems</i> .
Confidential Information	Information that is by its nature confidential or is known by the other party to be confidential and includes: <ul style="list-style-type: none"> (a) any information relating to the financial position of the party and in particular includes information relating to the assets or liabilities of the party and any other matter that affects or may affect the financial position or reputation of the party; (b) information relating to the internal management and structure of the party or the personnel, policies and strategies of the party; (c) information of the party to which the other party has access, other than information referred to in paragraphs (a) and (b), that has any actual or potential commercial value to the first party or to the person or corporation which supplied that information; and (d) any information in the party's possession relating to the other party's clients or suppliers and like information.
Contracted Capacity	The nominal quantity of gas transportation to be undertaken under a service agreement between a User and the Service Provider.

Covered Pipeline	The whole or particular part of a pipeline which is regulated under the Code.
Grandfathered Contract	A contract for the provision of gas transportation services by Origin Energy, whether or not in conjunction with other services, entered into before the date for complying with the ring fencing provisions of the Code.
National Gas Pipelines Access Agreement	A national agreement endorsed by CoAG and signed by all Australian Heads of State on 7 November 1997 to introduce a national gas pipelines access regime.
Prospective User	A person who seeks or who is reasonably likely to seek to enter into a Service Agreement with a Service Provider and includes a User who seeks or may seek to enter into a Service Agreement for an additional Service.
Reference Services	A Service that is specified as a Reference Service in an Access Arrangement.
Reference Tariff	A tariff specified in an Access Arrangement as corresponding to a Reference Service.
Regulator	Independent Gas Pipelines Access Regulator in Western Australia established under the <i>Gas Pipelines Access (WA) Act 1998</i> .
Related Business	The business of producing, purchasing or selling Natural Gas, but does not include purchasing or selling of Natural Gas to the extent necessary: <ul style="list-style-type: none"> (a) for the safe and reliable operation of a Covered Pipeline; or (b) to enable a Service Provider to provide balancing services in connection with a Covered Pipeline.
Ring Fencing	A requirement on a Service Provider to establish arrangements to segregate or “ring fence” its business of providing Services using a covered pipeline from other business activities.
Service	A Reference Service or Non-Reference Service relating to the transportation of gas by a Service Provider, and in the case of a Service Agreement means the particular reference Service or Non-Reference Service the subject of that Service Agreement.
Service Agreement	An agreement between a Service Provider and a User for the provision of a Service.
Service Provider	In relation to a pipeline or proposed pipeline, means the person who is, or who is to be, the owner or operator of the whole or any part of the pipeline or proposed pipeline.

Tubridgi Pipeline System Comprises the Tubridgi Pipeline (Licence Number WA: PL 16), and the Griffin Pipeline (Licence Number WA: PL 19)

User A person who has a current Service Agreement or an entitlement to a Service as a result of arbitration under Section 6 of the Code.

11 ABBREVIATIONS

AA	Access Arrangement
AAI	Access Arrangement Information
ACCC	Australian Competition and Consumer Commission
CoAG	Council of Australian Governments
DBNGP	Dampier to Bunbury Natural Gas Pipeline
GJ	Gigajoules (10^9 joules)
OffGAR	Office of Gas Access Regulation
Origin Energy	Origin Energy Resources Ltd (ACN 007 845 338)
OEAM	Origin Energy Asset Management Ltd
PJ	Petajoules (10^{15} joules)
TJ	Terajoules (10^{12} joules)