SUBMISSION TO THE

ECONOMIC REGULATION AUTHORITY

Draft Decision on Proposed Revisions to the

Access Arrangement For Western Power's Network

May 2012

synergy
energy solutions you can use

Executive Summary

Matter

The Electricity Networks Access Code 2004 (**Code**) establishes under an access arrangement the framework for access to distribution and transmission network services in Western Australia. The framework includes access to Western Power's covered network, and the regulation and funding of augmentations to this covered network. Western Power's current access arrangement (**AA2**) was approved by the Economic Regulation Authority (**Authority**) in January 2010 with a start date of 1 March 2010.

On 29 March 2012 the Authority published and invited comments its draft decision on Western Power's Proposed Revisions to the Access Arrangement (**PRAA**) developed under the Code. Subject to the Authority's approval, the PRAA will apply from 1 July 2012 to 30 June 2017 (**AA3**).

Context

The role of the Authority is to determine whether Western Power's proposed revised access arrangement complies with the requirements of the Code. In doing so, the Authority is guided by specific provisions of the Code relating to particular elements of the access arrangement, as well as the Code objective of promoting economically efficient investment in and operation and use of electricity networks and services of networks in Western Australia, to promote competition in markets upstream and downstream of the networks.

Scope

Synergy in providing its comments has relied on its practical experience and has focused primarily on the efficient operation and use of Western Power's electricity networks and services of networks.

Key issues

Synergy has provided comments on particular key issues associated with the operation of the standard access contract and the use of reference services under this contract.

Recommendations

Synergy recommends that the Authority review the matters raised in Synergy's previous and current submission with a view to addressing key issues in the standard access contract in order to promote regulatory outcomes in the public interest.

INTRODUCTION

Synergy appreciates the opportunity to comment on the Authority's Draft Decision on the PRAA. In formulating this submission Synergy has focussed on the factors the Authority must consider when deciding whether to approve the PRAA, which are those listed under clause 4.30 of the Access Code (**Code**) and the matters specified under section 26(1) of the *Economic Regulation Act 2003* (**ERA Act**):

> **"Factors the Authority must have regard to**
> 4.30 In determining whether to *approve* a *proposed access arrangement*, the *Authority* must have regard to following:
>
> (a) the geographical location of the *network* and the extent (if any) to which the *network* is interconnected with other *networks*; and
>
> (b) contractual obligations of the *service provider* or other persons (or both) already using the *network*; and
>
> (c) the operational and technical requirements necessary for the safe and reliable operation of the *network*; and
>
> (d) to the extent relevant — *written laws* and *statutory instruments*."

> **"26. Authority to have regard to certain matters**
> (1) In performing its functions, other than the functions described in section 25(c) and (d), the Authority must have regard to —
>
> (a) the need to promote regulatory outcomes that are in the public interest;
>
> (b) the long-term interests of consumers in relation to the price, quality and reliability of goods and services provided in relevant markets;
>
> (c) the need to encourage investment in relevant markets;
>
> (d) the legitimate business interests of investors and service providers in relevant markets;
>
> (e) the need to promote competitive and fair market conduct;
>
> (f) the need to prevent abuse of monopoly or market power;
>
> (g) the need to promote transparent decision-making processes that involve public consultation."

As most of the comments provided by Synergy relate to the ***standard access contract***, Synergy has also considered the Authority's draft decision in light of the requirements applicable to that contract being set out in Section 5.3 of the Code, which requires:

> "5.3 A *standard access contract* must be:
>
> (a) reasonable; and
>
> (b) sufficiently detailed and complete to:
>
> (i) form the basis of a commercially workable *access contract*; and
>
> (ii) enable a *user* or *applicant* to determine the value represented by the *reference service* at the *reference tariff*."

Finally, in providing its responses Synergy has also provided specific examples from its actual and practical experience to show why the Authority's comments in its Issues Paper[1] are not consistent with one or more of the criteria set out above.

Words in *italics* but not defined in this submission have the meaning given to them in the Code.

STANDARD ELECTRICITY TRANSFER ACCESS CONTRACT

Standard Access Contract Represents the Basic Terms and Conditions

Before raising specific concerns with the standard access contract Synergy would like to address some of the general comments made by the Authority. The first issue concerns the Authority's comments set out below pertaining to the nature of the standard access contract.

In its Draft Decision the Authority appears to have formed the view that the *standard access contract* does not represent the minimum or basic terms for an *access contract*.

> 1384. Synergy's submission states that "It is important to recognise the Standard Access Contract represents the minimum standards and terms for an access contract". This statement is not correct as a service provider and a potential user are free to negotiate on any terms of access to a service (including terms which differ from a standard access contract). However, in the event of a dispute over the terms of an access contract for a reference service, the arbitrator must not make an award specifying terms of an access contract that are inconsistent with the standard access contract for the reference service in the access arrangement (section 10.21 of the Access Code).

Synergy agrees that the Code clearly provides for *users* to negotiate terms which differ from a *standard access contract*. However, Synergy submits that the Authority's view that the *standard access contract* does not represent the basic terms and conditions that will apply to network services appears to be contrary to section 104(2)(c)(ii) of the Industry Act:

> "104(2) Provision is to be made in the Code -
>
> (c) as to the lodgement by the network service provider of an arrangement for network infrastructure facilities covered by the Code setting out –

[1] Issues Paper on Western Power's Proposed Revisions to the Access Arrangement for the Western Power Network, 7 November 2011 (**Issues Paper**).

(ii) the basic terms and conditions that will apply to access to services unless an access agreement contains different terms and conditions; and…"

Consequently, Synergy submits, consistent with the Industry Act, the *standard access contract* is intended to have practical effect and set out the basic terms and conditions that will apply to access to services.

Synergy is also of the view that the *access arrangement* must contain a set of basic terms and conditions that will apply to access to services from Western Power to give effect to the outcomes outlined in section 4.30 of the Code and section 26(1) of the ERA Act. For example, in numerous instances Synergy has simply requested that the Authority insert into the standard access contract provision that mirror the regulatory obligations imposed on the network operator. By failing to accept Synergy's approach the Authority is, contrary to its obligation under 4.30(d) of the Code not having regard to written laws and statutory instruments.

In addition, by failing to have regard to these written laws (including codes and regulations) the Authority is also, contrary to its obligation under section 26(1)(b) not promoting a regulatory outcome that is in the public interest. The Authority must certainly agree that obligations imposed by a democratically elected legislature must reflect the legislature's view on what is in the public interest. It is in fact the role of the law makers to decide what is in the public interest. In many instances a breach by the network operator to comply with a regulatory obligation has no adverse impact on the network operator at all, which results in many instances of non compliance particularly when the costs to the network operator of complying with the obligation materially outweigh the consequences to it's of non-compliance. Yet, surely the law makers made the acts, codes and regulations with the expected outcome that the network operator would comply with them particularly when the costs to the network operator of complying with the obligation materially outweigh the consequences to it of non-compliance.

Many of Synergy's suggested changes reflect a means to give meaningful incentives for the network operator to comply with its obligations, by facing contractual consequences for failing to comply. Without these contractual consequences the network operator has at most an obligation to report a breach, but even that reporting obligation would not apply or be very limited in most instances. The Authority must assist in driving regulatory outcomes reflected in law by creating real financial consequences from a failure to comply. In turn it is not reasonable for the Authority (and therefore in contravention of section 5.3 of the Code) to have the *standard access contract* reflect or incentivise different commercial outcomes than the outcome stipulated and contemplated by laws and regulations.

Finally, the Authority's approach in many instances leaves out crucial details that are necessary to form the basis of a commercially workable access contract. A commercially workable agreement must by definition address operational and other practical issues shared by the market. If the agreement does not, or does not result in a commercially effective outcome in which the service provider actually takes responsibility for the consequences of the risks allocated to it, then the contract is commercially unworkable. In Synergy's experience it is neither reasonable nor commercially workable to enter into

an agreement to leave key issues unresolved or to leave these issues to be resolved through a dispute resolution process.

Key Issues in the standard access contract: Connection Point Problems

> 1401. The Authority observes that, in the normal course of events, there would never be a Connection Point that is not subject to the access contract for a retailer or other network user. However, if for some reason a Connection Point exists where there is no contract with a retailer, then that connection point would revert to the "default supplier" retailer under section 59 of the Act.

Under section 5.1(b) of the Code a *standard access contract* must provide the terms and conditions for a *reference service*. Under the PRAA four proposed *reference services* are specific to Synergy[2]. Under section 5.3 of the Code the *standard access contract* must provide reasonable and commercially workable terms and conditions for these *reference services*. Because the concerns set out below relate to *reference services*, they are not simply subject to negotiation between Synergy and the network operator, and the Authority is obliged to ensure that the *standard access contract* deals with these concerns in a manner that results in a reasonable and commercially workable contract.

Synergy has over 900,000 connection points on its access contract. To enable Synergy to bill and provide other services to its customers behind these connection points (that is, to make the agreement commercially workable) Synergy needs

- Clear and workable obligations imposed on the network operator for adding and removing connection points to ensure that the connection point database is accurate and subject to change only in accordance with established rules and procedures. It is not commercially workable to have a contract that is ambiguous and that can be read as permitting, unilateral change to connection points or connection point details by the network operator;
- Timely updating of the database to ensure that a retailer is able to bill its customers without delay;
- Given the number of connection points an automated mechanism for changing the database;
- An ability to recover any loss or damage that Synergy suffers as a result of the network operator not meeting these obligations.

Synergy currently operates in an environment in which none of the above is in place. As a result has faced the following real situations:

- Western Power operates certain schemes that permit connection points for reference services to be created or removed contrary to the *Applications and Queuing Policy*. Contrary to the Authority's statement in its Draft Decision Synergy has numerous examples of orphan connection points on Western Power's

[2] The A1, A3, C1 and C3 reference services.

network. For example, Western Power's Contractor Connect scheme, where a customer works with an approved electrical contractor without the knowledge of a retailer, can result in orphan connection points being created and the network operator makes a retrospective determination of the default supplier after a connection point has been created[3]. In the majority of these cases Synergy becomes liable for energy consumed under the calculation of the Notional Wholesale Meter.

- Synergy being unilaterally assigned a connection point for which it has no retail contract in place (resulting in Synergy paying network charges, but being unable to recover the charges from the end user or consumer).

[3] This determination sometimes occurs several years after the connection point has been created and energised.

- The network operator refusing to delete a connection point for over two years in spite of Synergy's request, resulting in Synergy incurring network charges for a site with no customer, thereby leaving Synergy as the ultimate payer of the network charges
- Synergy estimates that on any given day a material number of the connection points or associated details (including billing information) are incorrect.

The results of the above real scenarios are:

- Synergy has the significant administrative burden to retrospectively bill or refund this customer
- Synergy must administer billing queries caused by the network operator
- Synergy must delay billing a customer until it is sure that the customer exists and how much the customer owes
- Synergy must perform reconciliations of customers
- Synergy must administer customer complaints
- Synergy must pay Ombudsman costs
- Synergy must in some circumstances provide a payment plan if the unbilled amount is too great for the customer to pay
- Synergy may be required to report the late billing as a type 2 breach in some circumstances
- Synergy has the electricity consumption assigned to it at the notional wholesale meter even though it may not be Synergy's customer. Synergy may not recover this money from the actual consumer of the electricity and the assignment to the notional wholesale meter could increase Synergy's liability for capacity costs administered by the IMO
- the proposed standard access contract creates and incentive for Western Power not to give effect to clause 3.6(c)(iii) because it will reduce the revenue it will receive from a user
- if the identification of the connection point comes too late, Synergy may not be able to collect the revenue from the customer at all if either the Customer Service Code or Energy Operators (Powers) Act prevents that collection.

Yet because the *standard access contract* does not contain any mechanism by which the vast amount of information associated with over 900,000 connection points is to be accurately and timely updated, and puts no real workable obligation on the network operator to maintain an accurate database, imposes no real and workable obligation on the network operator to update the database on an accurate and timely basis, and does not permit Synergy to recover for the type of damages that Synergy suffers, Synergy must ultimately bear this risk and these losses even though they are completely outside of Synergy's control and should sit more properly with the network operator.

The Authority, in its Draft Decision, has also determined if a *connection point* exists without a supply contract with a retailer being first established, then the *connection point* would revert to the default supplier. Such a determination ignores completely the issues outlined above. For example, how is Synergy to know when it has been allocated such a *connection point*? Is it when the *service provider* advises Synergy, which can be years after the event? Further, how is Synergy to recover the network and energy costs of the electricity taken by such a customer during that period?

Synergy submits that these issues are why the regulatory regime presupposes that the default supplier has submitted an electricity transfer application, under the *Applications and Queuing Policy*, prior to the connection point being established.

In Synergy's view in the absence of the *Application and Queuing Policy* and an accurate register there is no other mechanism to determine a default supplier. However, Western Power often unilaterally determines that Synergy is the default supplier for orphan connection points.

A retailer may only supply electricity to a customer through a *connection point* on its *access contract.* This requirement underpins the operation of the Wholesale Market Rules and the efficiency of the market. Consequently, the provision of an accurate list of *connection points* on an *access contract* is essential to a retailer's business and the operation of the Wholesale Market Rules. Anything else would result in Synergy bearing the cost in the wholesale market of errors made by Western Power without recourse to Western Power (alternatively, Synergy should be able to recover these costs from Western Power under the damages regime proposed by Synergy in this submission).

Further, this information is also an essential part of any normal commercial agreement: a purchaser of services must have certainty of the scope of services it is acquiring and the basis for the charging of those services. No purchaser would accept a situation in which a supplier can unilaterally and retrospectively determine the scope of services provided: the list of connection points, in respect of the *reference service*, is in effect the scope of services being provided and is also the basis on which Western Power charges for its services. Without an accurate list of connection points the retailer cannot accurately determine what services it is receiving and being asked to pay for.

The examples above relate to the network operator escaping responsibility for not complying with the *Applications and Queuing Policy*. The refusal to incorporate Synergy's suggested changes as contractual obligations is also not consistent with section 59(c) and the Electricity Industry (Obligation to Connect) Regulations 2005, regulation 7(1)[4]. This section contemplates a register that accurately details the connection points and the corresponding default supplier.

[4] This regulation contemplated that it is the retailer or default supplier who makes the request to energise and supply a premise. That is, the default supplier is not retrospectively determined after the premises in energised.

59. Regulations as to default supplier

The regulations may —

(a) require that a default supplier be determined, in accordance with the regulations, for each connection point as defined in the regulations;

(b) require that the default supplier so determined be a retail licensee that supplies electricity at the relevant connection point;

(c) require that a register be established and maintained, in accordance with the regulations, showing the name of the default supplier for the time being determined for each connection point;

In addition, it is also important to note that license condition 99[5] and regulation 36 of the Electricity Industry (Customer Contracts) Regulation 2005 also contemplate that the network operator will have a mechanism to accurately identify the retailer associated with a *connection point*.

36. Determination of default supplier

(1) A distributor is required to determine from time to time the default supplier for each connection point that connects to a distribution system operated by the distributor.

(2) A determination under subregulation (1) must be made in such a way that the default supplier for each connection point is the retail licensee identified by the distributor as supplying electricity at the connection point.

(3) It is a condition of a distributor's distribution licence or integrated regional licence that the distributor must comply with the obligation in subregulation (1).

[5] From the Economic Regulation Authority, Electricity Compliance Reporting Manual, May 2011.

(c) If Western Power* receives a notice from the User* under clause 3.6(a), then it must notify the User* that it accepts the deletion, and the date that the deletion takes effect, if:

(i) Western Power* has successfully processed a Customer* transfer request in relation to the Connection Point* under the Customer Transfer Code*; or

(ii) the Connection Point* has been added to another Access Contract* by some other means; or

(iii) the Facilities and Equipment* in respect of the Connection Point* have been permanently Disconnected* from the Connection Point*,

otherwise Western Power* may notify the User* that it rejects the deletion.

The Customer Transfer Code regulates and ensures the timely deletion of a connection point under clause 3.6c(i). The inclusion of wording to refer to the timeframes stipulated by the Customer Transfer Code is also the only meaningful way to ensure that the network operator is held commercially accountable for the consequences of not performing obligations imposed on it under the Customer Transfer Code. This is particularly so given the damages regime currently proposed in the PRAA. The inclusion of this additional wording would act as a powerful driver to ensure that the network operator meets its obligations under the Customer Transfer Code.

The timely operation of clauses 3.6(c)(ii) and (iii) are not regulated under the Customer Transfer Code or any other legislation. The proposed standard access contract places no obligation on Western Power to give effect to clause 3.6(c)(ii) and (iii) in a timely and efficient manner. Therefore, to make the contract commercially workable these two sub-clauses require amendment to require that the obligations be performed in a timely manner.

The inclusion of wording to refer to the timeframes is the only meaningful way to ensure that the network operator is held commercially accountable for the consequences of not performing obligations imposed on it under the *standard access contract*. The inclusion of this additional wording would act as a powerful driver to ensure that the network operator meets its service obligations.

The above shows the regulatory obligations imposed on the network operator under the Customer Transfer Code. Synergy is merely requesting that the *standard access contract* mirror these obligations and provides the same level of certainty. A failure to impose an obligation on the network operator to maintain an accurate connection point database and to require timely updates to that database are not consistent with the Authority's obligation to have regard to written laws and to promote regulatory outcomes that are in the public interest, as discussed in further detail at the beginning of this submission.

Payment of Security for Material Breaches

In its previous submission Synergy submitted that clause 9 of the proposed standard access contract required an amendment, consistent with the requirements of clause 5.3(a) of the Code, to ensure that only breaches of material contract obligations require the payment of security.

The Authority in its Draft Decision formed a view that it is unnecessary and confusing to insert the word "material" into clause 9(a) of the *standard access contract*.

> 1494. The Authority considers it is unnecessary and confusing to insert the word "material" to clause 9(a) as suggested by Synergy. Among other things, a primary purpose of clause 9(a) is to specify the 'threshold test' to be applied by Western Power in determining whether or not Western Power will require security from a User (or indemnifier). It is not, and does not require, an analysis of which "obligations" Western Power needs to consider in making such a determination.

Synergy does not understand the rationale for this objection. The Authority seems to imply that the concept of materiality introduces a level of complexity into the standard access contract, yet the Authority has accepted the same concept of materiality in the standard access contract in particular in clauses 4.2, 13(c), 18.3, and 25.1(b) where it works in Western Power's interest. The Authority's position is therefore inconsistent with the Authority's tolerance of a materiality threshold elsewhere in the standard access contract.

In this particular clause Synergy's request for the inclusion of a materiality threshold is reasonable. Without the inclusion of this materiality threshold a breach of an immaterial contractual obligation can trigger draconian consequences. The concept of materiality is also necessary in this context to create commercial workability.

Removing Supply from Residential Homes With PV Systems

The Authority requires an amendment to be made to clause 3.6 of the proposed standard access contract such that a one month notice period for permanent disconnection is required for generators up to and including 30 kVA. These generators are typically photovoltaic generators used by residential homes and the methods of connection for these generators are approved by Western Power under the *Application and Queuing Policy* and the *Technical Rules*.

> 1420. The Authority requires an amendment to be made to the electricity transfer access contract such that a one month notice period for permanent disconnection is required for generators up to and including 30 kVA, providing the generator is offsetting load.

In Synergy's view this amendment is contrary to clause 4.30(b) and (d) of the Code. In particular it also appears to be contrary to the practice that is currently in place for abolishing the supply for residential homes, the services provided under the Metering

Code[6] and the Model Service Level Agreement[7] (**MSLA**) approved by the Authority. This is because clause 5.2 of the Metering Code requires users to rely on the Model Service Level Agreement approved by the Authority instead of negotiating a separate agreement for services:

> **5.2 Unwritten service level agreement adopts model service level agreement**
>
> If a *network operator*[54] provides, and a *user* accepts, a *metering service* and there is no written *service level agreement* between the parties in respect of the *metering service*, then unless the parties agree otherwise, the terms of the unwritten *service level agreement* for the *metering service* are to be taken to be those set out in the *model service level agreement* in respect of the *metering service*.

In particular, it is important to note the Standard Metering Services in the Model Service Level Agreement are also a component of the *reference services* that are covered by the terms and conditions of the *standard access contract*.

Clause 5.27 and 5.28 in the Code details the *supplementary matters*, including metering services, and how these matters must be dealt with in an *access arrangement*. Furthermore, clause 23 of the standard access contract specifies that the provisions of the access arrangement in respect of supplementary matters apply also as terms of the access contract, to the extent they are relevant.

In addition, it is important to note that Western Power must provide the services to metering Code Participants[8] that are required to be provided by the Metering Code and the various Metering Code documents approved by the Authority. This provision applies unless a party has negotiated a different service level agreement with Western Power. In Synergy's view this provision is aligned with section 26(1)(b) and (f) of the ERA Act. Hence, it is also relevant that under clause 12(g) of the Metering Code the Authority is listed as a Code Participant.

However, it is also relevant to note that clause 2.5 of the Code contemplates that matters dealt with by the *Applications and Queuing Policy* and *Technical Rules* are not matters that may be negotiated or varied under an agreement between Western Power and another party.

Synergy also notes that with respect to supply abolishment for residential homes there appears to be no difference to how Western Power abolishes the supply for a residential home with a photovoltaic generator compared to a home without a photovoltaic generator.

[6] Electricity Industry Metering Code 2005 (**Metering Code**).
[7] Developed under the Metering Code.
[8] As defined under the Metering Code.

Therefore, Synergy submits that in this matter and where the parties have not negotiated a different agreement, the *standard access contract* must be aligned with how services[9] must be provided under the Metering Code and as approved by the Authority in the Metering Code documents[10] in order to give effect to 4.30(b) and (d) of the Code and make it clear how *supplementary matters* will be dealt with under the *standard access contract*. In Synergy's view the abolishment of a supply and connection point is a relevant matter to be dealt with under the *standard access contract* in sufficient detail and clarity in order to be commercially workable and give effect to clause 5.3(b)(i) of the Code.

In addition, it is also important to note that, under the current *standard access contract*, unless there is a contractual requirement that ensures the metering database[11] is aligned with the connection point database then Synergy may suffer the adverse commercial consequences of errors between these databases in respect of using a *reference service*.

Without the inclusion of this change the Authority is placing Synergy in an invidious position. On the one hand it is obliged under regulations to meet the stricter obligations under the MSLA for services ultimately provided by the network operator, yet it cannot hold the network operator accountable for these stricter obligations. Without Synergy's requested changes Synergy has a gap between what it is required to provide and what it can compel the network operator to provide. That approach is neither reasonable nor commercially workable. In addition, and as discussed previously Synergy must have a damages regime that allows it to recover the type of losses it is likely to incur. Without that change the allocation of theoretical risk to the network operator is meaningless as the network operator does not bear any consequences if that risk does eventuate.

Obligation to Mitigate Connection and Network Risks Prior To Approving The Connection to the Network

Synergy in its previous submission proposed changes to clause 6.2(e) of the proposed *standard access contract* to ensure that Western Power does not unreasonably refuse to enter into a Connection Contract with a Controller. In Synergy's view such an amendment is required for the *standard access contract* to be commercially workable and give effect to the outcomes detailed in section 26(1) of the ERA Act. The change is also necessary to enable Synergy to exercise its rights to nominate a controller as permitted by the AQP.

The Authority in its Draft Decision appears to have had separate and individual discussions with Western Power on Synergy's public submission on the PRAA and formed the view that Synergy's proposed amendment to clause 6.2(e) is unclear and unworkable.

[9] In this case the services for supply abolishment.
[10] Developed under Part 6 of the Metering Code.
[11] Regulated under the Metering Code and the Communication Rules approved by the Authority.

1440. The Authority has discussed Synergy's concerns with Western Power. Western Power considers that the inclusion of clause 6.2(g) at the last access arrangement review sufficiently meets both the concerns raised by Synergy during the current access arrangement and those raised in Synergy's current submission, which in substance are the same.

1443. The Authority agrees with Western Power that Synergy's proposed amendments to clause 6.2(e) are unclear and unworkable, and will result in ambiguity.

Therefore, for customers consuming more than 50 MWh, in the circumstance where:

1. Western Power refuses to address or mitigate any connection and network risk with a Controller through a Connection Contract; and
2. The nature of the operations are too technical and complex for a retailer to supply the Controller unless the Controller has a Connection Contract with Western Power;

then, the effect of the Authority's Draft Decision, will mean that the Controller will not receive a supply unless they negotiate their own *access contract* with Western Power.

Therefore, Synergy submits it is important for the Authority to clarify how the *standard access contract* is intended operate in the circumstances in which:

1. Western Power refuses to address or mitigate any connection and network risk with a Controller through a Connection Contract; and
2. The nature of the operations is too technical and complex for a retailer to supply the Controller unless the Controller has a Connection Contract with Western Power.

In addition, for customers consuming more than 50 MWh, it is also important for the Authority to clarify how its Draft Decision and the proposed *standard access contract* is aligned with the Electricity Industry (Obligation to Connect) Regulations 2005 in order to give effect to clause 4.30(c) and (d) of the Code.

Reconciling and Paying Access Charges

The Authority in its Draft Decision appears to have had separate and individual discussions with Western Power on Synergy's public submission on the PRAA and formed the view that 10 business days for a retailer to reconcile and pay access charges is reasonable and consistent with industry practice.

1487. The Authority has discussed Synergy's concerns with Western Power who has since provided the Authority with a summary of payment periods for other Australian gas and electricity legislation and access arrangements. It also notes the provisions of the National Electricity (Retail Support) Amendment Rules 2010, which although yet to come into effect, will regulate the periods within which retailers are required to pay network charges to a distributor. In these rules the due date for payment is defined as being 10 business days from the date of issue specified on a statement of charges.

1488. The Authority has confirmed the information provided by Western Power and agrees that the current payment duration of 10 business days is consistent with industry practice. It therefore considers that the payment terms in clause 8.3 are reasonable and do not require change.

The Authority, in support of its draft determination, has cited the provisions of the National Electricity (Retail Support) Amendment Rules 2010. However, the Authority has not recognised that these national rules are underpinned by a robust and reliable framework to ensure the reliable communication of connection point and metering information and data between participants to give effect to a payment duration of 10 business days.

It is also relevant to note that these proposed national rules amendment also provide for the network operator to directly issue a bill to a consumer[12] for network charges. Such an arrangement would significantly reduce the liability on retailers and ease the burden on retailers of reconciling and recovering network charges.

The proposed national rules amendment, clause 6B.A2.2(c), also goes further to specify that a retailer has no liability to pay network charges that have been, or are to be, billed directly to the shared customer under a direct billing arrangement between the network operator and the customer. However, the *access arrangement*, approved by the Authority, does not provide for such a direct billing arrangement[13], for a shared customer[14], to occur between the Western Power and a consumer on the retailer's *access contract*.

A similar robust communication framework for connection point and metering data does not exist in Western Australia to give effect to the proposed 10 business day payment date in the *standard access contract*. Therefore, in Synergy's practical experience, because there is no similar framework in Western Australia it takes Synergy longer to reconcile the connection point data, metering data and associated charges. This also means that sometimes Synergy is not always actually able to physically receive, process and perform the reconciliation of network charges.

[12] The end customer.
[13] As specified under the National Electricity (Retail Support) Amendment Rules 2010.
[14] As defined under the National Electricity Rules.

Such a framework is not currently available in the Communications Rules[15] approved by the Authority. In addition, Synergy submits that such a framework would be a supplementary matter contemplated under clause 5.27 of the Code and clause 23 of the proposed *standard access contract*.

It is also important to note that Synergy operates in a market that differs from the national regime. Synergy has only one distributor with which it has an access contract and therefore all its connection points are contained within a single monthly invoice. Alternatively eastern states retailers will have a number of distributors that invoice them and it is unlikely that all of their connection points will be invoiced simultaneously and require payment within the same 10 day period. It is more likely these retailers are invoiced on different days depending on the distributor, thereby allowing them to spread the reconciliation process over a longer period when taking into consideration all the connection points for which they are liable. Therefore Synergy position of having to reconcile in excess of 900,000 connection points within a 10 day period is a situation unique to the Western Australian Energy Market and the *reference service* that Synergy uses.

Consequently, Synergy requests that the Authority to reconsider Synergy's previous submission and its Draft Decision on this matter.

Proposed Eligibility Criteria For Reference Services

The Authority has accepted the network operator's argument to permit the operator to narrow down the number of *users* who are eligible for a *reference service* under the *standard access contract* by introducing a wide range of eligibility criteria for each reference service.

The result of this decision is an actual change to each *reference service*.

A *reference service* is comprised of both its technical description and the principal terms and conditions on which it is offered. If, as is proposed in the PRAA, an application of the principal terms and conditions causes a derogation from the benefits of the service offered, that derogation amounts to a change in the service itself.

Synergy submits that where an eligibility criterion is integral to, or takes away the benefits of, or deprives a user of the benefits of a service being offered as part of the *reference service*, then the criterion is actually part and parcel of the *reference service*. Therefore, to meet the requirements of a *reference service* under the Code, there needs to be evidence that the benefits to be provided is likely to be sought by a significant number of users and applicants, or a substantial proportion of the market for services in accordance with clause 5.2(b) of the Code.

[15] Developed under the Metering Code.

For example, one of the eligibility criteria for the *reference service* A1 Anytime Energy (Residential) Exit Service is that the exit point is located at a residential premises or a premises occupied by a voluntary/charitable organisation.

This is a key element of the service and is not a term and condition. In other words, this criterion is part and parcel of the service offered; it is not part of the terms and conditions on which the service is offered. Synergy accepts that this criterion, and the similar criterion in each of the other *references services*, meets the requirements of clause 5.2(b) of the Code. However the *standard access contract* should specify the criterion as part of the *reference service*, not as some sort of condition precedent to the offering of the service.

However, there is no evidence that any of the following criteria meet the requirements of clause 5.2(b) of the Code:

- the various meter requirements; and
- the requirements to comply with the Technical Rules and the requirements that no exemption under the Technical Rules have been granted.

As such these criterions should not form part of the principal terms and conditions of the *reference services*.

Further, there is a key difference between:

- offering a service on terms and conditions, which if breached by a user permit the service provider to remedies under the *standard access contract*; and
- refusing to offer a service unless certain criteria are met.

The latter amounts to a change in the service offered and can only be part of the *reference service* if the criterion meets the requirements of clause 5.2(b) of the Code. Synergy submits there is no such evidence and that the Authority should not permit the criteria to be included as part of either the *reference service* or the *standard access contract*.

Finally, Synergy submits that permitting Western Power to refuse to offer (as opposed to suspend the provision of) the services contemplated by the *reference services* where the following criteria are not met is unreasonable and contrary to clause 5.3(a) of the Code:

- The various meter requirements. The obligations for specific meter types at connection points is imposed on Western Power under the Metering Code. If the Authority accepts this criterion as a pre-requisite to Western Power offering the *reference service* the Authority will effectively enable Western Power to refuse to provide a *reference service* in circumstances where Western Power is the one at fault rather than the user or the applicant.
- Requirements to comply with the Technical Rules and the requirements that no exemption has been granted. The standard access contract should, and does, contain a requirement that the user comply with the Technical Rules. However, to enable Western Power to refuse to offer the *reference service* where the user has

not complied with all of the Technical Rules requirements, irrespective of the impact of such compliance on Western Power or other users of such non-compliance is, or could be, out of all proportion to the consequences of such compliance. Synergy submits this is unreasonable, particularly given Western Power's contractual entitlements.

Compensation For Loss Caused by the Network Operator

Synergy in it its previous submission put forward that in order for the *standard access contract* to be reasonable and sufficiently detailed to form the basis of a commercially workable *access contract* it must contain a mechanism and clear provisions for retailers and customers to be compensated for all appropriate loss caused by an act or omission of a *service provider*.

Again, because the concerns set out above relate to reference services for Synergy, they are not simply subject to negotiation between Synergy and the network operator and need to be addressed to make the standard access contract commercially workable. In particular, the damages regime set out below is necessary to ensure that the network provider actually bears the consequences of the risks allocated to it in the standard access contract. In the absence of such a damages regime, the network provider has no incentive to perform certain parts of the contract and does not suffer the commercial or financial consequences of such non-performance.

The current definition and application of Direct Damage under the standard access contract is too narrow and one-sided. It is not clear the circumstances and conditions that would need to apply in order for a retailer to receive any compensation for the loss it has suffered due to an act or omission of the *service provider*.

In addition, Synergy submits that there is no incentive, as required by section 2.1(b) of the Code, for the service provider to ensure the economically efficient operation and use of Western Power's electricity *networks* and *services* of *networks* when providing *services* under the *standard access contract*. In addition, Synergy submits that the monopoly *service provider* is in the best position to manage its risk and its operations when providing *services* and therefore, should be liable for its actions in relation to the provision of those services. It is also not reasonable for *users* to incur further costs under arbitration in order to be compensated for the acts or omissions of the network operator.

As discussed previously Synergy must have a damages regime that allows it to recover the type of losses it is likely to incur in respect of using the *reference services*. Without that change the allocation of theoretical risk to the network operator is meaningless as the network operator does not bear any consequences if that risk does eventuate.

Consequently, Synergy proposes that clause 19[16] in the *standard access contract* must contain the following provision in order to ensure and promote the efficient operation and use of *networks* and *services* of *networks*:

"19.4 Western Power liability

(a) If Western Power* is negligent or commits a Default* under this Contract* it must:

(i) repay to the User* any Customer Pass Through Amounts* which the User* is not reasonably able to recover from its Customers* because of the negligence or Default* of Western Power* or because of delay by Western Power* in rectifying or otherwise addressing the negligence or Default*;

(ii) reimburse the User's* reasonable costs, including legal costs, of any reasonable action taken for the purposes of recovering from its Customers* the Customer Pass Through Amounts* referred to in clause 19.4(a)(i);

(iii) reimburse the User*'s reasonable Operational Costs* of addressing and mitigating the impacts on its business operations arising from, or in connection with, the negligence or Default* of Western Power*;

(iv) compensate the User* for any loss or damage, including Indirect Damage*, the User* suffers or incurs as a result of, or arising from, any reduction in cash flow caused by Western Power's* negligence or Default*;

(v) reimburse the User* for all expenses and charges (including any Indirect Damage* or other damages, penalties, fines or interest) that the User* incurs as a result of or in connection with a claim by a Customer* under the Competition and Consumer Act*, which the User* is not reasonably able to avoid because of the negligence or Default* of Western Power*;

(vi) not enforce any rights it may have against the User* or the Indemnifier* in respect of a User's Default* that arises due to the negligence or Default* of Western Power*.

(b) The User* must notify Western Power* if the User* intends to take legal action to recover amounts under clause 19.4(a)(i) or to take or not take legal action to defend a claim by a Customer* in relation to clause 19.4(a)(iv) and provide all reasonable details of the actions the User* proposes to take.

[16] Synergy also recognises that a liquidated damages may be more appropriate for certain mass transaction in which it would be difficult to quantify each time the actual amount of the loss incurred by the *user* and to lessen the administrative burden on the parties.

(c) Western Power * must, within [7 days] of receiving notification under clause 19.4(b), advise the User* whether Western Power* wishes to take over the proposed legal action, in which case the User* and Western Power* must work co-operatively to enable Western Power* to take over such legal action on behalf of the User*.

Customer Pass Through Amounts* means amounts paid by the User* to Western Power* under the Contract* which the User* would, in the normal course of its business, pass on to its Customers* and the exclusion of Indirect Damage* does not apply.

Operational Costs* means amounts paid by the User* to Western Power* under the Contract* which the User* would, in the normal course of its business, pass on to its Customers* and the exclusion of Indirect Damage* does not apply.

Competition and Consumer Act* means the *Competition and Consumer Act 2010* (Cth)."