

IN THE WESTERN AUSTRALIAN ELECTRICITY REVIEW BOARD (IN ITS CAPACITY AS THE LOCAL APPEALS BOARD PURSUANT TO THE NATIONAL GAS ACCESS (WA) ACT 2009, THE NATIONAL GAS ACCESS (WA) (PART 2) REGULATIONS 2009 AND THE ENERGY ARBITRATION AND REVIEW ACT (WA) 1998)

No 1 of 2010

Re Application for review of the decision by the Western Australian Economic Regulation Authority dated 5 August 2010 to draft and approve its own revised Access Arrangement to apply to the Goldfields Gas Pipeline

Application by:

BHP BILLITON NICKEL WEST PTY LTD

Applicant

No 2 of 2010

Re Application for review of the decision by the Western Australian Economic Regulation Authority dated 5 August 2010 to draft and approve its own revised Access Arrangement to apply to the Goldfields Gas Pipeline

Application by:

**SOUTHERN CROSS PIPELINES AUSTRALIA PTY LTD
SOUTHERN CROSS PIPELINES (NPL) AUSTRALIA PTY LTD
ALINTA DEWAP PTY LTD
GOLDFIELDS GAS TRANSMISSION PTY LTD**

Applicant

**BHP BILLITON NICKEL WEST PTY LTD
STATEMENT OF FACTS, ISSUES AND CONTENTIONS IN NO 1 OF 2010**

10631303_7.doc

MALLESONS STEPHEN JAQUES
Level 10, Central Park
152-158 St George's Terrace
PERTH WA 6000

Telephone (08) 9269 7000
Facsimile (08) 9269 7999
DX 91049 Perth
Ref:BJD:KB:09-5502-6840

Capitalised terms used in this document utilise the definitions contained in the National Third Party Access Code for Natural Gas Pipeline Systems contained in Schedule 2 of the Gas Pipelines Access (Western Australia) Act 1998 (WA) (Code), unless otherwise defined in this document.

Statement of Principal Facts

The principal facts can be summarised as follows:

- 1 The Goldfields Gas Pipeline (**GGP**) consists of the gas pipeline system described by the Western Australian pipeline licence WA: PL 24.
- 2 The pipeline system comprises approximately 1378 km of high pressure gas pipeline extending from Yarraloola in the Pilbara region to Kalgoorlie in the Southern Goldfields Region of Western Australia.
- 3 The GGP is for all purposes a Covered Pipeline within the meaning of the Code.¹
- 4 The GGP is owned by Southern Cross Pipelines Australia Pty Limited, Southern Cross Pipelines (NPL) Australia Pty Ltd and Alinta DEWAP Pty Ltd, together comprising the Goldfields Gas Transmission Joint Venture (**GGTJV**). Goldfields Gas Transmission Pty Ltd (**GGT**) acts on behalf of the GGTJV participants as the operator/service provider of the GGP.
- 5 The Applicant (**BHPB**) is a User of haulage Services provided by GGT, pursuant to a separate contractual arrangement between GGT and BHPB, under which BHPB pays a tariff equivalent to the Reference Tariff.
- 6 The GGP as originally constructed incorporated two compressor stations, at Yarraloola (the Pipeline inlet) and at Ilgarari (near GGP's half way point). This compression was sufficient to accommodate the original loads of the GGTJV and the early loads of Users.²
- 7 As Users' use of the GGP increased, the Pipeline's utilisation progressively approached maximum Capacity. In order to accommodate the new load, GGT installed the Wiluna Compressor Station in 2000-2001, and the Paraburdoo Compressor Station in 2003-

¹ s 10.8 and s 1.1 of and Schedule A to the Code.

² Draft Decision para 134.

2004. These expansions were treated as part of the Covered Pipeline under the Access Arrangement in place at the time.³

8 After the previous 2005 Access Arrangement was approved, GGT further expanded the Capacity of the GGP. These further expansions were achieved by installing a second compressor at Paraburdoo, and new compressor stations at Wyloo West and Ned's Creek (**New Compressors**). As a result, the Capacity of the GGP was further expanded by a total of approximately 49 TJ/day⁴ (**Expansions of Capacity**), thereby enabling GGT to provide significant additional transmission services (**Additional Services**) to existing and prospective Users.⁵

9 However, the actual provision of the Additional Services was only possible through the combined operation of the New Compressors *together with*:

(i) the use of most of GGT's business assets and infrastructure involved in the existing GGT business (**GGP Transmission Assets**), including:

(A) the GGP itself, being 1,378km of steel pipeline and all of the plant and equipment described in the System Description in the 2010 Access Arrangement Information filed by GGT on 5 August 2010 (**2010 AAI**): see pages 20-22 of the 2010 AAI and worksheet entitled "Input_99_09" of the Regulator's further final decision model; and

(B) GGT's head office and corporate and administration infrastructure: see pages 11-12 of the 2010 AAI; and

(ii) the personnel employed by GGT to operate and manage the GGP Transmission Assets (**Personnel**).

10 Under clause 10.3 of the 2005 Approved Access Arrangement (**2005 Access Arrangement**), if GGT expanded the capacity of the Pipeline, GGT was required to elect:

³ Draft Decision para 135.

⁴ Draft Decision para 136.

⁵ For the purposes of this application and BHPB's contentions, a reference to Additional Services is intended to capture a single additional service which is a Service for the purposes of the Code, alternatively a combination of services, all or part of which are a Service for the purposes of the Code.

- (a) that the expanded capacity would be treated as part of the Pipeline for the purposes of the 2005 Access Arrangement and GGT would exercise its discretion to submit proposed revisions to the Access Arrangement under Section 2 of the Code; or
- (b) that the expanded capacity would not be treated as part of the Pipeline for the purposes of the 2005 Access Arrangement and GGT would lodge a separate Access Arrangement for such expanded capacity; or
- (c) that the expansion would not be covered, subject to GGT notifying the Regulator of that fact prior to the expansion coming into operation.

11 By notices dated 30 November 2006 (Paraburdoo), 22 April 2009 (Wyloo West) and 21 August 2009 (Ned's Creek), GGT informed the Regulator that it had elected pursuant to clause 10.3 of the 2005 Access Arrangement, that the relevant expansions would not be covered.⁶

12 On 23 March 2009, GGT submitted proposed revisions to the GGP access arrangement for approval under the Code, in accordance s 2.28 of the Code. The 2010 Access Arrangement was to commence on 1 January 2010.

13 In its proposed Access Arrangement, GGT proposed, *inter alia*, that:

- (a) none of the Additional Services form part of the Reference Service or any Service; and
- (b) none of the costs (capital or non-capital), revenues and volumes referable to the Additional Services be taken into account, either directly or indirectly, in determining the Total Revenue and the Reference Tariff for the Reference Service.

14 On 9 October 2009, the Regulator issued a draft decision in respect of the 2010 Access Arrangement (**Draft Decision**).

15 In the Draft Decision, the Regulator, *inter alia*:

⁶ Draft Decision para 137.
By referring to these "elections", BHPB makes no concession as to their efficacy or effect.

- (a) recognised GGT's elections referred to in paragraph 11 as elections to exclude the Expansions of Capacity from the Covered Pipeline;⁷ but
- (b) considered that the capital assets constructed, developed or acquired for the purpose of providing the Expansion of Capacity are assets which "are otherwise used to provide Services" and therefore form part of the Capital Base of the GGP for the purpose of determining the Reference Tariffs;⁸ and
- (c) decided that all actual and forecast costs, revenues and volumes relating to the Expansions of Capacity must be taken into account in determining the Reference Tariff.⁹

16 On 13 May 2010, after considering submissions received in relation to the draft decision, the Regulator issued a final decision in respect of the 2010 Access Arrangement (**Final Decision**).

17 In that decision, the Regulator, *inter alia*:

- (a) determined that the Expansions of Capacity which GGT had elected under the 2005 Access Arrangement to exclude from coverage did not form part of the Covered GGP and determined that the Code did not provide it with the jurisdiction to determine a Reference Tariff for the GGP on the basis of provision of access to the GGP as a whole;¹⁰
- (b) determined that the Reference Tariff should be revised (from that specified in the Draft Decision) to ensure that the capital costs, operating costs and Capacity of *only* the Covered GGP should be used in determining the Total Revenue, and the Services to be provided using only the Covered GGP should be used to derive a Reference Tariff for the GGP;¹¹ and
- (c) by reason of the above, calculated the Total Revenue without regard to the fact that the Additional Services could only be provided by means of the GGP, particularly the GGP Transmission Assets and Personnel.

⁷ Draft Decision para 196.

⁸ Draft Decision para 197.

⁹ Draft Decision para 198.

¹⁰ Final Decision para 60.

¹¹ Final Decision para 59.

- 18 On 5 August 2010, following consideration of amendments to the Access Arrangement proposed by GGT in response to the Final Decision, the Regulator issued a further final decision, in which it decided to draft and approve its own Access Arrangement in terms which reflected and incorporated, *inter alia*, the determinations in the Final Decision in the formulation of a Reference Tariff for Users seeking a Reference Service on the GGP (**Further Final Decision**).
- 19 In doing so, the Regulator calculated the Reference Tariff based on a financial model which assumed a commencement date for the 2010 Access Arrangement of 1 January 2010, for the purposes of determining the approved Total Revenue and the Reference Tariff, but which did not contain any ‘true up’ mechanism (**True-up Error**) to make allowance for the fact that:
- (a) the actual commencement date was 20 August 2010;¹² and
 - (b) in the period between 1 January 2010 and 20 August 2010 (**Delayed Start Period**), the Reference Tariff charged by GGT was the (higher) Reference Tariff imposed under the 2005 Access Arrangement.

Issues

- 20 As to the Regulator’s decision in relation to the Expansions of Capacity, the principal issue is whether the Regulator’s decision to make no allowance for the efficient costs involved in providing the Additional Services in calculating the Total Revenue for the purposes of determining a Reference Tariff in the 2010 Access Arrangement involved an exercise of discretion which was incorrect or unreasonable.
- 21 As to the True-up Error, the principal issue is whether the Regulator’s decision to determine the Reference Tariff for the 2010 Access Arrangement, based on a model that did not incorporate a true-up mechanism to take account of the higher 2005 Reference Tariff that applied during the Delayed Start Period, involved an exercise of discretion which was incorrect or unreasonable.

Contentions

- 22 BHPB contends that the Regulator’s Final Decision and Further Final Decision:

¹² See paragraph 131 of the Further Final Decision.

- (a) have misinterpreted and misapplied the Code in determining the Reference Tariff in the 2010 Access Arrangement;
- (b) are inconsistent with the underlying Code objectives which prevent the abuse of monopoly power;
- (c) are inconsistent with the underlying Code objectives which provide rights of access to third parties on terms which are fair and reasonable; and
- (d) should be amended to calculate properly the Reference Tariff in accordance with the Code and its objectives.

23 In particular, BHPB contends that the Regulator's Final Decision and Further Final Decision should have calculated the components of the Reference Tariff affected by the Expansions of Capacity as follows:

- (a) first, determined a Total Revenue that was calculated by reference to the efficient costs of providing *all* Services, including the capital costs and non-capital costs associated with the provision of all or part of the Additional Services: section 8.4 of the Code;
- (b) second, determined the proportion of Total Revenue that the Reference Tariff was designed to recover as follows:
 - (i) by identifying those capital costs and non-capital costs that were *solely* attributable to the Reference Service (**Exclusive Costs**);
 - (ii) by identifying those capital costs and non-capital costs that were attributable to providing the Reference Service *jointly* with other Services (namely all or part of the Additional Services) (**Joint Costs**);
 - (iii) by identifying the portion of the Joint Costs that are to be recovered through the Reference Tariff, in accordance with a methodology that meets the objectives in section 8.1 of the Code and was otherwise fair and reasonable; and
 - (iv) then adding that identified portion of the Joint Costs to the Exclusive Costs (**Recoverable Costs**): see section 8.38 of the Code; and

(c) third, determined a Reference Tariff that recovered *only* the Recoverable Costs: see section 8.2(b) of the Code.

24 As to the over-recovery by GGT referred to in paragraph 19 above, BHPB contends that the Regulator should have incorporated an offsetting amount or factor in the determination of the Reference Tariff to take account of the higher 2005 Reference Tariff that applied during the Delayed Start Period.

AJ MEAGHER

I WYLIE

MALLESONS STEPHEN JAQUES

8 March 2011