

Dr Patrick Walsh
Chairperson
Essential Services Commission
of South Australia
GPO Box 2605
Adelaide SA 5001

14 December 2005

Dear Dr Walsh

Review of Envestra's Gas Distribution Access Arrangement - Proposed Revisions

EA-IPR Retail Partnership (EA-IPR) thanks you for the opportunity to comment on the proposed revisions to Envestra's Access Arrangement for the South Australian gas distribution system. We provide our comments as follows.

1 Credit support

Envestra's credit requirements go beyond those that would protect Envestra's legitimate commercial interests.

(a) Invoicing and payment (section 19 of Annexure G Terms & Conditions)

Generally, in agreements of this type, payment is monthly in arrears not monthly in advance as in this case. Accordingly, Network Users are effectively required by the operation of clause 19.3 to make payment to Envestra two months earlier than they otherwise would based on Envestra's estimate of the amount likely to be payable by a Network User. Envestra will then revise this estimate a month later, and any difference is factored into the amount that a Network User must pay to Envestra in the following month. When the actual charges incurred by the Network User for that month are determined, the difference between the actual charges and Envestra's second (revised) estimate is factored into the amount that the Network User must pay to Envestra in the following month.

In this way, the amount payable by Network Users in respect of each month is effectively calculated three times (based on two estimates and the actual amount). This is unnecessarily burdensome and not required to protect Envestra for Network User credit risk given that Envestra will obtain a bank guarantee from Network Users that do not meet the creditworthiness thresholds.

EA-IPR refers to and supports the position of Origin Energy in section 1 of its submission dated 18 November 2005.

(b) *Credit policy (section 6.4 of Access Arrangement)*

While it may well be in Envestra's legitimate commercial interests to require that Network Users satisfy a certain credit rating, that credit rating must be reasonable in all the circumstances. EA-IPR is therefore concerned by the discretion that Envestra retains in section 6.4 of the Access Arrangement to alter the acceptable credit rating unilaterally and with no applicable limitations or restrictions on the way that it exercises this right.

EA-IPR also considers that the level of security acceptable to Envestra for a Network User to provide (as an alternative to having the required credit rating) is excessive for the purpose of protecting Envestra's legitimate interests. The option for a Network User to provide Envestra with a bank guarantee in the amount of Envestra's "reasonable estimate" of three months' charges is especially excessive when regard is had to:

- (i) the requirement for Network Users to make payment based on an estimated amount two months before the actual amount is determined; and
- (ii) Envestra's right under paragraph (a) of clause 24.2 of the Annexure G Terms & Conditions to terminate the Agreement with extremely short notice (seven days) if the Network User fails to pay any amount due to Envestra under the Agreement (or any Related Haulage Agreement).

2 Liability

EA-IPR is concerned about aspects of the liability provisions of the Annexure G Terms & Conditions which are as a package unreasonably weighted in favour of Envestra.

(a) *Limitation period (clause 25.1)*

Envestra has no liability to a Network User for any claim based on an act or omission of Envestra under the Agreement unless the Network User gave full particulars of the claim to Envestra within three months of the claim becoming known to the Network User, or within three months of when the claim should have become known to the Network User.

EA-IPR regards this restriction as far too onerous and unreasonable when compared to the normal statutory limitation periods. There is no justification for having such a substantial restriction on Network Users' general right to

make claims against Envestra. In fact, such a short period may encourage Network Users to make ambit claims as they may not have had time to consider or investigate them properly.

(b) *Indemnities (section 29)*

EA-IPR is concerned about the degree to which the indemnities in this section, are substantially in Envestra's favour. In particular, the indemnity in clause 29.1 requires Network Users to indemnify Envestra for any breach of the Agreement - regardless of its materiality. This indemnity should be mutual or should be deleted.

Similarly, despite the heading to clause 29.2 (Network Damage), the indemnity in this clause applies to a very wide range of types of loss including, for example, loss in relation to the operation, administration or management of the Network, and loss caused by an act or omission of a Network User's customer.

At a minimum, the indemnity against property damage and personal injury that Envestra currently provides under clause 25.1 of the existing Access Arrangement and that Envestra has omitted from the revised Access Arrangement, should be restored.

In its *Access Arrangement Information*, Envestra claims that the current indemnity in clause 25.1 is "unnecessary" because it requires Envestra to indemnify the Network User for negligence, "which Envestra is required to do at common law." EA-IPR disputes this assertion. If this is the case, then Envestra does not need the indemnities in its favour either for Network Users' breach of the Agreement or negligence. In fact, indemnities do give greater scope for recovery of loss than is available under common law.

(c) *Delivery pressures (clause 13)*

Envestra has an obligation under clause 13.1 to ensure that gas is delivered with a pressure within a certain range. However, in clause 13.2 Envestra will not breach this obligation if its failure to do so is due to (inter alia) "the technical, practical and physical limitations of the Network", and this exception applies "whether or not Envestra knew, or ought to have known, of those facts or matters at any time".

EA-IPR regards this limitation of liability, and the corresponding restriction in clause 13.3, as excessive. Envestra is responsible for operating and managing the Network, and should do so as a prudent operator would. If, for example, Envestra failed to maintain the Network adequately, this could have an effect on the technical, practical or physical limitations of the Network. If, as a result, gas

were not capable of being delivered with the correct pressure, by the operation of clause 13.2 Envestra would not have breached its obligation to deliver the gas at the correct pressure.

While it might be inappropriate for Envestra to be obliged to undertake extensions or expansions in order to comply with its obligation under clause 13.1, the exclusion of liability for “technical, practical and physical limitations of the Network” is too broad considering Envestra’s underlying obligations. For the same reasons, clause 13.3 should be amended or deleted.

(d) *Indemnity (clause 15.3)*

EA-IPR regards this indemnity as too broad. It ought only to apply to warranties made or deemed to be made by the Network User under clauses 15.1 or 15.2 of the Agreement.

(e) *Insurance (section 30)*

EA-IPR regards the following obligations as an inappropriate interferences with the commercial discretion of Network Users:

- (i) to obtain insurance with reputable insurers approved by Envestra;
- (ii) to ensure the insurance notes the interest of Envestra;
- (iii) to notify Envestra of any event which does or might give rise to a claim under the insurance that the Network User is required by the Agreement to maintain, even if it has no connection with Envestra; and
- (iv) to take whatever steps Envestra reasonably requires to make and enforce or settle such a claim, which will interfere with the insurer’s right of subrogation.

These clauses are drafted on the basis that Network Users will take out individual insurance in relation to obligations under the Terms & Conditions which may not be appropriate if a Network User has global policies.

3 Unaccounted for Gas

Significantly, Network Users will be required to supply the Unaccounted for Gas (UAFG) for the Network (section 2.5). The cost of this UAFG will be added to the cost of gas as a premium, with the size of that premium determined according to the consumption of a Network User’s customers. A Network User will be liable for a far

higher percentage premium on gas consumed by customers that acquire less than 50 TJ in a financial year, than customers that acquire 50 TJ or more in a financial year.

EA-IPR seeks more explanation for the decision to allocate UAFG costs on this basis (including both the classification of customers and the percentage of UAFG costs allocated to the classes). Envestra simply states in its *Access Arrangement Information* that it is “due to the fact that large customers tend to be serviced by steel high pressure mains that do not exhibit any material leakage compared to general network mains that service the majority of customers.”

More importantly, though, EA-IPR considers that it is inappropriate for the UAFG model to move towards that used in Victoria, without an effective spot market in place in South Australia. In its *Access Arrangement Information*, Envestra advocates for this move on the basis that “Users are in a better position to source and manage gas supply arrangements and deal with the risks associated with gas procurement”, while on the other hand “Envestra will no longer be required to enter into the gas supply market and compete with or contract with retailers for the purchase of gas.”

EA-IPR agrees that Victorian network users, by operation of the spot market in that State, may be in a better position than the owner or operator of the network to manage the risks associated with UAFG, and is in favour of the market liquidity afforded by a spot market model if that model is properly developed. However, until appropriate developments in the South Australian gas market take place, EA-IPR does not support Envestra’s proposal.

4 Overruns

EA-IPR is concerned that the overrun provisions of the Annexure G Terms & Conditions are inappropriately skewed towards increasing Network Users’ MDQs.

(a) *Automatic cessation*

Once an MDQ has been increased under clause 6.4 (due to four overruns in a month) or clause 6.5 (due to eight overruns in a year), it returns to its former level after two years. This two year period is too long for the MDQ to be increased, relative to the overruns (and associated periods) required to trigger the MDQ increase.

The MDQ will also not return to its former level if during that two year period there is:

- (i) one Network Day where the former MDQ was exceeded; or
- (ii) one hour where one twelfth of the former MDQ was exceeded.

These restrictions on the MDQ returning to its former level are too onerous relative to the duration of the increased MDQ.

Further, if either of these overruns does occur during the two year period, there is no provision for reducing the increased MDQ to its previous lower level in the future. EA-IPR submits that there must be some mechanism that applies if either of these overruns occurs.

(b) *Voluntary cessation*

There is no provision for Envestra to decrease an MDQ on the request of a Network User. Clause 7A.3 is the only mechanism for decreasing an MDQ. In this respect, EA-IPR refers to and supports the position of AGL in its submission dated 18 November 2005.

5 Annexure G Terms & Conditions

EA-IPR has included in an Attachment further comments in relation to the particular clauses of the Annexure G Terms & Conditions in addition to the comments above.

If you require any more information then please contact me on 03 8807 1132.

Yours sincerely

Liesel Koelmeyer
Head of Compliance

Attachment - Terms & Conditions comments

Clause	Comment
5.5(c): Quantities Received	This is a very broad basis on which to determine receipt. It is not clear why preference should not be given to metered readings (where available) or in accordance with the relevant apportionment deeds.
9.3: Form of Request	This clause only provides Envestra with the right to be given forms, documents and information required to perform testing. Given that Network Users are also subject to testing requirements (clauses 9.1 and 9.2), this clause should be mutual.
9.6: Inaccurate Meters	In the absence of a legitimate basis for such a distinction, the permissible margin of accuracy for metering equipment ought to be the same regardless of whether Envestra or the Network User is responsible for that equipment.
16.2: Planned Maintenance	The obligation for Envestra to notify Network Users of planned interruptions should require Envestra to give Network Users sufficient notice so that Network Users can satisfy their notice obligations under the Energy Retail Code. Network Users are required under clause 15.3.4 of the Code to give customers at least four business days' notice of such interruptions. Envestra should therefore be required to give at least six business days' notice.
16.5 - 16.7: Supply Curtailment	These obligations should be mutual so that Envestra is required to give information in a timely manner to enable Network Users to meet their obligations under clause 15.3.5 of the Energy Retail Code to provide explanations to small customers who request it regarding unplanned maintenance or interruptions within certain timeframes.
17.4: Provision of Service	<p>This clause requires Envestra to "use its best endeavours" to reconnect a delivery point "as soon as is practicable". Envestra is not required to reconnect a delivery point before 7:30am or after 4pm on a business day.</p> <p>In contrast, Network Users are required under clause 15.2 of the Energy Retail Code to reconnect a customer on the day of the request if they receive the request before 3pm on a business day</p>

Clause	Comment
	<p>or if the customer pays any applicable after hours reconnection charge.</p> <p>Network Users should have adequate rights under the Terms & Conditions to comply with their obligations under the Energy Retail Code.</p>
17.6: Multiple Network Users	If Envestra is to have the benefit of this clause and not be obliged to disconnect a Domestic DP in certain circumstances, while distributors are compelled under clause 5.1 of the Gas Distribution Code to disconnect a customer at the written direction of a retailer, then Network Users should cease to be responsible for charges relating to use of a Domestic DP following such a written direction.
20: Correction of billing errors	This clause does not apply where Envestra raises a billing error. The eleven month time limitation should apply equally to both parties.
23: Failure to pay	A Network User should not be liable to pay interest, or be subject to set off or suspension, in respect of amounts it disputes under section 20A while such amounts remain in dispute.
23.2: Right to Set Off Unpaid Amounts	<p>The provision for Envestra to set off payment of <i>any</i> amounts due to a Network User against <i>any</i> amounts owing by the Network User to Envestra should be restricted to payments and amounts owing under the Agreement.</p> <p>This right should also be mutual.</p>
23.3: Right to Suspend Services, 24.2: Termination by Envestra	It is inappropriate to allow Envestra to suspend or terminate the provision of services by Envestra to a Network User on the basis of a breach by the Network User of a Related Haulage Agreement or failure of the Network User to pay an amount under a Related Haulage Agreement. These rights should be restricted to breaches and failures to pay under the Agreement.
24.2: Termination	The seven day notice period appears to be very short in the context of these Terms & Conditions.
24.2(e):	This right should be deleted. It is for Network Users to manage the impact of any “material adverse changes” to their ability to

Clause	Comment
Termination	comply with the Agreement, and the requirement that Envestra's opinion be "reasonable" is not a sufficient safeguard against the potential inappropriate use of this termination right by Envestra. Envestra's other termination rights are more than adequate to protect Envestra's legitimate interests.
25.1 - 25.3: Service Provider's Liability	<p>The clause numbering here is incorrect, which has consequences for the cross-referencing. The second clause 25.1 should be renumbered 25.2, the existing clause 25.2 should be renumbered 25.3 and the existing clause 25.3 should be renumbered 25.4.</p> <p>The limitation of Envestra's liability under clause 25.3 (Maximum Liability for Other Loss) should also apply to the benefit of Network Users.</p>
27: Force majeure	This section is only for the benefit of Envestra. In the absence of a legitimate basis for such a bias, the section should be mutual.
28: Network User to assist	This section is only for the benefit of Envestra. In the absence of a legitimate basis for such a bias, the section should be mutual.