

7. Terms and Conditions

Amendment 14

The text of clause 2.5 of Annexure G has been deleted as required by the Draft Decision. Envestra has noted the Commission's comments in respect of the new clauses that Envestra included in place of clause 2.5.

Clause 2.2

In the Final Decision, the Commission stated that it would be likely to approve the minor amendments put forward in relation to clause 2.2. Given this comment, Envestra has retained those amendments.

The First Part of Replacement Clause 2.5

The Commission has stated in the Final Decision that it would not approve this sub-clause. Envestra has therefore deleted the sub-clause.

Second Part of Replacement Clause 2.5 and New Clauses 2.6 and 2.7

The Commission has stated in the Final Decision that it would not approve these clauses. Envestra has therefore deleted them.

New Clause 24.7

The Commission has stated in the Final Decision that it would be likely to approve a clause such as new clause 24.7. Envestra has therefore retained this clause.

Further Comments – New Clause 2A

Envestra is concerned that, with the changes required by the Commission, the Agreement does not address gas balancing.

Envestra acknowledges that the Gas Balancing section of the Services Policy will state that gas balancing is regulated through the Retail Market Rules. However, Envestra does not believe that this is adequate from a legal perspective because the Access Arrangement does not have contractual force between Envestra and the Network Users.

Accordingly, Envestra has included a new clause 2A in the terms and conditions to address gas balancing issues. In effect, this new clause incorporates the terms of rule 307 of the Retail Market Rules.

Clause 2A.1 states that nothing in the Agreement is intended to be inconsistent with Chapter 5 of the Retail Market Rules and that, in the event of any inconsistency, Chapter 5 will prevail. Chapter 5 of the Retail Market Rules deals with gas balancing issues.

Clause 2A.1 embodies the principles stated in the last part of rule 307(1) of the Retail Market Rules and in rule 307(3) of the Retail Market Rules. The inclusion of clause 2A.1 is necessary because the clause makes it clear that the Agreement is not intended to be inconsistent with Chapter 5 (as required by rule 307(1) and rule 307(3)).

Clause 2A.2 is in the same terms as the first part of rule 307(1) of the Retail Market Rules. It provides for the Network User and Envestra to acknowledge that Chapter 5 governs gas

balancing issues. Clause 2A.2 gives contractual force to the statement which appears in the Gas Balancing section of the Services Policy.

Clause 2A.3 is in the same terms as rule 307(2) of the Retail Market Rules. It provides for Envestra and the Network User to recognise that imbalances are likely to occur but it is a user's responsibility to ensure balance in accordance with Chapter 5. This clause has been included to ensure that rule 307(2) of the Retail Market Rules has contractual force as between Envestra and the Network User.

Clause 2A.4 ensures that clause 2A is consistent with rule 307 by providing for clause 2A to receive the same interpretation as rule 307 of the Retail Market Rules.

Envestra submits that new clause 2A is reasonable. It does no more than reflect the requirements of the Retail Market Rules and incorporate those requirements into the contractual arrangements between Envestra and Network Users.

Amendment 33

In response to the Draft Decision, Envestra has made clause 27 (the force majeure clause) symmetrical, as required by the Commission. Envestra also put forward various consequential changes to the force majeure clause that were designed to address some of the implications of making the clause symmetrical. Envestra has noted the Commission's comments in the Final Decision about the consequential changes.

Clause 27.1

In the Final Decision, the Commission indicated that it would accept Envestra's consequential changes to clause 27.1. Envestra has therefore retained these changes.

Clause 27.3

In the Final Decision, the Commission indicated that, whilst the general rationale for clause 27.3 appears reasonable, the Commission was concerned that the clause extended to charges in the nature of penalties and obligations to pay money under indemnities. The Commission expressed the view that clause 27.3 should not apply to charges in the nature of penalties or to obligations to pay under indemnities.

Envestra has retained clause 27.3 and asks the Commission to reconsider the views it expressed in the Final Decision in relation to this clause.

Envestra has reviewed the terms and conditions applicable under the access arrangements for seven gas distribution networks owned by companies other than Envestra Limited. In each case, the force majeure clause contains a carve out for obligations to pay money such that a Network User cannot claim relief for a failure to pay on the basis of force majeure. None of the force majeure clauses distinguish between whether the obligation to pay relates to service charges, overrun charges or obligations to pay money under indemnities. Table 1 contains a summary of the relevant provisions of the other access arrangements. The Commission's position is exceptional.

With all due respect, Envestra believes that the Commission may have misinterpreted clause 27.3. Clause 27.3 ensures that a Network User cannot claim force majeure relief in respect of an obligation to pay a charge otherwise accrued under the Agreement. That is, where a charge or other obligation to pay money has been incurred by a Network User, the Network User cannot then claim, for example, that due to a change in economic circumstances restricting the Network User's liquidity (ie an event beyond the Network User's control), that

the User is relieved from the obligation to pay. It is not reasonable to allow a Network User to claim relief from an obligation to pay for these types of reasons. No other access arrangement gives Network Users relief in those circumstances.

Clause 27.4

In the Final Decision, the Commission indicated that clause 27.4 was not consistent with the purpose of a force majeure clause. The Commission stated that it would be likely to find the clause reasonable if it were limited so that a party could only claim the benefit of force majeure where it had taken all reasonable steps to prevent or remedy the breach.

In view of the Final Decision, Envestra has amended clause 27 to address the issues that the Commission has raised. Clause 27.2(a) has been amended to make it clear that a party can only rely on the force majeure clause where it has taken reasonable precautions to guard against the effects of force majeure. New clause 27.5 makes it clear that a party must use all reasonable endeavours to overcome force majeure as soon as is reasonably practicable.

Envestra has retained clause 27.4 (in the form that it originally proposed) so that Network Users have strict liability for their obligations under clauses 11.1, 12.1 and 15.1. Envestra believes that it is reasonable to make a Network User liable for a breach of its obligations under those clauses, even where that breach occurs for reasons beyond the control of the Network User.

Envestra considers that clause 27.4 is reasonable because the Network User is in a better position than Envestra to manage the risk of a breach of clauses 11.1, 12.1 and 15.1. Clauses 11.1, 12.1 and 15.1 deal with the condition and quality of gas when it is delivered at the receipt points, before it enters Envestra's network. Envestra has no control over the condition or quality of gas outside of its network. These are all matters that are within the control of the Network User or parties with whom it contracts – namely, the gas producers or the transmission pipeline operator.

To the extent that the Network User does not directly control gas specifications, gas pressure or title to gas, the Network User is in a position to control those matters through its contract with the gas producers or through its contract with the transmission pipeline operator.

Envestra would expect that a Network User's gas purchase contract to require the gas producers to deliver gas that complies with the relevant specifications and also to require the gas producers to provide the Network User with good title to that gas.

Envestra would also expect that a Network User's transmission haulage contract will require the transmission pipeline operator to deliver good title to gas which complies with the relevant specifications and which is within the relevant pressures at the receipt point.

If the force majeure clause is available in respect of clauses 11.1, 12.1 and 15.1 then a Network User will be able to claim force majeure as a result of non-performance by a gas producer or transmission pipeline operator. In those circumstances, the resulting loss will fall on Envestra even though the condition and quality of the gas is beyond Envestra's control.

Envestra believes it makes more sense for the Network User to remain liable for a breach of clauses 11.1, 12.1 and 15.1 even though that breach results from events beyond the control of the Network User. This should not mean that the Network User will ultimately bear the loss. Rather, the Network User should be able to recover the loss from either the gas producers (for breach of the gas sales contract) or the transmission pipeline operator (for breach of the transmission haulage contract), depending on which of them is at fault for producing off-

specification gas; delivering gas outside the required pressures; or providing inadequate title to gas.

If the Commission allows Network Users to claim force majeure in respect of clauses 11.1, 12.1 and 15.1 then the Commission is, in effect, requiring Envestra to bear the risk of matters beyond its control and insulating the gas producers and the transmission pipeline operator from liability for breach of their contracts with the Network Users.

Envestra notes that clause 27.4 is similar to provisions that appear in the Access Arrangement for the New South Wales Gas Network (see clause 45 of the General Terms set out in Schedule 2A)(approved June 2005) and also in the Access Arrangement for the Canberra Distribution System (see clause 3.53 of the Access Arrangement approved in November 2004).

TABLE 1: FORCE MAJEURE CLAUSES IN OTHER ACCESS ARRANGEMENTS

Access Arrangement	Details of Force Majeure Clause	Does the Force Majeure Clause apply to an obligation to pay money?	Does the Force Majeure Clause apply to an obligation to pay overrun charges?	Does the Force Majeure Clause apply to an obligation to pay under an indemnity?
AGL Gas Networks Access Arrangement for NSW Gas Networks (approved June 2005)	Clause 45, General terms applicable to Reference Services, Schedule 2A to the Access Arrangement	No	No	No
AllGas Energy System (Queensland) (approved June 2006)	Clause 19.1 of the terms and conditions set out as Appendix C to the Access Arrangement	No	No overrun charges	Yes
AlintaGas Gas Distribution System (approved August 2005)	Clause 37, General Terms and Conditions, Part c of the Access Arrangement	No – see clauses 37.2 and 37.4	No	No
Actew AGL, Canberra Distribution System Access Arrangement (approved November 2004)	Clause 3.53, Access Arrangement	No	No overrun charge	No
Multinet Gas Distribution System Access Arrangement (approved March 2002)	Clause 10, Terms and Conditions, Part C to Access Arrangement	No	No overrun charge	No
TXU Victorian Gas Distribution System Access Arrangement (approved March 2002)	Clause 10, Terms and Conditions, Part C to Access Arrangement	No	No overrun charge	No
Country Energy Access Arrangement for The Great Southern Network (Wagga Wagga)	Clause 15.4, Terms and Conditions, Appendix 1 to the Access Arrangement	No	No overrun charges	No