Disclosure of Confidential Information

Proposed Access Arrangement lodged by Epic Energy South Australia Pty Limited for the Moomba to Adelaide Pipeline System

October 2000

Commission File No: CR99/53; C2000/269
Commission and Code Registrar Application No: GR9902

Introduction

On 1 April 1999 the Australian Competition and Consumer Commission ("the Commission") received an application from Epic Energy South Australia Pty Limited ("Epic Energy") for approval of a proposed access arrangement for its Moomba to Adelaide Pipeline System (MAPS).

On 16 August 2000 the Commission issued its Draft Decision in respect of the proposed access arrangement. In preparing its Draft Decision the Commission took account of the existing haulage agreements between Epic Energy and Origin Energy Limited ("Origin") and Terra Gas Trader Pty Limited ("TGT"). However, some of the issues arising from the existing contracts considered by the Commission could not be discussed in the Draft Decision owing to confidentiality constraints. The Commission's reasoning in respect of these issues was therefore included in Confidential Annexure 4 to the Draft Decision.

In the Draft Decision the Commission indicated that it intended to follow the processes set out in section 42 of the *Gas Pipelines Access (South Australia) Law* ("Gas Law"), (as far as required by the parties), with a view to making material in Confidential Annexure 4 publicly available.

On 28 September 2000 the Commission issued notices under section 42 of the Gas Law to Epic Energy, Origin and TGT setting out the confidential material that it wished to disclose. Section 43 of the Gas Law sets out a process for parties to seek review of disclosure notices. The review period specified in section 43 has now expired and the parties to the notices have not sought review.

Therefore, this Disclosure of Confidential Information sets out the material specified in the section 42 notices.

The Commission invites interested parties to make submissions on any issues raised by the material set out in this paper. Parties making submissions are free to identify other relevant issues. Please make your submissions in writing. The submissions by interested parties will be publicly available on public register files maintained by the Code Registrar and Commission, and Epic Energy will have the opportunity to comment on public submissions.

If you include in your submission information that is of a **confidential or commercially sensitive** nature, it should be clearly marked as such. Under the Code (section 7.12), the regulator (the Commission) must not disclose such information to any person nor to the Code Registrar. However, information may be disclosed if the regulator is of the opinion that disclosure would not be unduly harmful to the legitimate business interests of the service provider, a user or a prospective user. Therefore if you wish to claim confidentiality or commercial sensitivity, please explain the reasons and identify the legitimate business interests that would be harmed by public disclosure of the information.

It would assist the Commission if copies of each submission could be provided in any electronic format compatible with Microsoft Word 97 for Windows. If you claim

confidentiality for part of a submission, please provide hard and electronic copies in a 'public' and a 'confidential' version.

Please address submissions as follows:

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In your submission, please quote reference numbers 'CR99/53' (which is the Commission file number) and 'GR9902' (which is the application registration number used by the Code Registrar and Commission).

Submissions are due by close of business

Monday, 30 October 2000.

Further information

Copies of the proposed **access arrangement**, **access arrangement information** and other information are freely available from the ACCC Website at http://www.accc.gov.au (under 'Gas').

Photocopies of the above documents **or** copies on computer disc may be obtained from the Commission by contacting Ms Hema Berry (phone 02 6243 1274, fax 02 6243 1202, e-mail hema.berry@accc.gov.au). There is a $5 fee for discs, while the fee for photocopies is a total of $20.

Requests for photocopies only of these documents may also be directed to the Code Registrar in Adelaide (Level 19, Wakefield House, 30 Wakefield Street, Adelaide 5000; phone 08 8226 5786, fax 08 8226 5866). Fees applicable will be according to the Code Registrar's determination.

The ACCC Website will be updated as additional information becomes available.

Please contact Mr Warwick Anderson (phone 02 6243 1240, fax 02 6243 1205, e-mail warwick.anderson@accc.gov.au) if you have any questions or want to discuss anything further.

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Part A

Clause 16.2 of the haulage agreement deals with Rights to Developable Capacity.

The provisions of this clause give certain rights to the Shipper over expansion of the MAPS where the cost of expansion is either small or at a lower cost per unit of capacity than the current cost of capacity. Essentially the Shipper has the right to acquire any capacity created by the Pipeline Owner where the cost is minor. Where the cost of the expanded capacity is significant, the Pipeline Owner may not offer that capacity to new Shippers on terms that are generally more favourable than the terms on which haulage services are provided to existing Shippers under the existing haulage agreements.

The Commission understands that this clause was included in the Haulage Agreement to reflect the fact that the foundation Shippers were required to fund the entire cost of the Moomba-Adelaide Pipeline for the first ten years after its privatisation. In return for this financial commitment, each Shipper was to be entitled to a fixed proportion of the capacity of the Moomba-Adelaide Pipeline. Clause 16.2 was designed to ensure that having made the commitment to reserve capacity in the Moomba-Adelaide Pipeline and thereby underwrite Epic's investment in the pipeline for 10 years, the foundation Shipper's investment was not subsequently undermined by Epic offering new capacity to other pipeline users at rates lower than those being paid by the foundation shipper.

The Commission believes that this clause could in practice operate to constrain the service provider in relation to the services, and terms and conditions of service, it could provide to third parties for newly developed capacity. In the Commission's view it does not amount to a contractual right to acquire a certain volume of services. Therefore, in the Commission's view clause 16.2.1 (notwithstanding its commercial rationale) constitutes or contains an exclusivity right. The Commission acknowledges that arguments to the contrary can be made as to whether the clause constitutes an "exclusivity right".

The Commission accepts that this clause would not ordinarily operate in practice to disadvantage potential users relative to existing users, given the likely threshold levels required for investment in developable capacity indicated by Epic representatives in discussions. Accordingly, the Commission does not wish to pursue it in the current access arrangement period. Nevertheless, it cannot be ruled out that the clause may have some practical effect. Further, in the Commission's view such a provision should not form part of future agreements.

In the Commission's view, the clause may in practice have some actual anti-competitive effects in the event of negotiations to interconnect services over a new pipeline system with services over MAPS. The Commission reserves its position as to its response in the event of such a development. The discussion in section 3.7.4 of the Draft Decision, in respect of a possible trigger for early review, is relevant.

Part B

Clause 15.14.1 of the haulage agreement limits the circumstances in which the Pipeline Owner may provide interruptible services through a lateral. In essence, the clause provides that the Pipeline Owner may not offer interruptible capacity in a lateral in which firm capacity is reserved by the Shipper where the Shipper has notified the Pipeline Owner that there is sufficient unutilised capacity available in the lateral to enable the Shipper to offer lateral capacity on a firm basis.

The Commission understands that the intention of the parties in negotiating the haulage agreements was that the Shipper was required to reserve the entire capacity, and to pay the Pipeline Owner the entire cost, associated with any lateral reserved by the Shipper, irrespective of the rate of the Shipper's utilisation of that lateral. Having regard to this requirement, clause 15.14.1 was designed to allow the Shipper to on-sell capacity in the laterals which it had reserved and thereby earn a return on its payments to the Pipeline Owner. If the Pipeline Owner was able to sell interruptible capacity in laterals in which there was spare capacity it would undermine the Shipper's ability to sell lateral capacity on a firm basis and recover its fixed cost payments, whereas Epic would profit from having sold the same capacity twice.

Despite the commercial rationale for clause 15.14.1 the Commission is of the view that clause 15.14.1 constitutes or contains an exclusivity right. However, a contrary view has been expressed to the Commission being that, taken in the context of the whole haulage agreement, this clause does not constitute an exclusivity right.

As noted in section 3.1.5 of the Draft Decision, other contractual provisions that, in the Commission's opinion, are not exclusivity rights give the Shippers substantial control of capacity during the term of the agreements. These provisions are the size of the Shippers' capacity reservations (totalling 100 per cent of the system's indicative capacity); the right to renominate capacity on the day; and Shipper rights over receipt and delivery points. In other words, the scope of services that Epic can offer is constrained even without any exclusivity rights.

The Commission has not been able to establish from the information provided to it that existing Shippers have in fact declined to resell unutilised capacity. However, the information that the Commission has indicates some dissatisfaction with terms that have been offered.

Accordingly, the Commission concludes that this clause adds to a capability arising from the agreements for the Shippers to offer capacity on terms that may not be commercially reasonable. The Commission is unable to determine, on the limited information before it, whether the right has been unreasonably exercised to date.

This clause only applies with respect to the Shippers' existing capacity reservations. Accordingly, in the Commission's view it could not be exercised to restrict the freedom of the service provider to supply a service utilising newly created capacity.

Part C

Clause 15.13 of the haulage agreement provides an option for Epic to require the surrender of capacity in the event that a customer of an existing Shipper changes supplier.

This clause does not necessarily allow Epic to require the transfer of all of the capacity that is sufficient for a new supplier to meet the needs of a customer. The quantity that can be required to be transferred is limited to the net effect of the loss of the customer on the capacity needed by the original shipper. This net effect may be less than the maximum or average volume taken by the customer due to the aggregation effect of the original shipper's customers. In fact there may be situations where no reduction in the original shipper's requirements results from the customer loss.

For this reason, the management of capacity transfer has to date been achieved through secondary markets transactions.

As noted in section 3.1.5 of the Draft Decision, in the Commission's view, if a shipper loses sales to another supplier the mechanisms to deal with the capacity no longer required for those sales should be non-discriminatory between shippers. The Commission believes that mechanisms for the transfer of capacity can be included in the access arrangement for the benefit of third parties without detracting from existing contractual rights.