

## **Attachment 14: Non-tariff elements**

**Access Arrangement Information for the 2016-21  
ACT, Queanbeyan and Palerang Access  
Arrangement**

**Submission to the Australian Energy Regulator**

**June 2015**



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## 14 Non-tariff elements

### *Key points*

- ActewAGL Distribution's proposed terms and conditions for access to its reference service are set out in the new reference service agreement (RSA), which is a schedule to the 2016-21 access arrangement. Users of the reference service will enter into the Australian Energy Regulator (AER) approved RSA, instead of the individually negotiated gas transport services agreements (GTAs) that applied under the 2010-15 access arrangement.
- ActewAGL Distribution has engaged with the network users on the proposed shift to an RSA, and the network users support the proposal. The proposed approach is consistent with that approved by the AER for other gas distribution businesses.
- The proposed trading policy, queuing policy, and arrangements for changing receipt and delivery points have been amended to align with the approach adopted by Jemena Gas Networks (JGN), and approved by the AER.

### *Consumer benefits*

The proposed RSA will benefit consumers as:

- it will improve transparency for existing and prospective network users on the terms and conditions on which ActewAGL Distribution will provide its reference service, thereby facilitating access and energy market competition;
- it will simplify and consolidate the two GTAs into one RSA, which will be easier for network users to manage;
- by adopting a similar agreement to JGN, there will be a more harmonised approach for the ACT and New South Wales;
- it was less costly to adopt the RSA than amend the current GTAs, given the full implementation of the National Energy Customer Framework and the proposed changes to the current services and tariffs. ActewAGL Distribution can pass these cost savings on to consumers.

### **14.1 Introduction**

In this attachment ActewAGL Distribution explains the proposed revisions to the terms and conditions of access to reference services and other non-tariff components of the access arrangement.

ActewAGL Distribution proposes to restructure and simplify the access arrangement such that terms and conditions are set out in an RSA, which is schedule 5 to the 2016-21 access arrangement.

### **14.2 Regulatory requirements**

Under Rule 48(d) of the National Gas Rules (Rules) the access arrangement must specify, for each reference service:

- the reference tariff;
- other terms and conditions on which the reference services will be provided;
- queuing requirements;
- capacity trading requirements;
- extensions and expansion requirements; and
- terms and conditions for changing receipt and delivery points.

Reference tariffs are specified in schedule 3 of the 2016-21 access arrangement and are explained in attachment 12 of this access arrangement information. The other matters on the above list are specified in section 2 and sections 9 to 12 of the 2016-21 access arrangement and are explained in this attachment.

Appendix O.04 to the Overview of this access arrangement information sets out the revisions to the 2010-15 access arrangement that ActewAGL Distribution is proposing for the 2016-21 access arrangement.

The proposed revisions must be consistent with relevant requirements in the National Energy Retail Rules (NERR) and National Energy Retail Law (NERL), and also contribute to the National Gas Objective (NGO) as set out in the National Gas Law (NGL). Specific Rules requirements are discussed in the sections below.

### **14.3 Customer references in this attachment**

There are references within this attachment to different customer types and groups. Table 14-1 defines some of the key customer terms within the proposed access arrangement, RSA and reference tariff schedule that are referred to in this attachment.

**Table 14.1 Understanding ActewAGL Distribution’s customers**

Term	Description
<b>customer</b>	<p>means:</p> <ul style="list-style-type: none"> <li>the person who purchases the gas supplied at a delivery point; or</li> <li>a consumer of hot water in a residential unit where hot water is supplied through a centralised gas-fired hot water system and whose energy consumption is individually metered by ActewAGL Distribution to measure gas withdrawn at the relevant delivery point.</li> </ul> <p>This means that the customer will be the person that has the gas account with the retailer and is the same as the 'Shared Customer' under NERL.</p> <p>A customer is not necessarily the end consumer if the gas is first sold to an intermediary.</p>
<b>volume customer</b>	means a customer who is reasonably expected to use less than 10 terajoules (TJ) of gas a year.
<b>demand customer</b>	means a customer who is reasonably expected to use equal to or more than 10 TJ of gas a year.
<b>end customer</b>	<p>means the end consumer of the gas or energy that ActewAGL Distribution delivers to a delivery point.</p> <p>The end customer is usually the same as the customer, except where there is an intermediary that is supplying gas or energy to them using the gas delivered by ActewAGL Distribution (in that case, the intermediary is the customer).</p>
<b>small customer</b>	<p>where used in the context of the NERL, means a residential customer who consumes less than 1 TJ of gas at a residential premises or a business customer who consumes less than 1 TJ of gas a year at a business premises.</p> <p>where used in the context of the GTA, mean a customer who is reasonably expected to use less than or equal to 10 TJ of gas a year.</p>
<b>large customer</b>	<p>where used in the context of the NERL, means a business customer who consumes equal to or more than 1 TJ of gas a year at a business premises.</p> <p>where used in the context of the GTA, means a customer who is reasonably expected to use more than 10 TJ of gas a year.</p>
<b>shared or retail customer</b>	means a customer with a gas sales contract with a retailer.
<b>user</b>	means the person to whom ActewAGL Distribution is supplying a pipeline service pursuant to a contract or under an access determination. Used in the context of ActewAGL Distribution's contractual counterparty.
<b>network user</b>	means one or more users generally without referring to the specific 'user'.
<b>self-contracting network user</b>	means a customer who does not have a retailer and has entered into an arrangement directly with ActewAGL Distribution for network services.
<b>delivery point</b>	means a point at which gas is withdrawn from the network.

#### **14.4 Terms and conditions in the 2010-15 access arrangement**

The 2010-15 access arrangement contains general terms and conditions which apply to all services (in part 3) and specific terms and conditions for each reference service (in the attachments).

Under clause 3.6 of the 2010-15 access arrangement, users must enter into a GTA before being given access to services. Two GTAs set out the more detailed terms and conditions for the reference services. These agreements do not form part of the 2010-15 access arrangement. One GTA is for small customers and the other GTA is for large customers.

The 2010-15 access arrangement also contains ActewAGL Distribution's policies on capacity trading, queuing and extensions and expansions, and requirements for changing receipt and delivery points.

#### **14.5 Proposed reference service agreement**

ActewAGL Distribution is proposing one RSA which will form part of the 2016-21 access arrangement. Schedule 5 of the 2016-21 access arrangement contains the proposed RSA.

The proposed RSA sets out the terms and conditions on which ActewAGL Distribution will offer its haulage reference service to network users and prospective network users. The proposed RSA is modelled on JGN's approved RSA for its 2015-20 access arrangement with further amendments to reflect regulatory and market arrangements specific to ActewAGL Distribution.

#### **14.6 Key principles relevant to the proposed RSA**

ActewAGL Distribution considers it is in the long term interests of consumers to create more transparency for existing and prospective network users on the terms and conditions on which it will provide a reference service to better facilitate access and retail competition in the ACT gas market.

At the same time, ActewAGL Distribution agrees with the AER<sup>1</sup> that the agreement between a gas distribution business and its network users should achieve an appropriate allocation of risk between service providers, network users and customers and avoid a prescriptive approach on commercial matters in the access arrangement.

The AER has indicated that risk should be borne by the party best able to control or manage it, and that this promotes the NGO by 'providing the opportunity to minimise the risk, which can

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<sup>1</sup> AER, *Access Arrangement draft decision – Envestra Limited 2013-17*, September 2012, Attachment 12, pp. 293-294, AER, *Access Arrangement draft decision - Multinet Gas (DB No. 1) Pty Ltd Multinet Gas (DB No 2) 2013-17*, March 2013, Attachment 12, pp. 377-378, AER *Access Arrangement draft decision - SPI Networks (Gas) Pty Ltd 2013-17*, September 2012, Attachment 12, pp. 375 - 377, AER, September 2012, p. 433, AER, *Access Arrangement draft decision – Jemena Gas Networks (NSW) Ltd 2015-20*, December 2014, Attachment 12, p. 9. In its final decisions for each of these businesses, the AER adopted the same assessment as outlined in the draft (see, for example, AER, *Final decision Jemena Gas Networks (NSW) Ltd Access Arrangement 2015-20*, June 2015, Attachment 12, p. 7).



lead to greater efficiency and lower prices'.<sup>2</sup> This is an important principle which ActewAGL Distribution seeks to reflect in the RSA.

In addition, ActewAGL Distribution has the following significant distinguishing characteristics which are similar to JGN in New South Wales (NSW) but different to other gas distribution businesses:

- ActewAGL Distribution's network covers the ACT and NSW (Queanbeyan and Palerang) and is therefore regulated by the ACT and NSW governments in relation to its technical and operational aspects and in relation to the quality and reliability of gas supplied through its network;
- the regulations place substantial responsibility on ActewAGL Distribution at the distribution network level but not at the production level for all the gas brought into ActewAGL Distribution's network. This is because all the gas brought into ActewAGL Distribution's network is sourced from other jurisdictions and is therefore beyond the scope of the ACT and NSW regulatory jurisdiction. As a result, there is in effect no corresponding regulation applicable to producers and ActewAGL Distribution's network users in respect of the gas that is produced, sold, purchased and injected by them into the upstream transmission pipelines outside of the ACT and NSW which connect to ActewAGL Distribution's network within the ACT and NSW; and
- supply and transportation of gas from the source of production through transmission pipelines and to ActewAGL Distribution's network is conducted through a chain of bi-lateral contractual arrangements between owners of gas and the pipelines transporting it. The control of gas flows through Eastern Australia is conducted in accordance with these commercial arrangements. Consistent with this market approach, ActewAGL Distribution relies on its contractual relationship with its network users to procure the upstream supply outcomes needed to ensure the safe and reliable supply of gas to customers and to satisfy gas quality regulations. This is different to the approach of managing the physical market in Victoria where the Australian Energy Market Operator (AEMO) assumes responsibilities for control of supply and demand, gas quality and other physical operations of the system.

Given the similarities between the JGN and ActewAGL Distribution gas distribution businesses as compared to other gas distribution businesses, by adopting a similar agreement to JGN, ActewAGL Distribution is adopting a more harmonised approach for the ACT and NSW network users and customers. Further, consolidating the two GTAs into one agreement—the RSA—will simplify the agreement for ActewAGL Distribution's network users and make it easier for network users to manage the agreement. ActewAGL Distribution considers this is in the long-term interests of consumers as it should lead to lower costs to facilitate gas services to customers in the ACT, Queanbeyan and Palerang.

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<sup>2</sup> AER, *Access Arrangement draft decision – Envestra Limited 2013-17*, September 2012, p. 433, and AER, *Access Arrangement draft decision – Jemena Gas Networks (NSW) Ltd 2015-20*, December 2014, Attachment 12, p. 9.

Consumers will also benefit from this approach as it is less costly for ActewAGL Distribution to adopt JGN's RSA and leverage from the similarities of the gas distribution businesses than amend the two GTAs given the proposed changes to the services policy and tariffs (which are set out in attachments 2 and 12, respectively, of this access arrangement information), and the regulatory frameworks which are described below. ActewAGL Distribution can in turn pass on these cost savings to consumers.

At ActewAGL Distribution's engagement sessions, network users supported the proposal to move from the two GTAs to one RSA which will form part of the 2016-21 access arrangement.

## **14.7 Key differences between the GTAs and the proposed RSA**

### **14.7.1 Accommodating the full implementation of the National Energy Customer Framework**

On 1 July 2016, when ActewAGL Distribution's 2016-21 access arrangement is scheduled to commence, the National Energy Customer Framework (NECF) will be implemented in full for the first time.

NECF essentially comprises:

- the NERL and the NERR—among other things, the NERL and NERR operate so that a deemed standard connection contract (DSCC) will automatically apply between ActewAGL Distribution and customers with a gas sales contract with a retailer (known as 'retail or shared customers') who are connected to ActewAGL Distribution for the customers' ongoing connection and supply of gas;<sup>3</sup>
- Part 12A of the Rules (Gas connection for retail customers)—Part 12A sets out a process for retail customers to initiate a new physical customer connection to ActewAGL Distribution's network and alterations to existing connections. Once a Part 12A connection contract is entered with a customer, under the NERL it will form part of the DSCC with that customer once gas becomes available at the customer's premises;<sup>4</sup> and
- Part 21 of the Rules (Retail support obligations between distributors and retail customers)—Part 21 largely governs:
  - the charging and invoicing of retailers for ActewAGL Distribution's distribution service charges (i.e. reference tariffs and charges under ActewAGL Distribution's access arrangement) for shared customers; and

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<sup>3</sup> The DSCC applies automatically to retail customers connected to ActewAGL Distribution's network unless a separate negotiated customer connection contract or an AER approved customer connection contract for large customers applies. Generally speaking, a substantial majority of customers connected to ActewAGL's network will be subject to ActewAGL Distribution's DSCC.

<sup>4</sup> Section 70(2) of the NERL. The terms of the mandated form of DSCC set out in Schedule 2 of the NERR are primarily focussed on the ongoing energisation and supply of gas through a customer's connection. Section 70(2) of the NERL contemplates that a new physical connection or connection alteration be separately addressed under a physical connection contract formed under a Part 12A NGR, which automatically becomes part of the DSCC (as additional terms) once it is formed.

- the retailer credit support requirements for these charges.

From ActewAGL Distribution's perspective, the key high-level change introduced through NECF is the creation of direct rights and obligations between the distributor and the customers that connect and take gas from the distributor's network. Before NECF, a 'linear' relationship existed with customers buying energy from retailers and retailers then engaging ActewAGL Distribution to transport gas through its network to the customers. Under that model, ActewAGL Distribution had a primary relationship with the retailer and the contracting arrangements between ActewAGL Distribution and retailers reflected that.

NECF establishes a 'triangular' relationship so that customers now have rights and obligations with ActewAGL Distribution in addition to the previous relationship between customers and retailers, and retailers and ActewAGL Distribution.

A transitional NECF has been in force in the ACT from 1 July 2012 to 30 June 2016. During this period, the impacts of this change on the relationship between ActewAGL Distribution, retailers and customers have been relatively limited as the transitional NECF contemplates that the retailer would act on behalf of the customer in relation to any of the customers' rights and obligations with their distributor. The intention of this transitional arrangement was to preserve the arrangements between the distributor and the retailer under the 'linear' relationship until a new arrangement could be implemented under the new access arrangement to reflect the 'triangular' relationship.

To reflect the full implementation of NECF, ActewAGL Distribution's proposed RSA contemplates the following:

- for network users who are retailers—the RSA rights and obligations between ActewAGL Distribution and the retailer for the delivery of gas to the retailer's customers' delivery points need to accommodate and work consistently with the retailer's customers' arrangement with ActewAGL Distribution under the DSCC and any Part 12A of the Rules connection contract in place between ActewAGL Distribution and the customer; and
- for self-contracting network users (i.e. customers who do not have a retailer)—Part 12A and Part 21 of the Rules and the DSCC do not apply. For self-contracting network users, the RSA still needs to address arrangements for new connections, as well as arrangements for payment and invoicing, and credit support requirements for ActewAGL Distribution's reference tariffs and charges.

#### **14.7.2 Accommodating the proposed services and tariff structure**

ActewAGL Distribution proposes several changes to the services and tariff structure in the 2010-15 access arrangement. The proposed changes to the *Services policy* are set out in attachment 2 of this access arrangement information, and the proposed changes to the tariff structure are set out in attachment 12 and the Tariff Structure Statement (appendix 12.01).

To reflect the proposed changes to the services and tariff structure, ActewAGL Distribution's proposed RSA contemplates the following.

- The RSA will set out the terms and conditions on which ActewAGL Distribution will provide its reference service—the haulage reference service.
- Before any customer delivery points will be eligible for the haulage reference service under the 2016-21 access arrangement, network users will need to enter into an RSA with ActewAGL Distribution and transfer their customers' delivery points from the two GTAs to the RSA.

(Information on a bulk transfer process for the transfer of all delivery points on the two GTAs to the RSA at the 2016-21 access arrangement commencement is set out in section 14.7.3 of this attachment.)

- At the time of the transfer, all delivery points will be automatically assigned to a default tariff category and network users will have the option to request a different tariff category to the default tariff category for their customers' delivery points. Customers will be initially allocated to the default tariff categories as follows:
  - all of the network user's customers on a Tariff Service in the 2010-15 access arrangement will be automatically assigned by ActewAGL Distribution to the individually metered residential tariff category (VRI);
  - all of the network user's customers on a Capacity Reservation Service or Managed Capacity Service in the 2010-15 access arrangement will be automatically assigned by ActewAGL Distribution to the large customer capacity tariff category (DBC); and
  - all of the network users' customers on a Throughput Service in the 2010-15 access arrangement will be automatically assigned by ActewAGL Distribution to the large customer throughput tariff category (DBT),

unless the network user requests a different tariff category and ActewAGL Distribution agrees the delivery point is eligible for that tariff category.

(Further information on the tariff assignment process is set out in attachment 12 and the Tariff Structures Statement (appendix 12.01) of this access arrangement information.)

- As the RSA consolidates the two GTAs (one GTA for small customers and one GTA for large customers):
  - customers reasonably expected to use less than 10 TJ of gas per year will be classified under the RSA as 'volume customers'; and
  - customers reasonably expected to use equal to or more than 10 TJ of gas per year will be classified under the RSA as 'demand customers'.

Similar to the GTAs, the RSA sets out different terms and conditions for volume customers and demand customers to take into account the different energy characteristics of these customers. More information on this is set out in section 14.7.5 of this attachment.

### 14.7.3 Introducing a bulk transfer process

ActewAGL Distribution proposes to introduce a bulk transfer process in the RSA to:

- facilitate the smooth transfer of customers from the two GTAs to the RSA;
- provide its network users with the opportunity to derive the benefits of the new tariff categories from 1 July 2016 when the new access arrangement is expected to commence; and
- provide its network users with a one-off automatic maximum daily quantity reduction for demand customers.

Network users will be able to bulk transfer customers to the RSA as follows:

- the network user will need to enter into a form of the RSA with ActewAGL Distribution within 2 weeks of 1 July 2016; and
- within 3 business days of entering a form of the RSA with ActewAGL Distribution, the network user will need to provide ActewAGL Distribution with formal notification to bulk transfer its customers to the RSA.

If the network user requests a different tariff category to the default tariff category (referred to in section 14.7.2 of this attachment) and the network user seeks the benefit of the tariff category from 1 July 2016, the network user will need to provide ActewAGL Distribution with:

- at least 3 months' prior to 1 July 2016:
  - a list of customers to be assigned to a different tariff category to the default tariff category;
  - the tariff category the network user is requesting for that customer; and
  - evidence to support that request (where applicable); and
- at the same time as its formal bulk transfer notification, formal notification of its tariff assignment in accordance with its list provided under the paragraph above.

If a network user satisfies the conditions for a bulk transfer, the contracted maximum daily quantity for all of its demand customers will automatically be reduced to the ninth-highest daily gas consumption over 1 July 2015 to 30 June 2016 unless:

- the network user notifies ActewAGL Distribution otherwise; or
- a pre-existing commercial arrangement exists between the network user and ActewAGL Distribution for a minimum contracted maximum daily quantity to apply for a specified term.

The rationale for this approach is to:

- offer network users the benefit of the non-default tariff categories from 1 July 2016 with minimal costs to ActewAGL Distribution and network users (ActewAGL Distribution

requires network users to sign a form of RSA within two weeks after 1 July 2016 to avoid costs from retrospective billing);

- streamline the transfer process at the new access arrangement commencement;
- provide sufficient time for network users and ActewAGL Distribution to administer the tariff assignment process; and
- ensure there is a commercial arrangement in place to facilitate the bulk transfer process and tariff assignment process.

If network users request transfers outside of the bulk transfer process, this will need to be assessed by ActewAGL Distribution on a case-by-case basis to account for the administrative effort and costs involved to facilitate this process.

If network users request tariff assignment outside the bulk transfer process, the tariff assignment rules set out in the Initial Reference Tariff Schedule will apply.

#### **14.7.4 Removing contestable meter data services from the proposed RSA**

Under the 2010-15 access arrangement, the meter data service is a separate reference service which may be removed as a reference service if meter data services become contestable in the ACT and NSW. The GTAs reflected this intention by setting out terms and conditions for when a meter data service is no longer offered as a reference service.

For the 2016-21 access arrangement, ActewAGL Distribution is proposing to consolidate the seven reference services under the 2010-15 access arrangement into one reference service—the haulage reference service. As a result, the RSA does not include any terms and conditions where a meter data service is no longer offered as a reference service.

ActewAGL Distribution is proposing this approach because it does not consider meter data services will become contestable for gas over the 2016-21 access arrangement period as the provisions to facilitate contestable meter data services in AEMO's Retail Market Procedures for the ACT and NSW have been removed.

The proposal to include meter data services within a haulage reference service is consistent with the approach approved by the AER for other gas distribution businesses.<sup>5</sup> It will also simplify the RSA for prospective and existing network users.

#### **14.7.5 Changes to the terms and conditions for volume customers and demand customers**

Consistent with the GTAs for small and large customers, ActewAGL Distribution proposes to include different terms and conditions for volume customers and demand customers to reflect the different energy characteristics of these customers.

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<sup>5</sup> AER 2013, *Access Arrangement final decision – Envestra Limited 2013-17*, March; AER 2015, *Access Arrangement final decision – Jemena Gas Networks (NSW) Ltd 2015-20*, Attachment 2, June.

#### 14.7.5.1 Volume customers

The rights and obligations of existing volume customers under the RSA will be similar to their rights and obligations under the GTA for small customers.

#### 14.7.5.2 Demand customers

ActewAGL Distribution proposes a different approach in the RSA for demand customers compared to the GTA for large customers. This approach is consistent with JGN's approach and has been approved by the AER. ActewAGL Distribution proposes:

- all demand customers seeking reference services will be on a haulage reference service on an ongoing basis. This means that network users are no longer required to nominate a reference service for their demand customers for each term;<sup>6</sup>
- network users may request an increase in their demand customer's contracted capacity requirements (contracted maximum daily quantity or 'MDQ', or contracted maximum hourly quantity or 'MHQ') at any time, subject to the queuing policy set out in the access arrangement. This means that network users will have more flexibility to seek additional contracted capacity for their demand customers;<sup>7</sup> and
- ActewAGL Distribution proposes to determine a demand customer's capacity charge based on their chargeable demand and to set out the process for calculating the chargeable demand in the RSA.<sup>8</sup> More information on chargeable demand can be found in attachment 12 of this access arrangement information.

A chargeable demand-based capacity charge achieves the right balance between:

<sup>6</sup> Under the GTA for large customers, a network user must nominate a service - Capacity Reservation Service, Managed Capacity Service, Throughput Service for their demand customer which will apply over a certain term (generally one year). Before the expiry of the term, the network user may nominate an extension on that service or another service. Where a network user does not make a nomination before the expiry of the term, ActewAGL Distribution may, at its discretion, allow a further extension for a specified period. If a network user does not make a nomination and ActewAGL Distribution does not exercise its discretion to extend the term, ActewAGL Distribution is no longer required to provide reference services to the demand customer.

<sup>7</sup> Under the GTA for large customers, a network user may only request an increase in their demand customer's contracted MDQ within three months of the commencement of the service and only where new equipment is commissioned at the demand customer's delivery point that increases the gas capacity of the delivery point or where daily metering is installed at the delivery point, when it was not previously available at the delivery point.

If a network user is not eligible to seek an MDQ increase for their demand customer, the network user's only recourse for additional capacity is to seek overruns. The process for requesting overruns is complex - for example, if a network user requests an authorised overrun, that overrun may have a retrospective effect. The network user may need to rebill their demand customer for the retrospective amount or calculate an adjustment to include in their future invoice to the demand customer - all of which is administratively costly and timely.

<sup>8</sup> Under the GTA for large customers, network users may incur overrun charges at a delivery point if:

- they cannot request an MDQ increase for the delivery point; and
- the demand customers uses gas in excess of the MDQ at the delivery point.

These overrun charges may have a retrospective effect, and have a complex charge structure for different types of overruns – for example, summer tranche capacity, additional capacity, short term capacity.

- streamlining the process for demand customers to use more capacity at the delivery point;
  - ensuring demand customers appropriately pay for the capacity they use on the network; and
  - ensuring demand customers are not immediately charged for consuming gas in excess of their contracted capacity entitlements, unless there is insufficient capacity on the network for this excess gas and this action causes damage to the network and/or causes supply issues to customers on the network.
- ActewAGL Distribution proposes to offer network users the opportunity to seek an automatic one-off MDQ reduction from the 2016-21 access arrangement commencement as part of the bulk transfer process described in section 14.7.3 of this attachment.

This will:

- assist network users (and their demand customers) to transition from the existing charge structure to a chargeable demand-based charge; and
- provide network users and their demand customers with an opportunity to reassess their contracted capacity requirements under the 2016-21 access arrangement, and to revise it through this process.

During engagement sessions with ActewAGL Distribution, the network users supported the proposal to streamline the process for demand customers. This should in turn lead to lower costs for the parties to administer this process, which should be passed on to customers as cost savings.

#### **14.7.6 Changes to the liability and indemnities**

ActewAGL Distribution has reviewed the liability and indemnity provisions in its 2010-15 access arrangement and made a number of changes in incorporating those provisions into its proposed RSA in order to:

- streamline the drafting;
- reflect changes in the law (such as the introduction of NECF);
- focus the provisions on areas where contractual protection is needed having regard to the principle that risk should be allocated to the party best able to control or manage that risk (consistent with the NGO); and
- achieve consistency with the approach adopted by JGN, and approved by the AER.<sup>9</sup>

Consistent with the approach of JGN:

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<sup>9</sup> AER, *Access Arrangement final decision – Jemena Gas Networks (NSW) Ltd 2015-20*, June 2015, Attachment 12.



- The proposed RSA contains standard clauses providing for the exclusion of ActewAGL Distribution liability, except to the extent caused by ActewAGL Distribution's negligence or wilful misconduct, in respect of 12 specific matters which are the responsibility of the user or involve steps taken by ActewAGL Distribution in accordance with the NGR to ensure the ongoing safety and reliability of its network. Examples include exclusion of ActewAGL Distribution liability for unauthorised overruns by the user and the user delivering out-of-specification gas to ActewAGL Distribution's network. The relevant clauses of the proposed RSA are 5.6(c), 6.2, 7.4(b), 9.4(b), 10.1(d), 10.1(e), 10.3(c), 14.9(b), 15.12, 22.3, 23.7 and Annexure 6, clause (d).
- The proposed RSA includes a standard clause excluding and limiting ActewAGL Distribution's liability, to the extent permitted by law, in respect of consumer guarantees under the Australian Consumer Law, which forms schedule 2 to the *Competition and Consumer Act 2010* (Cth) (clause 26.2).
- The proposed RSA contains standard indemnities in favour of ActewAGL Distribution in respect of liability arising from 10 specific matters, except to the extent that liability is caused by ActewAGL Distribution's negligence or wilful misconduct. Each of those matters is the responsibility of the user or involve steps taken by ActewAGL Distribution in accordance with the Rules to ensure the ongoing safety and reliability of its network. Examples include user indemnities for ActewAGL Distribution liability arising from unauthorised overruns by the user, the user delivering out-of-specification gas to the network, or the user requesting the suspension of delivery of gas. The relevant clauses of the proposed RSA are 6.2, 7.4(b), 9.4(b), 10.1(e), 10.3(c), 14.9(b), 22.3, 23.7 and Annexure 6, clause (d).
- The proposed RSA contains mutual indemnities under which each party indemnifies the other against damages suffered or incurred by the other as a result of personal injury, death or property damage caused by the indemnifying party's negligence or wilful misconduct or breach of the RSA (clauses 26.1(a) and (b)).
- The liability of the parties (including under the indemnities outlined above) is limited by mutual limitation of liability clauses (clauses 26.3 and 26.4) under which, save for the exclusions set out in clause 26.5 (discussed below), the liability of one party (**First Party**) to the other:
  - is limited to direct damage, arising from personal injury, death or property damage caused by the negligence or wilful misconduct of the First Party or breach of the RSA; and
  - excludes all consequential damage except to the extent that the loss can be recovered under an insurance policy. For these purposes, consequential damage is defined broadly in the RSA and includes loss of revenue, profit, business interruption liabilities and indirect or consequential loss.

The proposed RSA includes a clause capping ActewAGL Distribution's aggregate liability for direct damages to amounts recoverable under its insurance policies plus retentions

(e.g. deductibles or excesses) (clause 26.3(b)). This is required to assist ActewAGL Distribution to maintain its overall risk exposure and insurance costs at their current levels.

- The proposed RSA includes a clause excluding the application of the mutual limitation of liability clauses in specific circumstances (clause 26.5). This includes, for ActewAGL Distribution, where it delivers out-of-specification gas to a delivery point (to the extent caused by the negligence or wilful default of ActewAGL Distribution) and for users, unauthorised overruns, failure to comply with the gas nominations and gas balancing requirements, delivery of out-of-specification gas or gas which does not meet pressure specifications, and failure to cease delivering gas to ActewAGL Distribution's network as required by the RSA. Each of those matters for the user is within the user's direct control.

The similarities between the ActewAGL Distribution and JGN businesses (which are not shared by other gas distribution businesses) warrant the consistent application of liability and indemnity provisions in the RSA. In particular:

- the laws governing the networks of both businesses impose obligations on the network operator but not the users or producers as most of the gas is sourced from other jurisdictions;
- as between the network user and the network operator, the network user is best placed to manage these obligations through their commercial arrangements with the owners of the gas and the pipelines transporting it (known as the upstream parties);
- this is the only means for ActewAGL Distribution to comply with its obligations under law as ActewAGL Distribution has no control of the gas being injected into its network from other jurisdictions; and
- the liability and indemnity provisions proposed by ActewAGL Distribution (and accepted by the AER in its final decision regarding JGN) appropriately reflect the risk allocation between the parties and manage ActewAGL Distribution's financial exposure from a breach of the provisions of the RSA. In each case where the proposed RSA contains a limitation of liability or indemnity, the provision relates to circumstances over which ActewAGL Distribution has no control and the user is better placed than ActewAGL Distribution to manage the risk that is the subject of the provision. In this regard, ActewAGL Distribution adopts, in support of the limitation of liability and indemnity provisions in its proposed RSA, the positions set out in the table commencing on page 28 of Appendix 1.2 to JGN's 2015-20 Access Arrangement Information dated 30 June 2014 regarding its explanation of JGN's RSA (reproduced in appendix 14.01 to this access arrangement information).

Further, in circumstances where the ActewAGL Distribution and JGN network businesses are comparable in the relevant respects, consistency between the liability and indemnity provisions in the RSAs of ActewAGL Distribution and JGN is in itself consistent with the NGO. This is because ActewAGL Distribution's network spans both NSW and the ACT with the effect that efficiencies

arise for market participants from ActewAGL Distribution adopting a position on liability and indemnity that is consistent with that adopted by JGN in the surrounding region. For example, consistency in approach as between ActewAGL Distribution and JGN allows other market participants to adopt a common approach to issues of liability and indemnity in both regions, thereby reducing transaction costs and corporate overheads. The AER has previously recognised the benefits of consistency in considering the access arrangements of Envestra Ltd's Victoria and Albury networks.<sup>10</sup> While the AER's decision in that context related to differences in the terms and conditions of one entity with two networks, the same issue arises where there is close geographic proximity as in the case of the networks of ActewAGL Distribution and JGN.

### **Liability and indemnity provision for gas nominations and gas balancing**

ActewAGL Distribution has proposed a new liability and indemnity provision in its RSA which is not currently in JGN's AER approved RSA.

ActewAGL Distribution's rationale for this is:

- its gas network does not operate under a market arrangement such as the declared wholesale gas market in Victoria or a short-term trading market in Sydney, Adelaide and Brisbane; and
- therefore, ActewAGL Distribution continues to rely on the gas balancing arrangements in its RSA to ensure its network users inject sufficient gas into its network to match customer withdrawals to ensure its network is in balance.

If ActewAGL Distribution's network is not in balance, there can be loss of gas supply on the network, which can lead to similar dire consequences as loss of supply from users' failing to deliver gas which meets the minimum and maximum receipt point pressure requirements (clause 14.9 of the RSA).

For this reason, the new liability and indemnity provision provides that, as between ActewAGL Distribution and network users:

- users must ensure they comply with the gas nominations and gas balancing arrangements set out in the RSA, including, complying with their 'confirmed nominations' obligations;
- ActewAGL Distribution will not be liable for, and users will indemnify and hold ActewAGL Distribution harmless from, a breach of the gas nominations and gas balancing obligations (clause 7 of the RSA);
- similar to the other liability and indemnity provisions, this provision excludes liability except where ActewAGL Distribution is negligent or acted with wilful default, in which case, ActewAGL Distribution accepts that it is appropriate for it to be held liable; and

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<sup>10</sup> AER 2013, *Access Arrangement final decision – Envestra Limited 2013-17*, Attachment 13, March 2013, p. 249.

- for the same reason as clause 14.9 of the RSA relating to the delivery of gas within the minimum and maximum receipt point pressure requirements, the exclusion of consequential damage (clause 26.4 of the RSA) does not apply.

As between ActewAGL Distribution and network users, ActewAGL Distribution considers users are in a better position to manage these obligations given users:

- have commercial arrangements with the upstream parties to arrange for quantities of gas to be delivered into ActewAGL Distribution's network;
- have commercial arrangements with customers to manage their customers' gas withdrawal needs; and
- are therefore in the better position than ActewAGL Distribution to manage the injections into, and withdrawals from, ActewAGL Distribution's network under the gas nominations and gas balancing arrangements.

#### **Liability provision in ActewAGL Distribution's 2016-21 access arrangement**

ActewAGL Distribution has proposed a new liability and indemnity provision in clause 13 of its 2016-21 access arrangement revisions proposal regarding loss in relation to any request by a user, any delay in relation to consent and any failure to agree on a matter in respect of the access arrangement. This provision excludes liability arising under the access arrangement except where ActewAGL Distribution is negligent or acted with wilful default, in which case, ActewAGL Distribution accepts that it is appropriate for it to be held liable. This provision will not affect a user's right to seek to have any disputes resolved under the NGL and the Rules.

#### **14.7.7 Changes to the agreement due to change in law**

A new clause 1.3 has been inserted into the RSA to enable an RSA between ActewAGL Distribution and its network users to be amended to accommodate a change in law. It is important to have a fair and reasonable mechanism under which RSAs with network users can be amended because such agreements are intended to run for at least five years and the regulatory environment, including the Rules, in which they operate, is rapidly developing and changing. The AER has previously recognised the desirability of including such a clause in an RSA.<sup>11</sup>

ActewAGL Distribution's proposed clause for allowing amendments to agreements to accommodate changes in law is fair and reasonable as:

- it only operates in circumstances where there has been a change in law (as that term is defined in clause 1.1 of the RSA); and
- the RSA may be amended only where the parties reach agreement, unless ActewAGL Distribution, acting reasonably, considers that the required change will not adversely affect the network user's rights or obligations under the agreement, in which case ActewAGL Distribution may make the necessary amendment.

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<sup>11</sup> AER, *Final decision Jemena Gas Networks (NSW) Ltd Access Arrangement 2015-20*, June 2015, Attachment 12, p. 11.

ActewAGL Distribution considers that its proposed clause 1.3 is consistent with the NGO as:

- it will be able to make amendments to the RSA with its network users in an efficient manner, where:
  - a change in law occurs during the course of an agreement which makes it necessary to amend the agreement; and
  - the necessary amendment will not adversely affect the network user.

This will minimise the burden on the network user and therefore on the administrative costs for both network users and ActewAGL Distribution;

- the proposed clause allows either party to seek to amend the terms of the agreement and the parties to agree the necessary changes; and
- if agreement is not reached between the parties on the amendments to the RSA, the clause prescribes a streamlined mechanism to resolve this (namely, the dispute resolution process in clause 30 of the RSA).

#### **14.7.8 Changes to the agreement to reflect the governing law under the RSA**

A new clause 32.10 has been inserted into the RSA to specify that the governing law of an agreement is that applicable in the ACT. This clause is consistent with the NGO because it minimises costs associated with the provision of natural gas services by providing consistency and legal certainty as to the manner in which agreements are to be interpreted.

The AER has recognised the desirability of legally certain terms and conditions and the relevance of this to the NGO in recent decisions.<sup>12</sup> Proposed clause 32.10 promotes consistency and legal certainty given ActewAGL Distribution's network extends beyond the ACT into NSW. This creates a risk that, without a governing law clause, equivalent terms in agreements with different users could be interpreted differently as a result of the application of the law in two different regions. Such an outcome would be inefficient for reasons including that there is no significant benefit arising from uncertainty, or flexibility, as to the governing law and ActewAGL Distribution and network users would nonetheless be likely to incur higher transaction costs and corporate overheads as a result of such a lack of consistency.

#### **14.8 Extensions and expansions policy**

In accordance with Rules 48(1)(g) and 104, the 2016-21 access arrangement includes ActewAGL Distribution's proposed extensions and expansions policy (section 9).

<sup>12</sup> AER, *Access Arrangement draft decision – Envestra Limited 2013-17*, September 2012, Attachment 12, pp. 293-294, AER, *Access Arrangement draft decision - Multinet Gas (DB No. 1) Pty Ltd Multinet Gas (DB No 2) 2013-17*, March 2013, Attachment 12, pp. 377-378, AER *Access Arrangement draft decision - SPI Networks (Gas) Pty Ltd 2013-17*, September 2012, Attachment 12, pp. 375-377, AER, September 2012, p. 433, AER, *Access Arrangement draft decision – Jemena Gas Networks (SW) Ltd 2015-20*, December 2014, Attachment 12, p. 9. In its final decisions for each of these businesses, the AER adopted the same assessment as outlined in the draft (see, for example, AER, *Final decision Jemena Gas Networks (NSW) Ltd Access Arrangement 2015-20*, June 2015, Attachment 12, p. 7).

The extensions and expansions policy sets out the arrangements for coverage of extensions and expansions (that is, whether they are treated as part of the covered pipeline, and are subject to the reference tariffs and other terms and conditions in the access arrangement), as well as related definitions and process matters such as reporting and notification requirements.

ActewAGL Distribution proposes only minor drafting changes to the policy in the 2010-15 access arrangement.

The policy involves different treatment for extensions of 'high pressure pipelines'<sup>13</sup> and extensions and expansions which are not high pressure pipelines. For high pressure pipelines, ActewAGL Distribution must notify the Relevant Regulator (the AER) as to whether it 'intends for the proposed extension to be covered by the Access Arrangement'. The AER must then notify ActewAGL Distribution of its decision on ActewAGL Distribution's proposed coverage approach.

In contrast, extensions to and expansion of the capacity of the network carried out by ActewAGL Distribution which are not high pressure pipeline extensions are covered by the access arrangement, unless ActewAGL Distribution proposes to the AER that the extension or expansion not be covered. Where the extension or expansion is covered, ActewAGL Distribution will offer reference services for that extension or expansion at the reference tariff (that is, with no change to the reference tariffs).

#### **14.9 Capacity trading policy**

In accordance with Rules 48(1)(h) and 105, the 2016-21 access arrangement includes a capacity trading policy (section 10).

ActewAGL Distribution proposes changes to the capacity trading policy for the 2016-21 access arrangement to align with the approach adopted by JGN, and approved by the AER.<sup>14</sup>

In the 2010-15 access arrangement, the ability to transfer contracted capacity and change receipt points and delivery points were contained in one part - Trading Policy.

In the 2016-21 access arrangement, this part has been divided into two parts:

- the transfer of contracted capacity which has been retitled 'Capacity Trading Policy' and appears in section 10; and
- change of receipt points and delivery points which appears in section 11.

In addition, the requirements for capacity transfers and changes to a user's receipt and delivery points are now located in the RSA.

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<sup>13</sup> As defined in the 2016-21 access arrangement, clause 9.1.

<sup>14</sup> AER 2015, *Final decision Jemena Gas Networks (NSW) Ltd Access Arrangement 2015-20*, Attachment 12, June, p. 16.

### **14.10 Changing receipt and delivery points**

Pursuant to Rule 48(1)(h), the 2016-21 access arrangement states the terms and conditions for changing receipt and delivery points (section 11). The requirements are consistent with the principles set out in Rule 106.

ActewAGL Distribution proposes changes to the terms and conditions for changing receipt and delivery point for the 2016-21 access arrangement to align with the approach adopted by JGN, and approved by the AER.<sup>15</sup>

### **14.11 Queuing policy**

The proposed 2016-21 access arrangement includes a queuing policy (section 12).

Under Rule 103(3), queuing requirements must establish a process or mechanism (or both) for establishing an order of priority between prospective users of spare or developable capacity (or both) in which all prospective users (whether associates of, or unrelated to, the service provider) are treated on a fair and equal basis.

The requirements must be sufficiently detailed to enable prospective users:

- to understand the basis on which an order of priority between them has been, or will be, determined; and
- if an order of priority has been determined, to determine the prospective user's position in the queue.

The queuing policy in the 2010-15 access arrangement (part 9) has been substantially retained. Some changes are proposed to align with the AER approved approach adopted in the 2015-20 JGN access arrangement<sup>16</sup>. The RSA provides some additional information to users regarding the effect of the queuing policy on requests to increase MHQ or MDQ requirements.

Pursuant to Rule 52(2), appendix O.04 to the Overview of this access arrangement information sets out all the amendments to the 2010-15 access arrangement that ActewAGL Distribution is proposing for the 2016-21 access arrangement.

### **List of appendices to this attachment**

Appendix 14.01 sets out the positions adopted by ActewAGL Distribution in support of the limitation of liability and indemnity provisions in its proposed RSA, discussed in section 14.7.6 of this attachment.

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<sup>15</sup> AER 2015, *Final decision Jemena Gas Networks (NSW) Ltd Access Arrangement 2015-20*, Attachment 12, June, p. 17.

<sup>16</sup> AER, *Final decision Jemena Gas Networks (NSW) Ltd Access Arrangement 2015-20*, Attachment 12, June, pp. 13-14.

### *Abbreviations used in this document*

Abbreviation	Full term
ACT	Australian Capital Territory
AEMO	Australian Energy Market Operator
AER	Australian Energy Regulator
Cth	Commonwealth Government
DBC	Demand Business Capacity major customer capacity tariff category
DBT	Demand Business Throughput (the major customer throughput tariff category)
DSCC	deemed standard connection contract
GTA	Gas Transportation Agreement
JGN	Jemena Gas Networks (NSW) Ltd
MDQ	maximum daily quantity
MHQ	maximum hourly quantity
NECF	National Energy Customer Framework
NERL	National Energy Retail Law
NERR	National Energy Retail Rules
NGCF	National Gas Connections Framework
NGL	National Gas Law
NGO	National Gas Objective
NSW	New South Wales
RSA	Reference Services Agreement
Rules, the	National Gas Rules
TJ	terajoule(s)
VRI	Volume Residential Individual residential individually metered tariff category