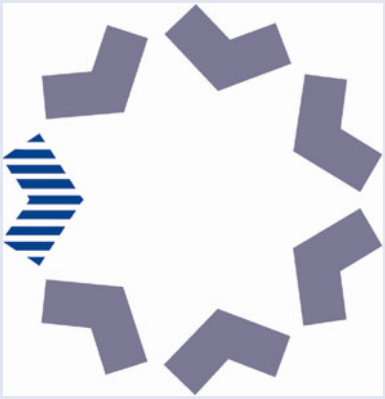
National Competition Council

Western Australian access regime for electricity networks

Application for certification
under section 44M(2) of the
Trade Practices Act 1974

Final recommendation

National Competition Council
12 October 2005



Contents

1 Summary and recommendation 3

2 The certification principles 4

3 Western Australia's application 4

4 The Western Australian access regime 4

5 Statement of reasons 4

Clause 6(3)(a): significant infrastructure 4

Clauses 6(4)(a)–(c): negotiated access 4

Clause 6(4)(d): regular review 4

Clause 6(4)(e): reasonable endeavours 4

Clauses 6(4)(f): negotiated access 4

Clause 6(4)(g): independent dispute resolution 4

Clause 6(4)(h): binding decisions 4

Clause 6(4)(i): principles for dispute resolution 4

Clause 6(4)(j): facility extension 4

Clause 6(4)(k): dealing with a material change in circumstances 4

Clause 6(4)(l): compensation 4

Clause 6(4)(m): anti-competitive conduct 4

Clause 6(4)(n): separate accounting 4

Clause 6(4)(o): Access to financial information 4

Clause 6(4)(p): cross-jurisdictional regimes 4

6 Duration of certification 4

References 4

Council publications related to certification matters 4

1 Summary and recommendation

1.1 In July 2005, the Government of Western Australia applied to the Council to recommend that the state's access regime for electricity network services (the Western Australian regime) is an effective access regime under s44M of the *Trade Practices Act 1974* (TPA). Section 44M of the TPA requires the Council to determine whether the Western Australian regime satisfies the principles set out in clauses 6(2) to 6(4) of the Competition Principles Agreement (CPA).

1.2 The Western Australian regime is set down in part 8 of the *Electricity Industry Act 2004*, which establishes the Electricity Networks Access Code 2004 for third party access to electricity transmission and distribution networks in Western Australia. Certification of this regime would exclude the services subject to the regime from 'declaration' for access under part IIIA of the TPA.

1.3 The Council released a draft recommendation on 3 August 2005. It received no submissions in response to the draft recommendation.

1.4 **The Council's <u>recommendation</u> is:**

The Western Australian regime should be certified for 15 years.

2 The certification principles

2.1 Section 44M of the TPA provides for the Council to recommend to the Commonwealth Minister (the Australian Government Parliamentary Secretary to the Treasurer (The Hon. Chris Pearce MP)) on the effectiveness of an access regime established by a state or territory government. The Council must recommend that the regime is either effective or not effective. If the Council recommends certification because it is satisfied that the regime is effective, it must also recommend the period for which the Minister's decision should be in force.

2.2 In making a recommendation the Council must consider the guiding principles of clauses 6(2) to 6(4) of the CPA (see box 1) and not other matters (s44M(4) of the TPA). This does not, however, prevent an effective access regime containing additional matters to the extent they are not inconsistent with the CPA clause 6 principles (s44DA(2)).

Box 1: The clause 6(2) to 6(4) principles of the Competition Principles Agreement

6(2) The regime to be established by Commonwealth legislation is not intended to cover a service provided by means of a facility where the State or Territory Party in whose jurisdiction the facility is situated has in place an access regime which covers the facility and conforms to the principles set out in this clause unless:

(a) the Council determines that the regime is ineffective having regard to the influence of the facility beyond the jurisdictional boundary of the State or Territory; or

(b) substantial difficulties arise from the facility being situated in more than one jurisdiction.

6(3) For a State or Territory access regime to conform to the principles set out in this clause, it should:

(a) apply to services provided by means of significant infrastructure facilities where:

(i) it would not be economically feasible to duplicate the facility;

(ii) access to the service is necessary in order to permit effective competition in a downstream or upstream market; and

(iii) the safe use of the facility by the person seeking access can be ensured at an economically feasible cost and, if there is a safety requirement, appropriate regulatory arrangements exist; and

(b) incorporate the principles referred to in subclause (4).

6(4) A State or Territory access regime should incorporate the following principles:

(a) Wherever possible third party access to a service provided by means of a facility should be on the basis of terms and conditions agreed between the owner of the facility and the person seeking access.

(b) Where such agreement cannot be reached, governments should establish a right for persons to negotiate access to a service provided by means of a facility.

(c) Any right to negotiate access should provide for an enforcement process.

(d) Any right to negotiate access should include a date after which the right would lapse unless reviewed and subsequently extended; however, existing contractual rights and obligations should not be automatically revoked.

(e) The owner of a facility that is used to provide a service should use all reasonable endeavours to accommodate the requirements of persons seeking access.

(f) Access to a service for persons seeking access need not be on exactly the same terms and conditions.

(g) Where the owner and a person seeking access cannot agree on terms and conditions for access to the service, they should be required to appoint and fund an independent body to resolve the dispute, if they have not already done so.

(h) The decisions of the dispute resolution body should bind the parties; however, rights of appeal under existing legislative provisions should be preserved.

(i) In deciding on the terms and conditions for access, the dispute resolution body should take into account:

(i) the owner's legitimate business interests and investment in the facility;

(ii) the costs to the owner of providing access, including any costs of extending the facility but not costs associated with losses arising from increased competition in upstream or downstream markets;

(iii) the economic value to the owner of any additional investment that the person seeking access or the owner has agreed to undertake;

(iv) the interests of all persons holding contracts for use of the facility;

(v) firm and binding contractual obligations of the owner or other persons (or both) already using the facility;

(vi) the operational and technical requirements necessary for the safe and reliable operation of the facility;

(vii) the economically efficient operation of the facility; and

(viii) the benefit to the public from having competitive markets.

(j) The owner may be required to extend, or to permit extension of, the facility that is used to provide a service if necessary but this would be subject to:

(i) such extension being technically and economically feasible and consistent with the safe and reliable operation of the facility;

(ii) the owner's legitimate business interests in the facility being protected; and

(iii) the terms of access for the third party taking into account the costs borne by the parties for the extension and the economic benefits to the parties resulting from the extension.

(k) If there has been a material change in circumstances, the parties should be able to apply for a revocation or modification of the access arrangement which was made at the conclusion of the dispute resolution process.

(l) The dispute resolution body should only impede the existing right of a person to use a facility where the dispute resolution body has considered whether there is a case for compensation of that person and, if appropriate, determined such compensation.

(m) The owner or user of a service shall not engage in conduct for the purpose of hindering access to that service by another person.

(n) Separate accounting arrangements should be required for the elements of a business which are covered by the access regime.

(o) The dispute resolution body, or relevant authority where provided for under specific legislation, should have access to financial statements and other accounting information pertaining to a service.

(p) Where more than one State or Territory regime applies to a service, those regimes should be consistent and, by means of vested jurisdiction or other cooperative legislative scheme, provide for a single process for persons to seek access to the service, a single body to resolve disputes about any aspect of access and a single forum for enforcement of access arrangements.

3 Western Australia's application

3.1 In July 2005, the Government of Western Australia applied to the Council to recommend that the state's access regime for electricity network services (the Western Australian regime) is an effective access regime under section 44M of the *Trade Practices Act 1974* (TPA). If a regime is declared as effective, the services subject to the regime cannot be 'declared' for access under part IIIA of the TPA.

4 The Western Australian access regime

4.1 The Western Australian regime is set down in the Electricity Networks Access Code 2004 under part 8 of the *Electricity Industry Act 2004*. The access code provides for a regime for third party access to regulated electricity networks in Western Australia. It provides a framework for the Economic Regulation Authority to review and approve the prices and the terms and conditions under which the owner of a network will allow third parties to use that network.

The regulatory framework

4.2 The Western Australian access regime forms part of a wider regulatory framework through which the Western Australian Government seeks to promote competitive outcomes, provide appropriate consumer protection, and ensure the safe and efficient operation of electricity infrastructure and services.

4.3 The Western Australian electricity industry has lacked a competitive framework and has among the highest electricity prices in Australia. In recognition of this the Western Australian Government endorsed an electricity reform plan with the aim of boosting economic growth, creating new jobs and helping to drive down electricity prices. The plan involved establishing a competitive electricity industry (Electricity Reform Implementation Unit 2005).

4.4 The Electricity Industry Act provides the legal framework for the restructure of the Western Australian electricity industry. It established:

(a) the rules for the wholesale electricity market

(b) an independent licensing regime and electricity networks access code

(c) measures to protect customers, such as the Customer Service Code, the Electricity Ombudsman and standard customer contracts.

(d) the Western Power Network extension and expansion policy.

4.5 Under the Act the Economic Regulation Authority has responsibility for licensing and the access regime. It also provides advice to government on electricity tariffs and electricity market surveillance.

4.6 The second major arm of the reform process involves the restructure of Western Power into four new government owned entities—the Electricity Generation Corporation, Electricity Retail Corporation, Electricity Networks Corporation and Regional Power Corporation. This reform has been implemented via the *Electricity Corporations Act 2005*, which amends the *Electricity Corporation Act 1994* and renames it the *Electricity Transmission and Distribution Act 2005*. The government anticipates that the restructure of Western Power will be completed by 31 March 2006.

4.7 As part of the reform process the Western Australian Government has established a tariff equalisation fund under the Electricity Corporations Act to support its uniform electricity tariff policy. The Electricity Networks Corporation will be required to contribute to the fund, which will be used to pay the Regional Power Corporation for the difference between its cost of supply and the price paid by customers in areas outside of the South West Interconnected System (SWIS). The new Act provides for the Electricity Networks Corporation to recover contributions to the fund through access charges set out in the Electricity Networks Access Code. The government is currently in the process of amending the code to reflect this change and to implement other amendments (see para 4.19).

Structure of the access regime

4.8 The Western Australian Electricity Networks Access Code has fifteen chapters and five appendices:

1. **Introductory**: defines terms used throughout the code

2. **General principles**: spells out the code objective and basic principles

3. **Coverage**: describes the parts of electricity network infrastructure that is subject to the code, sets out the criteria for assessing whether particular infrastructure should become subject to the code, the processes for coverage and the circumstances in which coverage should be revoked

4. **Access arrangement: Approval and review**: details the method the regulator must use for approval and review of the access arrangement for a covered network

5. **Access arrangement: Content**: lists and details the matters that must be in an access arrangement to satisfy the approval requirements

6. **Price control**: sets out the principles with which reference tariffs and a reference tariff policy included in an access arrangement must comply

7. **Pricing methods**: sets out the principles with which the method for determining tariffs (reference and non-reference) in an access arrangement must comply

8. **Price lists**: sets out the process to be followed where an approved access arrangement includes a requirement for annual approval of a price list by the Economic Regulation Authority

9. **Regulatory test**: sets out the test to apply when considering major augmentation to a covered network and to ensure appropriate incentives are in place to maximise the net benefit from augmentation

10. **Dispute resolution**: establishes an arbitration mechanism for resolving disputes between the service provider of a covered network and a prospective user where they cannot agree on the terms of access to a service. In any such arbitration, the

arbitrator must apply the terms of the access arrangement established with the Economic Regulation Authority

11. **Service standards**: sets out the minimum service standards a service provider must adhere to, monitoring and reporting requirements and penalties for non-compliance

12. **Technical rules**: sets out the principles with which technical rules must comply and the process for approval of the rules

13. **Ringfencing**: obliges a integrated network service provider to separate the functions and business of providing access to networks from its other functions and services, and sets out principles for ringfencing rules, monitoring and reporting requirements

14. **Administration and miscellaneous**: deals with disclosure and use of confidential material and other administrative matters; and requires a service provider to establish and maintain an information package (including access arrangements and pricing) in relation to the covered network

15. **Transitional**: gives the Minister for Energy the power to make determinations on transitional matters in relation to commencement of part 8 of the Electricity Industry Act and requires that access arrangements be compatible with the wholesale electricity market and changes made to the threshold for contestability

Appendices: which provide a flowchart of the access arrangement approval process, the procedural rules for arbitration, the matters to be addressed by the technical rules and the general process for public consultation.

Viewing the Western Australian electricity access regime

Western Australia's *Electricity Industry Act 2004*, *Electricity Corporation Act 1994* and *Electricity Act 1945* can be viewed at the State Law Publisher: http://www.slp.wa.gov.au/index.html.

The Electricity Networks Access Code 2004 can be viewed at Electricity Reform Implementation Unit: http://www.eriu.energy.wa.gov.au/.

A schematic of the interrelationship between electricity regulatory requirements and access can be viewed in Western Australia's application (p. 26) at: www.ncc.gov.au.

Services covered by the Western Australian regime

4.9 In Western Australia the electricity access regime applies to the portions of the SWIS owned by Western Power and may apply to other electricity network infrastructure facilities in Western Australia that meet the coverage criteria in the Electricity Networks Access Code.

4.10 Part 8 (s103) of the Electricity Industry Act defines network infrastructure facilities to mean:

> *(a)* *the electrical equipment that is used only in order to transfer electricity to or from an electricity network at the relevant point of connection including any transformers or switchgear at the relevant point of connection or which is installed to support or to provide backup to that electrical equipment as is necessary for that transfer*
>
> *(b)* the *wires, apparatus, equipment, plant and buildings used to convey, and control the conveyance of, electricity*

which together are operated by a person (a 'network service provider') for the purpose of transporting electricity from generators to other electricity networks or to consumers.

4.11 The generic type of service that may be covered by the Western Australian regime is defined in chapter 1 of the Electricity Networks Access Code as a service in relation to the transportation of electricity provided by means of a covered network including:

(a) a connection service (the right to connect facilities and *equipment* at a connection point)

(b) an entry service or exit service (the right to transfer electricity into or out of the network)

(c) a network use of system service

(d) a common service (services that provide benefits to users of the network, not just individual users, such as services that ensure reliability of a network)

(e) a service ancillary to a service listed in paragraphs (a) to (d) above

but does not include an excluded service (a service that meets the criteria in paragraphs (a)–(e), but the supply of the services is subject to effective competition and the cost of the service is able to be excluded from consideration for price control purposes without departing from the code objective).

The coverage mechanism

4.12 Under chapter 3 of the Electricity Networks Access Code anyone may apply to the Minister for a network to be covered. The Minister must consider the matter through an open and transparent two stage public consultation process, and make a draft and final decision as to whether the network should or should not be covered. The Minister must make a decision for coverage where the network meets the following criteria:

(a) access (or increased access) to covered services provided by means of the network would promote a material increase in competition in at least one market (whether or not in Western Australia) other than the market for the covered services provided by means of the network

(b) it would be uneconomic for anyone to develop another *network* to provide the covered services provided by means of the network

(c) access (or increased access) to the covered services *provided* by means of the network would not be contrary to the public interest.

4.13 In assessing coverage the Minister must also have regard to the geographical location of the network and the extent (if any) to which the network is interconnected with other networks. The Minister may decide to cover the network to a greater or lesser extent than requested in the coverage application where the Minister considers that doing so is consistent with the code objective.

4.14 The Electricity Networks Access Code also allows parties to apply to the Minister for revocation of coverage, including for the covered portions of the SWIS. On receipt of the application, the Minister assesses whether the coverage criteria continue to apply to the relevant network.

Amendment and replacement of the access code

4.15 The Minister has power to amend the Electricity Networks Access Code or repeal and replace it. Section 108(1) of the Electricity Industry Act requires the Minister to undertake public consultation prior to exercising this power. Further, under section 110, the Minister must consult with any network service providers that may be affected by a proposed amendment or replacement of the access code.

4.16 Section 110 also enables a network service provider to make submissions to the Minister to request that the access code be amended (or repealed and replaced) in the event that the network service provider considers that the access code (or a provision of it) has, as a result of altered circumstances, become unreasonable or inappropriate in its application to the network service provider.

4.17 Where the code is amended, repealed or replaced existing access arrangements remain in force, unless the parties have specified this as a trigger event for a review of the arrangements or agreed in writing to review the arrangements.

4.18 Where the code is amended it is also necessary to consider whether the regime prescribed in the code continues to be an effective regime. That is, whether the regime continues to satisfy the clause 6 principles. If the regime is modified in such a way that the principles are no longer satisfied the regime ceases to be effective and the services covered by the regime again become subject to declaration under part IIIA of the TPA.

Proposed amendments to the code

4.19 Western Australia is currently amending the Electricity Networks Access Code to:

(a) insert a new clause to recognise the tariff equalisation fund established under the Electricity Corporations Act and:

(i) allow the Electricity Networks Corporation to propose, and the Economic Regulation Authority to approve, a method for recovering the Tariff Equalisation Contribution from distribution tariffs

(ii) require any recovered payments to be allocated among the users of the networks in a manner that is equitable in its effects on those users

(b) delete s6.56 of the code to ensure consistent guidance on revenue methods, specifically to prevent the approval of an access arrangement that allows a service provider to make a return on capital contributions

(c) make editorial amendments to correct typographical and drafting errors.

4.20 The Council's recommendation does not take account of these changes. That said, the proposed amendments do not appear to be inconsistent with the clause 6(2) to 6(4) principles of the CPA.

5 Statement of reasons

5.1 This section provides the Council's view of the Western Australian regime assessed against each of the clause 6(2)–(4) principles of the CPA (see box 1, pp. 4–4).

Clause 6(3)(a): significant infrastructure

> For a State or Territory access regime to conform to the principles set out in this clause, it should:
>
> (a) apply to services provided by means of significant infrastructure facilities where:
>
> (i) it would not be economically feasible to duplicate the facility
>
> (ii) access to the service is necessary in order to permit effective competition in a downstream or upstream market
>
> (iii) the safe use of the facility by the person seeking access can be ensured at an economically feasible cost and, if there is a safety requirement, appropriate regulatory arrangements exist.

5.2 Clause 6(3)(a) sets out the threshold criteria that limit the scope of effective access regimes to significant bottleneck infrastructure services.

5.3 Clause 6(3)(a)(i) essentially limits application of an access regime to the services of infrastructure facilities that exhibit natural monopoly characteristics—that is where it is more efficient for a single facility to meet current and reasonably foreseeable levels of demand for the relevant services than two or more facilities.

5.4 Clause 6(3)(a)(ii) recognises that monopoly provision of infrastructure services can act as a natural barrier to entry and hence competition in upstream and downstream markets. Access to the services of the infrastructure facility may promote competition in upstream and downstream markets by addressing the monopoly problem.

5.5 This should occur only where any safety issues can be addressed at a reasonable cost, including the cost of putting in place appropriate regulatory arrangements (clause 6(3)(a)(iii)).

The Western Australian regime

5.6 The Western Australian regime applies to the services of covered electricity network infrastructure facilities used for the transfer of electricity to or from an electricity network. It does not apply to upstream facilities or services of upstream facilities such as electricity generators or the electricity produced.

5.7 'Service' and 'network' are defined terms in the Western Australian regime (see paragraphs 4.10–4.11).

5.8 'Coverage' of a network makes it subject to the obligations of the Electricity Networks Access Code, which contains a coverage and revocation mechanism and sets out coverage criteria that closely reflect the clause 6(3)(a) principle of the CPA. An outline of the coverage mechanism is provided in paragraph 4.12.

5.9 The Electricity Networks Access Code revocation mechanism enables parties to seek an independent assessment of whether the coverage principles continue to apply to a particular network. This ensures that coverage may be revoked should the clause 6(3)(a) principle no longer apply.

5.10 The code includes an exclusion provision (see paragraph 4.10) so that coverage need not be invoked where there is evidence of effective competition and the network is operating in a manner consistent with the code objective. This conforms with the clause 6(3)(ii) principle, which seeks to apply access regulation to a service only where it is necessary to permit effective competition in a downstream or upstream market.

5.11 Following an extensive public consultation process the Western Australian Government concluded that the only electricity infrastructure in Western Australia that meets the coverage criteria under the code is the portions of the SWIS owned by Western Power. The services of this network are covered under the code.

5.12 Western Power is the dominant participant in the electricity industry in Western Australia. It is a vertically integrated electricity supplier providing generation, transmission, distribution and retail services. It owns and operates most of the SWIS. Portions of the SWIS covered under the code include over 4000 kilometres of transmission lines and 60 000 kilometres of distribution lines. The SWIS has a transformer capacity of 5014 megavolt amperes. Western

Power uses the SWIS electricity network to transmit electricity from any of around 18 power stations to 867 000 customers located in the south west of Western Australia (mostly retail consumers living in Perth).

5.13 In relation to the south west region of Western Australia, there are no substitute services on offer to deliver electricity from points of generation to points of consumption with similar network characteristics to the SWIS network.

5.14 In its application the Western Australian Government noted that essential safety requirements are regulated by the Electricity (Supply Standards and System Safety) Regulations 2001 and that the code requires network service providers of covered networks, and non-covered networks that are part of an interconnected system that contains one or more covered networks, to have a set of technical rules approved by Economic Regulation Authority. In assessing the technical rules the authority is required to have regard to the objective of the access code and ensure that technical rules:

(a) are reasonable

(b) do not impose inappropriate barriers to entry to a market

(c) are consistent with good electricity industry practice

(d) are consistent with relevant written laws and statutory instruments.

Summary

5.15 The Western Australian regime applies to services provided by means of significant electricity networks. Coverage under the code applies to the portions of the SWIS owned by Western Power. There are economies of scope and scale to be gained from developing, operating and using such a comprehensive and integrated network rather than a number of ad hoc point to point transmission lines. The current system is capable of servicing the major population centres of Western Australia. These features suggest that it would not be economically feasible to duplicate this network.

5.16 Western Power is a vertically integrated service provider. It operates generation, transmission, distribution and retail electricity services. Access to the services of an electricity network may promote competition in electricity generation and electricity retailing by

addressing the bottleneck commonly associated with electricity transmission and distribution infrastructure.

5.17 A system is in place under the code to deal with potential safety issues related to interconnection. The Council is not aware of safety issues arising under clause 6(3)(a)(iii) with regard to the Electricity Networks Access Code framework.

Conclusion

5.18 The Council considers the Western Australian regime satisfies clause 6(3).

Clauses 6(4)(a)–(c): negotiated access

Clauses 6(4)(a)–(c): negotiated access

A State or Territory access regime should incorporate the following principles:

(a) Wherever possible third party access to a service provided by means of a facility should be on the basis of terms and conditions agreed between the owner of the facility and the person seeking access.

(b) Where such agreement cannot be reached, governments should establish a right for persons to negotiate access to a service provided by means of a facility.

(c) Any right to negotiate access should provide for an enforcement process.

5.19 Clauses 6(4)(a)–(c) are appropriately considered together because they jointly establish a framework for negotiations to proceed in an effective access regime. Clause 6(4)(a) establishes commercial negotiation as a cornerstone in determining access outcomes. The principle of negotiation is complemented by clauses 6(4)(b) and (c), which recognise the need for underpinning regulatory measures where a service provider has considerable market power. In this sense, clauses 6(4)(a)–(c) require an appropriate balance between commercial negotiation and regulatory intervention to facilitate credible negotiations.

5.20 Independent regulatory guidance to third parties may be needed to create an environment conducive to effective negotiations. This is especially true of industries where third parties have limited information on which to base negotiations or where many disputes are likely. In such circumstances, third parties may lack sufficient

information and bargaining strength to negotiate reasonable terms and conditions, and credible pricing structures may only emerge through lengthy and potentially costly arbitrations. This prospect would be inimical to a genuine negotiation process.

5.21 To address these issues, regulatory processes should address information and market power asymmetry to give third parties a workable platform from which to enter negotiations. In the absence of such measures, an access regime may establish a right to negotiate in theory, but may put third parties in a position of negotiating blindly with a monopoly provider or of being offered potentially inappropriately high prices (for example, prices that include monopoly rents) on a 'take it or leave it' basis. The latter may amount to a constructive denial of access, and cannot be viewed as satisfying clauses 6(4)(a)–(c).

5.22 Addressing information and market power asymmetry is likely to require, among other things, guidance on appropriate access prices or price boundaries established through either:

(a) independent and transparent regulatory processes that provide for stakeholder consultation

(b) a robust competitive process, subject to independent oversight, that determines terms and conditions of access.

5.23 In considering whether an access regime provides appropriate guidance to market participants, the Council focuses, in the first instance, on whether regulatory processes are sufficiently robust to make the guidance credible. In particular, market guidance should be independent, developed through open and transparent processes that allow stakeholders to participate, and provide stakeholders with reliable information to inform their views. Regulatory processes should be derived from appropriate legislative underpinnings, rather than being applied on an ad hoc basis, and should be clearly defined and made publicly available, to allay concerns of bias or perceptions of agreements made 'behind closed doors'.

5.24 While the clause 6 principles do not specify particular outcomes, they provide that outcomes should strike a balance between a range of factors, which taken as a whole, point to the pursuit of efficient outcomes through the regulatory process.

5.25 The clause 6 principles recognise the need for an independent arbitration mechanism (clauses 6(4)(g)–(h)) to complement the

negotiation/regulatory framework. In considering clauses 6(4)(a)–(c), the Council is conscious that the dispute resolution framework will affect the environment for negotiation. In particular, parties are more likely to engage in genuine negotiations if a robust mechanism is available to settle disputes.

The Western Australian regime

5.26 The Western Australian regime is intended to apply in circumstances where commercial negotiations between third party access seekers and the owners/operators of covered networks are not successful. A key principle of the regime is freedom to contract and parties are not precluded from negotiating commercial arrangements that suit their particular needs and circumstances. This is supported by a regulatory framework that aims to provide incentives conducive to effective negotiations, including mechanisms to address information and market power asymmetry, safeguards for commercially sensitive information and procedures to enforce the right to negotiate provided by coverage (Government of Western Australia 2005a).

The freedom to contract principle

5.27 Section 2.5 of Electricity Networks Access Code expresses the general principle of freedom to contract. This means that access seekers and network service providers are free to negotiate the terms and conditions of access, including price, service standards, term of the contract, invoicing and payment and insurance. Where parties can negotiate access to a covered network, the code states that the negotiated outcome will prevail over the code. The freedom to contract is subject only to general limitations relating to queuing policy, ringfencing objectives and rules and any applicable technical rules. These restrictions relate to procedural fairness and network safety matters.

A regulatory framework for negotiation

5.28 To provide an environment conducive to commercial negotiation the Electricity Networks Access Code requires the owners/operators of covered networks to submit an access arrangement to the regulator—Economic Regulation Authority—for approval. The 'up-front' development and approval of access arrangements is

intended to provide both access seekers and owners/operators of covered networks with some certainty about the likely terms and conditions of access. It is also intended to reduce the likelihood of disputes (requiring resolution) under the access regime.

5.29 The Economic Regulation Authority may approve an access arrangement only after conducting an extensive public consultation process and being satisfied that the proposed access arrangement meets the code objective and

(a) specifies at least one *reference service* and provides a description of the services to be offered and, to the extent reasonably practicable, allows prospective users to obtain a service that includes only those elements that the user wishes to be included in the service and to obtain separate tariffs for those elements (entry services should be available without the need to purchase a corresponding exit service for example)

(b) includes a *standard access contract* for each reference service setting out the terms and conditions that apply to the service

(c) includes *service standard benchmarks* for each reference service that are sufficient to enable the user to determine the value represented by the reference service at the reference tariff

(d) includes *price control*, which for the first access arrangement must be determined by reference to the service provider's approved total costs (that is by setting a revenue cap or price cap)

(e) includes *pricing methods* setting out the structure of reference tariffs, which determines how target revenue is allocated across and within reference services. The pricing methods may result in tariffs that distinguish between voltage levels and classes of users or may relate to specific connection points (demand levels, energy quantities and time of use, for example). Pricing methods must as a primary objective aim to recover the forward-looking efficient costs of providing reference services and set the lower bound reference tariff at no less than the incremental costs of service provision and the upper bound reference

tariff at no more than the stand-alone cost of service provision

(f) includes a current *price list* specifying proposed prices to apply for the next pricing year. This must be accompanied by information that would allow users to understand how the service provider derived elements of its prices

(g) includes a *applications and queuing policy*: defining the priority that access seekers have in negotiating for capacity

(h) includes, in the case where a network would require augmentation, a *capital contributions policy* setting out the circumstances in which a user may be required to make a capital contribution and the method for calculating any capital contribution required

(i) includes a *transfer and relocation policy*: allowing transfer and relocation (to another connection point) of a user's access rights and setting out the rules for notification, consent and refusal

(j) includes, if necessary, *efficiency and innovation benchmarks* providing an objective standard for assessing the service provider's efficiency and innovation during the access arrangement period

(k) includes provisions dealing with *supplementary matter*s (balancing, line losses, metering, ancillary services, stand-by, trading and settlement etc) and be consistent with and facilitate the rules and code objective

(l) includes *revisions submissions* specifying the timing and triggers for review and revision of the access arrangement.

5.30 An access arrangement submitted to the regulator for approval must be accompanied by an access arrangement information package. This should enable users and prospective users to understand the derivation of the elements of the proposed access arrangement and must include the categories of information identified in chapter 14 of the Electricity Networks Access Code.

5.31 The regulator has about six to eight months (from receipt of the proposed access arrangement) in which to issue a final decision on it. In deciding whether to approve an access arrangement, the regulator must undertake a transparent process involving public consultation.

The regulator must assess whether the arrangement meets the code objective and satisfies the content requirements set out in chapter 5 (and chapter 9, if applicable) of the Electricity Networks Access Code. Section 4.30 of the code states that the regulator's assessment must have also regard to:

(a) the geographical location of the network and the extent to which it is interconnected with other networks

(b) contractual obligations of the service provider and/or other persons using the network

(c) operational and technical requirements necessary for the safe and reliable operation of the network and any relevant written laws and statutory instruments.

5.32 The regulator's draft, final and further final decisions on the access arrangement must consider all submissions received and include a statement of reasons for the decision. Where the regulator's final decision is not to approve the access arrangement it must prepare a further final decision and then, if approval is still not granted, draft and approve its own access arrangements. In addition, if the first access arrangement is not ready within 12 months the Economic Regulation Authority is empowered to draft and approve an interim access arrangement. The regulator must publish and advertise all its decisions and place all decisions and related information (submissions, draft, interim and final access arrangements and information packages etc) on its public register.

5.33 Parties are free to negotiate access on the basis of information contained in the access arrangement and the access arrangement information package. It is possible for them to negotiate tariffs that are different from the reference tariffs. Chapter 10 of the code contains a dispute resolution mechanism if commercial agreements cannot be reached. This mechanism can be invoked by either party referring the dispute to the regulator who may seek to settle the dispute through conciliation (where the parties agree) or refer the matter for arbitration by the Western Australian Gas Disputes Arbitrator. In resolving the dispute the arbitrator must have regard to the code objective and the provisions of the access arrangement. The arbitrator must also have regard to other factors such as the geographical location of the network (see paragraphs 5.31(a)–5.31(c) above). The requirements are similar to those listed in clause 6(4)(i) of the CPA.

5.34 All decisions made by the regulator and arbitrator are subject to judicial review by the Supreme Court of Western Australia. Part 8 (s. 118) of the Electricity Industry Act provides for regulations for the enforcement of obligations created by the access regime. Under the Electricity Industry (Access Code Enforcement) Regulation 2005 the Supreme Court of Western Australia may impose a range of fines, sanctions and remedies including injunctions and damages for breaches of the Act.

Powers and independence of regulators and appeal bodies

5.35 The Western Australian regime gives the Minister for Energy control over the policy decision to cover a network. All regulatory functions are undertaken by the Economic Regulation Authority, which is an independent statutory authority established under the Economic Regulation Authority Act 2003. The Electricity Networks Access Code requires both the Minister and authority to conduct open and transparent consultation processes prior to making a decision. It also sets out clear objectives and decision making criteria that the Minister and the authority must follow.

5.36 The Economic Regulation Authority has three members and is supported by a secretariat. In 2004-05 the authority was allocated a forward budget of about $4 million a year, with about $1.5 million of that expenditure allocated for electricity reform related matters (table 5.1). In the 2005-06 budget the Western Australian Government has allocated additional funding in light of higher than expected expenditure.

Table 5.1: Economic Regulation Authority expenditure

Appropriations	*2004-05*[a]	*2005-06*[b]	*2006-07*[b]	*2007-08*[b]
	$'000	*$'000*	*$'000*	*$'000*
Electricity reform	1 528	1 528	1 528	1 528
Total	**4 153**	4 355	4 355	3 756
	(6 262)[c]	(5 627)[d]	(5115)[d]	(4 688)[d]

[a] Budget estimate. [b] Forward estimate. [c] Estimated actual expenditure. [b] Revised forward estimate.

Source: Government of Western Australia 2004, Government of Western Australia 2005b.

5.37 The Western Australian regime explicitly recognises two main appeal bodies — the Western Australian Gas Disputes Arbitrator and the Supreme Court of Western Australia. The Economic Regulation Authority can also conciliate disputes.

5.38 The current Western Australian Gas Disputes Arbitrator is Mr Laurie James. He is a Supreme Court barrister and solicitor and is Chairman of the Western Australian law firm Kott Gunning. The arbitrator is subject to the same independence, financing and immunity provisions as apply to the Economic Regulation Authority. The Supreme Court of Western Australia is subject to independent jurisdiction under the *Supreme Court Act 1935*.

Summary

5.39 The broad framework of the Electricity Networks Access Code largely mirrors the National Third Party Access Code for Natural Gas Pipeline Systems (the National Gas Code), which the Council has previously found provides a balance between commercial negotiation and regulation under clauses 6(4)(a)–(c). The model of enforceable access arrangements approved by an independent regulator provides an appropriate platform for third parties to enter commercial negotiations, with binding dispute resolution available to settle disputes.

5.40 In particular, the Electricity Networks Access Code provides price guidance in the form of reference tariffs set with independent and transparent regulatory processes. There is an arms length separation of the regulator and appeal bodies from facility owners, current users, access seekers, governments and other stakeholders. The Economic Regulation Authority enjoys a separate legal mandate, with freedom from day-to-day ministerial control in exercising regulatory functions. The Economic Regulation Authority, the Western Australian Gas Disputes Arbitrator and the Supreme Court of Western Australia are sufficiently resourced and independent to properly carry out their tasks under the Western Australian regime. The regime provides a mechanism to deal with any potential conflicts of interest should they arise.

Conclusion

5.41 The Council considers the Western Australian regime satisfies clauses 6(4)(a)–(c).

Clause 6(4)(d): regular review

> A State or Territory access regime should incorporate the following principle:
>
> (d) Any right to negotiate access should include a date after which the right would lapse unless reviewed and subsequently extended; however, existing contractual rights and obligations should not be automatically revoked.

5.42 The intent of clause 6(4)(d) is to provide for a periodic review of the need to apply access regulation to a particular service. Markets change and evolve over time. To be efficient and effective, access regulation must be able to respond to the changing needs of the market. Any review process should not override commercially determined outcomes by automatically revoking any existing contractual rights.

The Western Australian regime

5.43 The Western Australian regime has similar coverage and revocation provisions to the National Gas Code, which is certified as effective. Under the Electricity Networks Access Code, coverage provides third parties with an enforceable right to negotiate access to the services of the covered network. Any person can apply to the Minister for Energy for coverage of a particular network to be revoked. The Minister for Energy is then required to undertake an open and transparent public process and make a decision about whether coverage should be revoked. The Minister's decision must be based strictly on the coverage provisions in the code. A decision to revoke coverage means that there would no longer be an enforceable right to negotiate access to the services of the network concerned under the Western Australian regime. However, it would not disturb any existing contractual (or other) rights or obligations.

5.44 In addition to the provisions for reviewing and possibly revoking coverage, the Electricity Networks Access Code requires periodic review of access arrangements. Under chapter 5 of the code, an access arrangement must include a date for review and may specify trigger events for a review, with the period between reviews to be five years unless a longer period is approved by the regulator. In approving a longer period between reviews the Economic Regulation Authority must determine whether it is consistent with the code objective and have regard to the likely advantages and disadvantages of giving approval.

Conclusion

5.45 The Council considers the Western Australian regime satisfies clause 6(4)(d).

Clause 6(4)(e): reasonable endeavours

> A State or Territory access regime should incorporate the following principle:
>
> (e) The owner of a facility that is used to provide a service should use all reasonable endeavours to accommodate the requirements of persons seeking access.

5.46 Clause 6(4)(e) requires that the service provider of a covered network use all reasonable endeavours to accommodate the requirements of access seekers. The Council considers that an access regime may either incorporate clause 6(4)(e) explicitly, or through general provisions that have the same effect. Access regimes considered to date have underpinned this principle have required the service provider to:

(a) provide written information on spare capacity and indicative access terms and conditions, including sufficient information for access seekers to understand the derivation of tariffs

(b) use all reasonable endeavours to accommodate a person's request for access to spare capacity

(c) respond to access requests and negotiate terms and conditions within a reasonable timeframe

(d) provide a written explanation as to why a particular request for access cannot be accommodated, including likely prospects for future access.

5.47 In addition, where the regulator-approved reference tariffs cannot be reassessed in arbitration the Council considers it is essential that information disclosure be sufficient to facilitate market assessments and fair and reasonable regulatory outcomes. At the same time information disclosure provisions should not unduly harm a service provider's competitive position as this could potentially stifle investment in electricity infrastructure.

The Western Australian regime

5.48 The Western Australian regime explicitly requires the service provider to use reasonable endeavours to provide access to covered services. Section 2.7 of the code states that a service provider for a covered network must use all reasonable endeavours to accommodate an applicant's:

(a) requirement to obtain covered services

(b) requirements in connection with the negotiation of an access contract.

5.49 Section 2.8 further states that a service provider must:

(a) comply with the access arrangement for its covered network and must expeditiously and diligently process access applications

(b) negotiate in good faith with an applicant regarding the terms of an access contract

(c) to the extent reasonably practicable in accordance with good electricity industry practice, permit an applicant to acquire a covered service containing only those elements of the covered service which the applicant wishes to acquire.

(d) to the extent reasonably practicable, specify a separate tariff for an element of a covered service if requested by an applicant, which the service provider must determine in accordance with sections 10.23 and 10.24 (these sections essentially require the new tariff to be set with regard to cost differences compared to the reference tariff using the pricing methods outlined in chapter 7 of the code)

(e) when forming a view as to whether all or part of any proposed new facilities investment meets the new facilities investment test, form that view as a reasonable and prudent person.

5.50 The principle of reasonable endeavour is supported by explicit provisions in the code. The Electricity Networks Access Code requires that the access arrangement information for a network include sufficient information to enable prospective users and the regulator to understand the derivation of the elements in the access

arrangement, including the reference tariffs. The relevant information includes access pricing principles, capital costs, system capacity and key performance indicators. The regulator must ensure that the access arrangement information meets the requirements of the code and may publish guidelines setting out the information to be included in an access arrangement and require service providers to implement the changes in information packages.

5.51 Under chapter 14 of the code the service provider of a covered network must establish and maintain an information package on the covered network and provide a copy of the package to a user or access seeker within 10 business day of receiving a request. Each year the service provider must also determine the spare capacity of the transmission system. This information must be made available in a register for inspection on reasonable terms or provided through a report for which the service provider may charge a reasonable fee. In addition, chapter 5 of the code requires an access arrangement to include an applications and queuing policy that is of sufficient detail to enable users and access seekers to understand the policy. The policy must require reasonable endeavours from all parties in accommodating access and negotiating the terms and conditions. Parts of the code also seek to balance information provision with the confidentiality requirements of the service provider.

5.52 In addition, section 115 of the Electricity Industry Act prohibits conduct that prevents or hinders access. This is intended to constrain any attempt by a network service provider to refuse to accept an application for access.

Summary

5.53 The Electricity Networks Access Code seeks a reasonable balance between the interests of service providers and access seekers and users. The information disclosure requirements in the code appear to be sufficient to facilitate market assessments and fair and reasonable regulatory outcomes, while protecting the interests of all affected parties. The code requires timely dealing without imposing strict deadlines where flexibility may be important. These features of the code are likely to encourage competitive outcomes while maintaining incentives for ongoing investment in electricity infrastructure.

Conclusion

5.54 The Council considers the Western Australian regime satisfies clause 6(4)(e).

Clauses 6(4)(f): negotiated access

Clause 6(4)(f): differing terms and conditions

A State or Territory access regime should incorporate the following principle:

(f) Access to a service for persons seeking access need not be on exactly the same terms and conditions.

5.55 Clause 6(4)(f) is intended to remove any doubt that access may be provided on different terms and conditions to different users. Wherever access agreements are negotiated commercially, access will most likely be provided on different terms and conditions. One reason is that there are different costs and risks associated with providing access to different users.

The Western Australian regime

5.56 The Western Australian regime requires network service providers to submit an access arrangement that must include terms and conditions on which a service provider will supply each reference service. This serves to provide expeditious access to basic services and provides a benchmark to aid negotiation where parties seek the flexibility to negotiate terms and conditions of access. Section 2.5 of the code provides freedom to contract, which is backed by the reasonable endeavours requirements discussed above.

Conclusion

5.57 The Council considers the Western Australian regime satisfies clause 6(4)(f).

Clause 6(4)(g): independent dispute resolution

A State or Territory access regime should incorporate the following principle:

(g) Where the owner and a person seeking access cannot agree on terms and conditions for access to the service, they should be required to appoint and fund an independent body to resolve the dispute, if they have not already done so.

5.58 Under clause 6(4)(g), an effective access regime must contain a mechanism to ensure that the parties to a dispute have recourse to an independent dispute resolution process. The arbitrator should be independent of all stakeholders, including service providers, current users, access seekers and governments. Clause 6(4)(g) also requires that the disputing parties fund the arbitration.

5.59 The process of dispute resolution includes all mechanisms available for resolving disputes, including appeals processes. The Council regards this set of mechanisms as a package, with different elements capable of satisfying independence issues. Alternative approaches to independent dispute resolution may include:

(a) separation of the regulator from the arbitrator (for example, by vesting each function in separate bodies)

(b) a mechanism enabling either party to a dispute to require the arbitrator to appoint an alternative body if a question of bias arises

(c) an independent appeals process to address questions of arbitrator bias or independence.

5.60 These alternatives do not preclude other approaches from satisfying clause 6(4)(g).

The Western Australian regime

5.61 Under the Western Australian regime, parties can seek to resolve disputes through the default dispute resolution process provided for in chapter 10 of the Electricity Networks Access Code or agree on an alternative process. The dispute resolution process contained in the code allows parties to refer a dispute to the regulator. The regulator may conciliate the dispute or may refer the dispute to the Western Australian Gas Disputes Arbitrator. In making a decision, the

arbitrator must apply the provisions of the access arrangement and take into account the matters set out in sections 2.2 and 10.15 (which replicates section 4.30) of the code, which require the arbitrator to have regard to the code objective and other matters such as the geographical location of the network (see paragraphs 5.31(a)–5.31(c) for details). If the dispute is solely about the tariff to be applied to a reference service, the arbitrator must apply the reference tariff. These matters are consistent with those listed in clause 6(4)(i) of the CPA.

5.62 The procedural rules for arbitration are set out in appendix 5 of the Electricity Networks Access Code. The code requires that arbitrations be informal and be expedited as quickly as possible (expedited processes are available for queuing disputes). The hearing should be conducted in private (unless the parties agree to a public hearing) with the arbitrator determining who may be present with regard to the wishes of the parties and the need for commercial confidentiality. In hearing a dispute the arbitrator must seek and consider submissions from the disputing parties. The arbitrator must issue a signed determination or interim determination in writing that includes reasons. The final decision must be issued within three months of requiring parties to make submissions. The access code does not expressly require or prevent the public release of the determinations.

5.63 The arbitrator has discretion on the allocation of costs. In its application the Western Australian Government stated that this approach provides an incentive for parties to negotiate in good faith and in accordance with the provisions of the access code.

5.64 The arbitrator's decisions are subject to appeal on a question of law under appendix 5 of the code. An appeal should be lodged with the Supreme Court of Western Australia within 28 days of the arbitrator's decision.

Summary

5.65 The Western Australian regime:

(a) uses an independent arbitration process for resolving disputes and separates the role of the regulator and the arbitrator

(b) provides for the costs of arbitration to be borne by the disputing parties with the allocation of costs at the discretion of the arbitrator

(c) makes the decision of the arbitrator open to appeal on a matter of law.

Conclusion

5.66 The Council considers the Western Australian regime satisfies clause 6(4)(g).

Clause 6(4)(h): binding decisions

A State or Territory access regime should incorporate the following principle:

(h) The decisions of the dispute resolution body should bind the parties; however, rights of appeal under existing legislative provisions should be preserved.

5.67 Under clause 6(4)(h) an effective access regime should have a credible dispute resolution mechanism. An arbitrator's decision should be binding. This should be supported by preserving existing legislative rights of appeal for review of the dispute resolution body's decision (for example, on account of breaches of rules of judicial fairness). Preserving such rights does not require a government to insert lengthy appeal provisions into an access regime.

The Western Australian regime

5.68 Under sections 10.34–36 of the Electricity Networks Access Code the arbitrator's decision is binding unless the access seeker elects not to enter into an access contract as specified by the award of the arbitrator. The access seeker has five business days after the granting of an award to notify the arbitrator of its decision. In addition, part 8 (s. 118) of the Electricity Industry Act provides for regulations for the enforcement of obligations created by the access regime. Regulations under the Act prescribe fines of up to $100 000 and an ongoing daily penalty of $20 000 (see also paragraph 5.34).

5.69 As discussed in paragraph 5.64 the arbitrator's decision is subject to appeal on matters of law only. The appeal must be lodged not later than 28 days after the arbitrator's decision is made. The Western

Australian Government argues that this strikes an appropriate balance between procedural fairness and achieving timely regulatory outcomes.

Conclusion

5.70 The Council considers the Western Australian regime satisfies clause 6(4)(h).

Clause 6(4)(i): principles for dispute resolution

> A State or Territory access regime should incorporate the following principle:
>
> (i) In deciding on the terms and conditions for access, the dispute resolution body should take into account:
>
> (i) the owner's legitimate business interests and investment in the facility
>
> (ii) the costs to the owner of providing access, including any costs of extending the facility but not costs associated with losses arising from increased competition in upstream or downstream markets
>
> (iii) the economic value to the owner of any additional investment that the person seeking access or the owner has agreed to undertake
>
> (iv) the interests of all persons holding contracts for use of the facility
>
> (v) firm and binding contractual obligations of the owner or other persons (or both) already using the facility
>
> (vi) the operational and technical requirements necessary for the safe and reliable operation of the facility
>
> (vii) the economically efficient operation of the facility
>
> (viii) the benefit to the public from having competitive markets.

5.71 An effective access regime requires a dispute resolution body to weigh up each matter set out in clause 6(4)(i) of the CPA. It may also require a dispute resolution body to take account of other matters where this is not inconsistent with clause 6 of the CPA.

The Western Australian regime

5.72 The Western Australian regime states that the arbitrator in making a decision must have regard to the code objective and a range of other factors (refer to paragraphs 5.31(a)–5.31(c) for details). Any award must not be inconsistent with the standard access contract for

the reference service set out in the service provider's access arrangement (section 10.21 of the code).

5.73 As noted by the Western Australian Government in its application the code objective states the requirements of criteria (i) and (iv) under clause 6(4)(i). The code also requires that any access arrangement take account of the costs to the owner of providing access and the economic value to the owner of any additional investment as well as the interests of other parties and the community more broadly as required by the other criteria under clause 6(4)(i). Thus the dispute resolution process embodies the clause 6(4)(i) principles of the CPA.

5.74 The Western Australian regime also requires that the arbitrator take account of the geographical location of the network and the extent to which it is interconnected with other networks. These factors impact on the costs and benefits arising from access and therefore consideration of these matters is not inconsistent with clause 6 of the CPA.

Conclusion

5.75 The Council considers the Western Australian regime satisfies clause 6(4)(i).

Clause 6(4)(j): facility extension

A State or Territory access regime should incorporate the following principle:

(j) The owner may be required to extend, or to permit extension of, the facility that is used to provide a service if necessary but this would be subject to:

(i) such extension being technically and economically feasible and consistent with the safe and reliable operation of the facility

(ii) the owner's legitimate business interests in the facility being protected

(iii) the terms of access for the third party taking into account the costs borne by the parties for the extension and the economic benefits to the parties resulting from the extension.

5.76 In some situations, the needs of an access seeker can only be met by expanding capacity or extending the geographical range of a facility (the access seeker could construct the necessary facility and seek interconnection to the owner's infrastructure, for example). These

matters should be subject in the first instance to negotiation between the parties. However, clause 6(4)(j) provides for the arbitrator to require the owner of the facility to 'extend or permit extension' of a facility to satisfy the needs of the access seeker.

The Western Australian regime

5.77 Chapter 2 of the Electricity Networks Access Code requires a service provider to undertake and fund an augmentation (an increase in the capability of the covered network to provide covered services, including by the development, construction, acquisition or commissioning of new network assets) to its network where it is required to provide a covered service sought in an access application and forecasts indicate that the augmentation meets the new facilities investment test.

5.78 The new facilities investment test is set out in section 6.52 of the code. It states that a new facilities investment may be added to the capital base if:

(a) the new facilities investment does not exceed the amount that would be invested by a service provider efficiently minimising costs, having regard, without limitation, to:

(i) whether the new facility exhibits economies of scale or scope and the increments in which capacity can be added

(ii) whether the lowest sustainable costs of providing the covered services forecast to be sold over a reasonable period may require the installation of a new facility with capacity sufficient to meet the forecast sales.

5.79 One or more of the following conditions is satisfied:

(a) the anticipated incremental revenue for the new facility is expected to at least recover the new facilities investment or if a modified test (as determined by the service provider or the regulator)[1] has been approved and the new facilities

[1] The regulator may approve a modified test if it is efficient (the advantages of the test outweigh the disadvantages) and it would promote achievement of the code objective.

investment is below the test application threshold—the modified test is satisfied

(b) the new facility provides a net benefit in the covered network over a reasonable period of time that justifies the approval of higher reference tariffs

(c) the new facility is necessary to maintain the safety or reliability of the covered network or its ability to provide contracted covered services.

5.80 Where the augmentation (or part of the augmentation) does not meet the test the service provider is not compelled to undertake the augmentation unless the applicant provides a capital contribution. This may be provision in kind or a financial contribution for the required augmentation as determined under the capital contributions policy of the access arrangement.

5.81 Chapter 10 of the code also permits the arbitrator to make awards in relation to the augmentation of a network where this is necessary to facilitate access. The arbitrator must be satisfied that the augmentation is technically and economically feasible and consistent with safe and reliable operation of the network. All awards in relation a major augmentation (exceeding $5 million (distribution system) or $15 million (other networks)) must also undergo a regulatory test involving a public consultation process to ensure the augmentation provides maximum net benefit. The regulatory test is assessed by the Economic Regulation Authority.

5.82 The Electricity Networks Access Code definition of 'covered services' includes a 'connection service', which means the right to connect facilities and equipment at a connection point. This means that an access seeker can invoke the arbitration process contained in chapter 10 of the code in the event of a dispute over terms and conditions for interconnection with a covered network.

Summary

5.83 The Western Australian regime requires a network owner to extend, or to permit extension (including via interconnection) of a covered network facility where this is necessary to facilitate access and is technically and economically feasible and consistent with the safe and reliable operation of the network. The Electricity Networks Access Code provides a means of ensuring appropriate infrastructure

investment goes ahead where the network owner is expected to at least recover the costs of its investment in the network expansion or where the access seeker agrees to make an appropriate capital contribution for a required augmentation to the network.

Conclusion

5.84 The Council considers the Western Australian regime satisfies clause 6(4)(j).

Clause 6(4)(k): dealing with a material change in circumstances

A State or Territory access regime should incorporate the following principle:

(k) If there has been a material change in circumstances, the parties should be able to apply for a revocation or modification of the access arrangement which was made at the conclusion of the dispute resolution process.

5.85 The Council considers this clause in conjunction with clause 6(4)(a), which places an emphasis on commercial negotiation. Through the commercial negotiation process parties could define the thresholds that suggest a material change in circumstances has occurred and this could act as a trigger to reopen negotiations. Alternatively, an access regime could make provision for parties to refer disputes concerning what constitutes a material change in circumstances to the dispute resolution body or some other body.

The Western Australian regime

5.86 The regime specifically allows a service provider to determine in advance what constitutes a material change in circumstances or a trigger event for inclusion in an access arrangement. When the conditions of a trigger event are met the service provider must notify the Economic Regulation Authority and submit proposed revisions to the access arrangement to the authority for approval (section 4.37 of the code).

5.87 Through the contract negotiation process parties can also seek terms and conditions relating to a material change in circumstances and/or negotiate contractual provisions regarding force majeure. (The model

standard access contract at appendix 3 of the Electricity Networks Access Code sets out variation and termination conditions as well as force majeure events.) Where parties cannot agree on terms in this regard, the contractual dispute may be referred to the arbitrator. Once parties have entered into a contract it is binding. The parties have resort to common law (such as the doctrine of frustration), however, in dealing with matters of this nature.

Summary

5.88 Parties may agree in advance on the circumstances under which an access contract/access arrangement may be reopened/revised. Parties also may have access to common law remedies in the event of a material change in circumstances. The Council considers that this framework adequately meets the requirements of clause 6(4)(k).

Conclusion

5.89 The Council considers the Western Australian regime satisfies clause 6(4)(k).

Clause 6(4)(l): compensation

A State or Territory access regime should incorporate the following principle:

(l) The dispute resolution body should only impede the existing right of a person to use a facility where the dispute resolution body has considered whether there is a case for compensation of that person and, if appropriate, determined such compensation.

5.90 Clause 6(4)(l) does not mean that an access regime need allow a dispute resolution body to impede existing rights. Where a dispute resolution body can do this, however, it must also be empowered to consider and, if appropriate, determine compensation.

The Western Australian regime

5.91 The Western Australian regime places restrictions on access awards. Under section 10.32 of Electricity Networks Access Code the arbitrator cannot make an award that would impede the right of a user under an access contract unless the user agrees or the

arbitrator is satisfied that the user is or will be appropriately compensated for the impeded right.

5.92 In addition, section 4.34 of the code states the regulator must not approve a proposed access arrangement that would have the effect of depriving a person of a contractual right that existed prior to the proposed access arrangement, but this does not apply to an 'exclusivity right' that arose on or after 30 March 1995.[2] Exclusivity rights are effectively contractual rights held by a third party that prevent or limit the ability of the owner/operator from offering spare capacity to other third parties. Such rights are fundamentally at odds with the purpose behind the introduction of the access provisions in part IIIA of the TPA. The Electricity Networks Access Code's treatment of exclusivity rights is therefore consistent with the requirements of clause 6(4)(l).

Conclusion

5.93 The Council considers the Western Australian regime satisfies clause 6(4)(l).

Clause 6(4)(m): anti-competitive conduct

A State or Territory access regime should incorporate the following principle:

(m) The owner or user of a service shall not engage in conduct for the purpose of hindering access to that service by another person.

5.94 The Council considers that an access regime may incorporate this clause explicitly or contain provisions that have the same effect.

The Western Australian regime

5.95 The Western Australian regime expressly prohibits hindering or preventing access. Section 115 of the Electricity Industry Act states

[2] An exclusivity right is defined in the Electricity Networks Access Code as a contractual right that by its terms either expressly prevents a service provider supplying covered services to persons who are not parties to the contract, or expressly places a limitation on the service provider's ability to supply covered services to persons who are not parties to the contract.

that the service provider must not engage in conduct aimed at hindering or preventing:

(a) access by any person to services in accordance with the Electricity Networks Access Code

(b) the making of access agreements or any particular agreement in respect of those facilities

(c) the access to which a person is entitled under an access agreement or a determination made by way of arbitration.

Further, a person who has access to services under an access agreement must not engage in conduct aimed at hindering or preventing access by another person to services of a covered network. The Act provides for regulations to prescribe fines of up to $100 000 and an ongoing daily penalty of $20 000 for breaches of conduct rules.

5.96 In its application the Western Australian Government also points to a number of provisions in the code that aim to prohibit conduct for the purpose of hindering. Section 13.8 of the code, for example, contains provisions to prevent a service provider using an associate contract or a deemed access contract to prevent or hinder access by any person to a covered service. The Model Applications and Queuing Policy has also been designed stop access seekers from capacity hoarding with the intention of hindering access to the covered network.

Conclusion

5.97 The Council considers the Western Australian regime satisfies clause 6(4)(m).

Clause 6(4)(n): separate accounting

A State or Territory access regime should incorporate the following principle:

(n) Separate accounting arrangements should be required for the elements of a business which are covered by the access regime.

5.98 This clause is designed to ensure that service providers make available financial information specific to the elements of a business

that are subject to the access regime, and for each service that is potentially subject to access.

The Western Australian regime

5.99 Chapter 13 of Electricity Networks Access Code sets out the ringfencing provisions for the Western Australian regime. Ringfencing currently applies to Western Power and could apply to any other integrated service providers that become subject to the code. The code applies separate accounting, provides for special treatment of commercially sensitive information and arms length business dealings in relation to ringfenced businesses.

5.100 Section 13.1(g) of the code states that the service provider's accounts and records relating to its covered network must be kept in a way that:

(a) provides a comprehensive view of the ringfenced business's legal and equitable rights and liabilities in relation to the covered network

(b) provides a true and fair view of

(i) the network business as distinct from any other business carried on by the service provider or any associate of the service provider

(ii) income derived from, and expenditure relating to, the covered network

(iii) the service provider's assets and liabilities so far as they relate to the covered network

(c) provides sufficient information to enable the price control and pricing methods, and the ringfencing objectives of the code and any applicable ringfencing rules, to be applied in a reasonable manner

(d) enables all revenue received by the service provider from the provision of goods or services to an associate of the ringfenced business to be separately identified

(e) enables all expenditure by the service provider on goods or services provided by an associate of the ringfenced business to be separately identified.

5.101 In addition, the regulator may draft and approve ringfencing rules for the purpose of ensuring that the ringfencing objectives are achieved. It must draft and approve such rules for a covered network if it determines that the ringfencing objectives are not being achieved for the covered network. The regulator can apply the rules to a specified network or class of network or to all covered networks in a specified geographical area or interconnected system. In developing rules for an integrated service provider the regulator may add ringfencing objectives or deal with any matter the regulator considers necessary or convenient to:

i. achieve the code objective or the ringfencing objectives

ii. maintain the confidence of those who generate, transport or consume electricity that the code objective or the ringfencing objectives are being achieved.

The regulator may also require the physical separation of all or part of the network business's offices, equipment or marketing staff from those of any other business (section 13.23 of the code).

5.102 The regulator must consult the public before approving, revoking or varying ringfencing rules. It must place approved, revoked or varied ringfencing rules on the public register.

5.103 Chapter 13 requires a service provider to comply with the ringfencing objectives of the code and comply with any ringfencing rules applied to its covered network(s). The provisions may require a service provider to procure an associate of the ringfenced business to comply with the ringfencing objectives, rules and compliance procedures. Competitive neutrality provisions apply under section 13.11(e)–(f) to prevent biased treatment of affiliated and non-affiliated businesses.

5.104 The service provider must establish, maintain and implement effective procedures to ensure and monitor its compliance with its ringfencing obligations. It must place its compliance procedures on the public register held by the regulator and assess and report on the effectiveness of its compliance with the ringfencing requirements in the code. The service provider must report to the regulator details of any breach of the ringfencing obligations as soon as it becomes aware of the breach. The regulator can then consider whether to make a determination in relation to the breach.

5.105 Except for Western Power a service provider may apply to the regulator for an exemption from the ringfencing obligations of the code. Any person may also apply for any exemptions granted to be revoked. In either case the regulator must consult publicly and publish details of any grant, revocation or variation of an exemption to the ringfencing obligations.

Summary

5.106 In its Electricity Networks Access Code Western Australia has developed comprehensive and rigorous ringfencing provisions that provide a flexible approach to suit most situations. The rules provide for separate accounting of ringfenced business, including any relevant associate businesses, and address potential competitive neutrality concerns.

Conclusion

5.107 The Council considers the Western Australian regime satisfies clause 6(4)(n).

Clause 6(4)(o): Access to financial information

A State or Territory access regime should incorporate the following principle:

(o) The dispute resolution body, or relevant authority where provided for under specific legislation, should have access to financial statements and other accounting information pertaining to a service.

5.108 An effective access regime would provide the dispute resolution body and other relevant bodies (for example, regulators and appeals bodies) with the right to inspect all financial documents pertaining to the service.

The Western Australian regime

5.109 The Electricity Networks Access Code confers on the arbitrator—the Western Australian Gas Disputes Arbitrator—the power to gather information about any matter relevant to the access dispute in any way the arbitrator thinks appropriate. Section 13.45 requires the service provider to comply with any request from the arbitrator or

Economic Regulation Authority to inspect or make copies of the service provider's accounts and records for the covered network.

5.110 Section 14.4 of the code requires the service provider to collect time-series data for variables that are used in the calculation of the target revenue and to make that information available to the authority on request. The Economic Regulation Authority can also exercise its power to obtain information and documents under section 51 of the Economic Regulation Authority Act 2003. Section 51 of the Act states that if the authority has reason to believe that a person has information or a document that may assist the authority in the performance of its functions, the authority may require the person to give the authority the information or a copy of a document.

5.111 Sections 14.12–15 set out the code provisions relating to the handling of confidential information. The provisions require that the recipient not disclose, advertise or publish any confidential material to any person (other than a worker of the recipient who is bound by an adequate confidentiality undertaking), unless the recipient is of the opinion:

(a) that the disclosure of the confidential material would not cause detriment to the disclosing person or another person

(b) that, although the disclosure of the confidential material may cause detriment to the disclosing person or another person, either:

(i) the public benefit in disclosing it outweighs the detriment

(ii) the recipient is: expressly required by the code to disclose it despite any claim of confidentiality; or is required by another written law or statutory instrument to disclose it.

5.112 Failure to comply with the requirements of the code and other laws and regulations relating to these matters can attract a fine of up to $10 000 or 12 months imprisonment.

Conclusion

5.113 The Council considers the Western Australian regime satisfies clause 6(4)(m).

Clause 6(4)(p): cross-jurisdictional regimes

Clause 6(2)

The regime to be established by Commonwealth legislation is not intended to cover a service provided by means of a facility where the State or Territory party in whose jurisdiction the facility is situated has in place an access regime which covers the facility and conforms to the principles set out in this clause unless:

(a) the Council determines that the regime is ineffective having regard to the influence of the facility beyond the jurisdictional boundary of the State or Territory

(b) substantial difficulties arise from the facility being situated in more than one jurisdiction.

Clause 6(4)(p)

A State or Territory access regime should incorporate the following principle:

(p) Where more than one State or Territory regime applies to a service, those regimes should be consistent and, by means of vested jurisdiction or other cooperative legislative scheme, provide for a single process for persons to seek access to the service, a single body to resolve disputes about any aspect of access and a single forum for enforcement of access arrangements.

5.114 Clauses 6(2) and 6(4)(p) relate to the services of facilities extending beyond the boundary of the state or territory seeking certification. To satisfy these clauses, the relevant access regimes should establish access regimes that remove any inter-jurisdictional obstacles and provide for a seamless process for obtaining access to a service.

The Western Australian regime

5.115 Western Australia's existing electricity network does not exceed the state's boundaries. The Western Australian Government advises that the network is unlikely to be connected to the national grid in the foreseeable future. Due to the isolated nature of the electricity and transmissions and distribution networks in Western Australia the government considers that interconnection across the state boundary would not be technically or economically feasible. Therefore it is unlikely that the Western Australian regime will have any influence on services provided outside the regime's coverage. Therefore the Western Australian regime does not need to address clause 6(4)(p). Similarly, because the facility has negligible influence, if any, beyond Western Australia's borders the Council considers there is no basis

for determining that the access regime is ineffective under clause 6(2).

Conclusion

5.116 The Council considers that the Western Australian regime satisfies clause 6(2) and that the regime does not need to satisfy clause 6(4)(p).

6 Duration of certification

6.1 Section 44M(5) of the TPA requires the Council to make a recommendation on the period that any certification should be in force. Western Australia seeks a recommendation from the Council that its access regime be certified as effective for a minimum of 15 years.

6.2 The certification period needs to be long enough to give business certainty and influence the pattern of competition in relevant upstream or downstream markets. Against these considerations must be balanced the potential for technological development, reform initiatives (such as changes in legislation governing access to network service) and future market evolution. It should also provide an opportunity for review to ensure the access regime has not become obsolete or inappropriate.

6.3 Previously, the Council has recommended that applications of the National Gas Code in Victoria, New South Wales, Western Australia, South Australia, the ACT and the Northern Territory be certified for a period of 15 years. It has also recommended that the Northern Territory electricity access regime be certified for a period of 15 years.

6.4 The Council notes that the Western Australian Government has implemented reforms to disaggregate Western Power. Such reforms are pro-competitive and would not appear to warrant a recommendation from the Council for a shorter certification period than recommended for other jurisdictions.

6.5 Regardless of the duration of certification, an access regime ceases to be effective where it no longer satisfies the clause 6 principles. This may occur if the regime is substantially modified, say, using the

powers under sections 108 and 110 of the Electricity Industry Act (see paragraphs 4.14–15). Such a situation could also arise if the clause 6 principles are modified. While cessation of effectiveness would not affect the operation of the regime, it would expose services covered by the regime to the possibility of declaration.

6.6 Where a State or Territory amends an access regime after it has been certified it is open to that jurisdiction to seek the views of the Council as to the continued effectiveness of the regime or to formally apply to the Council for recertification of the regime.

Conclusion

6.7 The Council considers the Western Australian regime (as applying at 12 October 2005) should be certified for 15 years.

References

Electricity Reform Implementation Unit 2005, Why do we need electricity reform, http://www.eriu.energy.wa.gov.au/index.html, Viewed: 2 August 2005.

Government of Western Australia 2004, *2004-05 Budget*, Budget Paper no. 2, Perth.

—— 2005a, Application to the National Competition Council for a recommendation on the effectiveness of the Western Australian third party access regime for electricity networks.

—— 2005b, 2005-06 Budget, Budget Paper no. 2, Perth.

Relevant Western Australian legislation

Electricity Act 1945

Electricity Corporation Act 1994

Electricity Transmission and Distribution Systems (Access) Act 1994
(formerly the *Electricity Corporations Act 2005)*

Electricity Industry Act 2004

Economic Regulation Authority Act 2003

Electricity Networks Access Code 2004

Electricity Distribution Regulations 1997

Electricity Industry (Access Code Enforcement) Regulation 2005

Electricity Transmission Regulations 1996

Council publications related to certification matters

The National Access Regime: A guide to part IIIA of the Trade Practices Act 1974

Part A Overview
Part B Declaration
Part C Certification

Electricity

Northern Territory electricity network regime

Gas

National Gas Code
New South Wales interim gas access regime for gas distribution networks
New South Wales access regime for gas pipeline services
Victorian gas access regime
Queensland gas access regime
Western Australian gas access regime
South Australian gas access regime
Tasmanian gas access regime
Australian Capital Territory gas access regime
Northern Territory gas access regime

Ports

Victorian access regime for commercial shipping channels
South Australian access regime for ports and maritime services

Rail

New South Wales rail access regime
Queensland access regime for rail services
Western Australian access regime for rail services
Northern Territory and South Australian rail access regime for rail services