

Our Reference: DMS 3171292
Enquiries: Karthi Mahalingham
Telephone: (08) 6212 1129

17 December 2008

Rob Pullella
Access Arrangement Review
Electricity Access
Economic Regulation Authority
PO Box 8469
Perth BC WA 6849

Dear Mr Pullella,

Western Power's Proposed Revisions to the Access Arrangement – Further Submission on Contribution Policy and Approved ENAC Amendments

Synergy appreciates this opportunity to make the following further submissions on the Contribution Policy submitted by Western Power under its proposed revised access arrangement (**PRAA**). Unless otherwise specified, words in italics in this submission have the same meaning as in the Electricity Networks Access Code (**ENAC**) and words in capital letters have the same meaning as in the Contributions Policy.

1 Overarching Considerations

In providing its comments Synergy believes it is important to first highlight the fundamental aims and objectives of the Electricity Networks Access Code 2004 (**ENAC**). The ENAC aims to:

1. provide *access to services* and to give effect to the *Competition Principles Agreement* (presumably so that the ENAC is capable of certification as an effective access regime under Part IIIA of the *Trade Practices Act 1974* (Cth)); and
2. establish a framework for third party *access* to electricity transmission and distribution networks with the objective of promoting the economically efficient investment in, and operation and use of, *networks* and *services* of *networks* in Western Australia in order to promote competition in markets upstream and downstream of the *networks*.

In addition, it is also important to note that section 2.2 of the ENAC relevantly requires the Minister and the Economic Regulatory Authority (**ERA**) to have regard to the *Code objectives* when performing a function under the ENAC, whether or not the provision refers expressly to the *Code objectives*.

2 Preliminary Issues

Synergy submits that the Contributions Policy is not strictly consistent with the requirements of the approved ENAC. The scope of the Contributions Policy appears to have been broadened such that it now permits Western Power to double recover in the short term and to have *users* fund *work* in relation to the *network* that is economically inefficient.

Synergy notes that the PRAA is based on the proposed amendments to the ENAC published in July 2008 and that this appears to have resulted in the PRAA not being consistent with the amendments to the ENAC approved by the Minister on 22 October 2008. Synergy submits that it is problematic for *users* to review the Contributions Policy until it has been adequately revised to meet the requirements of the ENAC. Therefore, Synergy strongly requests the ERA to extend the timeframe for the revision of Western Power's *access arrangement* to at least allow the *access arrangement* to be revised to reflect the requirements of the approved ENAC amendments.

3 Contributions Policy – ENAC requirements

Under sections 5.12(a) and (b) of the ENAC Western Power must, in its PRAA, include a *contributions policy* which meets the following objectives

"(a) it strikes a balance between the interests of:

(i) *contributing users*; and

(ii) *other users*; and

(iii) *consumers*; and

(b) it does not constitute an inappropriate barrier to entry."

In addition, section 5.13 of the ENAC also requires the *contributions policy* to facilitate the operation of the ENAC.

Synergy submits that for the reasons set out below the Contributions Policy is not consistent with the provisions of the ENAC outlined above.

A3.1 Headworks Scheme

Synergy submits that the Headworks Scheme in the Contributions Policy does not comply with:

- section 5.14(d) of the ENAC, because it does not contain a mechanism designed to ensure that there is no double recovery of *new facilities investment* or *non-capital costs*: or

- 5.17D(d)(iv) of the ENAC because it does not contain a mechanism designed to ensure that there is no double recovery of costs in all the circumstances, including the manner of calculation of other *contributions* and *tariffs*.

Synergy submits that once the Contributions Policy is amended to include these mechanisms, interested parties should be given sufficient time to review, understand and make submissions to the ERA on the design and effectiveness of the mechanism.

A3.2 Western Power Must Undertake Work If Applicant Enters Into Contract

Section 2.10 of the ENAC relevantly requires that, subject to section 2.11, Western Power must undertake and fund any *required work*. Section 2.11 relevantly permits Western Power to refuse to undertake and fund any *required work* under section 2.10 where the *contributions policy* requires *contributions* to be made and the *applicant* has not either made the *contribution* or reached agreement with Western Power on the terms on which the *applicant* will make the *contribution*.

Synergy submits that the Contribution Policy does not comply with these two sections of the ENAC.

Clause 4.1(a) of the Contributions Policy does not expressly require Western Power to fund and undertake that part of the *work* which is *required work* if the *applicant* enters into a contract with Western Power. In contrast, clause 4.1(b) does impose a positive obligation on Western Power to undertake and fund *headworks*, in compliance with section 2.12 of the ENAC.

Therefore, Synergy submits that Clause 4.1(a) of the Contributions Policy should be amended to require that Western Power must undertake the *work* if the applicant enters into a contract with Western Power, and must undertake and fund that part of the *work* which is *required work* (emphasis added).

A3.3 Applicant Should Only Pay For Work Necessary to Provide Covered Service

Section 2.8(c) of the ENAC requires Western Power "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".

Synergy submits that the Contributions Policy does not provide clear and sufficient guidelines on how the functionality of the Required Work in the Contributions Policy will be delineated so that *applicants* can choose and ensure they only pay for those elements of the *covered service* they wish to acquire.

Clause 2(c) of the Contributions Policy specifies that a Contribution is for "Works"¹, which is relevantly defined as being "all works required to be undertaken to provide an Applicant with the Covered Services sought by the Applicant ...". The word "required" arguably limits the Contribution to only necessary consequential work. However, the Contributions Policy does not provide any guidance on how Western Power or an Applicant is to determine what is "required".

Synergy submits that the Contributions Policy needs to provide sufficient guidance in this area in accordance with section 5.15(a) of the ENAC, so that *applicants* can determine the circumstances in which they are required to make a *contribution*.

It is important to point out, that in addition to determining the lowest sustainable cost in providing the requested *covered service*, the Contributions Policy must also strike a balance between *contributing users*, other *users* and *consumers*. Therefore, Synergy submits that the Contribution Policy must contain sufficient guidance so that *applicants* and the *service provider* can also:

1. determine what Work is required;
2. ensure *applicant* can choose and only pay for those elements of the *covered service* they wish to acquire; and
3. determine and strike the balance between the various interests as required by sections 5.12(a) and (b) of the ENAC.

In addition, in order to avoid confusion Synergy also submits that the Contribution Policy should adopt the ENAC terminology for "Work" and "Required Work".

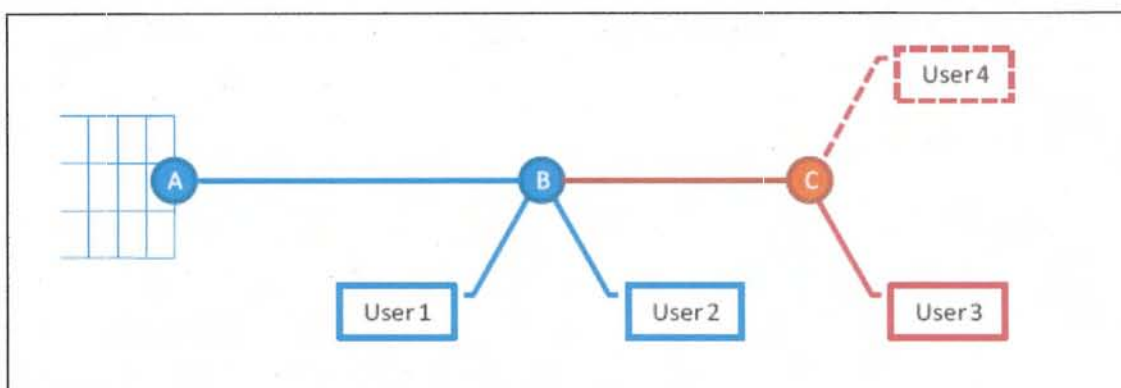
A3.4 Dealing With Network Extensions Equitably under the Contributions Policy

Section 5.15 of the ENAC requires that a Contribution Policy must set out :

- "(a) the circumstances in which a *contributing user* may be required to make a *contribution*; and
- (b) the method for calculating any *contribution* a *contributing user* may be required to make; and
- (c) for any *contribution*:
 - (i) the terms on which a *contributing user* must make the *contribution*; or
 - (ii) a description of how the terms on which a *contributing user* must make the *contribution* are to be determined."

¹ Synergy notes that the definitions of "Works" and "Required Work" in the Contribution Policy are not aligned with the definitions in the ENAC, which creates certain complexities and potential confusion.

Synergy submits that, given the requirements of section 5.15 and the competing interests that need to be balanced in accordance with section 5.12, the Contributions Policy must be very clear on how it deals with network extensions and expansions; in particular the Contributions Policy should include mechanisms that demonstrably have the objective of striking a balance between the interests of *contributing users*, other *users* and *consumers*, and not constituting a barrier to entry.



The diagram above outlines a hypothetical scenario where the Network has already been extended from point A to point B, at which point User 1 and User 2 have been *connected*. Subsequently, a new *applicant*, User 3, seeks to be *connected* at point C, which would require the *network* to be extended from B to C.

Synergy submits that, for the reasons set out below, this scenario highlights that the Contribution Policy does not effectively fulfil the requirements of sections 5.12 and 5.15 of the ENAC. In particular, it is not clear whether or not the Contributions Policy requires User 3 to pay only for the costs of extending the Network from B to C. There are three key reasons which Synergy will cover, namely:

1. Connection Assets;
2. rebate; and.
3. Contributions associated with multiple Applicants.

Connection Assets

The Contributions Policy requires the Applicant to pay the full Forecast Costs of any Works to provide Connection Assets. However, the Contributions Policy is ambiguous as to whether the reference to "full Forecast Costs" in clause 7.1 is subject to the lowest sustainable cost obligation in clause 3.

Synergy submits that this ambiguity should be resolved by making it clear that clause 7.1 is subject to the obligation in clause 3.

The definition of Connection Assets uses the ENAC definition, being, relevantly, "all of the network assets that are used only in order to provide *covered services* at the *connection point*".

In the hypothetical scenario described above, this arguably includes the entirety of the Network extension from point B to point C, plus the assets which might in normal usage be considered to be Connection Assets at point C.

One of the ambiguities in the ENAC is that if a new User, User 4, were to Connect at point C, this would appear to transform the Network between point B and point C from Connection Assets to Shared Assets.

Section 5.15 (b) of the ENAC requires the Contributions Policy to set out "...the method for calculating any *contribution* a *contributing user* may be required to make". The Contributions Policy certainly does not contain any explicit rules dealing with this scenario involving User 4. Synergy submits that this scenario is likely to be a common scenario. Therefore, this ambiguity must be addressed in the Contributions Policy so that it explains what happens in this situation.

Rebates

Clause 9.2 of the Contributions Policy provides for rebate arrangements in certain circumstances. Clause 9.3 of the Contributions Policy provides that a subsequent Applicant must pay the rebate to Western Power as "an upfront amount". Hence, whether User 3 pays a rebate in respect of the Network between points A and B, will depend upon whether Users 1 and 2 have negotiated a rebate agreement with Western Power.

However, the Contributions Policy does not provide for rebate arrangements to be publicised, so it is not clear how User 3 could determine in advance that a rebate would be payable, or that any rebate sought by Western Power had been calculated in accordance with the relevant agreements.

Therefore Synergy submits that the Contributions Policy needs to be amended to include an auditable mechanism for managing and publishing the rebate arrangements.

Contributions Associated With Multiple Applicants

Clause 5.4(a) provides for the apportionment of Forecast Costs (effectively *contributions*) between multiple Applicants. However Synergy submits that the operation of the clause is not transparent. Clause 5.4(c) provides that if Western Power "reasonably expects" (a non-transparent test) to receive Tariff income from future Applicants, then it will make an apportionment between the Applicants and the expected future Applicants.

The Contributions Policy does not provide any guidance as to how this apportionment might be undertaken. Synergy submits that the Contributions Policy must clearly set out how the apportionment will be undertaken in order to comply with sections 5.12 and 5.15 of the ENAC.

Synergy notes that if the Headworks Scheme or a "Supply Extension Scheme" under appendix 8 of the ENAC applies, the outcomes will be different from those described above. Synergy submits that, for analogous reasons to those set out above, it is important that the Contributions Policy also provides a clear basis for dealing with these circumstances.

A3.5 Transparency and Predictability

Synergy submits that the Contributions Policy does not, in accordance with section 5.15 of the ENAC, provide adequate clarity on the circumstances and method in which Contributions are to be determined and apportioned.

Firstly, confusion arises because the Contributions Policy uses language which differs from, and is inconsistent with, the ENAC. For example, the Contributions Policy defines "Work" in a significantly different way to the ENAC. Further, Forecast Cost appears to be utilised in the Contributions Policy when the ENAC would generally use *forecast new facilities investment*. In addition, clause 5 of the Contributions Policy uses the expression "new facilities investment test" to mean a modified form of the *new facilities investment test*, with the anticipated revenue test in section 6.52(b)(i) removed. It is not immediately clear why this modified test has been used, but if it has been used to give Western Power a greater degree of flexibility in determining Contributions (see for example the first dot point below) Synergy submits that it is inconsistent with section 5.15 of the ENAC.

Other key areas where the Contributions Policy lacks clarity and transparency are set out below.

- The Contribution payable by an Applicant is to be calculated by determining the amount of Forecast Costs which do not pass the Contributions Policy's version of the New Facilities Investment Test. From this is deducted the amount likely to be recovered in the form of New Revenue from providing Covered Services to the Applicant or its Retailer. The process of calculating the appropriate deduction is not transparent. It involves an assessment of an amount "likely" to be recovered over a "reasonable time". Both of these assessments are left to Western Power's discretion.
- The Contributions Policy does not include any mechanism for Western Power to provide the Applicant with assistance in determining the forecast nature of these costs, and what will and will not likely be included in Works. The Applications and Queuing Policy does require Western Power to provide an estimate of the Contribution, but not any details as to how it is calculated, which makes it extremely difficult for an applicant to assess and challenge.
- Clause 5.4 of the Contributions Policy provides for a non-transparent apportionment of Contributions between multiple Applicants.
- There is no reporting or accounting requirements on Western Power to establish that it has adopted the lower sustainable cost under clause 3 of the Contributions Policy.

- The Contribution can include a Headworks contribution, but clause 6 does not provide any detail on how Headworks Charges are to be calculated.

Synergy submits that these matters are not desirable or consistent with sections 5.12 to 5.15 of the ENAC and create a lack of transparency for the *contributing users*, other *users* and *consumers*. Consequently, Synergy submits the Contributions Policy must address these issues in transparency by obliging Western Power to provide reasonable details to the Applicant on how a proposed Contribution is derived.

A3.6 Contributions For Non-Capital Costs

Synergy notes that section 5.14(b) of the ENAC effectively requires a Contributions Policy to only permit *contributions* in respect of prudent *non-capital costs*, however there is an additional aspect to the definition of *efficiently minimising costs*, which captures *service standards*.

Clause 3 of the Contributions Policy applies to all contributions including in respect of non-capital amounts. Clause 7.2 is also relevant here. However, clauses 3 and 7.2 do not comply with clause 5.14(b) because they do not capture the full meaning of the ENAC defined term *efficiently minimising costs*.

Further, the interaction between the two clauses is not clear and could cause confusion. Synergy submits that the Contributions Policy should be amended to make the interaction clear in order to comply with section 5.15 of the ENAC.

Further, there is some additional confusion in the Contributions Policy because clause 2(c)(iii) provides that a Contribution may be charged in respect of those "non-capital costs ... which would not be incurred by a service provider efficiently minimising costs". Synergy submits that this is clearly incorrect and the clause needs to be amended to comply with section 5.14 of the ENAC.

A3.7 Demonstrating When NFIT Has Not Been Met

Section 5.14(a) of the ENAC requires that (subject to Appendix 8 contributions and a *headworks scheme*) "a Contributions Policy must not require a *user* to make a *contribution* in respect of any part of *new facilities investment* [**NFI**] which meets the *new facilities investment test*" (**NFIT**).

Subject to the comments in this submission about the way the Contributions Policy modifies what it calls the "New Facilities Investment Test", the Contributions Policy does require that the first step in calculating a Contribution payable by an Applicant is determining the amount of NFI which does not meet NFIT. However, there is no express requirement in the Contributions Policy for Western Power to demonstrate the various stages of its application of the Contributions Policy, including its calculations or determinations under clause 5.2. Thus, although clause 5.2 prescribes a process, it is not be easy for an Applicant, or anyone else, to assess Western Power's compliance with that process.

Synergy submits that the Contributions Policy should contain a provision for Applicants to be advised when Western Power determines that any proposed NFI has failed the *new facilities investment test* before Western Power proposes a modified test under the ENAC or charges the Applicant a Contribution. Synergy also submits that the Contributions Policy should also require Western Power to provide an affected Applicant with reasonable details for Western Power's decision so that the Applicant can be in a position to decide whether or not to challenge Western Power's decision.

A3.8 Mechanism To Prevent Double Recovery

Synergy notes that the PRAA is based on the proposed amendments to the ENAC published in July 2008 and that on the 22-Oct-2008 the Minister approved amendments to ENAC.

Synergy's preliminary review of these amendments has indicated that there have been changes between the proposed amendments to the ENAC that the Access Arrangement is based on and the amendments that were finally approved by the Minister on 22-Oct-2008. One example of this change is the policy on double recovery. The proposed amendment specified that an *access arrangement* needed to have the objective of no double recovery and in some circumstances permitted double recovery in the short or medium term.

The ENAC amendments approved by the Minister actually require an *access arrangement* to ensure there is the effect of no double recovery. There is therefore an absolute obligation for the PRAA to contain a mechanism designed to ensure that there is no double recovery of *new facilities investment* and *non-capital costs*. Synergy submits that this level of change between the proposed ENAC amendments and the amendments that were approved by the Minister on 22-Oct-2008 is fundamental and material. In addition, it also has a significant impact on the operation of the proposed Contributions Policy and the determination of *charges*.

Synergy submits that the Contributions Policy does not contain any mechanism which is expressly identified as having been designed to ensure there is no double recovery of *new facilities investment* or *non-capital costs*.

Section 5.14(a) of the ENAC requires that the Contributions Policy must not require a *user* to make a *contribution* in respect of any part of *new facilities investment* which meets the *new facilities investment test*. Clause 5.2(d) of the Contributions Policy uses what is described as the New Facilities Investment Test, which involves substituting the "anticipated incremental revenue" test in section 6.52(b)(i) of the ENAC with a different test.

Section 6.52(b)(i)A of the ENAC requires that to satisfy the *new facilities investment test*, the "anticipated incremental revenue" for the *new facility* must be expected to at least recover the *new facilities investment*, or that a modified test be passed.

"*Anticipated incremental revenue*" is defined in detail in section 1.3 of the ENAC. Relevantly, it refers to "increased income from *charges* ... reasonably anticipated to arise from the increased sale of *covered services* on the network to one or more *users*", being sales that would not have occurred had the *new facility* not been commissioned.

Clause 5.2 of the Contribution Policy's simplified "incremental revenue" test does not provide for revenue from any *user* other than the Applicant, and does not provide for a possible modified test. In addition, the accompanying apportionment mechanism in clause 5.4(c) does not expressly state that there should be no double recovery.

Clause 8.1 of the Contributions Policy only permits accounting back to actuals in respect of augmentations in excess of \$1,000,000. There is thus the possibility of over-recovery for all other Contributions, if the forecast turns out to have been too high. There is tension between this exclusion of accounting back to actual costs, and the blanket statement in clause 3 of the Contributions Policy that Contributions must not exceed the amount that would be required by a prudent service provider acting efficiently. The Contributions Policy should make it clear which provision prevails.

Synergy submits that the Contributions Policy does not provide any details on how Western Power is to go about the forecasting process. It may be that clause 3 is intended to provide a practical curb on forecasting, because it limits the final amount of Contributions. However, since there is no mechanism for accounting back to actuals in respect of any amount other than Contributions in excess of \$1,000,000, there is a gap in the Contributions Policy as to how this is to work in practice.

In addition, Synergy submits that it is not clear whether the combined effect of clauses 5.2(d) and 5.4(c) is guaranteed to either:

1. be the same as the *new facilities investment test*; or
2. satisfy the requirement of section 5.14(d) of the ENAC that the Contributions Policy contain a mechanism designed to ensure that there is no double recovery.

Synergy submits that the Contributions Policy should be amended to address these issues in order to comply with the ENAC.

A3.9 Alternative Options Inconsistent With The ENAC

Synergy submits that the definition of Alternative Options in the Contributions Policy is not consistent with the definition of *alternative options* in the ENAC. Synergy further submits that the effect may be to give Western Power the ability to charge *users* for all sorts of Network enhancements, rather than in relation to *major augmentations* only, and to thus potentially "gold plate" the Network. If so, this would be inconsistent with the ENAC objectives and should not be permitted.

Synergy submits that the definition of Alternative Options in the Contributions Policy should be the same as in the ENAC, which will assist in ensuring that ENAC objectives are fulfilled and that *users* only need to pay for *major augmentations* to the Network to provide only *covered services*.

3 Conclusion

Synergy submits these preliminary comments for the consideration of the ERA and would be pleased for the opportunity to meet and discuss these issues in detail.

Yours faithfully

KARTHI MAHALINGHAM
Networks Manager
Synergy