

## Recommendation Of The National Gas Pipelines Advisory Committee To Relevant Ministers – When an Access Arrangement may be accepted by a Regulator

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### 1. Recommendation – When an Access Arrangement may be accepted by a Regulator

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Each State and Territory has applied or proposes to apply the Gas Pipelines Access Law, comprising Schedule 1 (Third Party Access to Natural Gas Pipelines) and Schedule 2 (the National Third Party Access Code for Natural Gas Pipeline Systems) (the *Code*), as a law of that State or Territory. The Commonwealth has also applied the Gas Pipelines Access Law in certain Commonwealth territories and adjacent areas. The Code can be amended by agreement between Relevant Ministers of the Commonwealth, States and Territories following a recommendation from the National Gas Pipelines Advisory Committee (*NGPAC*).

NGPAC recommends to Relevant Ministers that the Code be amended as set out in Appendix A1.

This recommendation is made pursuant to section 9.1 of the Code and section 6(1) of Schedule 1 of the Gas Pipelines Access Law.

### 2. Reasons for Recommendation

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#### (a) Background

The Code requires the owner or operator of a pipeline ‘covered’ by the Code (a *Service Provider*) to establish an “access arrangement” with the relevant regulator for that pipeline. The access arrangement must set out the key terms and conditions on which the Service Provider will provide access to its pipeline.

The Code establishes the following process for the approval of an access arrangement by a regulator.

- The Service Provider submits its proposed access arrangement to the relevant regulator.
- The relevant regulator engages in public consultation and then issues a draft decision on whether or not it will approve the Service Provider’s access arrangement. If the regulator is minded not to approve the access arrangement, it must state the amendments or nature of the amendments which should be made to the access arrangement in order for it to be approved.
- The relevant regulator engages in further public consultation and then issues a final decision. That final decision may:
  - approve the Service Provider’s original Access Arrangement;
  - approve a revised Access Arrangement submitted by the Service Provider which the relevant regulator is satisfied

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incorporates the amendments which were required by the relevant regulator in its draft decision; or

- not approve the Access Arrangement and state the amendments or nature of the amendments which would have to be made to it in order for the regulator to approve it.
- If the Access Arrangement is not approved, the Service Provider must submit a revised Access Arrangement by a date specified by the regulator.
- If the Service Provider submits a revised Access Arrangement, the regulator must approve that revised Access Arrangement if the regulator is satisfied it incorporates the amendments required by the regulator in the final decision. If the Service Provider does not submit a revised Access Arrangement or submits a revised access arrangement that does not incorporate the amendments required by the regulator, the regulator must impose its own Access Arrangement on the Service Provider.

**(b) Proposed Amendment**

NGPAC has been advised that the regulator would not have any discretion to accept a revised Access Arrangement proposed by a Service Provider that does not exactly incorporate the amendments required by the regulator in its draft or final decision. For example, if the regulator in its final decision requires an amendment which contains an error or requires something which is unworkable and the Service Provider in response proposes a revised Access Arrangement which corrects the minor error or which deals with the regulator's concerns in a more practical way, the regulator has no discretion to accept that revised Access Arrangement. Even if the regulator agrees with the variations proposed by the Service Provider, the regulator's only available option would be to reject the Access Arrangement proposed by the Service Provider and instead impose its own Access Arrangement (which could be identical to that proposed by the Service Provider). This lack of flexibility seems undesirable.

As a consequence, NGPAC recommends amending the Code to enable regulators to accept a revised Access Arrangement which either substantially incorporates the amendments required by the regulator in its draft or final decision, or otherwise satisfactorily addresses the concerns the regulator identified in its draft or final decision.

### **3. Unanimous Recommendation**

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The members of NGPAC make this recommendation unanimously.

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## **4. Significance and Public Consultation**

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The members of NGPAC considered the amendment recommended to be “significant” for the purposes of the Code. The public consultation process required under the Code for significant amendments was therefore followed.

A copy of the Information Memorandum distributed to seek public comments on the proposal is attached. The Information Memorandum discusses the issues associated with the amendment in more detail (see in particular Chapter 3).

NGPAC received two submissions in favour of the amendment (from AGL and CMS) and one submission opposing the amendment (from Duke Energy). Duke believed the amendment was not necessary as there was already enough flexibility in the current regime. Duke also believed that the amendment would introduce discretionary powers for the regulators that would diminish the transparency and accountability of the regulatory process.

NGPAC considered the issues raised by Duke. NGPAC (and certain of the regulators) have received legal advice that there is no flexibility for regulators to approve a resubmitted access arrangement that does not exactly incorporate the amendments specified in the regulator’s final decision. Regulators will have a discretion to determine on a case by case basis whether amendments are sufficiently significant to merit further public consultation. In NGPAC’s view, the amendment will not jeopardise regulatory transparency or accountability.

As a consequence, NGPAC decided unanimously to make this recommendation.

**National Gas Pipelines Advisory Committee**

**Date: 10 May 2000**

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## Appendix A1

### Proposed Amendments

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1. After section 2.15 of the Code **insert:**

2.15A The Service Provider may, after the date of the draft decision, resubmit the Access Arrangement, revised so as to incorporate or substantially incorporate the amendments specified by the Relevant Regulator in its draft decision or otherwise address the matters the Relevant Regulator identified in its draft decision as being the reasons for requiring the amendments specified in its draft decision.

2. For section 2.16 of the Code **substitute:**

2.16 After considering any submissions received by the date specified by the Relevant Regulator under section 2.14, the Relevant Regulator must issue a final decision that:

- (a) if the Service Provider has not submitted a revised Access Arrangement under section 2.15A:
  - (i) approves the Access Arrangement originally proposed by the Service Provider; or
  - (ii) does not approve the Access Arrangement originally proposed by the Service Provider and states the amendments (or nature of the amendments) which would have to be made to the Access Arrangement in order for the Relevant Regulator to approve it and the date by which a revised Access Arrangement must be resubmitted by the Service Provider; or
- (b) if the Service Provider has submitted a revised Access Arrangement under section 2.15A:
  - (i) subject to section 2.16A, approves the revised Access Arrangement; or
  - (ii) does not approve the revised Access Arrangement and states the amendments (or nature of the amendments) which would have to be made to the revised Access Arrangement in order for the Relevant Regulator to approve it and the date by which a revised Access Arrangement must be resubmitted by the Service Provider.

3. After section 2.16 of the Code **insert:**

2.16A The Relevant Regulator may (in the Relevant Regulator's discretion) approve a revised Access Arrangement under section 2.16(b)(i) only if the Relevant Regulator is satisfied that the revised Access Arrangement:

- (a) incorporates or substantially incorporates the amendments specified by the Relevant Regulator in its draft decision; or

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- (b) otherwise addresses to the Relevant Regulator’s satisfaction the matters the Relevant Regulator identified in its draft decision as being the reasons for requiring the amendments specified in its draft decision.
4. In sections 2.18 and 2.21(c) of the Code for “section 2.16(b)” wherever appearing **substitute** “section 2.16(a)(ii) or (b)(ii)”.
5. For sections 2.19 and 2.20 of the Code **substitute**:
- 2.19 If the Service Provider submits a revised Access Arrangement by the date specified by the Relevant Regulator under section 2.16(a)(ii) or (b)(ii) then the Relevant Regulator must issue a further final decision that:
- (a) if the Relevant Regulator is satisfied that the revised Access Arrangement incorporates the amendments specified by the Relevant Regulator in its final decision under Section 2.16(a)(ii) or (b)(ii), approves the revised Access Arrangement; or
- (b) if the Relevant Regulator is satisfied that the revised Access Arrangement either substantially incorporates the amendments specified by the Relevant Regulator or otherwise addresses to the Relevant Regulator’s satisfaction the matters the Relevant Regulator identified in its final decision as being the reasons for requiring the amendments specified in its final decision under section 2.16(a)(ii) or (b)(ii), either approves or does not approve the revised Access Arrangement (in the Relevant Regulator’s discretion); or
- (c) in any other case, does not approve the revised Access Arrangement.
- 2.20 If the Service Provider does not submit a revised Access Arrangement by the date specified by the Relevant Regulator under section 2.16(a)(ii) or (b)(ii) or the Relevant Regulator does not approve the revised Access Arrangement under section 2.19, the Relevant Regulator must:
- (a) in the case of an Access Arrangement submitted under section 2.2, draft and approve its own Access Arrangement, instead of the Access Arrangement proposed by the Service Provider; or
- (b) in the case of an Access Arrangement submitted voluntarily under section 2.3, not approve the Access Arrangement.
6. After section 2.37 of the Code **insert**:
- 2.37A The Service Provider may, after the date of the draft decision, resubmit the revisions to the Access Arrangement, amended so as to incorporate or substantially incorporate the amendments specified by the Relevant Regulator in its draft decision or otherwise address the matters the Relevant Regulator identified in its draft decision as being the reasons for requiring the amendments specified in its draft decision.

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7. For section 2.38 of the Code **substitute**:

2.38 After considering any submissions received by the date specified by the Relevant Regulator under section 2.36, the Relevant Regulator must issue a final decision that:

- (a) if the Service Provider has not submitted amended revisions to the Access Arrangement under section 2.37A:
  - (i) approves the revisions to the Access Arrangement originally proposed by the Service Provider; or
  - (ii) does not approve the revisions to the Access Arrangement originally proposed by the Service Provider and, if the revisions have been proposed by the Service Provider as required by the Access Arrangement, states the amendments (or nature of the amendments) which would have to be made to the revisions in order for the Relevant Regulator to approve them and the date by which the amended revisions must be resubmitted by the Service Provider; or
- (b) if the Service Provider has submitted amended revisions to the Access Arrangement under section 2.37A:
  - (i) subject to section 2.38A, approves the amended revisions to the Access Arrangement; or
  - (ii) does not approve the amended revisions to the Access Arrangement and, if the revisions have been proposed by the Service Provider as required by the Access Arrangement, states the amendments (or nature of the amendments) which would have to be made to the revisions in order for the Relevant Regulator to approve them and the date by which the amended revisions must be resubmitted by the Service Provider.

8. After section 2.38 of the Code **insert**:

2.38A The Relevant Regulator may (in the Relevant Regulator's discretion) approve amended revisions to an Access Arrangement under section 2.38(b)(i) only if the Relevant Regulator is satisfied that the amended revisions:

- (a) incorporate or substantially incorporate the amendments specified by the Relevant Regulator in its draft decision; or
- (b) otherwise address to the Relevant Regulator's satisfaction the matters the Relevant Regulator identified in its draft decision as being the reasons for requiring the amendments specified in its draft decision.

9. In sections 2.40 and 2.43 of the Code for "section 2.38(b)" wherever appearing **substitute** "section 2.38(a)(ii) or (b)(ii)".

10. For sections 2.41 and 2.42 of the Code **substitute**:

2.41 If the Service Provider submits amended revisions to the Access Arrangement by the date specified by the Relevant Regulator under

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section 2.38(a)(ii) or (b)(ii) then the Relevant Regulator must issue a further final decision that:

- (a) if the Relevant Regulator is satisfied that the amended revisions to the Access Arrangement incorporate the amendments specified by the Relevant Regulator in its final decision under section 2.38(a)(ii) or (b)(ii), approves the amended revisions to the Access Arrangement; or
- (b) if the Relevant Regulator is satisfied that the amended revisions to the Access Arrangement either substantially incorporate the amendments specified by the Relevant Regulator or otherwise address to the Relevant Regulator's satisfaction the matters the Relevant Regulator identified in its final decision as being the reasons for requiring the amendments specified in its final decision under section 2.38(a)(ii) or (b)(ii), either approves or does not approve the amended revisions to the Access Arrangement (in the Relevant Regulator's discretion); or
- (c) in any other case, does not approve the amended revisions to the Access Arrangement.

2.42 If the Service Provider does not submit amended revisions to the Access Arrangement by the date specified by the Relevant Regulator under section 2.38(a)(ii) or (b)(ii) or the Relevant Regulator does not approve the amended revisions to the Access Arrangement under section 2.41, the Relevant Regulator must draft and approve its own amended revisions to the Access Arrangement, instead of the revisions proposed by the Service Provider.