

# **SUBMISSION TO THE NATIONAL GAS PIPELINES ADVISORY COMMITTEE**

## **PROPOSED AMENDMENTS TO THE NATIONAL THIRD PARTY ACCESS CODE FOR NATURAL GAS PIPELINE SYSTEMS**

27 April 2001

### **Background**

- 1 This document responds to the request for submissions contained in the information memorandum published by the National Gas Pipelines Advisory Committee (“NGPAC”) on 6 April 2001 (“**Information Memorandum**”).
- 2 The following comments address the issues specifically identified on page 16 of the Information Memorandum and, where relevant, include general comments. It is hoped our comments may be of some assistance to the NGPAC as it further considers its proposal.
- 3 For the avoidance of doubt, we make this submission in our own right, not in our capacity as an adviser to any particular person.
- 4 Our comments are based upon our experience in advising Regulators and interested parties in relation to the application of the National Third Party Access Code for Natural Gas Pipelines (“**Code**”) to gas distribution and transmission pipelines covered under the Code.

### **Executive summary**

- 5 Broadly, we support the proposition of an amendment to the Code which would confer on Regulators powers to review proposed variations to Reference Tariffs.
- 6 Any power conferred on Regulators should not supplant the powers and processes provided for in sections 2.28 and following of the Code. They should be limited to a review to ensure consistency with a pre-determined pass-through mechanism, not to ensure consistency with any general policy approach a particular Regulator may have.
- 7 We consider Option A is preferable to Option B. However, we suggest the information gathering powers conferred under section 8.3C be revised to reflect the provisions (particularly the requirements for exercise) of sub-section 41(1) of Schedule 1 to the Gas Pipelines Access Act in operation in each State and Territory, under the Gas Pipelines Access Law.

## General comments

- 8 We concur in general with the NGPAC’s interpretation of sections 8.3 and 10.8 of the Code as set out at pages 5 – 6 of the Information Memorandum. While there may be some scope under section 8.3 to design Reference Tariff Policies that allow for approaches other than “pure” price path or cost of service approaches, there may not be substantial support for using approaches that vary significantly from those set out in section 8.3.
- 9 We note reference has been made to section 2.49 of the Code, which it is said prevents the use of a Reference Tariff Policy that would result in changes to a Reference Tariff during an Access Arrangement Period without meeting the requirements of sections 2.28 and following of the Code.
- 10 In our view, it is beyond doubt that some variation in Reference Tariffs is possible under section 8.3. This is apparent in the express terms of section 8.3. Accordingly, the effect (and presumably the intention) of section 2.49 is not to completely prevent any variation in Reference Tariffs, for the following reasons.
- 11 Section 2.49 refers to “changes to the Access Arrangement”. In our view, a variation in a Reference Tariff which occurs in accordance with its corresponding Reference Tariff Policy is not a change to the Access Arrangement for the purposes of section 2.49. This is particularly so if the Reference Tariff is a formula which, when applied to a User’s characteristics and requirements, determines the Charge that a User would be required to pay. In circumstances where some variation in the Reference Tariff is contemplated (such as under a cost of service approach), a variation in the Reference Tariff may result in a different dollar amount being payable, but it is not likely that this would constitute a change to the Access Arrangement itself.
- 12 Notwithstanding this, we consider an amendment to the Code which specifically addresses these issues would be preferable to reliance upon technicalities of interpretation.
- 13 It follows from these comments that we consider the proposed amendment to section 2.49 under Option A is unnecessary. A variation to the Reference Tariff which follows from application of an Approved Reference Tariff Variation Method would not constitute a “change in the Access Arrangement”.

## Comments regarding NGPAC’s issues

*Is the proposal to expressly allow for tariffs to be adjusted in accordance with a price control formula or a pass through or other variation mechanism appropriate?*

- 14 For the reasons set out in paragraphs 7 – 9 above, we consider expressly providing for the adjustment of Reference Tariffs in accordance with mechanisms specified in the Code is preferable to relying upon an interpretation of what may be permissible. Interpretations may be open to change (albeit limited, if any) over time, depending upon the particular circumstances of each case. There may also be some potential for inconsistency between approaches taken when approving different proposed Access Arrangements.
- 15 As NGPAC has noted, the costs involved in conducting a full review of an Access Arrangement under sections 2.28 and following may be disproportionately high

where a relatively minor change to a Reference Tariff is proposed. The costs involved in reviewing any revision to an Access Arrangement and any public submissions are typically substantial, which may give rise to inefficiencies in the conduct of the activities of Regulators and/or interested parties (including Service Providers).

- 16 Accordingly, we consider expressly allowing for tariffs to be adjusted in accordance with a price control formula or a pass through or other variation mechanism is, in principle, appropriate.

*Is the conferring of express powers on Regulators during an Access Arrangement Period to verify that variations to Reference Tariffs have been made in accordance with an approved Reference Tariff variation method appropriate?*

- 17 We consider there is at least some force in the argument that Regulators should not have extensive powers to become involved during an Access Arrangement Period and to allow Service Providers to conduct their respective businesses without unjustified regulatory interference, based on the principle of “light-handed” regulation. Such an approach is likely to produce the most efficient outcome possible in a regulated market environment.
- 18 Accordingly, any Reference Tariff variation method should be designed such that the appropriateness or otherwise of any variation proposed in accordance with the relevant method is not an issue. The role of Regulators would be to confirm that any proposed variation is to be made in accordance with the relevant Reference Tariff variation method, but not to consider whether the variation is “appropriate” generally (in terms of the relevant Regulator’s policy approach, for example).
- 19 This may be achieved by designing the Reference Tariff variation method at the time of approval of the Access Arrangement (or any revisions to it) such that only clearly defined variations may be made. An example may be changes in tax rates within certain ranges, where the only change to the Reference Tariff is an increase or decrease in the Reference Tariff by an amount which corresponds to the tax rate increase or decrease, as the case may be.
- 20 Such a variation method may foreclose the use of methods which require a more involved assessment by the Regulator of any proposed variation. However, if a more involved assessment is required, then it may be that a full review under sections 2.28 and following of the Code is warranted.
- 21 The powers proposed under Option A generally accord with the above comments. However, it is not expressly stated (in section 8.3C or otherwise) that the Regulator’s role is only “to determine whether the variations proposed are consistent with the Approved Reference Tariff Variation Method contained in the Reference Tariff policy” (as stated in paragraph 8.3C(c) in Option A). We suggest consideration be given to including a statement to this effect, either in the amendment to section 8.3 or by including such a statement in the overview to chapter 8 of the Code. While the latter would have less legal effect than the former, it would have effect to the extent that it would remove any doubt.

*Do Regulators require additional information-gathering or other powers to carry out the administrative role described in [this] Information Memorandum? If so, is the amendment to clause 8.3C(c) proposed as part of Option B appropriate?*

- 22 Extensive information-gathering powers are given to Regulators under section 41 of Schedule 1 to the Gas Pipelines Access Act in force in each State and Territory, pursuant to the agreement of the Council of Australian Governments on 7 November 1997.
- 23 Under sub-section 41(1), if the relevant Regulator has reason to believe that a person (which may be any person) has information or a document that may assist the Regulator in the performance of any of the Regulator's prescribed duties under the Gas Pipelines Access Law, then the Regulator may require that person to give the Regulator the information or a copy of the document. These powers would extend to any amendment to section 8.3, since in carrying out duties imposed by the amendment, Regulators would be performing their prescribed duties under the Gas Pipelines Access Law.
- 24 Under Option A, the information-gathering powers proposed in paragraph 8.3C(c) are not specific. It is not clear which party is to decide whether any or how much information is necessary to enable the relevant Regulator to make the requisite determination. It is foreseeable that Service Providers may consider less information is required than may Regulators due to Service Providers being inherently more familiar with the relevant issues, having proposed the variation. This may unnecessarily create disputes in this regard between the relevant Regulator and Service Provider in any assessment of a proposal.
- 25 The information-gathering powers proposed in paragraph 8.3C(c) under Option B accord with sub-section 41(1), in so far as the information that may be required by the relevant Regulator must be specified by that Regulator. However, under paragraph 8.3C(c), the Regulator has the power to specify information as being necessary to enable consideration of the proposed variation. This conflicts with sub-section 41(1), under which the Regulator must have reason to believe the information would assist in the performance of the Regulator's duties before the information may be required.
- 26 In our view, paragraph 8.3C(c) should be re-drafted to mirror in effect the terms of sub-section 41(1). We do not consider any additional information-gathering powers would be required if this were done.

*Where a Regulator rejects a Service Provider's proposed variation, should the Regulator be required to impose its own variation or should the Regulator be given a discretion to do so? Are the amendments to clauses 8.3E and 8.3G proposed as part of Option B appropriate?*

- 27 There are likely to be advantages and disadvantages from the perspective of the Regulator and the Service Provider respectively in obliging or entitling the Regulator to impose its own variation in the qualifying circumstances.
- 28 As a preliminary observation, obliging the Regulator to impose its own variation consistently with the relevant Reference Tariff variation method may avoid any potential for tariffs that are no longer appropriate continuing in effect for an extended period. There is likely to be some benefit in avoiding a situation where tariffs

continue in this way, particularly if their design at the time of approval were predicated on variations occurring before the next full review. As this situation may presently arise under the Code, it will only be an issue in the context of the proposed amendments where there was any such predication in the design of Reference Tariffs.

- 29 In relation to the imposition of variations, it is foreseeable that a Service Provider may object in principle to any ability of the Regulator to impose its own variation, on the basis that this would remove any legitimate discretion the Service Provider has to operate its business as it sees fit (within the framework of an Access Arrangement). On the other hand, the Regulator may consider this would give the Service Provider an opportunity to withhold cost changes (such as tax rate changes, for example) from Users, by not making any variation in accordance with the relevant Reference Tariff variation method.
- 30 In our view, obliging the Regulator to impose its own variation in accordance with the relevant Reference Tariff variation method where the Service Provider fails to do so may be generally appropriate. It would ensure Service Providers keep to the terms of their Reference Tariff Policy at all times, not just when it is in their interests to do so. It would also ensure Regulators give detailed reasons for any rejection, since in the process of formulating a variation which the Regulator considers is consistent with the relevant Reference Tariff variation method, the Regulator would be obliged to develop, support and convey to interested parties its own interpretation of that method.
- 31 Providing the Regulator with a discretion to impose its own variation may potentially forego these benefits. Accordingly, we consider sections 8.3E and 8.3G as proposed under Option A are preferable to the versions proposed under Option B.

*Does a default notice period for the commencement of variations need to be specified in the Code? Is the amendment to section 8.3D as proposed as part of Option B appropriate?*

- 32 As a general observation, the Code currently provides for default approvals or commencements where the Regulator does not notify its decision within certain time periods (for example, section 7.4 of the Code regarding Associate Contracts). We consider there is merit in including default provisions such as these, since they expedite processes which should not ordinarily be drawn out, lengthy exercises. This is consistent with the principle of “light-handed” regulation, limiting the involvement of the Regulator in the business of Service Providers.
- 33 There may be some instances where the prescribed period is insufficient to give a matter due consideration. However, any such instances are not likely to occur frequently if the prescribed period is set at an appropriate limit or a limited ability to extend the prescribed period is provided for (this is discussed further below).
- 34 Under Options A and B, paragraph 8.3D(b) may render paragraph 8.3D(a) redundant in cases where the Service Provider sets a shorter default period in its notice provided under section 8.3B than the period the Regulator considers necessary to make the requisite determination. The redundancy may arise as follows. When approving the Reference Tariff Policy, the Regulator may consider it would be in accordance with the balancing of interests required under section 2.24 of the Code to set a default period which would be likely to encompass all foreseeable variations

under the Reference Tariff variation method proposed by the Service Provider. Thus, paragraph 8.3D(a) would only have effect where, for whatever reason, the Service Provider considers a longer period is necessary.

- 35 In some cases, the Regulator may consider the longer period proposed by the Service Provider to not be necessary. However, under section 8.3D as drafted under either Option A or Option B, the Regulator would not be able to allow a proposed variation and require that it be implemented earlier than the date specified in the notice issued under section 8.3B.
- 36 In our view, it would not be appropriate to give the Regulator any power to bring forward the implementation date. A consequence of this may be that variations are not implemented as quickly as the Regulator may consider necessary. However, the alternative may be that the Regulator requires the earlier implementation of a variation in circumstances where it is not fully informed of or is not in the best position to judge the Service Provider's ability to in fact make the implementation within the shorter period. This may potentially result in an infringement of a Service Provider's entitlement (subject to certain limits) to conduct its business as it sees fit, which may not be appropriate in the context of the Code or generally.
- 37 It follows from these comments that we do not consider paragraph 8.3D(c) as proposed under Option B to be necessary.
- 38 With regard to time extension, under section 8.3H, the Regulator may extend the periods provided for in sections 8.3B to 8.3G. For the avoidance of doubt, we consider the date of implementation of an approved variation under section 8.3D is likely to be a matter which would fall within paragraph 8.3H(a), since it is the Service Provider who will implement and therefore amend the Access Arrangement to reflect the revised Reference Tariff. Given our comments above regarding the nature of variations to the Reference Tariff outside the review process under sections 2.28 and following of the Code, we do not consider section 8.3D should be amended to redress this outcome.

### **Errata**

- 39 On page 11 of the Information Memorandum in the proposed amendment to section 2.49 of the Code it appears the word "Variation" should be inserted into the phrase "Approved Reference Tariff Method" used in the third line.

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**CORRS CHAMBERS WESTGARTH**