Review of the National Access Regime
Productivity Commission
PO Box 80
BELCONEN ACT 2616 17 May 2001
(via email)

Dear Sirs

Part IIIA Position Paper

I had not originally proposed to make a further submission since I generally supported the recommendations made in the Position Paper, especially Tier 1. However a couple of recommendations do call for comment in light of other recent developments (in particular, the decision of the Australian Competition Tribunal on 4 May 2001 on the application by Duke to review the decision of the Minister in favour of coverage of the Eastern Gas Pipeline (the "*Duke*" decision)) and accordingly I will confine myself to those.

1. Proposal 5.2 calls for explicit recognition that Part IIIA covers eligible services provided by both vertically integrated and non-integrated facilities. While I had advocated that Part IIIA be confined, as proposed by Hilmer, to vertically integrate facilities, I accept that the Commission has come to a different view. However I can see no need for explicit recognition of the application of Part IIIA to non-vertically integrated facilities given that the two Tribunal decisions to date (*Sydney Airport*[1] and *Duke*) both dealt with situations where the service provider was not vertically integrated, and did so without any apparent controversy.

2. Proposal 6.1. The second limb of this proposal deals with criterion (b) and proposes that the language be changed from "another facility" to "a second facility". Again, both Tribunal decisions reached a conclusion that, notwithstanding the use of the word "develop", account should be taken of existing facilities. It is difficult to see that the minor wording change advances matters, particularly given the commentary at page 142 of the Paper which emphasises the need for the new wording not to be interpreted narrowly to

1 (2000) ATPR 41-754.

mean a second facility based on the same technology. As the Tribunal (as well as the NCC) has already come to a view about the existing wording, any change will likely lead to an inquiry as to what was intended and this may introduce new uncertainties.

3. Proposal 6.2 is apparently designed to address the difficulty by making express reference to existing facilities. However the principal areas of controversy to date have related to the meaning of the word "service" in criterion (b) and this does not appear to be addressed by the proposal in 6.2. The Commission will recall that the Tribunal in the Sydney Airports decision referred to difficulties experienced by some witnesses, and indeed parties, in comprehending the level of service described in criterion (b). Likewise, it was an issue of the definition of service which gave rise to the Robe River litigation[2]. In the recent *Duke* decision the Tribunal decided[3], contrary to the submissions advanced by Duke, that, for the purposes of criterion (b), "*no market analysis is necessary or appropriate in the description of the services provided by the pipeline"*. As a consequence the Tribunal held that the fact that there was another pipeline in the same market as the Eastern Gas Pipeline was irrelevant to the consideration of whether there was another facility providing the same service as the EGP. Although there are wording differences between the criteria and the way they operate under the Gas Pipeline Access Law and under Part IIIA, the principle seems to be the same. Accordingly, if a new approach is to be adopted in relation to defining this criterion, considerable care needs to be devoted to the drafting. This is reinforced by the proposal (with which I agree) that Part IIIA should operate as a model for other access regimes.

4. Proposal 9.5. It is proposed that appeals against decisions to declare services under Part IIIA should be abolished as part of the Tier 2 approach. This proposal appears to be based on a desire to align Part III with Part XIC, the regime for telecommunications. This overlooks the fact that there are special reasons why the telecommunications regime is drafted in the way it is and the

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2 *Hamersley Iron Pty Ltd v. NCC & Ors* (1999) ATPR 41-705.

3 At para 69.

absence of the appeal right is germane to those reasons which do not have application generally. It is inappropriate that the drafting of Part IIIA should be driven by a specific industry regime when the opposite approach has already commended itself to the Commission. The Commission should, I suggest, abandon this proposal on the basis that it conflicts with the broad principles adopted by the Position Paper in relation to interference with property rights and the preservation of rights of appeal.

Yours sincerely

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