10 May 2004

Mr Tony Hinton
Presiding Commissioner
Gas Access Regime Inquiry
Productivity Commission
LB2 Collins Street East
MELBOURNE VIC 8003

Via Email: gas@pc.gov.au

Dear Mr Hinton

The attached legal advice commissioned by the Australian Pipeline Industry Association (APIA) responds to the submission by the National Competition Council (NCC) dated 20 April 2004 on the relationship between the National Gas Access Regime and the Declaration Provisions of Part IIIA of the Trade Practices Act 1974.

In light of the submission made by the NCC and APIA's attached legal advice, APIA believes that it is imperative that the Commission's final report provide clear guidance and recommendations on the means of addressing the matters set out in the NCC's letter.

APIA understands that one of the key objectives of energy market reform is to increase, rather than reduce, the level of certainty for service providers subject to the provisions of the Gas Access Code, whether "covered" or otherwise. APIA believes that the intended effect and operation of the Part IIIA Access Regime was to exclude assets which operate under an effective access regime such as the Gas Access Regime. Accordingly APIA believes that the Commission should make a clear finding that the Gas Access Regime, established to provide certainty and nationally consistent outcomes, should exclude the possibility of any application of the Part IIIA provisions.

The legal advice also notes that it would be possible by legislation to require that any amended Gas Access Regime be treated as "an effective access regime". The advice indicates that this approach would be justified under the circumstances and APIA agrees with this approach.

APIA would be pleased to discuss this further with the Commission if desired.

Yours sincerely

Allen Beasley
Chief Executive Officer
Australian Pipeline Industry Association Ltd.

middletons
lawyers

Melbourne | Sydney

7 May 2004

Our reference
7370-EAPL04-0305-L- Productivity Commission

Mr Allen Beasley
Chief Executive Officer
Australian Pipeline Industry Association
PO Box 5416
Kingston ACT 2604

Dear Sir

Productivity Commission inquiry into the National Gas Access Regime – Submission of the National Competition Council

You have asked us to comment on a submission made by the National Competition Council (**NCC**) to the Productivity Commission in a letter dated 20 April 2004.

NCC submission

The stated aim of the NCC's letter is to "clarify the position of the potential operation of the declaration provisions of Part IIIA of the *Trade Practices Act 1974* (TPA) to pipelines not covered by the National Gas Access Regime". The National Gas Access Regime ("the Regime") comprises the National Third Party Access Code for Natural Gas Pipeline Systems ("the Code") and related legislation.

The letter advances two main propositions:

- Firstly, that pipelines "covered by the National Gas Access Regime are protected from declaration (section 44G(4) of the TPA) so long as they remain covered". (As the letter explains, the National Gas Access Regime has been certified as "an effective access regime" under section 44N of the TPA in its application in New South Wales, Victoria, Western Australia, South Australia, the ACT and the Northern Territory. The NCC's comment is intended to apply only to pipelines within these jurisdictions (hereafter "the relevant jurisdictions").)

- Secondly, that if the coverage criteria in the Code were to be amended so that "the hurdle" for coverage was higher than the hurdle for declaration, "it would be possible that some pipelines may not meet the criteria for coverage, but would meet the criteria for declaration".

Discussion

(a) Protection from declaration so long as a pipeline is covered.

In our view the first proposition is incorrect or, at least, potentially misleading.

While the letter is not entirely clear on the point, it appears to imply that if a pipeline is not actually "covered" under the Regime, even though it is susceptible to coverage if the relevant coverage criteria of the Regime are satisfied, it is not "protected from declaration" under Part IIIA of the TPA. In our view this is incorrect.

Pipelines within the relevant jurisdictions are subject to the Regime. They may be "covered" or not "covered". "Covered" pipelines are the subjects of prescribed access arrangements whereas uncovered pipelines are not. As the NCC's letter points out, pipelines may be "covered" because they were included in Schedule A of the Code since its commencement or may have become covered subsequently through the coverage process, the competitive tender process or the submission of a voluntary access arrangement. It may be added that pipelines may be "uncovered" because an application for coverage has not been made or, if made, has been unsuccessful (for example, the Eastern Gas Pipeline), or because an application for revocation of coverage has been successful (for example, portion of the Moomba to Sydney Pipeline System). In the latter cases the criteria for coverage under the Regime were found not to have been satisfied. The Regime contemplates the possibility that a pipeline may move in and out of coverage as circumstances change. An uncovered pipeline subject to the Regime is liable to coverage at any time if the Regime's coverage criteria are satisfied.

Sub-sections 44G(2)(e) and 44H(4)(e) of the TPA stipulate respectively that the NCC cannot recommend that a service be declared under Part IIIA, and the Minister cannot declare a service, unless, in each case, they are satisfied that, among other things, "*access to the service is not already the subject of an effective access regime*". According to the ordinary meaning of these words, if access to a service may be ordered under an access regime, it is the "subject" of that regime, whether or not an order is actually in operation at any given time. In the context of the Regime, access to a pipeline is only mandated if the pipeline is "covered" within the terms of the Regime. However, if access to the pipeline falls within the scope of the Regime so that coverage may be imposed if the relevant criteria are satisfied, the pipeline is a "subject" of the Regime, whether or not the pipeline is actually covered at any particular time.

If the sub-sections were intended to bear the meaning apparently suggested by the NCC, it would have been very easy for the draftsman to use the words "the subject of an access arrangement under an effective access regime". The words chosen in the sub-sections indicate a different meaning.

The interpretation we have suggested is supported by the scheme of the Competition Principles Agreement and the *Competition Policy Reform Act*. The scheme is clearly designed to avoid unnecessary duplication of access regulation. If access to a pipeline can be ordered under an "effective" access regime applying appropriate criteria, there is no need for Part IIIA of the TPA to apply.

If the NCC's apparent interpretation were correct, it would be possible right now for the NCC (in response to an application under section 44F) to recommend declaration under Part IIIA of a

service provided by a pipeline if the pipeline is not currently a "covered" pipeline under the National Gas Access Regime. This would be so notwithstanding the fact that the pipeline is susceptible to coverage under the Regime if coverage criteria are met. The Minister could then make a declaration under Part IIIA on the NCC's recommendation. Subsequently, the pipeline service provider or some other person could apply for coverage under the Regime. Because (as the NCC points out in its letter) the current criteria for coverage under the Regime and for declaration under Part IIIA are in the same terms, the criteria for coverage would be satisfied. There would then be two access regimes applicable to the pipeline. It is most unlikely the legislation was intended to operate this way.

While we think our interpretation of the TPA provisions is correct, if there is real dispute about it we suggest an amendment to the TPA to clarify the position would be warranted so as to avoid uncertainty and the possibility of unnecessary duplication of access regulation. Recommendation 10.4 of the Productivity Commission's Report on the Review of the National Access Regime, accepted by the Government in its Response, supports this suggestion.

(b) Differences between the criteria in Part IIIA and those in the National Gas Access Regime

The NCC's second proposition implies that, if the "hurdles" (criteria) for coverage under the National Gas Access Regime are changed so they are higher than those for declaration under Part IIIA, a pipeline that is not actually "covered" under the Regime (though susceptible to coverage if the Regime's criteria are met) may be subject to a declaration under Part IIIA. This is correct so far as it goes but warrants some clarification.

In the circumstances the NCC describes, the NCC could not recommend declaration under Part IIIA of a service provided by a pipeline unless (as noted earlier) it was satisfied that "*access to the service is not already the subject of an effective access regime*".

As the Minister has already decided that the National Gas Access Regime in the relevant jurisdictions is "an effective access regime", sub-section 44G(4) requires the NCC to "follow that decision" unless it "*believes that, since the Commonwealth Minister's decision was published, there have been substantial modifications of the access regime or of the relevant principles set out in the Competition Principles Agreement*". Under general principles, the NCC would have to form such a belief on reasonable grounds.

If the Regime is amended, it is possible the NCC may form the belief that "there have been substantial modifications" since the Minister's decision was published. In that event the NCC would not be obliged to follow the Minister's decision and would have to decide for itself whether it should be satisfied that the Regime is "an effective access regime". It might reach the conclusion that it should not be satisfied.

Similarly, when considering the NCC's recommendation and deciding whether to declare a pipeline service, the Minister must follow the earlier decision to certify the Regime unless he or she believes that "there have been substantial modifications" since the Minister's decision was published. If the Minister forms that belief, he or she would then have to consider whether the amended Regime is "an effective access regime".

If the relevant jurisdictions apply for certification of an amended Regime as "an effective access regime" and the Commonwealth Minister makes a decision to that effect, the NCC and the Minister would then be obliged to treat the amended Regime as "an effective access regime".

It would also be possible for the Commonwealth to require by legislation that an amended Regime be treated as "an effective access regime". As the amendments resulting from the current Productivity Commission inquiry will have been the subject of extensive examination and debate, legislation requiring the amended Regime to be treated as "an effective access regime" would seem to be justifiable in order to provide certainty and avoid the possibility of unnecessary duplication of access regulation.

Conclusions

- Insofar as the NCC's letter suggests that pipelines subject to the current National Gas Access Regime are protected from declaration under Part IIIA of the TPA only if they are actually "covered" under the Regime (as opposed to susceptible to coverage if the relevant criteria are satisfied), we think it is incorrect. If there is likely to be any serious dispute on the point, a legislative amendment to clarify the position would be justified.

- As regards the possibility that the criteria for coverage under an amended National Gas Access Regime may present a higher standard than the standard for declaration under Part IIIA of the TPA, this could result in access to pipelines being regulated both under Part IIIA of the TPA and under the National Gas Access Regime. As the "hurdle" under Part IIIA would be lower, Part IIIA is likely to be 'de facto' the applicable regime. This result would be avoided if the Commonwealth Minister declared the amended Regime to be "an effective access regime". It could also be avoided by Commonwealth legislation to this effect. Such legislation would seem justifiable in this case.

Please let us know if you wish us to clarify or expand on any aspects.

Yours faithfully

Geoff Tapereil