19th March 2004

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

Dear Mr Hinton

This letter provides comments in response to the Productivity Commission's Draft Report from its review of the Gas Access Regime.

The comments herein are of a technical nature. Because the Code Registrar performs a range of functions on behalf of all States, Territories and the Commonwealth, it is not proposed to present views on policy issues, on which the jurisdictions could hold different views. The comments presented here are not necessarily those of any jurisdiction. They are presented only to identify problems with some findings and recommendations, and to suggest possible solutions for consideration.

It is noted that Draft Recommendation 11.1 is to the effect that the Code should be amended (sections 2.22 and 2.44 of the Code) so that Regulators would be able to extend the period for approval of an Access Arrangement by two months only once. The aim of this is clearly to shorten the delays generally experienced in the approval of Access Arrangements. However, it is likely that an 8-month time limit (6 months plus one permitted extension of 2 months) would not be sufficient to enable a well-considered approval to be given in all situations, without a shortening of the process presently provided for in the Code.

The proposal to shorten the approval process presented in Draft Recommendation 11.3 (discussed at pp.345-346 of the Draft Report) to remove the "further final decision" would not be practicable.

This is because the present process outlined in the Code constitutes a coherent whole, of which the further final decision is an integral part. The present "standard" process is that after the Regulator has issued a final decision, the Service Provider revises the Access Arrangement to incorporate

changes required by the Final Decision. The Regulator then checks the revised Access Arrangement to ensure that it incorporates the amendments specified by the Regulator in the Final Decision. The further final decision is the document that the Regulator issues to signify that the revised access arrangement is in accordance with the Regulator's final decision.

Clearly, the whole approval process would be incomplete if the further final decision were simply removed.

It should be noted in general that if the Service Provider is to draft the Access Arrangement in response to the final decision, then that Access Arrangement will need to be checked by the Regulator to ensure that it is in conformity with the final decision. It is difficult to see how this checking can be avoided if the Service Provider is to draft the Access Arrangement.

It is noteworthy that prior to the Second Amending Agreement (which came into operation on 9 November 2000) the Regulator was required, after the Service Provider had submitted an Access Arrangement, which the Regulator considered incorporated the amendments specified by the Regulator in its final decision, to issue a final decision that approved the revised Access Arrangement.

This led to inflexibility, in that no departures from the final decision were possible, even if the Regulator did not object to them or considered that they addressed concerns expressed by the Regulator in its final decision in an alternative manner acceptable to the Regulator. The Second Amending Agreement addressed this inflexibility, and created the term "further final decision" in lieu of the term "final decision." (there were in fact two "final decisions" in the original Code).

An alternative option to shorten the process by eliminating one of the steps in the current process, would be as follows:

1. The initial public consultation on the Access Arrangement proposed by the Service Provider would be removed. (The procedures in sections 2.10-2.13 and 2.31, 2.32, 2.34 2.35 of the Code would need to be changed). After the Service Provider submits an Access Arrangement to the Regulator, the Regulator would prepare a draft decision on it. The Service Provider's Access Arrangement would be presented as an attachment to the Draft Decision. One major public consultation would then be held the Regulator's draft decision. Parties would be able to comment on the Service Provider's proposed Access Arrangement as part of this process.

   Following this, the remaining process would then follow the current practice, whereby the Regulator would prepare a Final Decision, and the Service Provider would prepare and submit to the Regulator a revised Access Arrangement, which would incorporate changes identified by the Regulator in the Final Decision. After this, the Regulator would issue a further final decision, which approves the

revised Access Arrangement or, if it does not approve the revised Access Arrangement, draft and approve its own Access Arrangement.

One possible argument in favour of this Option is that in practice no Regulator to date has, to the best of my knowledge, simply proposed to accept an Access Arrangement as submitted by a Service Provider. It is arguable whether the value of this round of consultations is such as to warrant its retention.

An argument against this Option is that the Regulator would not have the benefit of the public consultations before preparing its Draft Decision.

It is arguable, however, that with the experience that Regulators have gained since the commencement of the Regime, the public consultations on the Service Provider's Access Arrangement alone is now less crucial than when the Regime was in its infancy. A Regulator could, under this Option, still receive and consider submissions to the effect that the Service Provider's proposed Access Arrangement is to be preferred in whole, or in part, to the proposals in the draft Decision.

An alternative option, which would shorten the process by eliminating a different step in the process, is as follows:

2. The present process, including the separate consultation on the Access Arrangement submitted by the Service Provider is retained, but following consultations on the draft decision, the Regulator would issue a final decision and draft and approve its own Access Arrangement.

This would effectively do away with the further final decision.

This option would entail a departure from the principle that the Service Provider should normally formulate and present its own Access Arrangement, even when the changes to the Access Arrangement are required in response to decisions made by the Regulator.

An argument in favour of this option is that it would be expected to shorten the approval process.

An argument against this option is that it would increase the workload of the Regulator. It could also lead to a long period of "suspense" on the part of the Service Provider, if the Regulator were not to be required to further consult with the Service Provider on the Access Arrangement. The absence of "feedback" from the Service Provider during the formulation of the Access Arrangement could result in the insertion of inflexible or unworkable provisions into it.

However, the Code could be amended to provide for consultation between the Service Provider and Regulator during the formulation of the Access Arrangement.

A third, theoretical option would be to combine options 1 and 2. This would eliminate two steps from the current process.

The steps in the options are outlined (in simplified form) in the attachment.

Other Matters

Page 301 Table 9.1 of Draft Report

In the table it is stated that in SA the net present value sharing of unforecast gains between the business and the user is 50/50.

In fact the Envestra Access Arrangement (at section 3.3.7 of the Envestra Access Arrangement) provided for the retention of 100% of unforecast efficiency gains by the Service Provider (business).

Page 349 of Draft Report

It is stated, referring to section 38 of Schedule 1 of the GPAL, that:

> "An application for review must be made within 14 days of the primary decision."

Section 38(2) of the GPAL provides that:

> 38(2) The time for making an application under this section for a review of a decision expires 14 days after the decision is placed on the public register kept by the Code Registrar under the Code.

Draft Recommendations 8.2 and 8.3

These relate to the proposed monitoring regime. It is suggested that further detail would be useful.

It is unclear *what* is to be monitored. Most of the proposals in 8.2 involve the issuing and adoption of policies and procedures. Only the third dot point expressly involves the provision of information. To leave this wholly to the NCC to recommend in each case, as is proposed in Recommendation 8.3 would create uncertainty and potential inconsistency from case to case.

An alternative approach would be to specify in the Code at least a core of certain minimal information to be provided to the Regulator. The NCC could then have the option of adding further disclosures of particular relevance to each particular pipeline.

Presumably the "third party access policy formulated by the Service Provider" (first dot point of 8.2) would need to be approved by a Regulator or the NCC. It would be important for the Code to define at least approximately the contents and limitations of such a policy. If this were not done, considerable

uncertainty would result, particularly if Regulators had wide discretion to specify the contents of such a policy.

Draft Recommendations 8.2, 8.3 and 8.4
Would the information be on the Public Register kept by the Code Registrar?

Draft Recommendation 11.4
The recommendation is not quite clear, as it does not identify the sections of the Code, which are to be amended. Section 2.15A of the Code does not incorporate a power to specify a date by which the Service Provider may submit a revised Access Arrangement.

Regulators already have power under other provisions of the Code to specify the dates by which Service Providers and others must take various steps in the access Arrangement approval process, such as:

> in section 2.12 (date for submissions on proposed Access Arrangement);
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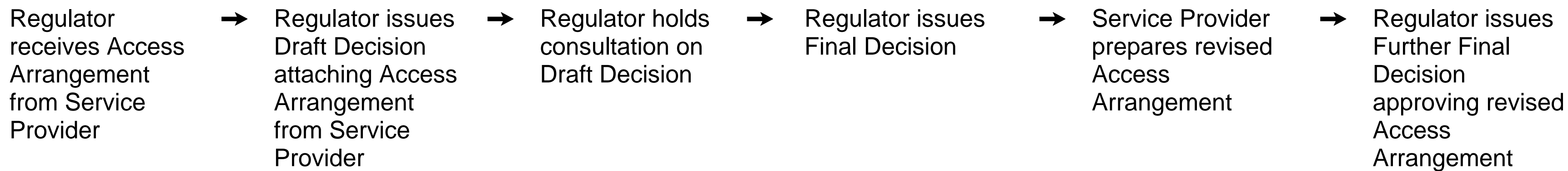
> section 2.14 (date for submissions on draft decision);
>
> section 2.16(a)(ii) (date by which a revised Access Arrangement must be resubmitted).

Yours faithfully

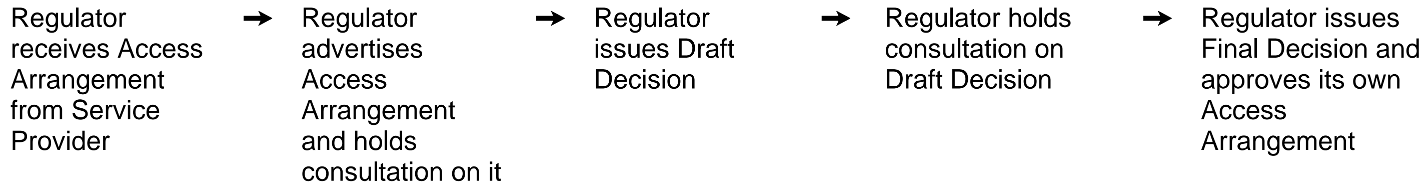
George Scherer
Delegate for Code Registrar

Present Standard Procedure

Alternative 1



Alternative 2



Alternative 3