Final decision

APT Pipelines NT Pty Ltd
Ring fencing waiver application

August 2011

Contents

Shortened forms

ACCC	Australian Competition and Consumer Commission
AER	Australian Energy Regulator
AGP	Amadeus Gas Pipeline
APTNT	APT Pipelines NT Pty Ltd
NGL	National Gas Law
NGR	National Gas Rules
NT Gas	NT Gas Pty Ltd
NT Gas Distribution	NT Gas Distribution Pty Ltd
the Code	the National Third Party Access Code for Natural Gas Pipeline Systems

Overview

On 27 May 2011, APT Pipelines NT Pty Ltd (APTNT) submitted an application to the Australian Energy Regulator (AER) under s. 146(1)(b) of the National Gas Law (NGL), seeking exemption from its ring fencing obligations under s. 140 of the NGL. The application was made in anticipation of APTNT, a fully owned subsidiary of the APA Group, acquiring full ownership of the Amadeus Gas Pipeline (AGP) and shares in NT Gas Distribution Pty Ltd (NT Gas Distribution) on 17 June 2011.

Prior to 17 June 2011, NT Gas Pty Ltd (NT Gas), a company 96 percent owned by the APA Group, was the service provider for the AGP. In 2002, NT Gas was granted an exemption (the 2002 exemption) by the Australian Competition and Consumer Commission (ACCC) which allowed NT Gas to provide marketing services to NT Gas Distribution, an associate company of NT Gas, which carried on a related business of selling gas.

Given that APTNT is not covered by the 2002 exemption and wishes to keep current staffing arrangements in place following its acquisition of the AGP, APTNT has formally sought a new waiver from its obligations under s. 140 of the NGL.

Section 140 of the NGL prohibits a covered pipeline service provider from sharing marketing staff with an associate that takes part in a related business. The AER may exempt a service provider from the requirement if it is satisfied that the cost of compliance with the relevant requirement outweighs the associated public benefit resulting from compliance.[1]

The AER released a draft decision exempting APTNT from its ring fencing obligations under s. 140 of the NGL on 1 July 2011. In the draft decision, the AER considered that, based on the current market environment for gas in the Northern Territory, including the low levels of demand and little prospect of a new entrant creating an effective retail market in Darwin, there would be little public benefit in requiring APTNT and NT Gas Distribution to separate their marketing staff. This position is consistent with the decision made by the ACCC in the 2002 exemption.

The AER invited interested parties to make written submissions on its draft decision by 25 July 2011. No written submissions were received by the AER in relation to this matter. The AER is satisfied that circumstances have not changed since the AER made its draft decision. Therefore, consistent with the draft decision, the AER's *final decision*, in accordance with s. 146(2)(b) of the NGL, is that the AER exempts APTNT from the ring fencing obligations set out in s. 140 of the NGL.

The AER retains the power to repeal or vary the exemption at any time if the AER is no longer satisfied that the grounds for the exemption are met. Additionally, given that NT Gas no longer requires the exemption provided by the 2002 waiver, the AER revokes the previous exemption granted to NT Gas by the ACCC on 13 March 2002.

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1 r. 31(4) of the NGR

1 Introduction

1.1 Background

Prior to 17 June 2011, NT Gas was the service provider for the AGP, which is also known as the Amadeus Basin to Darwin Gas Pipeline. On 16 June 2011, the APA Group announced that it would acquire the AGP.[2] The AGP is a transmission pipeline that transports gas from the Palm Valley and Mereenie gas fields in the Amadeus Basin and from the Blacktip gas field in the Bonaparte Basin to Darwin.

The 2002 exemption

On 10 December 2001 NT Gas submitted an application to the ACCC to have its obligations under ss. 4.1(h) and (i) of the National Third Party Access Code for Natural Gas Pipeline Systems (the Code) waived. These provisions prohibit a service provider from sharing marketing staff with an associate involved in a related business that buys or sells gas. The waiver would allow NT Gas staff to provide services, including marketing, to NT Gas Distribution, an associate of NT Gas that carries on a related business of selling natural gas.

On 13 March 2002 the ACCC issued a final decision (the 2002 exemption) stating that it would issue a notice under s. 4.15 of the Code waiving the requirement for NT Gas to meet the ring fencing requirements set out in ss. 4.1(h) and (i). The Commission was satisfied that the costs of complying with the ring fencing obligations outweighed the associated public benefit. Most importantly, as the AGP capacity was fully contracted until 2011 and there was little prospect of significant demand growth in the short to medium term, there appeared to be limited scope for downstream competition in the Darwin area. Consequently, the Commission found that the public benefit from the two companies ceasing to share marketing staff was not likely to be significant in the circumstances.

In its decision, the Commission also stated that significant changes in prevailing conditions such as the expiry of the AGP foundation contract in 2011 or the introduction of gas to the region from the Timor Sea would warrant a review of the waiver.

1.2 Application for waiver

On 27 May 2011, APTNT lodged an in-confidence application under s. 146 of the NGL seeking exemption from its ring fencing obligations under s. 140 of the NGL. The application was made in anticipation of APTNT, a fully owned subsidiary of the APA Group, acquiring full ownership of the AGP on 17 June 2011.

On 17 June 2011 APTNT acquired:

1. The Amadeus Gas Pipeline
2. The shares in NT Gas Distribution from NT Gas Pty Ltd. NT Gas Distribution owns the Darwin gas distribution network and carries on a

2 http://www.apa.com.au/investor-centre/news/asxmedia-releases/2011/amadeus-gas-pipeline-acquisition.aspx; APTNT, *Application to exempt APTNT from ring fencing obligations under section 140 of the NGL*, May 2011, p. 3-4

related retail business of buying and selling gas for the purposes of supplying customers on the Darwin distribution network and potentially customers taking supply from the AGP

3. Land tenure rights, buildings, and other assets from NT Gas

Following the acquisition, APTNT became the owner and operator of the AGP and the owner of NT Gas Distribution. Given that APTNT is not covered by the 2002 exemption and wishes to keep current staffing arrangements in place, APTNT has formally sought a new waiver under s. 146 of the NGL.

1.3 AER's draft decision

In the draft decision, the AER considered that the cost of complying with the ring fencing obligations under s. 140 of the NGL currently outweighs any associated public benefit and therefore the APTNT's obligations with respect to sharing of marketing staff should be waived. Additionally, given that NT Gas is no longer the service provider for the AGP and therefore no longer requires the exemption provided by the ACCC's 2002 decision, the AER considered that a repeal of the 2002 exemption is warranted and appropriate.[3]

The AER considered that there were minimal practical implications of APTNT's acquisition of the AGP and the shares in NT Gas. This is because APTNT is an associate company of the APA Group and that APTNT intends to keep existing staff arrangements in place. Control of the AGP has not changed and continues to remain with APA.[4]

In its application, NT Gas Distribution estimated the costs it would incur to meet the ring fencing obligations based on the prospect of hiring an additional resource or a contractor to provide marketing services. While the AER considered that the cost of compliance proposed by APTNT was not reasonable, it considered that the cost of complying with the ring fencing obligations may have a significant impact on the revenue of NT Gas Distribution.[5] The AER also expressed the view that, based on the current market environment in the Northern Territory, there would be little public benefit in requiring APTNT and NT Gas Distribution to separate their marketing staff.[6] These considerations were consistent with the decision made by the ACCC in the 2002 exemption.

3 AER, *Draft decision: APT Pipelines NT Pty Ltd Ring fencing waiver application*, July 2011, p. 13.
4 ibid., p. 12.
5 ibid., p. 11.
6 ibid., p. 12.

2 Legislative and rule requirements

2.1 Relevant legislative and rule requirements

2.1.1 Granting an exemption

Section 146(1)(b) of the NGL enables a covered service pipeline provider to apply to the AER for an exemption from the ring fencing requirements in s 140. Section 140 of the NGL states that:

> *(1) On and after the compliance date, a covered pipeline service provider must ensure that none of its marketing staff are officers, employees, consultants, independent contractors or agents of an associate of the covered pipeline service provider that takes part in a related business.*
>
> *(2) On and after the compliance date, a covered pipeline service provider must ensure that none of its officers, employees, consultants, independent contractors or agents are marketing staff of an associate of the covered pipeline service provider that takes part in a related business.*

Rule 31(4) of the National Gas Rules (NGR) outlines the factors that the AER must take into account when considering a request for exemption of the ring fencing obligations:

> *(4) An exemption is to be granted from section 140 of the NGL (segregation of marketing staff etc.) or section 141 (accounts) if the AER is satisfied, on the application of a service provider, that the cost of compliance with the relevant requirement for the service provider and its associates would outweigh the public benefit resulting from compliance.*

The AER must deal with a waiver application in accordance with the expedited consultation procedure.[7] Rule 9(2) of the NGR states that for an expedited consultation procedure the decision maker must proceed as follows:

> *(a) the decision maker must, after such consultation (if any) as the decision maker considers appropriate (and any revision of the proposal that results from that consultation), make a draft decision; and*
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> *(b) the decision maker must give copies of the draft decision to the parties to the administrative process in which the decision is to be made; and*
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> *(c) the decision maker must publish, on its website and in any other way the decision maker considers appropriate, the draft decision together with a notice:*
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> > *(i) stating why the decision is required; and*
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> > *(ii) giving reasonable details of the context in which the draft decision has been made, the issues involved and the possible effects of the decision; and*
> >
> > *(iii) inviting written submissions and comments on the draft decision within 15 business days from the date of the notice;*
>
> *(d) the decision maker must, within 20 business days after the end of the period allowed for making submissions and comments on the draft decision, consider all submissions and comments made within the time allowed and make its final decision.*

2.1.2 Repealing an exemption

Section 20 of Schedule 2 of the NGL provides for the amendment and/or repeal of a decision to grant an exemption and states that:

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[7] Rule 31(2) of the NGR

If this Law authorises or requires the making of an instrument, decision or determination –

(a) the power includes power to amend or repeal the instrument, decision or determination; and

(b) the power to amend or repeal the instrument, decision or determination is exercisable in the same way, and subject to the same conditions, as the power to make the instrument, decision or determination.

3 Submissions

The AER invited interested parties to make written submissions on its draft decision in relation to the application by APTNT seeking exemption from its ring fencing obligations under s. 140 of the NGL. Written submissions were due to the AER by 25 July 2011. No written submissions were received by the AER in relation to this matter.

4 AER's consideration

The AER remains of the view that there are minimal practical implications of APTNT's acquisition of the AGP and the shares in NT Gas.[8] While the cost of compliance proposed by APTNT, in the view of the AER, is not reasonable, the AER considers that the cost of complying with the ring fencing obligations may have a significant impact on the revenue of NT Gas Distribution and might materially reduce its profitability.[9]

The AER is also of the view that the capacity and demand factors which prevented the development of effective competition in downstream markets in 2002 continue to be relevant. Hence, the public benefit from APTNT ceasing to share marketing staff with NT Gas Distribution would not be significant unless market conditions changed substantially.

Given these considerations, the AER is satisfied that the cost APTNT would incur in complying with section 140 of the NGL would outweigh any public benefit from meeting these obligations. In granting an exemption APTNT will be allowed to share its marketing and sales staff with NT Gas Distribution which carries on a related business. Furthermore, given that NT Gas is no longer the service provider of the AGP and therefore no longer requires the exemption provided by the ACCC 2002 final decision, the AER considers that repeal of the 2002 waiver is warranted and appropriate.

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[8] ibid., p. 12.
[9] ibid., p. 11.

5 AER’s final decision

In accordance with section 146(2)(b) of the NGL, the AER exempts APTNT from the ring fencing obligations under s. 140 of the NGL. Consistent with its draft decision, the AER considers that the cost APTNT would incur in complying with s. 140 of the NGL would outweigh any public benefit from meeting these obligations.

The AER may repeal or vary the exemption at any time if the AER is no longer satisfied that the grounds for the exemption are met.

The AER also repeals the exemption granted to NT Gas pursuant to the ACCC’s 2002 final decision, which waived the requirement for NT Gas to meet the ring fencing requirements set out in ss. 4.1(h) and (i) of the Code.