

25 June 2004

Mr Michael Walsh  
Director, Gas Group  
Regulatory Affairs Division  
Australian Competition and Consumer Commission  
GPO Box 3648  
SYDNEY NSW 2001

Dear Mr Walsh

### **Draft Regulatory Reporting Guidelines for Gas Pipeline Service Providers**

Australian Pipeline Trust (“APA”) welcomes the opportunity to participate in the development of accounting guidelines to be issued under the Code.

APA notes the implicit recognition in the Guidelines that it is the service provider, rather than the regulator, who determines the detailed methodology to be adopted by the service provider to ensure that its accounts comply with the obligations under section 4.1. This is reflected in the concept in the Guidelines of the service provider’s “manual”. APA also recognises the potential benefit of the standardisation of information requirements through the establishment of consistent national guidelines under section 4.2 of the Code. It is important that in advancing the development of these Guidelines that both of these matters are properly recognised.

APA believes there are several fundamental matters relating to the nature of the proposed Guidelines which must be addressed before the Guidelines can be finalised, including:

- the authority under which the Guidelines are proposed to be issued;
- whether the Commission has power to impose new obligations on service providers including submission of annual reports in a specified format, auditing of accounts etc;
- absence of any evidence that the benefit of the Guidelines, if they were shown to be enforceable, would outweigh the significant costs which will be incurred in complying; and
- the implications of these Guidelines being issued at a time when it is expected that there will be changes in the gas access regime, including as to the identity of the regulator and the objectives of the regime.

These issues are addressed in the attached paper.

APA considers it important that the significant uncertainty as to the Commission’s power to impose the obligations created by the Guideline is resolved. Until this occurs, debate on the form and content of the actual accounting requirements of the Guideline is, to some extent, premature. Accordingly, APA’s comments on the draft Guidelines are more concerned with the nature of the regulator’s powers, rather than the details of the proposed accounting treatments.

We would be happy to meet with the Commission to discuss this submission if this would assist in resolution of these issues.

Yours faithfully

Michael McCormack  
General Manager, Commercial

## 1. AUTHORITY UNDER WHICH GUIDELINES ARE ISSUED

It is not clear from the Guidelines what power the Commission is exercising in relation to the Guidelines:

- (i) the Commission can issue “general accounting guidelines” with which service providers must comply in complying with the obligations in sections 4.1(c), (d) and (e) [section 4.2(a)]; or
- (ii) in the absence of guidelines issued under 4.2(a), if a service provider prepares its own guidelines, the Commission has discretion to approve such guidelines [section 4.2(b)]; or
- (iii) if neither (i) nor (ii) apply, the Commission has discretion to issue guidelines which apply to a particular service provider [section 4.2(b)].

Clearly, these Guidelines are not intended to be guidelines under (iii) as they are of generic application, and contemplate the possible issue of guidelines specific to a service provider. However, it is not clear whether the Guidelines are intended to be general accounting guidelines issued under 4.2(a), or an identification by the Commission of its requirements for a service provider’s guidelines to be approved under 4.2(b). In fact, the Guidelines appear to seek to be both, although this is not clear on the face of the document.

If these are to be issued as guidelines under 4.2(a), then their function is to be *general* accounting guidelines. They cannot extend to mandating detailed requirements as to the manner in which the service provider will comply with sections 4.1(c), (d) and (e), nor to pre-judge what the Commission will require in assessing a request by the service provider for approval of the service provider’s guidelines.

Guidelines under 4.2(a) also cannot impose on a service provider an obligation to develop guidelines for approval by the Commission under 4.2(b): it is only if the regulator has not issued general accounting guidelines under 4.2(a) that a service provider may submit its own guidelines for approval by the Commission. If these are intended to be issued under 4.2(a), the issue of these Guidelines may in fact operate to prevent the Commission approving a service provider’s own guidelines under 4.2(b), and yet that is clearly not the intent of the guidelines.

If these are intended to be “general accounting guidelines” under 4.2(a), they should be revised to limit their operation to those matters legitimately within the scope of “general accounting guidelines”. If these are not to be guidelines under 4.2(a), nor service provider specific guidelines under 4.2(b), they can have no binding basis and this should be recognised in the document.

While there may be benefits in the Commission indicating the matters which would influence its consideration of whether to approve a service provider’s guidelines under 4.2(b), such an “indication” cannot operate to impose mandatory requirements, either in form or substance. To the extent that the Guidelines purport to mandate requirements for obtaining approval of the Commission under 4.2(b), they must be modified to remove the purported new obligations, and to make plain their operation as “indicative” rather than mandatory considerations.

This confusion as to the nature of the Guidelines, and the authority under which they are intended to apply should be rectified, and interested parties then given an opportunity to

consider the revised document. Only when the Guidelines can be clearly identified as deriving from a particular provision of the Code can parties make a properly informed submission on the requirements of the document.

## **2. IMPOSITION OF NEW OBLIGATIONS ON SERVICE PROVIDERS**

The Guidelines include a number of new, apparently mandatory, obligations – auditing of accounts, provision of annual reports, sign off requirements etc. They also include assertions that the Commission may require reports to be provided at different times to those specified.

The imposition of these obligations appears to go significantly beyond the powers granted to the Commission under the Code:

- (a) under 4.2, the Commission has power to issue general accounting guidelines – the proper interpretation of this is that the guidelines can only be directed to the matters in sections 4.1(c), (d) and (e): that is, preparation of separate accounts for each covered pipeline, preparation of consolidated accounts for service provider's total business, and allocation of shared costs. None of these matters deal with annual provision of information to the regulator, or the auditing of accounts. Accordingly, it seems that the obligations in the Guidelines cannot be imposed under the general thrust of section 4.2;
- (b) under the last paragraph of 4.2, the Commission has power to include in its Guidelines requirements for the accounts to contain information and to be presented in a manner to enable verification of reference tariffs. However, the regulator's role in relation to verification of reference tariffs arises only when a reference tariff is proposed. Accordingly, this last paragraph can only reasonably be read to mean that guidelines can require accounts to be kept in a manner that enables the regulator – when reference tariffs are proposed – to verify them. It is also beyond the reasonable scope of 4.2 to impose an obligation for auditing of accounts where there is no basis to assume that such an audit is required to enable the verification of reference tariffs. It therefore seems that these obligations cannot be imposed under the last paragraph of 4.2;
- (c) under 4.12, the regulator is granted a power to require the service provider to demonstrate the adequacy of its measures. The power granted the regulator in 4.13 is to specify the intervals at which the service provider reports on the measures taken to ensure compliance. Neither of these sections bestow on the regulator power to establish additional requirements which the regulator considers desirable for the service provider to comply with in observing the obligations in 4.1;
- (d) there is no general power in the Code for the regulator to require these matters. Generally, section 4 imposes obligations on the service provider and does not provide the regulator with an on-going compliance monitoring role. There is therefore no implicit power in section 4 generally which can form the basis for the imposition of the new obligations contained in the Guidelines.

The Guidelines should therefore be revised to remove these obligations.

### **3. COSTS/BENEFIT ASSESSMENT**

There is no recognition in the Guidelines of the costs to service providers – and therefore to users – of compliance with the Guidelines. Even if the Commission does have power to mandate all or many of the obligations in the Guidelines, these should not be imposed until a rigorous assessment of the costs and benefits of compliance is conducted. This is particularly the case where the imposition of the obligations is not clearly within the intent of the legislature, and cannot therefore be taken to have already been considered.

To date, there is no evidence that there is any identifiable benefit to be obtained by requiring service providers to do more than comply with the obligations as stated in the Code. There is also no evidence, on the face of the Guidelines, that these are part of a national and uniform development of information requirements, notwithstanding this has been recognised as desirable by NGPAC and the Productivity Commission.

### **4. THE IMPLICATIONS OF GUIDELINES BEING ISSUED AT THIS TIME**

The Code has been in force for a number of years, with no demonstrated significant detriment arising from the absence of guidelines under section 4.2. At the same time, it may be generally expected that the release of the Productivity Commission's Final Report, and the establishment of the Australian Energy Regulator, will lead to changes of some significance in the gas access regime.

The issue of guidelines under 4.2, particularly in the level of detail contained in these Guidelines, at this time would be inappropriate. The imposition of new obligations at a time when the general regime is being considered, and the identity of the regulator is to change, will cause confusion and additional cost. It also contributes to regulatory uncertainty – will the AER maintain such Guidelines? What would be the effect on the Guidelines of changes in the objects of the Code, if these were to be implemented. How would the Guidelines operate if the new coverage approach suggested in the Productivity Commission's Draft Report is implemented?

Given there has been no demonstrated need for such Guidelines, they should not be imposed. It should be left to the new regulator, if the AER considers it necessary, to establish new Guidelines once any changes to the Code are known and understood.