

12 December 2008

Mr Mike Buckley
General Manager
Network Regulation North Branch
Australian Energy Regulator
Via email: AERinquiry@aer.gov.au

Draft Access Arrangement Guideline

Dear Mr Buckley

The Australian Pipeline Industry Association (APIA) welcomes the opportunity to comment on the Australian Energy Regulator's (AER) Draft Access Arrangement Guideline.

The National Gas Rules do not require the AER to produce this Guideline; consequently APIA requests the AER clarify the status of this Guideline.

The Draft Guideline also appears to have unnecessarily adopted some electricity based terminology and approaches. It should be recognised by the AER that gas transmission and electricity transmission are not particularly similar in terms of their operating environment and commercial drivers. Regulating gas transmission with a regulatory template based on the electricity industry approach is unlikely to result in optimal outcomes.

APIA considers the Draft Guideline has the potential to be a useful tool for Service Providers in preparing an Access Arrangement submission. This submission highlights areas where APIA considers further detail and/or amendments would benefit users of the Draft Guideline and provide clarity. In particular APIA suggests the AER pays particular attention to:

- the definition of a 'non-material variation' (Draft Guideline Reference 3.5.1);
- the treatment of confidential information, in line with the comments on page 6 on this submission (Draft Guideline Reference 4.1.4); and
- clarifying the distinguishing features of 'elements' and 'components' of an access arrangement (Draft Guideline Reference 5.2).

APIA would be pleased to discuss any issues relating to the Draft Guideline further with the AER.

Yours sincerely



Cheryl Cartwright
Chief Executive



APIA Response to the Australian Energy Regulator's Draft Access Arrangement Guideline

Introduction

APIA is the peak national body representing the interests of Australia's transmission pipeline sector. APIA's membership is predominantly involved in high-pressure gas transmission. APIA's members include contractors, owners, operators, advisers and engineering companies and suppliers of pipeline products and services.

APIA welcomes the opportunity to comment on the Australian Energy Regulator's (AER) Draft Access Arrangement Guideline, dated September 2008 (Draft Guideline). APIA believes the Draft Guideline is beneficial in providing guidance to pipeliners preparing to submit Access Arrangements (AAs).

This Draft Guideline particularly impacts on APIA members in eastern Australia who own and operate regulated pipelines but also has relevance to APIA members in Western Australia.

This paper will first address general issues and then deal with specific issues as they arise in the Draft Guideline.

1. General Issues

As a general comment the Draft Guideline does not seem to offer any major insight into how the AER will approach the task of using its discretion to assess and approve AAs, beyond that which could be taken from the National Gas Law and Rules.

In particular, the Draft Guideline should clarify:

- the status of the Draft Guideline and whether the guideline is mandatory. Unlike the National Electricity Rules, the National Gas Rules do not require the AER to produce any Guideline, consequently APIA is seeking clarity on the status of this guideline; and
- the status of the Draft Guideline in relation to the Western Australia Economic Regulatory Authority processes. Having two sets of interpretive or mandatory guidelines for the National Gas Law and National Gas Rules is less than ideal.

Additionally, APIA considers that the Draft Guideline appears to have unnecessarily adopted some electricity based terminology and approaches.

APIA has concerns that the AER is seeking to regulate gas infrastructure using the electricity infrastructure “regulatory template”, despite the fact that both industries are governed by different laws and rules.

It should be recognised by the AER that gas transmission and electricity transmission are not particularly similar in terms of their operating environment and commercial drivers. Regulating gas transmission with a regulatory template based on the electricity industry approach is unlikely to result in optimal outcomes.

APIA believes that the less prescriptive regulatory approach for gas infrastructure is more suited to gas assets as it provides an opportunity for Service Providers to submit their own innovative approaches and solutions to asset specific issues.

2. Process Issues

2.1 General Process Issues

In making notices the AER is not always committed by the Draft Guideline to directly inform interested parties. APIA recognises that in reality the AER does inform interested parties but believes it would be beneficial if the Draft Guideline committed the AER to informing interested parties, such as the Service Provider, by email, in the event of any notices.

2.2 Specific Process Issues

Draft Guideline Reference 3.1.1 Pre-proposal submission process

APIA generally considers pre-submission processes are useful. However APIA seeks an explicit recognition that any information or positions put forward in pre-submission processes by the Service Provider may be varied or withdrawn without penalty or comment. The Service Provider should not be held to any preliminary information or position put forward in the pre-submission process.

APIA also suggests there be an explicit statement in the Draft Guideline as to whether the AER and the Service Provider can agree and finalise any items or issues in the pre submission process. APIA has a preference that the AER and the Service Provider should be able to do so.

Draft Guideline Reference 3.1.3 Draft Decision

The Draft Guideline, p14, states:

“One key difference between the consultation and decision making process under the former code and the NGL (and NGR) is the limited opportunity for the AER to respond to new (and substantive) issues once the Draft Decision is made. The consultation process after the Draft Decision focuses on the Service Provider’s response including amendments to the proposal to reflect the Draft Decision. The decision making process in the NGR does not envisage substantive issues being raised and deliberated on after the Draft Decision is made.”

This statement is inconsistent with the National Gas Rule. Rule 60(1) allows the Service Provider to submit additions as well as amendments to the AA which “address matters raised in the AA Draft Decision.” Rule 60(2) then provides that such amendments must be “limited to those necessary to address matters raised in the access arrangement Draft Decision unless the AER approves further amendments.” Therefore Rule 60(2) appears to envisage further amendments beyond matters raised in the Draft Decision (subject to AER approval).

It is not correct to say that the “decision making process in the NGR does not envisage substantive issues being raised and deliberated on after the Draft Decision is made”. There may well be circumstances in which the amendments to the AA proposal address matters raised in the Draft Decision properly and raise substantive new matters for the regulator’s consideration. If such new substantive matters were properly raised, the regulator would be legally obliged to consider and deliberate on those matters as part of the decision making process.

As a matter of good legal and administrative practice the AER should take into account any material issue raised after the Draft Decision, including issues which may have only arisen after the Draft Decision (including a third party response to the Draft Decision or other exogenous factors impacting on the covered pipeline).

This is particularly important as the Service Provider may only have 15 business days to respond to the Draft Decision. Depending on the type of issue being addressed and the size and breadth of the Draft Decision this time frame may be too short to fully address issues raised in the Draft Decision. Such tight response times could lead to an incorrect decision, an uninformed decision or a decision that is counter to the NGL objective.

In addition, as a matter of clarity, it should be explicitly stated that the Service Provider will be notified and provided with a copy of the Draft Decision.

Draft Guideline Reference 3.1.4 Final Decision

The process which occurs if an AA is not approved should be expanded on in the Draft Guideline. The final decision process has changed markedly from the Code practice of a further final decision and should be set out clearly.

Draft Guideline Reference 3.1.5 Summary of Decision Making Time and Process for Assessing a Full AA

The statement on p16 of the Draft Guideline puts forward:

“The six months decision making process can be extended by a further two months”

The paragraph following this statement provides that there is:

“an absolute time limit of 13 months for making a decision about a full access arrangement.”

This wording will potentially cause some confusion as to whether the process is a six month or thirteen month process. APIA suggests any potential confusion can be removed from the Draft Guideline by more explicitly stating processes that ‘stop-the-clock’ are not counted toward the six month decision making process.

Draft Guideline Reference 3.4 When a Service Provider fails to submit an AA proposal

As a matter of clarity the Draft Guideline should make comment on procedure in the event of a Service Provider failing to submit an AA on time (due to a timing error, administration issue or IT problem) but it is submitted a short time after the deadline. For example APIA understands that in the past an AA may not have been submitted on time as the regulator’s IT system did not accept the AA due to an embedded macro or virus.

APIA believes that in instances such as this, as a matter of common sense and as a matter of minimising AER workload, a small period of grace should be provided to cover such circumstances.

Draft Guideline Reference 3.5.1 Non-material variations

The Draft Guideline does not define a “non-material variation”. APIA believes that it is appropriate that the Draft Guideline set out some indication as to variations that the AER would consider to be non material. APIA understands that previously some AAs have included guidelines for materiality.

As a matter of clarity the Draft Guideline should make comment about the process for amending obvious typographical errors, correcting non-contentious errors of fact or non-contentious administration changes (eg a change of address) and whether such a process is necessarily formal.

APIA recognises this is partially addressed in section 5.6 of the Draft Guideline, although section 5.6 deals with significant matters that require revocation of an AA. Section 5.6 should be at least cross-referenced to 3.5.1, and differences in interpretation between the two sections should be explicitly identified.

3. Information Issues

3.1 General Information Issues

In dealing with confidential information it may be of some benefit if the Draft Guideline made reference to the ACCC guidelines to handling confidential information and indicated points of difference with the general ACCC policy.

3.2 Specific Information Issues

Draft Guideline Reference 4.1.2 What submissions the AER needs to consider

Draft Guideline Reference 4.1.3 Guidance for making submissions

APIA has general concerns that the Draft Guideline sets out an overly prescriptive format in which submissions are to be submitted. This may act as a barrier to some parties making submissions. While it would be expected that APIA members can meet these requirements, APIA believes it is important that all stakeholders be given a chance to comment.

For the sake of clarity, the AER, via the Draft Guideline or otherwise, should clarify which Microsoft packages etc are acceptable for making submissions.

Furthermore the Draft state on p31:

“Submissions should be succinct, logically structured, outlining key issues in dispute and the party’s position in respect of these issues.”

Such a requirement is subjective. The Draft Guidelines should be amended to encourage such characteristics but they cannot be mandated. In any event APIA believes the AER has an obligation to consider all submissions, including less structured submissions.

The Draft Guideline goes on to say:

“In circumstances where parties wish to rely on material from, for example, websites, consultants’ or experts’ reports, the AER’s or other regulators’ papers, a court or tribunal decision, they should include a copy of the relevant documentation and information with their submission..... Even if the document has been provided in a previous submission for the same or different regulatory process, the entire document should be submitted.”

APIA believes that this requirement is unnecessary and creates additional administration work for Service Providers. APIA believes that a reference in an acceptable format¹ and a web link if the document is electronically available is sufficient.

In addition, this requirement has the potential to result in absurd outcomes - eg submissions will typically refer to previous AAs, the NGL, the NGR, market rules, the previous Gas Code, previous AER decisions relating to other assets etc – providing such documents is unlikely to be beneficial, particularly as many of these documents are on the AER website and/or are quite large.

¹ In relation to referencing, page 31 of the Draft Guidelines makes reference to “accurate referencing” and “complete and correct references”. To ensure consistency, the Draft Guideline should state the preferred method of referencing, eg Harvard, Oxford or an alternate system.

If the AER needs a full copy of a document the Service Provider should make one available on request. If the reference is to a document previously provided to the AER then a reference to the date it was previously provided should be sufficient.

Draft Guideline Reference 4.1.4 Submitting Commercial-in-Confidence material

On p32 the Draft Guideline states that in relation to submitting confidential information further discussion is available at section 3.1.4, however but section 3.1.4 does not appear to refer to confidential material. This cross-reference should be confirmed in the final Guideline.

The Draft Guideline, p32, states:

“In the circumstances where a confidential document is submitted but not accompanied by a non-confidential version of the document the AER may treat the submitted version as being non-confidential or it may give the confidential part of the submission less weight.”

APIA does not agree that the AER may treat a confidential document as non-confidential simply because it is not accompanied by a non-confidential version of the document. In circumstances where the entirety, or all but trivial aspects, of a document are confidential, there appears little point in providing a non-confidential version.

APA also disagrees with the proposal that AER give confidential information less weight where it has not been provided to third parties. There may be good reason why the information has not been provided (such as the third party not being prepared to enter into reasonable arrangements to protect the confidential information from unauthorised use or further disclosure, or that a third party may directly benefit commercially from the information -for example if an issue centres on an issue with a particular shipper then this issue should not necessarily be accorded less weight as the issue has to be kept confidential in order to avoid providing one shipper’s information to competing shippers).

The Draft Guideline should clarify what powers the AER uses to make a judgment on confidentiality.

In addition the Draft Guideline should outline:

- the rationale for confidential information being given less weight in decision making. Confidential information will often be the most relevant information for making decisions in some circumstances;
- what occurs if information marked confidential is determined by the AER to be non-confidential and is disclosed and damages can subsequently be demonstrated; and
- how more informal information exchanges, such as email exchanges between Service Provider and AER officers, are to be treated.

4. Access Arrangement Submission

4.1 Specific Access Arrangement Submission Issues

Draft Guideline Reference 5.2 Access Arrangement proposal and approval

The Draft Guideline discusses the “elements” of an AA proposal. It is important that the Draft Guideline provide clarity on what the AER views as “elements”.

In this regard, we note that the Draft Guideline consistently distinguishes between non-tariff “elements” and tariff “components” of an AA (for example, section 5.4 and Appendix E). APIA suggests that the distinction between elements’ and ‘components’ of an AA should be clarified, particularly having regard to the comments on rule 41 in section 5.2 (ie approving ‘elements’ of a proposal).

Draft Guideline Reference 5.4.1.5 Extensions and expansions requirements

As noted in the Draft Guideline, extensions and expansions only become part of the covered pipeline if this occurs pursuant to the policy in the approved AA. This is made clear in both section 18 of the NGL and rule 104 of the NGR.

APIA therefore questions the position stated in the Draft Guideline on p46 that

“It is appropriate for expansions to be included as part of the covered pipeline and if relevant subject to the reference tariff(s) unless otherwise determined by the AER.”

APIA suggests that this statement should be deleted as the treatment of each extension and expansion should be considered on its merits in accordance with the approved extensions and expansions policy.

Draft Guideline Reference 5.4.2.3 The building block approach to determining total revenue

The Draft Guideline states, p53:

“The NGL only allows the building blocks (cost of service) approach to determining tariffs. The AER will work with the relevant Service Providers transitioning from a methodology not consistent with the building block method to determining total revenue.”

APIA seeks some clarification of the AER’s position on this particularly given NPV approaches will result in under recovery in early years. A shift from NPV to cost of service part way through an assets life will potentially disadvantage the Service Provider.

APIA assumes NGR Rule 89 would be used to address this issue. This seems to be recognised as the Draft Guideline, p6, states:

“In regulatory decisions made by the ACCC to date relating to gas, the depreciation used for the opening capital base of the next access arrangement period has been the

same figure as the depreciation figure used (at the time of the previous assessment) for the revenue calculation for the current access arrangement period. The figure for the revenue calculation is necessarily the forecast depreciation (that is, based on forecast capital expenditure, redundancies and disposals). The consistent use of forecast depreciation for both revenue calculation and calculation of the opening asset base will ensure that the Service Provider's assets are depreciated completely, but only once, over their economic lives."

APIA believes that this issue may best be addressed by separate discussions with pipeline owners rather than via the Draft Guideline but believes that it is an issue which should be clarified.

Draft Guideline Reference - Box Case Study – MSP, p55

APIA is unsure as to how such paraphrasing of the Tribunal in the MSP case illuminates the process for the establishment of an initial capital base. The MSP case is probably the least representative case of establishing a capital base, and in any event, given the MSP is now either uncovered or subject to light regulation, the case is less relevant.

If a case was intended to be used to better illustrate the establishment of an initial capital base for a covered asset perhaps the Roma Brisbane Pipeline, the Victorian Transmission System or a distribution network could be used.

Draft Guideline Reference - Overall Economic Value note, p57

APIA notes that the benefits listed in this note on economic value do not include the net value to Service Providers. As this is specifically referred to in rule 79(3), APIA suggests that the note be amended accordingly.

Draft Guideline Reference - Rate of return, p59

Implicit in the Draft Guideline is an indication that the rate of return will be based on the AER electricity WACC review findings. APIA believes any such implication is inappropriate – gas pipeline rates of return should be set on their merits rather than by reference to the electricity WACC review (although APIA recognise that some elements of this review – eg MRP and gamma - may be relevant to gas infrastructure).

APIA would continue to stress that seeking to regulate gas infrastructure using the electricity infrastructure “regulatory template” is unlikely to result in optimal outcomes. A less prescriptive regulatory approach is more suited to gas assets.

Draft Guideline Reference GasNet incentive box, p61

APIA notes that the discussion on GasNet incentives commences with reference to GasNet then discusses “the various Victorian Service Providers”, (presumably the Victorian gas distributors). For the sake of accuracy it should be noted that decisions relating to the gas distributors were made by a different regulator.

APIA also believes that some of the negative aspects of incentive mechanisms should be discussed. In particular these mechanisms can assume that the Service Provider is operating in a static environment and that any variations from the forecast other than CPI can be attributed to the Service Providers actions. This is incorrect as there are many external impacts on Service Providers.

5.4.3 Other relevant information to be provided with an AA proposal

In relation to KPIs, APIA would strongly maintain that KPIs previously used are sufficient and have the strong benefits of continuity and general acceptance by regulators and stakeholders.

5. Reference Tariff Variations

Draft Guideline Reference 6.1 Tariff variation mechanism framework

The Draft Guideline's initial discussion of price escalation options seems to make no explicit mention of incentive based price escalation - eg CPI-X - and yet this has been the cornerstone of gas pipeline incentive based regulation. Instead the Draft Guideline uses electricity terminology – eg “variable cap on revenue (derived from a particular combination of reference services)”. This should be addressed.

APIA recognises that there is discussion of CPI-X later in this section but believes that such discussion should be given greater priority as CPI-X is central to incentive regulation.

Draft Guideline Reference 6.1.1 Schedule of fixed tariffs

The second paragraph of section 6.1.1 suggests that all AA submissions must provide a methodology to address a delay in final approval beyond the expiry date of the current AA. As the standard submission date for a review is now 12 months (National Gas Rules 50(1)9a) before that date, the AER seems to be suggesting that it will often take almost the whole 13 month maximum time to complete reviews.

It would be more appropriate to seek such an adjustment at the Draft Decision stage, as at this time timing will be known with more certainty.

6. Review of Decisions

As the AER does not control or dictate Merits Reviews there is no explanation as to why a discussion on Merits Review is included in the Draft Guideline.

In section 1.1, the Draft Guideline is described as addressing:

“issues relevant to the AER's economic regulatory function relating to access arrangements”

and section 1.2 describes the role of the Draft Guideline is:

“to provide information ...about the content of access arrangements and access arrangement proposals and the AER’s decision making processes relating to access arrangements under the NGL and NGR.”

Clearly the processes and scope of Merits Review falls outside these areas. To the extent they are included in the Draft Guideline there may be a perception that the AER is attempting to guide or otherwise influence the review body. APIA believes that Draft Guideline relates to AAs not Merits Reviews, and that Merits Reviews should be deleted from the Draft Guideline.

7. Other Comments

Appendix C: Transitional Arrangements

This appendix notes that on commencement of the NGL, sections 3, 8 and 10.8 of the Code “will apply to transitional access arrangements until the access arrangement is revised”. It would be useful if the Draft Guideline could provide guidance on the intended operation and practical effect of this transitional provision, particularly as they may apply to revisions.

8. Conclusion

APIA considers the Draft Guideline, with some amendments as outlined above, will provide a useful reference tool to Service Providers. However the NGR does not mandate the AER to produce or follow this Guideline and thus it is important that the AER clarify the status of this Draft Guideline.

APIA is concerned that it appears elements of the electricity regulatory approach are being imposed on gas regulations as a result of several processes, including (potentially) this Draft Guideline. Whilst streamlining of regulation may be supported in some cases, the gas and electricity transmission sectors have different laws and rules because the fundamentals of the two industries are different.

APIA believes that the less prescriptive regulatory approach for gas infrastructure is more suited to gas assets as it provides an opportunity for Service Providers to submit appropriate approaches and solutions to asset specific issues.

When reviewing the Draft Guideline in light of submissions APIA requests that the AER pay particular attention to:

- the definition of a ‘non-material variation’;
- the treatment of confidential information, in line with the comments in this submission; and
- clarifying the distinguishing features of ‘elements’ and ‘components’ of an AA.