Geoff McCormick
Barrister
905 Isaacs Chambers
555 Lonsdale St
Melbourne, Vic 3000

Tel: 9225 8970
Mobile: 0417 394 298
Clerk: Gordon and Jackson
ABN: 68 217 002 359

Advice

GasNet access arrangements – roll in to Capital Base of value of easements

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Introduction

The GasNet access arrangements have now been lodged with the ACCC. In the submission supporting those arrangements, at page 29, it is made plain that GasNet seeks to include in the "Capital Base" for the GNS (GasNet system) $40.2 million representing the value of easements[1]. This is to be contrasted with the initial asset base of the PTS identified by the ACCC in 1998 of $363.7 million.

GasNet alleges in its submission (again at page 29) that the original decision to exclude easements from the "Capital Base" of the PTS was a "policy decision taken by EPD (Energy Projects Division).. in order to meet the State Government's objectives of imposing maximum uniform tariffs."

Summary of advice

I have seen no evidence of any policy decision by EPD as described. However, that is beside the point. The issue instead is whether at law GasNet can now include easements in the "Capital Base".

In my opinion GasNet cannot now include easements in the "Capital Base". My reasons are as follows.

[1] GasNet also seeks to include certain pipeline regulators with a value of $1.9 million. See pages 29 and 32 of the GasNet access arrangement submission. As will be appreciated from what I am about to say, these pipeline regulators too may not be able to be included because of the effect of section 8.9 of the National Code.

Section 8.9 of the National Code prevents inclusion

Section 8.9 of the National Code[1] provides as follows (again omitting parts immaterial in present context):

> "….Consistently with those principles, the Capital Base at the commencement of each Access Arrangement Period after the first, for the Cost of Service methodology, is determined as:
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> (a) the Capital Base at the start of the immediately preceding Access Arrangement Period; plus
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> (b) the New Facilities Investment or Recoverable Portion (whichever is relevant) in the immediately preceding Access Arrangement Period (adjusted as relevant as a consequence of section 8.22 to allow for the differences between actual and forecast New Facilities Investment); less
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> (c) Depreciation for the immediately preceding Access Arrangement Period; less
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> (d) Redundant Capital identified prior to the commencement of that Access Arrangement Period,
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> ….subject….to such adjustment for inflation (if any) as is appropriate given the approach to inflation adopted pursuant to section 8.5A."

As the GasNet access arrangement submission notes (at page 30), the Victorian Code[2] equivalent of this section has been the subject of interpretation by the ACCC in its Final Decision dated 6 October 1998 in respect of the current GasNet access arrangement. In that decision (at page 25), the ACCC said the following:

> "In terms of future regulatory period, however, the Commission notes that the Victorian Access Code requires that the capital base be determined mechanically, adjusted only for depreciation, new facilities investment and redundant capital

[1] Section 8.9 is mirrored in the "fixed principles" that apply to GasNet's next access arrangement period. However for present purposes the principles have been rendered irrelevant by the way GasNet has dealt with them. To explain. Clause 5.3.6 of the current GasNet approved access arrangement sets out the "fixed principles" that apply to that next period being the principles specified in clause 9.2(a) of the Victorian Gas Industry Tariff Order 1998. Clause 9.2(a)(3) of the Tariff Order is in broadly the same terms as section 8.9. See pages 21 and 22 of the GasNet access arrangement submission where clause 9.2(a)(3) is set out. GasNet argues, in effect, on page 22 of its submission, that clause 9.2(a)(3) is to be interpreted in the same way as it interprets section 8.9. As I see it, this would import the residual discretion or power that GasNet contends exists in respect of that section. Pursuant to section 8.47 of the National Code (and also section 8.47 of the Victorian Code), the principles may not be changed for the next access arrangement period without the agreement of the Service Provider. Perhaps cognizant of the danger that clause 9.2(a)(3) coupled with section 8.47 thus poses to its case, GasNet then goes on (at page 23 – see para 5.2.4(e)(iv)) to agree under section 8.47 to the ACCC changing the "fixed principles".

[2] Victorian Third Party Access Code for Natural Gas Pipeline Systems.

(section 8.9). Therefore, in order for the methodology proposed by TPA to be consistent with the requirements of the Victorian Access Code, the appropriate formula for determining the capital base at the commencement of the next access arrangement period is:

> Capital base = initial capital base (indexed) – depreciation (indexed) + new facilities investment (indexed) – redundant capital

The Commission notes that the Victorian Access Code does not provide scope to revalue the existing assets outside of what is permitted by this formula."

Section 8.9 of the Victorian Code is in identical terms to section 8.9 of the National Code with the exception of the last sentence referring to section 8.5A which was added to the National Code (along with section 8.5A itself) at the end of 1999.

There is no doubt in my mind that what the ACCC said above represents a correct statement of the law. Despite that, GasNet argues that there is a residual discretion or power left with the ACCC whereby it can re-visit the Capital Base at the start of each access arrangement period. In support of this proposition, the possibility of manifest errors is pointed to and it is stated that "it cannot have been the intention" that such could not be corrected. See page 31 of the GasNet access arrangement submission.

I put to one side the obvious response that on GasNet's own argument there was no "manifest error" in not including the value of easements, it was instead a deliberate policy decision.

Instead, looking at the National Code, one must ask where is there a provision that in effect allows the ACCC to depart from the clear words of section 8.9 and revisit the initial Capital Base. GasNet in its access arrangement submission do not point to any such provision. That is not surprising as there is none. The closest one gets is section 10.5(b)(ii) of the National Code which allows one to use the italicised Introduction and Overviews to the Code and each section as aids to interpretation where "the ordinary meaning conveyed by the text of a provision leads to a result that is manifestly absurd or unreasonable". However there is nothing in either the Introduction to the Code or the Overview to section 8 that would help GasNet in its argument, even assuming that the 1998 interpretation by the ACCC of section 8.9 is manifestly absurd or unreasonable – which it is not.

In that respect, it should not be overlooked that the ACCC's 1998 interpretation of section 8.9 is consistent with a fundamental principle that underlies the National Code, namely that there should be a high degree of certainty and consistency for service providers and end users. See the Gas Reform Implementation Group *Policy Information Paper* dated May 1998, pages 6 and 10. Not allowing revisiting of the Capital Base after its initial determination can be seen as consistent with that requirement for a high degree of certainty and consistency.

As such, my opinion is that section 8.9 prevents the inclusion in the Capital Base of the value of the easements.

Geoff McCormick

10 May 2002