



12 November 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

This letter provides the initial response of the Energy Networks Association (ENA) to the ACCC's request for comments on the recently issued *Draft Regulatory Reporting Guidelines for Gas Pipeline Service Providers* (draft guidelines)

The ENA is the peak national body representing owners and operators of gas and electricity distribution networks valued at over \$30 billion. These include owners and operators of gas distribution networks valued at over \$5.5 billion regulated under the National Gas Code.

The development by the ACCC of the draft guidelines is a matter of significant concern for ENA members, due in part to their potential to establish a precedent for arrangements for the gas distribution network sector under any future national regulation of gas distribution networks subject to the National Gas Code.

The ENA considers that the further development of these draft guidelines is inappropriate for the following reasons:

- the ACCC has not demonstrated any need to move beyond the less intrusive and costly ring-fencing compliance arrangements currently in place
- development of these draft guidelines has the potential to pre-empt proper and independent consideration by the Australian Energy Regulator (AER) on the need for and appropriate content of the guidelines
- there is a lack of clarity over whether the draft guidelines are 'general accounting guidelines' as provided by Section 4.2 (a) of the Code or non-binding guidance on the preparation of service provider proposed guidelines under Section 4.2 (b)

- a number of the obligations which the draft guidelines purport to impose are potentially ‘beyond powers’.

These reasons are discussed in more detail below.

Lack of demonstrated need for development of the guidelines

The ENA considers that the ACCC has failed to demonstrate any compelling need for the development of the detailed and intrusive obligations contained in the draft guidelines.

Since May 2001, the ACCC has required gas pipeline service providers to submit annual ring-fencing compliance reports. In its overview of the 2003 ring-fencing reports the ACCC has stated that existing ring-fencing compliance arrangements were designed to ‘fulfil the reporting requirements of the Code without creating an unreasonable regulatory burden on service providers’.¹ The ACCC also stated that approval and sign-off requirements for these existing ring-fencing compliance reports provided it with ‘sufficient confidence’ that ring fencing procedures were complied with ‘thoroughly’.²

In this context, the ENA does not consider the extensive obligations imposed by the draft guidelines necessary or appropriate. Further, the ENA understands that to date no parties have raised any complaints relating to ring-fencing arrangements failing to be effective.³

In considering the lack of need for the development of these guidelines, it is relevant that Australian governments (through the National Gas Pipelines Advisory Committee) resolved in April 2003 that no deficiency in existing information collection provisions of the National Gas Code (including Section 4.1-2) had been demonstrated. At this time NGPAC opted to refer a regulator-initiated proposal to broaden the scope of Sections 4.1-2 to the Productivity Commission’s *Review of the Gas Access Regime* (a proposal the Productivity Commission considered but did not accept).

The Productivity Commission examined the operation of ring-fencing provisions of the National Gas Code and found that existing provisions were generally operating well. The Commission made a specific finding that an extension of regulatory powers to allow the collection of information between access arrangement reviews (as contemplated in the draft guidelines) was inappropriate and unnecessary.⁴

Potential for the guidelines to pre-empt decisions of the AER

The Australian Energy Regulator was formally established as a separately constituted regulatory body by Commonwealth legislation in June 2004. The *Australian Energy Market Agreement* specifies that the AER will assume responsibility for enforcing the Gas Code in relation to the gas transmission sector by no later than July 2005.

¹ ACCC *Overview of the 2003 ring-fencing compliance reports*, p.1 <www.accc.gov.au>

² ACCC (2003), p.1

³ ACCC *Submission to the Productivity Commission Review of the Gas Access Regime*, 15 September 2003, p.8

⁴ Productivity Commission *Review of the Gas Access Regime – Inquiry Report*, June 2004, Finding 7.7

With approximately eight months at most until the transitioning of responsibility, the ENA does not consider it appropriate for the ACCC to be engaged in the development of draft guidelines of this kind. The ENA understands that the ACCC currently intends to require pipeline service providers to submit Regulatory Accounting Manuals by April 2005 for assessment. If introduced, this will mean that the guideline will effectively commence operation less than three months prior to the formal assumption by the AER of responsibility for gas transmission regulation.

Given the ACCC has in previous years stated its satisfaction with existing ring-fencing compliance arrangements, the ENA considers a more effective approach would be for the ACCC to discontinue development of the guideline, in recognition that the issues it raises lie within the responsibilities of the newly-established AER. The decision to establish an independent AER would be significantly undermined if ACCC processes in relation to monitoring and enforcement of National Gas Code obligations were claimed to pre-empt the AER's flexibility to determine its own approach following 1 July 2005.

Lack of clarity over status of the draft guidelines

The ENA has serious concerns over the lack of clarity about the fundamental nature of the draft guidelines proposed by the ACCC. It is unclear whether the ACCC is proposing:

- a 'general accounting guideline' as envisaged by Section 4.2 (a) of the Code; or
- non-binding guidance to offer assistance to service providers in the preparation of the service provider developed accounting guidelines that are envisaged by Section 4.2 (b) of the Code.

The Commission's draft guidelines do not make a clear distinction between these (mutually exclusive) options, and include references which leave open this critical ambiguity.⁵ In ENA's view, the development by the ACCC of non-binding guidelines which attempt to pre-empt and define the contents of the service provider developed guidelines envisaged by Section 4.2 (b) would be an unproductive use of limited regulatory resources. It would also be contrary to the clear intention of Section 4.2 (b) to provide a basis for a service provider to voluntarily develop specific accounting guidelines relevant to the individual service provider's operations.

Provisions potentially beyond powers

Several aspects of the draft guidelines appear to impose obligations beyond those provided for under Sections 4.1-2.

Obligations requiring auditing and annual reporting do not appear to be supported by interpretations of Sections 4.1-2 by regulatory bodies and service providers. In April 2002 the WA Office of Gas Access Regulation issued the paper *Information*

⁵ See ACCC *Draft Regulatory Reporting Guidelines for Gas Pipeline Service Providers*, May 2004, p.1-4 and p.21-23

Collection Powers under the Gas Pipelines Access Regime. This paper highlighted (deliberate) constraints on information collection powers which it claimed were deficiencies in the overall regime. The paper stated that:

Regulators do not have the power to require reporting of information by service providers in periods between times of review of access arrangements....⁶

This conclusion accords with legal advice received by ENA members in relation to the *Draft General Accounting Guidelines for Gas Distribution Network Service Providers* issued by the Queensland Competition Authority in 2003. In particular, this advice confirmed that Section 4.2 does not provide a regulatory authority with the power to require annual lodgement of regulatory accounts. In its decision on *General Accounting Guidelines for Gas Distribution Network Service Providers* the QCA acknowledged that it lacked the power to impose auditing obligations and require board sign-off of regulatory accounts, as currently proposed in the ACCC draft guideline.⁷

The lack of power to require annual lodgement of accounts was a critical argument used by Australian regulatory bodies advocating expanded information powers through NGPAC. The draft guideline appears predicated on an assumption this limitation to the scope of Section 4.2 does not exist. If the ACCC has advice to this effect, the ENA considers it should be made public to allow stakeholders to better understand why the ACCC considers these obligations to be within the powers accorded by Sections 4.1-2. We understand other parties will be lodging detailed legal advice relating to the consistency of obligations contained in the draft guidelines with existing Code provisions.

These comments represent the initial views of ENA members on threshold issues associated with the development of the guidelines. They are provided on the presumption that, as these draft guidelines have been developed with substantive consultative input sought from only the gas transmission sector, separate consultation arrangements would apply if in the future the AER was to consider the introduction of similar guidelines applying to gas distribution network service providers.

If you have any queries relating to this submission, or wish to discuss any aspect of ENA's views on this matter, please contact Garth Crawford on (02) 6272 1519.

Yours sincerely

[Signed copy follows]

Bill Nagle
Chief Executive
 Energy Networks Association

⁶ OffGAR Office of the Gas Access Regulator *Information Collection Powers under the Gas Pipelines Access Regime*, 14 April 2002, p.13

⁷ QCA Decision – *General Accounting Guidelines for Gas Distribution Network Service Providers*, May 2003, p.5