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Mr Mike Buckley
General Manager
Network Regulation North Branch
Australian Energy Regulator
SYDNEY

Dear Mr Buckley

**Annual Compliance Reporting Consultation**

Jemena Gas Networks (NSW) Ltd (Jemena) (formerly Alinta AGN Ltd) has reviewed the Draft Annual Compliance Guideline (the Draft Guideline) and accompanying Discussion Paper (the Paper) published by the AER in July. In summary, Jemena acknowledges that reporting is an important element of a compliance monitoring regime, however we are concerned that the proposed reporting scheme is a heavier response to ringfencing compliance risk than is necessary in the current industry environment. The AER should consider alternative schemes that are commensurate with the risks involved and with a focus on efficiency.

## A lighter-handed approach should be considered

Reporting in the form and detail proposed will be costly. The information must be assembled from a range of sources within the service provider's business and some items require a narrative response. Legal input will be necessary, especially if a statutory declaration is required. For most organisations there will be two or more levels of management briefings and review before the report can be presented to the board (if board sign-off is required). The person signing a statutory declaration (if one is required) may also call for additional briefings and assurances. All of this involves direct costs as well as potentially significant opportunity costs.

In the Paper (page 3) it is stated that alternatives have been considered but only one is described in any detail i.e. "upfront compliance programs incorporating site visits of service providers, desk reviews and audits of how records are maintained and kept." That alternative would clearly be more intrusive and onerous than the one proposed.

There are at least two other approaches that would be more in keeping with the risks involved, and more efficient than the one proposed. The first would involve annual reporting on an exception basis i.e. an assurance that full compliance has been achieved with details of any exceptions. This is the form adopted by several jurisdictional regulators that require formal compliance reporting. The jurisdictional schemes may also require immediate reporting of any breach of designated high exposure obligations. The second alternative, which Jemena favours, would be for

the AER to monitor ringfencing compliance by making periodic enquiries of service providers in relation to their compliance with specific obligations. The AER already monitors businesses' compliance with certain obligations under the National Electricity Rules in this way.

The current industry environment supports a lighter-handed approach for monitoring gas ringfencing compliance:

- The gas transmission and distribution industry has been subject to ringfencing and related obligations under the Gas Pipelines Access Law and Gas Code for nearly 10 years. Throughout that period the industry's compliance performance has been good.
- When the gas access regime was being developed in the mid-1990s, potential users were concerned about the exposures they might face when seeking access. Those concerns were addressed through ringfencing. Despite those early concerns, ringfencing has not been a significant issue for users or potential users since access was bedded down. That is the case for both networks and transmission.
- At the time the Gas Code was introduced, a significant number of service providers had associated retail businesses and potential users were especially concerned about how they would be treated by those service providers. Today, ActewAGL Distribution is the only covered pipeline within the AER's jurisdiction that has an associated retailer.
- Gas networks have never had to report on ringfencing to jurisdictional regulators with the level of detail or in the manner proposed. In fact in some jurisdictions e.g. Victoria, the regulator has never established a frequency for reporting on ringfencing compliance under the Gas Code, and formal ringfencing reports have not been made. On the other hand, the ACCC has required transmission businesses to provide detailed reports for a number of years. Despite these differences, there is no evidence that users and potential users are any less comfortable in dealing with network businesses than with transmission businesses where ringfencing is concerned.
- Ringfencing obligations, while important, represent only a small proportion of a service provider's total compliance obligations. Arguably many other obligations have equal or greater public significance and yet don't, and don't need to, attract the degree of regulatory scrutiny now proposed for ringfencing.

Rather than reducing the intrusiveness of reporting requirements in recognition of these considerations, the AER's proposed regime will require more extensive and detailed reporting than has been considered appropriate in the past, especially for network service providers.

**Comments on the proposed reporting scheme**

Should the AER decide to proceed in the manner proposed in the Draft Guideline, Jemena has a number of specific comments:

- Jemena is happy to report on a June year, however, it can be difficult for businesses to complete and submit reports within a month of the end of the reporting period. This is especially so for businesses that have a June financial year. In most other cases where regulators require reporting on compliance and similar matters, the submission date is two months after the end of the reporting

period. A submission date of 31 August would be more reasonable for ringfencing compliance reporting.

- In Jemena's view the related business question (question 2.1) is best dealt with by a straightforward assurance that the service provider has not carried on a related business during the reporting period (assuming that is the case). Provision of an organisational chart as proposed can only answer the question indirectly and is unlikely to be definitive given the frequency of organisational changes. If the AER would like details of Jemena's organisational structure for other purposes, then it should be possible to provide that information under an informal arrangement.
- The requirement to list all associates (question 2.2(a)) goes further than the ACCC's requirement to list only associates with "any involvement in natural gas". In fact, given the scope of s140 of the NGL, it should only be necessary to list those associates (if any) that take part in a related business. Having said that, Jemena questions the value of providing details of associates at all given the nature of the assurances required by questions 2.2(b) and (c).
- Jemena acknowledges that the AER may, at its discretion, require that reports "be verified by way of statutory declaration …" (NGL, s55(d)). However, in Jemena's view, there is no case for invoking that power in the present case. Jemena is not aware of any comparable corporate reporting obligation where a statutory declaration is required. An assurance signed by the CEO should suffice. Even if that view is not accepted, the ACCC established a form of assurance for ringfencing reporting which involved signing by the CEO and a Director with approval of the service provider's board. That form has apparently been adequate for the ACCC's purposes.

  Jemena also notes that the NGL contains sanctions for providing false or misleading information in response to an information instrument (NGL, s60). The potential penalties for making a false statutory declaration are much more severe. Accordingly, statutory declarations should be reserved for cases where there is a real incentive to produce false or inaccurate information, and where the consequences of doing so are material.

  Having said that, Jemena sees no good reason for requiring board sign-off (let alone a statutory declaration) for compliance reporting of this type. Requiring sign-off at board level suggests a lack confidence in the integrity of the CEO and in the compliance culture of the business, which may be unwarranted. The requirement for board sign-off adds to cost and can also make it more difficult for a business to submit reports by 31 July (but see previous comment) especially in cases where some or all board members are based overseas.
- Jemena notes the proposed requirement to provide copies of the financial statements "most recently submitted" to ASIC (question 2.3(e)). The quoted phrase is important because financial statements may be submitted to ASIC as late as four months after the entity's financial year end. Available financial statements lodged with ASIC will inevitably relate to a different period than the compliance report. The specification must also recognise that some service providers (e.g. small proprietary companies) are not required to submit financial statements to ASIC.
- The proposed requirement in relation to associate contracts (question 2.5) is inefficient. Service providers will already have provided the AER with details of new and varied associate contracts in compliance with NGR s33, and the AER will have details of any application for approval of an associate contract. It should be sufficient to ask the question "have details and copies of all new and varied

associate contracts been provided to the AER within 5 business days? If not, please provide details."

- The purpose of Attachment 3 to the preliminary regulatory information order is unclear: it is not mentioned in the Draft Guideline or in the preliminary order.
- More generally, some of the information that is to be reported under the proposal:
  - can be readily tested by the AER itself (e.g. to determine whether access arrangements and terms and conditions are available on service providers' websites); or
  - will already be known to the AER and in some cases will have originated with the AER. Items in this category include:
    - additional ringfencing obligations and exemptions
    - details of associate contracts and associate contract approvals
    - access determinations and
    - approvals of access arrangements that include provision for bundling.
- Jemena questions the value and efficiency of reporting such information especially if it is to be done under a sworn statement. To the extent that the AER's objective is simply to obtain confirmation that the service provider is aware of applicable obligations then that could be achieved in other, more efficient, ways. For example, the AER could issue periodic questionnaires for response by the service provider's senior management.

## A related matter

In the course of reviewing the proposal, Jemena has identified what appears to be an inconsistency in the definition of marketing staff of an associate of a service provider in s138(1)(b) of the NGL. The definitions of marketing staff of an associate and marketing staff of a covered pipeline service provider are the same. In particular, marketing staff comprises those employees, consultants etc "… directly involved in the sale, marketing or advertising of **pipeline services** …" (ss138(1)(a)(ii) and 138(1)(b)(ii)) (emphasis added).

This is a change from the Gas Code which defined marketing staff as those who are "directly involved in sales, sales provision or marketing [of the relevant entity's goods and services]." Marketing staff of the service provider were those involved in sales etc of pipeline services and marketing staff of an associate were those involved in the sales etc of the associate's goods and services. The Gas Code prohibited marketing staff of a service provider from working in any capacity for an associate that took part in a related business and vice versa.

Jemena understands that the intention was to retain the principles of the Gas Code in moving to the NGL. However, the NGL definition of marketing staff of an associate appears to be inconsistent with that intention in that it does not recognise that marketing staff of an associate that takes part in a related business will inevitably be engaged in marketing services other than pipeline services. For a person who is on the staff of an associate to be engaged in selling etc pipeline services there would need to be an arrangement between the service provider and the person or the associate. If the associate takes part in a related business, it is difficult to see how a person could be marketing staff of the associate (as defined) otherwise than in breach of s140.

Should you wish to discuss this submission, please contact Warwick Tudehope on (02) 9270 4551.

Yours sincerely

Alf Rapisarda
General Manager, Energy Networks