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Our Ref: COAG Energy Council – EESA Response Binding Arbitration
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Submitted via email: energycouncil@industry.gov.au

**Submission to the draft Bill introducing a binding commercial arbitration process for gas pipeline access disputes in the National Gas Law**

Epic Energy South Australia Pty Ltd ("EESA") welcomes the opportunity to provide comments to the COAG Energy Council Secretariat on the draft amendment Bill which is seeking to establish a binding commercial arbitration framework.

EESA notes the Australian Pipeline and Gas Association's ("APGA") submission on the National Gas (South Australia) (Pipelines Access-Arbitration) Amendment Bill 2017 ("Amendment Bill") and fully endorses the position contained in that submission.

The COAG Energy Council agreed in December 2016 to implement a commercial arbitration framework for pipeline access disputes in the National Gas Law as recommended in Dr Michael Vertigan AC's Examination of the Current Test Regulation of Gas Pipelines report ("Vertigan Review"). The proposed Amendment Bill seeks to set out a commercial arbitration framework.

EESA supports the intent of the legislation subject to the matters addressed within the APGA submission and our comments below.

**Feedback**

Below EESA has responded to each of the questions raised in the COAG Energy Council Gas Market Reform Bulletin 3:

1. Does the proposed framework provide sufficient threat of arbitration, whilst still ensuring that commercial negotiation is the preferred approach for access to open pipelines?

- The proposed Amendment Bill does provide sufficient threat of arbitration, whilst ensuring commercial negotiation is the preferred approach for open access pipelines.

  EESA considered however the proposed Amendment Bill appears to extend beyond the stated intent by establishing powers in the National Gas Rules ("NGR") to dictate behavior throughout the commercial negotiation. Section 216F – Access Proposals encourages the NGR to include a process for commercial negotiation.

  Negotiations take various forms either due to the relative complexity of the access request, the timing of the access request or the physical requirements to meet the access request. Some examples include:

  > *"Example 1 - An access request which requires augmentation to the pipeline. In this example the timeline to develop a response will be subject to the complexity of the specific request, factors such as the location of the augmentation and the level of engineering support required will determine the realistic timeframe for the development of a response to the access request. It should also be noted that in many cases numerous options exist to develop an acceptable outcome which may limit or remove the need for augmentation"*

  In the above example a prescribed negotiation process within the NGR may limit the ability to develop flexible options for those seeking access.

  > *"Example 2 - Access request received one month in advance versus 1 year in advance, in each case the length of time available to negotiate terms varies and this timeframe can be driven by many reasons. In this example service providers will engage to ensure a response is provided to an access seeker within the timeframe available which meets the needs of the access seeker."*

  In example 2 service providers and access seekers will develop an acceptable timetable to ensure all requirements are met. A prescription on process under the NGR may remove this flexibility and create undue delay.

  It would be impracticable to develop an all-inclusive list of information, including time-lines for the provision of information, within the NGR. Including this information in the NGR may result in inefficient outcomes where processes need to be adhered to where they do not add value or otherwise artificially slow down the process.

  EESA considers that Section 216F is unnecessary as behaviors are effectively managed through the risk of arbitration. In the examples above where negotiations do break down an option to refer to arbitration exists. Service providers and those seeking access should have the ability to carry out commercial negotiations in the most efficient manner without the added impost of the NGR.

2. Is there anything in the framework which may suggest that the expeditious resolution of the access dispute will not occur?

   - EESA considers that the power for the scheme regulator to refer a dispute to arbitration under section 216J may limit the expeditious resolution of an access dispute. As drafted the scheme regulator receives notification of an access dispute under Part 2, the dispute must be referred to arbitration unless an exception under section 216J is met.

The exceptions noted in section 216J will likely require the scheme regulator to review the notification of access dispute, develop an understanding of the subject matter of the dispute and determine if the negotiation to date has been in good faith. The scheme regulator will be required to review information and seek input from relevant parties to satisfy itself that an exception does not apply, this initial process is likely to be duplicated by the arbitrator in the event it is referred.

EESA considers that a more expeditious resolution could be achieved by following commonly adopted processes typical of commercial arbitration including under the Commercial Arbitration Act 2011. In these cases the dispute is directly referred to an arbitrator who in the first instance will determine his/or her jurisdiction over the matter. An arbitrator would not have jurisdiction if the listed exceptions apply.

Where an arbitrator determines that he or she holds jurisdiction over the matter then the arbitration can continue as contemplated by the Amendment Bill. The regulator's role in the arbitration process could be more akin to that of an administering body such as the ICC or ACICA in a commercial arbitration conducted under domestic or international law.

- Section 216M identifies the principles to be taken into account by the arbitrator in making its determination. EESA considers that only 216M(b) pricing principles specified in the rules is relevant to the determination of the access dispute noting that the rules are yet to be developed.

  It is likely that the rules will take into account the national gas objective and be inclusive of all parameters to which an access dispute is to be determined. Parts (a) the national gas objective and (c) any other principle specified in the rules will therefore not be required.

  It is also considered that an ability for the arbitrator to consider "other matters" deemed appropriate will lead to delays in the resolution of the matter as it enables either party to develop any number of arguments for consideration by the arbitrator. Any "other matter" is likely to be irrelevant to the determination provided the pricing principles are well developed.

  EESA is of the view that the rules including the pricing principles or framework for the pricing principles should be developed before any final version of the Amendment Bill is issued. A risk exists that each stakeholder is trying to find a solution to a problem that is yet to be defined.

3. Are there other changes to the draft Bill that you consider are necessary to support a best practice arbitration and negotiation framework? Please provide an evidence base for your reasons.

   - EESA makes no further recommendations.

4. Do the proposed amendments provide a sound foundation for information transparency and disclosure particularly around service costs, pricing and contract terms and conditions?

   - Section 216F appears to provide some foundation for the NGR to stipulate information transparency and disclosure, specifically Section 216F(2)(d) suggests the NGR include:

     *"Information that a service provider must publish to assist a prospective user or user to determine whether to make an access request"*

As stated above, section 216F appears to also cover a process for negotiation which is considered to be beyond the Vertigan Review recommendation and unnecessary in ensuring the commercial negotiations are the preferred approach.

Section 216F therefore appears to hold a dual purpose in that it encourages the NGR to stipulate a process for negotiation and information to be published.

EESA recommends that Section 216F is removed from Access Disputes and separate amendments are made to consider the enhanced transparency matters as recommended by the Vertigan Review.

5. Are there other alternative options or models for a binding commercial arbitration framework that may better achieve the outcomes proposed by the Examination of the Current Test for the Regulation of Gas Pipelines report? Please provide details and reference existing models if relevant.

   - EESA makes no further recommendations.

6. What are your views on the interaction of these reforms with other COAG Energy Council gas market reform priorities, including standardisation of capacity contracts? Are there improvements which could be made?

   - The complexity of the proposed binding arbitration process will be determined by the development of the rules and also the outcomes of the proposed standardisation of capacity contracts.

     As discussed earlier in this submission EESA is of the view that the Amendment Bill should only be finalised once the rules are fully developed.

     The development of a standardised capacity contract option for access seekers will have the impact of limiting access disputes to where the standardised option is not utilised or not offered where for example an access seeker has requested a bespoke capacity contract to meet its individual requirements.

     EESA considers that the Amendment Bill and rules should be developed in parallel with the other COAG Energy Council gas market reform priorities, specifically the standardisation of capacity contracts.

7. What key parameters would you suggest be covered in the Rules to support these legislative reforms?

   - The protection of genuine third parties and the binding nature of arbitration determinations is considered critical to the development of an efficient and effective outcome to the proposed legislative reforms.

     <u>Genuine Competition</u>

     In many cases throughout commercial negotiation both service providers and access seekers are operating with genuine competition. A service provider may have greater interest for capacity than what capacity exists or an access seeker may have alternate options to concluding an agreement for capacity including an alternate pipeline; SEAGas Pipeline versus Moomba to Adelaide Pipeline for example.

An access dispute cannot be used as a tactical tool to circumvent genuine third party interest which is possible where capacity must be reserved during an access dispute under section 216U.

Binding determination

Also when a determination is made by an arbitrator a capacity contract must be in a form that can be binding on both parties, to ensure this is possible all terms and conditions must be addressed prior to an access dispute occurring. For example, if an access seeker has no ability to satisfy credit requirements, which may be consistent with pricing principles, then it should not be seeking arbitration. In this example the service provider could be constrained in their efforts by third party debt financiers.

To address the above issues the NGL and NGR must stipulate that where genuine competition exists or a capacity contract is not capable of execution except for the matters under dispute, an arbitrator must not make a determination

- The development of the rules including the pricing principles along with the standardisation of capacity contracts is also a critical process to enable a full assessment of the impact of the Amendment Bill. Each service provider is different due to the service provider's size, corporate structure and market participation. For example a Queensland pipeline servicing a predominately Liquefied Natural Gas users will have a different profile to a service provider supplying gas fired generation in South Australia.

  It is important that the process of capacity standardisation and the pricing principles address the various differences between service providers. Specifically on the pricing principles as they relate to the Amendment Bill, EESA considers it necessary that the pricing principles developed enable service provider or pipeline specific parameters to be included.

**Conclusion**

EESA is supportive of the intent of the proposed Amendment Bill and is of the view that it provides a strong basis for developing the requirements for binding arbitration of access disputes. The key principles to be considered include an expeditious outcome and maintaining commercial negotiation as the preferred response. The above mentioned matters would support the desired outcome which was recommended in the Vertigan Review.

Should you wish to discuss further any of the issues raised in this submission, please contact me on (08) 8343 8110.

Yours sincerely

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