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8 February 2017

COAG Energy Council Secretariat
By email to energycouncil@industry.gov.au

DRAFT NATIONAL GAS (SOUTH AUSTRALIA) (PIPELINES ACCESS-ARBITRATION) AMENDMENT BILL 2017
SUBMISSION BY HYDRO TASMANIA

The attached submission has been prepared by Hydro Electric Corporation (Hydro Tasmania) in response to the request for stakeholder input included in the Gas Market Reform Bulletin Three, January 2017 "Introducing a binding commercial arbitration process for gas pipeline access disputes in the National Gas Law".

Hydro Tasmania strongly supports the gas reform work undertaken by the COAG Energy Council and in particular the recommendations of the report "Examination of the Current Test for the Regulation of Gas Pipelines" by Dr Michael Vertigan AC in December 2016.

Hydro Tasmania has a significant involvement in the east coast gas market as a wholesaler of gas and a user of gas for power generation in both Tasmania and Victoria. Hydro Tasmania also retails gas in Victoria through its fully owned subsidiary Momentum Energy. With regard to pipeline access, Hydro Tasmania is the largest shipper on the Tasmanian Gas Pipeline as well as a shipper on the Eastern Gas Pipeline and APA's Victorian Transmission System and Victorian gas distribution networks.

Thank you again for providing Hydro Tasmania with the opportunity to comment on the Draft Legislation. Hydro Tasmania looks forward to continuing involvement with the consultation process on the transparency and disclosure and rule change aspects of the reform as well as with the second stream of work related to transport capacity trading.

If you have any questions about the submission please contact Mr Sanjay Verma on Sanjay.verma@hydro.com.au or by telephone on 03 8612 6481 or 0419 947 641.

Yours sincerely

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Hydro Tasmania: Submission on the National Gas (South Australia) (Pipelines Access-Arbitration) Amendment Bill 2017

1. Introduction

Hydro Tasmania agrees that an essential problem in the gas industry is that *"parties negotiating for pipeline services have unequal levels of bargaining power and information"*.[1] As a general concept, Hydro Tasmania agrees that competition is likely to be enhanced and costs are likely to be lowered through mandating greater disclosure and transparency of pipeline services and pricing, and mandating commercial arbitration if negotiations between the parties break down.

Hydro Tasmania considers that the draft commercial arbitration framework set out in the *National Gas (South Australia) (Pipelines Access-Arbitration) Amendment Bill 2017* (**Draft Legislation**) is a good starting point for the implementation of Vertigan's reforms. However, it notes that the draft legislation is somewhat limited in nature, given that most of the detail will be contained in the amendments to the National Gas Rules. Hydro Tasmania notes that the South Australian Minister for Mineral Resources and Energy will make these initial rules, and that a separate consultation process will be undertaken to develop the relevant rules. The ultimate effectiveness and workability of Vertigan's reforms will depend on the detail of what is implemented, particularly in these rules.

This submission sets out a number of areas that Hydro Tasmania considers warrant further consideration in developing the Draft Legislation.

2. What additional information needs to be in the Draft Legislation

2.1 Format of the arbitration

Hydro Tasmania agrees with Vertigan that where commercial processes are working effectively, the resort to arbitration should rarely be required. However, where parties to a negotiation are unable to reach a commercial resolution, it is critically important that the arbitration is quick and effective at providing a commercial resolution to disputes.

Vertigan states that arbitration should be commercially-based (as distinct from judicial or regulator-based) and Hydro Tasmania considers this to be essential. A more practical, commercial approach is more likely to be achieved if the arbitration is commercially-based, rather than regulator-based.

An issue of significant concern to Hydro Tasmania is that there is often an asymmetry of commercial interests in resolving pipeline access disputes. While for shippers the results are undoubtedly very important, for pipelines they can have a whole of business impact, especially if pipeline precedents are set. As a result, there may be an incentive for pipelines to delay and for arbitration times and costs to increase.

Hydro Tasmania submits that limited timeframes should be implemented for the various procedural steps in an arbitration. Furthermore, the Draft Legislation should set out the intention that arbitrations be concluded within three months. While the arbitrator should have the ability to extend the timetable if there are good reasons to do so, this ability should not extend beyond a period of six months.

[1] as identified in the *Examination of the Current Test for the Regulation of Gas Pipelines* report at p12

2.2 Enhancing process management

While the nature of the dispute and the actual decision of the arbitrator should be kept confidential, Hydro Tasmania believes that the following information should be published. This information could be placed on website of the administrator of the commercial arbitration process:

(a) the relevant pipeline involved;

(b) the parties to the arbitration, subject to consent of that relevant party;

(c) the name of the arbitrator; and

(d) the time taken for the arbitration

Such public disclosure will provide transparency around how the process is working, without compromising the confidentiality of parties, and assists other parties in selecting an arbitrator with the requisite experience. This will enhance the efficiency and effectiveness of the system as a whole.

3. What changes are needed to the drafting contained in the Draft Legislation?

3.1 The binding nature of an arbitration

Section 216Q of the Draft Legislation states that "*subject to the Rules, an access determination is enforceable as if it were a contract between the parties to the access determination".* It is not clear what this drafting is intended to achieve.

One interpretation of the drafting of s216Q is that the arbitrator will have the power to require a shipper to accept, and pay for access to the service under dispute, on the arbitrated terms and conditions.

It is unclear to Hydro Tasmania that such an interpretation is intended, given that this would potentially lead to anomalous outcomes. It would, for example, be a very significant concern if a shipper could be forced to enter into a new contract on terms and conditions which are commercially unviable.

For example, the Vertigan Report notes the difficulties experienced by Tas Gas Retail in negotiating an acceptable gas transportation agreement in relation to the TGP:

> *According to the ACCC Inquiry, a recent proposal to extend the network from Port Latta to Smithton, which had secured Federal funding of $6 million, did not proceed due, at least in part, to the TGP Pty Ltd asking shippers to pay a 200 per cent premium on their past charges. Tas Gas Chief Executive Officer, Roger Ingram, has publicly indicated that Tas Gas was not able to obtain acceptable commercial terms in relation to the TGP and therefore could not meet federal government timelines to secure supporting funding under its Tasmanian Jobs and Growth Package.*

Hypothetically, if Tas Gas and TGP went to an arbitration on this dispute and the arbitrator set the terms and conditions of access at a 200% premium on past charges, clearly Tas Gas should not be compelled to accept a service on these terms given that this pricing renders the extension project unviable.

The arbitration should be binding, in the sense that if the shipper does choose to enter into a contract with pipeline operator that the arbitrated terms and conditions apply to that contract. However, the shipper should be free to choose not to enter into a contract on the arbitrated terms with the pipeline operator.

Hydro Tasmania submits that the Draft Legislation should make it clear that the arbitrator does not have the power to require the parties to enter into an agreement.

In the alternative, if it is intended that the arbitrator be given the power to force the shipper to take the service on the arbitrated terms and conditions, the Draft Legislation should require that a draft decision be given by the arbitrator. If this were the case, given that under s216P of the Draft Legislation, "*the prospective user or user seeking access… may terminate the arbitration before an access determination is made by the arbitrator*", the shipper would be able to end the dispute at the draft decision stage if it does not consider the terms and conditions to be commercially acceptable.

3.2 Information disclosure

Hydro Tasmania supports the intent of the Vertigan reforms in relation to more comprehensive transparency and disclosure requirements, i.e.:

> *Increased transparency provides parties seeking pipeline services with an improved ability to undertake timely and effective negotiations.*
>
> *Enhanced information should be provided by pipeline operators on the full range of services provided, including in relation to applicable pricing, terms and conditions.*
>
> *Further, pricing principles, and/or information on the methodology used to determine prices for different services, including costs incurred, should be published to enable shippers, or potential shippers, to better assess the reasonableness of the prices and terms offered.*

Hydro Tasmania considers that the current Draft Legislation could be amended to more fully encompass these concepts.

Hydro Tasmania suggests that s216F be amended in the following way:

> 216F—Access proposals
>
> 1. The Rules ~~may~~ must contain provisions for or with respect to—
>
> (a) seeking access to a pipeline service provided or to be provided by means of a non-scheme pipeline (or by a part of a non-scheme pipeline or by an extension of a non-scheme pipeline); and
>
> (b) seeking to vary an access contract in a significant way or to a significant extent.
>
> 2. Without limiting subsection (1), the Rules ~~may~~ must provide for such things as—

(a) the information to be provided to a service provider by a prospective user or user who makes a request for access or a variation contemplated by subsection (1) (an ***access request***); and

(b) the information to be provided by a service provider in response to an access request; and

(c) time-lines for the provision of information or a response by a service provider in response to an access request; and

(d) information that a service provider must publish to assist a prospective user or user to determine whether to make an access request; and

(e) information that a service provider must publish on the full range of services provided, including applicable pricing and other terms and conditions; and

(f) pricing principles and/or information on the methodology used to determine prices for different services that a service provider must publish, including costs incurred; and

(g) the principles that a service provider must publish on the process for expanding the capacity of a pipeline; and

(h) pricing principles and/or information on the methodology used to determine prices for different services that a service provider must provide in response to an access request where the services sought by users are different to those for which prices are published; and

~~(d)~~(i) the recovery by a service provider of costs associated with providing information to a prospective user or user who makes an access request

4. Transitional provisions

4.1 Transitional provisions should ensure that prior negotiations are counted towards the requirement for 'good faith' negotiations once the legislation comes into effect.

Hydro Tasmania submits that the Draft Legislation should ensure that the reforms do not impede or hinder negotiations between shippers and pipeline operators that are already on foot. The Draft Legislation should ensure that the negotiations that have occurred prior to the commencement of the legislation constitute 'good faith' negotiations and are deemed to meet any requirements of the Draft Legislation or Rules in relation to the process that the parties need to go through before commencing an access dispute.

Clearly, once the Draft Legislation is enacted, parties that have already undertaken lengthy negotiations over a period of several months or years should not be compelled to restart the process in order to meet the requirements for negotiations before being able to notify the scheme regulator that an access dispute exists. Hydro Tasmania suggests that transitional provisions are a sensible way to deal with this issue.

These transitional arrangements should operate by requiring any party who lodges a request for an arbitration determination within 30 days of commencement of the regime to provide with the request for arbitration, a document setting out the steps that have been taken in good faith to reach a resolution prior to the date of the notification. The Scheme Administrator can then determine whether those steps are sufficient to meet the requirements of the good faith obligations, such that the process does not need to be recommenced under the new processes.