24 October 2008

Jemena Gas Networks
(NSW) Ltd
ABN 87 003 004 322

Level 14
1 O'Connell Street
Sydney NSW 2000
Locked Bag 5001
Royal Exchange
NSW 1225

T +61 2 9270 4500
F +61 2 9270 4501

By e-mail: annualcompliance@aer.gov.au

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

Dear Mr Buckley

Annual Compliance Order
Submission in response to Draft Decision

Thank you for the opportunity to comment on the AER's Draft Decision in relation to its proposal to make a general regulatory information order under section 48(1)(b) of the National Gas Law. The order will require service providers to report annually on compliance matters.

In our previous submission dated 12 August 2008, we argued that the proposed reporting requirements are overly detailed and onerous. In support of that case, we discussed at some length the industry's experience of operating under the Gas Code for 10 years; the changes that have taken place over that time; and the range of approaches that regulators have taken to monitoring compliance under the Gas Code (including no formal reporting requirement at all in Victoria). We concluded that, in light of that experience, a lighter-handed approach is warranted under the NGL and proposed two alternative ways in which the AER might monitor compliance.

We also criticised the proposal to require that annual reports be covered by a statutory declaration made by a Director. We are strongly of the view that a statutory declaration is inappropriate for a compliance report of the type proposed. The ACCC has been satisfied in the past by a form of assurance involving sign-off by the service provider's CEO and a Director. A similar form of assurance should be satisfactory to the AER.

These positions were generally supported by a number of others who made submissions in previous rounds of consultation. We had hoped that the AER would give greater weight to these arguments in its Draft Decision.

We have a number of comments to make on the Draft Order that accompanies the Draft Decision:

- Jemena welcomes the allowance of additional time (to 31 October instead of 31 July) for submission of annual reports. However, we note that the AER's principal reason for making the change is that it will enable the statutory financial

reports provided with a compliance report to relate to the same year as the report. That will be the case for businesses that have a July to June financial year. For other businesses, such as Jemena which operates on an April to March year, the reporting and accounting periods will not align.

- Clause 3: "on 31 October" conflicts with the later parts of the Clause. We suggest replacing "on 31 October of each year ... do the following:" with "in accordance with the following:"

- If a statutory declaration is to be required, there are several amendments that might be made to Clause 6:

  - 6(a): insert "provided" after "information and documentation"

  - 6(b): replace "... kept or maintained is accurately represented." with "... kept or maintained by the service provider accurately represents that information and documentation."

  - 6(e): insert "with" after "... reasons why the Order is not complied".

In Attachment 1:

- Jemena understands that the AER's intention in clause 2.1 is to elicit the same range of information that the ACCC has required in the past i.e. details of "Associates with any involvement in natural gas". If that is the case, then clauses 2.1(a) and (b) as drafted are unclear and raise a number of issues.

  - Clause 2.1(a) appears to offer the option of two quite different reporting alternatives i.e. the service provider must report either "the key business units … of the service provider" (i.e. the internal structure of the service provider) or "relevant controlled entities or associates of the service provider" (i.e. entities external to the service provider). We assume that the option is unintended.

  - The proposed inclusion of "relevant" (in "relevant controlled entities and associates") is confusing because there is no apparent relevance criterion.

  - It is unclear whether "providing pipeline services" at the end of clauses 2.1(a) and (b) is intended to qualify "service provider" (in which case it is redundant) or "relevant controlled entities and associates" in which case it is unclear how the resultant list of entities and associates will be relevant to the title of the clause i.e. "Carrying on of a related business". In fact, clause 2.2(a) would appear to be a clearer statement of the information that clause 2.1 is intended to produce.

  - In light of these observations, clause 2.1(a) could be better stated as:

    > Provide, in an organisational chart or alternative format, information that identifies:
    > (i) any associates of the service provider that are service providers;
    > (ii) any associates of the service provider that take part in a related business; and
    > (iii) the principal business units and divisions (if any) of the service provider
    > as at the end of the reporting period.

- In clause 2.2(a), "of the NGL" should be deleted from the first line. In addition, clauses 2.2(b) and (c) would be clearer if the phrase "as identified in 2.2(a)", was placed at the end of the clause in each case.

- In our initial submission dated 12 August 2008, we drew attention to another matter that is relevant to clause 2.2, that is, an apparent inconsistency in the definition of "marketing staff of an associate" as persons who sell etc pipeline services (section 138 of the NGL). In short, a person who sells etc pipeline services would only do so under an arrangement with the service provider e.g. as a contractor or agent. Thus, a person who is marketing staff of an associate is also marketing staff of the service provider and so, where an associate takes part in a related business, a person who is marketing staff of that associate as defined, would inevitably be contravening s140.

  It is Jemena's understanding that there was no intention to alter the principles of the prohibition on sharing marketing staff in moving from the Gas Code to the NGL. Those principles go to the heart of ringfencing and can be stated simply as:

  - marketing staff of the service provider – a person who sells etc the service provider's goods and services – must not work in any capacity for an associate that takes part in a related business, and
  - marketing staff of an associate that takes part in a related business – a person who sells etc the associate's goods and services – must not work in any capacity for the service provider.

  Sections 138 and 140 of the NGL have a different effect.

  If the views expressed above are correct, then the solution would appear to be to define marketing staff of an associate in a way that mirrors the definition of marketing staff of a service provider i.e. marketing staff of an associate is someone who sells etc the goods and services of the associate.

  We acknowledge that this is a drafting issue in the NGL and is outside the scope of the current consultation. However, it should be addressed if the definitions are to be meaningful and workable.

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

Yours sincerely

Sandra Gamble
Group Manager Regulatory