Hydro Tasmania: Submission on the Gas Pipeline Information Disclosure and Arbitration Framework Implementation: Initial National Gas Rules

1. Introduction

The following submission has been prepared by Hydro Tasmania in response to the request for stakeholder input into the Gas Market Reform Group's (GMRG) Information Disclosure and Arbitration Framework Implementation Initial National Gas Rules (Initial Rules) for access to non-scheme pipelines, released in June 2017. Hydro Tasmania has previously made submissions to GMRG on the National Gas (South Australia) (Pipeline Access-Arbitration) Bill 2017 (2017 Bill) and on the Options Paper prior to the GMRG's Final Design Recommendations which were approved by the COAG Energy Council's Standing Committee of Officials (SCO) in June 2017.

Hydro Tasmania considers that work carried out by the GMRG to date in arriving at its Final Design Recommendations represents very significant progress towards the GMRG's objective of facilitating timely and effective commercial negotiations between shippers and the operators of non-scheme pipelines by reducing the imbalance of bargaining power that shippers can face and by posing a constraint on the exercise of market power by pipeline operators[1].

Hydro Tasmania believes that the Final Design Recommendations have in general been well translated into the Initial Rules, although it does recommend a few changes for the sake of clarity, especially with regard to transitional arrangements. However, Hydro Tasmania does have significant concerns about an alternative pricing principle (Rule 569 (2)) which has been included within the Initial Rules for stakeholder consultation. There are two main reasons:

- First, as the explanatory note for stakeholder consultation itself notes, the adoption of these principles would involve a significant departure from the intended design which was supposed to be a commercially based approach to resolution of disputes and not one based on detailed regulatory considerations; and

- Secondly, it is not simply a matter of applying one pricing principle to get to an outcome under the alternative version. As noted in Box 2 of the explanatory note for consultation, there are a range of other provisions in the regulatory regime that are relevant to how, and to what extent, past recoveries are to be allowed in certain circumstances and, for example, mechanisms to address redundant capital.

Hydro Tasmania supports strongly the original pricing principle as set out in the Final Design Recommendations.

Hydro Tasmania continues to be highly supportive of the energy reforms being undertaken by the GMRG and looks forward to the commencement of the Framework in the near future.

[1] Gas Market Reform Group, "Gas Pipeline Information Disclosure and Arbitration Framework, Implementation Options Paper", March 2017 page v.

2. Pricing and other principles: Hydro Tasmania believes that the Original Version (Alternative 1) of Rule 569(2)(a) should be adopted

The Initial Rules set out in Rule 569 the pricing and other principles by which an arbitrator is to be bound when determining an access dispute. Rule 569(1) requires that the arbitrator takes into account the objective of the Framework as defined in Rule 546(1). This defines reasonable terms as being…"*at prices and other terms and conditions that, so far as practical, reflect the outcomes of a workably competitive market"*.

Hydro Tasmania is strongly supportive of this objective being included within the Rules for the Framework and, indeed, within the National Gas Laws. Hydro Tasmania considers this objective to set out well what should be expected as an outcome of the whole process undertaken to date.

Rule 569(2) sets out some further pricing principles that an arbitrator must take into account. Rule 569(2)(a) sets out the requirement that the price must reflect the cost of providing that service and relates cost to asset value.

The original version of Rule 569(2)(a) (Original Version) states:

"(a) The price for a pipeline service must reflect the cost of providing that service, including a commercial rate of return that is commensurate with the prevailing conditions in the market for funds and reflects the risks the service provider faces in providing the pipeline service. For the purposes of this paragraph (a), the value of any assets used in the provision of the pipeline service must be determined having regard to asset valuation techniques consistent with the objective of this Part set out in rule 546(1), including those that take into account past recoveries of capital."

The Initial Rules provides an alternative Rule 569(2)(a) (Alternative Version):

(a) The price for a pipeline service must reflect the cost of providing that service, including a commercial rate of return that is commensurate with the prevailing conditions in the market for funds and reflects the risks the service provider faces in providing the pipeline service. For the purposes of this paragraph (a), the value of any assets used in the provision of the pipeline service must be determined as if the pipeline were a covered pipeline, with the asset value to be determined as follows:

> *(i) if the non-scheme pipeline was commissioned before 1 July 2008, in the manner provided for in rule 77(1)(a);*
>
> *(ii) if the non-scheme pipeline was commissioned after 1 July 2008, in the manner provided for in rule 77(1)(b); or*
>
> *(iii) if the non-scheme pipeline has previously been subject to an access arrangement, in the manner provided for in rule 77(3).*

Box 2 in the Explanatory Note[2] clarifies the asset value methodologies for the Alternative Version to mean:

- For pipelines constructed before the commencement of the Gas Code (November 1997) asset value to be calculated with regard to a number factors set out in Gas Code Sections 8.10 but, with outcomes according to Section 8.11
- For pipelines constructed after November 1997, according to section 8.13 of the Gas Code

[2] Gas Market Reform Group, "Gas Pipeline Information Disclosure and Arbitration Framework, Initial national gas Rules, Explanatory note for stakeholder consultation", June 2017, page 24.

- For pipelines that were previously covered and had an asset value determined, largely by reference to the asset value determined.

According to the Explanatory Note, the Alternative Version was included because of stakeholder concerns that the arbitrator and negotiating parties would (under the Original Version) have too little guidance about how to determine the starting asset value, thus impacting on the costliness, timeliness and efficiency of negotiation and arbitration and raising uncertainty for both pipelines and shippers[3].

Hydro Tasmania has concerns about adopting such a quasi-regulatory approach as set out in the Alternative Version. The primary concern is that the Alternative Version does not necessarily allow an arbitrator to make an independent assessment of values and prices that most reasonably reflect the outcomes of a workably competitive market – in other words, the outcome may conflict with the overall objective of the Framework.

The proposed Framework utilising commercial arbitration is not intended to replace regulation under the Gas Code or an option to have coverage of the pipeline where it is appropriate.

Another significant concern is that it is not simply a straightforward matter of applying one pricing principle to get to an outcome under the Alternative Version. As noted above and in Box 2 of the explanatory note for consultation, there are a range of other provisions in the regulatory regime that are relevant to how, and to what extent, different methodologies can be applied, past recoveries are to be allowed and, for example, mechanisms which are available to handle redundant capital.

Hydro Tasmania recommends that the Original Version of Rule 569(2)(a) be retained.

3. Other Comments

3.1 History of financial and pricing information (Rules 553, 555, 556 and 557)

A consistent history of demand, financial information and pricing and associated commercial terms is essential for users in assessing whether prices offered are reasonable. It is not clear from the Initial Rules whether such a history must be available on websites and, if so, how long back the history needs to go.

Hydro Tasmania considers that the Rules should specify maintenance and easy access to a history of all the required information going back for 5 years.

3.2 Interim access determination (Rule 571)

Rule 571 refers to an arbitrator making an interim determination. Such a situation was discussed in the Final Design Recommendation paper[4] specifically with the recommendation that an interim determination could allow a shipper's access to a pipeline to continue on existing terms and conditions until a determination is made (assuming the capacity is still available), even if the transportation agreement expires prior to the final determination..

Hydro Tasmania believes that the clarity of Rule 571 with regard to this intention would be improved if specific reference was made to the ability of an Interim Determination to continue a shipper's access to a pipeline including on existing terms and conditions and assuming the capacity is still available until a final determination is made, even if the final determination takes place after the expiry of the transportation agreement.

[3] Gas Market Reform Group, "Gas Pipeline Information Disclosure and Arbitration Framework, Initial national gas Rules, Explanatory note for stakeholder consultation", June 2017, page 22.

[4] Gas Market Reform Group, "Gas Pipeline Information Disclosure and Arbitration Framework, Final design recommendation", June 2017 page 82.

3.3 Transitional arrangements (Schedule Rule 53 and Rules 567, 568 and 572)

Schedule Rule 53 allows a request for access before the commencement date to be treated as an access request under the Framework if an election is made within 20 business days of the commencement of the Framework. Requests and responses and information provided or exchanged prior to the commencement date would then be allowable for use within an arbitration. Hydro Tasmania understands this Schedule Rule to allow for access to the Framework from the commencement date, even if the formalities have not all been complied with in the way prescribed by the new Rules so that the introduction of the Rules is not gamed.

From an abundance of caution, in order to ensure that the transitional provisions can be effectively implemented, it would be useful to amend Rule 53(5) so that it reads:

> *(5) Where an election is made under subrule (3) or (4), for the purposes of rules 567 and 568:*
>
> *(a) information provided during negotiations includes information exchanged during any negotiations that may have occurred before the commencement date; and*
>
> *(b) an arbitrator will grant leave under subrule 568(1).unless to do so would cause unreasonable prejudice to either party to the access dispute.*

That would ensure additional information can be provided unless doing so is oppressive.

Hydro Tasmania also believes the rules which relate to transitional arrangements for disputes where negotiations have taken place before the commencement date could be enhanced in the following ways:

- Rule 572(2), should ensure that the arbitrator can "stop the clock" for such disputes with regard to the preparation and exchange of offers and information which has reasonably not previously occurred. As currently framed, the arbitrator can only stop the clock when both parties agree, if the arbitrator appoints an independent expert or where a party has failed to comply with its requirement to exchange information.
- Ensuring that parties whose transportation agreements expire shortly after the commencement date retain access to transport until an interim determination can be made. This could be done by inserting a provision in the Schedule Rules to allow the Scheme Administrator to make an initial interim access determination allowing continued access to pipeline services if there is not sufficient time for an arbitrator to be appointed and make an interim determination before existing transportation agreements expire. Such an initial interim determination could apply until the arbitrator made an interim or final determination.

Finally, GMRG has sought feedback about the possible inclusion of a date into Schedule Rule 53(4) to provide a limit to how far back in time a pipeline response to a request for access can be considered as an access offer. Hydro Tasmania has no objections to the inclusion of such a date (e.g.December 2016) if it relates only to a decision as to which disputes can be handled under the transitional arrangements. However, Hydro Tasmania considers that information and offers may have been exchanged before such a date which would be relevant to an arbitration. If there is a possibility that the inclusion of such a date precludes the provision of such material to an arbitrator, then Hydro Tasmania considers that the date should not be included.