



5 October 2012

Australian Energy Market Commission
PO Box A2449
Sydney South NSW 1235
Via web portal

Comments on GRC0012 Reference service and rebateable service definitions, Consultation Paper, 13 September 2012

Dear Commissioners

The Australian Pipeline Industry Association (APIA) submits the following comments on the Commission's 13 September 2012 Consultation Paper on the Reference Service and Rebateable Service Definitions Rule Change Proposal.

While this submission does not deal with the specific aspects of the proposed rule change outlined in the consultation paper, APIA considers it important to make submission on three key issues:

1. Firstly, the process the Commission is following with the proposed rule change is a departure from the normal rule change process set out in the National Gas Law (NGL) and not only sets a worrying precedent but more importantly, may not be the correct process to be followed under the NGL in relation to rule change proposals.
2. Secondly, even if the first issue is not accepted, the proposed rule change outlined in the Consultation Paper is not a complete preferred rule change. It does not address all required matters to give effect to the change – in particular it fails to

outline the transitional arrangements necessary to understand how it will apply to the Victorian declared transmission system.

3. Thirdly, APIA is concerned with the retrospective effect of the proposed rule change, if implemented.

These points are important because they run the risk of undermining investor confidence in the framework of economic regulation under the NGR.

Process for making the proposed Rule

The Commission has announced, by means of its Consultation Paper dated 13 September 2012, an intention to fundamentally change its position on the proposal to change the definition of “rebateable service” to that stated in its Draft Determination.

This effectively amounts to a new proposed rule change.

APIA considers that such a fundamental departure from a position outlined in a draft determination cannot be instigated through a consultation paper nor can it be implemented without the Commission undertaking the level of consultation envisaged for a proposed rule change.

There is a real risk that the proposed process is flawed.

In the Draft Rule Determination, the Commission considered that a change to the rebateable service definition as proposed by the AER would not be in the long term interests of consumers, noting in particular the increased risk to new investment. The Commission concluded:¹

The Commission considers that the proposed rule may lead to an increased risk to investment which would not be conducive to efficient investment in natural gas services and would not be in the long term interests of consumers. This is because there is potential to change the risk/reward relationship in existing bilateral contracts if the proposed change to the rebateable service definition is accepted.

In the Consultative Paper the Commission is now proposing a significant change to the rebateable service definition that applies only to pipeline services provided by means of the Victorian declared transmission system (DTS). This new definition would remove the existing limitation on rebateable services that the market for the service is substantially different from the market for any reference service.

However, it is not clear, from the content of the Consultation Paper, how the Commission has reconciled this new approach with its earlier view that changing the rebateable service definition would not be in the long term interests of consumers.

¹ AEMC, Draft Rule Determination: National Gas Amendment (Reference service and rebateable service definition) Rule 2012, 15 March 2012, p 28

Given the significant variation to the more preferable rule that was set out in the Commission's Draft Rule Determination, APIA considers that the Consultation Paper issued by the Commission in effect replaces the Draft Rule Determination published on 15 March 2012 (at least in so far as the definition of the rebateable service is concerned). APIA is strongly of the view that the Commission must, as a matter of law and of good practice in rule development and making, follow the provisions of section 308 on the NGL.

APIA notes the provisions of section 312 of the NGL but submits that to interpret and apply this provision to enable the Commission to make an alternate preferable rule in the final determination that is a substantial departure from the preferable rule outlined in the draft determination is inconsistent with good practice in market regulation. If a substantial departure is proposed then a new draft determination should be published, in line with the provisions of section 312 of the NGL.

Further APIA submits that following the provisions of section 308 would ensure there is adequate opportunity for stakeholder engagement in the Commission's development of the applicable rules.

Incomplete Proposed Rule

The Commission's Consultation Paper does not contain a complete proposed rule change as it fails to include the drafting of transitional arrangements that may be required. In section 5.3 the Commission identifies that the AER has requested inclusion of:

a transitional provision in making the final rule that deals with the operation and application of the final rule to access arrangement reviews already in progress.

APIA notes that neither the AER nor the Commission has provided any drafting for the transitional provisions. Possible transitional arrangements of this type were not identified as part of the draft determination or the Consultation Paper.

To the extent that the Consultation Paper does not set out a draft of the rule which the Commission intends to make (including any rules dealing with transitional arrangements), the Consultation Paper does not constitute a "complete" draft rule determination, as required by section 308 of the NGL.

A rule dealing with transitional issues is of the same importance as any rule the Commission makes – transitional provisions have substantive operation and it is incorrect to treat them as somehow ancillary or of secondary importance to the making of any other rule.

It is not sufficient for the Commission to simply publish a Consultation Paper identifying matters which it may seek to address in a final rule. If the Commission intends to address entirely new matters in a final rule, including possible transitional provisions that would deal with the operation and application of the final rule to access arrangement reviews already in progress, then it is required to publish a draft of the rule which it intends to make, for public consultation.

Potentially retrospective nature of the Commission's proposed Rule

APIA is also concerned by the Commission seemingly contemplating, in the Consultation Paper, the making of transitional provisions that would purport to deal with the operation and application of the final rule to access arrangement reviews already in progress.

APIA submits that any such provisions run the risk of being beyond the power of the Commission. This is because Schedule 2, Clause 43(1) of the NGL precludes the application of an amended definition of Rebateable Service to an access arrangement review which in the case of the DTS has not only "begun" but in the case of the DTS, has passed the draft decision stage.

Even if the Commission considers this provision of the NGL does not limit its powers in relation to the proposed alternative rule, APIA submits that a significant regulatory risk is created if rule changes were to apply with retrospective effect, particularly when:

- It affects rights or liabilities accrued under the previous operation of that rule; and
- a service provider has already prepared and submitted its revised access arrangement proposal on the basis of the then prevailing rules. This is exacerbated when the NGL and NGR do not give the service provider the automatic right to make submissions to the regulator as part of the access arrangement approvals process on the issue of the effect of the rule change.

In summary, APIA considers that the scope for retrospective rule making could undermine investor confidence and seriously reduce the attractiveness of investing in Australian infrastructure. It is critical therefore, that any changes to the Rules should be limited to prospective application and be implemented by following the process envisaged under the NGL.

If you would like further information please contact me on (02) 6273 0577 or at sdavies@apia.asn.au.

Yours sincerely



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