



ICRC

Independent Competition and Regulatory Commission

Decision

Assessment of Associate Contract between ActewAGL Distribution and AGL Wholesale Gas Limited

March 2004

The Independent Competition and Regulatory Commission (the commission) was established by the *Independent Competition and Regulatory Commission Act 1997* to determine prices for regulated industries, advise government about industry matters, advise on access to infrastructure and determine access disputes. The commission also has responsibilities under the Act for determining competitive neutrality complaints and providing advice about other government-regulated activities.

The commission has three commissioners:

Paul Baxter, Senior Commissioner
Robin Creyke, Commissioner
Peter McGhie, Commissioner.

Submissions, correspondence or other enquiries may be directed to the commission at the addresses below:

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For further information on this or any other matters of concern to the commission please contact Ian Primrose, Chief Executive Officer, on 6205 0779.

Contents

Introduction.....	1
Summary of Events	2
Application of the National Third Party Access Code for Natural Gas Pipeline Systems	4
Associate Contracts.....	4
Approval of Relevant Regulator Required for Associate Contracts	4
Public Consultation.....	5
Amendments to proposed Distribution Services Agreement	5
Substantial lessening, prevention or hindrance of competition in the market	5
Decision	7
Appendix A – Proposed Distribution Services Agreement	8

Introduction

Under section 7.1 of the *National Third Party Access Code for Natural Gas Pipeline Systems*, a service provider must not enter into an Associate Contract as defined in the Code without first obtaining the approval of the relevant regulator. ActewAGL Distribution has submitted a proposed Associate Contract to the Independent Competition and Regulatory Commission (the commission) for approval. The proposed contract is a Distribution Services Agreement for the provision of gas transportation services to AGL Wholesale Gas as part of interim gas supply arrangements introduced to supplement the supply of natural gas to east coast markets following the January fire at the Moomba gas plant in South Australia and resultant constraints on production and supply.

Services under the proposed contract would be supplied at a special tariff calculated with these particular circumstances in mind, and not at the Reference Tariff under the current Access Arrangement for ACT, Queanbeyan and Yarrowlumla. Where the contract is for the supply of services other than at the Reference Tariff, section 7.3 requires the commission to conduct such public consultation as it considers appropriate.

On 4 February 2004 the commission released an issues paper inviting interested stakeholders to provide comments on the issue of whether the proposed Associate Contract would have the effect of substantially lessening, preventing or hindering competition in a market as contemplated by section 7.1 of the *National Third Party Access Code for Natural Gas Pipeline Systems*. No submissions were received in response to the issues paper, and the commission did not conduct public hearings in relation to this matter.

The commission does not consider that the contract is likely to have the effect of substantially lessening, preventing or hindering competition in a market. However, the commission has decided to approve the proposed Associate Contract on a conditional basis, to ensure that the provision of services under it are clearly and visibly within the limits of the supplementary supply arrangements necessitated by the fire at Moomba and the subsequent shortages.

Summary of Events

An explosion and subsequent fire occurred at the Moomba gas plant in the early hours of 1 January 2004, severely reducing the quantity of natural gas available from that plant for transmission to New South Wales, the Australian Capital Territory and South Australia.

The governments of New South Wales and South Australia, on 5 January 2004, announced the formation of an intergovernmental taskforce (the taskforce), comprising senior officials from each State, which would meet daily to analyse each state's gas requirements and apportion supplies from the Moomba field to minimise disruption in each state.

Supplementary supplies of gas to the New South Wales market were secured from Victoria through transmission on the Duke Eastern Gas Pipeline (EGP) and via Culcairn on the East Australian Pipeline (EAPL) system. The configuration of the interconnection between the EGP and the AGL network at Horsley Park in Sydney prevents that pipeline from delivering sufficient quantities of gas to meet the full demand of that network.

The opportunity to utilise transportation through the ACT to increase the quantity of Victorian gas available from the EGP was recognised during evaluation of supply options for New South Wales and was communicated to and endorsed by the taskforce. The proposed interconnect service will increase the amount of gas physically available from the EGP by transporting additional gas from Hoskinstown, through ActewAGL's network to Watson, and then through the EAPL transmission system for delivery into the AGL network at Wilton (see Appendix B). AGL Wholesale Gas has subsequently negotiated with Duke, EAPL and ActewAGL Distribution to establish arrangements to transport gas to the Sydney market from the EGP via the ActewAGL network.

On 30 January 2004 ActewAGL Distribution submitted for the commission's approval a Distribution Services Agreement between itself and AGL Wholesale Gas which specifies the particular terms and conditions of proposed services in response to the supplementary gas supply arrangements endorsed by the task force. That Agreement is Appendix A to this report. Terms not specifically covered by the Distribution Services Agreement will be as set out in the Access Arrangement for ACT, Queanbeyan and Yarrowlumla in January 2001 (the Access Arrangement).

At the time the proposed associate contract was submitted to the commission, the balance between supply and demand across South Australia, New South Wales and the ACT had not required the additional EGP gas to be transported through the ActewAGL network. The supply shortage, which began on 1 January 2004, was expected to last for some months. In a news release dated 23 February 2004, Santos advised that the Moomba gas supply capacity now exceeds current South Australia and New South Wales customer requirements. This excess capacity has allowed reinjection of processed gas not needed by customers into underground storage, for future use during high demand periods. The reinjection operation, which is replacing gas from storage used during the plant shut down, is typically undertaken at this time of year ahead of the peak winter demand period.

While there are no immediate supply constraints affecting the New South Wales market, the commission has noted that as the weather cools and demand increases the need to supplement supply may still arise. In the circumstances the commission

considers it prudent to move forward with the approval process so that arrangements are in place should the need arise.

Application of the National Third Party Access Code for Natural Gas Pipeline Systems

The *Gas Pipelines Access Act 1998* (ACT) gives effect in the Territory to the *National Third Party Access Code for Natural Gas Pipeline Systems* (the Gas Code) and nominates the Independent Competition and Regulatory Commission (the commission) as the local regulator in respect of gas distribution pipelines in the Australian Capital Territory.

The segment of pipeline through which gas would be transported under the proposed Distribution Services Agreement is subject to the current Access Arrangement for ActewAGL Distribution System in ACT, Queanbeyan and Yarrowlunla, approved in January 2001.

Section 1.20 of the Gas Code relevantly provides that a pipeline or proposed pipeline, which is subject to an Access Arrangement, is covered from the date that the Access Arrangement becomes effective until the expiry date of the Access Arrangement.

The relevant segment of pipeline is therefore 'covered pipeline' for the purposes of the Gas Code.

Associate Contracts

Section 10.8 of the Gas Code defines an "Associate Contract" as:

- (a) a contract, arrangement or understanding between the Service Provider and an Associate in connection with the provision of a service; or
- (b) a contract, arrangement or understanding between the Service Provider and any person in connection with the provision of a Service which provides a direct or indirect benefit to an Associate and which is not an arm's length transaction.

The proposed Distribution Services Agreement is an agreement for the provision of gas transportation services between ActewAGL Distribution (the Service Provider) and AGL Wholesale Gas. AGL Wholesale Gas is a wholly owned subsidiary of the Australian Gaslight Company, which is a joint venture partner in ActewAGL.

The commission is satisfied on this basis that the Distribution Services Agreement submitted by ActewAGL Distribution is an Associate Contract for the purposes of the Gas Code.

Approval of Relevant Regulator Required for Associate Contracts

Section 7.1 of the Gas Code relevantly provides that a Service Provider must not enter into an Associate Contract without first obtaining the approval of the Relevant Regulator. The Relevant Regulator must not refuse to approve a proposed Associate Contract unless it considers that the contract would have the effect, or would be likely to have the effect, of substantially lessening, preventing or hindering competition in a market.

Public Consultation

If an Associate Contract provides for the supply of Services at the Reference Tariff the Relevant Regulator may make a decision under section 7.1 without conducting public consultation. However, in all other cases section 7.3 requires the Relevant Regulator, prior to making a decision under section 7.1, to conduct such public consultation as it considers appropriate. In conducting public consultation the Relevant Regulator may, but need not, make public the content of part or all of the Associate Contract. The Relevant Regulator must not make public any part of the Associate Contract which the Service Provider claims is confidential or commercially sensitive except where the Relevant Regulator is of the opinion the disclosure of the part of the Associate Contract concerned would not be unduly harmful to the legitimate business interests of the Service Provider or a User or Prospective User.

Under the Distribution Services Agreement proposed, ActewAGL Distribution would provide the gas transportation services to AGL Wholesale Gas at a rate lower than the reference tariff. The tariff proposed is special tariff calculated specifically in response to the supply shortage and the resultant need for supplementary gas supply arrangements, and will apply only to services supplied under this Distribution Services Agreement.

In keeping with its obligations under the Gas Code, the commission released an issues paper on 4 February 2004 seeking comment on the potential for the proposed associate contract to substantially lessen, prevent or hinder competition in the market.

No submissions were received in response to the issues paper. The commission did not conduct public hearings in relation to this matter.

Amendments to proposed Distribution Services Agreement

Since the release of the issues paper, the proposed agreement has been amended as outlined below.

Clause 4 (Transportation Service) of the proposed agreement, as submitted to the commission, provided that "all ACT load has priority over the services to be provided to AGL Wholesale under this agreement". This clause has been qualified to the effect that ACT load will have priority unless the ACT Government makes a direction to the contrary, in keeping with the commitments it has made to the inter-governmental taskforce.

At the commission's suggestion clause 2 (Extended Term) of the Agreement has been amended to clarify that the term of the Agreement may be extended by agreement of the parties for a further three months only where the extension is on the same terms as the original agreement.

Substantial lessening, prevention or hindrance of competition in the market

Under section 7.1 of the Code the commission must not refuse to approve a proposed associate contract unless it considers that the contract would have the effect, or would be likely to have the effect, of substantially lessening, preventing or

hindering competition in a market.

The commission makes the following observations in relation to the proposed Distribution Services Agreement:

- The proposed agreement is for a limited term only, and exists for the sole purpose of facilitating supplementary gas supply arrangements necessitated by the fire at the Moomba gas plant and the resultant constraints on production and supply of gas to New South Wales. Once supplies to New South Wales from the Moomba Plant are fully and reliably restored, AGL Wholesale must, under the terms of the Agreement, cease to use the service.
- ActewAGL Distribution retains the right to terminate the agreement at its sole discretion if at any time it considers that the provision of services under the Agreement has, or may have, an adverse impact on ActewAGL's users, end customers or the network.
- There is currently no competition for gas transportation services over the section of pipeline affected by the Agreement. The relevant area of pipeline is part of the ACT gas distribution network.
- The tariff proposed under the Distribution Services Agreement is \$0.085 per gigajoule. This is considerably lower than the current reference tariff for distribution services along the same segment of pipeline. It should be noted, however, that it is a tariff applied in a limited, specific circumstance to a pipeline that is not subject to competition.

The tariff proposed was developed specifically in response to the extenuating circumstances surrounding the current supply shortage, and was calculated by assessing the avoidable operating costs. The method of calculation was agreed between the parties as an expeditious method of arriving at a special tariff for the supplementary supply arrangements, as deemed reasonable in the circumstances, and should in no way be taken as a precedent for the calculation of any other tariff relating to the gas network.

The resultant tariff is consistent with that charged for transport for an equivalent distance through the Eastern Gas Pipeline.

While not an issue specifically contemplated by the Gas Code, in addressing the proposed tariff the commission has given due consideration to its potential impact upon ACT consumers. This is not, however, an issue contemplated by the Gas Code

Decision

Having considered the circumstances the commission is of the opinion that the proposed Distribution Services Agreement would not have the effect, nor would it be likely to have the effect, of substantially lessening, preventing or hindering competition in a market.

The decision of the commission is therefore to approve the Distribution Services Agreement. This approval is subject to the following conditions, which are contemplated by the agreement, and relate to the special circumstances in which this contract has been submitted:

1. The commencement and termination of the agreement, insofar as they are determined by the full and reliable restoration of supply to New South Wales from the Moomba Plant, will be determined on the advice of the Department of Treasury as to the status of supply and the ongoing need for services to be available under the agreement.
2. Services supplied under this Agreement are strictly limited to those necessitated by the shortage of supply to New South Wales from the Moomba plant as a result of the January fire. This agreement will have no application to any subsequent arrangements, or to any future, unrelated supply shortages.

Appendix A – Proposed Distribution Services Agreement

The following information has been extracted from the Distribution Services Agreement submitted to the commission by ActewAGL Distribution on 30 January 2004.

Parties

The parties to the Agreement will be:

AGL Wholesale Gas Limited (ABN 26 072 948 504)
111 Pacific Highway, North Sydney 2059

ACTEW Distribution Limited (ABN 83 073 025 244) and AGL Gas Company (ACT) Pty Limited (ABN 24 008 552 663) trading as **ActewAGL Distribution** (ABN 76 670 568 688)
ActewAGL House, 221 London Circuit, Canberra ACT 2601

Initial Term

The Agreement will commence on the date it is approved by the commission and, subject to the terms of the Agreement, will continue for a period of three months from the commencement date.

Extended Term

Subject to the agreement of the parties, the term may be extended for a further three months on the same terms as this agreement.

Special Purpose

The parties acknowledge that the sole purpose of this agreement is to supplement gas supplies to New South Wales as a result of the supply shortage following the January fire at the Moomba Plant. Once New South Wales supplies from the Moomba Plant have been fully and reliably restored, AGL Wholesale must cease using the service.

ActewAGL may terminate this agreement at any time if, in its sole discretion, it considers that providing the service has, or may have, an adverse impact on ActewAGL, its users, end customers or the network.

Transportation Service

On each day of the Agreement, ActewAGL will use reasonable endeavours to:

- (a) Receive gas at the Receipt Point up to the MDQ; and
- (b) Deliver gas to the Delivery Point up to the MDQ

("the **Transportation Service**")

AGL Wholesale acknowledges that ActewAGL's ability to provide the Transportation Service may be limited by capacity or operational constraints and accordingly:

- (a) subject to any applicable law (including a direction from the ACT

Government) all ACT load has priority over the services to be provided to AGL Wholesale under the Agreement; and
(b) the Transportation Service will be provided on an interruptible basis.

Maximum Daily Quantity (“MDQ”)

Under the Agreement the maximum quantity of gas which ActewAGL Distribution would be obliged to transport and deliver to the Delivery Point on any day (excluding overruns) would be 20TJ.

Maximum Hourly Quantity (“MHQ”)

Under the Agreement the maximum quantity of gas which ActewAGL Distribution would be obliged to transport and deliver to the Delivery Point in any hour (excluding overruns) would be 1250 GJ.

Receipt Point

The Receipt Point, being the point at which gas will be received into the network under the Agreement, will be the Hoskinstown Metering Station.

Delivery Point

The Delivery Point, being the point at which gas is withdrawn from the network under the Agreement, will be the Watson Metering Station.

Tariff

For the purposes of the emergency supply arrangements governed by this Agreement, ActewAGL Distribution has developed an indicative tariff of \$0.085 per gigajoule of gas delivered to the Delivery Point (exclusive of GST) under this Agreement.

This tariff is consistent with that charged for transport through the Eastern Gas Pipeline.

Withdrawals

The quantity of gas withdrawn at the delivery point will be determined by measurement at Watson and/or as otherwise deemed by ActewAGL.

Metering Charge

AGL Wholesale must reimburse ActewAGL for any reasonable costs it incurs in adapting any metering or associated equipment to enable the carriage and/or to determine the quantities of gas exiting the network under this agreement.

Payment terms

ActewAGL will use reasonable endeavours to invoice ActewAGL on a monthly basis. AGL Wholesale must pay all invoices within 14 days. ActewAGL may invoice AGL Wholesale on the basis of estimated metering data.

GST

If GST is imposed on any supply of any services provided by ActewAGL under this Agreement, then subject to ActewAGL issuing a tax invoice, AGL Wholesale must pay, in addition to any GST exclusive consideration payable for that supply, an amount calculated by multiplying the value of the GST exclusive consideration (without deduction or set-off) by the prevailing GST rate.

Liability

To the maximum extent permitted by law, ActewAGL's liability in respect of any supply made pursuant to this agreement is limited to the resupply of the service or the payment of the costs of resupplying the service.

Operational Balancing

Inputs will be deemed to be the quantity withdrawn at the delivery point. Nominations will be in accordance with a nomination process as agreed with ActewAGL from time to time.

Other terms and conditions

The terms and conditions applying to the Through-Put Service in the ActewAGL Access Arrangement for ACT, Queanbeyan and Yarrowlumla dated 17 January 2001, apply to the extent that they are not inconsistent with the terms of this agreement.

AGL Wholesale must ensure that it has all relevant licenses and authorisations (if any) and meet all obligations under relevant law.

Term of Agreement

ActewAGL proposes to offer the Hoskinstown to Watson emergency interconnect service for the duration that assistance is or may be required for the delivery of gas into the Sydney market as a result of the current Moomba Gas shortage affecting NSW, ACT and SA. Once Moomba supplies have been restored to normal levels the service will be terminated.