



Todd Energy

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Gas Pipelines Inquiry
The Commerce Commission
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Cross-submission in response to Gas Pipelines Inquiry Conference

Introduction

1. Todd Petroleum Mining Company ("TPM") notes that Contact Energy Limited ("Contact") has taken the position that the Commission should conduct an inquiry into the proposed open access regime for the Maui pipeline. In particular, Contact submits that the type of carriage offered under that regime is relevant to the Commission's gas pipelines inquiry.
2. For the reasons set out in the first section of this submission, TPM believes that the Commission does not have jurisdiction to consider open access issues as part of this inquiry and, even if it did have the jurisdiction, it would be inappropriate for the Commission to do so.
3. Shell and OMV have written to the Commission, by letter dated 13 August, about why the proposed form of carriage is to be preferred to that advocated by Contact. TPM agrees with the contents of that letter.

Summary

4. In TPM's view, open access matters do not fall within the terms of reference of the current inquiry and the Commission does not have the jurisdiction to consider open access issues under Part IV of the Act.
5. The Maui Mining Companies (MMCs) are presently, and have for some considerable time been, consulting with industry about open access on the Maui onshore pipeline. That process, and the substance of the proposed regime, is subject to oversight by the Minister of Energy. That is a process established specifically to deal those issues and it is unnecessary for the Commission to also consider them as part of the gas pipelines inquiry.
6. Open access issues were raised by Contact for the first time at the conference, following publication of the Commission's Draft Report. If the Commission now gives consideration to those issues, the MMCs will not have been given adequate notice and

will not have had adequate opportunity to respond to them. Natural justice issues will inevitably arise.

7. In any event, the form of carriage proposed by MMCs is the preferred carriage regime for Maui open access, taking into account factors such as the Maui Gas Contract legacy rights, the tight implementation schedule and available pipeline capacity.

Background

8. As the Commission is aware, the Maui Mining Companies, through Maui Developments Limited, are in the process of implementing an open access regime for the Maui Pipeline. In the development of the proposals, MDL has been mindful of the policy objectives of the Crown in creating a non-discriminatory, diverse and competitive gas supply industry, while not impinging upon the legacy rights of the Crown under the Maui Gas Contract. Following discussions between the industry and the Minister of Energy, a timetable has been agreed, with the objective of delivering a fully functioning open access regime by March 2005, with the additional objective of allowing some limited early access by the end of October 2004.
9. Despite this challenging timeframe, MMCs have undertaken extensive consultation with industry on its proposals. This work is on-going and is under Ministerial scrutiny through the appointment of an Independent Expert.

Commission's jurisdiction to consider open access issues

Scope of the Gas Pipelines Inquiry

10. The scope of the gas pipelines inquiry is set by the terms of reference in the Minister's letter to the Commission dated 30 April 2003 and the Commission's powers under the relevant sections of the Act. The Minister has requested the Commission's advice as to whether gas pipeline services should be controlled under section 52 of the Act. The Commission is limited to considering whether or not the provision of pipeline services should be controlled, having regard to the four matters listed in the letter of request. TPM does not believe that the scope of the inquiry extends to a consideration of whether any person should be required to provide pipeline services. Accordingly, Contact's submissions on the proposed open access regime are not relevant to the current inquiry and the Commission should not take them into account.
11. There is no power under Part 4 of the Commerce Act to require open access to any particular pipeline. This can be taken both from the plain wording of Part IV and its inadequacy in addressing access issues.
12. Section 70 allows the Commission to grant authorisations in respect of any component of "prices, revenues, or quality standards" that apply in respect of the controlled services. Contact suggests the term "quality standards" is wide enough to encompass authorisations provided for open access to gas pipelines. TPM refutes this suggestion.

13. The power to grant authorisations in respect of “quality standards” was inserted by the Commerce (Controlled Goods or Service) Amendment Act 2001. Before this amendment, the terms of an authorisation under section 70 were limited to the maximum, actual or minimum price of the goods or services. The aim of the amendment was to give the Commission greater flexibility to impose modern regulatory methodologies such as CPI-X and sliding scale regulation. The reference to “quality standards” was included because of the relationship between price and quality. It allows the Commission to prevent a controlled firm decreasing its costs to maintain its margin by providing goods and services of a lesser quality. It was not intended to give the Commission power to compel access to services.
14. That interpretation of section 70 is supported by section 55, which provides that no person can supply a controlled good or service other than in accordance with an authorisation. Sections 55 and 70 cannot be read consistently if an authorisation under section 70 could extend beyond the terms of supply to requiring actual supply of a controlled good or service.
15. Further, if Part IV of the Act was intended to apply to access issues then it would need to include a detailed access code similar to that in the Telecommunications Act 2001 and Part IIIA of the Australian Trade Practices Act 1974. The Act simply does not have the machinery required to provide for access and Parliament did not intend it to be used as a de facto regulatory access regime.
16. The inquiry’s terms of reference also preclude examination of open access issues. The Minister has only requested the Commission to consider whether an Order in Council can be made under section 53 and to provide specific advice on:
 - whether gas pipeline services may be controlled in terms of section 52 of the Act;
 - the methodology that the Commission considers appropriate for valuation of pipeline assets for the purpose of its advice on the matters covered in [that] letter;
 - the net benefits to the public of control; and
 - any other matter that the Commission may think relevant to a decision on whether control should be introduced.
17. There is no express reference to open access in the Minister’s letter requesting the inquiry and a consideration of open access issues cannot be implied into any of the above items. Although the Minister’s fourth bullet point appears to be wide, the Commission is only able to consider matters relevant to a decision on whether control should be introduced. There is no power under the Act to require open access, so it is not relevant to the control decision. The fourth bullet point must also be read ejusdem generis with the other matters in the list. Each of the three preceding matters relates to the control of gas pipelines under Part IV of the Act. Open access issues do not so relate, and are

therefore not within the terms of reference prescribed by the Minister.

Open access regime is being considered in other forum,

18. Development of the Maui open access regime is being progressed in another forum, which is subject to Ministerial oversight.
19. The open access regime has been developed by the Maui Joint Venture parties over the last 2 years. The Government has expressed an interest in the matter, including in its "Government Policy Statement: Development of New Zealand's Gas Industry". The Minister of Energy has appointed Mr Ross Cartey from PricewaterhouseCoopers, Australia, to oversee the Government's interest. Further, the Mining Companies have engaged Mr Cartey to sit on their open access steering committee, as an independent expert. His role in the first respect is to advise the Crown on whether the proposed regime meets the Government's policy objectives, including of providing non-discriminatory access to all shippers. The appointment of an independent expert allows the Minister to monitor development of the open access arrangements and alert MDL to any aspects of the proposed regime that may be inconsistent with Government policy.
20. The Open Access Steering Committee has sought input on its proposal from the industry. Submissions have been received from a number of parties, including Contact. MDL has responded to those submissions in some detail and will, of course, be taking the matters raised in those submissions into account in finalising the terms of the open access regime. Further consultation is scheduled.
21. In addition, the Gas Industry Steering Group ("GISG") established by the gas industry is a body mainly of Chief Executives that has been working on industry governance matters over the last approximately 12 months. The Commission will be aware that, after considerable work, the GISG recommended to the Minister of Energy that a co-regulatory model be adopted for the gas industry, and that the Minister accepted that recommendation. The model accordingly forms part of the Electricity and Gas Industries Bill, which is currently before Parliament.
22. As the second stage of its work programme, the GISG will be examining specific work streams relating to industry governance, including pipeline access matters. The GISG proposes to develop open access proposals. Such proposals will be placed before the Minister of Energy for his consideration and either acceptance or not.
23. In summary, open access matters are being thoroughly reviewed by the Maui Open Access Steering Committee. The Gas Industry Steering Group is likely to consider access issues generally for the industry. Given the considerable work being done in those two fora, and given the Ministerial oversight in each case, there is no need for the Commission to consider these issues in the context of the gas pipelines inquiry.

Natural justice

24. TPM records that the Commission did not raise open access issues in its Draft Report and has not otherwise notified TPM that these issues are under consideration. Open access issues have only been raised by Contact at a late stage of the inquiry. If the Commission considers open access issues in its final report, that will inevitably raise issues in relation to the Commission's obligations of natural justice.
25. The Commission has not given TPM or other parties to the inquiry any notice of intention to consider open access issues, nor any indication of the scope of the material that it would take into account as part of any such consideration. Given the considerable uncertainty surrounding these issues, TPM has been deprived of opportunity to make full submissions on all potential issues under consideration.

Maui Open Access Regime – proposed carriage v contract carriage

26. In their letter, Shell and OMV have attempted to provide the Commission with general information about the form of carriage proposed for Maui open access. TPM agrees with the contents of that letter. However, that is not a comprehensive submission on the open access issues raised by Contact. Without knowing further details of the issues that might be under consideration, TPM is unable to respond to them in full.

Yours sincerely



Chris Hall

General Counsel