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Dear Sir/Madam

Proposed National Gas Law (NGL) Response to Exposure Draft

Thank you for the opportunity to comment on the exposure draft of the National Gas Law. CitiPower and Powercor Australia (**the businesses**) are Victorian electricity distributors which will be affected if a number of issues signalled in the exposure draft of the NGL are adopted by the MCE and flow through to the National Electricity Law and Rules.

Section 24 'Propose- respond model not to apply under this Rule unless Rules provide otherwise'

- 1 The drafting approach adopted in section 24 NGL may be misconstrued as being indicative of a Parliamentary intention that, if Rules are otherwise silent, 'consider determine' is the default approach. The inclusion of this specific presumption in the NGL against propose-determine also may influence the AEMC against adopting the propose-respond regulatory decision making model in relation to Rule change proposals.
- 2 This is inconsistent with the MCE's expressed intention (page 18 MCE Response to Expert Panel Report) to not specify any 'global presumption' for regulatory decision making and instead to allow a 'fit for purpose' approach to be adopted under the applicable Rules. We therefore submit that section 24 NGL needs to be redrafted so it is neutral as between regulatory decision making approaches in accordance with the 'fit for purpose' approach. Suggested wording for section 24 NGL is as follows:

'Nothing in this Law is to be taken to require that the AER apply a particular approach to regulatory decision making in:

- (a) an access arrangement final decision,
- (b) limited access arrangement, or

(c) any aspect or element of a access arrangement or limited access arrangement, unless the Rules specify otherwise.'

- 3 In addition the express power for the AER to substitute its own 'reasonable assumptions' for any assumption made by a service provider in its access arrangement (sections 170 (3)(c)(i) & 178(3)(a) NGL)) has the effect of mandating the 'consider-determine' regulatory decision making model, irrespective of what may appear in the Rules. This power is given to the AER without any associated requirement to first find that the assumption made by the service provider was 'unreasonable', flawed or deficient.
- 4 With regard to the many aspects of an access arrangement that are founded upon 'assumptions', this power would allow the AER to determine the form of the access arrangement without reference to the proposal put forward by the service provider. Further, as this right is included in the NGL it will override any specific adoption of a 'propose-respond' approach that may otherwise occur in the Rules. This is clearly contrary to the MCE's intention not to prescribe a regulatory decision making model in the NGL and the businesses submit that these two sub-sections should not be included in the NGL.
- 5 The amendments we suggest in relation to section 24, 170 and 173 NGL will avoid any single overriding regulatory decision making approach being applied and meets the expressed intention of the MCE in accordance with the recommendation of the Expert Panel.

Sections 272 – 292 NGL 'Merits Review'

- 6 The proposed form of the merits review in the NGL contains a number of features that have not previously been consulted upon. The overarching concern held by the businesses upon review of this draft is that, while the need for merits review in the context of a best practice regulatory regime has been acknowledged by the MCE, the benefits of a merits review regime are substantially undermined by the inclusion in the NGL of every possible form of limitation of that right.
- 7 Obviously a right of review that cannot be accessed due to technicalities, even where there may be a clear example of regulatory error, is not going to achieve the benefits identified in the MCE's May 2006 decision to adopt a limited merits review regime. In particular we consider that the extent of the limitations around this right of review are inconsistent with the MCE's objectives of:
- maximising accountability,
 - maximising regulatory certainty, and
 - achieving the best decisions possible (page 3, MCE May 2006 Decision).
- 8 In essence the merits review provisions as drafted in the NGL run the risk of being a 'Claytons' merit review process, providing only the appearance of a substantive right for a service provider/asset owner to have a regulatory decision transparently reviewed for error by an independent arbiter. Aspects of the drafting of the merits review provisions that give rise to this concern are addressed below.

Definition of 'Reviewable Regulatory Decision'

- 9 The NGL defining what is a 'reviewable regulatory decision' by reference to a regulatory decision that is prescribed as such under yet to be passed regulations is repugnant to the concepts of accountability and regulatory certainty. In essence under this model no regulatory decision of the relevant Minister, the Commonwealth Minister, the AEMC, or AER made under the NGL is reviewable, unless a regulation under the NGL has first been

enacted expressly making it reviewable. In addition, such regulation can itself be amended with regard to particular decisions and therefore a right of review that may have existed can be selectively withdrawn virtually at any time.

- 10 The benefits that derive from a right of merits review are founded in the fact that there is a degree of certainty and universality about its application. This is why such rights are commonly in legislative instruments that require a Parliamentary enactment to remove or vary them. To include a right of review in the NGL, but with access to this right of review being subject to regulation, is both unnecessary and inappropriate.
- 11 It is unnecessary because the NGL already includes a number of other significant limitations on the right to appeal, in particular the need to seek leave to appeal from the Tribunal as well as meeting materiality thresholds. Further, successfully pursuing an appeal depends upon making out one of the grounds of appeal, this should always be the focus for the Tribunal and not whether various technical requirements have been met in order for the review process to apply.
- 12 It is inappropriate because making the right of appeal subject to regulatory discretion unacceptably removes regulatory certainty, reduces the incentive for the decision maker to make robust defensible regulatory decisions and has the potential to avoid a decision maker being held accountable for flawed regulatory decision making.

Section 275 NGL - Materiality Thresholds

- 13 We consider that a financial materiality threshold is not appropriate and, if one is to be applied, that a threshold of \$5 million or 2% of annual regulated revenue is too high, as it will exclude most regulatory decision making, except 5 yearly price reset determinations. The Businesses suggest that the requirement that the Tribunal not grant leave to appeal 'unless it appears to the Tribunal that there is a serious issue to be determined' is a sufficient threshold to prevent frivolous or vexatious appeals and the remainder of section 273 NGL (which seeks to apply specific financial thresholds to each 'issue to be determined') be deleted.
- 14 If the MCE determines to include a financial threshold it should be substantially reduced from those proposed. These high thresholds will otherwise frustrate the stated objective of the MCE of 'encouraging best administrative decisions in all circumstances and encouraging investment in electricity and gas across those sectors by promoting confidence in the regulatory process.' (MCE Decision May 2006. In this regard we suggest a flat threshold of \$2 million would be more appropriate as applying a balance between 'encouraging best administrative decisions in all circumstances' and a justifiable *de minimus* threshold.
- 15 In addition, it is not clear to the Businesses how any monetary materiality threshold applies with regard to the ground of appeal that 'the original decision maker made more than one error of fact in its finds of fact and that those errors of fact, in combination, were material to the making of the decision' (section 278(1)(b) NGL). We understand from a recent meeting with a representative of the Victorian Department of Infrastructure, that it was intended that the \$5 million or 2% of annual revenue threshold be cumulative with regard to multiple errors of fact, when pleading this ground of review. This is logical given that this ground would probably not otherwise be possible to make out if it were necessary for each error of fact that in combination was material to the making of the decision, to show a revenue impact of \$5 million or 2% of regulated revenue. However, as currently drafted, it is not clear how such a threshold is to apply to this ground of appeal.
- 16 Removing a set monetary threshold in favour of the Tribunal being satisfied that there is a serious issue to be determined would also remove this uncertainty, however if the MCE

instead decides to retain a monetary threshold section 275 NGL should be redrafted to remove the reference to 'the issue to be determined' in 275(a) NGL and instead refer to 'the grounds of review to be determined relates to an amount...'

Section 276 NGL – Leave refusal for failure to make submission

17 The requirement that the Tribunal refuse leave to appeal where there has been a failure to make a submission on a matter, when this may arise due to a minor failing in a lengthy and complex price review process, is inappropriate and disproportionate in its effect. The regulated entity may be unaware of the significance of the particular issue until it has seen the determination that results. It would therefore be unfair to remove the right for review where a legitimate decision may have been made to not respond on an issue (where a response was not legally required) and to allocate resources to other issues. The Businesses submit that the leave requirements under section 276 NGL is inappropriate, potentially unfair and should be removed.

AER Information Gathering Powers

18 The NGL gives the AER wider information gathering powers than existed under the *Gas Pipelines Access (South Australia) Act 1997* and also wider powers than exist under the *Trade Practices Act 1974*. The proposed provisions are very broad and potentially intrusive and, even where the power is not related to potential breaches of the NGL, are akin to those powers that would be provided to an enforcement agency for investigations into criminal conduct, rather than for information gathering for an administrative regulatory purpose. The businesses believe that the AER's information gathering powers should be limited to information relating to its functions to assess and monitor access arrangements.

19 Under section 41 NGL the power conferred on the AER to obtain information is related to a 'performance or exercise of a function or power conferred upon it' under the NGL or rules. The Expert Panel expressed the view that the NGL and Rules should clearly delineate the information gathering powers of the AER, however the NGL merely gives this power in the broadest of terms and therefore does not provide any certainty to service providers.

20 We consider that these very intrusive powers should therefore be limited to:

- information the AER requires to assess access arrangements and related matters (and not all matters under the NGL and Rules); and
- information related to a contravention of the NGL or Rules.

Confidentiality

21 The breadth of the information gathering powers provided to the AER and AEMC and the ability they will have to disclose such information, even where the information does not disclose a breach of a NGL, is of concern. Rule 5 of the proposed NGR also proposes a Public Information role for the AER. This goes beyond the pure enforcement role envisaged for it under the governance arrangements of the NEM and once again gives potential for a significant breach of confidentiality in terms of information required to be supplied to the AER which could then be disseminated by it under this role.

22 Section 41(6) and 56 NGL state that it is not a reasonable excuse or grounds for a failure to comply with an information notice to claim confidentiality. While section 41(9) NGL removes any contractual or civil penalty that might be imposed on the party providing the information or document for having breached confidentiality, this does not address the broader commercial and economic consequences that may flow from such a breach of

confidence. In this regard we note that the Expert Panel noted that confidential information should be protected from disclosure, where to do otherwise would be detrimental to the interests of the service provider. We note that the ability to withhold commercially sensitive information from the public domain and competitors is a cornerstone in the competitive process and is necessary to promote efficient market outcomes in the energy sector.

23 In particular we note that it is generally accepted that:

- Businesses are entitled to be able to maintain and protect a competitive advantage; and
- by being able to maintain such a competitive advantage, innovation and efficiency are enhanced.

24 We therefore submit that the NGL should include a specific obligation for the AER and AER not to disclose information provided in response to a notice issued under section 41 or 56 NGL, where the party providing the information or document asserts that it confidential or commercially sensitive information. In addition, any decision by the AER not to maintain confidentiality, should be made a reviewable decision under the merit review provisions of the NGL.

Need to balance benefits with costs

25 We note that the Productivity Commission in its June 2004 Review of the Gas Access Regime and the Expert Panel both referred to the need to ensure that the benefits of obtaining, or collecting information, should not exceed the costs to the service provider of producing that information. The Expert Panel saw this as a necessary part of providing clarity around information requirements, while the Productivity Commission saw such obligations as potentially adding unnecessarily to service providers compliance costs.

26 Section 43(b) and 44(b) of the NGL however define both a 'general regulatory information order' and a 'regulatory information notice' as obliging the service provider, or an associate of the service provider, to 'prepare maintain or keep' information in a particular form and throughout the regulatory period. We note that the Expert Panel notes that the cost of regulatory compliance should be weighed against the benefits and that where the costs exceed the benefits the obligation may not be justifiable. In this regard we consider that this very broad power to place information reporting obligations on a service provider, or an associate of a service provider, may create a very expensive and burdensome task for the affected business. We submit therefore that these provisions of the NGL be amended to include the test that, if the costs of such information collection and supply outweigh the benefits, the obligation can be avoided or modified on cost/benefit grounds. In addition any decisions by the AER on such an application should be a reviewable decision under the merits review provisions.

27 The businesses submit that this would be consistent with the approach to such information advocated by the Productivity Commission and Expert Panel and would provide greater commercial certainty to regulated businesses and service providers, whether they are associated with the service provider or not.

Uplift of Code Terms to the NGL

28 We note that a significant proportion of gas industry regulatory obligations have been elevated from the Gas Code to the NGL. This is a significant change from the existing energy regulatory model, where industry participants, including customers, have input into Code changes as required to meet changing circumstances.

29 We understand that in general terms including a regulatory obligation in legislation is appropriate where it relates to:

- the fundamental principles and broad goals of a regulatory regime;
- rules of general application; and
- rules that require long term certainty;

30 However where a degree of flexibility its required, or the subject matter is highly technical, we submit such obligations are better located in the Rules. The Businesses therefore suggest that the extent of the uplift from Code to the NGL be subject to careful review, on an obligation by obligation basis, to ensure that including that obligation in the NGL is appropriate and does not unintentionally detract from efficient market outcomes.

Associate contracts

31 We note that the NGL regime relating to associate contracts is specific to the gas industry, as it is linked to the duties for provision of pipeline services by all pipelines other than those to which a 15 year no coverage determination applies. We however note that the broadening the of the definition of 'associate' by allowing a person or class of person to be prescribed to be an associate by regulation runs contrary to the recommendation of the Expert Panel to increase clarity and regulatory certainty. We consider that an 'associate' is adequately defined by reference to related body corporate definitions under the Corporations Act or, if the proposed NGL definition is to be used, the exception for arms length commercial contracts should be retained in order to give greater guidance and certainty to business. .

Should you have any further questions in relation to this submission, please do not hesitate to contact Rolf Herrmann on (03) 9683 4282 or email rherrmann@powercor.com.au.

Yours sincerely

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