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Ms Michelle Croker
Gas Market Development Section
National Energy Market Branch
Department of Resources, Energy and Tourism
GPO Box 1564
Canberra ACT 2601

Dear Michelle,

Consultation on National Gas (South Australia) (Short Term Trading Market) Amendment Bill 2009

1. Introduction

Jemena appreciates the opportunity to provide comments to the MCE on the National Gas (South Australia) (Short Term Trading Market) Amendment Bill 2009 (the **Bill**).

This submission has been prepared by Jemena on behalf of its owned gas network and pipeline assets; namely, Jemena Gas Networks (NSW) Ltd (**JGN**), Eastern Gas Pipeline (**EGP**) and Queensland Gas Pipeline (**QGP**).

Given the gas volumes to be transported by these assets, they will have a significant role as infrastructure facilitating the short term trading market (**STTM**). As a result, and in common with all infrastructure owners, Jemena places a high priority on the STTM being introduced with a minimum of disruption to established processes, and with a clear intention to avoid the creation of significant new and unforeseen risks to infrastructure owners.

2. Jemena issues – pipelines and networks

Jemena has some significant concerns relating to the potential for new risks and resulting costs to Pipeline Operators and Network Operators (**Operators**) to arise as a result of implementation of the STTM - including amendments to Retail Market Procedures (**Procedures**) being made to accommodate the STTM.

Jemena considers that the Natural Gas Law (**NGL**) is the appropriate place for immunity and liability limitations to be addressed. However, the exposure draft NGL is clearly deficient in its protection for Operators.

Jemena notes that Operators will not be trading participants under current market design. Both Network Operators and Pipeline Operators will, however, have obligations to process

and provide information to AEMO under the STTM or Retail Market Rules and Procedures, which will be used by AEMO to calculate trading participants' provisional or final settlements.

Information of the type being used by the STTM is currently only used for commercial purposes in the context of contracts between operators and pipeline/network shippers or users. The STTM creates a situation where this information will now mandatorily be applied for commercial purposes outside the context of contracts between Operators and shippers/users, with the following significant consequences:

- a) Operators' liabilities to their customers or other third parties could arise from data use; and
- b) there may be scope for claims to be progressed under legal avenues outside Operator's contracts.

It follows that the STTM appears to establish new and credible risks for Operators while not providing commensurate means for these risks to be mitigated under contract or offset through financial payment or reward.

We elaborate on these issues below. Sections 3 to 5 deal with network matters, while sections 6 to 10 deal with pipelines.

3. Network information quality under the STTM

The STTM will result in daily metering data that is currently provided for retail market purposes (with substantial caveats on its fitness for use) being applied for wholesale market trading. In particular:

- Network meter data will be used for high value energy trades when it has not been designed for (and may not be fit for) this purpose;
- There will be inadequate time for Jemena to verify daily measurements and estimates for release to AEMO immediately after the gas day (STTM amendments currently require this data to be provided to AEMO by 9.30 am whereas current systems provide this data by 12 am), leaving no time for review of error reports before STTM Users provisional settlement positions are used in bidding decisions for the following day; and
- The distributed nature of networks (hundreds of telemetered daily metered sites) pose real and practical operational limitations on the availability and reliability of data provided in short time windows.

4. Jemena concerns – liability and immunity

As a result of the information deficiencies noted above, Jemena has real concerns with the liability and immunity provisions of the Bill, as follows:

(a) Definition of STTM Information needs amendment

The definition of STTM Information does not clearly include information used by AEMO in STTM calculations where that information is provided to AEMO under retail market rules and procedures. Such information could be viewed as having been provided to AEMO in its capacity of a retail market operator, even though the purpose of the retail rules is only to acquire information for STTM allocations.

As a result, the immunity provided in the proposed new section 91FED is likely not to apply to Network Operators. Network Operators are the only type of participant potentially excluded from the benefit of clause 91FED in this manner. Jemena submits that this is not a reasonable or even handed outcome. Jemena therefore requests that clause (b) of the definition of STTM Information be amended as follows:

'STTM information means information that-

(a) a person gives to AEMO to comply with section 91FEA(1); or

(b) a person gives, in circumstances expressly permitted by the Rules or this Law (including pursuant to the Retail Market Procedures and National Gas Procedures), to AEMO which is used by AEMO in its capacity as operator of the short term trading market of the adoptive jurisdiction in which the person participates.'

where:

Retail Market Procedures and *National Gas Procedures* have the meanings given to those terms in the National Gas Law as amended by the National Gas (South Australia) (National Gas Law – Australian Energy Market Operator) Amendment Act 2009.

(b) No opportunity to manage risk

Jemena does not have the opportunity of managing risks arising from the nature of the data through ordinary contractual disclaimers. As a result, there is the potential for the risk position of Jemena to be unclear in respect of its provision of information to AEMO. Jemena therefore requests that a provision be added to the proposed amendments whereby a Network Operator's liability in respect of claims arising from the provision of data used in STTM operation is limited to an obligation to rectify errors and omissions in information provided, to the extent reasonably practicable.

This approach is reasonable and accords with the National Gas Objective as it:

- allows the normal commercial relationships between Network Operators and their customers to operate in an efficient way, unencumbered by risks that in bi-lateral arrangements would be unacceptable and thereby encourage inefficient levels of risk mitigation;
- enables the market to address the development of performance standards for this data (if required) through specific rules-based obligations, rather than incentivising high-cost systems changes (the costs of which will flow through to Network Users and end consumers of gas); and
- reflects the level of risk that allocation agents and other data providers commonly accept as normal prudent and efficient practice within the industry. For example, an obligation only to correct allocations is a common limitation of liability in other gas jurisdictions for allocation agents.

(c) Data standards not specified in STTM design

STTM design elected to adopt existing sources of data used by the retail market rather than incur inefficiencies to redevelop specific data systems to meet the needs of the STTM. Additionally, Jemena notes that performance requirements in relation to data quality are not clearly specified. As a result, unless network operator immunity is included, then the responsibilities of Network Operators are not clear and could result in costly disputes, with little or no gain to the long term interests of market participants as a whole, or to end users of gas.

(d) Operational assistance and potential liability

Finally, the STTM design requires Network Operators to provide certain operational assistance for Contingency Gas operation. Furthermore, various market administration triggers may hinge on a Network Operator's operational capabilities or decisions; for example, to introduce involuntary curtailment of load. It is not reasonable that a Network Operator's

decisions in this regard, made in good faith to meet technical objectives of safe and reliable supply and asset integrity, should be clouded by risk of unquantified potential financial consequences for wholesale market participants upstream of the network at the Hub. Jemena therefore requests that the Bill make provision for:

- a) protection to Network Operators for losses arising from operation of the network (except where those losses are caused by the intentional bad faith or malicious acts);
- b) liability caps (on an annual fixed monetary sum basis); and
- c) exclusion of liability for employees and directors of Network Operators.

5. Networks are facilitators only

In considering the matter of distributor liability under the STTM, it is important to note that among the various participants in the STTM, networks in particular are playing a facilitating role. Networks have no commercial arrangements with wholesale market participants and have no interests in the wholesale market from which any rewards could flow to counter increased risks. The immunity and liability amendments which Jemena has proposed above cannot therefore be seen as contradicting any normal commercial risk/reward arrangements in the wholesale market.

6. Pipeline Operators – key issues

Jemena supports the submission made by the Australian Pipeline Industry Association (APIA) on behalf of the STTM pipelines.

Many of the issues raised above for networks will also apply to pipelines. In particular:

- Information provided by pipeline operators will have wide consequences for operation of the STTM;
- Specific immunity for pipeline operators needs to be broad enough to recognise errors and omissions in calculations performed by pipeline operators, as well as in the information provided to them;
- In the absence of any prescribed performance standards to define 'negligence', reference to negligence should be deleted and replaced with 'wilful misconduct' or similar;
- The liability cap as proposed presents a high potential exposure to pipeline operators – the liability cap should be an annual limit;
- Jemena submits that exclusion of liability for employees and directors of Network Operators should apply.

We elaborate on these and other matters below.

7. Liability

In the STTM, pipeline operators will be required not only to provide information, but to collect information and to perform calculations for the operation of the market. It may be that some of this data and information will be inaccurate, erroneous or merely preliminary, due to the STTM timeline constraints.

Jemena considers that pipeline operators should have immunity from liability for these types of activities, except if they act in bad faith. 'Negligence' should not be a reason for withdrawing immunity. This term is unclear and could be held to include situations even where pipeline operators had shown an adequate duty of care in their systems and processes.

Liability cap

Jemena supports a cap on liability, but the proposed cap of \$400,000 per claimant per event is, in Jemena's opinion, far too high. There could be multiple claimants for an event lasting several days, thus creating a total liability of many millions. Jemena suggests that an annual cap not exceeding \$400,000 should apply.

Individual officers, employees and directors of pipeline operators should have the benefit of a notional \$1 liability cap. National Gas Regulations¹ confer this benefit on the Bulletin Board Operator's employees and officers. Jemena submits that it should be extended to also cover the Pipeline and Network Operator's employees/officers.

8. Procedures

AEMO's powers under section 91BRH below are very broad. Jemena submits that some formal processes should be in place to guide the use of these powers. For example, any proposed guidelines, tests and standards should be made available to registered parties for comment before finalisation.

Further, Jemena considers that most of the relevant STTM requirements should be placed in the Rules, rather than the Procedures. There should not be an open-ended power for AEMO to alter the STTM design via Procedural change, without adequate industry participation. By making proposed Procedural changes available to registered parties before finalisation, participants may gain some assurance that the proposed changes are appropriate.

9. Transitional arrangements

Jemena considers breaches of STTM obligations and associated liability by registered parties should be lightly dealt with in the establishment phase of the STTM.

It is likely that it will take time to become familiar with the new market, processes and systems as AEMO and industry develop an understanding of their systems, interactions and market behaviours. During this period (say the first 12 months), it would be more appropriate to issue a warning, with financial penalties only for recurring offences.

10. Cost recovery

Jemena is concerned that pipeline operators have not been guaranteed any cost recovery for the development of new STTM systems and processes. We note that the Gas Market Leaders Group (GMLG) has cited this as a relevant matter to be addressed.

In common with other pipeline operators, Jemena considers that its STTM costs should be recovered. Further, since the costs are being incurred as a result of legislative change, they should be recoverable as a right and not rely on the success of future commercial negotiations.

11. Conclusion – pipelines and networks

In conclusion, Jemena seeks confirmation that Operators will not incur increased exposure under the STTM regime, particularly without any guaranteed cost recovery. Operators should have immunity for any data or services provided to AEMO for the STTM in good faith. It is unacceptable that the STTM could create new exposures for Operators in the form of negligence claims from third parties that do not have any contractual relationship with the Operators.

¹ National Gas Regulation 10: Maximum civil monetary liabilities—AEMO (including Bulletin Board functions), paragraph 1(f).

Should you wish to discuss this submission please contact Sandra Gamble, Group Manager Regulatory, on (02) 92704512 or email: sandra.gamble@jemen.com.au.

Yours sincerely

A handwritten signature in black ink that reads "Sandra Gamble". The signature is written in a cursive, flowing style.

Sandra Gamble
Group Manager Regulatory