

# OFFICE OF GAS ACCESS REGULATION

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Our Ref: 1028/99

Dr Tom Parry  
Chairman  
Independent Pricing and Regulatory Tribunal  
Level 2, 44 Market Street  
Sydney  
NSW 2000



Dear Dr Parry

## **DRAFT ASSOCIATE CONTRACT GUIDELINES**

Thank you for your letter of 16 July 2001 seeking comments on the Draft Associate Contract Guidelines.

The Office of Gas Access Regulation is pleased to offer comments, which are attached, on the draft guidelines. The Western Australian Gas Access Regulator approved an associate contract between AlintaGas Networks Pty Ltd and AlintaGas Sales Pty Ltd on **18 April** 2001 and the comments on the draft guidelines are offered based on the experience of this approval process.

If you have any further queries on this matter, please do not hesitate to contact Mr Robert Pullella on 9213 1944.

Yours sincerely

ROBERT PULLELLA  
A/EXECUTIVE DIRECTOR

13 August 2001



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## SUBMISSION ON DRAFT ASSOCIATE CONTRACT GUIDELINES

The Office of Gas Access Regulation (“**OffGAR**”) is pleased to make this submission to the Independent Pricing and Regulatory Tribunal (“**Tribunal**”) in response to the Tribunal’s call for submissions on its draft Associate Contract Guidelines (“**Guidelines**”), issued in July 2001.

This submission provides an overview of *OffGAR*’s experience in assisting the Western Australian Independent Gas Pipelines Access Regulator (“**Regulator**”) to assess an Associate Contract under the National Third Party Access Code for Natural Gas Pipeline Systems (“**Code**”). Some comments on the Guidelines are also provided, which *OffGAR* feels may be of some assistance given *OffGAR*’s experience. *OffGAR*’s experience and comments described in this submission are not necessarily the same as or similar to those of the Regulator.

Generally, *OffGAR* supports the publication of general guidelines in the form of the **Tribunal**’s draft Guidelines. The issues raised by the assessment required under section 7.1 of the Code are complex and quite different to the assessments carried out under chapter 2 of the Code in relation to proposed Access Arrangements and under chapter 4 of the Code in relation to ring fencing requirements. Accordingly, guidelines addressing the kinds of issues typically raised are likely to be beneficial to interested parties and should enable the making of more detailed and informed submissions. This is likely to assist the relevant regulator to make its decision under section 7.1 of the Code and should therefore be encouraged.

### **OffGAR’s Experience**

The Regulator has assessed one Associate Contract under the Code. *OffGAR* was closely involved in assisting the Regulator to conduct the public consultation required under section 7.3 of the Code, to review submissions received and to prepare the Regulator’s decision.

The Associate Contract was between AlintaGas Networks Pty Ltd and AlintaGas Sales Pty Ltd. Broadly, AlintaGas Networks Pty Ltd proposed supplying to AlintaGas Sales Pty Ltd various Reference Services as offered under its approved Access Arrangement, although at a discount to the relevant Reference Tariffs. The terms and conditions on which the supply would occur also differed in some limited respects from the Access Arrangement terms and conditions.

The Regulator approved the Associate Contract after assessing it in accordance With the Code, as it was concluded the Associate Contract was not likely to have the effect of



substantially lessening, preventing or hindering competition in a market. The process followed in assessing the Associate Contract was as prescribed under the Code, as follows.

As the Associate Contract provided for the supply of Services at a tariff other than the Reference Tariff, the Regulator was obliged to conduct public consultation in accordance with section 7.3 of the Code. Under sections 7.4 and 7.5 of the Code, this entailed an assessment period of 49 days. The mechanism for “stopping the clock” provided for in paragraph 7.4(b) of the Code did not apply as the Regulator did not notify either of the AlintaGas entities additional information was required in order to assess the Associate Contract. The Regulator approved the Associate Contract within the **49** day period.

In order to assist in the making of submissions, OffGAR prepared for release by the Regulator an issues paper which summarised the significant provisions of the Associate Contract and relevant provisions of the Code. Submissions were requested within **3** weeks of publication of the issues paper. The Regulator opted for a **3** week submission period as it was felt this was a reasonable period in the context of the 49 day period available to the Regulator. Any longer would have given the Regulator insufficient time to properly consider all the issues, while any shorter may have created the same difficulty for interested parties. Submissions were ultimately received from 4 interested parties and AlintaGas Networks Pty Ltd. A copy of the issues paper, the submissions and the Regulator’s approval may be obtained from OffGAR’s website.

The main concern raised in submissions was the advantage apparently conferred on AlintaGas Sales Pty Ltd by the discounted tariffs. The reason given by AlintaGas Networks Pty Ltd for the contract (and the discounts) being necessary was that it **was** necessary to ensure AlintaGas Sales Pty Ltd had in place the requisite contractual **rights to** have gas delivered to existing and new customers throughout the mid-west and south-west areas of Western Australia.

A number of interested parties considered the discounts and some other advantages provided under the contract provided AlintaGas Sales Pty Ltd with an unfair competitive advantage in the retail market for natural gas. However, the Regulator considered no such advantage was likely to accrue, since AlintaGas Networks Pty Ltd would be unable to recover the value of the discount from other users of the gas distribution system because the discounts were not “prudent discounts” under section **8.43** of the Code. This meant the discounts would not be subsidised by other users. While this loss transfer may have provided some benefits to the AlintaGas group of companies – for example, through a reduction in total taxation liabilities – the Regulator did not consider such benefits would impact upon the contestability **of** the retail market for natural gas or were likely to be “large or weighty” or material in terms of having any potential to substantially lessen, prevent or hinder competition.

OffGAR made a number of observations in reviewing the AlintaGas Associate Contract and the Regulator’s decision. The primary observation is that in many circumstances, it will **often** be particularly difficult to identify matters which would be likely to have the effect **of** substantially lessening, preventing or hindering competition where there is only a slight difference between the terms of the Associate Contract and any approved Access Arrangement.

Additionally, conducting the requisite assessment in detail within the time limits specified in sections 7.4 and 7.5 of the Code may be particularly difficult if the relevant regulator has

limited available resources to conduct the assessment. This is due to the complexity of the issues that submissions may raise and the wide variety of Associate Contracts that may be proposed. There is also a difference between the kinds of assessments carried in respect of proposed Access Arrangements and Associate Contracts, with the latter focussing on issues relating to competition law, theory and practice, while the former focuses on issues of contract law, economic theory and gas pipeline operation. As such, assessing a proposed Associate Contract may require slightly different skills.

### Comments on the Guidelines

The Tribunal sets out its interpretation of “Associate Contract” in part 2 and particularly paragraph 2.3 of the Guidelines. OffGAR concurs with the Tribunal’s view that the definition of “Associate Contract” under section 10.8 of the Code extends to include any proposed variation to agreed contracts or other such arrangements or understandings. A further issue OffGAR has considered is whether the definition extends to include, for example, joint marketing ventures between associates. In this regard, OffGAR notes any contract, arrangement or understanding relating to such ventures may fall within the definition of “Associate Contract” if it is entered into *in connection with* the provision of a Service (as defined in section 10.8 of the Code). Notably, the definition does not require the relevant Service to be provided by the Service Provider to the associate. Accordingly, such marketing ventures may fall within the definition to the extent they are associated with or are connected to the Service Provider providing Services to any person.

The Tribunal sets out its interpretation of paragraph 7.4(b) of the Code in paragraphs 6.6 – 6.8 of the Guidelines. For the purposes of paragraph 6.6, OffGAR notes the time at which any information request is deemed to have been given is likely to be the time **the request is** received by the person to whom it is directed, under sections 30 and 31 of the Appendix to Schedule 1 to the ~~Gas~~ Pipelines Access Law. Additionally, paragraph 7.4(b) of the Code may be interpreted such that the initial notification to which the Tribunal refers in paragraph 6.6 of the Guidelines must set out the substance of the information request, since paragraph 7.4(b) states in part “*...the Relevant Regulator notifies the Service Provider that it requires additional information ...*” and does not refer to any additional notification or request being given to the Service Provider. This may preclude use of the Tribunal’s proposed initial notification and subsequent information request. Such ~~an~~ interpretation may be supported by section 41 of Schedule 1 to the Gas Pipelines Access Law, under which an information request is to be made by giving written notice to the relevant person with the notice identifying the information or documents requested. The Tribunal’s view that it may issue a notice and subsequently issue a written request identifying the particular information required may therefore not be supported.

Similarly, the Tribunal’s view expressed in paragraph 6.8 of the Guidelines to the effect that the clock will “re-start” for the purposes of the Code only once the Tribunal provides the Service Provider with written acknowledgment that all requested information has been received may not be supported under paragraph 7.4(b) of the Code. However, in practice the proposed notification may not be an issue if given by facsimile transmission on the same day, such that timing ceases to be a substantial issue.

The Tribunal discusses various issues relating to barriers to entry and market concentration in paragraphs 10.9 – 10.12 of the Guidelines. OffGAR’s experience from assessing the AlintaGas Associate Contract is that in the case of Covered Pipelines, issues such as barriers to entry and market concentration may be more relevant to downstream markets

than, say, the market for distribution of natural gas if that market is served by only one pipeline. In the latter case, it is presumed it would be inefficient to duplicate the pipeline and, accordingly, its operator is a monopoly Service Provider.

The Tribunal appears to consider in paragraph 13.2 of the Guidelines that issuing a section 41 notice in connection with the assessment of a proposed Associate Contract would not “stop the clock” for the purposes of section 7.4 of the Code. This is because section 41 does not refer to information requests relating to the assessment of Associate Contracts. Similarly, sections 7.1 – 7.6 of the Code do not refer to section 41. OffGAR concurs in this regard with the Tribunal’s view, except in so far as a section 41 notice is issued to the Service Provider under the Associate Contract (i.e. as opposed to the Service Provider’s associate).

This is because 7.4(b) of the Code only states “...*the Relevant Regulator notifies the Service Provider*...”. This may include a section 41 notice issued to the Service Provider as paragraph 7.4(b) does not preclude such an interpretation and it would be **an odd** result if the same notice could be issued under paragraph 7.4(b) and section 41 with different consequences for the purposes of “stopping the clock”. This interpretation may be supported by considering section 7.11 of the Code, which expressly addresses section 41 so as to avoid any potential overlap. If such an overlap were considered possible in relation to section 7.4, then it would have been a simple matter for Parliament to address it in the same way when drafting paragraph 7.4(b) (that is, by stating section 41 is unavailable, for example). The fact that it did not do so suggests to OffGAR that a section 41 notice issued to the Service Provider would “stop the clock”.

This concludes OffGAR’s submission.

Any questions relating to this submission should be directed to Robert Pullella, available on (08) 9213 1944.