

3 April 2001

Mr Robert Pullella
Office of Gas Access Regulation
6th Floor
197 St Georges Terrace
PERTH WA 6000

Dear Mr Pullella

**PROPOSED HAULAGE CONTRACT BETWEEN ALINTAGAS NETWORKS
PTY LTD AND ALINTAGAS SALES PTY LTD**

On 9 March 2001 the Office of Gas Access Regulation (“OffGAR”) released an issues paper (“Issues Paper”) in relation to the proposed Haulage Contract between AlintaGas Networks Pty Ltd (“Networks”) and AlintaGas Sales Pty Ltd (“Sales”). The Issues Paper sought public submissions in relation to the proposed Haulage Contract.

Given some of the matters which have been raised in the Issues Paper, Networks considers it appropriate that it provide a response to some of those matters raised. Networks’ response is set out below.

General Comments

Applicable test

As the Issues Paper quite correctly states at page 1, the Regulator is required to approve the proposed Haulage Contract unless he considers it would be likely to have the effect of substantially lessening, preventing or hindering competition in a market. At law this is the only test the Regulator is able to consider in determining whether or not to approve the proposed Haulage Contract. The Regulator has no choice but to approve the proposed Haulage Contract unless he can establish that the proposed Haulage Contract would have this prescribed effect on competition.

At a number of points in the Issues Paper the Regulator refers to the potential giving of a “competitive advantage” to Sales. It is significant to note that the applicable test is not that of competitive advantage, but rather is that of a substantial lessening, preventing or hindering of competition in a market. It would be quite incorrect to equate a finding that a clause of the proposed Haulage Contract confers a competitive advantage on a party, with a finding that the proposed Haulage Contract has or would be likely to have the effect of substantially lessening, preventing or hindering competition in a market as a whole. As a

matter of law, the existence of a competitive advantage is not determinative of the existence of a substantial lessening preventing or hindering of competition in market.

In any event, it is Networks' opinion that the proposed Haulage Contract does not give either a competitive advantage to Sales, nor does it substantially lessen, prevent or hinder competition in a market.

Tariff Issues

For the purposes of clarity, the proposed discounts apply to 24 delivery points only. For remainder of the approximately 450,000 delivery points to which the proposed Haulage Contract applies, the applicable tariff is the reference tariff. The schedules annexed to the proposed Haulage Contract set out all of the sites to which Reference Service A and B1 apply, not simply the sites to which the discounts apply. Accordingly, in the vast majority of cases the proposed Haulage Contract provides for the supply of services at the applicable reference tariff.

In relation to the consideration of the discounted haulage tariffs, the central issue to note is that the *National Third Party Access Code for Natural Gas Pipelines Systems* (the "Code") is based on the notion that the Reference Tariff should be the benchmark tariff for a specific service. Parties have the ability to negotiate contract terms and conditions (including price) outside of that benchmark set under the Access Arrangement. This is the fundamental basis of the Code. Networks and its Users have, and will, negotiate within this framework.

Delivery points to which the discounts apply

In relation to existing delivery points, the discounts are limited to those delivery points specified in the schedules to the proposed Haulage Contract. Any discount applicable to a new delivery point will be negotiated on a case by case basis with the relevant User.

The Issues Paper correctly notes that the gas supply contracts which relate to the delivery points which have discounted tariffs, were entered into prior to the Regulator's approval of the Access Arrangement. However, this is not the main consideration, as the primary rationale for the offering of the discounts to these delivery points continues irrespective of the approval of the Access Arrangement. It is most likely that the relevant User in relation to these delivery points, will enter into future haulage contracts with Networks, which incorporate the same or a similar discount. In each case Networks will examine the circumstances of the customer and the requirements of the User and determine what, if any, discount to the reference tariff is applicable to that delivery point at that time.

Non-discriminatory policy

Page 4 of the Issues Paper notes "AlintaGas has indicated that the same discount would be offered by AlintaGas Networks to any User, other than AlintaGas Sales, which supplied the relevant customer". This proposition is not an entirely accurate representation of Networks' intentions. Networks does not consider that the appropriate process is that of the publication or offering of a standard discount applicable to a specific delivery point. Rather, the appropriate process is that of Users approaching Networks to

supply a particular delivery point and in that approach, requesting a discount for that delivery point and providing justification to Networks as to why that User considers that Networks should provide the discount for that delivery point.

Networks has adopted a non-discriminatory policy on discounts. Any request for a discount will be considered in the same way regardless of whether the party requesting the discount is Sales or another User. It is not Networks' position that, if it chooses to offer a discount to Sales, the *same* discount will automatically be offered to other Users (or potential Users). The main reason for the inability of Networks to automatically offer the same discount to all Users, is that Users will make requests for differing energy requirements (for example, contract peak rate and user specific facilities) in relation to the same delivery point. Accordingly, the applicable tariff charged by Networks may vary from User to User at a specific delivery point, depending on their specific requirements, or the risks associated with the provision of access to that User.

Networks notes the Regulator's concern on page 4 of the Issues Paper, in relation to the inability of Users to determine what discount is available, if the relevant parts of the schedules are not disclosed to potential Users in some way. Networks does not believe that this is a legitimate concern. There is no need for the proposed Haulage Contract to deal with the availability of discounts to Users other than Sales. All prospective Users have the right to seek a haulage tariff from Networks other than the applicable reference tariff, and this right is not limited to any particular delivery points. Moreover, in practice, market participants will be aware of delivery points which are vulnerable to competition and will seek haulage rates from Networks which reflect this.

At page 6 of the Issues Paper, the Regulator seeks public comment on whether representations made by Networks that discounted distribution tariffs would be available to Users other than Sales, should be binding on Networks. On a number of occasions¹ Networks has made public representations to the effect that discounts will be available to any User who can establish the necessity of that discount for that particular delivery point. It would not be commercially astute for Networks to retract from this position which it has made so publicly.

Furthermore, the proposed Haulage Contract is a contractual agreement between Networks and Sales. As a matter of law, its legal effect can only be in relation to those two parties. It would not only be ineffective, but also inappropriate, to attempt to impose obligations on Networks in relation to third parties, in a contract as between Networks and Sales.

Effect on competition

Each of the 24 sites to which a discounted tariff has been specified in the schedules are supplied by Sales under contract. Sales is bound to continue supplying under those

¹ The representations in relation to the availability of discounts were made in Networks' covering letter to the Regulator when submitting the Access Arrangement in June 1999, representations were also made at AlintaGas's Public Forum in relation to the Access Arrangement on 2 May 2000, and representations were also made in Networks' covering letter when submitting the proposed Haulage Contract on 27 February 2001.

contracts until the contract is terminated. In these circumstances, the Regulator's approval of the proposed Haulage Contract will have no effect on competition in the market, until the contracts entered into by Sales reach their termination dates. Only then will the end users of gas become contestable customers, and only then will other parties be able to offer to supply gas in competition.

Until an end use customer becomes contestable, the tariff specified in the register of the proposed Haulage Contract is irrelevant to the process of competition in the market for gas.

Competition in that sector of the market in which gas is supplied under long term contracts can begin to operate only when end user customers become contestable. Retailers other than Sales may then offer to supply gas at a price which includes a transportation component. The tariff at which Networks is prepared to provide transportation services to a competing retailer becomes critical. Whether, at that point, there would be any effect on competition would depend on the operation of Networks' non-discriminatory policy and the relative magnitudes of the other costs of both Sales and competing retailers.

At the time a customer becomes contestable, Sales would determine its delivered gas price to meet competition in the retail market for gas. It would seek to negotiate a new tariff for transportation services with Networks, consistent with its competitive position and may even seek tariffs from competing network service providers. Competing retailers would also seek to negotiate tariffs for gas transportation services with Networks which were consistent with their competitive positions.

The competitive effect would not depend on the tariff specified in the register of the proposed Haulage Contract. That tariff plays no role at the time a customer becomes contestable. The terms and conditions of the proposed Haulage Contract would not be relevant to any lessening, preventing or hindering of competition which might take place. That is, the proposed Haulage Contract would not have the effect of lessening, preventing or hindering competition in the retail market for gas in Western Australia.

Disclosure of the discounts

Section 7.3 of the National Access Code does not require that the discounted tariffs be made public. In addition, the release of any part of the distribution tariff (being part of the end consumer's gas price), or other information which has the potential to identify the end use consumer, would be harmful to the business interests of both Sales and Networks. Furthermore, the release of such information would also prejudice the business interests of the end use consumer, and may also constitute a breach of Sales' confidentiality obligations under the relevant gas supply agreements with customers.

It is Networks' position that there is no reason to release any specific tariff information. Networks has committed publicly to a non-discriminatory pricing policy and to depart from this policy would be commercially and legally unacceptable.

Competition in the market does not require disclosure of tariffs. Competition in the market requires only that Networks be prepared to negotiate, in good faith, with competing Users. Networks' preparedness to negotiate in good faith is, however, not a

matter which can be dealt with in the proposed haulage contract. Networks has publicly stated its intention to negotiate in good faith with Users.

Non-tariff Issues

Networks is of the opinion that none of the non-tariff issues identified in the Issues Paper, either in isolation or as a whole, could have the effect of substantially lessening, preventing or hindering competition in a market.

Furthermore, Users of the GDS are generally in a position where they have their own legal advisers review the terms of a proposed haulage contract. It is generally the case that the User will require that some of the terms and conditions of the Haulage Contract are amended to suit their specific preferences. In this case, when Sales and Networks were negotiating the terms of the proposed Haulage Contract, Sales requested amendments in order to suit their specific requirements, where those requests were considered non material Networks accommodated the amendment, as it would with any User.

Whilst Networks does not consider that any of the amendments from the Access Arrangement could have a material effect on competition, nonetheless some of the issues raised in Annexure 2 of the Issues Paper are addressed briefly in Annexure 1 to this submission.

Conclusion

We look forward to discussing these issues in further detail with you.

Please do not hesitate to contact Ian Devenish on 9486 2737 should you require any further information.

Yours sincerely

**ROBERT BROWNING
CHIEF EXECUTIVE OFFICER
ALINTAGAS NETWORKS PTY LTD**

ANNEXURE 1 – NON-TARIFF ISSUES

Clause 3

Whilst it is correct to say the proposed Haulage Contract is not for any defined period, it is not correct to say that the contract could be terminated after a period of less than a year.

Clause 3 provides that the contract is to end when Sales is no longer entitled to take delivery of gas at any delivery point. Accordingly, the earliest that the contract could end would be the latest end date in the Schedule, at present this is considerably longer than 1 year.

The only situation in which the proposed Haulage Contract could have a duration of less than 1 year would be if a party is in default under the proposed Haulage Contract. Whilst not expressly referred to in the Access Arrangement, the default of a party under any contract is ordinarily something which would give rise to the right on the part of the other party to terminate.

Clause 4

The addition of clause 4 is necessary so that Sales can bring forward that end date where a customer has provision in their contract with sales to review the end date during the term of the contract.

Clause 6

The establishment of a register recording the delivery points to which the proposed Haulage Contract applies is the only method of managing the large number of delivery points which fall under the proposed Haulage Contract.

The period over which **existing** USDF will be amortised has been specified in all cases as 20 years. Whilst this is a variation from the provision of the Access Arrangement, the variation has been necessary in order to avoid the operation of clauses 21 and 22 of the Access Arrangement to existing customers which could result in USDF being amortised over a period as little as 1 year, where the customer has entered into a 1 year contract with Sales.

The application of a standard duration of amortisation for all existing delivery points has been done in the interests of reasonableness to Users. The amortisation of new delivery points will be considered on a case by case basis. This is a non-discriminatory policy on the basis of a distinction between existing and new customers, rather than a distinction between Users.

Clause 14(1), (2) & (3)

It is clear that this information would need to be reported to the User. The reporting of this information is not an ancillary service. Ancillary services will be addressed in a separate agreement. In every haulage contract Networks will specify in more detail the information to be provided to the User. It is common industry practice to provide this information to the User. It is simply a refinement to the provision contained in the Access Arrangement.

Clause 21(2), (3) & (4)

These clauses provide greater certainty to the User as to the actual HHV they have received.

The Issues Paper notes that a User would presumably be bound by clause 13 of schedule 7 of the Access Arrangement. AlintaGas does not agree with the contention that Networks and a User are bound by the general terms and conditions contained in the Access Arrangement in addition to the terms of the proposed Haulage Contract. As a matter of law it is the proposed Haulage Contract which will set out the rights and obligations of Networks and the User, the terms and conditions contained in Schedule 7 are not incorporated into that contract.

Clause 27

Any non reference tariff provided by Networks will have been reached as a result of negotiation between Networks and the User. Part of that negotiation will be agreement as to the term over which that discount is to apply. The reason that clause 27 does not address non reference tariffs is that they will be set for the duration of the service as agreed between Networks and the User.

Clause 60

The Trading Policy in Chapter 5 of the Access Arrangement addresses transfers or assignments of capacity by Sales, yet the Access Arrangement does not permit assignment in any form by Networks. Networks envisages that this clause would probably only be invoked if another party was to become the owner or operator of the GDS or part of the GDS.

Even though clause 60 of the proposed Haulage Contract goes further than what is set out in the Access Arrangement, it is intended to do no more than achieve an appropriate balance in relation to the assignment of obligations and rights under the proposed Haulage Contract. It is notable that the rights provided to Networks in clause 60 of the proposed Haulage Contract are not as generous as those provided to Users in the Trading Policy.