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Mr R Pullella  
Office of Gas Access Regulation  
PO Box 8469  
Perth Business Centre 6849

Dear Mr Pullella,

The Australian Council for Infrastructure Development (AusCID) appreciates the opportunity to comment on the regulatory process following the Supreme Court Decision in relation to OffGAR's Draft Decision on access arrangements for the Dampier to Bunbury Natural Gas Pipeline (DBNGP).

The Council formed in 1992 and currently has in excess of 100 members, drawn comprehensively from all economic infrastructure sectors including electricity generation, transmission and distribution, gas transmission and distribution, roads, rail, telecommunications, water, airports and ports. As a representative of investors, operators, financiers and service providers to regulated infrastructure, AusCID recognises the important role that regulation plays in the Australian economy, yet is concerned with the likely impacts that the Office of Gas Access Regulation's Final Decision on the DBNGP may have on long term investment in regulated infrastructure.

In this submission, AusCID will not comment on the detail of the regulatory decision making process following the Supreme Court Decision, but will rather focus on the wider implications of that process which are not necessarily exclusive to the DBNGP, or indeed Western Australia. Sustained investment in infrastructure is vital to the continued growth of the Australian economy and the welfare of its entire population. The message that the Final Decision will send out to the investment community will be critical in terms of incentivising investment in essential infrastructure in the future.

A number of critical issues were raised during the legal challenge in relation to the interpretation and application of the National Third Party Access Code for Natural Gas Pipeline Systems (National Gas Code). In particular, the Court Decision identifies a number of issues that have relevance to the future application of the Code in relation to the appropriate factors to be considered in reaching regulatory determinations and in relation to the balance between economic considerations and social and political implications.

## **Interpretation of the Code**

AusCID strongly supports the judgement's position that, in reaching decisions on third party access prices, the regulator should take into account a number of policy principles that have been established in Section 2.24 (a) – (g) of the National Gas Code, with each factor being given equal weight as 'fundamental principles'. As such, the regulator is required to take the legitimate business interests of the service provider into account, as well as the public interest which, in AusCID's view, is best served by securing, developing and maintaining the efficient delivery of essential services at reasonable prices.

The correct interpretation of Section 2.24 (both in terms of the role the section itself and each of the factors contained in it have to play in assessing access arrangements) has particular relevance to the issue of the treatment of past investment decisions including the expenditure that was made at the time when the regulated asset was purchased. The recovery of the actual price which was paid on investment as well as affording the investor an opportunity to earn an adequate return on that investment should be regarded as a legitimate business interest of a regulated service provider, and therefore be taken into consideration by the regulator (as a fundamental element) in determining access prices.

On the issue of monopoly returns, the judgement concludes that the National Gas Code is not aimed at replicating the outcomes of a theoretically 'perfect' market, which is an abstraction. It is designed to promote outcomes similar to those that might occur in a 'workably' competitive market (which may sometimes include elements of persistent market power). As such, the Code leaves the door open as to whether recovery of monopoly returns should be allowed.

While AusCID accepts that some form of price control may be necessary in nationally significant industries where the existence of and subsequent abuse of market power may lead to inappropriate monopolistic pricing, we support the Productivity Commission's view that market power does not always lead to economic and social inefficiency. In industries where innovation is associated with large and risky investments, the prospect of extra profits that result from some market power is essential, and therefore lowering prices through heavy-handed regulatory mechanisms may not always lead to the most desirable and efficient outcome. The Court Decision makes it quite clear that the Act and the Code should not be applied so as to prohibit "the expectations of service providers of monopoly returns where those expectations were reasonable".

## **Cost of Service Approach**

It is AusCID's view that, in its judgement, the WA Supreme Court attempts to query the validity of the forward-looking costs approach that regulators generally apply with regards to establishing an Initial Capital Base, while expressly supporting the recovery of more than just 'efficient capital investment' or regulated revenues in appropriate circumstances. This has critical implications not only in terms of protecting the legitimate business interests of regulated service providers, but also in terms of ensuring that political and social considerations are met by not distorting investment. In

the case of gas pipelines, this is even more important given the historical context in which pipelines came into private sector ownership.

## **Costs vs Benefits**

AusCID believes that the regulator should aim to strike a balance between granting the consumer short-term monetary gains in terms of reduced tariffs and ensuring that an adequate stock of infrastructure is maintained and developed by allowing the owners to earn fair returns on their investment, leaving sufficient incentive for investment in the future.

A small amount of additional cost to the customer may lead to large benefits in terms of securing investment in new or expanded infrastructure facilities. The wider social and economic benefits of such investment, particularly the timely creation of new employment opportunities and the security offered to existing industries to expand their operations when it will suit their strategic agenda, need to be factored more assertively into the regulators' assessments.

## **Conclusion**

In conclusion, AusCID is concerned that, if the regulator fails to take account of these social, political and public interest considerations, and continues to be guarded purely by replicating economic efficiency outcomes, this can only create uncertainty in the wider investment community, not just among infrastructure investors. This will also act to further distort future decisions on whether to invest in regulated infrastructure or not and ultimately in the industries requiring competitively priced and secure infrastructure services.

The Regulator should ensure that the reference tariff for the DBNGP be set at a level that provides sufficient incentive for Epic Energy, or indeed the whole investment community, to make further investments in pipeline assets in Australia. The long-term losses to the economy and to the community in terms of forgone investment or higher returns necessary to attract investment will be far greater than any short-term gains through slightly lower access prices.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'D. O'Neill', with a stylized flourish at the end.

Dennis O'Neill  
Chief Executive Officer