



DECISION:

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

Submitted by

AlintaGas Limited

**INDEPENDENT GAS PIPELINES ACCESS REGULATOR
WESTERN AUSTRALIA**

18 April 2001



DECISION

On 27 February 2001, AlintaGas Limited submitted to the Regulator a proposed contract (“Haulage Contract”) between AlintaGas Networks Pty Ltd and AlintaGas Sales Pty Ltd for access to haulage services provided by means of the Mid-West and South-West Gas Distribution Systems.

Under the Haulage Contract, AlintaGas Networks proposes supplying AlintaGas Sales with services broadly equivalent to Reference Services A, B1, B2 and B3 under its Access Arrangement for the Mid-West and South-West Gas Distribution Systems. The Haulage Contract provides for some differences to the Access Arrangement in the terms and conditions of service provision and also provides for the services to be provided at tariffs less than the relevant Reference Tariffs.

The Regulator considers that the Haulage Contract constitutes an Associate Contract under section 7.1 of the *National Third Party Access Code for Natural Gas Pipeline Systems* (“Code”). Accordingly, AlintaGas Sales and AlintaGas Networks may not enter into the proposed Haulage Contract without first obtaining the approval of the Regulator.

The Regulator is required to approve the Haulage Contract unless the Regulator considers it would be likely to have the effect of substantially lessening, preventing or hindering competition in a market. In forming a view in this regard, the Regulator considered the issues raised by interested parties in submissions made on the proposed Haulage Contract.

The Regulator has decided to **approve** the proposed Haulage Contract. The Regulator does not consider the Haulage Contract is likely to have the effect of substantially lessening, preventing or hindering competition in the retail market for natural gas. The Regulator is mindful of the concerns expressed by Users regarding the potential for anti-competitive conduct and may take any action as appropriate should the Regulator become aware of such conduct.

The Regulator’s deliberations in reaching this decision are summarised in the Executive Summary set out in section 1 of this document. Detailed supporting information constitutes the remainder of this document.

Copies of this document are available from the Office of Gas Access Regulation (*OffGAR*) by contacting Robert Pullella on +61 8 9213 1944, or through *OffGAR*’s website: (<http://www.offgar.wa.gov.au>).

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SUMMARY OF DELIBERATIONS

CONTENTS

1	EXECUTIVE SUMMARY	1
1.1	Evaluation Context	1
1.2	The Relevant Market	2
1.3	Tariff Issues	2
1.4	Non-Tariff Issues	3
2	ASSESSMENT OF ASSOCIATE CONTRACTS	5
2.1	Code Requirements	5
2.2	Single Decision	5
2.3	Public Consultation	5
	2.3.1 Notification of the Proposed Haulage Contract	5
	2.3.2 Submissions Received	6
3	ASSESSMENT CRITERIA	7
3.1	Overview	7
3.2	Substantial Lessening, Preventing or Hindering of Competition	7
3.3	The Relevant Market	10
	3.3.1 The Concept of a Market	10
	3.3.2 Precedent Decisions	11
	3.3.3 Submissions	11
	3.3.4 Considerations of the Regulator	12
4	COMPETITION IN THE SUPPLY OF NATURAL GAS	15
4.1	Precedent Decisions	15
4.2	Submissions	15
4.3	Considerations of the Regulator	16
5	EFFECTS OF THE PROPOSED HAULAGE CONTRACT ON COMPETITION	17
5.1	Tariff Issues	17
	5.1.1 Introduction	17
	5.1.2 Submissions	17
	5.1.3 Considerations of the Regulator	23
	5.1.4 Conclusion	27
5.2	Non-Tariff Issues	27
	5.2.1 General Issues	27
	5.2.2 Specific Issues – Clause Differences	29
	5.2.3 Additional Considerations	39
	5.2.4 Conclusion	40

1 EXECUTIVE SUMMARY

1.1 EVALUATION CONTEXT

Under section 7.1 of the Code, a Service Provider must not enter into an Associate Contract without first obtaining the Regulator's approval of that proposed contract. The Regulator is required to approve the proposed Associate Contract unless the Regulator considers it would be likely to have the effect of substantially lessening, preventing or hindering competition in a market.

The process of assessing whether or not a proposed Associate Contract would be likely to have the effect of substantially lessening, preventing or hindering competition in a market is complex. It involves a number of concepts which have been the subject of detailed commentary in the context of the *Trade Practices Act 1974*, both academic and judicial. The Regulator is guided by that commentary. In order to meet the obligations imposed upon the Regulator under section 7.1 when assessing AlintaGas' proposed Haulage Contract, this document sets out an analysis of the application of those concepts. It is noted that the concepts have not been the subject of detailed analysis by other Regulators under section 7.1 of the Code.

In assessing whether the Haulage Contract would be likely to have the effect of substantially lessening, preventing or hindering competition in a market, the Regulator is not concerned so much with the relative positions of particular competitors as with the state or condition of the market in question.

Thus, the critical issue is that of market contestability. That is, the exposure of a supplier in the market to competition in the supply of the good or service to customers.

It should also be noted that the assessment process under section 7.1:

- does not give the Regulator any opportunity to review the Access Arrangement or in any way alter the terms and conditions and tariffs under which third parties may secure access to the Mid-West and South-West Distribution Systems;¹ and
- is not an exercise in taking into account and balancing the interests of AlintaGas Networks, Users or Prospective Users or any other person such as is the case under section 2.24 of the Code for assessment of Access Arrangements.

The only actions for the Regulator under section 7.1 of the Code are to either approve or not approve the Haulage Contract.

Notwithstanding the Regulator's conclusion that the Haulage Contract is not likely to have the effect of substantially lessening, preventing or hindering competition, the Regulator recognises that some concern has been expressed by Users about the potential for anti-competitive conduct in the market. It is beyond the scope of the Regulator's assessment of the Haulage Contract to speculate about that potential. In the event of any such conduct the

¹ It should be noted that the terms and conditions of third party access to the distribution systems are not subject to change until such time as the Access Arrangement is reviewed.

Regulator may take this into account when reviewing the Access Arrangement or when considering any future Associate Contract and may take any other action considered appropriate.

In this regard, the Regulator will be assisted by the reporting obligations imposed on the relevant Service Provider under chapter 4 of the Code.

1.2 THE RELEVANT MARKET

The Regulator's view is that for the purposes of assessing the impact of the proposed Haulage Contract, the market is defined as the retail market in Western Australia for natural gas.

1.3 TARIFF ISSUES

The primary factor in the Regulator's decision to approve the Haulage Contract is that the Haulage Contract would leave largely unchanged AlintaGas Sales' ability to offer discounted prices in the retail market for natural gas.

From the perspective of AlintaGas Limited, the corporate parent of AlintaGas Sales and AlintaGas Networks, the only effect of the Haulage Contract is to shift losses (if in fact AlintaGas Sales would incur losses by offering discounted prices) from AlintaGas Sales to AlintaGas Networks. Without the Haulage Contract, for any given retail price those losses would be incurred by AlintaGas Sales. AlintaGas Networks cannot recover the value of the discounts from other Users of the distribution systems because the discounts are not "prudent discounts" under section 8.43 of the Code. This is significant. It means that any losses incurred as a result of offering discounts (whether made by AlintaGas Sales or AlintaGas Networks) will not be subsidised by other Users but will rest with the AlintaGas group.

The implicit transfer of losses from AlintaGas Sales to AlintaGas Networks could benefit the AlintaGas group through means such as a reduction in total taxation liabilities. However, any such benefits would not reduce the contestability of the retail market for natural gas. Further, those benefits are not likely to be "large or weighty" or material in terms of having the potential to substantially lessen, prevent or hinder competition.

Discounted distribution tariffs could conceivably form a basis for price cutting by AlintaGas Sales with a short-term effect of limiting potential for the entry of competing gas retailers to the market, even though (as noted above) the availability or otherwise of discounted tariffs is not considered to affect the ability of AlintaGas Sales to reduce retail gas prices. If the retail market for gas were not contestable, AlintaGas Sales would be able to offer discounted prices, drive competitors out of the market and then raise prices to supra-competitive levels. Such conduct may constitute "predatory pricing" and be actionable under the *Trade Practices Act*. However, the Regulator does not consider the prospect for any conduct such as predatory pricing is a relevant issue in dealing with the matter of discounted distribution tariffs for the following reasons.

- The retail market for the sale of natural gas is likely to be readily contestable. No pipeline infrastructure is required to enter the market as a retailer.
- Proof of predatory pricing (which falls under section 46 of the *Trade Practices Act* as a misuse of market power) requires proof of at least one of three proscribed anti-competitive

subjective purposes. This cannot be predicted by the Regulator when assessing the Haulage Contract under section 7.1 as it is future conduct.

- If it emerges (after entry into the Haulage Contract) that AlintaGas Sales or AlintaGas Networks are engaging in conduct which amounts to a misuse of market power, then that would be actionable by any person under the *Trade Practices Act*. That is considered to be a separate issue to determining whether or not the Haulage Contract would be likely to have the requisite effect on competition under section 7.1.

Accordingly, given the above and because the Haulage Contract will leave largely unchanged the ability of AlintaGas Sales to offer discounted prices in the retail market for natural gas, the Regulator does not consider that the likely effect of the Haulage Contract will be to substantially lessen, prevent or hinder competition in the retail market for natural gas in so far as tariff issues are concerned.

1.4 NON-TARIFF ISSUES

AlintaGas Sales may obtain a competitive advantage over other Users if the terms and conditions on which it obtains the Reference Service under the Haulage Contract vary from the Access Arrangement Terms and Conditions.

That advantage may translate to the Haulage Contract being likely to have the effect of substantially lessening, preventing or hindering competition in the defined market if they are significant and affect to an appreciable extent the ease of the usual way of supplying a service. This could provide AlintaGas Sales with greater flexibility generally in securing gas distribution services, less onerous obligations (such as those relating to credit terms, reporting obligations) or more detailed information regarding the Service acquired.

It may be that variations in individual terms or conditions do not have much significance but, taken as a whole, may confer a competitive advantage that is sufficient to offend against the test prescribed in section 7.1.

The Haulage Contract does in fact provide for a number of variations from the Access Arrangement Terms and Conditions. Some of the variations provide AlintaGas Sales with a greater degree of flexibility or more detailed information than is available to other Users under the Access Arrangement Terms and Conditions.

However, the Regulator does not consider that these variations, individually or taken as a whole, confer on AlintaGas Sales an advantage that would such as to be able to be described as being likely to have the effect of substantially lessening, preventing or hindering competition in the retail market for natural gas. The reasons for this view are as follows.

- In the case of some of the variations, Users may reasonably expect to be able to negotiate similar terms or conditions (as the case may be), due to the Access Arrangement providing only an overview of what may be expected to be negotiated between AlintaGas Networks and Users.
- The terms and conditions which would apply between AlintaGas Networks and AlintaGas Sales are not unusual in a commercial sense – they may be described as normal commercial terms which may be reasonably expected to be found in any contract.

- In the case of the variations that confer an advantage on AlintaGas Sales, the Regulator does not consider those advantages to be sufficient to offend against the test in section 7.1.

Accordingly, the Regulator does not consider that the likely effect of the Haulage Contract will be to substantially lessen, prevent or hinder competition in the retail market for natural gas in so far as non-tariff issues are concerned.

2 ASSESSMENT OF ASSOCIATE CONTRACTS

2.1 CODE REQUIREMENTS

Section 7.1 of the Code provides that a Service Provider must not enter into an Associate Contract without first obtaining the approval of the Relevant Regulator. Section 10.8 of the Code defines an Associate Contract as:

- (a) a contract, arrangement or understanding between the Service Provider and an Associate in connection with the provision of a Service; or
- (b) a contract, arrangement or understanding between the Service Provider and any person in connection with the provision of a Service which provides a direct or indirect benefit to an Associate and which is not an arm's length transaction.

Under section 7.1 of the Code, the Regulator cannot refuse to approve a proposed Associate Contract unless the Regulator considers that the contract would have the effect, or would be likely to have the effect, of substantially lessening, preventing or hindering competition in a market.

The existence or non-existence of any approved Access Arrangement for the pipeline affected by the Associate Contract is important. Under section 7.3 of the Code, the Regulator is required to conduct such public consultation as the Regulator considers appropriate in the course of considering an Associate Contract. Section 7.2 provides that if an Associate Contract provides for the supply of Services at the Reference Tariff (which only exists under an approved Access Arrangement) the Regulator may make a decision to approve or not approve the Associate Contract without conducting public consultation.

Sections 7.4 and 7.5 provide that the Associate Contract is deemed to have been approved if the Regulator does not notify the Service Provider that the contract has not been approved within 21 days if no public consultation is conducted or within 49 days if public consultation is conducted.

2.2 SINGLE DECISION

The Code does not require separate draft and final decisions prior to the Regulator approving or not approving an Associate Contract. Only this document, which sets out the Regulator's decision, will be issued.

2.3 PUBLIC CONSULTATION

2.3.1 Notification of the Proposed Haulage Contract

The Office of Gas Access Regulation (*OffGAR*) undertook the following actions to provide public notification of receipt of the Haulage Contract and to invite submissions from interested parties:

- forwarding of notices to interested parties registered with *OffGAR* (13 March 2001); and
- placing of the notice calling for submissions on the *OffGAR* web site (13 March 2001).

An issues paper was prepared by OffGAR and sent to interested parties on 13 March 2001. The issues paper was also made available from the OffGAR office and the OffGAR web site. A closing date for receipt of public submissions was set at 4:00 PM on 3 April 2001.

2.3.2 Submissions Received

Submissions were received from the following parties:

- AlintaGas Networks Pty Ltd
- Apache Energy Limited
- The Office of Energy
- CMS Gas Transmission of Australia
- AGL Energy Sales and Marketing Limited

The contents of submissions, where relevant, are summarised and addressed in this Decision as they relate to issues raised regarding specific matters addressed by the Haulage Contract.

3 ASSESSMENT CRITERIA

3.1 OVERVIEW

Associate Contracts have the potential to confer competitive advantages on the parties involved. This may lessen, prevent or hinder competition in a market. However, it is well recognised that vertical integration between firms may yield benefits to consumers through economies of scale or scope. Hence, a total prohibition on entry into any Associate Contract would be inappropriate. Only those Associate Contracts that would have the effect, or would be likely to have the effect, of substantially lessening, preventing or hindering competition in a market may not be approved.

Under section 7.1, the Regulator is required to assess whether the proposed Associate Contract would be likely to result in a substantial lessening, preventing or hindering of competition in a market. This raises two critical questions:

- what is meant by a substantial lessening, preventing or hindering of competition?; and
- what is the relevant market (or markets)?

These two matters are addressed below.

3.2 SUBSTANTIAL LESSENING, PREVENTING OR HINDERING OF COMPETITION

The meaning of the word “substantial” has received considerable attention in the context of the *Trade Practices Act 1974* (“TPA”) and mergers between companies. Section 50 of the TPA prohibits acquisitions of shares or assets which would have the effect or would be likely to have the effect, of substantially lessening competition in a substantial market in Australia, in a State or Territory.²

Considerations under the TPA give the Regulator the basis for interpreting the term “substantially” in the phrase “substantially lessening, preventing or hindering competition in a market.”

The word “substantial” can be the subject of differing interpretations in different contexts and in relation to other sections of the TPA. It has been interpreted as meaning “real or of substance” and as “large or weighty”. The Explanatory Memorandum to the *Trade Practices Legislation Amendment Bill 1992* stated:³

The term “substantial lessening of competition” is used widely through the Principal Act. It is here intended to mean an effect on competition which is real or of substance, not one which must be large or weighty.

The Government further clarified this during the Bill’s passage through the Senate:⁴

² “Substantial market” is relevant in the context of section 50 to remove mergers in small markets from scrutiny by the ACCC.

³ *Trade Practices Legislation Amendment Bill 1992*: Explanatory Memorandum, para 12, p 4.

⁴ Hansard, 10 December 1992, p 4776.

In signifying its intention that that word as now proposed to be used in s. 50 should bear the meaning “real or of substance”, the Government intends that the test should apply to effects on competition which are not merely discernible but which are material in a relative sense in the impact they may have upon effective competition in the market place.

This statement has been borne out in decisions of the Courts involving the TPA.⁵ As the terms of section 7.1 of the Code largely mirror those used in the TPA, the Regulator considers the threshold requirement in section 7.1 when referring to a substantial lessening of competition is relative. The following comments of the Federal Court conveniently capture the exercise that the Regulator has undertaken in assessing the effects of the proposed Haulage Contract on competition:

In the context of section 45 [of the TPA], the word ‘substantial’ is used in a relative sense. The very notion of competition imports relativity. One needs to know something of the businesses carried on in the relevant market and the nature and extent of that market before one can say that any particular lessening of competition is substantial.⁶

Additionally, the following comments of the Court in *ASX Operations Pty Ltd v Pont Data Australia Pty Ltd* should be noted:

In asking whether provisions of the agreements have or would be likely to have the effect ... of substantially lessening competition ... one looks not so much at the position of particular competitors as to the state or condition constituting the market or markets in question, actually or potentially ... It is also borne in mind that, whilst actual competition must exist and be assessed in the context of a market, a market can exist if there be a potential for close competition even though none in fact exists or dealings in it are temporarily dormant or suspended.⁷

In relation to the concept of hindering competition in a market, the Regulator has had regard to the definition of “hinder” referred to by Mason CJ in *Devenish v Jewel Food Stores Pty Ltd*, as “in any way affecting to an appreciable extent the ease of the usual way of supplying an article”.⁸

Sub-section 50(3) of the TPA requires regard to be had to the following non-exhaustive list of factors when analysing whether a merger would be likely to have the effect of substantially lessening competition. Some of these factors may be relevant to the consideration of the effect of a proposed Associate Contract on competition:

- the height of barriers to entry to the market;
- the level of concentration in the market;
- the degree of countervailing power in the market;
- the likelihood that the Associate Contract would result in the associate being able to significantly and sustainably increase profit margins;

⁵ See, for example, *Dandy Power Equipment Pty Limited v Mercury Marine Pty Limited* (1982) ATPR 40-315; *Dowling v Dalgety Australia Ltd* (1992) ATPR 41-165; *ASX Operations Pty Ltd v Pont Data Australia Pty Ltd (No 1)* (1991) ATPR 41-069.

⁶ *Radio 2UE Sydney Pty Ltd v Stereo FM Pty Ltd* (1982) 62 FLR 437 at 444.

⁷ *ASX Operations Pty Ltd v Pont Data Australia Pty Ltd (No 1)* (1991) ATPR 41-069.

⁸ *Devenish v Jewel Food Stores Pty Ltd* (1991) 172 CLR 32 at 45.

- the extent to which substitutes are available in the market, or are likely to be available in the market;
- the dynamic characteristics of the market, including growth, innovation and product differentiation; and
- the nature and extent of vertical integration in the market.

The Regulator notes that these factors relate generally to the contestability of a market rather than a degree of competition per se. That is, the factors relate to the potential for and ability of firms to enter a market and engage in competitive behaviour, rather than, necessarily, the actual extent of competitive behaviour. For example, the height of barriers to entry is important in assessing how readily a firm may be exposed to competition from a new entrant. Similarly, the degree of likelihood that an Associate Contract would enable the associate to significantly and sustainably increase profit margins is important in assessing the extent of exposure of the associate to a threat of competition, rather than the extent of competition existing in a market.

The distinction between the level of actual competitive behaviour in a market and the contestability of that market is particularly important in the context of Associate Contracts. A Service Provider and an associate commonly function as a vertically integrated business operation that is potentially able to achieve cost economies that are not available to a third party User. It is, in principle, desirable that these cost economies are achieved and, further, that the benefits are passed on to the end users of gas. It is the level of contestability of the market (the threat of competition) rather than the actual extent of competition that affects the incentives for the associated parties to both achieve these economies and pass the benefits on to consumers in lower prices. The Regulator recognises that in certain circumstances there is some potential for anti-competitive conduct. This is discussed below in sub-section 5.1.3 of this decision.

The test to be applied to determine whether the proposed Haulage Contract is likely to have the requisite effect on competition is a forward looking “with and without” test. It involves considering what would be the future state of competition in the market with and without the occurrence of the conduct in question. The test is not a comparison of the present state of competition with the likely future state of competition if the conduct occurred. However, the present state of competition may be relevant to illuminate the future state of competition absent the impugned conduct.⁹ Thus, the Regulator has considered:

- the likely future state of competition in any relevant markets if the Haulage Contract is entered into, in comparison with
- the likely future state of competition in any such markets if the Haulage Contract is not entered into.

⁹ *Stirling Harbour Services Pty Ltd v Bunbury Port Authority* [2000] ATPR 41-752 at 40,731.

3.3 THE RELEVANT MARKET

3.3.1 The Concept of a Market

Section 7.1 of the Code requires that the assessment of a substantial lessening, preventing or hindering of competition be applied to “a market”. This may be the market in which the parties to the contract operate or any other market.

Market definition is a necessary step in any assessment of the state of competition and whether any substantial lessening of competition is likely to occur. If the market is defined too broadly, then market power will be understated as a result of including products or sellers who do not restrain the ability of sellers of particular products from raising their prices above competitive levels. Alternatively, if the market is defined too narrowly, then apparent market power may be overstated because some effective competition might be excluded from the analysis.

Properly defining the particular market in question also serves the purpose of focussing the analysis of any competitive effects.

The Code does not set out a definition of “market”, nor does it establish how the dimensions of a particular market are to be established. The Regulator considers past experience under the TPA is useful in assessment of the proposed Haulage Contract.

“Market” is defined in section 4E of the TPA as:

... ‘market’ means a market in Australia and, when used in relation to goods or services, includes a market for those goods or services and other goods or services that are substitutable for or otherwise competitive with the first mentioned goods or services.

It is generally accepted that a market has the following four dimensions:

- product;
- geographic;
- functional; and
- temporal.

In the context of the proposed Haulage Contract, the product market may be a broader energy market or just a market for natural gas. The extent to which one is to be preferred to the other depends largely on actual and potential substitution by users and producers between the different forms of energy. Substitution is generally measured by the application of a hypothetical test – whether other products would be substituted for the product in question in response to a “small but significant non-transitory increase in price” (“SSNIP test”). Both demand-side substitution (users) and supply-side (producers) substitution are relevant.

Defining the functional market requires identification of the vertical stages of production and/or distribution that comprise the relevant area of competition. The Australian Competition and Consumer Commission (“ACCC”) indicated in its Merger Guidelines that

where there are overwhelming efficiencies of vertical integration between two or more stages, it would be inappropriate to define separate functional markets.¹⁰

The time dimension of the market refers to the period over which substitution possibilities should be considered. The longer the period, the more widely the market will be defined.¹¹ In assessing merger proposals, the ACCC takes into account substitution possibilities over the longer term (though still in the foreseeable future) that will effectively constrain the exercise of significant market power by the merged firm.¹² Against this background, the Regulator considers that an assessment of the competitive effects of an Associate Contract would be in the context of the market having the opportunity to adjust to the contract.

3.3.2 Precedent Decisions

Markets for natural gas in Western Australia have received some judicial and regulatory consideration. The Regulator notes there are precedent decisions in which the market or markets have been defined as:

- the State-wide market for energy (encompassing fuel oil, coal, electricity and natural gas);¹³
- State-wide markets for wholesaling or retailing natural gas;¹⁴
- the market for natural gas in Western Australia;¹⁵ and
- the market in Perth or the southern part of Western Australia for natural gas.¹⁶

3.3.3 Submissions

None of the submissions received addressed the issue of how the relevant market should be defined.

¹⁰ Australian Competition and Consumer Commission, *Merger Guidelines*, June 1999, p 38.

¹¹ *Re Tooth & Co Ltd; in re Tooheys Ltd* (1979) ATPR 40-113 at p. 18,196.

¹² Australian Competition and Consumer Commission, *Merger Guidelines*, June 1999, p 40.

¹³ Independent Pricing and Regulatory Tribunal of New South Wales, July 1997, *Determination of the proposed Access Undertaking of AGL Gas Networks Limited*, p. 87. The Determination dealt with the relevant market in New South Wales.

¹⁴ *BHP Petroleum Pty Limited* (1986) ATPR (Com) 50-122; *Delhi Petroleum Pty Limited and Santos Limited* (1988) ATPR (Com) 50-072; *Delhi Petroleum Pty Limited and Santos Limited* (1988) ATPR (Com) 50-076; *Trade Practices Commission v Santos Limited & Anor* (1992) ATPR 41-194; *Australian Gas Light Company* (1996) ATPR (Com) 50-223.

¹⁵ Australian Competition and Consumer Commission, July 1998, *Determination – application for authorisation – North West Shelf Project*, A90624, p. 25.

¹⁶ Australian Competition and Consumer Commission, September 1978, *Esso Exploration and Production Australia limited and Western Mining Corporation Limited*, A90161.

3.3.4 Considerations of the Regulator

Geographic market

It is convenient to first address the geographic definition of the market, although to some extent it is artificial to separate this process from definition of the product market.

It is noted that Western Australian natural gas pipelines are not currently connected with gas pipelines of the eastern States. As such, Western Australia can be regarded as a geographically isolated gas market.

The gas market can be considered in terms of Western Australia as a whole or as a smaller area. A possible narrower definition may be the market for the supply of natural gas by the Mid-West and South-West Gas Distribution System. The basis for such a narrower definition may be that customers who receive gas transported through the Mid-West and South-West Gas Distribution System cannot readily switch their demand between that and gas transported through other pipelines (or, for that matter, other forms of energy). However, this is not the case for at least some Users, for whom delivery directly from either the Parmelia Pipeline or the Dampier to Bunbury Natural Gas Pipeline (DBNGP) is an option.

Accordingly, in the Regulator's view, the relevant geographic market is Western Australia.

Product Market

The relevant product market may be the market for natural gas or the broader market for energy (which might include natural gas, electricity, fuel oil and/or coal). The market could also be that for a specified group of fuels such as:

- gas, distillate and fuel oil;
- gas and coal; or
- gas and electricity.

Natural gas faces competition from other energy forms. Western Australia has many examples of dual-fired power generating plants capable of switching between gas and other forms of energy such as distillate, fuel oil and coal. However, this dual-fuel capability is generally a security of supply issue and is much less a matter relating to competition between fuels. It has also been observed that there is visible competition between gas and electricity in the industrial segment and between gas and coal in power generation.¹⁷ These observations lend support to the view that the market should be defined as the broader energy market.

The distribution systems to which the proposed Haulage Contract relates is primarily concerned with the supply of gas to medium to small users, where gas and electricity are, in many situations, readily substitutable. This would support the view that the relevant product market for the purposes of assessing the Haulage Contract is a broader market for natural gas and electricity.

¹⁷ Australian Competition and Consumer Commission, July 1998, *Determination – application for authorisation – North West Shelf Project*, A90624, pp 23 – 24.

It may therefore be arguable that the relevant product market should be defined as something broader than the market for natural gas. However, for the purposes of assessing the Haulage Contract, the Regulator considers the relevant product market should be defined as the market for natural gas. This is because it is the market for natural gas to which the Haulage Contract directly relates. It is noted that if the Regulator concludes that the Haulage Contract is unlikely to have the effect of substantially lessening, preventing or hindering competition in the narrower market, then it is unlikely to have that effect in any broader market.

Functional Market

As the ACCC notes,¹⁸ functional delineation of the market is concerned with the extent to which maintaining a distinction between, for example, wholesale and retail levels is appropriate. The circumstances in which this might occur include where one firm, due to vertical integration, can sell a particular good or service at both a wholesale and retail level, or where one vertically integrated firm sells multiple components in supply of a single product.

The characteristics of the natural gas market, in so far as the Mid-West and South-West Gas Distribution System is concerned, are that the supply of natural gas involves a supply chain of transmission and distribution services as well as supply of the gas itself.

The functional level that the proposed Haulage Contract directly relates to is the level of the distribution service provided by AlintaGas Networks to AlintaGas Sales. However, the retail level is also particularly relevant to consideration of the Haulage Contract, since it is at the retail level that the proposed Haulage Contract may have any competitive effect, potentially placing other retailers of natural gas at a disadvantage to AlintaGas Sales and, hence, have any effect on competition in the retail sale of gas to end-users. It is in fact at the retail level where the impact, if any, of the Haulage Contract on competition is likely to be greatest.

Accordingly, the Regulator considers the relevant functional level in the market for natural gas is the level of retail sale of gas.

Temporal Considerations

In a determination on an Associate Contract, the Independent Regulatory and Pricing Tribunal (“IPART”) stated that the market it was considering was a product market for natural gas but that at the margin, over the longer term, some competition was provided by other forms of energy.¹⁹ In the case of AlintaGas’s proposed Haulage Contract, the Regulator considers that the relevant time period for consideration is the short to medium term, within which there may not be any potential for the effective substitution of other energy forms.

Summary

Overall, the Regulator’s view is that for the purposes of assessing the impact of the proposed Haulage Contract, the market should be defined as the retail market in Western Australia for natural gas.

¹⁸ Australian Competition and Consumer Commission, *Merger Guidelines*, June 1999, p 38.

¹⁹ Independent Pricing and Regulatory Tribunal of New South Wales, July 1997, *Determination of the proposed Access Undertaking of AGL Gas Networks Limited*.

It is considered that it would be inappropriate to adopt the narrower market definition of the market for the supply of natural gas by the Mid-West and South-West Gas Distribution System in Western Australia. This is due to the potential for gas retailers to use other pipelines in some cases.

While a broader market for energy in Western Australia may be appropriate due to the potential for substitution between gas and other energy forms, the Regulator has taken a prudent approach and considered the effect that the Haulage Contract may have on competition in the narrower market for natural gas.

4 COMPETITION IN THE SUPPLY OF NATURAL GAS

4.1 PRECEDENT DECISIONS

A number of comments in relation to the state of competition in the Western Australia natural gas market were made by the ACCC in its Determination regarding the North West Shelf Project. The comments were made prior to the application of the Code to the Mid-West and South-West Gas Distribution System or other pipelines in Western Australia, but they assist in providing some contextual background. The ACCC said:²⁰

A number of factors have given rise to a concentration of market power in the production and supply of natural gas in Western Australia:

- co-ordinated marketing;
- high barriers to upstream exploration, production and processing;
- the significant acreages and reserves controlled by joint ventures;
- the overlapping ownership interests in a number of actual and potential joint ventures; and
- the underdeveloped state of secondary markets and of intermediary trading services in transmission and gas.

Against this, downstream there are increasingly disaggregated transmission, distribution and retail levels of the market. The degree of bargaining power purchasers have in dealing with the producers depends on the supply options open to users. Even large users may be constrained in their purchasing options by producers' timetables for development of reserves.

4.2 SUBMISSIONS

The following submissions were received regarding the state of competition generally in the market²¹:

- CMS Gas Transmission of Australia

At present, AlintaGas Sales holds a substantial and enduring competitive advantage over other traders in the Mid West and South West gas distribution markets.

This advantage is derived from the substantial unutilised capacity AlintaGas Sales currently has contracted in the Dampier to Bunbury Natural Gas Pipeline (DBNGP).

- Apache Energy Limited

Indeed, it is our belief that the Gas Distribution System charges payable by AlintaGas Sales to date have already served to substantially hinder competition by allowing Sales to price other players out of the market. This is all but admitted in your Issues Paper which states that "the contracted retail price of gas sold by AlintaGas Sales to consumers is too low to accommodate the relevant Reference Tariff". Apache believes there is clear evidence of such pricing practice in recent times.

²⁰ Australian Competition and Consumer Commission, July 1998, *Determination – application for authorisation – North West Shelf Project*, A90624, p. 34.

²¹ The submissions did not focus directly on any specific market such as that defined in section 3 of this Decision. However, the Regulator assumes that the submissions relate at least broadly to the defined market, since they are not inconsistent with the definition.

4.3 CONSIDERATIONS OF THE REGULATOR

The submissions indicate views that Users consider AlintaGas Sales presently holds a substantial competitive advantage, allowing it to supply gas in the retail market, lower prices and hinder competition.

The Regulator notes that for the purposes of assessing whether the proposed Haulage Contract is likely to have the effect of substantially lessening, hindering or preventing competition, past conduct by AlintaGas Sales may be relevant to the assessment of the likely future state of competition in the market without the impugned conduct (in this case, the proposed Haulage Contract).²² However, the primary test is to assess the likely future state of competition “with and without” the conduct in question.

The submission from CMS Gas Transmission of Australia indicates a view that AlintaGas Sales may be deriving competitive advantages from other factors such as existing contracts for capacity in the Dampier to Bunbury Natural Gas Pipeline. The Regulator notes this concern and similar concerns identified in submissions that, currently, competition is not well developed. However, in assessing the likely effect of the Haulage Contract, the Regulator’s focus is not on the acceptability of such advantages per se, except in so far as they relate to the Haulage Contract. Under the Code, the Regulator is required to consider the likely effect on competition of the proposed Haulage Contract. Accordingly, this limits the scope of this review. It is not appropriate in this process to seek to establish whether there is an “acceptable” level of competition in the market (as distinct from market contestability).

²² See discussion above in section 1.2; *Stirling Harbour Services Pty Ltd v Bunbury Port Authority* [2000] ATPR 41-752.

5 EFFECTS OF THE PROPOSED HAULAGE CONTRACT ON COMPETITION

5.1 TARIFF ISSUES

5.1.1 Introduction

Under clause 15 of the proposed Haulage Contract, AlintaGas Sales may pay AlintaGas Networks either the Reference Tariff established under the Access Arrangement for the relevant Service or a different tariff. The Haulage Contract does not specify circumstances in which a tariff different to the Reference Tariff may be applied.

Registers of delivery points attached as schedules to the Haulage Contract will specify the tariffs payable to AlintaGas Networks for all current contracts held between AlintaGas Sales and other parties for the sale of gas.

AlintaGas Ltd has claimed confidentiality under section 7.11 of the Code in respect of the information contained in the registers forming schedules to the Haulage Contract. The Regulator has concluded that disclosure of the information in the schedules could unduly harm AlintaGas Networks' or AlintaGas Sales' legitimate business interests. However, it is considered appropriate to at least disclose that the registers indicate, as AlintaGas Ltd has confirmed in separate correspondence to the Regulator, that AlintaGas Sales would initially pay a tariff less than the relevant Reference Tariff for 15 delivery points to which Service A applies and 9 delivery points to which Service B1 applies. The differences are in some cases large relative to the value of the relevant Reference Tariff.

In correspondence to the Regulator separate from the proposed Haulage Contract, AlintaGas Ltd has advised that the discounted haulage tariffs will be applied to the delivery points where the contracted retail price of gas sold by AlintaGas Sales to consumers is too low to accommodate the relevant Reference Tariff. The contracts at issue were purportedly entered into prior to the Regulator's approval of the Access Arrangement.

AlintaGas Ltd has also indicated in correspondence to the Regulator separate from the proposed Haulage Contract an intention to either discontinue the tariff discount at the end of the term of the current contracts or to continue to offer the discount. In the latter case, AlintaGas Ltd has indicated that AlintaGas Networks would offer the same discount to any User, other than AlintaGas Sales, which supplied the relevant consumer. However, it is not clear how those Users would be able to determine what that discount is if the schedules or relevant parts thereof are not disclosed to the relevant Users in some way.

5.1.2 Submissions

All submissions made to the Regulator addressed the matter of the Haulage Contract providing for distribution tariffs charged to AlintaGas Sales to be different to the relevant Reference Tariffs. Relevant extracts from these submissions, including the submission from AlintaGas Networks, are reproduced below (edited as appropriate for consistency of terminology and nomenclature).

- AGL Energy Sales and Marketing Ltd

Without the benefit of the specific details pertaining to the sites in question it is difficult to assess whether the Associate Contracts would have the effect of substantially lessening, preventing, or hindering competition. On face value it does not appear unreasonable that tariffs for these sites be reduced to enable the retailer to meet the cost of supply, particularly when such reduction does not result in increase in tariffs elsewhere. AGL would recommend that the Office of Gas Regulation take the following issues into account:

- whether the contracted sites in question enable the host retailer to derive benefits that would not be available to other retailers, such as lower upstream costs, thereby limiting the ability of new entrants to compete in a particular geographic region, and
- whether these tariffs would be made available to other users in similar circumstances.

AGL supports the ability of retailers to negotiate tariffs lower than Reference Tariffs provided such lower tariffs are available to all retailers who can then have the opportunity to compete to supply a customer on an equal basis. The term of the proposed tariffs should be for the Access Arrangement Period and any variations over this period should be made available to customers (as opposed to being made public) to enable them to seek alternative offers when contracts expire. This requirement to offer discounted tariffs to all Users should be binding on AlintaGas Networks Pty Limited.

- Office of Energy

In the absence of the schedules to the Contract it is difficult to make any fully informed comments on the Contract. It appears, however, that AlintaGas Sales may have a competitive advantage in the retail supply of gas, through its ability to pay tariffs less than the Reference Tariffs for certain distribution services. It further appears that the potential advantage to AlintaGas Sales of discounted tariffs arises as a result of an increase in AlintaGas Sales' ability to reduce its retail prices to a level below the costs faced by competitors, which may enable undercutting of the prices of other gas retailers in order to defend its market share.

This outcome would seem on face value to be of advantage to customers having current contracts. However, this advantage may not necessarily flow on to new customers should the practice of discounted tariff arrangements be continued or extended. Theoretically, AlintaGas Sales could price up to the level of competitors facing Reference Tariffs while it takes an improved margin derived from discounted tariff arrangements. Another important aspect of this issue emerges in the case of customers who are not yet contestable. Up to 1 July 2002, AlintaGas Sales, in addition to its potential advantage of discounted tariffs, has the advantage of being the only eligible retailer and it can seek to maximise delivered prices under the regulated price cap.

It appears to this Office that it will be essential for the Regulator to have access to detailed information, both in relation to the Contract and the gas sales contracts at issue, for the Regulator to consider whether the advantage of discounted tariffs has the effect of substantially lessening, preventing or hindering competition in the gas retail market.

From the information provided in your Issues Paper, discounts may apply only in relation to existing gas sales contracts of AlintaGas Sales for certain delivery points. You should consider whether or not these discounts should or should not apply to any new contracts (or extensions of existing contracts, not already provided for) for those delivery points.

It is understood, from your Issues Paper, that the gas sales contracts to which discounts apply have expiry dates that range from March 2001 to June 2005 and that AlintaGas Ltd wishes to maintain its discretion to either discontinue the tariff discount at the end of the term of the current contracts or to continue to offer the discount. Should AlintaGas Ltd commit to discontinue discounts on the retail price of gas, a Contract condition to require this would be sufficient.

Should AlintaGas Ltd not be prepared to commit to discontinue discounts at the end of current contracts it could be asked to commit that to the extent that future tariff discounts are offered by AlintaGas Networks to AlintaGas Sales (that is, after expiry of the existing contracts) these would also be offered to other Users of the AlintaGas gas distribution systems. If this representation is binding upon AlintaGas Networks, this may alleviate concerns regarding any increased ability of AlintaGas Sales to offer discounts on the retail price of gas. It does not appear, however, that a condition in the Contract would be sufficient to place an obligation on AlintaGas Networks to this effect.

In any event a condition in the Contract that enables AlintaGas Networks either to discontinue the tariff discounts or to offer those to other Users of the AlintaGas gas distribution systems as well as to AlintaGas Sales, at expiry of the existing contracts, appears to be necessary.

Given that it may not be practicable to bind AlintaGas Networks to make discounted distribution tariffs available to Users other than AlintaGas Sales, the Regulator should consider making discounted distribution tariffs, and indication of the delivery points to which these apply, available to the public. It would be reasonable for AlintaGas Networks to notify the Regulator, and the Regulator to publish this information, at least 49 days before the discounted tariffs are to be offered (i.e. at least 49 days before expiry of the existing contracts). This would be consistent with the situation which would apply to new contracts between AlintaGas Networks and AlintaGas Sales involving discounted tariffs. In the latter circumstances the Regulator would be able to publish a proposed contract at least 49 days before such a contract might be entered into.

- Apache Energy

[The provision for tariffs to differ from the relevant Reference Tariffs] is by far the most controversial provision in the Haulage Contract. Despite the assurances that third party Users can in the future access the same (discounted) tariffs as AlintaGas Sales, should supply to the particular customers be renewed, this provision perpetuates the market power given to AlintaGas Sales to sell to a customer below cost.

AlintaGas Sales must, and retrospectively since the release of the Access Arrangement, pay tariffs for services to these customers at the rates and on the conditions under the Access Arrangement. In a number of cases Sales won this business on the basis that third parties could not approach the delivered gas prices offered by Sales because of the terms of the Access Arrangement. This must be unwound immediately and not perpetuated. It is not good enough to now provide for matching terms for contracts that expire sometime in the future.

We believe this is abuse of market power.

With regard to the discounted Reference Tariffs for some services, a number of supply contracts in question were most likely entered into under the Gas Distribution Regulations or in full knowledge of the proposed Access Arrangement, and against competition from other producers. We have previously pointed out to OffGAR the impossibility of competing to supply at the end of the Geraldton and Bunbury Extension “laterals”, given the tariffs for these laterals and the pricing offered by Sales.

With regard to transfer pricing, the neutrality argument may not be correct in that the strict application of the Access Arrangement to every customer in this State would most likely result in significantly increased revenues to AlintaGas Networks. If this transfer pricing does reduce the viability of AlintaGas Sales then it clearly points to the fact that AlintaGas Sales has been receiving a competitive advantage over other Users, confirming its undue dominance of the market.

The question is not the total profit for AlintaGas Ltd but how the natural monopoly part of the business has supported AlintaGas Sales in continuing to sell at below cost to customers and hence retaining market share where it would not otherwise have done so. AlintaGas Networks is neutral in this in that it continues to receive revenue but AlintaGas Sales is not neutral because the end result may be loss of market share.

These activities (discounted tariffs and cross subsidisation) have substantially lessened competition in the market, as other suppliers have not been able to compete as they have not had access to these subsidised tariffs. It is not good enough to say that this practice will cease (in one form or another) at the expiry of these contracts. It must be unwound immediately and AlintaGas Sales be forced to suffer the consequences of its previous anti-competitive actions.

With regard to the questions raised by OffGAR on this matter in page 6, we make the following comments.

- There are advantages to AlintaGas Sales in revenue transfer from Networks to Sales as this has enabled AlintaGas Sales to maintain market share which it may not otherwise have retained had it been forced to pay full price for access to the network.
- Yes, this has hindered competition in the market and examples can be provided to OffGAR on a confidential basis.
- Making discounted tariffs available to other Users is irrelevant given that AlintaGas Sales already has the contracts. The discounts should not be perpetuated. We have previously raised this issue with

respect to the pricing of “transmission pipelines” such as the Geraldton lateral and the extension of the Dampier to Bunbury pipeline south. These are transmission laterals and should be priced accordingly. They are not distribution laterals and the application of distribution pricing to them has distorted the cost of access.

- If customers at the end of these laterals were to pay delivered gas prices based upon the Reference Tariffs, they would face substantial price rises despite strong upstream competition in the gas market. This can only have been avoided or will only be avoided by AlintaGas Sales offering pricing to such customers based on discounted tariffs.
 - The correct course of action is to correctly price gas transport to the delivery points in question, make that pricing known now and apply that pricing to any renewal of the affected contracts. Until that occurs, AlintaGas Sales should be forced to pay the full tariffs, as per the Access Arrangement. There is a strong argument that this should be retrospective to the time of signing of the contracts in question, taking into account the history of the Access Arrangement and the Gas Distribution Regulations.
 - The discounted distribution tariffs should be made public and arguably could form a realistic basis for determining the ongoing tariffs.
 - Of course there is a material advantage to AlintaGas Sales by continuing the discounted distribution tariffs. Once again, these tariffs have enabled AlintaGas to acquire and maintain a market share that it may not otherwise have acquired had it been forced to compete on a level playing field.
- CMS Gas Transmission of Australia

Clause 15 of the proposed Haulage Contract provides for AlintaGas Networks giving AlintaGas Sales an unspecified discount on distribution system transport tariffs.

Assuming (for the purposes of a case study) a discount of 20 percent in AlintaGas Networks’ tariff, the difference in delivered gas price is \$ 0.38/GJ, as shown in the table below.

CASE STUDY

Delivered Gas Price: AlintaGas Sales Pays Discounted Tariff

AlintaGas Sales		New Trader	
gas purchase cost \$/GJ (typical)	2.00	gas purchase cost \$/GJ (typical)	2.00
DBNGP transport \$/GJ (reservation is sunk cost) <i>note 1</i>	1.25	DBNGP transport \$/GJ (trader pays full cost) <i>note 1, note 2</i>	1.25
distribution cost \$/GJ (20% discount assumed)	1.52	distribution cost \$/GJ (assumed)	1.90
margin \$/GJ (assumed)	0.20	margin \$/GJ (assumed)	0.20
delivered gas price \$/GJ	4.97	delivered gas price \$/GJ	5.35

note 1: assumes prevailing DBNGP tariff and proposed DBNGP Reference Tariff

note 2: assumes load factor of 0.75

In this case study, a discount of 20 percent was assumed. However, it is possible that considerably greater discounts could be offered. It follows that the greater the discount, the greater the competitive advantage.

However, it is also apparent from an examination (in the table below) of the marginal revenue obtained by AlintaGas Ltd, the parent of both AlintaGas Networks and AlintaGas Sales, that it is substantially in its interests to enter into the proposed Haulage Contract rather than obtain new business from third parties.

Marginal Revenue derived by AlintaGas Ltd from Transport in AlintaGas Networks Distribution System and Trading Activities vs. New Trader holding a Reference Service

AlintaGas Sales Associate Contract		New Trader Reference Service Contract	
DBNGP reservation \$/GJ (sunk cost recovered)	1.00	DBNGP reservation \$/GJ	0.00
distribution cost \$/GJ	1.52	Distribution cost \$/GJ	1.90
margin \$/GJ (assumed)	0.20	Margin \$/GJ	0.00
total marginal revenue \$/GJ	2.72	total marginal revenue \$/GJ	1.90

It is clear that retaining its subsidiary's (i.e. AlintaGas Sales') business, even with a distribution discount (i.e. \$1.52/GJ vs. \$1.90/GJ), is far more attractive (by \$0.82/GJ, being \$2.72/GJ minus \$1.90/GJ) than receiving the full distribution charge (\$1.90/GJ) and losing business to a competitor.

It is therefore apparent that if AlintaGas Networks is permitted to extend to AlintaGas Sales a discount on the transport tariffs applicable to use of the AlintaGas Networks distribution system, AlintaGas Sales will enjoy a significant and unfair competitive advantage over its competitors.

CMS therefore proposes that the transport tariff applicable to the proposed Haulage Contract be transparently made available to AlintaGas Sales' competitors.

CMS further proposes that this information be made available as soon as possible to enable new market entrants to begin with a 'level playing field' and fully evaluate the market environment when developing strategies.

...

The proposed Haulage Contract is notable for its failure to provide details relating to the specific operations of the virtual monopoly AlintaGas Limited. Under the proposed Haulage Contract, the aggregate corporate entity AlintaGas will retain most if not all of its monopoly advantages and hence monopoly power.

CMS therefore considers that the Regulator can realise his stated objective of promoting competition and facilitating entry to the distribution market by new gas traders by mandating that AlintaGas releases all details of its proposed Haulage Contract.

Consequently, CMS proposes that the content of the Delivery Point Register and any other unreleased parts of the proposed Haulage Contract be made available to all Users of the AGN Distribution System and all end users of gas supplied by that system.

CMS further proposes that this information be made available as soon as possible to enable new market entrants to begin with a 'level playing field' and fully evaluate the market environment when developing strategies.

- AlintaGas Networks

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 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. AlintaGas 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 AlintaGas Networks, which incorporate the same or a similar discount. In each case AlintaGas 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 AlintaGas Networks' intentions. AlintaGas 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 AlintaGas Networks to supply a particular delivery point and in that approach, requesting a discount for that delivery point and providing justification to AlintaGas Networks as to why that User considers that AlintaGas Networks should provide the discount for that delivery point.

AlintaGas 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 AlintaGas Sales or another User. It is not AlintaGas Networks' position that, if it chooses to offer a discount to AlintaGas Sales, the *same* discount will automatically be offered to other Users (or potential Users). The main reason for the inability of AlintaGas 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 AlintaGas 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.

AlintaGas 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. AlintaGas 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 AlintaGas 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 AlintaGas Networks which reflect this.

At page 6 of the Issues Paper, the Regulator seeks public comment on whether representations made by AlintaGas Networks that discounted distribution tariffs would be available to Users other than AlintaGas Sales, should be binding on AlintaGas Networks. On a number of occasions²³ AlintaGas 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 AlintaGas Networks to retract from this position which it has made so publicly.

Furthermore, the proposed Haulage Contract is a contractual agreement between AlintaGas Networks and AlintaGas Sales. As a matter of law, its legal effect can only be in relation to those two parties. It would not

²³ AlintaGas Networks reiterates in its submissions that 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 AlintaGas Networks' covering letter when submitting the proposed Haulage Contract on 27 February 2001.

only be ineffective, but also inappropriate, to attempt to impose obligations on AlintaGas Networks in relation to third parties, in a contract as between AlintaGas Networks and AlintaGas 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 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.

5.1.3 Considerations of the Regulator

Background

As the Regulator disclosed in the Issues Paper, the confidential registers attached as schedules to the proposed Haulage Contract indicate that AlintaGas Sales would pay a tariff less than the relevant Reference Tariff for 15 delivery points to which Reference Service A applies and 9 delivery points to which Reference Service B1 applies, as AlintaGas Ltd has confirmed in

separate correspondence to the Regulator. The differences are in some cases large relative to the value of the relevant Reference Tariff.

AlintaGas Networks has advised that the discounted haulage tariffs will be applied to the delivery points where the contracted retail price of gas sold by AlintaGas Sales to consumers is too low to accommodate the relevant Reference Tariff. The contracts at issue were purportedly entered into prior to the Regulator's approval of the Access Arrangement. Accordingly, the provisions of the Access Arrangement may not be relevant to how those customers were initially secured.

The Haulage Contract also allows for AlintaGas Networks to charge AlintaGas Sales tariffs other than the Reference Tariffs for haulage of gas to any delivery points, including those other than for which discounted tariffs are currently listed in the schedule to the Haulage Contract.

In assessing the Haulage Contract, the Regulator has considered whether there may be a substantial lessening of competition in the retail market for natural gas as a result of the actual or potential charging by AlintaGas Networks of distribution tariffs to AlintaGas Sales that are less than the relevant Reference Tariffs.

The submissions other than that from AlintaGas Networks expressed views that the ability of AlintaGas Networks to charge discounted tariffs to AlintaGas Sales would give AlintaGas Sales a competitive advantage in the retail gas market, and that this competitive advantage would result in reduced competition in that market. The submissions noted that this competitive advantage would be removed if AlintaGas Networks could in some way be held to its stated intent to not discriminate between AlintaGas Sales and other users of the distribution system when offering discounted distribution tariffs. In view of the submissions, the Regulator considered whether:

- i. the ability of AlintaGas Networks to charge discounted tariffs to AlintaGas Sales would give AlintaGas Sales a competitive advantage in the retail gas market; and
- ii. it is desirable and possible to hold AlintaGas Networks to the stated intent of non-discriminatory access to discounted tariffs.

Independently of matters raised in submissions, the Regulator also considered whether any competitive advantage to AlintaGas Sales would result in a reduction in contestability of the market for the retail sale of natural gas.

Potential Competitive Advantage

Submissions to the Regulator indicated or implied that AlintaGas Sales would, through discounted distribution tariffs charged by AlintaGas Networks, gain an ability to pass on the discount to end users of gas in the form of a lower retail gas price. It was argued that this would confer a competitive advantage on AlintaGas Sales through an ability to offer lower retail prices for gas and thus secure customers and market share at the expense of other actual or potential competing gas retailers.

In considering this argument, the Regulator considered whether access to discounted distribution tariffs would, in itself, confer on AlintaGas Sales an ability to reduce retail gas prices.

The Regulator first notes that any discount to a distribution tariff charged to AlintaGas Sales (or any other User of the distribution system) does not constitute a prudent discount within the meaning of section 8.43 of the Code. Section 8.43 of the Code contemplates a situation whereby a User of a pipeline is provided with a Service at a tariff less than the relevant Reference Tariff in situations where that User would not utilise the Service at the Reference Tariff, but the User would still be prepared to pay a lesser tariff that is sufficient to cover the avoidable cost of providing the Service plus make some contribution to the recovery by the Service Provider of fixed costs. In such a case, provision of the discounted tariff results in the Reference Tariff(s) being lower for all other Users than would be the case in the absence of the discount.

An Access Arrangement may make provision for such “prudent discounts” and allow for the value of the discount to be recovered from other Users. However, the Access Arrangement for the Mid-West and South-West Distribution systems does not provide for this. As a result, should AlintaGas Networks charge distribution tariffs less than the relevant Reference Tariffs to AlintaGas Sales (or any other User), there is no provision in the current Access Arrangement Period for any revenue thus foregone by AlintaGas Networks to be recovered from other Users.

Bearing in mind the inability of AlintaGas Networks to recover from other Users the value of discounts to distribution tariffs, the consequences of discounted tariffs on the competitive ability of AlintaGas Sales can be examined as follows.

The offering of a discounted tariff by AlintaGas Networks to AlintaGas Sales has the effect of reducing the revenue and profit of AlintaGas Networks by the amount of the discount. For a given retail price of gas, the revenue and profit of AlintaGas Sales (before tax) would increase by the value of the discount. Of note, however, is that the total revenue and profit of the two companies taken as a whole would not change unless there is some advantage to be gained from the implicit transfer of revenue and profit between the two companies, such as reduction of total taxation liabilities.

If AlintaGas Sales were to pass on the cost saving of the discounted distribution tariff in the form of a lower retail price of gas, then there would be a corresponding reduction in the profit of AlintaGas Sales and of the two companies in total. Moreover, the loss of revenue and profit to the two companies in total would be the same as if AlintaGas Sales was to offer the discounted retail price of gas in the absence of the discounted distribution tariff.

Payment by AlintaGas Sales of a discounted distribution tariff would not alter the ability of AlintaGas Sales to offer a lower retail price of gas relative to a situation in which no discount was available, while maintaining a given level of group profitability. As such, the Regulator is of the view that a discounted distribution tariff would not, in itself, affect the ability of AlintaGas Sales to discount the retail price of gas or to compete on a price basis with other gas retailers and would not affect the ability of AlintaGas to compete in the retail market for gas. The exception to this would be if there were indirect advantages from the transfer of revenue and profit between the two companies, such as reductions in taxation liabilities. This may, however, be regarded as a legitimate advantage of an integrated operation.

Non-Discriminatory Access to Discounted Tariffs

When submitting the Haulage Contract and in its submission in response to the Issues Paper, AlintaGas Networks indicated an intent (which it described as a “policy”) to not discriminate

between AlintaGas Sales and other Users in respect of access to discounted distribution tariffs. Submissions to the Regulator from AGL, Apache Energy and CMS Gas Transmission of Australia requested that the Regulator consider means of holding AlintaGas Networks to the stated policy of non-discriminatory access to discounts and/or to make available information on discounts that are made available to AlintaGas Sales.

In the context of approval of the Haulage Contract, the Regulator has no power under the Code to require AlintaGas Ltd or AlintaGas Networks to make available discounted distribution tariffs to users of the distribution systems. The relationship between AlintaGas Networks and third party Users is contractual. The Access Arrangement for the Mid-West and South-West Distribution Systems may form the basis of any contract or may, as in the case of the Haulage Contract, not play any role. While the Code provides for discounts to the Reference Tariff (through the prudent discount provisions of section 8.43), provision for such discounts would need to be incorporated in an appropriate manner into the Reference Tariff Policy of the Access Arrangement before AlintaGas Networks might be required to make the discount available to Users. Even in such a case, it may not be possible to require a Service Provider to offer a discounted tariff. In the event of a dispute over access, paragraph 6.18(e) of the Code prevents the Arbitrator from requiring a Service Provider to supply a Reference Service at a tariff other than the relevant Reference Tariff.

With regard to requiring AlintaGas Networks or AlintaGas Sales to make available to other Users information on the application of discounted tariffs, the Regulator is of the view that requiring such information to be made available is contrary to the legitimate business interests of the AlintaGas companies. Moreover, as such a requirement relates to a relationship between the AlintaGas companies and other parties, it is considered inappropriate to consider such a requirement in the context of the Haulage Contract.

Market Contestability

As noted above, the Regulator considers that the ability of AlintaGas Networks to offer discount distribution tariffs to AlintaGas Sales would not, in itself, give rise to a competitive advantage to AlintaGas Sales in the retail market for natural gas except where the transfer of revenue and profit between AlintaGas Networks and AlintaGas Sales has indirect advantages through cost economies associated with vertical integration. Such cost economies and associated competitive advantages would not, in principle, reduce the contestability of the retail market for natural gas.

The Regulator also considered whether the potential availability of discounted distribution tariffs might enhance the ability of AlintaGas Sales to engage in anti-competitive conduct for the purposes of capturing market share and reducing market contestability.

Discounted distribution tariffs could conceivably form a basis for price cutting by AlintaGas Sales with a short-term effect of limiting potential for the entry of competing gas retailers to the market, even though (as noted above) the availability or otherwise of discounted tariffs is not considered to affect the ability of AlintaGas Sales to reduce retail gas prices. It is noted, however, that this practice could contravene the TPA, if entered into for one of the three purposes (which may be a substantial purpose among others) proscribed in sub-section 46(1)

of the TPA.²⁴ As such, the Regulator considers that the anti-competitive effects of any such conduct is more appropriately addressed under the provisions of the TPA if it actually occurs, rather than being considered in regard to the approval of the Haulage Contract under the Code. At the present time, there is no evidence before the Regulator to suggest that AlintaGas Sales or AlintaGas Networks intend engaging in such conduct.

5.1.4 Conclusion

The Regulator has considered the potential competitive advantages that may accrue to the AlintaGas companies if the proposed Haulage Contract is approved and the effect these advantages (if any) may have on competition in the retail market for natural gas.

The Regulator concludes that the provision for discounted tariffs would not confer any competitive advantage on AlintaGas Sales in the retail market for natural gas, other than benefits that may arise from the implicit transfer of revenue from AlintaGas Networks to AlintaGas Sales, such as taxation benefits. Any such benefits would not reduce the contestability of the retail market for natural gas. Further, those benefits are not likely to be “large or weighty” or material in terms of having the potential to have the requisite effect on competition. Apart from such benefits, which may be regarded as a legitimate efficiency of vertical integration, the Haulage Contract would not have any impact upon AlintaGas Sales’ ability to offer discounted tariffs. Thus, the state or condition of future competition in the retail market for natural gas with and without the Haulage Contract would be largely unchanged.

Accordingly, the Regulator considers that the provision under the Haulage Contract for discounted tariffs is not likely to have the effect of substantially lessening, preventing or hindering competition in the retail market for natural gas.

5.2 NON-TARIFF ISSUES

5.2.1 General Issues

Submissions were received in respect of particular differences between the Access Arrangement Terms and Conditions and the proposed Haulage Contract, and more generally in respect of the changes taken as a whole. The submissions that address generally the differences between the Access Arrangement Terms and Conditions and the proposed Haulage Contract are as follows.

- AGL Energy Sales and Marketing Limited

AGL is of the view that terms and conditions should remain consistent with the Access Arrangement. Any changes to the terms and conditions of the Access Arrangement should be through a review process.

Where AlintaGas Networks Limited now considers that terms and conditions are an improvement on the Access Arrangement provisions (clauses 14(2), 14(3), 20, and 23), these arrangements should also be made available to all Users.

²⁴ The purposes are: eliminating or substantially damaging a competitor of the corporation or a related body corporate in any market; preventing the entry of a person into any market; and deterring or preventing a person from engaging in competitive conduct in any market.

- Apache Energy Limited

Whilst a number of the changes proposed in the Haulage Contract appear minor, and would be unlikely to constitute substantial competitive advantage to AlintaGas Sales, taken as a whole they provide AlintaGas Sales with more flexibility, longevity and general comfort than those offered to Users under the Access Arrangement.

- AlintaGas Networks

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 gas distribution systems 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.

The Regulator takes the view that as a general proposition, any User or Prospective User is free to negotiate such terms and conditions as may be agreed. This is made clear in the Code, which states that the role of the Reference Tariff under an Access Arrangement is to act as a benchmark, which the Regulator considers also applies to the terms and conditions applicable to Reference Services.

Accordingly, any User or Prospective User is not necessarily foreclosed from securing access on terms and conditions similar to or more favourable than those that would apply to AlintaGas Sales under the proposed Haulage Contract. A review of the Access Arrangement is not required under the Code where Users or Prospective Users wish to negotiate outside the terms and conditions for Reference Services set out in the Access Arrangement.

Notably, AlintaGas Sales does not have any general ability under the proposed Haulage Contract to require AlintaGas Networks to grant it special terms and conditions or to deal with it in any particular favourable way. This is significant because it means that apart from the specific differences in provisions of the proposed Haulage Contract, AlintaGas Sales does not receive any general competitive advantage by virtue of the Haulage Contract itself. AlintaGas Sales does have some advantage over its competitors in that it is a member of the same corporate group as AlintaGas Networks, which may facilitate the negotiation of some terms and conditions. However, this is an advantage of vertical integration that should not be denied **unless** the way in which AlintaGas Networks or AlintaGas Sales seek to use this advantage is likely to substantially lessen, prevent or hinder competition. It is in this context that the specific differences between the proposed Haulage Contract and the Access Arrangement were assessed.

While some of the customers to whom the Haulage Contract ultimately relates are not presently contestable (and so any competitive advantage which AlintaGas Sales has is not relevant in respect of those customers at this time), the Haulage Contract may also apply to numerous other current contestable customers and customers that become contestable at some time in the future. It is in respect of those customers that AlintaGas Sales may gain a

competitive advantage over other Users, by virtue of the non-tariff differences between the Haulage Contract and the Access Arrangement.

If particular differences have the potential to confer some competitive advantage on AlintaGas Sales, then the cumulative effect of those differences might be to substantially lessen, hinder or prevent competition in the retail market for natural gas in Western Australia. This would occur if the effect of the differences were such as to substantially reduce the contestability of the retail market for natural gas either in general or in respect of particular customers or classes of customers.

5.2.2 Specific Issues – Clause Differences

A number of the differences between the proposed Haulage Contract and the Access Arrangement identified in the Issues Paper formed the subject of specific submissions. Where material, these are discussed below. Additional matters not directly raised in submissions are dealt with under sub-section 5.2.3 – Additional Considerations.

Clauses 3 and 4 – Contract Duration

Clause 3 of the Haulage Contract relates to the duration of the contract. The Haulage Contract between AlintaGas Networks and AlintaGas Sales is not for any defined period. Under the Haulage Contract, AlintaGas Networks would provide distribution services to particular delivery points (listed in the schedules to the Haulage Contract) for a period commencing on a designated *start date* and ending on a designated *end date* in respect of each delivery point. Clause 4 of the Haulage Contract provides a mechanism for bringing forward the end date for the distribution service to a particular delivery point.

These provisions differ from the relevant provisions of the Access Arrangement. Under the Clause 1 of Schedules 4, 5 and 6 of the Access Arrangement, a haulage contract will be of duration of one year or more. There is no provision in the Access Arrangement for bringing forward the “end date” of a haulage contract.

The following submissions were received in relation to the duration of the Haulage Contract.

- Office of Energy

One clear difference between the Access Arrangement and the proposed contract relates to the duration of the Contract. It is considered that in the context of the full deregulation of the gas retail market on 1 July 2002, and the expected ensuing increase in competition, the inherent flexibility to reduce the number of gas customers being served under the arrangements in the Contract appears to be warranted.

- AGL Energy Sales and Marketing Limited

Clauses 3 and 4: AGL believes that the start date and end date of distribution services should be provided and should indicate the prices over the Access Arrangement period to enable other users to compete to supply the sites in question with certainty.

- Apache Energy Limited

The ability of AlintaGas Sales to terminate haulage arrangements at any time gives Sales a distinct advantage in the market compared to its competitors who are obliged to enter into arrangements of at least a year. Further, with no apparent mechanism to adjust the price of non-Reference Tariffs, discounted tariffs would appear to be able to continue indefinitely.

Again, the flexibility offered by [clause 4] is not available to competitors under the Access Arrangement. This allows Sales far more flexibility in its arrangements.

- CMS Gas Transmission

Clause 3 of the proposed Haulage Contract provides for a contract duration of any length. Clause 4 of the proposed Haulage Contract provides for complete flexibility in changing the contract termination date.

Consequently, AlintaGas Sales faces absolutely no risk of holding stranded capacity under the proposed Haulage Contract.

Clauses 1 of Schedules 4, 5, and 6 of the AlintaGas Networks Access Arrangement specify contract duration as being one year or more. The AlintaGas Networks Access Arrangement does not provide for changing the contract termination date. Further, the AlintaGas Networks Access Arrangement requires that the Queuing Policy applies to all capacity increases, while the proposed Haulage Contract requires queuing for capacity to new delivery points only.

Consequently, a User of the AlintaGas Networks Distribution System operating under the AlintaGas Networks Access Arrangement faces the risk of holding stranded capacity.

The fact that AlintaGas Sales would not face 'reservation risk' while its competitors would, gives AlintaGas Sales a significant commercial advantage.

It should be noted that in the event that AlintaGas Sales gains the business of an end user which was formerly supplied by a competitor, AlintaGas Networks is entitled to charge the reservation component of its contract with the competitor while simultaneously collecting transport revenue from AlintaGas Sales. Such 'double dipping' is of direct benefit to the parent company of AlintaGas Networks and AlintaGas Sales.

- AlintaGas Networks

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 AlintaGas 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.

Under sub-clause 3(2), the Haulage Contract will end when AlintaGas Sales is no longer entitled to take delivery of gas at any delivery point. As sub-clause 3(2) is presently drafted, this will be the earliest end date specified in the Schedule, not the latest, as AlintaGas submits. This may suggest that the Haulage Contract is limited in duration. However, under sub-clause 7(1) AlintaGas Sales may request AlintaGas Networks to add new delivery points to the register or to extend the end date for a delivery point already specified in the register. This will enable the parties to effectively extend the Haulage Contract for as long as they wish, subject to it being terminated under clause 51. The duration of the Haulage Contract is therefore potentially unlimited.

This potentially unlimited duration increases the significance of the other differences between the Haulage Contract and the Access Arrangement.

The issue raised in submissions appears to be that a User would, under the Access Arrangement, be obliged to enter into a contract for delivery to a delivery point for a minimum of one year. Thus, the User would be liable for reservation components of the distribution tariff regardless of whether that User's retail contract with the end user of gas

continues or is terminated during that time. The User may therefore bear a “reservation risk” while AlintaGas Sales does not, since it can bring forward the end date for delivery.

However, the Regulator does not consider this to be an issue of importance. If AlintaGas Sales were bound to a minimum one year term for any particular delivery point and remained liable for reservation charges when a retail sales contract is terminated, then the reservation charge payment would be a transfer payment between corporate members of the AlintaGas corporate group. This would not affect the overall profitability of the group. Accordingly, at least in so far as the revenue effect is concerned, no competition concerns may arise unless there were some reason for concluding that AlintaGas Sales would engage in pricing conduct designed to eliminate competitors (which is discussed above in relation to tariff issues). The Regulator considers it would be inappropriate to assume such conduct is likely to occur without any evidence of its likelihood or of such conduct occurring in the past.

The provision for bringing forward the end date, although insignificant in revenue terms, does give AlintaGas Sales a degree of flexibility that other Users do not have. The main advantage of this is to potentially enable AlintaGas Sales to operate more efficiently than its competitors, which is arguably a legitimate advantage of a vertically integrated operation. Measuring this advantage is not possible, since it is merely a future expectation. However, it has formed part of the Regulator’s overall assessment of the likely effect of the Haulage Contract on competition.

Clause 6 – Amortisation

Paragraph 6(4)(h) of the Haulage Contract specifies that, for Reference Services A and B1, the register of delivery points must include specification of the period over which any user-specific delivery facilities are amortised. In a letter of transmittal for the proposed Haulage Contract, AlintaGas indicated that the period of amortisation would typically be set at 20 years.

The Access Arrangement provides for amortisation over the lesser of the duration of the Haulage Contract and the economic life of the User Specific Delivery Facilities, which may be other than twenty years.

The following submissions were received in relation to the period for amortisation of the cost of User Specific Delivery Facilities.

- Apache Energy Limited

Again this provision arguably gives Sales an advantage over other Users as it can amortise the cost over 20 years rather than a lesser period. Apache’s discussions with AlintaGas Networks for new facilities has (correctly) had amortisation over the duration of the proposed haulage contract.

- CMS Gas Transmission

Clauses 6(3)(j) and 6(4)(h) state that User Specific Delivery Facilities are to be amortised over a period specified in the relevant Register.

It is feasible that both the method of amortisation and the period of amortisation specified in the proposed Haulage Contract could result in amortisation charges applicable to AlintaGas Sales being less than those applicable to a competitor operating under the AlintaGas Networks Access Arrangement.

In turn, this could lead to AlintaGas Sales enjoying an unfair competitive advantage over the competitor.

Therefore, CMS proposes that the terms of the proposed Haulage Contract and the AlintaGas Networks Access Arrangement regarding amortisation of User Specific Delivery Facilities be made consistent, transparent and available to AlintaGas Sales' competitors.

- AGL Energy Sales and Marketing Limited

AGL does not see any reason to vary the Access Arrangement terms with respect to amortisation.

- AlintaGas Networks

The period over which existing User Specific Delivery Facilities 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 [application] of clauses 21 and 22 of the Access Arrangement to existing customers which could result in User Specific Delivery Facilities 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.

The effect of paragraphs 6(3)(j) and 6(4)(h) where an amortisation period of 20 years is used may be this. If AlintaGas Sales secures a retail sales contract for a short period and enters into a distribution contract with AlintaGas Networks for a correspondingly short period, then AlintaGas Sales may pay charges associated with the User Specific Delivery Facilities based on amortisation over 20 years whereas another User would, in similar circumstances, pay charges based on amortisation over a shorter period (the period of the contract). Despite AlintaGas Networks' indication that these arrangement only apply to existing customers, there is nothing to stop the arrangements being applied to new customers.

This longer amortisation period might result in AlintaGas Sales incurring lower costs than its competitors, albeit at some financial risk to AlintaGas Networks and the AlintaGas group of companies that the cost of User Specific Delivery Facilities would not be totally recovered. This ability to manage cost recovery, prices and risk could be argued to be an efficiency of vertical integration.

The ability of other Users to secure similar amortisation periods would depend upon how AlintaGas Networks applied its "non-discriminatory policy". If it were applied unfailingly to all Users, then the difference may not have any anti-competitive effect. However, such application is not guaranteed. Accordingly, at least some competitive advantage may be conferred on AlintaGas Sales.

Clause 7 – Adding Delivery Points, Increasing the Contracted Peak Rate

Clause 7 of the Haulage Contract sets out a mechanism for dealing with any request by AlintaGas Sales to increase the contracted peak rate for a delivery point to which Reference Service A or B1 applies and to extend the end date for a delivery point for any Reference Service. It is subject to the provisions of clauses 17, 19 and the whole of chapter 6 (Queuing Policy) of the Access Arrangement.

The following submission was received in relation to increases in the contracted peak rate.

- AGL Energy Sales and Marketing Limited

Clause 7: Increases to contracted peak rate should be subject to the Queuing Policy.

The Regulator notes that any increases in the contracted peak rate for delivery of gas to delivery points on behalf of AlintaGas Sales pursuant to clause 7 are subject to the queuing policy under the Access Arrangement, under sub-clause 7(2).

As noted above in relation to clauses 3 and 4, the effect of sub-clause 7(1) is that the duration of the Haulage Contract may potentially be unlimited. The potential effect of this on competition is discussed in the summary of the Regulator's decision set out at the beginning of this document. Apart from this, and in relation to clause 7 itself, the Regulator considers that no advantage is conferred on AlintaGas Sales.

Clause 8 – Interconnection Contracts

Clause 8 of the Haulage Contract sets out detailed provisions regarding interconnection of the distribution system and an interconnected pipeline. By contrast, clause 10 of the Access Arrangement merely states what an interconnection service is. The notes that follow clause 10 of the Access Arrangement set out the types of matters with which an interconnection contract might be expected to deal.

The following submissions were received in relation to provisions for interconnection.

- Apache Energy Limited

An Interconnection Contract is a pre-requisite for the granting of a Haulage Contract. Any provisions that provide Sales with certainty compared to a third party User are to the advantage of Sales.

AlintaGas Sales has in the past complicated the granting of an Interconnection Contract by insisting that AlintaGas Networks keeps AlintaGas Sales whole with respect to linepack (supposedly in conformance with AlintaGas Sales' agreements with Epic Energy). There should be a provision in the Access Arrangement that removes the necessity for AlintaGas Sales to influence these matters.

Following on from that, AlintaGas Sales has insisted that if a customer is supplied via the Parmelia pipeline, then the operator of the Parmelia pipeline must provide back-up arrangements to its supply in the case of the failure of the Parmelia pipeline or its facilities. This is patently ridiculous and designed only to exclude third party Users.

- AGL Energy Sales and Marketing Limited

Clause 8: Detailed provisions regarding pipeline interconnections are necessary for safety and security of supply reasons. The arrangements in the Haulage Contract is a bi-lateral agreement between AlintaGas Networks Pty Limited and AlintaGas Sales Pty Limited. The broader issues of whether such arrangements could become barriers to entry should be considered if they are to be adopted as industry practice.

AlintaGas Networks has stated that clause 8 expands upon clause 10 of the Access Arrangement because it became apparent during negotiations for interconnection with the Parmelia Pipeline that more detail is required. It should be noted that the matters which clause 8 deals with are foreshadowed in the notes that follow clause 10 of the Access Arrangement. Clause 8 conforms to those notes. It may therefore be expected that any User or Prospective User may reasonably expect to be able to negotiate similar provisions in any contract they may enter into with AlintaGas Networks.

It should also be noted that any right to reimbursement of AlintaGas Networks by AlintaGas Sales under clause 8 (where AlintaGas Networks is liable for any penalty or charge as a result of the actions of AlintaGas Sales) is subject to AlintaGas Networks acting as a prudent pipeline operator.

The Regulator considers no competitive advantage is likely to be conferred on AlintaGas Sales by clause 8. This is because the terms of clause 8 do not appear to be unusually generous to AlintaGas Sales.

Clause 13 – Gas Pressure

Sub-clause 13(4) of the Haulage Contract provides for agreement between the parties to a delivery point pressure different to 7 kPa for Services B2 and B3. This contrasts with clause 3 of schedule 6 to the Access Arrangement, which provides for delivery of gas at standard nominal pressures not exceeding 7 kPa.

The following submission was received in relation to the flexibility this may provide.

- Apache Energy Limited

This clause potentially gives AlintaGas Sales an advantage over other Users in that if a third party User requests a pressure higher than 7 kPa, AlintaGas Networks may insist on a new lateral and its associated costs. If this provision is designed to give flexibility to AlintaGas Sales not open to others then it is to the advantage of AlintaGas Sales.

The consequence of sub-clause 13(4) is that the parties have a degree of flexibility that is not provided for under the Access Arrangement. However, it would be open to other Users to negotiate similar terms, if AlintaGas Networks were to apply its non-discriminatory policy. In any event, the Regulator considers the potential for AlintaGas Networks to require the installation of a new lateral is too remote to affect this assessment of the Haulage Contract and its likely effect on competition. Sub-clause 13(4) is not considered to confer any material competitive advantage on AlintaGas Sales.

Clauses 14 and 19 – Provision of Data

Sub-clause 14(1) of the Haulage Contract specifies AlintaGas Networks' obligations with regard to reporting of information for deliveries under Reference Service A. AlintaGas Networks must report particular types of information (relating to gas quantity, flow rates, quality and pressure) to AlintaGas Sales at least 12 times yearly, at 30-day intervals. Clause 5 of schedule 4 of the Access Arrangement does not make provision for reporting of information. The Haulage Contract thus provides for more reporting of information to AlintaGas Sales than applies to a User of Reference Service A under the Access Arrangement.

Under the Access Arrangement, ancillary services such as additional reporting may be acquired under clauses 13 and 14, which may be subject to an additional charge, unlike under the Haulage Contract.

Clause 19 of the Haulage Contract provides for the supply of metering data by AlintaGas Networks to AlintaGas Sales within one business day of the meter reading where the meter is read by means of telemetry and within three days of the meter reading where the meter is not read by means of telemetry. Clause 11 of schedule 7 of the Access Arrangement merely provides for data to be provided to a User within 5 business days of the meter reading regardless of how the meter is read.

AlintaGas Ltd states that additional requirements for reporting of information are a result of discussions with AlintaGas Sales regarding its requirements.

The following submissions were received in relation to provision of information to AlintaGas Sales.

- Apache Energy Limited

In a multi-user environment AlintaGas Sales should be due no more data than other Users. In other words, if AlintaGas Sales can insist on this information then so should a third party User be able to access that information. Information should be transparent to all Users.

- AGL Energy Sales and Marketing Limited

Clause 14(1) and clause 19: AGL supports the ability of a user to negotiate for additional services if it is seen as necessary to conduct business provided that there is a consistent framework for the provision of such additional services.

- CMS Gas Transmission

Both the proposed Haulage Contract and the AlintaGas Networks Access Arrangement provide for AlintaGas Networks to supply its customers with a variety of operational information within certain time periods.

The extent of the information provided in the proposed Haulage Contract is greater than that specified in the AlintaGas Networks Access Arrangement. Further, the time in which AlintaGas Networks is required to supply information under the proposed Haulage Contract is shorter than the corresponding time periods in the AGN Access Arrangement.

This disparity in the nature and timing of information supply gives AlintaGas Sales an unfair competitive advantage over its competitors.

Therefore, CMS proposes that the terms of the proposed Haulage Contract and the AlintaGas Networks Access Arrangement regarding the nature and timing of supply of operational information to Users of the AlintaGas Networks Distribution System be made consistent, transparent and available to AlintaGas Sales' competitors.

- AlintaGas Networks

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.

It is noted that the Access Arrangement does not expressly contemplate negotiation of terms for the provision of information. Accordingly, this is a matter that Users would be required to negotiate according to their specific needs, subject to the agreement of AlintaGas Networks. Depending on whether or not AlintaGas Networks chooses to negotiate this, AlintaGas Sales may gain an advantage that other Users are unable to secure. AlintaGas Networks has submitted that in every haulage contract it will specify in more detail the information to be provided to the User. However, the Regulator is unable to hold AlintaGas Networks to this representation – this would be a matter that the User and AlintaGas Networks would have to resolve.

The Regulator considers the differences in timing would not confer any substantial competitive advantage on AlintaGas Sales. The differences are only a matter of days, while the number of reports that must be provided remains the same (at least in respect of sub-clause 14(3)). With regard to the differences in substance of any reports, the Regulator considers the primary advantage gained by AlintaGas Sales is informational. Quantifying this advantage is difficult, but it may generally place AlintaGas Sales in a better position than its

competitors to respond to competition, assuming the competitors are unable to negotiate similar reporting requirements. Thus, there is potentially at least some competitive advantage.

Clause 20 – Metering Uncertainty

Clause 20 of the Haulage Contract sets out detailed provisions for dealing with metering uncertainty. Sub-clause 20(1) is essentially the same as clause 12 of schedule 7 of the Access Arrangement. Sub-clauses 20(2) – (10) are new and specify in detail the actions to be taken in the event of inaccurate meter readings, including the calculation or estimation of delivered quantities of gas and the remedy of underpayments or overpayments. The Access Arrangement does not contain similar provisions.

AlintaGas Ltd claims these merely reflect common practice in the industry.

The following submission was received in relation to the flexibility this may provide.

- Apache Energy Limited

Whilst these provisions may reflect common practice in the industry the same provisions are not available to other Users under the Access Arrangement. We have no objection in principle to this but once again any such provisions should be available to third party Users or not to AlintaGas Sales.

The Regulator considers no competitive advantages are conferred on AlintaGas Sales by sub-clauses 20(2) – (10) since these provisions are only procedural and are not unusually favourable to AlintaGas Sales as compared with what might be expected for unrelated Users. Similar provisions would be required in any other haulage contract.

Clause 21 – Use of Gas Quality Data from Other Locations

Sub-clauses 21(2) to 21(4) of the Haulage Contract provide for AlintaGas Networks to determine the higher heating value of gas delivered to a delivery point, where that delivery point is located in a sub-network with more than one gas receipt point.

There are no similar provisions in the Access Arrangement. Under the Access Arrangement, a User would presumably be bound by clause 13 of schedule 7 of the Access Arrangement, which provides for AlintaGas Networks to use gas quality data from equipment at one or more other locations to estimate gas quality at a delivery point in order to calculate energy flow rates for and quantities of gas delivered to a delivery point. In the absence of manifest error, the rates and quantities so calculated bind both parties to a Haulage Contract.

AlintaGas Networks claims the provisions are necessary due to the likelihood of interconnection with the Parmelia Pipeline and the potential for blending of gases within the gas distribution systems.

The following submissions were received in relation these provisions.

- Apache Energy Limited

The question of determination of the higher heating value in particular parts of the network has been under review for a number of years. It is our understanding that technical solutions exist for AlintaGas Networks to determine the heating value in particular sub-networks and apply that to the customers supplied from that sub-network.

AlintaGas Sales should be subject to the same provisions as all other Users. If AlintaGas Networks can use gas quality data to determine higher heating value then it should do so and advise all Users. AlintaGas Sales should not have any particular rights in excess of those available to other Users.

- AlintaGas Networks

These clauses provide greater certainty to the User as to the actual higher heating value 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.

With regard to AlintaGas Networks' submission, the Regulator accepts that it is the provisions of the proposed Haulage Contract and not the provisions of the Access Arrangement that govern the relationship between AlintaGas Sales and AlintaGas Networks. Accordingly, Schedule 7 of the Access Arrangement will not apply. The reference in the Issues Paper to Schedule 7 was in respect of the rights and obligations of a User entering into a contract for a Reference Service under the Access Arrangement.

With regard to sub-clauses 21(2) – 21(4) of the Haulage Contract (which are not contained in the Access Arrangement), the higher heating value determined in accordance with those clauses forms part of the information that must be reported to AlintaGas Sales under clause 14 of the Haulage Contract. Accordingly, the significance of sub-clauses 21(2) – 21(4) lies in the additional information AlintaGas Sales receives which may not be available to other Users. This is only an issue if those Users cannot negotiate reporting requirements such as those contained in clause 14, which is dealt with above. By themselves, these differences are not considered material in terms of conferring any competitive advantage.

Clause 27 – Pricing Beyond the End of the Access Arrangement Period

Under clause 27 of the Haulage Contract, there is a mechanism to determine the price payable at a delivery point where the price is a Reference Tariff and the Haulage Contract continues past the current Access Arrangement Period. The mechanism is the same as applies under the clause 19 of schedule 7 of the Access Arrangement. However, no mechanism is specified to address the situation where the price payable under the Haulage Contract is not the Reference Tariff.

The following submissions were received in relation to the continuation of tariffs beyond the end of the Access Arrangement Period.

- Apache Energy Limited

There are two issues embodied in this requirement. The continuation of a Reference Tariff past the Access Arrangement Period is an advantage to AlintaGas Sales compared to third party Users which will not have such certainty. Secondly, it enables lower Non-Reference Tariffs to be continued past the current Access Arrangement. Please see the comments above with respect to AlintaGas Sales' access to discounted Reference Tariffs.

- AlintaGas Networks

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.

As clause 19 of Schedule 7 to the Access Arrangement expressly provides for continuation of the relevant Reference Tariff beyond the end of the Access Arrangement Period, it is the continuation of any Non-Reference Tariff which is at issue.

The need for a provision such as clause 27 is to ensure there is a means of determining the relevant tariff where the existing tariff is a Reference Tariff if the Access Arrangement changes upon review. No such provision is necessary in the case of a Non-Reference Tariff because, as AlintaGas Networks submits, the continuation of that tariff is a matter that the parties would negotiate, by necessity. Thus, the fact that the Haulage Contract is silent regarding continuation of a Non-Reference Tariff does not of itself confer any advantage on any person. An advantage would only be conferred if AlintaGas Sales were able to secure continuation of a discounted tariff for a longer period than other Users, which cannot be assessed at this point in time.

Clause 60 – Assignment by Networks

Clause 60 of the Haulage Contract deals with assignment by AlintaGas Networks. AlintaGas Networks may assign all or part of its rights or obligations with the prior written consent of AlintaGas Sales. AlintaGas Sales may only withhold its consent on reasonable commercial or technical grounds. Under clause 59, AlintaGas Sales may only assign any right, interest or obligation in accordance with the Trading Policy specified in chapter 5 of the Access Arrangement.

Under clause 48 of schedule 7 of the Access Arrangement, neither party to a haulage contract may assign any right, interest or obligation except in accordance with the Trading Policy.

The following submissions were received in regard to assignment.

- Apache Energy Limited

This clause appears to give no advantage to AlintaGas Sales but one would question the changes AlintaGas Sales has proposed allowing AlintaGas Networks to assign all or part of its rights or obligations. This appears to override the provisions of the Access Arrangement in that Sales can approve assignment by Networks. It is unclear as to the extent of such assignment. Is it only to the parts of the network supplying AlintaGas Sales or to all parts of the network? If so, this puts third party Users at a distinct disadvantage as the network may be “sold from underneath them”. This appears to be a ‘Trojan Horse’ tactic, as it seems to circumvent the Access Arrangement limitation on assignment.

- AlintaGas Networks

The Trading Policy in Chapter 5 of the Access Arrangement addresses transfers or assignments of capacity by AlintaGas 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 gas distribution systems or part of the gas distribution systems.

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 AlintaGas Networks in clause 60 of the proposed Haulage Contract are not as generous as those provided to Users in the Trading Policy.

It is noted that what is of concern are any advantages that AlintaGas Sales may obtain relative to other Users, not relative to AlintaGas Networks. AlintaGas Sales gains no advantage

relative to other Users. The advantage which clause 60 creates is that if, for example, the gas distribution system were to be sold, then AlintaGas Sales could approve the requisite assignment by AlintaGas Networks without being constrained by the Trading Policy. This is not an advantage that would affect competition in the retail market for natural gas.

Clauses 61 and 62 – Representations and Warranties

Clauses 61 and 62 set out the representations and warranties made by AlintaGas Sales and AlintaGas Networks respectively. Such clauses are foreshadowed by clause 49 of schedule 7 of the Access Arrangement which states that the Haulage Contract must specify the representations and warranties which a User and AlintaGas Networks make to each other in entering into the Haulage Contract.

The following submission was received in relation to the representations and warranties.

- Apache Energy Limited

At face value these clauses are standard and as such should also be applied if applicable to other Users under the Access Arrangement. If not, AlintaGas Sales has a degree of comfort by their inclusion not available to third party Users.

Clauses 61 and 62 substantially mirror each other and are what may reasonably be expected in any contract. The clauses are not unusual or generous in themselves. Accordingly, the Regulator does not consider that any competitive advantage is likely to be conferred upon either AlintaGas Sales or AlintaGas Networks by these clauses.

5.2.3 Additional Considerations

A feature of the Haulage Contract is that it forms the basis for all of AlintaGas Sales' retail contracts for the delivery points specified in the Schedule. This contrasts with the situation that may face other Users, who rely upon the Access Arrangement. Since the Access Arrangement does not require AlintaGas Networks to enter into similar contracts with Users (that is, contracts using a "schedule approach"), Users may be forced to enter into a new haulage contract with AlintaGas Networks for each retail contract entered into with an end customer. The following submission was received.

- Apache Energy Limited

The tariff related issues are critical to the consideration of "a substantial lessening of competition". There are two main aspects:

- 1 the ability of Sales to have one contract for all its customers compared to customer by customer contracts required by other Users; and
- 2 the potential for discounted tariffs.

On the first issue, it is our understanding other Users will be required to enter into an independent Haulage Contract for each and every new sale, rather than provide for a schedule approach as proposed in the Associate Contract. This gives a huge degree of certainty and predictability to Sales compared to another User when negotiating supply. For example, come 2002, another User would be required at face value to enter into 200,000 Haulage Contracts if it were to wish to supply say domestic customers "north of the river".

AlintaGas Networks has not addressed this difference in its submissions to the Regulator. The Regulator considers it would be unlikely that AlintaGas Networks would seek to enter into a new haulage contract with a User for every retail contract held, since AlintaGas

Networks would unnecessarily incur additional inconvenience and expense if it did so with no corresponding benefit, other than perhaps assisting AlintaGas Sales by giving it an advantage over its competitors. It should be noted that nothing in the Access Arrangement forces Users and AlintaGas Networks to enter into a haulage contract for each and every retail contract or prevents the use of a schedule approach. However, the potential for AlintaGas Networks to require entry into a haulage contract for each and every retail contract remains if AlintaGas Networks wished to conduct its business in that way.

The schedule approach taken in the Haulage Contract does provide AlintaGas Sales with a certain degree of certainty in so far as it knows what the basis for its retail contracts will be. It may also receive cost savings resulting from not having to enter into many individual haulage contracts. This would translate to a competitive advantage over other Users only if those Users could not negotiate the same outcome. Since there is no benefit to AlintaGas Networks in not negotiating similar outcomes, Users should be able to do so. To that extent, any competitive advantage is considered marginal.

For the avoidance of any doubt, the Regulator has considered whether any addition to the specified delivery points by AlintaGas Networks under clause 7 of the Haulage Contract would constitute a new contract, which would then fall within section 7.1 of the Code and be required to be approved by the Regulator. The Regulator considers any such addition will not constitute a new contract, since it would simply be an action that falls within the Haulage Contract and is thus covered by it and any approval of it, in an “umbrella” effect. This forms part of the factors the Regulator has considered in assessing the competitive effect of the schedule approach, above.

5.2.4 Conclusion

The advantages that accrue to AlintaGas Sales under the differences between the terms and conditions of the Haulage Contract and the Access Arrangement Terms and Conditions are not extensive. The main advantages likely to have any effect on competition relate to the term of the Haulage Contract, amortisation, information reporting (meter reading) and the use of a schedule approach to enter into one haulage contract covering all retail contracts.

While these advantages provide AlintaGas Sales with a greater degree of flexibility than other Users and may enable some cost savings, it is not clear that other Users would not be able to negotiate similar arrangements, at least with regard to information reporting and the use of a schedule approach.

The differences could potentially lessen, hinder or prevent competition if they give AlintaGas Sales advantages of economies of scale (it may be able to secure more customers by being able to offer increased discounts) or scope (through more flexible retail terms and conditions) which would not otherwise follow from the vertical integration of the AlintaGas group. Generally, such outcomes may make new competitive entry unattractive, affect market growth, or increase the strength of vertically integrated groups. If the outcomes were such as to reduce the contestability of the market for the retail sale of natural gas, the cost economies available to AlintaGas Sales could enable a significant and sustainable increase in profit margins.

However, the Regulator does not consider such outcomes to be likely in this case. By themselves, the non-tariff differences are unlikely to result in such advantages to AlintaGas sales as would be sufficient to result in an increase in the strength of the vertically integrated

AlintaGas group and a reduced contestability of the market. As is discussed in relation to each of the non-tariff differences, the ability of Users to negotiate similar contractual provisions is not substantially restricted. Any restriction depends upon the actions of AlintaGas Networks, which has stated that it will not discriminate between Users and AlintaGas Sales.

The Regulator is therefore of the view that there are some advantages for AlintaGas Sales in the non-tariff terms and conditions of the Haulage Contract, relative to the terms and conditions that would apply under the Access Arrangement to the supply of Reference Services. These advantages may have an effect on future competition between AlintaGas Sales and other gas retailers. However, they are unlikely to affect the contestability of the retail market for natural gas. Hence, the Regulator considers they are unlikely to have the effect of substantially lessening, preventing or hindering competition in this market.