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By email: submissions@aemc.gov.au

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National Gas Amendment (Reference service and rebateable service definitions) Rule 2011

Submission from Jemena Limited to the Australian Energy Market Commission

Jemena welcomes the opportunity to make this submission on the AER's Rule change request in respect of the National Gas Rules 101 and 93(4).

As the owner of Jemena Gas Networks (NSW) Ltd, the largest gas network in NSW, Jemena is vitally interested in the outcomes of this Rule change consultation. Jemena welcomes further engagement with the AEMC in this matter.

If you wish to discuss this submission further please contact Sandra Gamble on (02) 9455 1512 or at sandra.gamble@jemena.com.au

Yours sincerely

A handwritten signature in black ink that reads "Sandra Gamble".

Sandra Gamble
General Manager Regulation and Strategy
Jemena Limited

Attachment:

National Gas Amendment (Reference service and rebateable service definitions) Rule 2011 -
Submission from Jemena Limited to the Australian Energy Market Commission, November 2011.

**NATIONAL GAS AMENDMENT (REFERENCE SERVICE AND REBATEABLE SERVICE
DEFINITIONS) RULE 2011**

**SUBMISSION FROM JEMENA LIMITED TO THE AUSTRALIAN ENERGY MARKET
COMMISSION**

KEY MESSAGES OF THIS SUBMISSION

- Jemena acknowledges that the AER has discerned a potential issue in applying the current Rules that may need to be addressed.
- The discerned issue is confined to one service provider in one jurisdiction. Jemena considers that there are matters which the AEMC should take into account when deciding if a Rule change is needed at all. We elaborate on these matters further in this submission.
- Jemena is of the view that the proposed Rule change is disproportionate to the AER's concerns with the Rules.
- Jemena considers that the proposed Rule change has the potential to confer additional discretionary power on the AER which is not required for the efficient functioning of the Rules.
- If the AEMC is persuaded that a Rule change is the optimal means to address the AER's concerns, Jemena submits that there are alternative Rule changes – including those set out by Jemena in this submission – that are better able to address the AER's concerns without alteration to the policy intent of the current Rules.

1. Scope of Rule change

Jemena agrees with the AEMC that the proposed Rule change has wide implications:

The AEMC notes that the proposed Rule change has broader application than addressing the specific issue identified by the Proponent. The proposed Rule change is relevant to any full regulation, covered pipeline which is required under the Rules to have an access arrangement.¹

Given that the AER proposal arises from an isolated issue, the wider implications of the proposal need to be thoroughly explored.

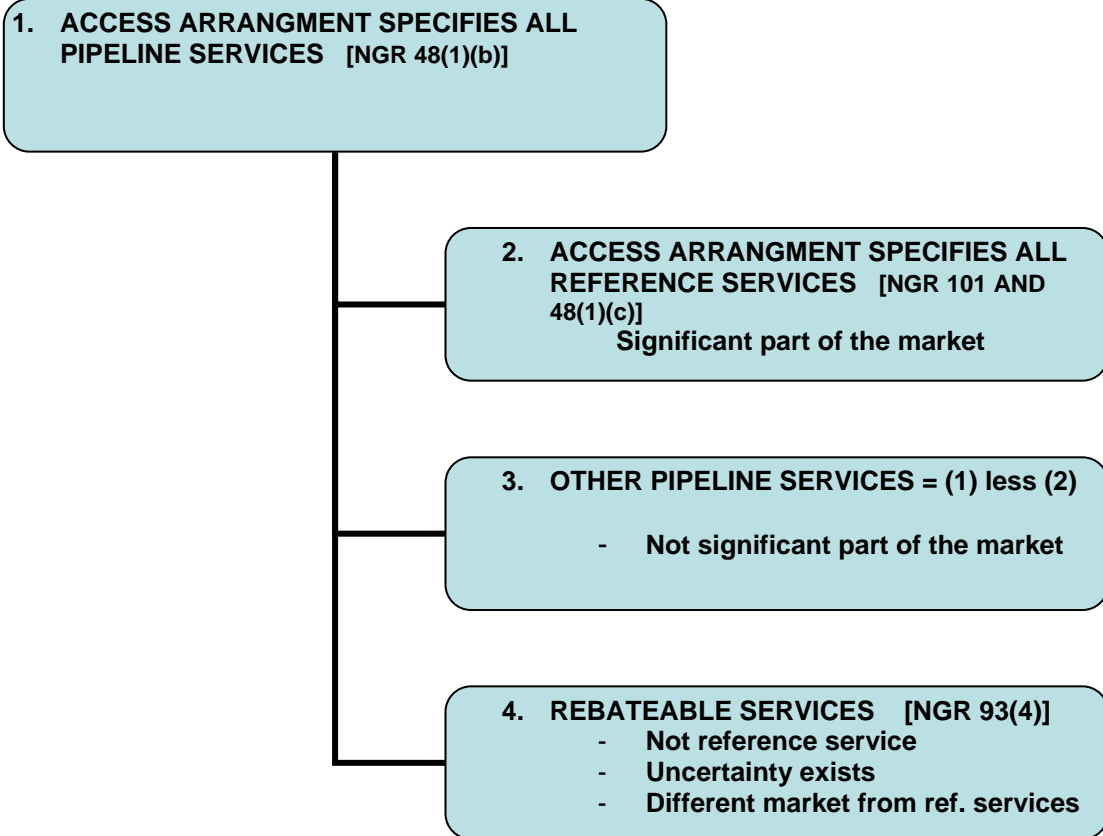
2. Nature of the Rule change request

Jemena's primary concern is with the extension of regulatory discretion which is inherent in the Rule change request.

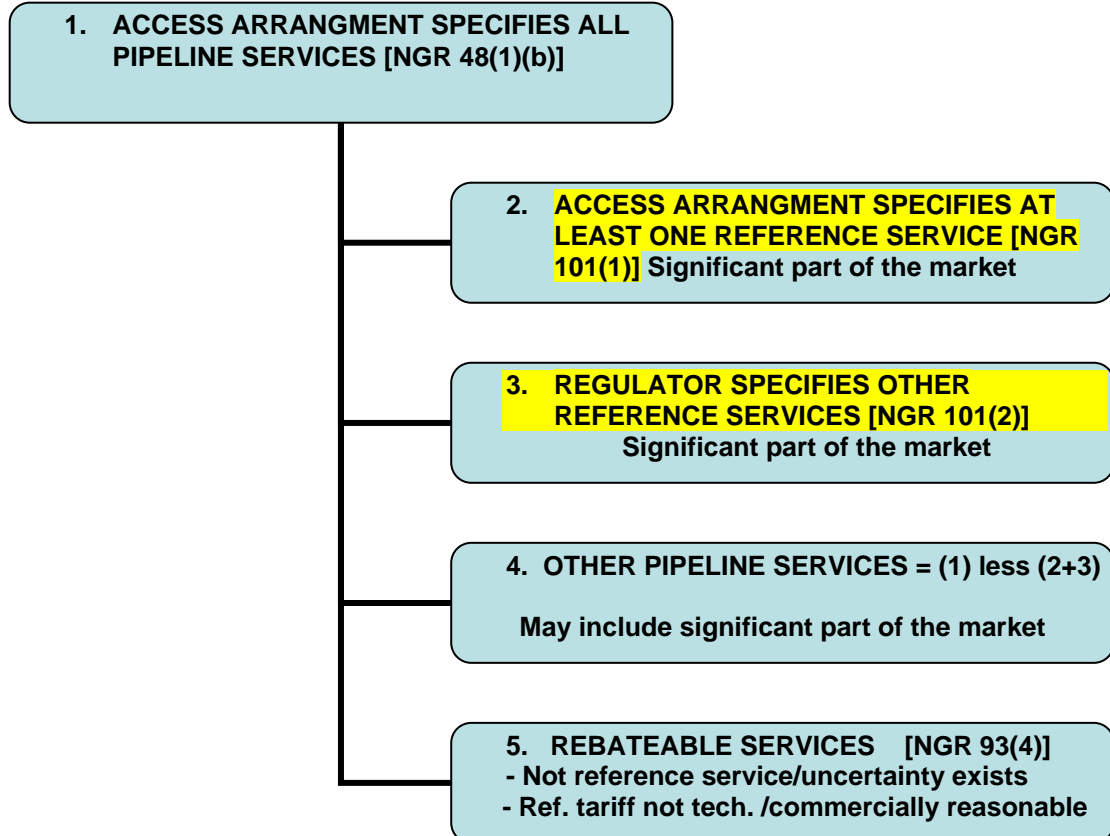
This perhaps can be best illustrated by the diagram on the following page.

¹ AEMC, consultation paper, *National Gas Amendment (Reference service and rebateable service definitions) Rule 2011*, p. 4.

WHAT HAPPENS NOW



RULE CHANGE PROPOSAL



What happens now

A full access arrangement:

1. must describe all pipeline services (r 48(1)(b))
2. must specify every services that is likely to be sought by a significant part of the market as a reference service (r 48(1)(c) and r 101)
3. by definition, leaves all other pipeline services as services that are NOT likely to be sought by a significant part of the market
4. leaves rebateable services to be determined by the existing definition (r 93(4))

Rule change proposal

A full access arrangement:

1. must describe all pipeline services (r 48(1)(b))
2. must specify AT LEAST ONE reference service which is likely to be sought by a significant part of the market (r 101(1))
3. must specify each pipeline service that THE REGULATOR CONSIDERS should be included in the access arrangement as a reference service and which is likely to be sought by a significant part of the market (r 101(2))
4. by definition, may omit from the reference services all other pipeline services whether they are required by a significant part of the market or not
5. leaves rebateable services to be determined by a new definition (r 93(4)).

Change in discretion

An extension of regulatory discretion occurs in items (2) and (3) of the Rule change proposal, as described above. Currently, the service provider must specify all reference services in its proposed access arrangement (without limitation), and design its service offering accordingly. The service provider may or may not include a rebateable service as well.

Under the AER's Rule change proposal, the Rules would be satisfied by the service provider including just one service as a reference service in its access arrangement, leaving the regulator free to specify additional reference services (or not) at its discretion.

It may be said that the regulator already has the power to specify additional reference services. Rule 59(2) says:

An access arrangement draft decision indicates whether the AER is prepared to approve the access arrangement proposal as submitted and, if not, the nature of the amendments that are required in order to make the proposal acceptable to the AER.

Examples:

2. If the AER is not satisfied that the access arrangement proposal designates as reference services all pipeline services that are sought, or likely to be sought, by a significant part of the market, the [draft] decision might indicate that further or other pipeline services should be designated as reference services. [emphasis added]

However, the proposed Rule goes further than existing Rule 59(2):

- The balance of judgement as to what will or will not be a reference service in any access arrangement will swing from the service provider (who should have the technical and commercial expertise to make this initial judgement call) to the regulator.
- The practical effect of the proposed Rule is that if the regulator considers a service should be a reference service, then it will be. The converse applies if the regulator considers a service should not be a reference service.
- Although the regulator's decision making will be subject to the National Gas Objective (NGO) and the Revenue and Pricing Principles (RPP) the fact is that the proposed Rule

would enshrine the primacy of the regulator's discretion as the key determining factor in nominating reference services.

As such, the proposed Rule introduces significant new risks for service providers. The service provider recovers the revenue that the AER has allowed through the services that are defined in the access arrangement and their associated terms and conditions, including pipeline tariffs (the service offering). The service offering is designed as an integrated whole to recover the allowed revenue taking into account the considerable technical, commercial and market risks which are clearly best quantified by the service provider. The service provider should have the unfettered ability to design the service offering. The proposal to modify Rule 101, if implemented, will provide the regulator with increased discretion to add to or alter the range of reference services as proposed by the service provider and, as a consequence, their associated terms and conditions. This will expose the service provider to significant risk that the balance and certainty inherent in the service offering as proposed by the service provider will be altered (with only generalised recourse by the AER to the NGO and RPP) in a way that is detrimental to the interests of the service provider.

Jemena submits that the consequential effects (described above) of the AER's proposed Rule change will not contribute to the achievement of the NGO. Specifically, these effects will not *promote efficient investment in, and efficient operation and use of, natural gas services for the long term interests of consumers of natural gas with respect to price, quality, safety, reliability and security of supply of natural gas.*

3. Jemena's Rule change alternative

Rule 101

To the extent that a full access arrangement deals with the pipeline services in detail, it is primarily concerned with those services that are likely to be sought by a significant part of the market. Any other service – e.g. services that are not likely to be sought by a significant part of the market - will not be a reference service.

The issue behind the AER Rule change proposal is whether and under what circumstances a service that is likely to be sought by a significant part of the market should be classified as a rebateable service as opposed to a reference service.

As presently drafted, Rule 101 requires that:

- (1) A full access arrangement must specify all reference services.
- (2) A reference service is a pipeline service that is likely to be sought by a significant part of the market.

That is, every service that is likely to be sought by a significant part of the market must be included in the access arrangement as a reference service with all that that entails.

The AER suggests that there are possible cases where a service is likely to be sought by a significant part of the market, but

- there is uncertainty about the level of demand for, and/or the revenue that will be derived from, that service; or
- there are commercial or technical reasons for not specifying the service as a reference service.

Accordingly, the AER suggests that the Rules should be changed to allow such a service to be rebateable, rather than a reference service.

However, as indicated in section 2, the AER's proposed Rule changes go well beyond what is necessary to accomplish its intent. Jemena suggests instead that the intent could be achieved by keeping Rule 101(1) left unchanged and amending Rule 101(2) as follows:

- (2) A reference service is a pipeline service that is:
- (a) likely to be sought by a significant part of the market; and
 - (b) not a rebateable service.

Jemena submits that its alternative wording avoids the detrimental effects of the proposed Rule change, and better contributes to the achievement of the NGO by clarifying that all services which are likely to be sought by a significant part of the market will be reference services unless they are rebateable services.

Rule 93(4)

We agree with the AER that the current 93(4)(c) provision may impede the classification of a service as a rebateable service. Accordingly, we accept that the current Rule 93(4)(c) could be removed.

The AER also proposes an additional alternative criterion for defining a rebateable service i.e. that “it is not commercially and technically reasonable to set a reference tariff for the service.” (Proposed Rule 93(4)(b)(ii)).

Consistent with the amendment that Jemena has suggested to Rule 101(2), Jemena suggests that the proposed Rule 93(4) should be amended to read as follows [amendments in italics]:

A pipeline service *may be* a rebateable service if:

- (a) *the service is likely to be sought by a significant part of the market; and*
- (b) either :
 - (i) substantial uncertainty exists concerning the extent of the demand for the service or of the revenue to be generated from the service; or
 - (ii) it is not commercially and technically reasonable to set a reference tariff for the service.

4. Matters which the AEMC should consider in relation to the Rule change request

The issue discerned by the AER is confined to one service provider in one jurisdiction. Jemena considers that there are matters which the AEMC should take into account when deciding if a Rule change is needed at all.

4.1 Possible alternatives to a Rule change

- Jemena notes that the Rule change request cites Part 19 of the Victorian Wholesale Market Rules as a possible alternative² to a Rule change, although this was rejected by the AER. Jemena suggests that the AEMC could explore this option in considerably greater depth, as it would quarantine a solution directly around the source of the issue. This may preclude the need for a Rule change. However, if the AEMC is persuaded that a Rule change is desirable on wider grounds, then for the reasons given in section 2 above, Jemena submits that the AER’s request should be amended in the form set out in section 5 below.
- The service which is the cause of the issue – GasNet’s AMDQ Credit Certificate (AMDQCC) scheme – is essentially unique to the Victorian gas market. Yet the Rule

² AER, *National Gas Rule change proposal in relation to reference services and rebateable service definitions and criteria*, 5 august 2011 (covering letter p. 2).

change request, in its present form, will substantially impact the entire market for pipeline services. The AEMC should evaluate whether this is an appropriate response to the issue.

- The issue originates from a matter identified by the ACCC in 2007, namely revenue streams obtainable from both gas flow and capacity on the relevant pipeline. The AEMC could evaluate whether the information available to the AER from its five years experience with the issue would allow an administrative solution to be developed other than a Rule change affecting the entire gas services market.

4.2 The former Gas Code and the current Rules

The Rule change request makes frequent reference to sections of the former National Gas Code as an appropriate model for changing the current Rules. For example:

- Prior to the Gas Rules, only one reference tariff had to be included in access arrangement for one pipeline service likely to be sought by a significant part of the market. The regulator had discretion as to how to treat other pipeline services³.
- Under the Gas Rules this flexibility has been removed/reduced. The Gas Rules define a reference service as a pipeline service that is likely to be sought by a significant part of the market. The AER is unaware of any policy reasons for this change⁴.

As discussed in section 3 above, the issue behind the AER's Rule change request is whether and under what circumstances a service that is likely to be sought by a significant part of the market should be classified as a rebateable service as opposed to a reference service. The issue is not about how many services should or should not be included in an access arrangement proposal by a service provider. Further, as noted in section 2 above, the AER already has full discretion under Rule 59(2) to add additional services as reference services. It also has the discretion to not accept a service provider's classification of reference services.

Jemena submits that, in seeking to clarify the definition of a rebateable service, there is no policy justification for returning to the regulatory framework of the Gas Code. The present Gas Rules are not a simple uplifting of the Gas Code, although there are fundamental similarities. The present Gas Rules stem in part from a review of the Gas Access Regime by the Productivity Commission (June 2004) and the further deliberations of an Expert Panel (April 2006)⁵. In Jemena's view, the presumption must be that what is placed in the current Rules is intended to be there.

³ AER, *Request for making of a Rule relating to rebateable service and reference service definitions and criteria*, 5 August 2011, p. 5.

⁴ AER, *Request for making of a Rule relating to rebateable service and reference service definitions and criteria*, 5 August 2011, p. 4.

⁵ The Ministerial Council on Energy Standing Committee of Officials responded to the Expert Panel in November 2006.

5. Jemena's alternative Rule change:

Please note underlined words are insertions and struck out words are deletions:

Amend Rule 93(4) as follows:

93 Allocation of total revenue and costs

(4) A pipeline service ~~is~~may be a rebateable service if:

~~(a) the service is not a reference service; and~~(a) the service is likely to be sought by a significant part of the market; and

(b) either:

(i) substantial uncertainty exists concerning the extent of the demand for the service or of the revenue to be generated from the service; and~~or~~

(ii) it is not commercially and technically reasonable to set a reference tariff for the service.

~~(c) the market for the service is substantially different from the market for any reference service.~~

Amend Rule 101(2) as follows:

A reference service is a pipeline service that is:

(a) likely to be sought by a significant part of the market; and

(b) not a rebateable service.