GREYMOUTH GAS

13 October 2017

Steve Bielby
CEO
Gas Industry Company Limited
By electronic upload

Dear Steve,

RE: Draft Recommendation ("the paper") on 14 July 2017 MPOC transition change request ("TCR")

GGNZ believes that the TCR is FGL's and the GIC's opportunity to demonstrate that they are committed to getting the best version of the new access arrangements in place. In particular, it is the GIC's opportunity to show that it will approach the GTAC evaluation as a true co-regulator of *all* industry participants, with a critical and unbiased eye.

To be clear, GGNZ absolutely supports the underlying rationale of the TCR. We want to see a smooth, timely and fair transition from existing arrangements to the GTAC (if / once it is approved). But we do not want a new code that lacks integrity, workability and resilience. The new code should be well-drafted, easily implemented and subject to a proper assessment by an independent body. We are therefore concerned about the precedent set by the TCR process.

Ignoring drafting errors jeopardises the integrity of the TCR and the new Code

The paper addresses a number of drafting issues raised by GGNZ in its submission. These fall into two categories. First, those that the GIC considers are 'technical' and do not require a new change request to fix, and second, those that the GIC does not agree affect the efficacy of the TCR.

GGNZ has significant concerns in respect of both. First, it is concerning that we are having to make these arguments at all. The GTAC process should not be continuing without proper expert legal input, the involvement of which should have avoided most of the issues raised in our submission.

The GIC's response to these drafting matters seems to be that "we all know what it means" – e.g. as to the requirement for arrangements to be in place for the VTC to terminate on the New Code Date (which is *not* what clause 22.16(c) actually provides) and new contracts under clause 22.16(f) having to incorporate the New Code by reference (which although the GIC says is clear from the surrounding clauses, would be the *most* clear if clause 22.16(f) actually required it). While that might be (although we say it should not be) adequate for the TCR, which is intended to serve a limited purpose over a short period of time in which all parties will

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more or less remain the same, such an approach will not be adequate for the GTAC. The GTAC is intended to govern the industry for the foreseeable future and should avoid to the maximum extent possible any ambiguity or deficiency in its drafting.

Second, all these comments were made in our initial response to FGL on its pre-submission draft of the TCR. Not a single one was adopted and FGL made no effort to explain whether or how it had considered the suggestions made. In terms of the GTAC process, and particularly given the amount of time parties have spent marking up what can only be described as an inadequate second draft GTAC, GGNZ is concerned at FGL's refusal to even address constructive feedback on its drafting of the TCR.

Third, the way in which these drafting concerns have been dismissed by the GIC, and the manner in which the paper has made its assessment, raises concerns that the GIC had predetermined its decision on the TCR.

Conflict of interest, reasonableness and predetermination issues

The shift to a single set of access arrangements is one of the GIC's stated strategic objectives. It is co-leading the process, and appears to support an ambitious timetable with a "go-live" date of 1 October 2018. There is no room in that timetable for rejected change requests, in respect of either the TCR or the GTAC. The GIC therefore has a vested interest in approving the TCR and the GTAC in the form in which they are presented to it. GGNZ is concerned that, in the case of the TCR, this has led the GIC to overlook drafting errors that should be corrected. We are further concerned that the same drivers may result in the GIC overlooking significant issues (of substance, drafting or both) when it comes to considering the GTAC.

GGNZ queries whether GIC's directors have robustly considered management's recommendations on the TCR, or whether they too may be affected by an interest in ensuring GIC meets its strategic objectives over and above the interests of GIC's shareholders in obtaining a new code that is fit for purpose. In particular, the paper's assessment of the status quo and its responses to some of the issues raised in submissions raises questions about whether a reasonable decision-maker could have come to the same conclusion:

- *Assessment should be against the status-quo, not counterfactuals*
  Having set out that its duty is to consider the TCR against the status quo and not against counterfactuals proposed by FGL or other parties the GIC concludes that it is to assess the TCR against two counterfactuals.

  The status quo, in relation to terminating the MPOC, is that the MPOC does not have an expiry date. That is the only status quo. The question should therefore be whether the TCR (i.e. imposition of termination date, and a process to replace the MPOC) is better than having a code with an indefinite expiry date.

  GGNZ believes there would be no problem concluding a positive answer to this assessment – provided that the process proposed for replacing the MPOC is robust, fair on industry, and contains appropriate safeguards. It is therefore not clear to us why the GIC has taken a flawed approach to assessing the TCR.

- *The substantive condition does not replace an existing clause of the MPOC*

The GIC adopts another unnecessary flaw in its assessment by purporting to assess the substantive condition against section 29.4 of the current MPOC. The substantive condition is not concerned with the assessment of MPOC change requests. It is a brand new provision to safeguard the industry against a premature or improper termination of the MPOC. It is therefore not sufficient to simply compare it to section 29.4 to determine whether it is adequately defined.

Further, the mere fact that it contains more detail does not determine the quality of that additional detail or, in fact, the quality of the clause as a whole. No amount of detail can make up for poor process.

- *Substantive drafting errors should have raised concerns*
  The paper's answer to the drafting errors raised by GGNZ does not make sense. For example:

  - *"Clause 22.16(c) of the Change Request … simply requires the necessary arrangements to be in place to effect termination of the VTC on the New Code Date."*

  This is incorrect – the correct legal reading of the TCR is that 40 business days before the New Code Date, the VTC etc. shall terminate on the New Code Date. It is not possible for the VTC to terminate on a date that is earlier than that date. GIC seems to have overlooked this and assumed that procurement of a future-dated termination date fulfils the condition, which technically it does not.

  - *"There is [no] need for clause 22.16(f) to link to the New Code. We think that incorporation of the New Code is clear through clauses 22.16(a) and 22.16(f)."*

  This is incorrect – the correct legal reading of the TCR is that the ICAs etc. that First Gas put to industry need not relate to the GTAC. Look at the current version of the GTAC and there is very little in there about access arrangements. First Gas has yet to materially discuss, consult or negotiate ICAs. There is no commercial protection for industry that the ICAs need to relate to the GTAC.

  In addition, GIC has overlooked our point that the New Code definition does not properly define the new code.

  - *"It is unclear why First Gas would go through the process of satisfying the conditions and then decide not to effect termination of TSAs and ICAs (i.e. complete the transition to a new GTAC). The use of the word "may" could be beneficial to provide flexibility to address any unforeseen issue that arises, but it would be our expectation that transition would occur on the New Code Date."*

  It does not matter that it might be unclear why First Gas would not go through with arrangements – the fact is that its predecessor did just this with B2B balancing arrangements. 'May' just creates uncertainty and has no benefit – all issues should be sorted in the conditions including the IT ones. If such discretion is required, this proves that the conditions as a group are inadequate.

- *"The condition requiring "First Gas to have certified that the information technology and other systems required to implement the New Code are fit for purpose ready to be put into production on the New Code Date" requires better definition and should include an obligation to demonstrate that the system is fit for purpose from a user perspective and that there is adequate technical training and support (Nova)."*

- *"We think that a statement regarding the suitability of the IT system, or its readiness, needs to be framed generally to cover a wide range of possibilities. Accordingly, it is not clear to us that the proposed drafting is inadequately defined."*

Again, this contains a non sequitur fallacy. If there is general framing of a statement, then that does not prove or disprove that the drafting is adequately defined.

To draw a conclusion on the drafting of 'fit for purpose', one needs to look to Trello to understand what First Gas intends it to mean. Here, they say *"Fit for purpose" in this context means that the IT system is capable of carrying out the core functions required under the GTAC*. Not only does this mean that the IT system does not have to be fully compatible with the GTAC, it also means that only (potentially a few) core things need to be compatible for the IT system to be fit for purpose. It also has no regard for user interface. This is woefully inadequate and proves that the proposed drafting is inadequately defined on this point.

It does not appear reasonable, in the face of so many drafting errors, for the GIC to have concluded that the TCR was fit for purpose or better than the status quo. Were it not for the tight timeframe, we would have expected the GIC to return the TCR to FGL with instructions to address these errors. However, what it did instead was conclude "*we do not consider that comments on the procedural conditions raise significant issues that should cause Gas Industry Co not to support the Change Request.*" This suggests that GIC had a bias towards supporting the TCR if it could prove to itself that comments on procedural issues were insignificant.

- *The TCR pushes risk onto the GIC's shareholders other than FGL*
  The paper states that *"First Gas has clarified that the 40 business day notice period is not intended to be the period for shippers to integrate their systems with the new GTAC – it is merely a final check that the introduction of the new GTAC can proceed on the New Code Date."*

  This pushes risk onto the GIC's shareholders other than FGL. To be fair and efficient, First Gas should indemnify shippers if the dates slip, or shippers should have an adequate window to integrate systems after it is certain that the GTAC is going ahead. GIC has overlooked contractual protection for industry, instead hoping for collaboration next year to just make things happen. An unconflicted co-regulator should be ensuring that the TCR promotes outcomes that benefit its shareholders as a whole, and does not favour one shareholder over others.

Next Steps

TCR was not adequately consulted on or negotiated with industry. While it does set forth a path for considering the GTAC, the TCR is weighted towards First Gas – with industry wearing

the risk. It also has poor drafting. It should have been pulled and redone. As GGNZ suggested at the time, it should have been done in Q1 2017.

Industry appears apprehensive about the GTAC as First Gas does not, currently, appear to be addressing or closing out parties' material issues.[1] The TCR was GIC's chance to show industry that it will unequivocally and fairly consider the GTAC. The paper on the TRC has assessed it against the wrong thing. Further, the paper on the TCR casts doubt about the degree of bias that may be in a GTAC assessment process – not necessarily consciously, but perhaps subconsciously. GIC is still best placed to consider the GTAC, but it is on notice.

We expect that if the TCR is not a *fait accompli* or *ultra vires*, then GIC's final recommendation (or a further draft recommendation) will adequately respond to the requests and points made in this letter. It may be in the industry's and GIC's best interests to outsource further consideration of the TCR (and perhaps the GTAC) to an independent third party, if GIC feels it cannot mitigate its conflict of interest or discharge its role appropriately.

Yours sincerely

Chris Boxall
Commercial Manager

[1] I.e. This is our conclusion after reading cover letters on the second draft GTAC – where two major parties (Shell New Zealand (2011) and Genesis Energy) appear to think that the GTAC is not even sufficiently advanced to mark it up.