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Submission: GTAC Consultation Version

Genesis Energy Limited (**Genesis**) welcomes the opportunity to provide comments to the Gas Industry Company (**GIC**) and First Gas (**FG**) on the revised draft of the Gas Transmission Access Code (**GTAC**) dated 11 September 2018.

We appreciate the efforts made by the GIC and FG to continue developing the GTAC, including the commitment to hold constructive workshops through July – September 2018.

We understand that the revised draft GTAC is intended to reflect, in legal terms, what was generally agreed at these workshops. Our comments below are intended to highlight where Genesis has outstanding concerns. In particular, these relate to the proposed peaking regime and the treatment of existing supplementary agreements.

We also provide comments on automatic mass-market nominations and the liabilities framework for further consideration, having taken our own legal lens on these matters and welcome the opportunity to discuss these further with you or provide additional clarification (as required). If you would like to discuss any of these matters further, please contact Duncan Jared by email: duncan.jared@genesisenergy.co.nz or by phone: (09) 951 9145.

Yours sincerely

Margie McCrone
Senior Advisor, Government Relations and Regulation

Part A: Matters other than gas quality, indemnity, liability

#	GTAC Ref	Issue	Genesis comments
1.	**Supplementary Agreements**		
(a)	GTAC clause 1.2(l)	Clause 1.2 sets out rules of construction which apply "unless the context requires otherwise". One such rule is that nothing in the GTAC shall apply or amend an existing ICA or existing Supplementary Agreement unless that agreement provides for that application or amendment.	This has the potential to create a conflict between the overarching context-reliant approach to exceptions, and the specific exception in clause 1.2(l) which requires a deliberate call-out. We suggest removing clause 1.2(l) into a new and separate clause 1.3.
(b)	GTAC clauses 1.2(l) and 7.4; existing Supplementary Agreements (**SAs**) clauses B2 and B3; clause 1.1 definition of "Receipt Zone"	Nothing in the GTAC applies to or amends an Existing Supplementary Agreement except to the extent the Existing Supplementary Agreement provides for that application or amendment.	On page 11 of the Final Assessment Paper (**FAP**) it is noted that some provisions of Supplementary Agreements are likely to need to be renegotiated to "make sense" under the GTAC – this appears to be the case in respect of Genesis' SAs. The process and timing for this is not specified in the GTAC. Genesis is engaged in discussions with FG in relation to the continuation / preservation of its existing SAs, and FG has indicated[1] that it "*intends to respect existing contract arrangements and any modifications to existing SAs will focus on necessary changes for operability*". Genesis therefore expects that the renegotiation process will preserve the commercial effect of its existing SAs, and that the renegotiated SAs

[1] FG memorandum *Block 3 Support Materials – 3.6 Supplementary Agreements*, dated 15 August 2018.

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			would not be treated as "new" (ie, that they would remain confidential). We note we have already signed a Letter of Understanding with FG regarding our existing SAs.
2.	**Peaking at Huntly**		
(a)	GTAC clauses 3.27	The term "Peaking Party" includes any Shipper using a Receipt Point where FG determines that an End-user using the Receipt Point "*materially impacts, or has the potential to materially impact the availability of the Transmission System and/or use of the Transmission System by other users*". A set of criteria is specified for FG to have regard to, including whether End-users can: • take more than 1/16 of their Daily Gas quantity in an Hour; • increase or decrease their Gas take within an Hour in a manner that can adversely affect other users of the Transmission System;	As previously highlighted,[2] Genesis does not consider that intra-Day peak running at Huntly has the potential to materially impact the availability or use of the Transmission System, even though Huntly appears to satisfy the criteria in the clause. FG has also indicated it expects to declare Genesis to be a Peaking Party in respect of Huntly.[3] These criteria should be narrowed to ensure that they achieve the stated purpose in the lead-in to the clause.

[2] Genesis presentations *GIC Preliminary GTAC Assessment*, 27 March 2018; *Hourly Overruns & Agreed Hourly Profiles*, 17 November 2017.
[3] First Gas memorandum *Block 2 Outputs – 7 Peaking*, 21 August 2018.

#	GTAC Ref	Issue	Genesis comments
		• take Gas at a rate that can adversely affect the Line Pack and/or pressure in the relevant part of the Transmission System; and • control their usage of Gas.	
(b)	GTAC clause 3.32	A Shipper using Supplementary Capacity (ie, transmission capacity under a Supplementary Agreement or Existing Supplementary Agreement) is not a "Peaking Party" in relation to that Supplementary Capacity.	The intent and operation of this clause is not clear, including the consequences when a Shipper uses Supplementary Capacity as well as DNC. We suggest clarifying this drafting.
(c)	GTAC clause 3.30	Peaking Parties are required to nominate an Agreed Hourly Profile (**AHP**) in OATIS "*in each nominations cycle*" (we interpret this as referring to the week-ahead, day-ahead and Intra-Day Cycles). The sum of Hourly amounts of capacity in the AHP equal the Peaking Party's nominations for that Day.	The drafting appears to mean that an AHP is required for each Day in the following week. Is that intended? If so, we suggest clarifying that the Shipper is not also required to give week-ahead and day-ahead nominations under clauses 4.8 and 4.9.
(d)	GTAC clauses 3.30 and 4.9	The drafting is not clear that a revised AHP may also provide for a changed total DNC for the Day (ie, as if the sum of the Hourly quantities in that	We suggest clarifying that a revised AHP given in an Intra-Day Cycle may also increase or decrease the total DNC for that Day.

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		AHP was a Changed Provisional NQ in the day-ahead cycle or an Intra-Day Cycle).	
(e)	GTAC clause 4.11	FG is required to provide for at least 7 Intra-Day Cycles in OATIS, but may reduce that number on 60 Business Days' notice after consulting with Shippers and Interconnected Parties.	We suggest that there should be a minimum number below which FG may not reduce the number of Intra-Day Cycles. These will be critical to intra-day flexibility relative to an existing AHP.
(f)	GTAC clause 4.16	If approved by FG, the aggregate of quantities in the AHP becomes that Shipper's DNC for that Delivery Point. A revised AHP may not amend Hourly nominations in respect of an hour in which Gas has already flowed.	We suggest expressly recording that a revised AHP in an Intra-Day Cycle may amend <u>future</u> Hours' quantities.
3.	**Peaking charges**		
(a)	GTAC, clauses 11.4 and 11.6	All Shippers are required to pay a charge (or, where applicable, will receive a credit) for Days in which their actual usage differs from DNC, as follows: • charge for usage above DNC: *DNC fee x DOQ x F*	The relationship between Daily Overrun / Underrun Charges and Excess Peaking Charges needs to be clarified. Are the two regimes mutually exclusive? If not, when do Peaking Parties pay Daily Overrun / Underrun Charges – do these apply in all cases where there is a Daily Overrun / Underrun, or only to the extent that it arises outside of an Hour for which Peaking Charges are payable?

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		• charge/credit for usage below DNC: *DNC fee x DUQ x (F – 2)* F is initially 1.5 for Delivery Zones and non-Congested Delivery Points, and 7.5 for Congested Delivery Points. FG may increase the former to 5 on 60 Business Days' notice, or above 5 (or 7.5 for Congested) by a Change Request. However, this clause does not apply "*to Peaking Parties if and to the extent section 11.5 applies.*"	
(b)	GTAC, clause 11.5	Peaking Parties are required to pay a charge (or, where applicable, will receive a credit) for Hours in which their actual usage differs by more than 25% from the three-Hour rolling average (**Hourly Limit**) of the Hourly quantities specified in the AHP for the preceding Hour, that Hour and the next Hour. If that tolerance is exceeded, however, the charge / credit is calculated relative to that individual Hour's nominated quantity specified in the AHP, as follows:	The combination of having charges or credits apply if there is a more than 25% departure from a rolling average of nominations, while the calculation of the charge or credit depends on individual Hours, arbitrarily restricts flow profiles that we understand do not give rise to any physical issue – eg in an hour of high gas flows between two low-flow hours, any excess above the AHP would give rise to peaking charges (there would be no tolerance).

#	GTAC Ref	Issue	Genesis comments
		• charge for usage > 125% of Hourly Limit: *DNC fee x HOQ x M* • charge/credit for usage < 75% of Hourly Limit: *DNC fee x HUQ x (M-2)* HOQ and HUQ are the overrun and underrun relative to the quantity specified in that Hour alone, not the three-Hour rolling average.	
(c)	GTAC, clause 11.5	The coefficient *M* in the peaking charge/credit calculation above is initially 1.5, but may be varied by FG on 60 Business Days' notice, up to a maximum of 5 (or higher via a Change Request). The initial setting produces a charge of 1.5 x DNC fee for HOQ, and a credit of 0.5 x DNC fee for HOQ. At the maximum level absent a Change Request, the charge would be 5 x DNC fee for HOQ and 3 x DNC fee for HUQ.	Genesis considers the proposed value of M to be out of proportion with the actual benefits of incentivising accurate Hourly nominations. In addition, if M > 2, Peaking Parties are also penalised for going below their Hourly Limit by more than 25% - ie, this would encourage more flows between two high-flow hours, even if actual demand in the middle hour is less than the nominated (lower) amount. With M > 1, during potential peaking hours Shippers are incentivised to nominate (and pay for) capacity that they do not expect to use, just to have a buffer – this is inefficient.
4.	**Automatic mass-market nominations**		
(a)	GTAC clause 4.23	For Shippers (**Specified Shippers**) delivering Gas to customers in allocation groups 4 and 6 under the	This clause should be expressly carved out from the Peaking Party regime, to clarify that the regimes are intended to be mutually

#	GTAC Ref	Issue	Genesis comments
		Downstream Reconciliation Rules (**Specified Customers**) other than at Congested DPs, FG will provide automatic nominations of DNC.	exclusive. It should also be clarified that Auto-Nomination Charges do not apply where a Specified Shipper has opted out of the regime.
(b)	GTAC, clause 4.23(b), (h)	The automatic nominations will be determined by an algorithm – FG will not apply any discretionary judgement or forecasting capability, nor will it have any liability for Specified Shippers' or Interconnected Parties' losses in connection with such nominations.	The quality of the algorithm will be important – could FG please advise the principles on which it will be based? Given that the algorithm will nominate Specified Shippers' DNC (for which they will be required to pay even if not used), what incentives will there be for FG to design an algorithm that nominates accurately? We suggest including a requirement for FG to consult on it and use reasonable efforts to maximise its overall accuracy, so as to minimise Specified Shippers' aggregate charges.
(c)	GTAC, clause 4.23(a), (e), (f)	The automatic nominations will be given by FG one hour before each deadline in the nominations cycle (including Intra-Day Cycles). Specified Shippers may opt out of the automatic nominations regime: • in respect of a Day, by overwriting or amending an automatic nomination in OATIS once it has been given (albeit that the Auto-Nomination Charge will still apply); or	We query whether, if a Specified Shipper has manually given a nomination, FG should overwrite that with an automatic nomination. Should that instead be treated as opting out for that Day? We do not see why Specified Shippers should have to wait until the next Year to resume automatic nominations.

#	GTAC Ref	Issue	Genesis comments
		on an ongoing basis, by giving written notice to FG – in which case the Specified Shipper may only resume automatic nominations by giving written notice to FG not later than 20 Business Days before the start of any Year.	
(d)	GTAC, clause 4.24	Specified Shippers will, on FG's request (even if they have indefinitely opted out), provide notice to FG not later than three Months before the GTAC commences and three Months before the start of each Year thereafter, specifying "*the number, location, characteristics and other relevant information*" in respect of their Specified Customers, as further specified in the Specified Shipper Nomination SOP. Specified Shippers must also update FG if there is a material change to that information during the course of a Year.	Could FG please provide more information as to what level of detail will be expected to be provided? It should be clarified that this information is Confidential Information for the purposes of the GTAC.
5.	**Curtailment**		
(a)	GTAC, clauses 9.1, 9.2 and 9.12	GTAC includes an express provision for FG to curtail Shippers' take of Gas where they fail to comply with an OFO, in which case the Shipper is deemed not to have acted as an RPO and is	The VTC and MPOC do not appear to include such a provision. We query how it will work in practice – will FG physically interrupt or limit the flow of Gas at RPs/DPs?

#	GTAC Ref	Issue	Genesis comments
		required to indemnify FG for any Loss incurred by FG (except to the extent that FG contributed to the Loss or failed to mitigate it to the fullest extent reasonably practicable).	
(b)	GTAC, clause 9.8; VTC, clause 10.1	The VTC regime requires curtailment to be "*in a way that ensures that the remaining allocation (if any) is on a fair basis determined by Vector*", while the GTAC regime specifies a formula to determine the reduction. The formula appears intended to lead to a pro rata reduction across Shippers using the relevant DP or RP, but the drafting is slightly unclear.	We suggest specifying that "*the Daily quantity that First Gas shall stipulate*" (to be multiplied by the proportion that each Shipper's Approved NQ bears to the total for that DP/RP) must be the same for all Shippers using that DP/RP, so that the reduction is pro rata.
(c)	GTAC, clause 9.6	If a Shipper supplies an End-user who needs a quantity of Gas to shut down its plant in a way that minimises the risk of damage to the plant, the Shipper may notify FG in advance of the required Gas quantity, in which case FG will (if practicable) allow for that quantity of Gas to be taken when it issues an Operational Flow Order.	We suggest specifying that the End-user may be the Shipper itself. The relation of this provision to the requirement for pro-rata reduction is not clear – we suggest clarifying.

Part B: Gas quality, indemnity, liability framework[4]

#	Issue	GTAC	RP ICA	DP ICA	Genesis comments
6.	**Gas quality indemnity**				
(a)	FG to procure indemnity	12.2		6.2	Under the GTAC and DP ICA, FG must ensure that the RP ICA requires the Interconnected Party to indemnify FG for Loss incurred from that party injecting Non-Specification Gas. Genesis is comfortable in principle with this chain-based approach to quality indemnities, so long as the chain is maintained – which in one case it is not, as described below.
(b)	Provision of indemnity	12.10	6.1	*Missing*	Clause 6.1 of the RP ICA sets out the indemnity from the RP Interconnected Party to FG, which FG is required to procure under the GTAC and DP ICA. Clause 12.10 of the GTAC effectively passes through this indemnity to the Shipper. However, there is a significant gap in the DP ICA, in that the DP ICA does not contain any effective pass-through indemnity from FG to the DP Interconnected Party. This may mean the DP Interconnected Party would fail to obtain the benefit of the indemnity obtained by FG. Genesis understands that the decision for FG to indemnify the Shipper, rather than the DP Interconnected Party, was made at the 22 August 2018 workshop. Genesis requests further information on the rationale behind this decision, and whether it would be

[4] Please note these matters have been set out in a separate table only for ease of cross-referencing the main body of the GTAC and the ICAs.

#	Issue	GTAC	RP ICA	DP ICA	Genesis comments
					appropriate for the indemnity to be provided to both the Shipper and the DP Interconnected Party (possibly with an anti-double recovery carve-out).
7.	**Gas quantity indemnity**				
(a)	FG not responsible for Delivery Pressure			3.1(c)(ii) 3.3(d)	Despite placing obligations on Shippers and Interconnected Parties at both Receipt Points and Delivery Points, and obtaining indemnities for Loss arising from a breach of these obligations, FG does not pass through any of these indemnities. Further, FG expressly disclaims liability in respect of Delivery Pressure (except in excess of specified upper limits such as MAOP). We query whether it's appropriate for FG to retain (close to) the full benefit of those indemnities, or whether some form of pass-through indemnity (similar to the gas quality indemnity in clause 12.10 of the GTAC) would be more appropriate.
7.	**Liability**				
(a)	Obligations to mitigate Loss "to the fullest extent reasonably practicable"	16.1	16.1	16.1	A Liable Party will not be liable to the extent the other party has not "mitigated its Loss to the fullest extent reasonably practicable". In the previous draft of the GTAC, this obligation was described as being to use "reasonable endeavours" to mitigate the Loss.

#	Issue	GTAC	RP ICA	DP ICA	Genesis comments
					We understand that following the 22 August 2018 workshop, the document now uses the "fullest extent" language throughout. We are concerned that this amendment has resulted in a substantive change in the standard of mitigation required. We query whether the new wording is more likely to be interpreted as using "all reasonable endeavours" (that is, to take *all* actions which are reasonable) instead of the previous obligation to use "reasonable endeavours" (i.e., to have an 'honest try' at mitigating without being required to exhaust all reasonable options).
(b)	Liability where FG is the Liable Party but another person responsible	16.6(a)	16.6(a)	16.6(a)	Clause 16.6(a) provides for FG's liability where FG is the Liable Party but that liability is or may be caused or contributed to by a breach of a TSA/ICA by a Shipper or Interconnected Party. Under clause 16.1, a party will not be a Liable Party unless the relevant loss arose from an act or omission of that party which failed to comply with the TSA to the RPO standard. It is therefore unclear how FG could be the Liable Party where the Loss arose from the actions of a third party and no breaching act or omission of FG was involved. While one possible approach to resolve this inconsistency would be to rely on the existing qualifier in clause 16.1 (which says that clause 16.1 is "subject to any further limitations in this section 16"), we suggest that it would be better to also state, in clause 16.6, that clause 16.6 applies "notwithstanding anything to the contrary in clause 16.1".

#	Issue	GTAC	RP ICA	DP ICA	Genesis comments
(c)	Recovery of FG costs	16.6	16.6	16.6	Clause 16.6 provides that where FG is the Liable Party but that liability is or may be caused or contributed to by a breach of a TSA/ICA by a Liable Third Party, the liability of FG to the injured party is limited to what FG recovers from the Liable Third Party, less FG's reasonable costs and expenses incurred in pursuing the Liable Third Party. The injured party should not be required to bear the costs of FG in this scenario, given that it is the party least able to manage or control this risk. The Liable Third Party should be required to separately pay those costs to FG, and those costs should be excluded from the liability cap, such that the injured party be made whole for the full quantum of its Loss.
(d)	Obligation on FG to pursue Liable Third Party	16.6	16.6	16.6	Clause 16.6 places an obligation on FG to "use reasonable endeavours to pursue and seek recovery from the Liable Third Party". In this context, "reasonable endeavours" is not a particularly onerous obligation. The scope of FG's obligation should be more clearly set out, and specifically require FG to engage lawyers, technical experts and debt recovery agencies, and to initiate litigation, if required. We also query why, given the decision to change other references to "reasonable endeavours" to "to the fullest extent reasonably practicable" throughout the GTAC and ICAs, this clause continues to adopt the "reasonable endeavours" standard.

#	Issue	GTAC	RP ICA	DP ICA	Genesis comments
(e)	Proportionate allocation of liability	16.7	16.7	16.7	Clause 16.7 provides an allocation/reduction mechanism which applies where FG is liable to multiple Shippers or Interconnected Parties and the sum of that liability exceeds FG's liability cap. After the allocation, the aggregate of FG's liability to all parties shall not exceed the liability cap. This may significantly reduce the amount recovered by the injured party, where the event which caused the loss also affected other Shippers or Interconnected Parties. It undermines the principle of each ICA having a distinct liability cap. It is not reflective of the equivalent provision in the MPOC (clause 28.5). We expect the rationale for this approach is that where the relevant event is caused by a single Shipper or Interconnected Party, FG will only be able to recover from that party up to the liability cap. However, we suggest considering other options, such as: • excluding these events from the liable third party's liability cap; • requiring FG to bear the difference (e.g. through insurance); or • stating that where the relevant event is caused by more than one Shipper or Interconnected Party, the aggregate reduced amount of liability is equal to the combined liability caps of those breaching parties.

#	Issue	GTAC	RP ICA	DP ICA	Genesis comments
					It is also unclear how the allocation mechanism would apply in circumstances where the relevant parties have differing amounts of 'available' liability cap, for example where a party has claimed for an unrelated event in the same year which has been deducted from the annual cap accordingly.
(f)	Proportionate allocation of liability	16.7	16.7	16.7	If clause 16.7 is retained in its current form, it should be amended to say that where the Apparent Liability exceeds the liability cap and FG's aggregate liability to all parties is reduced accordingly, it should be reduced to an amount equal to the liability cap, instead of "shall not exceed" the liability cap.
(g)	Procedure between FG and Defending Party	16.11	16.11	16.11	Clause 16.11 sets out a process where FG is the subject of a claim by a Shipper or Interconnected Party due to a breach by another Shipper or Interconnected Party (the "Defending Party"). Where this arises, FG notifies the Defending Party of the claim, and the Defending Party can elect to defend the claim in FG's name, and FG may assist. It is not clear how this process sits alongside the obligation in clause 16.6 for FG to use reasonable endeavours to pursue and recover damages from the breaching party. These obligations appear to be in direct conflict.
(h)	"Active steps"	16.11 (e)	16.11(e)	16.11(e)	Where the Defending Party has chosen to defend a claim in the name of FG, which requires that the Defending Party indemnify FG, then FG "will not take any active steps" which could be expected to directly result in that indemnity being used.

#	Issue	GTAC	RP ICA	DP ICA	Genesis comments
					"Active steps" is not a commonly used legal term. We suggest instead referring to "any deliberate act or omission" or similar.
(i)	References to other Interconnected Party(ies)		16.6 16.7 16.11 16.12	16.6 16.7 16.11 16.12	In the ICAs, "Interconnected Party" is defined to mean the particular named party to each ICA. However, in a number of instances clause 16 uses the term "Interconnected Party" to refer to <u>any</u> person who is an Interconnected Party under any ICA. This results in confusion and legal ambiguity, particular where provisions deal with that other party's actions and liability. We suggest introducing a new defined term in both ICAs, so that: • "Interconnected Party" continues to mean "the Party named as the Interconnected Party in this Agreement"; and • "Other Interconnected Party means a person (other than the Interconnected Party) whose gas producing or gas processing facility, pipeline, Distribution Network or gas consuming facility is physically connected to the Transmission System, irrespective of whether there is an ICA, an Existing Interconnection Agreement or no interconnection agreement at that point" This issue does not arise in the GTAC, which does not define "Interconnected Party" or "Shipper" to refer only to a specified person.