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SUBMISSION ON DRAFT RECOMMENDATION ON 24 APRIL 2015 'AMENDMENT PROCESS' MPOC CHANGE REQUEST

- 1 MDL welcomes the opportunity to submit on the Draft Recommendation on the 24 April 2015 'Amendment Process' MPOC Change Request (**APCR**). In this submission we will use the terms "MDL", "we", "us" and "our" to refer to the Gas Transmission Business of Maui Development Limited. This submission has been prepared by the Commercial Operator for and on behalf of MDL and does not necessarily represent the respective views of MDL's shareholders.
- 2 MDL agrees with Gas Industry Company (**GIC**) that:
 - "the dis-benefits of the APCR clearly outweigh the benefits";
 - the APCR would not advance the objectives of the Gas Act;
 - the MPOC is not a multi-lateral contract¹
 - "GIC's current role in relation to MPOC change requests forms part of a carefully crafted package reflecting the different interests in pipeline ownership and use";
 - the prospect of a voting regime raises equity and Gas Act concerns;
 - APCR implementation would give incumbent users greater control over the direction of the MPOC.
- 3 However we disagree with GIC's analysis on several key points. In particular MDL submits the Draft Recommendation does not adequately deal with the central matter, i.e., that *no* voting arrangement could be superior from a Gas Act and GPS perspective, or upon a cost/benefit analysis, to the status quo. No contract freely entered into, or investment made, should be subject to change either unilaterally or at the instance of a third party other than by agreement or under and by virtue of a defined process such as is set out in s 27.2. That process requires (among other things): a clear change proposition; the opportunity to be heard; a set of independently determined guiding principles; and a decision by an independent suitably qualified decision-maker which is itself subject to rules of conduct.

¹ The MPOC is not a contract at all. Rather it is a set of terms incorporated by reference into separate bi-lateral contracts between MDL and each Shipper, and MDL and each Welded Party;



- 4 By contrast a voting arrangement increases the likelihood that access terms are biased towards the commercial interests of incumbents or a voting majority of aligned incumbents². As the GIC themselves stated:

This could lead to positive changes being blocked, as emsTradepoint suggest, or incumbents raising entry barriers or otherwise eroding competition³.

All of these characteristics are inconsistent with the Gas Act, with the GPS, and with the co-regulatory framework. In a different context GIC has noticed these tendencies further itself – see 6 below.

- 5 It follows that we also disagree with GIC’s treatment of the multi-lateral contract issue. GIC does agree that, contrary to Mighty River Power’s contention, the MPOC is not a multi-lateral contract. GIC then says that this “would only be a major flaw in the APCR if some element of the proposal relies on that assumption.” Several aspects of the proposal do rely upon that assumption, for example in relation to disputes -- see page 27 of the Draft Recommendation. But even more important is that, in effect, the APCR asserts that a bi-lateral contract should be subject to amendment unilaterally or at the instance of a third party by a process which depends merely upon the formation of coalitions. The allocations of risk and reward, and the investment decisions, which depend upon the sanctity of contract would be all at risk.
- 6 GIC considers early engagement to be a potential benefit of APCR. We submit that early engagement is desirable, but its value is easily over-stated. The market-based balancing Change Request (mbb CR) provides a recent relevant example. MDL ran an extensive pre-consultation process prior to submitting the mbb CR⁴. Drafts were circulated and submissions invited five weeks later; individual meetings and a workshop were held in the interim; specific design questions were posed. Changes were made to the proposal before it was submitted to GIC. Nonetheless had it been put to a vote, the mbb CR would not have passed. GIC itself recognised the problem in its Final Recommendation on the mbb CR when GIC said:

We are not persuaded that [a collaborative solution] is realistic, including because ongoing disagreement reflects the fact that economic interests of stakeholders do not align.⁵

- 7 We submit the current decision-making mechanism – the GIC consultation and recommendation process – is designed to, and can be seen to have led to, the evolution of MPOC led by industry and via an industry process consistently with and subject to the Gas Act and the GPS. We also disagree with some of GIC’s analysis of the APCR’s benefits.

- *Early engagement.* As noted at above we submit GIC gives undue weight and ascribes undue benefit to early engagement. MDL supports early engagement but notes that experience in respect of mbb CR and under the

² This does not include potential new gas users, or even all existing gas users or wider stakeholders.

³ Final Recommendation on the 10 October 2014 ‘market-based balancing’ Change Request, p.25

⁴ See the summary in Appendix 1 of our November submission on the mbb CR.

⁵ Final Recommendation on the 10 October 2014 ‘market-based balancing’ Change Request, p. ii

revised VTC change process does not justify confidence that a particular or specified pre-consultation process will promote better outcomes.

- *GIC participation in Change Request design.* Rather than fully repeat our views on this matter here, we refer to our 22 June submission on GIC's "Transmission Access; Options for Improvement Paper 2." We consider GIC is a regulatory body and should act accordingly. We thus disagree with the "co-regulatory perspective" described on page 32 – and we do not consider the arguments in support of the proposition stand scrutiny. We also submit that the creation of a process (such as per the APCR) which would effectively allow GIC to regulate by forming, or being part of, a voting coalition⁶ is inconsistent with the Gas Act and GIC's regulatory role and function.
- *Code alignment.* GIC seems to take the view that aligning the MPOC change process with the revised VTC change process would enhance efficiency by reducing costs. GIC does not provide any evidence for its view. As a matter of fact the processes required or provided for under MPOC and the APCR are similar in terms of the creation of proposals for change, submission and cross-submission. The APCR adds a disputes provision which we submit would add significantly to the expense of achieving and implementing a change. We doubt there would be any cost saving. We also note that it is the VTC that has diverged from the norm (noted by the PEA) of GIC being a final decision-maker.

- 8 GIC asks a number of detailed questions in section 1.6. We submit that the questions really do not raise the key issues. We agree that the voting mechanism proposed in the APCR is flawed in many ways but, even if it could be fixed, this would not address the APCR's fundamental shortcomings. Although we note in respect of section 1.6 (b) that including a definition of 'related companies' could not possibly be considered a "minor and technical" correction.
- 9 There is substantial analysis – from other submitters and GIC alike – highlighting the proposal's flaws. OMV rightly concludes that APCR implementation would be a retrograde step. MDL therefore supports the conclusion of GIC's Draft Recommendation⁷ and looks forward to it being finalised.



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for **Maui Development Limited**

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⁶ Acknowledging that GIC does not itself vote.
⁷ If not all the reasoning.