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Mr. Steve Bielby
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Dear Steve,

Please regard this letter as our submission on the MPOC Amendment Process Change Request ("APCR") submitted by Mighty River Power ("MRP") on 24 April 2015. In this letter we will use the terms "MDL", "we", "us" and "our" to refer to the Gas Transmission Business of Maui Development Limited. Please note that views expressed in this submission may not necessarily represent the views of the individual shareholders of MDL.

We do not support the APCR, which rests on fundamental misconceptions about the nature of the MPOC. We will demonstrate this by reference to:

1. the context within which the MPOC was required, developed and finalised;
2. the legal status of the MPOC itself.

We will then offer some wider contextual considerations to further illustrate why the APCR should not proceed. Finally, for completeness, we will also comment on technical issues with the drafting and on aspects of MRP's application letter.

1. History confirms MPOC evolution must fit with Government policy

In order to properly understand the MPOC, and the context in which it was developed, it is first necessary to understand its history and the nature of the asset to which it governs access.

The Maui Pipeline is a key infrastructure asset with natural monopoly characteristics. This is reflected in Government policy, which in the early 2000s was developed in recognition of the need – for various reasons – to have non-discriminatory access terms governing its use.

A brief overview of events that led to development and entry into force of the MPOC is set out in an appendix to this letter. Key points to take away from this include the following.

- In response to a Gas Review led by MED, and a consensus that the gas industry could not achieve voluntary self-governance, gas industry participants advocated for and helped to develop a co-regulatory model. Under that model an independent co-regulator (i.e. the role for which GIC was subsequently established) would oversee progress in the evolution of transmission access terms against Government policy objectives – and recommend regulations if necessary.
- The subsequent development of the Maui open access regime was mandated by Government policy requirements, against the counterfactual threat of full regulation (by an Energy Commission) if the industry-led process faltered.

- Development was undertaken by a Steering Committee from MDL with input from gas industry participants. The Government closely monitored that development and was represented on the Steering Committee itself. While many issues were resolved to a sufficient degree to allow drafting of the MPOC to take place, unanimous agreement on all terms was never achieved.
- The final version of the MPOC was determined as a result of direct interactions between MDL and MED officials, to ensure it met Government policy requirements. Once satisfied this was the case, MED confirmed that the industry-led process was finished. It also noted that: "[a]s with any open access regime it will require further adjustment over time and the Gas Industry Company will play an ongoing important role in this area"[1].
- The Minister of Energy then invited MDL, on 16 August 2005, to implement the code.

Among the terms that were intensely discussed, particularly in the final months of development, were the code change provisions themselves. Several different change process models were proposed. Reviewing their history, the following points can be noted.

- Voting-based arrangements were proposed. However, those proposals were rejected.
    - MRP itself supported that rejection for a variety of reasons[2]. First among those was: "Decisions to change the code will become more difficult ... (more people = more difficult)".
- Various proposals suggested code amendments be subject to approval by an Open Access Review Panel, with members that could be appointed or elected by certain parties or categories of parties.
- Proposals were also made to embed the Government Policy Statement in the MPOC.
- All of those versions and proposals were replaced with the current arrangement that code changes are subject to "a written recommendation, following appropriate Gas industry consultation, supporting the Change Request" from the GIC"[3].
- Prior to finalisation of the MPOC, the MED noted that "a more central role [should be] provided to an independent body"[4] and introduced changes to the code change provisions. As a result of those, section 29.4(a) was changed to refer to: "the GIC (or any entity granted formal jurisdiction) ...".

A survey of this history can lead to only one conclusion: approval[5] from the GIC (or any entity granted formal jurisdiction) for an MPOC Change Request is not a casual requirement that can be freely set aside. The requirement that all changes be supported by an independent regulator, on the industry's and the Government's behalf, was well-considered after a lengthy process. Its objective, which we support, is to ensure that evolution of the Maui open access regime set out in the MPOC, in the absence of specific Regulations for terms and conditions of access to the Maui Pipeline, remains consistent with Government policy objectives.

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1 Letter from John Rampton, Chief Advisor, Fuels and Crown Resources, MED, to Ajit Bansal.

2 E-mail message to Shell dated 16 May 2005.

3 This was on the understanding that the GIC would be required to consider the GPS and Gas Act objectives in making any recommendation. That requirement was subsequently included in the MoU between GIC and MDL which provides (at paragraph 2.3) that, in performing the roles and functions specified for it in the MPOC, GIC will have regard to the objectives set out in section 43ZN of the Gas Act.

4 Letter from Chris Kilby, Manager Fuels and Crown Resources, MED, to Ajit Bansal.

5 In the form of a written recommendation to support.

It is important to bear in mind the spirit of the Government policy objectives which set the parameters for how the MPOC can evolve. They are in place "to ensure that gas is delivered to existing and new customers in a safe, efficient, and reliable manner"; hence, among others, the Gas Act objectives relating to the promotion of competition (and minimisation of barriers to it). The APCR risks doing something which the Government was alert to from the outset: the first GPS, dated 27 March 2003, required that the Maui open access arrangements "not be biased towards those with an existing contractual interest in the Maui pipeline". The MPOC is a living document in place to guard the interests of gas users present and future. It is not the property of those that, at any given time, are subject to its terms. Replacing the status quo with a voting system – by which incumbent Maui Pipeline users can control how the MPOC evolves (or does not evolve) – would be manifestly inconsistent with this.

We have avoided the temptation to speculate in this submission on potential consequences if control of the MPOC were to be entrusted to incumbents only. However, we do submit that the APCR is squarely inconsistent with the thread of Government policy; which has remained in place for more than a decade from its original promulgation.

2. Legal status: the MPOC is not a multi-lateral contract

The APCR also rests on a misconception about the nature of the contractual framework that governs access to the Maui Pipeline. Contrary to what MRP expresses in its application, the MPOC is not a "multi-lateral contractual agreement between Maui Development Limited and the Code signatories". Nor is it "essentially a contractual arrangement like any other albeit operating in a regulated environment." Rather, the MPOC is a set of terms that are incorporated by reference into every bi-lateral contract[6] between:

- MDL and each Shipper (Transmission Services Agreements, or "TSAs"), and
- MDL and each Welded Party (Interconnection Agreements, or "ICAs").

TSAs are agreements that must be in a form substantially as set out in Schedule 2 of the MPOC. In the absence of any existing AQ allocations, MDL currently offers and provides Transmission Services on identical terms[7] to every Shipper.

ICAs are agreements that must be in a form substantially as set out in Schedule 3 of the MPOC. Section 2.1(a) of the MPOC permits special terms and conditions in ICAs for: (i) a TP Welded Party, (ii) Methanex in relation to the Bertrand Road Welded Point, (iii) a Notional Point Welded Party. Excluding those few exceptions, MDL offers and provides interconnection with the Maui Pipeline on substantially identical terms[8] to every other party.

The key point to keep in mind is that – as defined in section 1.1 of the MPOC – references in the MPOC to:

- a Party means a reference to:
    - MDL or a Shipper within the context of a TSA, or
    - MDL or a Welded Party within the context of an ICA; and
- Parties means a reference to:
    - MDL and a specific Shipper within the context of a specific TSA, or
    - MDL and a specific Welded Party within the context of a specific ICA.

[6] It should be noted that there is no multi-lateral contract. Parties other than MDL do not have any contractual relationship with each other within the context of the MPOC.

[7] Meaning those set out in the MPOC.

[8] Again, meaning those set out in the MPOC.

In contrast, MRP's application, in paragraph 5, displays a core misunderstanding by including the phrase: "Whilst one of the parties to the Code ...". This is based on the misconception that there are parties to the MPOC. In reality, as noted above, Parties only exist in relation to specific TSAs or ICAs, and the MPOC is a set of standard terms incorporated by reference into each such TSA and ICA. It should be understood that in a formal and legal sense there cannot be any entity that is a "party to the MPOC".

For reasons that are beyond the scope of this submission, we submit that this legal structure is consistent with the policy context highlighted in chapter 1 above – and should be preserved. When it approved the MPOC the Government did not intend that incumbent users would be able to control evolution of Maui pipeline access terms without independent regulatory oversight. That is why MED officials insisted on the current change process – with a central role for GIC – before Ministerial sign-off could be provided.

Wider context

Other contextual considerations present further difficulties for the APCR. First among these must be the PEA advice, which MRP somewhat remarkably cites in support of its application.

As MRP points out, the PEA recommended code convergence and improved governance arrangements. It did not, however, envisage the removal of GIC from its role as the final decision maker (MDL and its veto powers apart) under the MPOC change process. Indeed, the PEA took the opposite view. In its Second Advice Report, at page 5, the PEA described GIC's role as final decision maker as an "important feature" of the Code governance arrangements.

Secondly and more broadly, the notion that incumbent parties can privately control access terms to natural monopoly infrastructure assets would be inconsistent with regulatory trends everywhere. A discussion of these trends is beyond the scope of our submission. However, we do submit it would not be difficult to establish the inconsistency of the APCR with regulatory trends in the telecommunications or electricity sector in New Zealand, and in other gas transmission regimes overseas.

Technical issues

In addition to our main concerns set out above, a range of technical issues pose further problems. These are described briefly below.

- A significant component of the APCR is the introduction of a dispute resolution process in relation to MPOC changes. The proposed arrangements suffer from and lead to several flaws.
    - It is not clear whether the dispute process is available for process disputes, substance disputes, or both.
    - The proposed process suffers from contractual nexus problems[9]. For example, what happens if MDL agrees with[10] a Party X seeking to bring a dispute on an MPOC change proposed by a Party Y? With whom does Party X dispute? How can it engage in a dispute with Party Y (or any other Party) without a contractual nexus?

[9] As explained earlier, it is based on the misunderstanding that the MPOC is a multi-lateral contract, under which Shippers and Welded Parties could have a contractual relationship with each other.

[10] And may even have voted consistently with.

- The new arrangements refer to an "Expert Advisor". In the absence of any provisions relating to appointment of such an advisor we assume this is a drafting error. Section 23 currently provides for resolution of some specific types of dispute by an "Expert".
- A newly proposed section 23.5 proposes that: "... the Expert Advisor is assigned the role of determining the outcome of a dispute associated with a proposed amendment to this Operating Code. The Expert Advisor will evaluate such a dispute having regard to the objectives of Section 43ZN of the Gas Act 1992 ...". We consider it extraordinary that such a function would be assigned to a purported "Expert Advisor", instead of to the regulatory body that actually has responsibility for those objectives under the Act. An Expert, in lieu of a court, is ordinarily tasked with resolving the meaning of an existing contract. By contrast, the APCR proposes to task an Expert with effectively creating a new contract. This is improper and legally unsound.
- Section 23 includes an existing provision that: "Pending the resolution of any Dispute or Expert Dispute, the Parties shall continue to perform their respective obligations pursuant to the provisions of this Operating Code." Now that the Operating Code itself can be subject to dispute, however, it is not obvious which version of it would remain in force during the dispute. If the intent is that the Operating Code would be amended regardless of such a dispute then this opens the prospect of flip-flops between disputed amendments.
- The APCR proposes a new section 23.7 stating that: "Following the resolution of any Expert Dispute this Operating Code will, if required, be amended to implement the decision on that Expert Dispute by the Expert Advisor". However, there are no provisions in the proposed section 29 that would allow for special treatment of such an implementation. This presumably means that any decision from an Expert could only lead to an entirely new amendment process starting again with a required "Change Request Notification". Moreover, if the new amendment could not obtain support by a super-majority vote then the decision of the Expert Advisor would be rendered moot.
- The APCR proposes a new section 29.11, which would require the proposer, among other things, to publish a response to "any substantive specific objection". Implicitly it is for the proposer to decide what this means. We view this as a problematic and unnecessary requirement that could generate further disputes (which may be impossible to resolve).

- We already discussed the inappropriateness of voting arrangements. The drafting of those proposed voting arrangements is also poorly defined. The proposed section 29.12 states that "each Party may publish a notice" but then contains bracketed text stating that "(and for this purpose each Party and its related companies shall be entitled to one vote only ...)".
  - The bracketed text is presumably intended to transform a "notice" into a "vote", but the APCR never provides any basis for granting voting rights to begin with.
  - The APCR does not introduce any definition for "related companies". In the context of the MPOC, for example, we would not know whether MDL, the Maui Mining Companies, STOS, SENZL and Nova would – together – be entitled to "one vote only".

- The voting arrangements make no distinction between Welded Parties and Shippers. This means Shippers can vote on amendments that only affect Welded Parties, and vice versa.
- It may also mean that a party such as Methanex, which is both a Shipper and a Welded Party, is entitled to only one vote; with an equal weight to that of any other person signing up for a TSA in order to participate in a vote[11].
- The bracketed text may contradict section 1.2(f) which states that: "a Welded Party may carry on the functions or business of a ... shipper, pipeline owner ... or any other role ... but for the purposes of this Operating Code ... shall be treated as a separate person for each such function or business notwithstanding that in law all or any of the functions or businesses may be carried on by the same legal entity."

- The new proposed section 29.10 states: "If a Party does not publish a response ... it will be deemed to approve the Draft Change Request and will not be entitled to vote against the Final Change Request under section 29.11."
  - This makes it impossible for any party to vote on a Final Change Request - which could be different from an earlier Draft Change Request it might have agreed with - unless it already provided an explicit response in the draft stage as well. We consider this an unreasonable requirement.
  - Section 29.11 does not contain any provisions relating to a "vote". We assume the intention was to reference the proposed bracketed text in the new section 29.12.
- The proposed amendments for section 29 include references to "MDL and Parties", "MDL and each Party", "MDL or any Party", "MDL and any Party". All of these seem to incorrectly imply that MDL is not a Party. In reality, MDL is a Party to every ICA and TSA.
- The APCR proposes a new section 29.2 requiring that: "MDL and each Party shall participate in the change process set out in this section 29 in good faith". Several problems are created by this proposal.
  - The concept of "good faith" in the context of Operating Code amendments is not defined. It seems to us that it would indeed be very difficult to define.
  - A new proposed section 29.17 states: "A Dispute arising out of section 29.2 ... shall be resolved in accordance with the dispute resolution procedure contained in sections 23.2 to 23.3." It is not clear to us, however, how that procedure could lead to any resolution of the binary (and arguably subjective) question whether a party displayed good faith or not[12].
  - A new proposed section 29.14 states: "MDL may withhold its consent to a Final Change Request if it considers (acting reasonably) that any Party has not participated in the process set out in this section 29 in good faith." In the absence of a definition for good faith, and without any objective measure to determine whether it was displayed or not, we consider it problematic to have such power.

[11] Because the MPOC regime does not require a Shipper to reserve capacity in advance, the barriers for becoming a Shipper on the Maui Pipeline are very low; in terms of requirements as well as financial commitment.

[12] In particular, we do not know on what grounds a determination of good faith can be negotiated.

Other comments

For the most part, we have not commented on MRP's application document. However, we do not understand how MRP arrived at its statement in paragraph 4 that: "In Mighty River Power's opinion the current Code amendment process is exclusive rather than inclusive". We note that:

- Under the current MPOC any Party may submit a Change Request. The only aspect that may be considered exclusive is that a non-Party may not submit a Change Request. However, the APCR maintains the same exclusion.
- Code amendments require support from the GIC "following appropriate Gas industry consultation". While the required support is indeed restricted to GIC, the process does not restrict the GIC in the scope of its consultation. Arguably, that scope can be wider than the proposed arrangements in the APCR. Except for the proposed voting arrangement, which is groundless and unrealistic, we do not consider the APCR process to be more inclusive.

We also note that the statement in MRP's application that "The amendment does not affect ... rights and obligations of the parties to ICAs or TSAs ..." is manifestly false. Allowing the terms and conditions underlying an ICA or TSA to be amended by some kind of majority vote, without any regulatory oversight, is a major change to the rights and obligations of Shippers and Welded Parties[13].

Concluding remarks

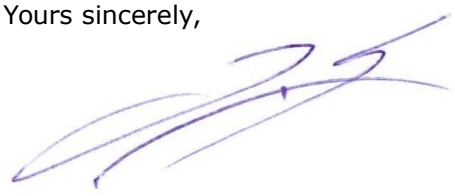
We have set out in this submission why we consider that the APCR misconceives the nature of the MPOC and the contractual structure within which it exists. We have done so by reference to various contextual considerations, particularly those relating to the MPOC's genesis and subsequent development. The Government policy dimension of that history is particularly compelling to us in revealing why the APCR is not only misconceived but also clearly contradicts the intentions of the GPS.

We have described a range of technical issues as well that illustrate problems with how the APCR has been drafted. Finally we have highlighted two aspects of MRP's application letter which we consider misleading.

In summary, taking all of this into account, we consider that the APCR is poorly drafted, ill-conceived and its proposals are inappropriate for adoption into the MPOC. Regardless of its motivations, we submit that it needs to be rejected.

We have appreciated the opportunity to provide this submission. For any additional questions or clarifications please do not hesitate to contact us.

Yours sincerely,



Jelle Sjoerdsma
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for Maui Development Limited

[13] And, as we already set out, an arrangement that was explicitly considered and rejected during the development of the MPOC.

Appendix Historical overview of MPOC development

- In March 2003 the Minister of Commerce issued a first Government Policy Statement (GPS) on Development of New Zealand's Gas Industry. It included a section covering "Open access to the Maui pipeline" with a statement that:

  > "The Government, as a party to the Maui contracts, invites Maui Developments Limited, the Natural Gas Corporation, Contact Energy and Methanex to present it with a proposal to enable open access to the Maui pipeline consistent with the following approach: ...
  >
  > ... the open access arrangements need to provide non-discriminatory access to all potential users and not be biased towards those with an existing contractual interest in the Maui pipeline."

- In June 2003 a Gas Industry Steering Group (GISG) with wide industry representation was formed to respond to the GPS. The GISG advised that the gas industry will require some form of regulatory backing to achieve the Government's objectives and outcomes.
- An Open Access Steering Committee was formed to start preparations and develop an operating code to enable open access on the Maui Pipeline.
- The Minister of Energy appointed Mr. Ross Cartey, from PricewaterhouseCoopers, Australia, to oversee the Government's interests with respect to the open access regime being developed by the Maui Joint Venture parties. He was also engaged to sit on the Open Access Steering Committee, as an independent expert.
- From 2004 onwards the Open Access Steering Committee and gas industry participants engaged in efforts to develop the MPOC. These efforts involved intensive consultation on numerous drafts of the code with several submission rounds and workshops.
- In October 2004 the Gas Act 1992 (the "Act") was amended to provide for Governance of Gas Industry. The amended Act includes provisions for co-regulation of the gas industry by the Government and an industry body. The first type of regulation listed in section 43C of the Act is:

  > "Regulations for terms and conditions of access to Maui pipeline ... [which] can be made at any time, (whether or not the industry body has been approved ...)"

- In December 2004 Gas Industry Company Limited was established as the "industry body" under the Act.
- In May 2005, after an intense period of industry discussions, MDL submitted an MPOC version to MED for approval.
- In June 2005 MED sent a message to gas industry participants that the industry-led process was finished. The process to conclude open access arrangements would now be led by Government.
- MED staff subsequently liaised with MDL to ensure the MPOC met Government requirements. Various amendments were made as a result, including amendments to the code change process in section 29.4 of the MPOC.
- On 16 August 2005 the MPOC was approved by Government for implementation. The Minister of Energy sent a letter to the Chairman of the Open Access Steering Committee of the Maui Mining Companies stating in its opening paragraph:

> "As you are well aware as of 20 May 2005, I instructed officials to take a formal role in ensuring that an open access regime for the Maui pipeline was put in place as soon as possible. Over the past two months the operating code developed by MDL, in consultation with gas industry participants, has been reviewed against government policy requirements and a number of changes have been proposed and adopted as a result of further consultation. As a result of this process I have reached the view that the Operating Code (version ... 8 August 2005) to enable open access to the Maui pipeline, is of a sufficient form and function that meets government policy requirements and I invite MDL to put this Code in place."

- In September 2005 the Maui Mining Companies provided confirmations in relation to the MPOC and commitments to let the open access regime commence.