



# Final Recommendation on 31 May 2013 VTC Change Request (Single Issue)

**Date issued: 4 November 2013**







## **About Gas Industry Co.**

Gas Industry Co is the gas industry body and co-regulator under the Gas Act. Its role is to:

- develop arrangements, including regulations where appropriate, which improve:
  - the operation of gas markets;
  - access to infrastructure; and
  - consumer outcomes;
- develop these arrangements with the principal objective to ensure that gas is delivered to existing and new customers in a safe, efficient, reliable, fair and environmentally sustainable manner; and
- oversee compliance with, and review such arrangements.

Gas Industry Co is required to have regard to the Government's policy objectives for the gas sector, and to report on the achievement of those objectives and on the state of the New Zealand gas industry.

Gas Industry Co's corporate strategy is to 'optimise the contribution of gas to New Zealand'.

**Enquiries:** Ian Wilson  
ian.wilson@gasindustry.co.nz  
04 472 1800

# Executive summary

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This Final Recommendation considers the appeal in relation to the Change Request submitted by Contact Energy Limited (Contact) to Vector Limited (Vector) on 6 May 2013 in accordance with section 25.4 of the Vector Transmission Code (VTC). The appeal and other relevant papers can be found at <http://gasindustry.co.nz/work-programme/vtc-change-request-appeal-31-may-2013-single-issue>.

The Change Request sought changes to the amendment/notification process in the VTC by providing that parties could only submit change requests that deal with a single issue, or related series of issues (Single Request). The change request was aimed at preventing parties from including one unrelated and often contentious issue, in a change request that otherwise dealt with related proposals.

Vector did not consent to the Change Request, so the change to the VTC was not made. Contact appealed to Gas Industry Co on two grounds seeking to have the change proceed. The two grounds are:

- Vector has invalidly withheld consent (section 25.6(a))
- Appeal by a shipper who did consent to the Change Request, where the relevant change was not made (section 25.6(c))

While we have reached a conclusion in regards to the first ground of appeal, we have not formed a view on the second ground of appeal.

## **Appeal Ground One - Final Recommendation**

Our assessment of appeal ground one in the Draft Recommendation set out our view that Vector has validly withheld consent for the Change Request as the Change Request will create ambiguity and may create inefficiencies in the operation of the VTC. After considering the submissions on the Draft Recommendation, Gas Industry Co's Final Recommendation confirms the initial decision that Vector has demonstrated a reasonable ground for withholding consent, and that Contact's appeal under section 25.6(a) fails.

## **Appeal Ground Two – Final Recommendation**

In the Draft Recommendation we questioned whether the VTC allowed Gas Industry Co to consider appeal ground two, where it had already been found that the appeal failed under appeal ground one. Gas Industry Co considered it had no jurisdiction to undertake a contractual interpretation exercise to interpret whether or not it is able to consider appeal ground two, as this could exceed its scope as an appeals body. We suggested that the VTC parties agree amongst themselves, or use the appropriate dispute resolution procedures contained in the VTC in order to reach a decision as to Gas Industry Co's jurisdiction. It appears from submissions that there are varying views as to whether Gas Industry

Co, as the appeals body, can or must consider Contact's second ground of appeal if we find that Vector has reasonably withheld consent. After reviewing the submissions of both Vector and the shippers, Gas Industry Co remains of the view that even if it does have the power (which we doubt it does) it is in any case desirable that the parties determine the matter by agreement between themselves or via the dispute resolution process set out in the VTC, as was set out in the Draft Recommendation.

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# 1

## Introduction

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On 6 May 2013, Contact Energy Limited (Contact) submitted a change request to Vector Limited (Vector) in accordance with section 25.4 of the Vector Transmission Code (VTC). The change request sought changes to the amendment/notification process in the VTC by providing that parties could only submit change requests that dealt with a single issue, or series of related issues (Single Request). The change request was aimed at preventing parties from including one unrelated and often contentious issue in a change request that otherwise dealt with related proposals (Package Request).

Vector did not consent to the change request and Contact appealed to Gas Industry Company on two grounds seeking to have the change request proceed. Contact appealed as a shipper who:

- considers that Vector had invalidly withheld consent for the change request (section 25.6(a)) (Appeal Ground 1); and
- consented to a change request, where the change request was not made (section 25.6(c)) (Appeal Ground 2).

Gas Industry Co determined that it was required to consider and make separate recommendations for each of Contact's grounds of appeal. A draft recommendation on Appeal Ground 1 was issued on 2 August 2013 (Draft Recommendation). Industry submissions closed on 23 August. Gas Industry Co received submissions from Contact Energy, Greymouth Gas, Mighty River Power and Vector.

The Draft Recommendation expresses Gas Industry Co's preliminary view that:

- Vector has validly withheld consent for the change request and, consequently, Appeal Ground 1 must fail;
- the provisions of the VTC are unclear about whether Gas Industry Co is able to consider Appeal Ground 2, having reached a (preliminary) view that Appeal Ground 1 has failed; and
- Gas Industry Co considers it inappropriate for it to develop a recommendation on Appeal Ground 2 unless it receives confirmation from the VTC parties that it can do so under the VTC, or otherwise by agreement of the VTC parties.

This Final Recommendation provides an assessment of the submissions received by Gas Industry Co along with a final decision (consistent with the Draft Recommendation) in regards to Appeal Ground 1; and further discussion in relation to Appeal Ground 2.



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## Draft Recommendation

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The Draft Recommendation expressed the preliminary view that Vector validly withheld consent for the change request and consequently Appeal Ground 1 failed; and secondly it was found that the provisions of the VTC are unclear about whether Gas Industry Co is able to consider Appeal Ground 2 having reached a view that Appeal Ground 1 had failed.

The process and test applied when forming that view was briefly explained, including the consideration of the five reasons given by Vector for withholding consent. Gas Industry Co concluded that reason five (that the change request would create ambiguity) established a reasonable basis for Vector to withhold its consent). Further, it was found that the ambiguity arising from the change request had the potential to exacerbate the potential procedural inefficiencies referred to by Vector in reason two. The other three reasons put forward by Vector did not establish a reasonable basis for withholding consent. Gas Industry Co invited VTC participants and Vector to provide submissions on its Draft Recommendation. Submissions on the draft recommendation were due by Friday 23 August 2013. Gas Industry Co received submissions from the following parties:

- Contact Energy;
- Greymouth Gas;
- Mighty River Power; and
- Vector Limited.

Contact Energy, Greymouth Gas and Mighty River Power all provided submissions which disagreed with Gas Industry Co's recommendation to not support the change request. The shippers' main concerns were around why Gas Industry Co decided not to support the change request, particularly in light of recent comments around the difficulties and complexities posed by Package Requests; although the shippers do acknowledge that the definition of a single issue and/or series of related issues could be problematic. The shippers do not consider that the absence of a clear process to handle disputes about whether a change request complies with the single request model is a fatal flaw. Rather, they consider that disagreements about the scope of a change request could be remedied either by informal industry initiatives or through the same VTC process used to assess change requests.

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## Analysis of Shippers' Submissions

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Submitters suggested that the existing arrangements (either informal or set out in the VTC) are sufficient to deal with disputes about whether a change request complies with the Single Request criteria. Contact's change request also did not flag the need for such measures to be taken. With respect, we have concluded that expecting industry to informally contest and determine whether a change request meets the Single Request criteria is, in the absence of a defined process, likely to create inefficiencies and detract from an assessment of the merits of the change request.

The process for clarifying change requests in section 25.4 is only likely to be helpful in limited circumstances. Section 25.4 will not help the parties in a situation where clarification is sought and provided, but there remains a dispute about whether a change request complies with the Single Request criteria. Once the clarification process is exhausted there is no clear process in the VTC outlining how disputes about the scope of a change request will be addressed and by whom.

We are of the view that disputes about the scope of a change request fall outside the appeal process in section 25 of the VTC. We consider it clear from the wording of section 25 that it is limited to dealing with appeals arising from decision making on change requests. Outside of any legitimate appeal under the approved process, Gas Industry Co does not consider that it currently has any mandate under the VTC to determine appeals based on whether or not a change request meets the Single Request criteria.

Ultimately we are of the view that the existing VTC change process is not equipped to address ambiguity arising from the Single Request criteria, or the resulting disputes. In this regard, the shippers' submissions strengthen our view that the ambiguity inherent in the change request has the potential to cause real procedural inefficiencies for VTC participants.

Although the submissions from the shippers raised a number of interesting points in regards to Appeal Ground 1, Gas Industry Co remains of the opinion, as indicated in the Draft Recommendation, that the ambiguity associated with the change request has the potential to create issues that the VTC is not currently equipped to deal with. On that basis we remain of the opinion that Vector validly withheld consent to the change request.

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## Analysis of Vector's Submission

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Vector's submission raises two key points – firstly that it agrees with the overall decision that it reasonably withheld consent to the change request, but it disagrees with what it considers to be the approach in the Draft Recommendation of independently considering each of Vector's reasons for withholding consent. Vector's view is that Gas Industry Co should have considered its five reasons as a whole and stepped back to consider the overall significance of the reasons it put forward for withholding consent.

We consider that the points raised by Vector with regard to our decision making approach on Appeal Ground 1 reflect a misunderstanding of the basis on which we considered Appeal Ground 1. It also appears that Vector has taken issue with some minor comments in the Draft Recommendation and given insufficient consideration to the wider commentary.

Vector also stated that a decision to withhold consent which is genuinely based on the Gas Act objectives and GPS objectives must be considered reasonable. In our opinion Vector is overstating the relevance of the objectives in the Gas Act and GPS. Gas Industry Co is required *to have regard to* the objectives when exercising the role of an appeals body under the VTC. In a case where reasonableness is at issue, there are other considerations that Gas Industry Co may consider, and which may influence the decision.

Vector's submission also expresses doubt that Contact has lodged a valid appeal under section 25.6(c). Vector suggests that the form and content of Contact's change request appeal is focussed heavily on section 25.6(a) and that Contact has not included sufficient information to establish grounds under section 25.6(c). We are of the view however that there is no issue with the validity of Contact's appeal on both grounds as these were both raised separately as the basis of Contact's appeal. Also, the VTC does not provide any guidance as to when an appeal is or is not held to be valid. Therefore Vector does not have a basis for proving the validity or otherwise of Contact's grounds of appeal.

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## Consideration of Process for Appeal Ground 2

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In the Draft Recommendation we questioned whether the VTC allowed Gas Industry Co to consider Appeal Ground 2, where it had already been found that the appeal failed under Appeal Ground 1. Gas Industry Co considered it had no jurisdiction to undertake a contractual interpretation exercise to determine whether or not it is able to consider Appeal Ground 2, as this could exceed its scope as an appeals body. We therefore asked the VTC participants to submit their views firstly on whether Appeal Ground 2 survives if Appeal Ground 1 is unsuccessful, and secondly whether Gas Industry Co has jurisdiction to consider Appeal Ground 2. We suggested that the VTC parties agree amongst themselves, or use the appropriate dispute resolution procedures contained in the VTC in order to reach a decision as to Gas Industry Co's jurisdiction.

The jurisdiction question arises because Gas Industry Co has limited legal obligations under the VTC; it is not a VTC participant and its obligations are limited to those that are set out in the Memorandum of Understanding (MoU) with Vector. Essentially the only obligations Gas Industry Co has in respect of the VTC are to not depart from the process contemplated by the MoU without first consulting Vector and the shippers; and various other obligations in relation to confidentiality, termination and payment which are irrelevant to this Recommendation. The MoU does not, however, contemplate a situation where Gas Industry Co may have to consider two grounds of appeal and does not set out the process for it to do so.

Because Vector and Gas Industry Co are the only parties to the MoU, Gas Industry Co does not owe its legal obligations under the MoU to shippers (who are most concerned with its interim position on Appeal Ground two). As demonstrated in its submission, Vector has no intention of facilitating, let alone requiring, Gas Industry Co to make a decision around Appeal Ground 2. The Draft Recommendation indicated Gas Industry Co's preference that the VTC participants and Vector attempt to resolve the issue of whether Appeal Ground 2 would survive a Final Recommendation where Appeal Ground 1 failed, either by agreement between themselves, or otherwise use the VTC dispute resolution procedure. After reviewing the submissions, it appears that the parties have not been able to reach such an agreement and the issue remains unresolved.

Submissions evidenced a diversity of views both on the substantive outcome of Appeal Ground 2 and on whether Gas Industry Co has the power to determine that appeal ground. That diversity serves to

underline our concerns about whether Gas Industry Co has the power to determine the issue. We conclude that the Draft Recommendation was correct – and even if Gas Industry Co does have the power (which we doubt on the basis of the above analysis) it is desirable that the parties determine the matter by agreement between themselves or via the dispute resolution process set out in the VTC.

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## Conclusion

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In conclusion, we find that with regards to Appeal Ground 1, Vector did reasonably withhold its consent in relation to Contact's change request due to the ambiguity and inefficiencies that are likely consequences should this change request take effect.

Our Final Recommendation in relation to Appeal Ground 2 is to proceed with our approach signalled in our Draft Recommendation - that we decline to determine Appeal Ground 2 and invite the VTC parties to resolve this issue either by agreement between themselves or using the dispute resolution process contained in the VTC.

We thank all parties for their submissions on this matter and look forward to seeing the results of further discussions between the VTC shippers and Vector on this issue.