MEMORANDUM

TO: Pipeline Users

FROM: First Gas

DATE: 30 November 2017

RE: Action Item D - Liability Provisions

At the GTAC workshop on 17 November 2017, First Gas agreed to review the liability provisions (and related ICA liability provisions) in the GTAC that enable the recovery of losses from events involving interconnected parties (such as the injection of non-spec gas) (Action Item D).

A mark-up of proposed changes to section 16 of the GTAC is provided below.

The intent of these final changes is to clarify that:

* Shippers can pursue other shippers and interconnected parties to recover loss;
* First Gas will use reasonable endeavours to identify the party at fault and pass on information to the party suffering loss;
* First Gas will assist with the process, pass on information, but need not be involved in defending the claim; and
* If a party is identified by First Gas as being at fault, First Gas will pass on information about the defending party to the shipper for them to pursue the defending party to recover loss.

Some consequent changes will also be made to section 7 to ensure consistency with the rights and obligations specified in interconnection agreements.

It should be noted that First Gas will be notified of quality excursions and therefore should be able to assist in passing on information. However, this is a reasonable endeavours undertaking as we may not be able to identify the cause of any event leading to loss. This is because First Gas may not be notified by the producer or the information provided may not be conclusive that a particular event caused the party to suffer loss.

We have also taken into account the mark-ups submitted on 24 November.

We welcome comment on this mark-up by **5pm, Wednesday 6 December 2017.**

1. **liabilities**

**Exclusion from a Party’s Liability**

* 1. Subject to any further limitations contained in this *section 16*,a Party (*Liable Party*) will not be liable to the other Party (*Other Party*) in respect of Loss suffered or incurred by the Other Party that arises out of or in connection with the relevant TSA (in contract, tort or generally at common law, equity or otherwise), except to the extent that Loss arose from an act or omission of the Liable Party that constituted a failure by it to comply with a provision of the relevant TSA to the standard of a Reasonable and Prudent Operator. The Liable Party shall only be liable to the Other Party to the extent that the Other Party did not cause or contribute to that Loss. The Liable Party shall not be liable to the extent that the Other Party has not used reasonable endeavours to mitigate its Loss.

**Limitation of a Party’s Liability**

* 1. If the Liable Party is liable to the Other Party in respect of any Loss suffered or incurred by the Other Party that arises out of or in connection with the relevant TSA (in contract, tort or generally at common law, equity or otherwise), other than for payment of amounts due pursuant to *section 11*, the Liable Party will only be liable for direct Loss suffered or incurred by the Other Party excluding (and the Liable Party shall not be liable for):
		1. any loss of use, revenue, profit or savings by the Other Party;
		2. the amount of any damages awarded against the Other Party in favour of a third party, except where the Liable Party is liable to make a payment under *section 11.9*; and
		3. the amount of any money paid by the Other Party by way of settlement to a third party, except where the Liable Party is liable to make a payment under *section 11.9*.
	2. The Liable Party shall in no circumstances be liable for any indirect or consequential Loss arising directly or indirectly from any breach of its (or any of the Other Party’s) obligations under the relevant TSA, whether or not the Loss was, or ought to have been, known by the Liable Party.

**Capped Liability**

* 1. Subject to *sections 16.5* to *16.8*, the maximum liability of a Party to the Other Party (in each case excluding liability, if any, that arises under *section 11.9*) will be:
		1. in relation to any single event or series of related events, $10,000,000 (ten million dollars); and
		2. in any Year, $30,000,000 (thirty million dollars), irrespective of the number of events in that Year.

For the purposes of this *section 16.4*, an event is part of a series of related events only if that event or events factually arise from the same cause.

* 1. The amounts referred to in *section 16.4(a)* and *(b)* (the *Capped Amounts*) shall each be adjusted annually on 1 October of each Year by multiplying each Capped Amount for the previous Year by the following adjustment factor:

Adjustment Factor = CPIn / CPI(n –1)

where:

CPIn means the most recently published CPI Index for the June quarter in the preceding Year; and

CPI(n –1) means the most recently published CPI Index for the June quarter in the Year that is 2 years prior to the Year in which the adjustment is being made.

The adjusted Capped Amounts calculated pursuant to this *section 16.5* shall be rounded to the nearest whole number.

The adjusted Capped Amounts shall not be retrospectively adjusted in the event the Government Statistician (or his/her replacement as the case may be) later revises the previously published values of the CPI Index.

The first adjustment will take place on 1 October in the Year following the first Year of this Code.

**Liability where First Gas is the Liable Party under multiple agreements**

* 1. Where:
		1. First Gas is the Liable Party; and
		2. First Gas’ liability is wholly or partially caused or contributed to by a breach of a TSA and/or ICA by one or more other Shippers or Interconnected Parties (*Liable Third Parties*), and First Gas recovers (using reasonable endeavours to pursue and seek recovery of those amounts or pursuant to section 16.12) any amount from those Liable Third Parties in respect of that breach,

then First Gas’ liability shall be limited to the aggregate of the amount so recovered plus any First Gas-caused liability (where the First Gas-caused liability is any amount which First Gas caused to contributed to as a result of failing to act as a Reasonable and Prudent Operator, which in any event shall be limited to the Capped Amounts).

* 1. Where:
		1. First Gas is the Liable Party; and
		2. First Gas is liable to one or more Shippers or Interconnected Parties under any TSA and/or any ICA (each TSA and ICA being a *Coincident Agreement*); and
		3. the sum of First Gas’ liability to the Other Party and to any other Shippers and Interconnected Parties before the application of any monetary caps (*the Apparent Liability*) exceeds the relevant Capped Amount,

then the maximum aggregate liability of First Gas to the Other Party shall be reduced to an amount determined and notified to the Other Party by First Gas, which amount shall reflect the proportion that First Gas’ liability to the Other Party bears to the Apparent Liability, provided that First Gas’ aggregated liability to the Other Party together with its liability under all Coincident Agreements shall not exceed the relevant Capped Amount.

* 1. Where the Liable Party is not First Gas, the maximum aggregate liability of the Liable Party to First Gas under the relevant TSA shall not exceed the relevant Capped Amount.

**General**

* 1. Each limitation or exclusion of this *section* *16* and each protection given to First Gas or a Shipper or its respective officers, employees, or agents by any provision of this *section 16* is to be construed as a separate limitation or exclusion applying and surviving even if for any reason any of the provisions is held inapplicable in any circumstances and is intended to be for the benefit of and enforceable by each of the Party’s officers, employees, and agents.
	2. Nothing in this Code or a TSA shall limit the right of either Party to enforce the terms of a TSA by seeking equitable relief, including injunction and specific performance, in addition to all other remedies at law or in equity.

**Subrogated claims**

* 1. If First Gas is the subject of a claim by a Shipper or third party (the *Claimant*) where the claim (or any part of it) arises because of a purported breach of a TSA by another Shipper or a purported breach of an ICA by an Interconnected Party (each such Shipper or Interconnected Party, the *Defending Party*), the following procedure shall apply:
		1. First Gas shall immediately give notice of the claim to the Defending Party;
		2. First Gas will not make any payment or admission of liability in respect of the claim without the prior written consent of the Defending Party. The Defending Party will not unreasonably withhold or delay its consent under this *section 16.11(b)*;
		3. the Defending Party may elect to defend in the name of First Gas any third party claim involving any litigation. The Defending Party must notify First Gas of its election within 10 Business Days of receiving notice of the claim. First Gas shall provide or procure to be provided such assistance as the Defending Party may require provided that the Defending Party first agrees in writing to:
			1. indemnify First Gas against any liabilities resulting from that claim and/or defence of that claim except to the extent that First Gas has caused those liabilities; and
			2. pay any reasonable costs directly incurred by First Gas in providing assistance in defending the claim,

except that First Gas shall not be required to render any assistance to the Defending Party pursuant to this *section 16.11(c)* (other than allowing a defence in First Gas’ name) in circumstances where First Gas reasonably believes that its reputation could be impaired by that assistance;

* + 1. if the Defending Party elects to defend a claim under *section 16.11(c)* then it may choose its own counsel for its defence. The costs of counsel will be met by the Defending Party;
		2. First Gas will not take any active steps which could be expected to directly result in the occurrence of an event for which an indemnity is payable under *section 16.11(c)(i)*; and
		3. the Defending Party shall not be required to make any payment in respect of any claim under this *section 16.11* based on a contingent liability until the contingent liability becomes an actual liability and is due and payable.
	1. If a Shipper (*Claiming Party*) wishes to make a claim against First Gas where the claim (or any part of it) arises from the act or omission of a Defending Party and First Gas has not made a claim against the Defending Party, the following procedure shall apply:
		1. the Claiming Party may elect to pursue the claim in the name of First Gas. The Claiming Party must notify First Gas of its election. First Gas shall provide or procure to be provided such assistance as the Claiming Party may require provided that the Claiming Party first agrees in writing to:
			1. indemnify First Gas against any liabilities resulting from that claim and/or pursuit of that claim except to the extent that First Gas has directly caused those liabilities; and
			2. pay any reasonable costs directly incurred by First Gas in providing assistance in pursuing the claim,

except that First Gas shall not be required to render any assistance to the Claiming Party pursuant to this *section 16.12(a)* (other than allowing proceedings to be commenced and prosecuted in First Gas’ name) in circumstances where First Gas reasonably believes that its reputation could be impaired by that assistance;

* + 1. if the Claiming Party elects to pursue a claim under *section 16.12(a)* then it may choose its own counsel. The costs of counsel will be met by the Claiming Party; and
		2. First Gas will not take any active steps which could be expected to directly result in the occurrence of an event for which an indemnity is payable under *section 16.12(a)(i)*.
	1. A Shipper shall not make any claim, demand or commence proceedings directly against another Shipper in relation to that other Shipper’s breach of its TSA or negligence in relation to any matter pertaining to or dealt with in that TSA. Neither a Shipper nor First Gas shall make any claims, demands or commence proceedings against each other in relation to any matter dealt with by a TSA (including a claim that First Gas or a Shipper has been negligent in relation to any matter pertaining to or dealt with in that TSA) except in accordance with that TSA. Nothing shall prevent:
		1. First Gas from exercising its rights and remedies under any ICA; or
		2. a transferor, transferee or Gas Transfer Agent from exercising its rights and remedies under a GTA.
	2. Prior to First Gas making any claim against any Liable Third Parties, First Gas shall first consult any Shipper who is a Claimant and provide an opportunity for that Shipper to have its Loss included in First Gas’ claim(s).
	3. If required by either Party in writing, the other Party will show evidence of comprehensive liability insurance cover with a reputable insurer covering third party property damage and personal liability for which the other Party may be legally liable under or in relation to its TSA, up to the Capped Amounts, except to the extent that such insurance is not permitted by law.
	4. For the purposes of this *section 16*, any reference to a breach of, or liability under a TSA shall include any breach of, or liability under a Supplementary Agreement or Interruptible Agreement.