

8 December 2017

By email

Trustpower Limited
108 Durham Street
Tauranga 3143

Dear Fiona

Open letter: Trustpower's concerns about the ability of the current GTAC proposal to provide access to the gas transmission network on reasonable terms

Introduction and purpose

We refer to your letter dated 24 November 2017 expressing concerns regarding the development of a new Gas Transmission Access Code (GTAC) to replace the current Maui Pipeline Operating Code (MPOC) and Vector Transmission Code (VTC).

Your letter raises a number of concerns. We have endeavoured to group common concerns under the following headings:

1. Gas Industry Co's role under the Gas Act 1992;
2. Trustpower's concerns regarding the GTAC process and design;
3. Criteria that apply to Gas Industry Co's assessment of the GTAC; and
4. Commerce Act risks.

Gas Industry Co's role under the Gas Act 1992

Your letter raises two key concerns regarding the industry-led GTAC process and Gas Industry Co's role in relation to that process:

- The length of time that the industry has been given to try and develop the GTAC; and
- Trustpower's view that the chances of a satisfactory GTAC being developed by the industry are low.

The suggestion appears to be that Gas Industry Co should have by now taken steps to recommend gas governance rules or regulations for transmission access arrangements. Your letter suggests that the Gas Act does not contain a preference for a contract based industry agreement or code as opposed to regulations or rules and that the question Gas Industry Co must ask itself is which mechanism will best deliver the desired outcome.

We disagree with this interpretation of Gas Industry Co's role under the Gas Act. The Gas Act is clear that, before making a recommendation to the Minister for a gas governance regulation, Gas Industry Co must "ensure that the objective of the regulation is unlikely to be satisfactorily

achieved by any reasonably practicable means other than the making of the regulation”.¹ It is not simply a case of choosing between non-regulatory solutions and regulation. Gas Industry Co must be satisfied that the objective of the regulation is unlikely to be achieved through non-regulatory means.

We are mindful of our regulatory function. To this end, we have been continually monitoring the industry process to assess whether regulatory intervention is appropriate. Gas Industry Co remains prepared to recommend transmission access regulations in the event that it determines that the industry-led solution is not a practical option for delivering a new gas transmission access code. However, we are also mindful that stakeholders have broadly supported the concept of an industry-developed GTAC to date. As per the above, we must be satisfied that the industry-led process is unlikely to meet the objectives of the regulation prior to recommending a regulatory solution.

Your letter suggests that the industry has been given an extraordinarily long time to achieve the outcome of access to gas transmission pipelines on reasonable terms and conditions. Previous discussions regarding terms and conditions of access to, and use of, gas transmission pipelines were complicated by the separate ownership of the gas transmission system. In that context, the focus was on convergence of two gas transmission codes into a single code. Those discussions were quite different to the current process for development of the proposed GTAC. The key issues relating to the gas transmission system have also changed since the early discussions (for example, access to capacity on Vector’s northern pipeline is no longer a significant issue and the balancing regime under the MPOC has been modified to introduce market based balancing). Accordingly, we do not think that it is reasonable to describe the current industry process for development of a GTAC as a continuation of previous processes.

Trustpower’s concerns regarding the GTAC process and design

We think there are two separate concerns under this heading:

1. *The extent to which First Gas has taken into account or agreed with Trustpower’s concerns regarding the substance of the new GTAC.*

Your letter identifies a number of concerns with the structure and the content of the proposed GTAC. We have noted those concerns and will consider them when assessing the proposed GTAC that First Gas submits to Gas Industry Co.

Gas Industry Co will consider the substance of the proposed GTAC, including stakeholder concerns regarding matters that have not been addressed, or have been deferred, as part of its assessment of the proposed GTAC. Trustpower will, of course, have the opportunity to participate in this process.

However, we must emphasise that whatever form the transmission access code takes (whether regulated, or industry-led) it will involve consideration of a number of competing interests and compromise on behalf of all parties. There will not be a solution that is perfect for all parties.

2. *First Gas’s consultation process for the last stages of the GTAC design has been inadequate.*

Gas Industry Co cannot dictate when the industry process for development of the proposed GTAC ends, or require industry to undertake further consultation. First Gas’s decision not to schedule

¹ Gas Act 1992 s 43N.

further workshops relating to the development of the GTAC is a decision for First Gas. Our role is to assess the final version of the GTAC whenever it is submitted to us.

The MPOC process provides a further opportunity for stakeholders to make submissions on the changes that First Gas has made to the proposed GTAC and provide comments on Gas Industry Co's assessment of the proposed GTAC if it is submitted to Gas Industry Co.

Criteria that apply to Gas Industry Co's assessment of the GTAC

Your letter expresses concern regarding the criteria against which Gas Industry Co will assess the new GTAC under the MPOC (i.e. that the new GTAC is materially better than the current terms and conditions of access to, and use of, the gas transmission system).

We think it is important to note that Gas Industry Co's role under the MPOC is separate from, and does not affect, its ability to recommend regulations under the Gas Act. Gas Industry Co's role under the MPOC is a contractual role that must be performed in accordance with the terms of the MPOC. The "materially better" standard is derived from the terms of the MPOC (by virtue of the approval of *MPOC Transition Change Request* submitted by First Gas on 14 July 2017, and recommended by Gas Industry Co on 31 October 2017), not Gas Industry Co's interpretation of the MPOC, or its role under the Gas Act.

We do not believe that Gas Industry Co's assessment of the new GTAC under the MPOC affects its ability to recommend gas governance rules or regulations to the Minister in the future. As noted above, Gas Industry Co's ability to recommend gas governance rules or regulations is a statutory role, which requires Gas Industry Co to have thoroughly explored the possibility of a non-regulatory solution. To this extent, we consider that Gas Industry Co's assessment of the new GTAC fulfils two functions:

- The role given to Gas Industry Co under the MPOC - to facilitate improvements to the gas transmission access arrangements so that they progress towards meeting the objectives in the Gas Act and the GPS; and
- Part of Gas Industry Co's normal assessment of considering different practical options for achieving a new gas transmission access code.

We do not accept that there is an issue with Gas Industry Co performing its role under the MPOC and potentially subsequently advising the Minister on "reasonable terms and conditions for access to and use of transmission or distribution pipelines". Gas Industry Co currently has a role in assessing code changes under the MPOC and has historically had a role in the approval of code changes under the VTC on the basis that there is no inconsistency between those contractual roles and its role under the Gas Act and GPS. In summary, Gas Industry Co's code change role does not remove the Government's expectation that Gas Industry Co will pursue the GPS outcome of reasonable terms and conditions of access.

In terms of the criteria that Gas Industry Co should apply to its assessment of the new GTAC, your letter focusses on section 43F of the Gas Act and the stated outcome in paragraph 13 of the GPS. Section 43F provides that the Minister may recommend regulations "prescribing reasonable terms and conditions for access to and use of gas transmission pipelines."² The term "reasonable" is used in that section to define the purposes for which the Minister may recommend regulations (i.e. the scope of the power). Paragraph 13 of the GPS identifies the

² Gas Act 1992 s 43F(2)(c). Section 43F defines the purposes for which the Minister may recommend regulations (i.e. the scope of the Minister's regulation making power).

outcomes that Gas Industry Co is expected to pursue. It is the objectives set down in section 43ZN and the GPS that Gas Industry Co must have regard to when considering whether to recommend regulation under the Gas Act, and similarly, when considering whether a non-regulatory solution will deliver against the requirements of the statutory framework. It is these same objectives against which Gas Industry Co intends to assess the new GTAC.³ While this does not require Gas Industry Co to apply a “reasonableness” standard, we believe that this standard is inherent in a number of the objectives against which Gas Industry Co will measure the new GTAC. For example:

- **Efficiency:** Gas Industry Co noted in its paper “Gas Industry Co Assessment of the GTAC” (**Assessment Paper**) that efficiency would require consideration of matters such as operating and transaction costs, efficient use of available capacity, competition amongst system users and equal and open availability of information.
- **Fairness:** The Assessment Paper noted that this would include consideration of whether there is equal access to services on offer, whether the price of the services reflects their value and the fairness of governance arrangements in relation to disputes.
- **Barriers to competition minimised:** The Assessment Paper noted that this objective would require consideration of matters such as whether the TSAs and ICAs together with the GTAC impose any unreasonable barriers to the entry of competitors, whether there are opportunities for gaming and undue information imbalances.

Accordingly, we think that concerns regarding the reasonableness of the terms and conditions of access will be highlighted in our analysis.

Commerce Act risks

When performing our code change role under the MPOC, we have been clear that compliance with the Commerce Act, and other relevant law, is the responsibility of parties to the arrangements. Our role is to assess the proposed arrangements in accordance with our role under the MPOC. We note that the extent to which the proposed GTAC contributes towards minimising barriers to competition will be a matter that Gas Industry Co considers as part of its analysis. However, specific competition issues arising from the structure of the arrangements are more likely a matter for the Commerce Commission.

Application to the Commerce Commission for an authorisation is a matter for the parties to the GTAC.⁴ Gas Industry Co is not a party to the MPOC or proposed GTAC by performing any function under those arrangements. It is not clear to us whether the Commerce Commission would be willing to consider an application for an authorisation, or provide advice, until the proposed GTAC is in its final form.

Conclusion

We hope this letter adequately responds to the concerns in your letter.

We have similarly responded with an open letter as well believe our response may be helpful for other stakeholders.

³ See Gas Industry Co’s paper “Gas Industry Co Assessment of the GTAC” published on 3 August 2017.

⁴ Section 58 of the Commerce Act permits a person who wishes to enter into a contract or arrangement to apply to the Commission.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Tim Kerr', written in a cursive style.

Tim Kerr
Legal Counsel

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