D03/912

5 DECEMBER 2002

VENCorp

Submission to ACCC in relation to its Draft Determination on Applications for Authorisation of the MSO Rules

1 Introduction

This submission is made in relation to the Commission's *Draft Determination* issued on 16 October 2002 proposing to grant authorisation to VENCorp's application for reauthorisation of the Victorian Market and System Operations Rules (MSO Rules), and to the pre-determination conference held on 21 November 2002.

In summary, VENCorp endorses the analysis undertaken and decisions made by the Commission in its *Draft Determination*. This submission also seeks to clarify and expand on comments made at the pre-determination conference.

In particular, this submission comments on:

- the duration of the authorisation
- the handling of matters raised by User Groups
- end-user representation on the Gas Market Consultative Committee (GMCC).

2 Overview

Firstly, no new issues relevant to the authorisation were raised at the pre-determination conference. There are no fundamental areas of disagreement, but rather misconceptions about:

- the effect and scope of an authorisation
- the distinction between matters of government policy on the one hand, and market operation on the other
- the distinctions between wholesale market rules, and issues relating to broader national upstream gas supply, and to Victorian retail pricing[1]

[1]. VENCorp notes that for the Victorian mass market, retail pricing currently remains subject to Essential Services Commission oversight and Government price controls under the safety net.

- the enormous variance in contract carriage models and contracting arrangements across Australia, and lack of publicly available information regarding details of gas contracts.

Industry remains strongly supportive of the MSO Rules, and of the *Draft Determination*. We note positive comments in written submissions to the Commission prior to the release of the *Draft Determination* by three gas retailers (AGL, TXU and Energex) and one direct market participant (Visy Paper). TXU and Energex reiterated that support at the predetermination conference.

3 Duration of authorisation

The rationale for granting a 10 year authorisation remains sound. In the absence of compelling contrary arguments, this decision should not be varied. To date, no such compelling arguments have emerged.

To recap, the rationale as set out in VENCorp's previous submissions is as follows:

- As with the National Electricity Code, there is no legal or practical requirement to link price reviews under access arrangements to competition authorisation[2].

- Moreover, to the extent practicable, costs associated with regulatory consultation should be minimised. Nevertheless, there will be a measure of overlap between the statutory review of Part 8 of the Gas Industry Act, and the next access arrangement revisions. Section 205 of the *Gas Industry Act 2001* requires a review in 2007 of Part 8 (including the role of VENCorp) to be conducted by the ACCC or another person appointed by the Victorian Minister, with the Minister to report to Parliament by 31 December 2007.

- VENCorp strongly believes that the public interest is best served by avoiding any further duplication associated with the authorisation. In support of this, VENCorp notes the following key dates:

Date	Details
September 2006 – March 2007	VENCorp and GasNet develop revised access arrangement proposals
March 2007	VENCorp and GasNet required to submit revised access arrangements, ***based on existing statutory framework,*** i.e. with VENCorp to continue to operate the GasNet principal transmission system on a market carriage basis
January to December 2007	The statutory review of the role of VENCorp must take place ***during*** 2007, reporting to the Minister by end December
	The review may be conducted by the ACCC, or someone else appointed by the Minister
December 2007	Service Envelope Agreement between VENCorp and GasNet may be varied by agreement, or by default, will continue on same terms and conditions. The agreement will not be terminated: clause 5.3.1 of the MSO Rules refers
2008 – 2009	Government to make decisions regarding market structure. If considered necessary to change the role of VENCorp:

[2] The National Electricity Code is authorised for a period of 10 years.

Date	Details
	change the role of VENCorp: - an alternate model would need to be developed - statutory amendments would be required to the Gas Industry Act - assets and liabilities would need to be transferred - industry contracts and regulatory instruments would require review Revised access arrangements would need to be developed and approved. New instruments or contracts may require competition authorisation

A 10 year authorisation provides a logical order to regulatory and review processes, avoids the costs and risks associated with market uncertainty, and minimises overlapping, potentially conflicting processes.

The unanimous view of those Market Participants that made submissions to the Commission (TXU, AGL, Energex and Visy Paper) supported reauthorisation of the MSO Rules for a 10 year period. Each stressed the public interest in providing an environment of certainty and stability for the MSO Rules. VENCorp rejects the assertion made by the EUAA at the conference that these supporters represent incumbents preserving their position in the market. These Market Participants represent a cross-section of interests among active traders, including previously "franchise" retailers, a new entrant retailer, and a direct end use customer.

The Department of Natural Resources and Environment also supported a 10 year authorisation period to avoid conflicts with the review of VENCorp's and GasNet's access arrangements in 2007, and the statutory review in 2007 of VENCorp's role as required by Gas Industry Act.

VENCorp states unequivocally that in seeking a 10 year authorisation period, it does not do so with the objective of avoiding industry, regulatory or statutory review. Indeed, on the contrary, when considered in the context of the other reviews already required by statute, access arrangements, the current MSO Rules, or the Commission's authorisation conditions, a mandatory requirement for an additional process to re-authorise the MSO Rules in less than 10 years would raise the spectre of continual, virtually unbroken, regulatory review over the entire authorisation period. Given that an authorisation may be revoked at any time if necessary or appropriate, a 7 or 8 year authorisation period would therefore add regulatory costs, investment uncertainty, and divert industry, user and regulator resources, *without any corresponding benefit.*

Further, the nature and timing of any changes arising from the statutory review in 2007 is as yet uncertain. These could range anywhere between a "no change" outcome, to one of fundamental change requiring legislative, regulatory, structural, contractual and system changes that may take up to 2-3 years to implement. Hence, a mandated reauthorisation process that falls within this period runs the real risk of being either entirely unnecessary, or of impeding an effective transition in the implementation of changes identified as necessary by the other prescribed reviews.

VENCorp remains strongly of the view that an authorisation period of 10 years is the appropriate duration, and supports the Commission's rationale as articulated in the *Draft Determination*[3]; to reduce this period would be likely to provide no additional benefit in terms of

[3] At page 65 of the Draft Determination

the level of regulatory oversight and actually be counter-productive in terms of increasing regulatory costs through diverting industry resources from their core businesses to participation in potentially unnecessary and/or repetitive regulatory process.

The views stated on behalf of the Energy Action Group and Energy Users Association of Australia imply some misconceptions about the role of an authorisation. Notably, the views fail to consider the following principles:

a) An authorisation cannot determine matters of government policy.

In considering an authorisation application, the Commission applies the tests required by the Trade Practices Act; it cannot impose matters beyond its power. If the Government's 2007 review concludes that no fundamental changes are required to Government policy and the market structure, then these are not appropriate matters for review through a further authorisation application.

b) Any government changes to the MSO Rules or market structures will automatically affect an existing authorisation.

If fundamental changes are proposed as a result of the statutory review, any potentially anti-competitive aspects of the revised arrangements will require amendments to the existing authorisation or a new authorisation application.

Even minor changes to the MSO Rules will require the ACCC's approval and consideration of the impact, if any, on the authorisation.

c) Anyone can propose a rule change at any time.

If problems arise in the future, or any existing concerns are considered to be important enough to warrant change, then any person can propose a rule change at any time. VENCorp must consider all such proposals, and must report to the Commission on all changes proposed, and actions taken.

The ACCC itself can initiate changes to the MSO Rules at any time.

d) The statutory review is the correct forum for reviewing policy issues.

The statutory review of Part 8 of the Gas Industry Act and the role of VENCorp need not be constrained by limitations applying to the authorisation test under the Trade Practices Act. If the result of an objective unfettered review by the ACCC (or an alternate person appointed by the Victorian Minister) does not convince the Victorian Government that a fundamental change is warranted, then it is not appropriate, or within the Commission's powers, for users to seek to 'second guess' Government's decision through a further review of the MSO Rules authorisation.

4 End User Proposals

At the predetermination conference, User Groups asserted that their proposals (summarised in italics below) had been rejected by the Commission. VENCorp believes this to be a highly unfair criticism of the Commission's consideration of these issues. Submissions made by users fall broadly within three categories:

a) Matters accepted and implemented by VENCorp after consultation with users and the Commission, or matters already provided for in the current MSO Rules or access arrangement

- *VENCorp to review VoLL*[4]
- *End user representation on the GMCC*[5]
- *VENCorp costs should be minimised*[6]
- *VENCorp should facilitate risk management*[7]
- *Review opportunities to provide a demand side response*[8]

b) Matters of a policy nature which are beyond the power of either VENCorp or the Commission to address

- *The VENCorp board should allow for direct end user representation*[9]
- *Nationally consistent gas market*[10]
- *Institute end user advocacy funding*[11]

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[4] Periodic reviews of VoLL are already prescribed under the MSO Rules clause 3.2.4(d).

[5] Refer to section 5 of this paper.

[6] This is achieved through the MSO Rules, VENCorp governance arrangements, and access arrangement processes.

[7] It is presumed that this refers to facilitation of risks associated with, so called, surprise uplift charges. This issue would form part of the review of locational and hourly pricing that the *Draft Determination* recommends that VENCorp undertake in 2003. As indicated in a separate submission to the Commission by Exxon Mobil, dated 8 Novmber 2002, VENCorp is also currently holding discussions with Exxon to explore possible MSO Rule changes to address issues of Force Majeure, an appropriate balance of liabilities for parties offering gas into the market, and the ability of producers tooffer "non-firm" gas injections. A workshop to discuss these issues with other industry participants is scheduled for December 2002, with a view to developing proposals for appropriate rule changes in early 2003.

[8] This is discussed in the *Draft Determination* at pages 12, 20, 21, 26, 28. However, this is captured primarily by the Commission's recommendation that VENCorp review locational hourly pricing. The establishment of improved pricing signals are a pre-requisite for the facilitation of demand side management.

[9] Appointments are made by the Governor in Council, in accordance with the provisions of s16G of the Gas Industry (Residual Provisions) Act 1994.

[10] If by this, the EUAA seeks to apply a common set of balancing and contracting arrangements to all pipelines, then users must recognise that even among contract carriage pipelines there is no single or common set of balancing arrangements, andeach pipeline system is supported by distinct and divergent contracting arrangements. With the exception of access arrangements and reference tariffs, these contracts are generally confidential. It is not within the power of governments or the ACCC to unilaterally impose changes to the existing market or contracting arrangements on all pipelines.

c) Matters rejected, based on a sound analysis and submissions to the Commission

- *Authorisation must not exceed five years*
- *The MSOR should be simplified.*

5 End user advocacy

As a preliminary point, we note that the GMCC is a consultation vehicle instituted by the VENCorp Board to meet in part the more onerous requirements imposed under the MSO Rules for consultation on rule change proposals; it does not form part of the MSO Rules. Accordingly, end user representation on the GMCC is not strictly a rules authorisation issue. As noted above, anyone can propose a rule change at any time, and VENCorp is required to consult on such proposals with all likely affected parties.

Nevertheless, at the pre-determination conference, VENCorp indicated its agreement to implement the suggestion made by the Commission in its *Draft Determination* that there be additional end user voting representation on the GMCC. This is consistent with our reputation for effective, transparent and inclusive consultation.

However, there are a number of unresolved issues associated with this proposal. Notably, these issues include:

- How will the advocate be selected and appointed?
- Who will the representative represent? What sector or category of end-user? Given that the GMCC already has a market customer representative, will this be a non-participant/ large user representative, a small user representative, or a general end user advocate?
- To whom will the advocate be accountable?

VENCorp will continue to work and consult with user groups and regulators (ACCC and ESC) to resolve these issues, but notes that these issues are not trivial.

VENCorp also notes both the Commission's view in its *Draft Determination* that "the case for end-user advocacy funding is not made out at this point"[12], and the counter views expressed in this regard by end user group representatives at the pre-determination conference. Should there be further consideration of this issue, VENCorp simply expresses caution based on experiences elsewhere that suggest managing the funding for such representation would require substantial administrative infrastructure to support it. For example, both CUAC[13] and NECA have Chairpersons and boards, formal processes and working groups to manage input and allocate funds. Both have faced significant practical difficulties in administering these schemes. Where there are existing funding arrangements for end user advocacy, such as that through CUAC, careful consideration should therefore be given to the overhead costs in establishing additional facilities which have essentially the same objective.

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[11] Our initial advice is that, under the current MSO Rules and access arrangement, it would be difficult for VENCorp to seek recovery of funding provided to one particular interest group (as distinct from consultation undertaken by VENCorp as required under the MSO Rules). VENCorp will explore this further if required.

[12] Page 50, *Draft Determination*

[13] Victorian Consumer Utilities Advocacy Centre