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Re: Consultation on MCE Review of Decision-Making in the Gas and Electricity Regulatory Frameworks

AGL welcomes the opportunity to participate in the SCO's consultation process on merits reviews for gas and electricity economic regulatory decisions. The issue of appropriate merits review is an important component of the MCE's Energy Market Reform program. Merits review and judicial review are an integral feature of administrative law within the Australian legal system. There is broad acceptance of the need for merits review of economic regulatory decisions - in addition to judicial review - which is reflected in merits review being a key component of a wide range of regulatory regimes. A prime example is the National Access Regime (NAR), which acts as a template for all other access regimes nationally.

AGL has participated actively in energy market reform processes during the 1990s that led to the implementation of the Gas Access Regime (GAR) and the National Electricity Market (NEM). It also participated in the subsequent reviews by the Parer Committee on Energy Market Reform and the Productivity Commission's reviews of the NAR and the GAR. AGL has been able to bring significant experience, because it has been privately owned since its establishment, and has probably the longest experience with utility regulation in Australia. AGL has consistently argued for the accountability and balance, which are provided by both merits and judicial review, in order for regulation to be robust and for all participants to have confidence in regulatory processes and outcomes.

Merits review and judicial review have been part of the GAR since its inception in 1998, and it is appropriate that the strong track record of merits review in the GAR be applied to improving the quality of access regulation in the energy market. Merits review under the GAR has provided significant benefits that have resulted in confidence in the GAR which is essential to an effective regulatory regime and continued incentives to invest in energy infrastructure. AGL remains persuaded of the need for review of regulatory decisions, not only on matters of procedure and law (which is a given), but also on matters of the merits and reasonableness of decisions.

It is essential that the SCO and MCE also recognise and preserve the rights of review that are currently available to participants under the GAR. Any material reduction to the merits review arrangements currently available under the GAR would represent a substantial loss of rights to participants for which there should be a demonstrable offsetting benefit and should be supported by strong policy reasoning. This is of particular importance in the case of gas transmission and distribution businesses for which merits review rights are established in the GAR as a significant protection against loss of property rights.

The discussion paper proposes two models for review of the merits of regulatory decisions: Model A – a limited model merits review, which is similar to (but not the same as) the

provisions of Section 39 of the Gas Pipelines Access Law – and an “augmented” judicial review. AGL’s analysis of these two models leads to the simple conclusions that:

- Model A provides a limited form of merits review (at the highly constrained end of possible models) that is likely to be appropriate, depending on decisions about particular elements of the model that are not concluded in the paper.
- Model B provides little, if any, increase in scope over ‘traditional’ judicial review, which is available in any case.
- While the paper presents the two models as alternatives, they are in fact complements.

This view is based on an analysis of the arguments for and against the two models. This analysis shows that there are a number of misconceptions about the operation of both models and that Model A is much more likely to meet the policy criteria for a merits review mechanism set out in the discussion paper.

The discussion paper raises several questions about whether it is appropriate to provide merits review, as is available for gas access, for electricity access. AGL cannot identify any differences between economic regulation of gas and electricity access, which would legitimately mean that the electricity regime would not benefit from merits review in the same way as the gas regime. The levels of discretion available to the regulator in electricity access regulation are no less than those available in gas access regulation, so it is logical that merits review, as applied in the gas access regime, should be made available to the electricity access regime.

The attached submission does not seek respond to all of the large number of issues raised in the SCO’s discussion paper, either in terms of arguments raised or in terms of all of the details of implementation. It is appropriate at this time that the debate focuses on the overall benefits of merits review of economic regulatory decisions. AGL submits that it is essential that industry be provided with the opportunity for further involvement in consultation on the detail of implementation, when the MCE has made its decision about the key elements of merits review arrangements.

If you have any questions regarding the above matters, please contact Chris Harvey, Manager Regulatory Development, on (02) 9921 2601 or by e-mail to charvey@agl.com.au.

Yours faithfully,

Dr RJ Wiles

General Manager Regulation and Policy