



16 June 2023

Charlotte Reed
Input Methodologies Manager,
Infrastructure Regulation
Commerce Commission
P O Box 2351
Wellington

Via email: [REDACTED]

Cc:

Andy Burgess - General Manager, Infrastructure Regulation
Vhari McWha – Commissioner
John Small - Chair

RE: Commission Conduct – 2023 IM review

Dear Charlotte

Yesterday was the first opportunity we had after the Commission’s presentation, to look at the papers that the Commission has produced on its draft decision for the 2023 IMs.

Given the process leading up to the draft papers, you will appreciate that MGUG had major unresolved concerns with the decisions made in the Gas IM amendment as part of the DPP3 process. Having been assured that the topic was open for a fresh review in the full IM process, and heartened by Commission’s request for submissions on the topic (“*Options to maintain investment incentives in the context of declining demand*”) we comprehensively prepared for that through the process leading to this draft decision¹.

The arguments (many repeated, enhanced, and previously ignored) through this process were prepared in good faith in order to give the Commission a clear opportunity to respond to them in a way that didn’t create an apparent timing jeopardy for the Commission². Having made our submission more than four months ago, we were naturally keen to see how the Commission had responded to the various challenges put against the arguments that supported their urgent, out of cycle gas IM amendment. We expected to be able to shape our further responses in the submissions now being called for on the draft decision.

¹ https://comcom.govt.nz/_data/assets/pdf_file/0022/308380/Major-Gas-Users-Group-MGUG-Submission-on-IM-Review-Options-to-maintain-investment-incentives-in-the-context-of-declining-demand-paper-9-February-2023.pdf

² Where the Commission feels that it can’t change a position because of statutory deadlines on decisions.

We may have missed it in scanning through the various relevant papers among the list of 23 documents, but the overriding picture appears to be that the Commission has simply refused to engage on the matters that we, other submitters³, and the Commission considered material to the review. If that is not the case, we'd happily take your direction as to where we should be looking to find the Commission's reasoning for supporting the current gas IM's, against our arguments why it shouldn't.

If it is the case that the Commission has simply refused to engage openly on material matters raised by stakeholders then we should consider in the interest of the integrity of the process, how that should be resolved. As things currently present, we have little confidence that the Commission's assurances of open mindedness and the importance of stakeholder input has any substance to that claim.

We would note that this isn't the first occasion that we've raised our concerns about lack of engagement and transparency in these processes.

We held a meeting on 3rd November 2022 in Wellington with Matthew Clark plus one (regrettably as it was meant to be an informal meeting, we haven't recorded the name, but I recollect that she might have been someone from your legal team). The purpose was to share our views on the gas IM/ DPP3 process that we found particularly frustrating as stakeholders in disagreement with Commission thinking and reasoning. The lack of acknowledgement and engagement on economic principles, legal precedent, and empirical evidence is one that is being repeated here. At the meeting we discussed that we can acknowledge differences in views. However, this should be founded on clear and robust argument and counterargument, in a transparent and open forum if the process is to have any meaning and integrity. This position seemed to be acknowledged as reasonable, and our perception was that the Commission was going to act positively on the feedback.

The second meeting was held in Wellington on 23rd February this year. Andrew Burgess and John Small were invited to a discussion with our members on Commission process and stakeholder expectations (agenda attached for clarity and transparency). The purpose was to pre-empt the same lack of engagement and transparency issues arising through the draft decision process, to avoid the same risk of legal challenge after the IM final decision. We felt that our concerns were heard and understood. We were assured that this shouldn't continue to be the case, and if we had any further concerns that we should raise them with the Commission.

We now find ourselves regrettably, in a situation where we are at loss as to what we can do to actually engage the Commission in the argument on what to do with the gas IMs.

Our overriding suspicion is that the Commission is so vested in its position in the Merit Review that its preferred position in this process is to simply do nothing and ignore matters raised by ourselves and others, that conflict with the Commission's appeal arguments.

We've sought our lawyers' advice on this proposition. They tell us that the Commission is supposed not to be partisan in a merit appeal. The driver for the Commission isn't to "win", it is to help the court to understand the issues thoroughly, and to welcome the outcome as useful guidance on the

³ Methanex, Nova, Greymouth

law and the right way to regulate, whatever it is. They point out that the record is closed for the appeal so what the Commission decides now should not affect it. They tell us therefore that the Commission should not be avoiding engaging with the inconsistencies of its stranding policy with what happens in competitive markets, because of concern that it could signify weakness on the issues in the appeal.

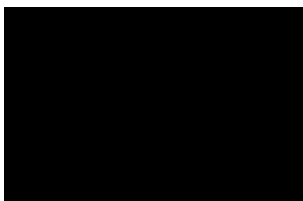
However, we can't help suspecting that the Commission is renegeing on the earlier assurances that the stranding issues would be properly addressed in this review, because it might end up looking like conceding on some of the appeal matters. It is otherwise inexplicable that your draft would just repeat earlier assertions without engaging on the evidence and logic.

Clearly, we think it is in everyone's best interest to deal with matters of disagreement in the process now, rather than after it is completed. We would therefore seek a meeting with the Commission to discuss this matter with some urgency. Given the short submission period it would be useful to have this meeting sometime in the week starting 27 June.

If it is your response that we just "engage with the submission process", we would have difficulty in accepting that advice. The evidence to date doesn't suggest that we can have any confidence that repeating unaddressed main arguments for a fourth time (DPP3/ IM amendment, IM Merit Review, 2023 IM Framework/ Issues/ Process, and now draft decision) would generate a different set of behaviours or responses from the Commission.

I look forward to your early response on this matter.

Yours sincerely



Len Houwers
Envisory Ltd/Arete Consulting Ltd
Secretariat for the Major Gas Users Group Incorporated

Attachment

- Email to Andy Burgess 20 February 2023