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**Office of
Council President**

24 November 2016

Examination of Coverage Test
COAG Energy Council Secretariat
GPO Box 787
Canberra ACT 2601

By email: energycouncil@environment.gov.au

Dear Dr Vertigan

Thank you for meeting with the members of the National Competition Council (NCC) on 17 November 2016 to discuss the current COAG Energy Council Gas Market Reform Group Inquiry into the coverage criteria for gas pipelines in the National Gas Law arising from the ACCC East Coast Gas Inquiry.

The NCC wishes to make the following points relevant to your Inquiry.

Firstly, if it is accepted that the ACCC has found that some gas pipelines are monopoly pricing and that any such monopoly pricing will persist in the long term then, in the Council's view, the ACCC has made a questionable assumption that these are circumstances in which the coverage criteria for gas pipelines in the NGL will not be satisfied.

The current test in criterion (a) is already a test of market power. That was made clear in *Re Duke Eastern Gas Pipeline Pty Ltd* [2001] ACompT 2 at [116] - [118]. The amendments made in 2006 to include a reference to a "material increase in competition" did not change the nature of the test. Rather, as paragraph 1.38 of the Explanatory Memorandum to the 2006 Bill makes clear, the change was intended to address the extent to which competition must be promoted, so that declaration occurred only where "increases in competition are not trivial".

The NCC considers that monopoly pricing that is persistent over the long term could generate circumstances that would meet the coverage criteria for gas pipelines in the NGL. Such circumstances are outlined in the NCC Gas Guide (October 2013). The NCC notes that some submissions have maintained that the criteria can be considered hard to trigger, however, there have been few gas pipeline coverage applications lodged with the NCC to test that proposition.

Secondly, the NCC considers that the ACCC inquiry report does not adequately consider the question of whether any monopoly pricing of gas pipelines – even if it is accepted that it is or has been occurring – will persist over the long-term. In other words, it is not evident to the NCC that the ACCC's report has fully considered whether any monopoly pricing is a permanent or transitory phenomenon.

Thirdly, the NCC has reservations regarding the ACCC's approach in that – at particular points in time - analogous reasoning could potentially be applied to many other sectors of the economy. For such sectors, however, the application of access regulation would be clearly unwarranted - the groceries sector can be cited as an example.

Regulatory solutions are not without significant cost, both direct (regulatory burden) and indirect (impacts on investment incentives). It was always the intention of the National Access Regime and National Gas Law that regulation would only be applied where the benefits were substantial and could not be achieved through other interventions or waiting for transitory distortions to dissipate.

For these reasons the NCC does not consider that the gas pipeline coverage criteria in the National Gas Law should be amended in the manner proposed by the ACCC in the East Coast Gas Inquiry.

The NCC recognises that, at least in the short term, there can be a bargaining imbalance between gas pipeline owners and gas shippers. The Council considers that a short term imbalance in the bargaining power might be overcome through increased information flows between parties and a commitment to arbitration on a commercial basis in the event that commercial negotiations are at an impasse. The NCC does not consider it necessary for any such arbitration to be conducted by or under the auspices of a regulatory body. To do so risks the application of regulatory parameters and particular cost models to what should be the facilitation of a private commercial arrangement.

Yours sincerely

Julie-Anne Schafer
President