

## 1 **Legal Issue 1: Necessity of Member (Legal) for the "Board" to make Regulations**

- 1.1 The present Draft Regulations are proposed to be prepared and published in absence of the Member (Legal) of the Petroleum and Natural Gas Regulatory Board ("PNGRB"). MGL submits that the Member (Legal) is an integral part of the PNGRB and its presence cannot be dispensed with while making regulations, such as the present Draft Regulations, that will affect the rights of entities. Section 2(f) of the Petroleum and Natural Gas Regulatory Board Act 2006 (the "Act") defines the "Board" as "*the Petroleum and Natural Gas Regulatory Board established under sub-section (1) of section 3*". Section 3 of the Act provides for the establishment and incorporation of the "Board" and Section 3(3) provides that: "*The Board shall consist of a Chairperson, a Member (Legal) and three other members to be appointed by the Central Government*". Section 4(1) of the Act provides for the qualifications of the Member (Legal).
- 1.2 Therefore, the 'Board', i.e. the PNGRB, has to necessarily comprise of the Chairperson and the Member (Legal) in addition to the three other members. This is apparent from the fact that the Act specifically provides for qualifications for appointment of the Member (Legal) while it does not do so for the rest of the members.
- 1.3 The Draft Regulations seek to determine the right of the entities to levy transportation rate that will be payable by third party entities, which could lead to potential disputes regarding payment of transportation rates, it is of utmost importance that the legal validity of these Draft Regulations is properly examined and considered by the PNGRB. Such legal examination cannot be done in absence of the Member (Legal) who is an essential part of the PNGRB as per the above-mentioned statutory provisions. MGL submits that when a body is acting in the capacity of a quasi-judicial body and is determining the rights of the parties, it is essential to have a person of legal mind as part of such body. If the Draft Regulations are proceeded with in absence of the Member (Legal) of the PNGRB, it would be contrary to the letter and spirit of the Act itself.

## 2 **Issue 2: Proposed regulations cannot apply at the end of the "exclusivity period"**

- 2.1 Without prejudice to the above, MGL submits that the Draft Regulations (under Regulation 3) intend for the same to apply "*immediately at the end of the period of exclusivity from the purview of common or contract carrier*" as provided under Regulation 12 of the Authorization Regulations which in turns refer to the PNGRB (Exclusivity for City or Local Natural Gas Distribution Networks) Regulations, 2008 (the "**Exclusivity Regulations**").
- 2.2 Under Section 20(4) of the Act, the PNGRB can decide the period of exclusivity with respect to laying, building, operating or expanding a CGD Network in accordance with *principles* that the PNGRB has to lay down by regulations. Prior to ending of such exclusivity period, the PNGRB has to first, in terms of Section 20 (1), (2) and (3) of the Act, declare a CGD Network as a "common carrier" after following the

statutory and regulatory procedure. MGL submits that the said Draft Regulations cannot apply automatically without following the procedure, ending with a declaration by notification (under Section 20(3)) as a common carrier. The said notification has to be issued after following the procedure under Section 20(1) and (2) of the Act, and the other extant Regulations of the PNGRB. The Draft Regulations intend to apply immediately at the end of the exclusivity period without there being any declaration of the same as common carrier and/or determination of the network capacity, which would be in contravention of the scheme and provisions of the PNGRB Act.

- 2.3 Further, the Exclusivity Regulations are presently under challenge before the Delhi High Court in an ongoing litigation. As the PNGRB is aware, a writ petition (W.P.(C) 9374/2015) was filed before the Delhi High Court which pertains to the legal validity of certain regulations forming part of the said Exclusivity Regulations. The Delhi High Court passed an order on 30 September 2015 in the said writ petition directing that: "*Any order passed by the respondent No.1 in the meanwhile pursuant to the notice dated 28.07.2015 shall be subject to further orders of this Court*" (Respondent No 1 being the PNGRB in that case), and this order is in place till date. Therefore, in the event that the PNGRB commences discussions on the assumption of expiry of exclusivity period, it should be done in light of the acknowledgement that all actions are subject to the pending writ petition, and are expressly subject to the Delhi High Court's order.

### **3 Issue 3: Clarity regarding regulating transportation rate for CNG**

- 3.1 Without prejudice to the above, MGL submits that the Draft Regulations seek to provide the PNGRB the powers to regulate, inter alia, the "transportation rate" for Compressed Natural Gas ("CNG"). The PNGRB would be aware that the Delhi High Court has previously held in *Indraprastha Gas Ltd v PNGRB* (2012), which was upheld by the Supreme Court (2015) on appeal by the PNGRB, that determination and fixation of "compression charges" by the PNGRB are beyond the purview of the Act and therefore void. The Delhi High Court had held that: "...any provision therein having the effect of empowering the Board to fix the price or the Network Tariff or Compression Charges for CNG, as long as not Transportation Rate, is beyond the competence of the Board and ultra vires the PNGRB Act and of no avail"; and also went on to hold that the PNGRB is "...not empowered to fix any component of Network Tariff or Compression Charge for an entity such as the petitioner having its own distribution network".
- 3.2 In light of the above judgment of the Delhi High Court, MGL seeks a clarification as to how the proposed "transportation rate for CNG" is different from the "compression charges" which have been earlier subject matter of litigation before the Delhi High Court; and whether the proposed concept of "transportation rate for CNG" is a mere change of the nomenclature of "compression charges" by calling it "transportation rate for CNG".

### **4 Issue 4: PNGRB has to determine Tariff and not abdicate that role to entities**

4.1 Without prejudice to the above, MGL submits that the Draft Regulations, under Regulation 4(1), provide that an entity shall *"determine in accordance with the provisions specified in the schedule, the transportation rate for CGD and transportation rate for CNG, which rates shall be applicable for the period in accordance with sub clause (1) of para 6 of the Schedule"*. Further, under Regulation 4(2), the Draft Regulations provide that an entity shall *"determine in accordance with the provisions specified in the schedule, the transportation rate for CGD and transportation rate for CNG, which rates shall be applicable for the period in accordance with sub clause (1) of para 6 of the Schedule"*. Regulation 4(3) provides that these rates would be webhosted, and lastly, Regulation 4(4) provides that: *"Any entity not satisfied with the rates determined under sub-regulation (1) or subregulation (2) or the web-hosting of such rates or information pursuant to subregulation (3), may file a complaint to the Board. The Board may examine the complaint under the extant provisions of the Act and the relevant regulations made thereunder and pass such order as it may deem fit.... "*

4.2 A reading of the above shows that the PNGRB, under these Draft Regulations, is empowering an authorized entity to determine the transportation rate for CGD and transportation rate for CNG; and that such entity has to web-host the transportation rates determined by it along with the calculation model. Further, any entity, other than the authorized entity, if not satisfied with the transportation rate fixed by the authorized entity, can approach the PNGRB by way of a complaint; and instead of actually determining tariff (which would be a regulatory function of the PNGRB), the PNGRB would essentially convert its role to resolution of a "dispute" under Section 24/25 of the Act. This would be contrary to the Act and the Regulations framed thereunder that empower the PNGRB (and not an authorized entity) to determine the transportation tariff for CGD Networks. The PNGRB cannot, by way of the present Draft Regulations, delegate and/or abdicate this power upon the authorized entity when under the scheme of the Act, it is the power and function of the PNGRB. Further, the PNGRB cannot subvert and/or abdicate its powers under the Act, and convert them to assume an adjudicatory role.

## 5 **Issue 5: Methodology for determination of tariff proposed in the Draft Regulations**

5.1 Without prejudice to the above issues, MGL has identified the following issues with the methodology proposed by the PNGRB in the Draft Regulations.

5.2 ***Allow useful life for underground pipelines as 25 years instead of 30 years as proposed***

Under the Schedule pertaining to Regulation 4 of the Draft Regulations, at Clause 4(viii) of the said Schedule, it is proposed to take the life of the pipeline as 30 years for depreciation purposes. MGL proposes that the same be considered as 25 years instead of 30 years because most of the CGD companies have considered useful life of underground pipeline as 25 years being one of the entries for general plant and machinery as per Schedule II in the Companies Act 2013, and in reality, there is no need of separate calculations beyond audited accounts.. The 30 years' life under the Companies Act 2013 would be with respect to exploration, production, and refining

activity, which are outside the purview of the Act itself, and not the subject of the proposed Draft Regulations in any event.

**5.3 *Allow nil residual value for underground pipelines infrastructure instead of 5% as proposed***

As pipeline infrastructure is underground most of the CGDs have considered residual value at the end of useful life as Nil instead of 5% as proposed. Practically there is no scrap value realisation for underground pipelines as cost of recovering scrap from ground is higher than the scrap value if any.

**5.4 *Allow certification of tariff calculation by Cost Auditors or Statutory Auditors***

(a) Purpose of Statutory Audit is basically to note the true and fair value of all items at entity level and giving assurance to the stake holders on operating and financial reporting control. Such audit does not cover reporting of cost based on various activities being undertaken by an entity, rather all cost are reported for as company as a whole.

(b) Purpose of Cost Audit is basically coming out with total and unit costs, with appropriate basis for apportion, allocation to different products. Cost Audit is anyway applicable to Natural Gas.

(c) MGL requests for certification by Cost Auditor and not just any practising Cost Accountant. This would avoid duplication of efforts.

(d) PNGRB has already rightly anticipated that Statutory Auditor will have to rely on Cost Audit report.

(e) Additionally, the time limit may be provided up to December of each year, since Cost Audit Report is allowed to be submitted by September.

**5.5 *Allow CWIP to be treated as part of fixed assets for tariff calculation***

(a) All CGDs carry substantial investment on this account at any point of time.

(b) Particularly pipeline infrastructure takes a few years before commissioning

**5.6 Normative post-tax rate of return on capital employed may remain unchanged at fourteen percent instead of proposed twelve percent.**

It is submitted that the above issues be taken into account by the PNGRB before proceeding with finalising the Draft Regulations. As stated above, each legal issues is without prejudice to the other, and the above should not be taken as MGL's comprehensive comments on the Draft Regulations as there may be other issues which may arise, (including but not limited to the issue on which a clarification has been sought), and MGL reserves its rights to bring the same to the notice of the PNGRB or any other appropriate forum as may be necessary. MGL

would be grateful for an opportunity of attending the open house being organised by the PNGRB to present and explain the points above.

Should you require any further details/clarification, please let us know.