

Comments On The Proposed Amendments To The Petroleum And Natural Gas Regulatory Board (Determination Of Natural Gas Pipeline Tariff) Regulations, 2008 (“NGPL Tariff Regulations”)

Executive Summary

- There is no statutory basis for the proposed regulations of “integrated natural gas pipeline system” and “unified tariff” as presently proposed in the PCD and the same are ultra s. 11 read with s. 22 PNGRB Act.
- Since there is no statutory basis for regulating integrated natural gas pipeline systems or regulating a unified tariff for such pipeline system, the same can be developed contractually between entities. This is because such systems are not prohibited by the PNGRB Act as long as they are created by authorised entities. The Hon’ble Board can support the development of such contractual framework. The unified tariff would be a tariff contractually agreed by the participating entities and would not be applicable to the mandated 33% common carrier capacity but to the remaining capacity that can be contractually aggregated by participating authorised entities.
- The concept of integrated natural gas pipeline system has to be applicable to all common carrier pipelines and all authorised entities can enter into contractual arrangements to create such integrated natural gas pipeline system.
- An enabling framework whereby authorised entities are permitted to create legal structures such as LLPs or JVCs and allow authorised entities to either assign/transfer pipelines completely to such entities or assign own use capacity and costs. Joint Operating Arrangements that allow for sharing of capex and opex and determination of contractual tariff can also be supported. Regulations supporting such contractual arrangements would fall within the present statutory framework of PNGRB Act and avoid the legal issues that the present proposal creates.
- The integration has to be applicable for all common carrier pipelines. There is no basis for segregating or discriminating between cost plus pipelines or competitively bid out pipelines from a concept of the unified integrated pipeline system which is in itself not contemplated in the statutory framework or authorization framework.

Overview

1. The PCD is proposing to introduce two new concepts in the NGPL Tariff Regulations namely the concept of: (i) an Integrated Natural Gas Pipeline System and (ii) Unified Tariff for an integrated natural gas pipeline system. The overall framework being proposed under the PCD, is as follows:
 - a. The Hon’ble Board may, either on its own or upon receiving an application of an entity already authorised to lay, build, operate or expand more than one “interconnected natural gas pipeline system” to which NGPL Tariff Regulations apply, determine the unified tariff in respect of the same;
 - b. “integrated natural gas pipeline system” in respect of an entity is defined in draft Regulation 4A to mean all the interconnected natural gas pipelines to which the NGPL Tariff Regulations apply and a list of such pipeline systems are identified in Part 1 of the proposed Schedule B.
2. “Unified Tariff” has been defined as the unit rate of tariff for the Integrated Natural Gas Pipeline System (excluding statutory taxes and levies) in Rs./MMBTU for transportation of natural gas. A special framework for unified tariff is provided in Part 2 of the draft Schedule B.

PART A: Comments on Draft Amendment Proposed Vide Public Notice

A.1 Overall Comments

3. *Integrated Pipeline Systems can be created through Contractual Arrangements:*

The PNGRB Act presently does not provide for regulation of integrated natural pipeline system. The PNGRB Act presently mandates an authorisation to be obtained by entity undertaking laying, operation, maintenance or expansion of common carrier pipelines. The PNGRB Act does not prohibit authorised entities from entering into contractual arrangements for joint operations of their respective common carrier pipelines and contractually pooling their respective own use pipeline capacity while maintaining the required 33% capacity¹ as common carrier capacity. The regulated tariff (either bid out or determined under NGP Tariff Regulations) is mandated to be applicable to common carrier capacity only and not to the remaining pipeline capacity.

This is because : (a) s. 16 only prohibits the laying, building, operating or expansion of any pipeline as a common carrier or contract carrier without prior authorisation from the PNGRB Act. This requirement is already satisfied with the authorisation obtained for each of the specific common carrier pipelines, and (b) the power to regulate transportation tariff (even through bid process) is for regulating “transportation rates for common carrier or contract carrier” (under s. 22 read with s. 11(e)(ii) PNGRB Act).

Since the term “common carrier” as defined in the PNGRB Act relates to pipelines required to allow transport of natural gas by more than one entity on a non-discriminatory open access basis; the regulated tariff determined under the applicable NGP Tariff Regulations or through bid process is applicable only to the common carrier capacity that is the obligation of the authorised entity to maintain for providing non-discriminatory access (i.e. upto 33% of capacity). The regulated tariff is not applicable for the remaining capacity of a common carrier pipeline, which can therefore be then contractually determined by the authorised entities.

Under s. 21(2) PNGRB Act, an entity other than the entity authorised to operate, is required to pay transportation rate for use of common carrier or contract carrier to the entity operating it. The provisions of the NGP Authorisation Regulations relating to common carrier capacity and the fact that the obligation for providing non-discriminatory access is limited to common carrier capacity and not to the entire capacity of the pipeline also make this clear.

The transport rate determined by the Hon’ble Board is limited to such capacity of the pipeline that is required to be maintained for non-discriminatory open access i.e. 33% of the capacity.

Therefore, in order to enable integrated gas pipeline network to be developed and unified tariff for such networks to be developed; contractual arrangements can be entered into between authorised entities that agree to participate in such integrated pipeline systems. The regulatory support required would be that of enabling such contractual arrangements to be more efficient such as by allowing for restructuring of the legal structure by which common carrier pipeline authorisations are being held.

To support implementation of integrated natural gas pipeline systems comprising of separately authorised common carrier pipelines, a suitable amendment to the NGP Authorisation Regulation to provide the flexibility to entities to restructure the manner in

¹ See Reg 5 Petroleum and Natural Gas Regulatory Board (Authorizing Entities to Lay, Build, Operate or Expand Natural Gas Pipelines) Regulations, 2008 (“NGP Authorization Regulations”)

which they hold the various common carrier pipelines, and also provide for the creation of Pipeline Capacity Trading Platforms can be provided.

A regulatory framework supporting authorised entities to create integrated pipeline systems through limited liability partnerships (LLPs) or a joint venture company or enter into a Joint Operating Arrangement can be developed that can also enable the transfer its/their separate authorised common carrier pipelines. This will enable a structure to pool costs (capex and opex) and depreciation and also consolidate revenue and at the same time maintain the statutory framework that only permits specific common carrier pipelines to be authorised.

Since the PNGRB Act presently does not contemplate regulatory jurisdiction or regulated tariff for integrated pipelines; such integrated pipeline networks can be created through contractual arrangements and restructuring of holding of common carrier pipelines. If the framework providing flexibility in transferring holding of common carrier pipelines is provided for, it would enable more efficient contractual arrangements to govern integrated natural gas pipeline operations.

4. **Proposed Regulations Need Enabling Statutory Framework:** The regulations for “integrated natural gas pipeline system” and “unified tariff” as presently proposed in the draft regulations are ultra vires the functions of the Hon’ble Board under s.11 read with s. 22 PNGRB Act.

The PNGRB Act will necessarily need to be amended to provide for a statutory framework to enable the concept of “integrated natural gas pipeline system” and “unified tariff” as presently contemplated to be provided for. The same cannot be introduced only through the presently proposed amendment of the PNGRB NGP Tariff Regulations.

The PNGRB NGP Tariff Regulations have been formulated under the framework of s. 61(2)(t) PNGRB Act read with s. 22 PNGRB Act. S. 61(2)(t) PNGRB Act vests the Hon’ble Board with the power to make regulations specifically for:

“(t) the transportation tariffs for common carriers or contract carriers or city or local natural gas distribution network and the manner of determining such tariffs under sub-section (1) of section 22.”

Section 22(1) PNGRB Act stipulates:

“(1) Subject to the provisions of this Act, the Board shall lay down, by regulations, the transportation tariffs for common carriers or contract carriers or city or local natural gas distribution network and the manner of determining such tariffs.”

The Hon’ble Supreme Court of India, in the case of *PNGRB v. IGL*², has held that the power of the Hon’ble Board to determine tariff under s. 22 PNGRB Act is limited to common carrier or contract carriers and terms “subject to the provisions of this Act” as used in s. 22 PNGRB Act, require that s. 22 PNGRB Act be read with other provisions of the PNGRB Act including and more specifically s. 11 PNGRB Act which enumerates the functions vested with the Hon’ble Board.

Under s. 11(e)(ii) PNGRB Act, the functions vested with the Hon’ble Board to regulate by regulations, transportation rates are limited to common carrier or contract carrier.

The terms “common carrier” is defined in s. 2(j) PNGRB Act to mean:

² (2015)9SCC209

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- (j) *"common carrier" means such pipelines for transportation of petroleum, petroleum products and natural gas by more than one entity as the Board may declare or authorise from time to time on a non-discriminatory open access basis under sub-section (3) of section 20, but does not include pipelines laid to supply- (i) petroleum products or natural gas to a specific consumer; or (ii) crude oil;*

Explanation.- For the purposes of this clause, a contract carrier shall be treated as a common carrier, if –

(a) such contract carrier has surplus capacity over and above the firm contracts entered into; or (b) the firm contract period has expired...."

The term "contract carrier" is defined in s. 2(m) the PNGRB Act to mean as follows:

"(m) "contract carrier" means such pipelines for transportation of petroleum, petroleum products and natural gas by more than one entity pursuant to firm contracts for at least one year as may be declared or authorised by the Board from time to time under sub-section (3) of section 20;"

Thus, presently there is no statutory recognition of the concept of an integrated gas pipeline but only separately authorised common carrier pipelines. Correspondingly, the power of the Hon'ble Board to determine a tariff is linked to the separate common carrier pipeline.

It is therefore apparent that the present statutory framework does not contemplate regulating nor provide for the proposed amendments to introduce regulations for of "integrated natural gas pipeline system" and "unified tariff".

The concept of integrated natural gas pipeline system can be enabled through a regulation supporting contractual arrangements between authorised entities and contractual tariff and making them more efficient.

5. **Inadequacy of the PNGRB NGP Tariff Regulations to provide a basis for Integrated Pipeline System or Unified Tariff:** The PNGRB NGP Tariff Regulations by themselves do not provide a suitable regulatory basis for the introduction of the concepts of "integrated natural gas pipeline system" and "unified tariff".

It is proposed that corresponding amendments to the PNGRB (Authorizing Entities to Lay, Build, Operate or Expand Natural Gas Pipelines) Regulations, 2008 ("**NGP Authorisation Regulations**") be also made to provide for entities to create integrated structures with different authorised common carrier pipelines in a manner that would allow for consolidation of pipeline capacity and costs.

Since PNGRB Act presently does not allow for regulated unified tariff for such integrated pipelines to be determined by the Hon'ble Board, the tariff can be determined contractually or through a trading platform which can be enabled through a separate regulation.

6. **Different Regulatory Structure Needed:** If the concept of "integrated natural gas pipeline system" and "unified tariff" as presently contemplated in the PCD is to be implemented through a regulatory framework, without amendment to the PNGRB Act and the introduction of an enabling statutory framework, then the regulatory framework will need to comprise of the following:

- a. **Amendment to PNGRB NGP Authorisation Regulations To Allow For Creation of Joint Operating Structures or SPVs or LLP that different authorised entities can transfer common carrier pipelines to:** The PNGRB

NGP Authorisation Regulations will have to be amended to allow for authorised entities to change the legal structure by which they own, operate and maintain different common carrier pipelines.

The regulatory framework would need to allow for the entities holding different common carrier pipelines to be treated as an integrated system of different authorised common carrier pipelines and allow for consolidation of capacity and costs incurred in respect of the same.

The framework will have to allow for the same authorised entity or different authorised entities to also create a limited liability partnership (“LLP”) or a joint venture company or enter into a Joint Operating Arrangement and transfer its/their separate authorised common carrier pipelines. This will enable a structure to pool capex and OPEX and depreciation and also consolidate revenue and at the same time maintain the statutory framework that only permits specific common carrier pipelines to be authorised.

- b. ***Amendment to PNGRB NGP Authorisation Regulations to Allow for Consolidation and Trading in Pipeline Capacity of different common carrier pipelines:*** In addition to providing the flexibility to entities to restructure the manner in which they hold the various common carrier pipelines, the PNGRB NGP Authorisation Regulations will need to be amended to specifically provide for the creation of Pipeline Capacity Trading Platforms.
 - c. The Hon’ble Board could also consider the measures taken by Australian Energy Market Commission for the East Coast Wholesale Gas Market and Pipeline Frameworks in 2016 that resulted in creation of the framework for pipeline capacity trading that become operational in March 2019 in Australia’s East Coast pipeline network.
7. ***Unified Tariff Will Need to be Either Contractually Determined and/or Through a Trading Platform Till Suitable Statutory Amendments are undertaken:*** Since under the present statutory framework of the PNGRB Act and applicable case law, there is no function or provision under the PNGRB Act providing for determination of a “unified tariff” for different common carrier pipelines, the same cannot be determined through regulation, but instead will be determined either contractually and/or through market process of an open capacity trading platform.

A.2 Specific Comments

8. **Draft Regulation 4A:**
- a. The proposed framework is not supported by the presently applicable statutory framework, as elaborated earlier.
 - b. Without prejudice to the submissions relating to lack of supporting statutory framework, it is stated that:
 - i. present draft provision seems to be drafted in a manner that fixes the integrated pipelines to only those already identified in Schedule B. It is submitted that the provision should provide for flexibility for additional pipelines to be classified as integrated gas pipeline systems.

- ii. Suo moto power to declare pipelines as integrated natural gas pipeline system as presently proposed should be reconsidered as without a supporting statutory framework, it would be necessary for the relevant entity(ies) to voluntarily accept or want the pipelines to be declared as an integrated pipeline system.
9. **Draft Schedule B Part 1:** Part 1 should allow for additional networks to be added from time to time and not be made a specific limited list. It should be made as an initial list, subject to further orders from time to time. This would enable additional unified networks to be added without need for amendment of the draft Schedule B Part 1.
10. **Draft Schedule B Part 2:**
 - a. The proposed framework is not supported by the presently applicable statutory framework, as elaborated earlier.
 - b. The tariff zones are defined in the NGP Authorisation Regulations, and would need to be suitably amended as being contemplated in Draft Schedule B Part 2 (Para 4)
 - c. Para 4 of the NGP Tariff Regulations would need to be amended to be made applicable to the proposed Draft Schedule B as presently its limited to Schedule A. Stakeholder consultation would be required.

PART B: Responses to Specific Points Raised in Annexure-2

1. **The proposed amendment in this public notice may be read along with the proposed amendment in NGPL Tariff Regulations webhosted on PNGRB website on 29.04.2020. As pipeline capacity is planned to be linked to authorised capacity as amended from time to time, we seek your suggestion on how to calculate capacity of Integrated Natural Gas Pipeline System.**

Suggestion: Since the Integrated Pipeline Network system will be based on voluntary submission of application, the self-declaration of capacity should be considered as the basis. It is also suggested that Unified Tariff be also be allowed to be determined contractually and/or through capacity trading platform.

2. **Whether integration should be considered only for cost-plus pipelines or Bid out Pipelines can also be included for the purpose of Unified Tariff and suggest proposed methodology for including bid out pipelines and any legal difficulty envisaged therein.**

Suggestion: The integration has to be applicable for all common carrier pipelines. There is no basis for segregating or discriminating between cost plus pipelines or competitively bid out pipelines from a concept of the unified integrated pipeline system which is in itself not contemplated in the statutory framework or authorization framework.

Neither the cost-plus pipelines nor the bid-out pipelines were developed or authorized keeping in view an integrated pipeline system. In the integrated pipeline system neither the cost plus tariff nor the bid out tariff would be applicable. Therefore, both types of common carrier pipeline are on equal footing for participating in integrated pipeline system.

The bid document for competitively bid out pipelines did not prohibit interconnectivity of the pipelines and therefore are not prevented from creating an integrated system. The bid tariff

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is only for the stand-alone common carrier pipeline and would in any event not be applicable to an integrated system. There is therefore no violation of competitive bid framework.

Furthermore, as indicated above, regulated tariff is applicable only to common carrier capacity and not the total capacity of the common carrier pipeline. The same is applicable for bid out pipelines.

3. Consequent to the change in NGPL Tariff Regulations, what changes may be required

Suggestion: As indicated above, an enabling statutory framework with required amendments to the PNGRB Act is required to implement the concept.

However, in absence of statutory framework being suitably amended, : (i) amendment to the NGP Authorization Regulation, (ii) NGP Capacity Determination Regulations, (iii) Affiliate Code of Conduct, (iv) Access Code for NGP, (v) Guiding Principles for declaring or authorizing NGP will all need to be appropriately amended.

Furthermore, an ideal regulatory scenario would be to have a stand alone comprehensive framework for integrated pipeline capacity backed by an applicable statutory for providing such unified tariff or integrated pipeline systems.

However, since presently there is no statutory framework for regulating either the unified tariff or integrated pipeline network operations but since the requirement under law presently is only for entities to obtain authorization for individual common carrier or contract carrier, the presently duly authorized entities can undertake the creation of integrated pipeline system/grid through contractual arrangements and contractually agree to tariff in respect of capacity other than common carrier capacity.

In order to enable such contractual arrangements to be implemented more efficiently, under the present statutory framework, the Hon'ble Board should enable the creation of such contractual framework and contractual tariff by allowing for authorized entities to create the structures as they may determine and allow for transfer of pipeline holdings to a suitable legal structure as participating entities may envisage such as LLP, JVC, Joint Operator Arrangements etc. (as described earlier in this Note).

4. in the corresponding related provisions of other NGPL Regulations. Comments are also sought from the stakeholder for the corresponding changes in the other regulations with reasons along with the proposed draft amendment.

Suggestion: Provided earlier in this Note.

5. Whether while determining the Unified Tariff, pipelines of subsidiary companies can be included in the Integrated Natural Gas Pipeline System or not and any legal difficulty envisaged therein.

Suggestion: Integrated NG Pipeline System should be formulated to allow pipelines of subsidiary companies. The concept of the integrated pipeline system is not restrained by entity holding, the authorization for the relevant pipeline or the manner in which the relevant authorization was obtained.

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6. **Whether two-Zone tariff concept may also be applied to other pipelines i.e. cost- plus pipelines other than Integrated Natural Gas Pipeline System. Further, whether to include bid out pipelines also without changing total revenue from the pipeline, which are not part of the Integrated Natural Gas Pipeline System, and any legal difficulty expected therein.**

Suggestion: In order to apply the two-zone tariff concept to pipelines other than integrated natural gas pipeline system, corresponding amendments to the NGP Authorizations Regulations will need to be undertaken.

7. **Whether PNGRB should give unrestricted freedom to the entity to decide zone wise tariff or it should be within certain specified parameters as per regulations**

Suggestion: As indicated earlier in this Note, under the present statutory framework the unified tariff can be a contractually determined by authorized entities tariff and/or a capacity trading platform determined rate and be applicable to capacity other than common carrier capacity. The present statutory framework does not provide a basis for providing a regulated unified tariff.

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