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S.No-285
Dt-10-10-19
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2724/2019/010/serc.

MAHANAGAR GAS LIMITED

GAIL, Govt. of Maharashtra & BGAPH Enterprise

MGL/COMM/PNGRB/8720

October 10, 2019

To,

The Secretary

Petroleum & Natural Gas Regulatory Board
1st Floor, World Trade Centre
Babar Road
New Delhi – 110001

Subject: Comments on draft "PNGRB (Guiding Principles for Declaring City or Local Natural Gas Distribution Networks as Common Carrier or Contract Carrier) Regulations, 2019"

Kind Attention: Ms. Vandana Sharma, Secretary

Dear Madam,

This is with reference to Public Notice No.: PNGRB/AUTH/7-MIS(3)/2015 dated August 22, 2019 seeking views/comments from the stakeholders on draft "PNGRB (Guiding Principles for Declaring City or Local Natural Gas Distribution Networks as Common Carrier or Contract Carrier) Regulations, 2019".

In this regard, please find attached herewith MGL's comments/views on the subject attached at **Annexure-I** for kind consideration of the PNGRB.

Thanking you

Yours sincerely,

Rajesh Wagle

(Rajesh Wagle)

Senior Vice President - Marketing

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MGL'S COMMENTS ON THE DRAFT PNGRB (GUIDING PRINCIPLES FOR DECLARING CITY OR LOCAL NATURAL GAS DISTRIBUTION NETWORKS AS COMMON CARRIER OR CONTRACT CARRIER) REGULATIONS 2019

In this note, MGL has provided comments on the draft "PNGRB (Guiding Principles for Declaring City or Local Natural Gas Distribution Networks as Common Carrier or Contract Carrier Regulations, 2019)" ("Draft Guiding Principles").

1 General comments

- 1.1 Section 61(2)(r) of the PNGRB Act 2006 provides that the PNGRB can regulate upon guiding principles and objectives for declaring common carrier, contract carriers and a CGD Network, in accordance with Section 20(5) of the PNGRB Act 2006. The Supreme Court held in JGL v PNGRB¹ that the regulation has to be consistent with the provisions of the PNGRB Act 2006 (in this case Section 20(5)² of the PNGRB Act). Section 20(5) of the Act itself provides the objectives and states that to PNGRB has the power to make regulations to determine the principles that it would follow to carry out the functions under Section 20 of the PNGRB Act.
- 1.2 We submit that under the scheme of Section 20 of the Act, PNGRB can declare an existing CGD Network as a common carrier; but before declaring an existing CGD Network as a common carrier, the PNGRB has to provide an opportunity of hearing to the entity owning the particular CGD Network, and PNGRB has to fix the terms subject to which each particular CGD Network would be declared a common carrier; the declaration of an existing CGD Network as a common carrier has to be done by notification by the PNGRB; and the (guiding) principles which the PNGRB would follow have to be set out in the form of regulations.
- 1.3 We also submit that there is no provision in the PNGRB Act for an *en masse* declaration of various CGD Networks as common carriers. The PNGRB Act specifically provides for a particular CGD Network (one by one, rather than *en masse*) to be notified as a common carrier. This is consistent with the fact that the guiding principles are general and are to be followed in all cases under Section 20, but each case of a CGD Network has to be considered on its own, and has to be the subject of a separate notification under Section 20(2) of the PNGRB Act. Therefore, the Draft Guiding Principles cannot set out regulations as they purport to do now, but have to be restricted to only setting out guiding principles based on which the case of each of the CGD entities would be considered for being declared as a common carrier.

¹ 2015 [9] SCC 209

² Section 20(5) of the Act: "For the purposes of this section, the Board shall be guided by the objectives of promoting competition among entities, avoiding in fructuous investment, maintaining or increasing supplies or for securing equitable distribution or ensuring adequate availability of petroleum, petroleum products and natural gas throughout the country and follow such principles as the Board may, by regulations, determine in carrying out its functions under this section".

- 1.4 The PNGRB may consider whether the Regulations contained in the Draft Guiding Principles would constitute as "Guiding Principles" as stated in the PNGRB Act. It is a settled position in law that in its meaning, a "Principle" can be very well differentiated from an "Objective". A "Principle" means: "A basic rule, law or doctrine" while "object of a statute" is defined as "the aim or purpose of legislation or the end that a statute is meant to accomplish". While the "objective" sets the end goal or desired result of the legislation, the "principle" is the guide to action/steps to be followed to fulfil the said objective. We submit that "guiding principles" as contemplated by the PNGRB Act may be taken to be basic principles, such as a guide, which the PNGRB would follow in implementing the scheme of Section 20.
- 1.5 We submit that the Draft Guiding Principles have to set out the broad principles based on which the law would be implemented. The words used by the legislature, i.e. "Guiding Principles" have to be given effect to – if the legislature wanted to say at Section 61(2)(r) that the PNGRB would simply frame regulations under Section 20(5) of the Act, then it would have said so. However, the legislature used the words "Guiding Principles" specifically only for the exclusivity issue (Section 61(2)(q)) and implementation of the scheme under Section 20 and specifically 20(5) (see Section 61(2)(r)). We therefore submit that the regulations in the Draft Guiding Principles, save for Regulation 4 setting out the objectives, would not be in the nature of "guiding principles" as are procedural and regulatory mandates, rather than setting out broad principles based on which each case of a particular CGD entity would be considered.
- 1.6 Lastly, we submit that the validity of Regulation 6 of the PNGRB (Exclusivity for City or Local Natural Gas Distribution Network) Regulations 2008 ("**Exclusivity Regulations**") is currently under challenge before the High Court of Delhi in the Writ Petition No. 9374 of 2015 ("**Exclusivity Writ**") and hence cannot be made operable till the final adjudication of the said Writ. The Exclusivity Writ, *inter alia*, challenges the validity and applicability of Regulation 5 and 6 of the Exclusivity Regulations in absence of any notified principles for determining the number of years for which a CGD Network shall be excluded from the purview of a common/contract carrier in terms of Section 61(q) of the Act. The Delhi High Court passed a status quo order on 30 September 2015 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). That order is still in place now. Therefore, the Draft Guiding Principles cannot come into force until the Exclusivity Writ is decided.

2 Comments on Specific Regulations

- 2.1 We submit that the objectives outlined at Regulation 4 of the Draft Guiding Principles would need to be brought in line with Section 20(5) of the PNGRB Act:
- (a) The additional words in Regulation 4 are underlined below:

"4. Guiding Principles for Declaring City or Local Natural Gas Distribution Network as Common Carrier or Contract Carrier

The Board shall, in seeking to declare the whole or part of any city or local natural gas distribution network as a common carrier or contract carrier be guided by the objectives of:

(a) protecting the interests of consumers by fostering fair trade and competition amongst the entities;

(b) promoting competition among entities;

(c) avoiding infructuous investments; and

(d) maintaining or increasing supplies or for securing equitable distribution or ensuring adequate availability of natural gas to consumers."

- (b) The underlined words above are different from the provisions under Section 20(5). If the Regulations are being made under Section 20(5), then the wording has to be consistent with that provision. Further, the heading of this particular Regulation says "Guiding Principles" but actually sets out the "objectives". Since the Draft Guiding Principles under Regulation 4 do not provide for any guiding "principles", and actually provide only the "objectives", the heading of the said Regulation should be changed to "Objectives for Declaring City or Local Natural Gas Distribution Network as Common Carrier or Contract Carrier".

2.2 Regulation 5 does not contain any guiding principles but rather provides procedural details of how the process would be conducted by the PNGRB. Additionally, under Regulation 5(2)(c) of the Draft Guiding Principles, once the PNGRB decides to declare a particular CGD Network as a common/contract carrier, the authorized entity has to submit an application for common carrier tariff determination under PNGRB (Determination of Common Carrier Network Tariff for City or Local Gas Distribution Networks) Regulations 2019. Since these Regulations have not yet been introduced/notified, there is no provision for an alternative option for determination of tariff for a declared common/contract carrier.

2.3 Regulation 6 of the Draft Guiding Principles, which provides for an "interim arrangement" for determination of common carrier capacity in a CGD Network, also does not set out any "Guiding Principles". It states that an authorized entity shall within 180 days from the end of its marketing exclusivity, declare and submit to the PNGRB, the capacity of its CGD Network under Regulation 4(1) of the Access Code Regulations. This is not in conformity with Regulation 4(1) of the Access Code Regulations, as Regulation 4(1) of the Access Code specifically provides for the authorized entity to declare its entry point capacity, exit point capacity and the CNG exit point capacity for open access 180 days before the end of its exclusivity period and not after.

- 2.4 Regulation 7 of the Draft Guiding Principles sets out the post-declaration scenario. This would also not qualify as a Guiding Principle. Further, a post-declaration scenario cannot be followed prior to declaring a CGD Network as a common carrier. We also submit that this Regulation seeks to generalise the common carrier capacity, and such generalisation is not consistent with the scheme of Section 20 of the Act, which requires each particular CGD Network to be dealt with separately and have its own terms. Such terms of open access would have bespoke capacity declarations as well, depending on the peculiarities of each CGD Network.
- 2.5 Regulation 8 of the Draft Guiding Principles is contradictory to the existing legal and regulatory framework and should be removed. Firstly, the said Regulation is titled, "General Principles for Common or Contract Carrier Capacity" but a conjoint reading of the Regulation and the scope of the term 'principle' as mentioned hereinabove, shows that Regulation 8 is not in the nature of 'principles' and is a continuation of the post-declaration scenario contained in Regulation 7. Regulation 8(2) of the Draft Guiding Principles, which provides the "Shipper" the right to assign or trade whole or any part of its assigned capacity of the CGD Network in the open market based on terms and conditions, is a concept that would have to be part of a separate regulation. Further, the PNGRB may have to view this from the point of view that the "Shipper" is provided access to the CGD Network under an access arrangement which is based on the Access Code Regulations which do not provide the Shipper any type of ownership or right of possession over the capacity it accesses in the CGD Network.
- 2.6 Regulation 9 of the Draft Guiding Principles is also not in the nature of a "guiding principle" to be followed for declaration of a CGD Network as a common or contract carrier as it provides the post-declaration procedure to be followed by an authorized entity for booking of common carrier or contract carrier capacity. Without prejudice to the same, while Regulation 9(1) provides for the application procedure for bidding for the capacity of the common or contract carrier, it fails to provide the basis on which the authorized entity would allot the capacity to a particular applicant from the number of applications received by it. Neither are any guiding principles nor any procedure is provided in respect of the same.
- 2.7 Regulation 11 of the Draft Guiding Principles is contradictory to the existing regulatory framework. Firstly, Regulation 11 does not provide for any "guiding principles" for declaration of CGD Network as a common or contract carrier and provides for a post-declaration procedure. The scheme of Regulation 11 is against the objective of providing infrastructure exclusivity to authorized entities for authorized areas under the Exclusivity Regulations. The validity of infrastructure exclusivity is 25 years of the life of the CGD network. Principle 11 of the Draft Guiding Principles allows the PNGRB to authorize a third party/entity to lay pipelines in the authorized area as an exception to the infrastructure exclusivity. In any event, this regulation does not relate to declaring an entity as a common carrier, but rather authorising another entity in respect of a particular geographical area. Therefore, this would not be

covered within the scope of "guiding principles" contemplated by Section 61(2)(r) of the PNGRB Act.

2.8 Regulation 12 of the Draft Guiding Principles are also beyond the scope of powers provided to the Board under Section 61(2)(r) of the PNGRB Act. It does not relate to declaration of the CGD Network as a common or contract carrier, and is specific to provision of access to third parties to set up CNG stations. In this regard, it is submitted that:

- (a) Draft Guiding Principles mentions that upon the expiry of the marketing exclusivity period, CNG stations shall not be considered as being covered by the infrastructure exclusivity and third parties can install CNG stations within authorised Geographical Areas (GAs) of the authorized entity. Under the PNGRB Act and the regulations thereunder, the CNG infrastructure and associated equipment are integral part of the CGD Network as defined. The definition (Section 2(k) of the PNGRB Act) is: "*....an interconnected network of gas pipelines and the associated equipment used for transporting natural gas from a bulk supply high pressure transmission main to the medium pressure distribution grid and subsequently to the service pipes supplying natural gas to domestic, industrial or commercial premises and CNG stations situated in a specified geographical area*". Therefore, CNG stations are included within the definition of a CGD Network.
- (b) In view of infrastructure exclusivity granted under the PNGRB Act, and the Regulations thereunder, allowing establishment of CNG stations by any other eligible entity in authorised GAs of CGD entities would be contrary to this grant of exclusivity and potentially in conflict with the provisions of the PNGRB Act.
- (c) MGL has made substantial investments in its CGD infrastructure expansion based on the fact that it would have network exclusivity throughout the economic life i.e. 25 years, and that "network" would include CNG outlets (including all equipment, pipes, network etc.). In CGD business, domestic PNG segment is highly capital intensive and offers marginal/negative returns on investments. As a result, to sustain business operations while serving the needs of the consumers, CGD entities have to balance the economics from other consumer segments, specifically from CNG segment.
- (d) Allowing establishment of CNG stations by other eligible entities in already authorised GAs of CGD entities during infrastructure exclusivity period would lead to "cherry picking" of more profitable CNG volumes without any obligation to serve less profitable domestic PNG segment. Existing retail outlets of automotive fuels (e.g. OMCs, etc.) may not allow providing access to authorised CGD entities to co-locate CNG stations at their outlets. Any factor that has a negative impact on a CGD Network's CNG segment would affect the growth of pipeline infrastructure and finally may result into adverse impact on growth of domestic PNG connections. During recently concluded bid rounds 9 and 10 and in previous bid rounds as well as for GAs

authorized as per Regulation 17 and Regulation 18 (1) of PNGRB Authorization regulations (GSR 196 E), number of CNG stations / Compression capacity was a part of Work Programme / Project milestones to be achieved by the CGD entity.

- (e) In view of the above, we would like to submit to PNGRB that CNG stations have always been an integral part of CGD networks and should be continued to be covered under infrastructure exclusivity.
- (f) A suitable provision may please be incorporated in the Draft Guiding Principles whereby a third-party seeking access in Common carrier network should also be obligated to fulfil the service obligations as per relevant PNGRB regulations.

2.9 Regulation 13 of the Draft Guiding Principles appear to us to be unnecessary, and not aligned with the objective of introducing the present Draft Guiding Principles, and are not covered under the powers of the PNGRB provided under Section 61(2)(r) of the Act. This Regulations provides for amendments to the Access Code Regulations. These amendments cannot be, in any manner, read or interpreted as 'guiding principles' and/or objectives by the PNGRB to declare a CGD Network as a common or contract carrier. If the PNGRB intends to amend the Access Code Regulations, it should do so by introducing a separate amendment to the Access Code Regulations in its powers under Section 61(2)(e) of the Act and not as part of the proposed guiding principles for declaration of a CGD Network as a common or contract carrier.

2.10 Draft Guiding Principles propose booking of capacity in common carrier network by Third parties for a period of less than one year. There may arise a situation wherein multiple small aggregators may seek capacity booking in common carrier network for smaller time periods (say few days or weeks) which may lead to different supply durations for different consumers. Accordingly, PNGRB is requested to specify a standard time period for which the capacity is required to be booked by Third parties in the Common carrier network to develop a suitable mechanism to simplify the process.

2.11 Network capacity augmentation would entail additional capex investment by the authorized CGD entity and as is understood from the Concept paper on determination of Transportation rates for CGD networks and CNG, the corresponding additional capex incurred by the authorized CGD entity for capacity augmentation would be recovered during the next tariff review. However, there will remain a possible risk of reduction in volume offtake and it is suggested to kindly develop a mechanism / provision in the Draft Guiding Principles protecting the interest of the authorized CGD entity which will be investing in upgradation of network in case if there is a volume reduction by Third Parties in the subsequent tariff review period.
