

15 January 2007

Mr Yeo Yek Seng
Deputy Chief Executive
Energy Market Authority
111 Somerset Road
#15-05 Singapore 238164

Dear Mr Yeo

Amendments to Gas Act (CAP 116A) – 2nd Request for Feedback

1. We submit our comments (attached) on the Amendments to Gas Act (CAP 116A) – 2nd Request for Feedback issued on 26 December 2006. Although we have tabulated our comments in the requested format it is imperative that the substance of this letter is digested first in order to provide the critical perspective and context to our suggested adjustments to the Gas Act amendments.

Statement of Interest

2. Senoko Power Ltd is the largest power generation company in Singapore. We are a major industry market player and the proposed amendments to the Gas Act (Cap. 116) will have a serious effect on our business.

3. As the largest gas consumer in Singapore and as a planned gas shipper/gas retailer, Senoko is committed to a gas industry in Singapore which is structured in a robust manner and is in line with generally accepted best international gas industry practices. We also aspire to the establishment of a gas industry whose governance and regulation is conducted in a fair and transparent manner, which we believe will attract investors to participate in the gas markets. Accordingly, we wish to state our concerns and comments in relation to the proposed amendments.

Summary of Major Points

4. *Certainty and clarity.* We believe that a healthily regulated environment is one in which the market participants have a sense of certainty and clarity as to their rights and obligations, individually as well as in a community. A Regulator will need to reserve a degree of discretion for flexibility, but this must be finely balanced with providing the industry as a whole with certainty and clarity. Our concern is that the draft amendments (and indeed the Gas Act generally) confer on the Authority an excessive degree of discretion.

5. An unjustifiably broad discretionary ambit will seriously undermine the participants' (including potential investors') confidence in the industry because:

- i) it creates uncertainty and doubt. Investors and participants have no assurance of how they will be treated, or that they will be treated equally. They also have no assurance that the Authority will take into account or give effect to their legitimate interests; and,
- ii) it may produce inconsistent results. An unduly broad discretion greatly enlarges the risk of different outcomes and decisions notwithstanding that the underlying fact scenarios may actually be identical.

6. In this regard, we recommend that the number of the situations in which the Authority reserves a discretion be moderated and confined to areas in which a discretionary power is obviously essential. In addition, where a discretionary power exists, the Act should set out clear and transparent parameters governing the exercise of the discretionary power. This will enhance regulatory certainty and clarity.

7. *Light-handedness*: It is common knowledge that well regulated markets actually require very little regulatory intervention. Markets in any industry are typically driven by economics and commercial imperatives, and effective regulation may be achieved through the economic and commercial objectives of the market participants. Hence, the desired regulatory effect may be obtained by providing for the appropriate incentives and conversely, disincentives, without resorting to the imposition of penalties and offences.

8. The draft amendments, however, provide for unnecessary detail, create an assortment of offences and provide for punitive penalties. We believe this is unnecessary and an overkill. A participant in many of the markets established by the Gas Act will necessarily incur a substantial capital investment in order to enter into the market. The threat of having its gas licence suspended or revoked as a result of a contravention is, in almost all instances, already an adequate and effective threat to ensure regulatory compliance. A liberalised market cannot develop if there is too much regulation.

9. *Fair and open access*: We share the Authority's desire to ensure that there should be open access to gas facilities. Gas infrastructure is extremely costly and without the appropriate safeguards, facility owners may create artificial barriers to open competition. Furthermore, we contend that :

- i) open access should apply equally and fairly across all facilities. For instance, when implemented, the Gas Network Code, should apply to all natural gas pipeline networks without discrimination; and,

ii) open access should be achieved without sacrificing an investor's legitimate interests. The effect of regulatory intervention be minimised – in other words, the Authority should have regard to the terms of any existing arrangements and seek to preserve them as far as possible. In particular, the Authority should not uproot and overturn lawful commercial arrangements which had been freely struck between contracting parties unless absolutely necessary to do so. Even in such situations, there should be provision for reasonable compensation where an investor's legitimate interests are prejudiced.

10. The regulatory regime engendered by the draft amendments is highly interventionist, and fails to have proper regard to bona fide contractual arrangements and capital investments made by the facility owners and users.

11. *Premature to regulate LNG now.* We share the Authority's belief that the LNG market must be made subject to appropriate regulation. However, given that the framework for the development, production and modus operandi of LNG has not yet been determined, it is difficult to see how any person could ensure that any regulatory proposal at this juncture will in fact be relevant or meaningful to the framework and structure which will eventually be developed and finalised. It should be borne in mind that so far, only a consultation paper has been published, but there has been little sustained discussion. It is suggested that LNG regulation be deferred for now and then revisited when the framework has been developed and clarity on its operation is available.

Comments and Conclusion

12. The aforementioned generic comments relating to:

- (a) certainty and clarity of the regulating regime;
- (b) light-handedness;
- (c) fair and open access; and,
- (d) the timing of the specification of the regulatory arrangements for LNG

are critical to this submission and underpin the detailed comments in the attached table.

13. We trust that the Authority will consider our submission favourably. We would be pleased to meet with the Authority to discuss any aspect of this submission and to work with the Authority and related parties to establish a sound and meaningful regulatory regime for the gas market, consistent with generally accepted best practices internationally.

Yours sincerely,

ROY ADAIR
President and CEO

S/No	Specific Provision Of Proposed Amendments	Revised Amendments	Comments and Reasons
1.	Section 2: Definition of “import”	To make clear that “import” does not include the mere provision of conveyance or transportation services.	“import” as defined means bring or cause to be brought into Singapore by any means. This may be read as including the provision of gas transportation services. It should be clarified that “import” does not include the act of conveying or transporting the gas, as those activities are separately licensed.
2.	Section 2: Definition of “natural gas or LNG in transit”	Delete the words “or kept at any place in Singapore”	<p>The proposed amendment refers to natural gas or LNG that is brought into Singapore but “without being kept at any place in Singapore”. This means that the expression has a very limited application to natural gas or LNG that just passes through Singapore without stopping in Singapore, as otherwise it may be regarded as being “kept” at a place in Singapore. The suggested deletion makes the definition more meaningful without affecting the regulatory objective (since the natural gas or LNG must still be solely for the purpose of being taken out of Singapore, and must not be brought into any ORF or LNG terminal).</p> <p>The framework for the production, use and other activities relating to LNG is not yet finalised (or near finalisation) and it is therefore premature to consider details in the Act that concern the principles which will govern the LNG business in Singapore.</p>
3.	Section 2: Definition of “relevant gas shipper”	Add “, or where the consumer itself ships gas to such premises, means that consumer” to the end of the definition	The proposed amendment contemplates that the shipper and the consumer are different persons. This does not recognise the possibility that the consumer may itself be the shipper of gas.
4.	Section 6(1) (e)(ii): ORF operator’s licence	Insert “subject to Section 6(2A),” at the beginning of paragraph (ii)	There is a drafting error. The provision should be made subject to the new Section 6(2A), which itself provides for an exception to the requirement for an ORF operator’s licence.
5.	Section 6(2A)(b)(iii)	To restate as follows: “where the facility is managed and operated by a person who or which holds for the time being	The concept is expressed incorrectly. The intention is rather that the principal shall not be required to obtain an ORF operator’s licence in respect of an ORF so long as the ORF is managed and operated by a person who had been granted an ORF operator’s

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		an ORF operator's licence to manage and operate the facility, the principal shall not be required to obtain an ORF operator's licence in respect of that facility"	licence to operate and manage that ORF.
6.	Section 7(5)	Delete	<p>The provision is redundant and superfluous, since the Authority is in any event under no obligation to grant any person a gas licence.</p> <p>Well regulated markets actually require very little regulatory intervention and this amendment is unnecessary.</p>
7.	Section 9(2)(m)	Delete	<p>It is unduly onerous for a gas participant to be required to provide upfront a performance security on any terms and conditions specified by the Authority. The quantum is unknown and there is also a cost which will be unnecessarily incurred. The requirement to provide a security should be limited to situations where a gas licensee had committed a breach or is likely to commit a breach (which in fact is already provided for in Section 19(b), in which case this proposed amendment is unnecessary.</p> <p>A healthily regulated environment is one in which the market participants have a sense of certainty and clarity as to their rights and obligations, individually as well as in a community. A Regulator will need to reserve a degree of discretion for flexibility, but this must be finely balanced with providing the industry as a whole with certainty and clarity. Our concern is that the draft amendments (and indeed the Gas Act generally) confer on the Authority an excessive degree of discretion.</p>
8.	Section 9(2)(n)	Revise as suggested in the next column	The approach is inadequate – it is unlikely that a gas licensee would not have established a business presence in Singapore, as otherwise it would be unlawfully carrying on business in Singapore. We recommend that the Authority consider refraining from granting a gas licence to any person which does not have a business

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			presence in Singapore.
9.	Section 9(7)	Delete	It is premature to draft provisions for a LNG terminal or its regulation, and neither are we able to comment meaningfully on such provisions. The provisions as drafted may in the event, be or not be appropriate. The framework for the production, use and other activities relating to LNG is not yet finalised (or near finalisation) and it is therefore premature to consider details in the Act that concern the principles which will govern the LNG business in Singapore.
10.	Section 32(5)	Delete	We do not think that this provision is necessary or appropriate. This allows private persons an inordinate power to make judgements when they may not have the requisite knowledge or expertise to do so. The consequences resulting as a result of gas plants or gas pipes being damaged may be considerable. This Section deals with earthworks and there should be no reason why the gas transporter could not be notified in advance of the earthworks being carried out.
11.	Section 32A(1)	To clarify and revise	The standard of “wilfully” is probably too lenient. A person who negligently or recklessly removes, destroys or damages any gas plant or gas pipe will have no liability.
12.	Section 32A(2)	To clarify and revise	<p>It is not clear how this Section is to operate <i>vis-à-vis</i> Section 32A(1) and Section 32 (in particular, Section 32(5) and 32(7)). Section 32A(4) should also be compared with Section 32(8). The provisions create confusion and the intention should be clarified so that the legislative objectives are clear.</p> <p>Well regulated markets actually require very little regulatory intervention and this amendment should be revised.</p>
13.	Section 33(2)(a)(ii)	Delete references to LNG	It is excessively wide to state that a special administration order may apply to <i>any</i> services provided by an LNG terminal operator. Surely it cannot be the case that any and all services which may be available from a LNG terminal operator are of equal magnitude of importance, and all of which justifies being made subject to the special

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			<p>administration order regime?</p> <p>The framework for the production, use and other activities relating to LNG is not yet finalised (or near finalisation) and it is therefore premature to consider details in the Act that concern the principles which will govern the LNG business in Singapore.</p>
14.	Section 38(4), (8B)	Revise as suggested in the next column	<p>It is concerning that the Authority has decided to disregard entirely the legitimate pre-existing rights and interests of contracting parties. While the objective of achieving open access should be given priority, some attempt should be made to assess the impact on pre-existing contractual interests, and ensure that the original investors are adequately compensated. It is also inappropriate to simply provide that the <u>Frustrated Contracts Act will apply – the legal doctrine of frustration is a last resort measure and its application is itself uncertain. Such uncertainty is undesirable in an industry of such national and strategic importance.</u></p> <p><u>It is unprecedented that a Regulator be given sole and absolute discretion to dictate what the facility owner should or should not charge the existing users of the facility, without also enacting the principles and parameters that the Regulator must give effect to. The provision unduly discriminates against investors in infrastructure facilities, who are not given any assurance that their investments will be respected or that they will be earn a reasonable rate of return. In addition, existing users, who may have made capital contributions to the development of the relevant facility, should also be protected. If a discretionary power is to be retained, the Section should also list out the considerations which the Authority will take into account, and the principles which the Authority will apply, in exercising its discretion (Section 38(5) is manifestly inadequate).</u></p> <p><u>We strongly believe that the Authority should take into account bona fide commercial principles, and any decision made under Section 38 should be based on established commercial principles generally accepted in businesses. The Gas Act will do well to provide that the affected parties be required to act in good faith and submit to</u></p>

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			<p><u>commercial mediation at the Singapore Mediation Centre.</u></p> <p><u>In addition, consideration should be given to ensure that Section 38 does not overlap with or undermine competition regulation in Part IX of the Gas Act.</u> A distinction should be made between technical reasons, and commercial or economic reasons for the inability to obtain access to the relevant facility. Section 38 should not apply where the reasons are commercial or economic, as that is the function of Part IX of the Gas Act, which regulates behaviour which prevents competition or abuses a dominant position. Furthermore, Section 38 as drafted may seriously undermine proper competition regulation by unduly favouring applicants and not giving adequate regard to the legitimate rights, interests and expectations of investors of facilities or the existing community of users of the facilities.</p>
15.	Section 38A	Revise to address the concerns highlighted in the next column	<p>The overall approach of the provision <u>unduly discriminates in favour of new applicants and is</u> highly susceptible to abuse.</p> <ul style="list-style-type: none"> • The trigger is that an applicant is “unable to enter into an arrangement”. This excessively favours applicants, who are entitled to invoke Section 38A as long as the applicant does not wish to agree to the allocation terms offered. For instance, say that there is a community of 4 users with an agreed allocation arrangement. A new applicant is however unhappy with an aspect of the arrangement and unsuccessfully requests a change. The unhappy applicant is now entitled to invoke Section 38A. • Section 38A(1) allows the Authority to have the sole discretion in deciding what allocation arrangement should apply, even to the extent of disregarding existing arrangements which have long served the existing community of users and with which that community is happy. There is no provision for due process and for representations to be made. • As also mentioned in the context of Section 38, a distinction should be made

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			<p>between technical reasons, and commercial or economic reasons for the inability to conclude an allocation arrangement. For the reasons stated above (concerning Section 38), Section 38A should not apply where the reasons are commercial or economic, as that is the function of Part IX of the Gas Act. Section 38A as drafted may seriously undermine proper competition regulation by unduly favouring applicants.</p>
16.	Section 49(1)	Revise to clarify the legislative concern sought to be addressed.	<p>We believe that the provision is defective. If a consumer lawfully terminates its contract with a gas retailer or gas shipper (or that contract has expired), and as a result of which the gas retailer or gas shipper discontinues the supply or shipping, that consumer concludes a gas retail or gas shipping contract with another retailer or shipper – is it the intention that in each and every such case, the consent of the gas transporter must be obtained before gas may resume being supplied or shipped to the consumer’s premises?</p> <p>It is also not clear how this provision operates in the context of the Gas Network Code.</p> <p>Open access should be achieved without sacrificing an investor’s legitimate interests.</p>
17.	Section 61B(1)	Revise the definitions of “designated gas transporter” and “gas pipeline network” to make clear that the Gas Network Code applies to all gas pipeline networks in Singapore	<p>It appears that the Authority has the power to stipulate that the Gas Network Code shall apply only to specific gas pipeline networks designated by the EMA. This stems from the definitions of “designated gas transporter” and “gas pipeline network” in Section 61A. If so, it means that not all the gas pipeline networks in Singapore will be accorded equal governance and this may result in discrimination between gas pipeline networks. It will also be contrary to the objective of providing for open access.</p>
18.	Section 61B(5)	Provide clarification as suggested in the next column	<p>The provision is exceedingly wide. A prohibition against the doing of something is finite, but the prohibition against not omitting to do anything is infinitely ambiguous. Furthermore, the duties to be performed are highly ambiguous – for instance, what is meant by “efficiency”, particularly “economic efficiency”. What may be efficient for a person may not have the same effect on another person – efficiency is determined by</p>

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			<p>reference to a particular person. In addition, it is probably not appropriate to require the gas shipper to not omit to do anything that has the prescribed effect on “any” of the operations of the gas pipeline network. It cannot be that all gas shippers are expected to have an exhaustive knowledge as to all the operations of the gas pipeline network.</p> <p>A healthily regulated environment is one in which the market participants have a sense of certainty and clarity as to their rights and obligations, individually as well as in a community.</p>
19.	Section 61(C)	To clarify	It should be clarified who bears the costs incurred for devising/participating in any tests or trials, and that such participants will be compensated.
20.	Section 61E(2)(a)	To clarify	It is not clear what is meant by “ <u>sanctioning the absolute limitation of appeals to the courts except in relation to matters of fact</u> ”? The meaning of this should be clarified.
21.	Section 61F	Delete paragraph (a), and revise as suggested in the next column	<p>A relevant gas shipper would have entered into a contract with the relevant direct access customer concerning the shipping of gas by the relevant gas shipper to the relevant direct access customer. The contract would have dealt with the obligations of each of the parties and the charges and remuneration payable by the relevant direct access customer to the relevant gas shipper. It cannot be that after having struck the contract, freely and on an arm’s length basis, that the gas shipper is able to reopen the commercial contract. A gas shipper may, if it subsequently feels that the contract it had concluded is not to its liking, ask the Authority to intervene to rewrite the contract which had been struck. This creates serious uncertainty and unjustifiably prejudices the relevant direct access customer. It is noted that as written, the provision is broad enough to allow both prospective and retroactive charges to be imposed on the relevant direct access customer.</p> <p>The provision as drafted is hence not only unnecessary, but highly susceptible to abuse. It should be rewritten to be confined to allow the Authority to require the relevant direct access customer to take such steps as are reasonably within its control to ensure</p>

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			the security or reliability of the conveyance of gas to the relevant direct access customer.
22.	Section 62(5)	Delete	This provision cannot in principle be credible or defensible. Any responsible and conscientious regulator would in the promulgation of its codes of practice, have regard to the regulations made under the enactment which it regulates.
23.	Section 62(2)	Clarify	It should be clarified who bears the costs of preparing the code or modifying the code on behalf of the Authority. The person should be entitled to be reimbursed the costs incurred in doing so.
24.	Section 62(6)	Revise as suggested in the next column	<p>The Authority appears to have the right to specify codes of practice without having conducted any consultation with, or obtained representations from, the class of licensees which will be affected by such codes. The issue here is that the codes may prejudice the interests of licensees which the Authority had not considered, and the concern is exacerbated by the amendment to Section 93(1) (the original text, as well as the first draft of the amendment, allows a person who is aggrieved by a code of practice to submit an appeal under that section, but the current amendment omits that text).</p> <p>The process is extremely highhanded and peremptory. Based on the proposed text, the Authority may simply direct a particular gas licensee to draw up a code of practice (presumably based on parameters prescribed by the Authority), and subsequently direct that the code so prepared apply to the entire class of gas licensees.</p> <p><u>We believe that there should be a fair, open and accountable process for the industry to draw up and issue codes.</u></p>
25.	Section 63	Delete the words “or any other person”.	The EMA appears to have an unjustifiably wide power to give directions to any person (and not only gas licensees). The legitimacy and rationale for such wide powers are unclear.
26.	Section 78(5A)	Delete. Alternatively, allow for the	The proposed amendment may in effect render the entire appeal process meaningless,

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		Minister to grant a suspension, pending disposal of the appeal.	<p>which can result in severe injustice. For example, if the Authority directs that an agreement be terminated, or that the person take certain conduct (which may entail that person or some other person incurring substantial expenditure), and in the event, the appeal is allowed. In that situation, there is no realistic prospect of the appellant being reinstated back to the original position.</p> <p>Although a similar provision is found in the Competition Act, there are many more layers of appeal in that Act and the concern legitimately is that an appeal process could take an unduly long time before it is exhausted (thereby stymieing competition). However, that concern does not apply to the gas industry, since the appeal is only to the Minister, who empanels a specialised Appeal Panel, and hence any appeal under the Gas Act is likely to be disposed of quickly.</p> <p>We therefore recommend that the provision be deleted, or in the alternative, the Minister be empowered to grant (on the application of the appellant) a suspension of the decision or direction, pending resolution of the appeal. Another possibility is for the Authority to undertake to indemnify the appellant in the event that the appeal is allowed, but the appellant cannot be reinstated to back to the original position.</p>
27.	Section 50 of the Amendments	N/A	The provision states that any person who is currently carrying on an activity which will become licensed following the Amendments have a grace period of 14 days to apply for a licence. It is suggested that the EMA should circulate proposed drafts of the new licences to the various parties which will be affected by the new licensing regime, so that any feedback may be given and the terms of the new licences settled well before the new licensing regime comes into operation.