



Decision under sections 19 and 20 of the *Competition and Consumer (Gas Market Emergency Price) Order 2022* on the application by AGL Upstream Investments Pty Ltd for an exemption from the ‘price cap’ under s 18.

22 March 2023

Decision

1. The ACCC is satisfied that it is appropriate to grant an exemption to AGL Upstream Investments Pty Ltd (**AGL Upstream**) pursuant to subsection 19(1) and to impose conditions on that exemption under subsection 20(2) of the Order.
2. The exemption is granted in relation to the application of the price cap under each of subsections 8(1), (2) and (3) of the Order.
3. The exemption is granted for the period of the Order, unless varied or revoked.
4. The ACCC has formed the view that is appropriate to grant this exemption based on Exempted Party’s current circumstances as set out in the documents and materials provided to the ACCC. Should the ACCC become aware of any material change in those circumstances, it may review the exemption and consider whether it is appropriate that the exemption should be varied or revoked under s22(1) of the Order.
5. The conditions are as follows:

Condition 1 – Notification

- a. AGL Upstream must notify the ACCC in writing of any material change to its circumstances, or material changes to information specified in AGL Upstream’s application or further information response within 10 business days of the change.

Condition 2 – Reporting and provision of information

- a. AGL Upstream must report to the ACCC, within 10 business days of entering the agreement, the volume and price of any gas to be supplied under a gas supply agreement that AGL Upstream enters into during the period of the Order for supply of gas of greater than or equal to 0.5 petajoules (PJ) per annum.
- b. AGL Upstream must, within 10 business days of the request, provide any information requested by the ACCC in relation to
 - i. the volume of regulated gas supplied by AGL Upstream during the term of this exemption;
 - ii. the persons to whom and the terms on which such gas was supplied; and/or
 - iii. any matter which the ACCC considers might give rise to a material change in circumstances.

6. The ACCC has made this decision based on information available at this time, and has had regard to the matters in subsection 19(2) of the Order and AGL Upstream's application, further information response and additional information response provided, including in relation to the volume of gas produced by AGL Upstream Investments Pty Ltd.

Statement of reasons

Summary

The ACCC is satisfied that:

- AGL Upstream Investments Pty Ltd (AGL Upstream) is a regulated gas producer within the meaning of the Order, producing small volumes of regulated gas.
- The primary business of AGL Upstream is attributable the production of coal seam gas.
- AGL Upstream's revenue interests from the Camden Gas Plant is forecast to be just over ██████████ in 2023, equating to 0.41% of the AGL Group's total gas turnover.
- Granting an exemption to AGL Upstream would not undermine the object of Part IVBB of the *Competition and Consumer Act 2010*, rather it would enable the AGL group to continue its normal operations in the concentrated retail market.
- Granting an exemption to AGL Upstream is appropriate and would not have any material adverse impact on gas prices for customers in Australia.
- AGL Upstream's gas production facility, Camden Project, is expected to close in August 2023.

Legislative Framework

1. On 16 December 2022, the *Competition and Consumer Act 2010* (Cth) (CCA) was amended to include Part IVBB ('Gas Market') to enhance the welfare of Australians through the regulation of the Australian gas market and in particular, to limit increases in gas prices.¹
2. The *Competition and Consumer (Gas Market Emergency Price) Order 2022* ('Order'), made under section 53M of the CCA, commenced on 23 December 2022. The Order prohibits regulated gas producers and affiliates of regulated gas producers from making certain offers on a gas trading exchange, entering into agreements to supply regulated gas, or supplying regulated gas under such agreements, at a price above \$12 per gigajoule (GJ) (known as the 'price cap') for a period of 12 months.
3. Under subsection 19(1) of the Order, the Australian Competition and Consumer Commission ('ACCC')² may grant an exemption, in relation to a person, if they have made an application under section 18 of the Order and the ACCC is satisfied that it is appropriate to do so having regard to the following matters outlined in subsection 19(2) of the Order:
 - (a) if the person is a regulated gas producer – the volume of regulated gas produced by the person;
 - (b) if the person is a regulated gas producer – the proportion of the business operations of the person represented by the business of producing regulated gas that it carries on;
 - (c) any material changes in the person's circumstances since the commencement of the Order;
 - (d) the object of Part IVBB of the CCA;

¹ CCA s 53.

² The power to grant an exemption in writing from any or all of subsections 8(1), (2) and (3) of the Order was delegated to the ACCC on 23 December 2022 per the *Competition and Consumer (Gas Market Emergency Price) Delegations 2022*.

(e) any other matter that the ACCC considers to be relevant.

The application

4. By application dated 12 January 2023, pursuant to subsection 18(1) of the Order, AGL Energy Limited applied for an exemption from the application of the price cap as contained in subsections 8(1), (2) and (3) of the Order on behalf of AGL Upstream (the **application**).³
5. AGL Upstream provided a response to the ACCC's request for further information on 15 February 2023 (**further information response**).
6. AGL Upstream provided a response to the ACCC's further request for additional information on 10 March 2023 (**additional information response**).

Factual background

7. AGL Upstream is involved in coal seam gas production and submits that it does not meet the exception requirements, including those contained in section 12 (exception for gas storage) and section 16 (exception for retailers) of the Order.⁴
8. AGL Upstream submits that it is a regulated gas producer within the meaning of the Order. AGL Upstream is part of a larger group of entities, including AGL Energy Limited and the entities it controlled as at the time the application was made (the **AGL Group**).⁵
9. AGL Upstream is wholly-owned by the parent company of the AGL Group, AGL Energy Limited.⁶ AGL Energy Limited and its wholly-owned Australian resident subsidiaries form a tax-consolidated group whereby AGL Energy Limited is the ultimate holding company.
10. AGL Gas Storage Pty Ltd, AGL Energy Limited and AGL Upstream Gas (MOS) Pty Ltd have also applied for exemptions under section 19 of the Order.
11. AGL Upstream has 100% ownership interests of the Camden Gas Plant.
12. AGL Upstream has regulated gas production interests through ownership of the Camden Gas Plant. AGL Upstream submits that this is its only regulated gas production interest.

Consideration

13. The ACCC is satisfied that it is appropriate to grant a conditional exemption to AGL Upstream. The ACCC has made this decision based on information available at this time and has had regard to the matters in subsection 19(2) of the Order and the application and further information response provided.
14. The ACCC's reasons for the decision to grant the exemption, by reference to each of the matters in paragraph 19(2) of the Order, are set out below.

³ The ACCC considers AGL Upstream Investments Pty Ltd to be the formal Applicant under section 18 of the Order for the purposes of assessing the exemption application made by AGL Energy Limited on behalf of AGL Upstream Investments Pty Ltd.

⁴ AGL Upstream, further information response, response to Q4

⁵ See Attachment A to the Applicant's application.

⁶ See Attachment A to the Applicant's application.

Section 19(2)(a) – For a regulated gas producer – Volume of regulated gas produced

15. AGL Upstream submits that it is a regulated gas producer within the meaning of the Order⁷ and is part of the AGL Group.⁸ The ACCC accepts that AGL Upstream carries on a business of producing gas and so is a regulated gas producer within the meaning of section 5 of the Order.
16. AGL Upstream submits that its only regulated gas production interests are through its ownership of the Camden Gas Plant.
17. The only regulated gas production facility in which AGL Upstream has an interest is Camden Gas Plant. The further information response states that the Camden Gas Plant is forecast to produce approximately [REDACTED] of gas in 2023. This is just over 0.2%⁹ as a proportion of the total forecast east coast demand in 2023 (571 PJ)¹⁰.
18. ACCC accepts that a low volume of regulated gas is produced by AGL Upstream through its production interests in the Camden Gas Plant.

Section 19(2)(b) – For a regulated gas producer – Proportion of business operations represented by the production of regulated gas

19. AGL Upstream submits that the AGL Group prepares its financial statements on a consolidated basis across AGL entities and that it does not prepare separate financial statements for individual AGL entities.
20. AGL Upstream submits that the Camden Gas Plant is forecast to generate [REDACTED] in revenue in 2023. This equates to around 0.41% of AGL Energy Limited's total gas turnover of [REDACTED] in the 2023 calendar year.¹¹ The AGL Group does not currently have the forecast total annual turnover of AGL Energy Limited for calendar year 2023.
21. AGL Upstream submits that the Camden Gas Plant generated just over [REDACTED] in revenue in the 2022 calendar year. As a proportion of total business operations, gas production equates to around 0.15% of AGL Energy Limited's total annual turnover for the 2022 calendar year.¹²
22. The ACCC accepts that regulated gas production is the primary business of AGL Upstream.

Section 19(2)(c) – Any material changes in circumstances since 23 December 2022 (the commencement of the Order)

23. AGL Upstream's application has not identified any material changes in AGL Upstream's circumstances since the Order commenced.

Section 19(2)(d) – Object of Part IVBB of the CCA

24. The object of Part IVBB of the CCA is to enhance the welfare of Australians through regulation of the Australian gas market, including limiting increases in gas prices.
25. The ACCC is of the view that, due to the low volume of gas produced by AGL Upstream, granting an exemption would not undermine the object of Part IVBB of the CCA.

⁷ AGL Upstream, application, response to Part A Q1

⁸ See Attachment A of the Applicant's application.

⁹ ACCC calculation of the sum of gas produced internally by AGL Upstream's Camden Gas Project as a proportion of total forecast east coast gas demand.

¹⁰ See ACCC, Gas Inquiry 2017-25 interim report, January 2023, pp 11.

¹¹ AGL Energy, further information response, response to Q8.

¹² AGL Energy, additional information response, response to Q4c.

26. Further, granting the exemption will not have any direct impact on prices for end-users as the prices at which the AGL Group supplies regulated gas to end-users will continue reflect prevailing market prices at the retail level. However, not granting an exemption, should it lead to AGL not competing as effectively in the retail market, could lead to higher retail prices which could undermine the object of Part IVBB.

Section 19(2)(e) – Other relevant matters that the ACCC considers to be relevant

27. AGL Upstream submits that its production at the Camden Gas Plant is scheduled to cease in August 2023. The ACCC does not consider the ceasing of the Camden Gas Plant to have a material impact on the assessment, considering the low volume of regulated gas production by the Camden Gas Plant.
28. The ACCC has considered the corporate structure and commercial arrangements relating to AGL Upstream and the AGL Group in reaching this decision, noting that the effect of granting this exemption is that certain affiliates of AGL Upstream will not be bound by the price cap in the Order in the circumstances set out in section 17 of the Order.
29. The ACCC is satisfied that AGL Upstream and its affiliates do not have the potential to supply significant amounts of gas into the wholesale domestic market. Accordingly, the ACCC is satisfied that granting the exemption will not have any material impact on prices for wholesale customers.
30. The AGL Group is a significant supplier of gas at the retail level. Prices at the retail level will continue to reflect prevailing market prices if the exemption is granted.
31. In summary, the ACCC considers that granting an exemption AGL Upstream will not have any material adverse impact on gas prices for customers in Australia. It will conversely support the AGL group's operations in the retail market by assisting AGL group to manage supply effectively.

Section 20(2) – Conditions imposed on price cap exemption

32. The ACCC considers it appropriate to grant a conditional exemption to AGL Upstream, having regard to the matters in subsection 19(2) of the Order, based on the information available at this time.

Condition 1 – Notification

33. Material changes in AGL Upstream's circumstances could impact the appropriateness of it holding an exemption. As such, it is appropriate to require AGL Upstream to notify the ACCC if there has been a material change to its circumstances or the information provided to the ACCC in support of its application for an exemption.

Condition 2 – Reporting and provision of information

34. The ACCC has formed the view that it is appropriate to grant this exemption, based, in part, on its understanding that AGL Upstream will not supply regulated gas direct to end-user customers outside the AGL Group.
35. Based on AGL Upstream's contribution to the AGL Group's portfolio of available gas, the ACCC is satisfied that it is appropriate that the exemption be subject to a condition that AGL Upstream must report to the ACCC any gas supply agreements that AGL Upstream enters into during the period of the Order. The ACCC is also satisfied that it is appropriate to include a condition requiring AGL Upstream to provide information requested by the ACCC, in the event it makes such a request, in relation to this

exemption. As the exemption will only operate for a limited time, it is important that any information sought by the ACCC be provided promptly.

36. The exemption provides AGL Upstream with the ability to supply its regulated gas above the price cap and the ACCC may review AGL Upstream's compliance with its exemption and conditions. The ACCC is satisfied that it is appropriate to require AGL Upstream to provide information to the ACCC in relation to its compliance with the conditions imposed on the exemption and any material changes of circumstance if such information is requested by the ACCC.
37. The ACCC is satisfied that these conditions are appropriate having regard to section 19(2) of the Order.