

IN THE WESTERN AUSTRALIAN GAS REVIEW BOARD

No 2 of 2005

Re an Application for review of the decision by the Western Australian Independent Gas Pipelines Access Regulator made on 15 December 2005 to approve its own Revised Access Arrangement for the Dampier to Bunbury Natural Gas Pipeline owned and operated by the Applicants

Application by:

**DBNGP (WA) Transmission Pty Ltd (ACN 081 609 190) and
DBNGP (WA) Nominees Pty Ltd (ACN 081 609 289)**

Applicants

**APPLICATION FOR REVIEW
(CONFIDENTIAL, REDACTED VERSION)**

Date of document: December 2005

Filed on behalf of: The Applicants

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[Capitalised terms used in this Application, unless defined in this Application, have the meaning given to them in the Revised Access Arrangement.]

Pursuant to s.39 of Schedule 1 to the *Gas Pipelines Access (Western Australia) Act 1998* (the "**Act**"), and s.2.48 of the national Third Party Access Code for Natural Gas Pipeline Systems (as set out in Schedule 2 of the Act) (the "**Code**"), the applicants apply for review of the decision made on 15 December 2005 by the Western Australian Economic Regulation Authority ("**Regulator**") whereby the Regulator decided to draft and approve the Regulator's own Revised Access Arrangement for the Dampier to Bunbury Natural Gas Pipeline ("**Pipeline**") (the "**Revised Access Arrangement**") in place of the Further Amended Proposed Revised Access Arrangement submitted by the first-named applicant on 30 November 2005 (the "**Unrevised Access Arrangement**"), and all decisions relating thereto.

The applicants seek the following final orders:

1. The decision of the Regulator to draft and approve his own Access Arrangement be immediately varied by the Board:
 - (a) by removing Part Haul T1 Service and Back Haul T1 Service as Reference Services and including them as Non-Reference Services and consequentially removing the Reference Tariffs for Part Haul and Back Haul T1 Services, and removing the terms and conditions for both the Part Haul T1 Service and Back Haul T1 Service; and
 - (b) by replacing the gas quality specification set out in the Revised Access Arrangement (“**Amendment 14**”) with the gas quality specification in the Unrevised Access Arrangement.
2. Further or alternatively, the Gas Review Board draft and approve a revised Access Arrangement which gives effect to order 1 above.
3. Such further or other orders as may be appropriate.

The applicants apply for review on the grounds set out below (which may be amended or further particularised once the applicants have access to all of the material referred to in s.39(5) of Schedule 1 to the Act).

Dated 29 December 2005

ALLENS ARTHUR ROBINSON

For and on behalf of the applicants

GROUND

[Note: In these grounds the applicants are jointly and separately referred to as “the Operator”]

A Grounds concerning inclusion of Part Haul T1 Service and Back Haul T1 Service as Reference Services

1. The Regulator erred in concluding that the Access Arrangement should include:
 - (a) a Part Haul T1 Service; and
 - (b) a Back Haul T1 Service,as Reference Services, in that the occasion for exercising its discretion to require such an amendment did not arise, or alternatively the exercise of its discretion was incorrect or unreasonable, for the reasons set out in grounds 2 and 3 below.

2. The Regulator misconstrued and misapplied s.3.3 of the Code in that, in assessing whether a Service is likely to be sought by a significant part of the market, for the purposes of s.3.3 of the Code, the Regulator:
 - (a) wrongly considered Capacity which was contracted for the full term of the Access Arrangement Period, when it ought to have disregarded such Capacity, for the purposes of determining whether the Service was likely to be sought; and
 - (b) wrongly considered the existence of Capacity to provide the Service, rather than demand by Prospective Users to utilise Capacity to provide the Service.

3. There was no finding by the Regulator in the Draft Decision, the Final Decision or the Further Final Decision that any User or Prospective User would seek access to a Part Haul T1 Service or a Back Haul T1 Service during the Access Arrangement Period, other than Users with existing contracts for the provision of such services.

4. If Part Haul and Back Haul T1 Services are Non-Reference Services, it follows that:
- (a) there should be no Reference Tariffs for these services;
 - (b) clauses 7.9, 7.10, 7.11, 8.1 and 9.1 in the Revised Access Arrangement should be consequentially amended; and
 - (c) consequential variations are required to the Regulator's Access Arrangement Information for the Dampier to Bunbury Natural Gas Pipeline dated 15 December 2005.

B Grounds concerning Gas Quality

5. The Regulator erred in the respects set out below by requiring the Unrevised Access Arrangement to be amended so as to include an Operating Specification for gas quality as set out in Amendment 14.
6. The exercise of the Regulator's discretion to require Amendment 14 was incorrect or unreasonable, in circumstances where:
- (a) the Regulator did not provide the Operator with information, or a summary thereof, concerning the likely quality of gas which various producers and Users (particularly North West Shelf Gas and Apache in their capacity as gas producers) had advised the Regulator they proposed to supply for receipt into the Pipeline during the Access Arrangement Period;
 - (b) the Regulator accepted the correctness of the facts and material on which assumptions were made in reports commissioned by it concerning the effect of Amendment 14, without disclosing or adequately disclosing those facts, material or assumptions to the Operator;
 - (c) the Operator immediately requested provision of the information, facts, material and assumptions referred to in paragraphs (a) and (b) after the Regulator's Final Decision disclosed their existence;
 - (d) the Regulator did not give the Operator any opportunity to make submissions concerning, and provide the Regulator with the Operator's modelling based upon, the information, facts, material and assumptions

referred to in paragraphs (a) and (b), before the Regulator's Further Final Decision;

- (e) the expert retained by the Regulator to conduct modelling concerning the effect of a change in gas quality specification (PB Associates) considered that the Operator's model would be more accurate than its own model; and
- (f) the Regulator declined to consider **[Redacted for confidentiality]** from the Operator, which concerned the effect of Amendment 14.

7. **Redacted for confidentiality**

8. Alternatively to grounds 1-4, the Regulator incorrectly found that there was insufficient information to substantiate a claim that Amendment 14 would mean that the Capacity of the Pipeline would be affected to an extent sufficient to compromise the Operator's ability to meet its present contractual obligations to existing Users.

Particulars

- (1) The Regulator in effect found that requiring the Operator to provide Part Haul and Back Haul T1 Reference Services in accordance with the gas specification prescribed in Amendment 14 would reduce the Pipeline's capacity to provide a T1 Service.
- (2) The finding in particular (1) was made on the basis of the incorrect or unreasonable exercise of discretion referred to in ground 6.
- (3) The finding in particular (1) was made on the basis of the incorrect finding referred to in ground 7, and if the error in ground 7 had not been made, the Regulator would necessarily have found that the change in the gas quality specification resulting from Amendment 14 would have been to reduce the Pipeline's capacity to provide a T1 Service to an even greater extent.
- (4) The Pipeline's existing capacity to provide a T1 Service, and such capacity even after Stage 4 Expansions, was already fully contracted.

9. Alternatively to grounds 1-4, the Regulator incorrectly found that there was insufficient information to substantiate a claim that Amendment 14 would mean that the effect of a broader gas quality specification would cause the Operator to be unable to deliver gas complying with present contractual specifications to existing Users.

Particulars

- (1) If the Regulator had not made the errors in grounds 6 and 7, the Regulator ought to have found that the likely quality of gas which would be supplied for Part Haul and Back Haul T1 Reference Services during the new Access Arrangement Period would be of the broadest quality required by Amendment 14.
- (2) The effect of the Operator providing more than 1 TJ/day of gas for Part Haul and Back Haul Reference Services in accordance with the gas specification prescribed in Amendment 14 would be to reduce the Pipeline's capacity to provide a T1 Service in accordance with existing transmission contracts which were re-negotiated by DBP with various Shippers in late 2004 ("**Standard Shipper Contracts**").
10. The occasion for exercising the Regulator's discretion to require the Amendment did not arise, or alternatively the exercise of its discretion was incorrect or unreasonable, in that, in the circumstances of grounds 8 and 9 above, the Regulator ought to have concluded that the Amendment:
- (a) would deprive existing Users and the Operator of contractual rights in existence prior to the date when revisions to the Unrevised Access Arrangement were submitted, contrary to s.2.47 of the Code; and
- (b) should not be required having regard to s.2.24, particularly ss.2.24(a) and (b), of the Code,
- but instead the Regulator misapplied and misconstrued s.2.47 and s.2.24 of the Code in the respects set out in grounds 11 to 13 below.
11. The Regulator misapplied and misconstrued s.2.47 of the Code in that it wrongly considered that:

- (a) s.2.47 applied only to the rights of contracting parties and did not extend to the obligations which parties might assume as a consequence of their contracting;
 - (b) s.2.47 did not apply to Operator's obligations under Standard Shipper Contracts:
 - (i) to deliver gas at outlet points in accordance with the gas quality specification under those contracts; and
 - (ii) to provide Capacity to meet the existing contracted Capacity of all Access Contracts on the Pipeline;
 - (c) the terms of s.2.47 only extended to effects on contractual rights that were sufficient to amount to a deprivation of the right to the performance of an obligation that is enjoyed by the other party to the contract;
 - (d) if a contractual right in question is, in substance, a right to constrain the terms of access of other parties then it is an Exclusivity Right that falls outside the protection of s.2.47;
 - (e) a restraint on the ability of the Service Provider to accept broader specification gas into the Pipeline from other Users was such an Exclusivity Right, and therefore the rights of Shippers to receive gas that met particular specifications under the Standard Shipper Contracts would not fall within the protection of s.2.47 to the extent that those rights expressly limited the Operator's ability to supply Services to persons who sought to ship broader specification gas in the Pipeline under the Unrevised Access Arrangement; and
 - (f) s.2.47 is triggered only where it can be shown that it is absolutely inevitable that a provision of the Revised Access Arrangement would deprive a person of a contractual right.
12. The Regulator misapplied and misconstrued s.2.24, particularly s.2.24(a), of the Code in that, by reason of the errors and in the circumstances referred to in grounds 8 and 9 above, it failed to give fundamental or sufficient weight to the effects of a broader gas specification upon the Operator's legitimate business interests and investment in the Pipeline, namely that:

- (a) the Operator [**Redacted for confidentiality**], and would thereby be unable to earn the Total Revenue for the new Access Arrangement Period;
 - (b) **Redacted for confidentiality**;
 - (c) **Redacted for confidentiality**
13. The Regulator misapplied and misconstrued s.2.24, particularly s.2.24(b), of the Code in that, by reason of the errors and in the circumstances referred to in grounds 8 and 9 above, it failed to give fundamental or sufficient weight to the effect of a broader gas specification upon the Operator's existing Standard Shipper Contracts, [**Redacted for confidentiality**].
14. The Regulator erred in concluding that, or further or alternatively, the occasion for exercising the Regulator's discretion to require the Amendment did not arise, or alternatively the exercise of its discretion was incorrect or unreasonable, to conclude that:
- (a) it would be unreasonable for the terms and conditions for Reference Services to not include a wider gas quality specification than the Operating Specification proposed by Operator for the Tf Service; and
 - (b) a wider gas quality specification represented a reasonable balance of interests between Users of the DBNGP, end users of gas and DBP itself, and is in the public interest.

Particulars

- (1) The Operator repeats the matters set out in Grounds 12 and 13 above.
- (2) Some agreements between Users and producers for the sale of gas include provisions for producers to impose broader gas specification on their customers without consultation with, or regard to, those customers' downstream rights or obligations. The imposition of the broader specification and the supply of gas with the broader specification, would cause the Operator to either refuse to accept gas from the affected Shipper or to breach the Operator's contractual obligations to other Shippers.

- (3) The Regulator failed to have any or any adequate regard to the contractual rights negotiated by the parties to the Standard Shipper Contracts and preserved by ss 2.24(b) and 2.47 of the Code, including the mechanism in the Standard Shipper Contracts to move to a broader specification.
- (4) The Regulator to have any or any adequate regard to the submissions of Users representing the majority of the gas delivered through the Pipeline, being submissions which did not support Amendment 14.
- (5) There was never a government policy that the gas quality specification for the Pipeline would be broadened beyond the specification provided for in the Unrevised Access Arrangement.
- (6) Given the low level of utilisation of gas by the domestic market and the other means of enabling gas to be delivered safely to domestic users, it was unreasonable to require a broader specification to address an issue that might arise in relation to a small proportion of the total utilisation of the Pipeline's Capacity
- (7) Where domestic appliances are already manufactured to meet a broader specification than that proposed by Operator, there is no question about appliance safety if Amendment 14 is not effected.
- (8) There was no evidence before the Regulator to support the conclusions that there would be a reduction in prices or an increase in competition.
- (9) The Regulator had no evidence as to whether Amendment 14 would have a net economic advantage to industry or to the State.
- (10) The Regulator erred in finding that, to the extent that Amendment 14 would necessitate extra costs in expanding and maintaining the Pipeline, that those costs would be recoverable from Shippers.