

Re Application for review of the decision by the Western Australian Independent Gas Pipelines Access Regulator published on 30 December 2003 to approve its own Access Arrangement for the Dampier to Bunbury Natural Gas Pipeline owned and operated by the Applicants

Application by:

EPIC ENERGY (WA) NOMINEES PTY LTD (ACN 081 609 289) (RECEIVERS AND MANAGERS APPOINTED) (ADMINISTRATORS APPOINTED) and EPIC ENERGY (WA) TRANSMISSION PTY LTD (ACN 081 609 190) (RECEIVERS AND MANAGERS APPOINTED) (ADMINISTRATORS APPOINTED)

Applicants

**DECISION ON APPLICATION FOR
FURTHER AND BETTER PARTICULARS
OF APPLICATION FOR REVIEW AND
APPLICANTS' STATEMENT OF FACTS, ISSUES
AND CONTENTIONS**

Members: Mr R M Edel, Presiding Member

Heard: 24 September 2004

Delivered: 29 September 2004

Representation:
Counsel: Applicants in Appeal No. 1:
Mr C L Zelestis QC and Mr J A Thomson

Respondents in Appeal No. 1:
Mr W S Martin QC and Mr N P Gentilli

Solicitors: Applicants in Appeal No. 1: Mallesons Stephen Jaques
Respondents in Appeal No. 1: Jackson McDonald

Cases Referred to in Judgment:

Re Calder; Ex parte Gardner (1990) 20 WAR 525;

Re Nicholls; Ex parte Plutonic Operations Ltd [2002] WASCA 232

Legislation Referred to in Judgment:

Gas Pipelines Access (Western Australia) Act 1998

Background:

1. By notices dated 30 July 2004 the respondent in appeal no. 1, Western Power Corporation (**Western Power**) sought further and better particulars of:
 - (a) the application for review lodged by the applicants (**Epic**); and
 - (b) Epic's statement of facts, issues and contentions.
2. Subsequently, Western Power and Epic agreed that Western Power would not press its application for a direction that those particulars be provided until the provision of Epic's written outline of submission on the basis that the written outline of submissions might contain sufficient detail to render Western Power's request for particulars unnecessary.
3. Epic's written outline of submissions was filed and served on or around 27 August 2004. Western Power has concluded that the written outline of submissions does not contain sufficient particulars and now seeks a direction that the particulars it has requested in relation to both the grounds for review and the statement of facts, issues and contentions be provided by Tuesday 5 October 2004.
4. Epic resists the application on the basis that it has adequately and fairly disclosed and explained its case in its application for review dated 14 January 2004, the annotated grounds of review dated 4 June 2004, the statement of facts, issues and contentions dated 16 June 2004 and the written outline of submissions dated 27 August 2004.

Power to Make Directions for the Provision of Particulars

5. Western Power submitted that the Board has the power to make directions for the provisions of particulars by reason of the following matters:
 - (a) section 39(3) of Schedule 1 to the *Gas Pipelines Access (Western Australia) Act 1998* (**the Law**) provides that an application for review pursuant section 39 must give details of the grounds for making the application;
 - (b) detailed grounds are required to ensure compliance with section 39(2)(b) and section 39(5) of the Law. Section 39(2)(b) provides that an application under subsection 39(1) may not raise any matter that was not raised in submissions to the Regulator before the decision was made. Section 39(5) provides that the Gas Review Board, in reviewing a decision under section 39, must not consider any matter other than the matter enumerated in sub-paragraphs (a) to (f);
 - (c) section 59(4) of the Gas Pipelines Access (Western Australia) Act 1998 (**the Act**) provides that subject to the Law, a party must be allowed a reasonable

opportunity to call or give evidence, to examine or cross examine witnesses and to make submissions to the Board;

- (d) section 59(4) reflects the principles of procedural fairness which, inter alia, would entitle a respondent to an application for review to know the case that it has to meet;
 - (e) quite apart from the operation of section 59(4), the principles of procedural fairness apply to these proceedings and entitle Western Power to know the case that it has to meet;
 - (f) the Board must also know the case to be met. Further, if Epic is successful in making out some or all of its application for review under section 39(2), then the Board has the power to set aside or vary the decision under review and for the purposes of the review may exercise the same powers with respect to the subject of the decision as may be exercised by the Regulator. Notably, the Board does not have the power to remit the matter to the Regulator or any other body (see section 38(9) which applies to section 39 review applications by virtue of section 39(6)). If the Board is to vary the decision then it must have a detailed understanding of not only Epic's case, but also the Regulator's decision and the factual background to that decision.
6. Epic did not make specific submissions as to the power of the Board to make directions for particulars.
 7. I consider that the Board does have the power to make directions for particulars. There can be no doubt that the rules relating to procedural fairness apply to applications for review pursuant to section 39(1) of the Law before the Board. Those rules require that Western Power, as a respondent to Epic's application for review, must know the case it has to meet and must be given an adequate opportunity to be heard in relation to that case.
 8. The position of the Board is not dissimilar to that of a Mining Warden sitting in open court under the Mining Act 1981 (WA). The Mining Warden in open court sits in an administrative capacity: *Re Calder; Ex parte Gardner* (1990) 20 WAR 525.
 9. The Full Court of the Supreme Court of Western Australia has previously decided that the rules of procedural fairness allow a Warden in open court to set a programme with which the parties to proceedings must comply in order to ensure that each is afforded natural justice: *Re Nicholls; Ex parte Plutonic Operations Ltd* [2002] WASCA 232. This includes directing that further and better particulars of an opponent's case be provided.

10. It is not clear whether the WA Gas Review Board would have any power to enforce compliance with any direction for particulars made. This issue was not the topic of specific submissions to the Board and does not appear to be specifically dealt with in the Act or the Law. It is to be noted that the Full Court in *Re Nicholls; Ex parte Plutonic Operations Ltd* [2002] WASCA 232 pointed out that:
- (a) the Warden in open court did not have jurisdiction to enforce any directions for particulars; and
 - (b) if an applicant failed to provide adequate particulars or background to the case to enable a respondent to know the case that it had to meet, then it would open to the Warden to refuse to permit the applicant to adduce evidence or to rely upon material which had not been made available to the other party in accordance with the Warden's direction. Alternatively, it might be appropriate to grant an adjournment.
11. For the purpose of dealing with this application, it is not necessary for me to decide, at this stage, whether the Western Australian Gas Review Board has any power to enforce any direction it might make for the provision of further and better particulars of grounds for review or other document.

Direction for Particulars

12. After having considered the submissions of the parties, I have come to the view that some of the further and better particulars sought by Western Power of Epic's grounds of review should be given in order to ensure that:
- (a) Western Power knows the case that it has to meet and is given an adequate opportunity to be heard on Epic's application for review; and
 - (b) the Board is fully informed of the detail pertaining to Epic's grounds of appeal.
13. I direct that Epic give the following particulars of its grounds of review (references are to the paragraph numbers in Western Power's request for further and better particulars of application for review dated 30 July 2004):

Under Ground 1

1(a)(i); 1(a)(iii)

1(b), save that the words "and the principles set out in those provisions of the Code in respect of which" in the first and second lines of paragraph 1(b) be deleted and the words "of the tariff in respect of which" be substituted and further that the words "make the

determination referred to therein" be deleted and the words "determine fell within the range of applicable tariffs" be substituted.

1(c)

Under Ground 2

2(a) and 2(b)

Under Ground 3

3(a)(i)-(v) (inclusive);, 3(b)(i) and (ii); 3(c) and 3(d)(ii)

Under Ground 4

4(a), (b), (c), save that the remainder of paragraph 4(c)(i) after the words "legitimate business interests" be deleted; 4(d)(i),(ii),(iii), save that the words "and give the usual particulars of that allegation" be deleted in paragraph 4(d)(iii); 4(e), (f), (g), (h); 4(i)(ii) and (iii); and 4(j); 4(k); 4(l); 4(m)

Under Ground 5

5(a)(i) and (ii); 5(b)(i), (ii), (iv), (v), (vi); 5(c)(i) and (ii)

Under Ground 6

6(a), 6(b), 6(c), save that the remainder of paragraph 6(c)(i) after the words "legitimate business interests" be deleted; 6(d), 6(e), 6(f), 6(h); 6(i); 6(j)(i), (ii), (iii), (v), (vi) (vii), (viii), (ix), (x), (xi) and (xii)

Under Ground 7

7(a)(i) save that the words "therein" in the third line in paragraph 7(a)(i) be deleted and the words "in subparagraph (a)" be inserted in their place; 7(a)(ii) and (iii); 7(b)(i) and (ii)

Under Ground 8

8(a), save that the word "therein" in the fourth line of paragraph 8(a) be deleted and the words "in ground 8" be substituted; 8(b)

Under Ground 9

9(a), (b), (c) save that the words "referred to therein" in the first and second lines of paragraph 9(c)(i) be deleted and the words "referred to in subparagraph (c)" be added at the end of paragraph 9(c)(i); 9(c)(ii), (iii) and (iv); 9(d)(i) and (iii)

Under Ground 10

10(a) and 10(c)

Under Ground 11

11(a)

Under Ground 12

12(a) and 12(b)

Under Ground 13

13(a)(i); 13(b)(i); 13(c)(i); 13(d)(i); 13(e)(i); 13(f)(i) and (iii); 13(g)(i); 13(h)(i); 13(i)(i), (iii), (iv) and (v)

Under Ground 15

15(a)(i); 15(b)(i); 15(c)(i); 15(d)(i); 15(e)(i); 15(f)(i); 15(g)(i); 15(h)(i); 15(i)(i); 15(j)(i); 15(k)(i)

Under Ground 16

16

Under Ground 17

17(a); 17(b); 17(c); 17(d); 17(f)(i); 17(g); 17(h)

Under Ground 18

18(a)(i)-(ii); 18(b) save that the remainder of paragraph 18(b)(i) after the words "legitimate business interests" be deleted; 18(c); 18(d) (save that in relation to paragraph 18(d)(ii) the words "and give the usual particulars of that allegation" be deleted); 18(e); 18(f) (save that in relation to paragraph 18(f)(ii) and (iii) the words "and give the usual particulars of that allegation" be deleted); 18(h); 18(i); 18(j); 18(k), 18(m) and 18(o).

Under Ground 19

19(e)(ii) and (iii)

Under Ground 22

22(a) and 22(b)

Under Ground 26

25(a)(i) and (iii), save that in relation to paragraph 25(a)(iii) the words "and give the usual particulars of that allegation" be deleted

Under Ground 27

26(a) (save that the words "and give the usual particulars of such allegation" be deleted);
26(e)

Under Ground 28

27(b) and 27(c)(ii)

Under Ground 29

28(b)

Under Ground 31

29(b)

Under Ground 32

30(a), 30(b) and 30(b)

Under Ground 34

31(a)

Under Ground 38

32(a)-(d) (inclusive)

14. It should be noted that:

- (a) The second, third and fourth introductory paragraphs of Western Power's request for further and better particulars of application for review dated 30 July 2004 should be followed in providing the particulars. This means that where it is convenient and appropriate to do so, a request may be answered by referring to a particular document. References should be made to particular page numbers and (where possible) paragraph numbers of documents in order to provide an appropriate level of particularity.

- (b) Many of the requests for particulars are repetitive or request information that has previously been sought in similar or identical form earlier in the requested for particulars. This is a function of the fact that common themes and issues are raised throughout Epic's grounds of review. However, this is likely to mean that answers to particulars are likely to be able to be repeated.
 - (c) Epic has today filed a document entitled "Applicant's Summary of Pipeline Sales Circumstances". I have not had an opportunity to consider it in detail but, on its face, it would appear to provide some of the particulars sought in Western Power's request for particulars of Epic's grounds for review. Similarly, some of the particulars that I have directed be provided may already be found in some form in Epic's written outline of submissions. To the extent that there is a clear answer to the request for particulars in the Summary of Pipeline Sale Circumstances or the written submissions, answers to the requests may refer to the appropriate paragraph or paragraphs of the Summary of Pipeline Sale Circumstances or the written outline of submissions.
 - (d) Notwithstanding the fact that some of the particulars sought by Western Power may be found in the Summary of Pipeline Sale Circumstances document or Epic's written outline of submissions and that Epic might, in providing answers to the request for further and better particulars, refer to those documents, it is appropriate that Epic confirm that in relation to the issues in question it intends to rely on the matters set out and no others.
15. In relation to Western Powers application for further and better particulars of Epic's statement of facts, issues and contentions I decline to make any orders for particulars.
16. In this case it is clear that Epic did not intend the statement of facts, issues and contentions to be exhaustive statement. Rather, it has clearly been drafted to focus attention on central alleged facts, issues and contentions. It does not purport to define the boundaries or content of the grounds of review.
17. Further, many of the issues the subject of the request for particulars made in relation to the statement of facts, issues and contentions are also dealt with in the request for further and better particulars made in respect of Epic's grounds of appeal. In my view, the provision of the further and better particulars of Epic's grounds of review will enable Western Power to adequately know the case that it has to meet.
18. For these reasons, I do not think that it is appropriate to make orders for further and better particulars of Epic's statement of facts, issues and contentions.

19. I direct that Epic file and serve its answers to the requests for particulars enumerated above by 5.00pm Wednesday 6 October 2004.

A handwritten signature in black ink, appearing to read 'Robert Edel', is centered on the page. The signature is written in a cursive, flowing style.

**ROBERT EDEL
PRESIDING MEMBER
WESTERN AUSTRALIAN GAS REVIEW
BOARD
APPEALS 1 AND 3 OF 2004**