

Re application for review of the decision by the Western Australia 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
(RECEIVERS AND MANAGERS APPOINTED)
(ADMINISTRATORS APPOINTED) (ACN 081 609 289)**

and

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

Applicants

Re Application for review of the decision by the Western Australia Independent Gas Pipeline Access Regulator dated 30 December 2003 to approve the Regulator's own Access Arrangement for the Dampier to Bunbury Natural Gas Pipeline.

Application by:

WESTERN POWER CORPORATION (WA 0124360E)

Applicant

**REASONS FOR DECISION ON APPLICATION
BY EPIC ENERGY (WA) NOMINEES PTY LTD
AND EPIC ENERGY (WA) TRANSMISSION PTY LTD
FOR ACCESS TO CONFIDENTIAL DOCUMENTS
BY NOMINATED PERSONS**

Members : Mr R M Edel, Presiding Member
Heard: 7 July 2004
Delivered: 19 July 2004

Representation:

Counsel:

Applicants in Appeal No.1:	Mr G H Murphy SC and Mr J A Thompson
Applicants in Appeal No. 3:	Mr P K Walton
Economic Regulation Authority:	Mr S G Colvin SC
Australian Gas Light Company	Mr K De Kerloy

Solicitors:

Applicants in Appeal No.1:	Mallesons Stephen Jacques
Applicants in Appeal No.3:	Jackson McDonald
Economic Regulation Authority:	Corrs Chambers Westgarth
Australian Gas Light Company:	Freehills

Cases Referred to in Judgment:

1. *Application by Epic Energy South Australia Pty Limited* [2002] ACompT 4
2. *Re Croser; Ex parte Rutherford* (2001) 25 WAR 170.
3. *Gillett as a member of a Medical Assessment Panel; Ex Parte Rusich (Applicant)* [2001] WASCA 111

Legislation Referred to in Judgement:

1. *Gas Pipelines Access (Western Australia) Act 1998*;
2. *National Third Party Access Code for Natural Gas Pipeline Systems*;
3. *Act Interpretation Act 1984*

Cases also Cited:

4. Hansard (WA) 18 June 1998 at 4268-9;
5. *Application by Epic Energy South Australia Pty Limited* [2003] ACompT 5;
6. *Bond Corporation Holdings Limited –v- Sulan and National Companies and Securities Commission and Others* (1990) 3 WAR 49;

Background

1. By an application dated 4 June 2004 Epic Energy (WA) Nominees Pty Ltd (Receivers and Managers Appointed) (Administrators Appointed) and Epic Energy (WA) Transmission Pty Ltd (Receivers and Managers Appointed) (Administrators Appointed) (together referred to as **Epic**) sought orders in relation to both appeals 1 and 3 of 2004 that:
 - (a) Certain nominated individuals be added to the list of persons referred to in paragraph 5(a) of the orders and directions of the Board made on 16 April 2004; and
 - (b) Within two days the Economic Regulation Authority provide to Epic Energy and Western Power an amended draft index of documents in the format of Annexure B to the orders and directions made by the Western Australian Gas Review Board on 16 April 2004 which includes in the draft index of documents:

- (i) all documents received pursuant to the exercise of the Regulator's power under subsection 41(1) of Schedule 1 to the Act, and all notices issued in connection therewith, during the course of deciding whether to approve Epic Energy's proposed access arrangement for the Dampier to Bunbury Natural Gas Pipeline (**DBNGP**);
- (ii) the complete financial model and all related spreadsheets and calculations (including working papers) for the derivation of the Reference Tariffs set out in the Access Arrangement for the DBNGP, drafted and approved by the Regulator.

SUBMISSIONS OF THE PARTIES

Access to Documents Obtained by the Regulator Under Section 41

2. Epic filed a written outline of submissions dated 4 June 2004, which submissions were supplemented by oral submissions at the hearing on 7 July 2004. Epic also filed an affidavit of Sharon Louise Henrick sworn 3 June 2004 in support of its application. Epic submitted, inter alia, that:

the Regulator had obtained documents pursuant to its power under subsection 41(1) of schedule 1 (**Law**) to the Gas Pipelines Access (Western Australia) 1998 (**Act**) during the course of deciding whether to approve Epic Energy's proposed access arrangement for the DBNGP. Documents were obtained by the Regulator that related to the price bid by two of the unsuccessful bidders for the DBNGP when it was sold to Epic in 1998. Further documents may have been obtained by the Regulator pursuant to section 41;

the documents relating to the bids lodged by the unsuccessful bidders for the DBNGP were of relevance to paragraphs 7, 12, 13, 17 and 18 of Epic's application for review of the Regulator's decision to approve and publish his own access arrangement for the DBNGP (**Decision**);

other documents obtained by the Regulator pursuant to section 41(1) may also be relevant;

documents obtained by the Regulator pursuant to section 41(1) are documents that address or relate to "matters" which the Board is required to consider pursuant to section 39(5) for the purposes of an application for review under section 39. A primary purpose of section 39(5) is to identify the subject matters which may be

considered by the Board. It is not to limit the documents which may be examined by the Board in the cause of its consideration of the "matters" in section 39(5). In other words, section 39(5) should be read as if the words "matters referred to in" were added to the opening sentence of subparagraph 39(5) after the words "matter other than";

this construction is confirmed by various passages of the Board's reason for decision on preliminary issues dated 16 April 2004 (see paragraphs 40, 50, 64, 65 and 66);

the Board's jurisdiction is dependant upon demonstrable error by reference to matters which were before the relevant regulator before the decision under review. Demonstration of the presence (or absence) of error will require an examination of the Regulator's approach and conduct in relation to, and the documents available to the Regulator concerning, the matter at the time the decision under review was made;

by way of example, consideration of the "matter" raised by Epic with the Regulator and in it's application for review to the effect that the Regulator failed to address fair market value or reasonable purchase price for the DBNGP (ground 7 of Epic's grounds of review) would require an examination of the bid material of the other bidders for the pipeline;

such construction is consistent with the power that the Board has pursuant to section 39(9) of the Law which provides, inter alia, that the Board may for the purposes of the review, exercise the same powers with respect to the subject matter of the decision as may have been exercised by the Regulator himself. In order to exercise the same powers as the Regulator, the Board would need to consider all of the information before the Regulator. A construction of section 39(5) which permits the Board to consider all material (including documents obtained by the Regulator pursuant to section 41) in relation to matters raised in an application for review is consistent with the role of the Board exercising the same powers as the Regulator in respect of those matters;

if the Board has access to documents obtained by the Regulator pursuant to section 41, then procedural fairness requires that Epic Energy should also have access to these documents.

Financial Model and Related Papers for Regulator's Access Arrangement

3. Epic also applied for an order requiring the Regulator to provide the complete financial model and all relevant spreadsheets and calculations (including working papers) for the derivation of the reference tariffs set out in the access arrangement for the DBNGP.
4. Epic submitted that:
 - (a) these documents must exist and should be disclosed because without these working papers the conclusions expressed by the Regulator and all reasons contributing to those conclusions cannot be properly examined and understood;
 - (b) the words "decision", the "written record of it" and "any written reasons for it" in section 39(5)(e) includes the Regulator's own financial model and related working papers;
 - (c) the financial model and related working papers should be disclosed for the same reasons that the section 41 documents should be disclosed;
 - (d) Section 42 was no obstacle to the production of documents obtained by the Regulator pursuant to section 41 because;
 - (i) as a matter of construction, section 42 is not a provision dealing with the powers of the Gas Review Board in relation to a review being conducted under part 6 of the Law. It is a separate provision and a separate part of the Law, addressing an entirely different topic;
 - (ii) section 42 relates to information which is claimed to be confidential or commercially sensitive at the time when the Regulator obtains it prior to making his decision;
 - (iii) where the Regulator's functions under the Third Party Access Code for Natural Gas Pipeline Systems (**the Code**) in relation to the approval of an access arrangement come to an end the question becomes one as to the proper exercise of the Board's functions under part 6 of the Law. It is for the Board to determine an appropriate regime for documents which remain confidential or commercially sensitive at the time when the Board exercises its functions;
 - (iv) were it otherwise, the Regulator could dictate the scope of the Board's review.

- (e) In any event, whatever view is taken as to the construction of section 42, that section is no impediment to the Regulator disclosing section 41 documents in the context of a Gas Review Board hearing because:
- (i) it is evident from section 32(1) of the Law that a review application brought under part 6 is a "civil proceeding"; and
 - (ii) section 42(3)(b) provides that section 42(2) does not prevent the regulator from using information or a document for the purposes of a civil proceeding;

Epic seeks only documents which were before the Regulator at the time of its decision and which relate to matters properly the subject of its application. Epic does not contend that the Board should consider section 41 documents that deal with matters not raised in submissions lodged by Epic with the Regulator, within the meaning of section 39(2)(b).

Submissions of Western Power Corporation

5. Western Power Corporation expressly adopted the written and oral submissions advanced on behalf of Epic in relation to that part of the application that related to access to documents.

Submissions of the Economic Regulation Authority

6. The Economic Regulation Authority (**ERA**) filed a written outline of submissions, which were supplemented by oral submissions at the hearing. The ERA also filed an affidavit of Simon Royce Adams sworn 5 July 2004 in relation to Epic's application for confidential and other documents. The ERA submitted, inter alia, that:
- (a) it is evident from the terms of sections 38 and 39 of the Law read in the context of the Code that section 39 provides for a limited right of review of the merits of a decision by the Regulator to draft and approve an access arrangement;
 - (b) section 39(5) adopts restrictive language in describing the matters that may be considered by stating that the Board in reviewing an access arrangement decision must not consider any matter other than the matters listed;
 - (c) an access arrangement decision can only be made by the relevant Regulator after a detailed process being followed under the Code. The relevant Regulator has power to provide further information to a person other than information subject to

confidentiality restrictions. After such a detailed process, it is to be expected that any right of merits review of an access arrangement would be confined. The process for making an access arrangement decision itself specifies the detail required in the decision and provides a mechanism by which further information may be requested. The Applicants have not raised any complaint before the Board as to either of those matters;

- (d) Section 39(2)(b) provides that an application to review an access arrangement decision may not raise any matter not raised in submissions to the relevant Regulator before the decision was made;
- (e) the review provided for in section 39 is confined to a consideration of those parts of the record of the process of decision making undertaken by the relevant Regulator that are relevant to the particular areas as to findings of fact and incorrect or unreasonable exercises of discretion alleged by the applicants;
- (f) an applicant may not embark upon a fresh factual enquiry or introduce new factual material that has not been raised by way of submissions or relied upon by the relevant Regulator. It is not open to explore for the first time in the appeal process whether there is further information that may assist an applicant's case in the context of an appeal to the Board;
- (g) if the Regulator has not used documents obtained by him under section 41 in the decision making process under the Code, and the applicant to the Board did not make submissions to the Regulator based on the documents, then the documents (and the notice requesting them) cannot be referred to by the Board;
- (h) the mere fact that documents were produced in response to a notice issued by the Regulator under section 41 does not bring those documents (or the relevant notice) within the list of matters set out in section 39(5);
- (i) the review provided for by section 39 is in relation to an error in factual finding or exercise of discretion that is apparent after consideration only of the matters listed in section 39(5). That is, the error must be apparent on the face of the record comprised by the documents listed in section 39(5). It is not open to go behind those materials in an attempt to establish error in a way that might occur if section 39 provided for a hearing de novo;
- (j) the written record of the Regulator's decision and the written reasons for the decision are particular documents that the Code requires the Regulator to place on

a public register (see section 7.9(a)(v) of the Code). They do not include extraneous financial models and working papers;

- (k) if the Applicant claims there is a factual error in the numbers in the decision, it can demonstrate that error by reference to the access arrangement information, the assumptions expressed in the Reasons for Decision by the Regulator and the submissions made to the Regulator. To review the working papers and financial models for error would be to raise a false issue. The question for the Board is whether the decision contains factual error.

7. As to disclosure of the financial models and working papers, the ERA opposes the disclosure of those documents.

8. The ERA submits that:

- (a) the written record of the Regulator's decision and the written reasons for the decision are particular documents that the Code requires the Regulator to place on a public register and such documents do not include extraneous financial models and working papers;
- (b) the Board's function in reviewing an access arrangement decision is limited both as to the grounds that may be raised and the materials that may be considered;
- (c) to allow inspection of the financial model and calculations would be to expand the jurisdiction of the Board;
- (d) section 7.13 of the Code indicates that an access arrangement decision should contain a summary of the assumptions and reasoning in relation to the initial capital base and a statement of whether the Regulator has adopted different assumptions to those described in the access arrangement information and reasons for that difference. The Regulator has included these matters and detailed financial models and working papers are not required to be presented as part of the reasons for decision;
- (e) to review the working papers and financial models for error would be to raise a false issue.

Submissions of the Australian Gas Light Company

9. The Australian Gas Light Company (AGL) filed a written outline of submissions and supplemented those submissions with oral submissions. AGL expressly adopted

paragraphs 1 to 22 of the written outline of submissions lodged by the ERA and adopted the oral submissions made by the ERA in relation to the question of the proper construction of section 39 and the operation of sections 41 and 42 of the Law. AGL submitted, inter alia, that:

- (a) the Gas Review Board has no power to grant the orders sought by Epic. Section 42(2) prohibits the Regulator from disclosing confidential and commercially sensitive information unless three conditions are satisfied:
 - (i) the Regulator has formed an opinion in accordance with sub-paragraph 42(2)(a);
 - (ii) the Regulator has given an appropriate notice to the provider of the information; and
 - (iii) an application for review by the provider is not lodged with the relevant appeals body within the specified period;
 - (b) section 42 is not subject to the Law or the Act;
 - (c) there is no evidence that the Regulator has formed the relevant opinion required under section 42(2)(a) or (b) or that the Regulator has given any notice to AGL in relation to confidential and commercially sensitive information provided by AGL to the Regulator under section 41 which the Regulator proposes to disclose. AGL maintains that the information it provided to the Regulator under section 41 is both confidential and commercially sensitive;
 - (d) neither section 38(8) of the Law or section 58(1)(b) of the Act do not empower the Gas Review Board to ignore or override the mandatory requirements of section 42 or to authorise the Regulator not to comply with those obligations;
 - (e) insofar as the Board's order of 16 April 2004 permitted or directed the disclosure of AGL's confidential and commercially sensitive information, it was beyond power and must be rescinded.
10. AGL did not file any affidavit evidence or make submissions in relation to access to the Regulator's financial model and working papers.
11. I have given consideration to all of the written and oral submissions made and the affidavit evidence filed.

Inspection of Documents Obtained by the Regulator pursuant to Section 41(1) of the Act

12. It seems clear on the evidence that documents were obtained by the Regulator pursuant to Section 41(1) before he made his final decision on the access regime governing the DBNGP from AGL relating to tariff paths contained in bids from unsuccessful final bidders (including AGL/CMS) and the nature of the differences between bids and the bid values of unsuccessful bidders, including AGL/CMS Energy.
13. On the basis of the evidence presented to me it is not entirely clear whether any other section 41 notices were issued and whether any documents were provided to the Regulator pursuant to any such section 41 notices
14. In any event, if I come to the conclusion that the Gas Review Board is entitled to inspect documents obtained by the Regulator pursuant to section 41(1) of the Act, orders for production of the documents will obviously proceed on the basis that the Regulator need only produce the documents that he actually obtained pursuant to the exercise of his power under section 41(1) of the Act, together with any notices issued in relation to such documents.
15. The central issue for decision is whether the Gas Review Board has the power to order the production of documents in the possession of the Regulator that he obtained pursuant to section 41(1) of the Act and whether the Gas Review Board may have recourse to those documents.
16. Section 41(1) of the Act provides that:

“If a relevant Regulator has reason to believe that a person has information or a document that may assist the Regulator in the performance of any of the Regulator’s prescribed duties under this Law, the Regulator may require the person to give the Regulator the information or a copy of the document.”
17. Section 41(9) defines the term “prescribed duty” as meaning:
 - “(a) Deciding whether to approve an access arrangement under the Code;
 - (b) Deciding whether to approve changes to an access arrangement under the Code;
 - (c) Deciding whether to approve a contract, arrangement or understanding between a service provider and an associate of a service provider;

- (d) Deciding under the Code whether to approve, disallow or make a variation to a Reference Tariff within an Access Arrangement Period (within the meaning of the Code);
 - (e) Monitoring compliance with the Code.”
18. As can be seen from the definition in section 41(9), the phrase “prescribed duty” largely relates to the discharge of the Regulator’s functions and obligations under the Code.
19. Section 42 provides, inter alia:
- “(1) This section applies if information or a document is given to the relevant Regulator under section 41 and, at the time it is given, the person giving it states that it is of a confidential or commercially sensitive nature.
 - (2) Except as otherwise provided in the Code, the relevant Regulator must not disclose the information or the contents of the document to any person unless:
 - (a) the relevant Regulator is of the opinion:
 - (i) that the disclosure of the information or document would not cause detriment to the person supplying it or to the person from whom that person received it; or
 - (ii) that, although the disclosure of the information or document would cause detriment to such a person, the public benefit in disclosing it out weighs that detriment; and
 - (b) the relevant Regulator has given the person who supplied the information or document a written notice:
 - (i) stating that the relevant Regulator wishes to disclose the information or contents of the documents, specifying the nature of the intended disclosure and setting out detailed reasons why the Regulator wishes to make the disclosure; and

- (ii) stating that the Regulator is of the opinion required by paragraph (a) and setting out detailed reasons why it is of that opinion; and
 - (iii) setting out a copy of this section and section 43,
 - (3) Subsection (2) does not prevent the relevant Regulator:
 - (a) from disclosing information or the contents of a document to a member of the staff of the relevant Regulator employed or engaged for the purposes of this Law or to another relevant Regulator; or
 - (b) from using information or a document for the purposes of civil or criminal proceedings; or
 - (c) from supplying the information or document to the member of a relevant appeals body for the purpose of proceedings in relation to the information or document.”
20. Sections 41 and 42 are contained in Part 7 of the Law which deals with general provisions relating to the Regulator.
21. Section 38(8) of the Law provides that:
- “(a) The relevant appeals body may require the relevant Regulator to give information and other assistance, and to make reports, as specified by the appeals body.”
22. Section 38(a) and section 38(9) of the Law are contained in Part 6 which deals with administrative appeals from decisions of the Regulator. Section 38(9) provides that:
- “In proceedings under this section, the relevant appeals body may make an order affirming, or setting aside or varying immediately or is from a specified future date, the decision under review and, for the purposes of the review, may exercise the same powers with respect to the subject matter of the decision as may be exercised with respect to the subject matter by the person who made the decision.”
23. Section 58(1)(b) provides that the Board may, for the purposes of proceedings before it:
- “(a) By summons signed on behalf of the Board by a member of the Board require the production before the Board of any relevant books, papers or documents;

- (b) Inspect any books, papers or documents produced before it and retain them for such reasonable period as it thinks fit and make copies of any of them or any of their contents;
 - (c) Require any person to make an oath or affirmation to answer truly all questions put by a member of the Board, or by a person appearing before the Board, relating to a matter before the Board; or
 - (d) Require any person appearing before the Board to answer any relevant questions put by them of the Board or by a person appearing before the Board.”
24. As was pointed out by the Australian Competition Tribunal in application by Epic Energy South Australia Pty Ltd [2002] ACompT 4 (**Epic No. 1**), the Board’s jurisdiction under section 38 is dependent upon demonstrable error by reference to matters which were before the relevant Regulator before the decision, of which review is sought, was made. Accordingly, the power to review under section 39(1), although involving a rehearing on the merits, ought to be construed as one to be exercised for the correction of error (see paragraph 20).
25. Section 39(2) of the Law provides that an application under that section:
- “(a) May only be made on the grounds, to be established by the applicant:
 - (i) of an error in the relevant Regulator’s finding of facts; or
 - (ii) that the exercise of the relevant Regulator’s discretion was incorrect or was unreasonable having regard to all the circumstances; or
 - (iii) that the occasion for exercising the discretion did not arise; and
 - (b) In the case of an application under subsection (1), may not raise any matter that was not raised in submissions to the relevant Regulator before the decision was made.”
26. It should be noted that the inquiry under section 39(2)(a)(ii) involves having regard to whether the exercise of the Regulator’s discretion was incorrect or unreasonable having regard to all the circumstances.

27. It is difficult to see how the Board can properly decide whether any of the grounds referred to in section 38(2)(a) have been made out unless it has access to all of the documents that were before the Regulator when he made his decision and that are relevant to the grounds of appeal.
28. In my view, the Board should be able to consider all of the material that was before the Regulator at the time that he made his decision, subject to three provisos:
- (a) pursuant to section 39(2)(b), an applicant under section 39(1) may not raise any matter that was not raised in submissions to the relevant Regulator before the decision was made; and
 - (b) pursuant to section 39(5) the Board must not consider any matter other than the matters enumerated in sub-paragraphs 39(5)(a) to (f) (inclusive); and
 - (c) the documents must be relevant to the grounds of review filed by the relevant applicant.
29. I will comment further on the scope of section 3(92)(b) and section 39(5) below.
30. The construction of section 42 of the Law advanced by the ERA and AGL would potentially deny the Board access to documents and material that are relevant to the appeal and which the Board is otherwise permitted to inspect pursuant to s 39(5).
31. In my opinion, the prohibition contained in section 42 of the Law on the Regulator disclosing information of contents of documents obtained pursuant to section 41(1) does not apply to the Board when hearing an appeal pursuant to section 39(1).
32. As a matter of construction, the prohibition in section 42(2) is aimed at a completely separate process and is contained in a different part of the Law to those provisions dealing with administrative reviews under section 39 of the Law. The apparent purpose of section 42(2) is to prevent the disclosure by the Regulator of the contents of confidential information to persons other than the Board without good reason.
33. Section 42(2) does not specifically address any prohibition on the supply of documents obtained pursuant to section 41(1) to the Board. Further, a construction of section 42 that would prevent documents obtained under section 41(1) being provided to the Board does not sit well with the power of the Board in section 38(8) of the Law to require the Regulator to give information and other assistance and to make reports as specified by the Board. That power is not qualified in any way in section 38(8).

34. Additionally, the construction of section 42 proposed by the ERA and AGL does not sit well with section 38(9), which allows the Board to exercise the same powers with respect to the subject matter of the decision as may be exercised with respect to that subject matter by the Regulator. If the Board, for the purposes of the review, may exercise the same power as that of the Regulator, one would expect it to have access to the same documents.
35. Further support for my conclusion can be found in section 39(5). That section contains a prohibition on the Board from considering any matters other than the matters enumerated in subsections (a) to (f) (inclusive). Parliament has clearly turned its mind to the matters that the Board can consider when dealing with an application for review under section 39(1) and subsection 39(5) makes no mention of any prohibition on considering matters contained in documents obtained by the Regulator pursuant to section 41(1).
36. Section 32(1) of the Law provides that:
- “A person may not bring civil proceedings in respect of a matter arising under this Law except in accordance with this part or part 6.”
37. This suggest that a review application brought under section 38 or section 39 (which are contained in part 6) are “civil proceedings”. There is nothing in section 39 that would suggest otherwise.
38. As I have already pointed out above, section 42(3)(b) provides that the prohibition contained in section 42(2) does not prevent the Regulator from using information or a document for the purposes of civil or criminal proceedings.
39. I consider that the word “using” is sufficiently broad to encompass the Regulator including section 41(1) documents in an index of documents, allowing inspection of those documents, providing copies of those documents to the applicant for review under section 39 and placing the documents before the Board for the purposes of proceedings under section 39(1) of the Law.
40. Having decided that section 42 of the Law does not prevent the Regulator from disclosing the documents to the Board, the next question is whether the Board is able to take those documents into account in light of the limitation contained in section 39(5) of the Law. Given that under the orders made below the Regulator is simply required to include any documents obtained by it pursuant to section 41(1) in the index of documents and provide inspection of those documents to the parties and given that the Board will not immediately be inspecting those documents, it is probably not necessary to make any findings at this

point in relation to the scope of section 39(5). However, in case I am wrong on that point and to provide further guidance for the future, I set out my views on that topic.

41. As was pointed out in Epic No. 1, the term “matter” in section 39(2)(b) and section 39(5)(a) has a broad meaning. The Australian Competition Tribunal pointed out that:

“The matters include the subject matters raised, the issues raised and the material relied upon in support of the position or proposal put forward in the submission as being relevant to the decision to be made. Thus, if any matter, whether by way of argument or evidentiary material, cannot be identified as broadly arising out of a matter fairly raised in the submissions to the relevant Regulator before the decision under review was made, it will not be permitted to be raised in the review.”

42. I took the same view in the Board’s reasons for decision on preliminary issues dated 16 April 2004.
43. Given the relatively broad definition of the term “matter” in section 39(5), it is my view that the legislature was not intending to restrict an applicant to referring to precisely the same documents in an application for review that were referred to in the original submissions to the Regulator before the Regulator’s decision was made. I do not consider that section 39(5) should be interpreted to mean that the Board is restricted to considering simply the list of documents set out at sub-paragraphs 39(5)(a) to (f). I consider that section 39(5) should be construed to mean that the Board must not consider any matters other than matters raised in the documents listed in sub-paragraphs (a) to (f).
44. Thus, if an issue relating to the market value of the DBNGP has been fairly raised in any of the documents set out in section 39(5)(a) to (f) then the Board is entitled to consider that matter.
45. In my opinion the scheme behind the review under section 39 is intended to prevent regard being had to new documents or material that was not before the Regulator when he made his decision. It would prevent, for example, the Gas Review Board from considering an entirely new report commissioned by an Applicant that was not before the Regulator at the time he made his decision even if it related to an issue or matter that had been the subject of written submissions made to the Regulator before the decision in question was made. This follows from the fact that the review pursuant to section 39 is a review on the merits in the sense described above. Such a review is inconsistent with new material or evidence being considered by the Board that was not before the Regulator and therefore not considered by him.

46. The limitation on applications for review contained in section 39(2)(b) should also borne in mind, namely, that applications may not raise any matter that was not raised in submissions to the relevant Regulator before the decision was made.
47. In the present case, documents relating to tariff paths contained in bids from unsuccessful final bidders and the bid values of unsuccessful bidders appear to be clearly relevant to the issue raised by Epic as to the proper market value of the DBNGP at paragraphs 7, 12, 13, 17 and 18 of Epic's application for review of the Decision.
48. Other documents may have been obtained by the Regulator pursuant to his power under section 41(1) of the Act. In my view, these documents and the section 41(1) notices themselves ought to be included in the index of documents referred to in paragraph 7 of the orders and directions made by the Western Australian Gas Review Board on 16 April 2004.
49. The scheme established by those orders is for all documents falling within section 39(5) to be listed in the index and for copies of documents requested by Epic and WPC to be provided to those parties subject to appropriate undertakings as to confidentiality and payment of reasonable photocopying fees.
50. The parties will then ultimately decide which documents they will seek to put before the Board at the hearing of the applications for review.
51. The Board will monitor documents that the parties seek to pose before it to ensure that:
 - (a) the document are relevant to the grounds of appeal;
 - (b) the documents fall within the scope of matters that the Board is permitted to consider pursuant to section 39(5) of the Act; and
 - (c) the documents do not raise matters that were not raised in submissions to the Regulator before his decision was made, contrary to section 39(2)(b).
52. Any challenge or objection to documents be placed before the Board (whether raised by a party or by the Board itself) can be dealt with either at or before the hearing of the applications for review.
53. If the Board proposes to inspect documents, it is axiomatic that the parties must be allowed an opportunity to inspect those documents and make submissions on them.
54. I consider that I have the power under section 38(8) of Law to require the Regulator to include the documents in an index of documents contemplated under order 7 and to provide

copies of those documents to the applicants, subject to appropriate confidentiality undertakings and the other matters that I have referred to.

55. Further or alternatively, I consider that I also have the power to subpoena any documents obtained by the Regulator pursuant to section 41(1) and the general power of the Board under section 58(1)(b) of the Act, should that become necessary.

Working Papers and Financial Models

56. Epic has applied for orders requiring the Regulator to provide the complete financial model and all related spreadsheets and calculations (including working papers) for the derivation of the reference tariffs set out in the access arrangement for the DBNGP.
57. Western Power adopted Epic's submissions in this regard.
58. AGL did not make submissions on this issue.
59. There did not appear to be an issue at the hearing of Epic's application that the financial model, related spreadsheets and calculations were documents existing and were in possession of the Regulator. Rather, the application was resisted on the grounds set out above and on the grounds that such documents did not comprise reasons for decision and that Epic had not established that there was any flaw, omission or insufficiency in the reasons that meant that the reasons should be expanded to include this additional information. The ERA submitted that in relation to the matters that Epic contended must have been supported by calculations, sufficient information was provided in the Regulator's final decision of 23 May 2004 to enable the relevant calculation to be made by Epic or any other party.
60. Although section 7.13 of the Code requires the Regulator to include certain information in his reasons for decision, section 7.13 says that the Regulator must include "at least" that information. Section 7.13 does not purport to be an exhaustive description of what information will comprise the Regulator's reasons for decision.
61. The question as to what comprises the Regulator's reasons for decision is a question of fact. It cannot be said that simply because the Regulator has provided certain reasons for his decision to the Code Registrar that those reasons necessarily comprise all of his reasons for decision. The Regulator may have inadvertently omitted some his reasons for decision.

62. The essential requirement for the giving of adequate reasons is that they disclose the reasoning processes of the relevant tribunal: Re Croser; Ex parte Rutherford (2001) 25 WAR 170.
63. In the context of personal injury claims where a tribunal has referred in its reasons to the method of calculation of its final figure, Courts have readily scrutinised that method of calculation underlying the final figure: Gillett as a member of a Medical Assessment Panel; Ex Parte Rusich (Applicant) [2001] WASCA 111.
64. A court reviewing an administrative decision is not conducting a review on the merits. In contrast, the Board is conducting a review on the merits, albeit that the power to review is one to be exercised for the correction of error and subject to the limitations set out in the Law and discussed briefly above. One would expect that the board should be able to have access to the financial models, calculations and work sheets in the course of such a merits review.
65. Further, such material is clearly part of the Regulators reasoning process and in my view the financial model and all related spreadsheets and calculations (including working papers) for the derivation of the reference tariffs set out in the access arrangement for the DBNGP do comprise part of the Regulator's reasons for decision.
66. As such, they fall directly within section 39(5)(e) of the Law and constitute material that can be considered by the Board.
67. I do not think it is an answer to the application for disclosure of these documents that the Regulator's assumptions supporting the calculation have been disclosed. These are complex matters and the Board would find it helpful to have regard to such information in order to properly understand how the Regulator arrived at certain calculations and in order to avoid guess work and making assumptions in relation to how certain calculations were made.
68. I consider that pursuant to section 38(8) of the Law I have the power to request the Regulator to provide the Board with that material and to include that material in the index of documents referred to at paragraph 7 of the orders of the Western Australian Gas Review Board in relation to preliminary issues made on 16 April 2004. Further, and in any event, the Board could issue a summons for the production of those documents pursuant to section 58(1)(b) of the Act.
69. Issues as to the confidentiality of section 41 documents being disclosed to the Board and the parties can be dealt with by means of appropriate confidentiality orders.

APPLICATION TO EXTEND LIST OF PERSONS WHO MAY SEEK CONFIDENTIAL MATERIAL

70. Epic, by paragraph 1 of its application, sought an order that each of the following persons be added to the list of persons referred to in paragraph 5(a) of the orders and directions of the Board made on 16 April 2004:

John Leslie Williams;

Martin Madden;

Brian Keith McMaster;

Jack Robert James;

Anthony Cribb;

Alison Stacey Kingston; and

Selena Veronica Barker.

71. It appears that the reference to paragraph 5(a) of the orders should be a reference to paragraph 5 (c). There was no opposition to this order being made save that:

(a) Western Power Corporation objected to Anthony Cribb having access to certain documents; and

(b) AGL opposed disclosure of the documents that it provided to the Regulator pursuant to a section 41(1) notice to Messrs Madden, McMaster, James and Cribb.

72. In relation to Western Power's objection to Mr Cribb being added to the list of persons referred to in paragraph 5(a) of the orders and directions of 16 April 2004, it was resolved at the hearing that the representatives for Western Power and Epic would confer with a view to isolating those documents that Western Power objected to Mr Cribb having access to. An order could then be made adding Cribb to the list of persons, save that he would not be entitled to have access to certain enumerated documents. It was agreed that the parties would confer amongst themselves and forward to me a minute of agreed proposed orders along these lines. To date I have not yet received such a minute. I will await the provision of such a minute. If it is not forthcoming within the next 14 days I will bring the matter back on for directions to resolve the issue. Any minute in relation to Mr Cribb should also deal with the issue relating to AGL's documents, which is discussed below.

73. The basis of AGL's objection to the four people referred to being included on the list of persons referred to in paragraph 5(a) of the orders and directions made on 16 April was that these persons are currently involved in the sale of the DBNGP. AGL is a bidder for that pipeline through another entity that it controls and does not want the processes and information that it used to develop its original bid for the DBNGP to be placed in the hands of Epic so that some comparison can be made and a view taken about the current bid being made by AGL.
74. The question as to how such issues of confidentiality should be resolved was not finally determined at the hearing. Insufficient evidence was placed before me to enable that to be done.
75. I am not unsympathetic to the position of AGL in relation to documents for which it has claimed confidentiality. It may be that the parties can construct an appropriate confidentiality regime along similar lines proposed in relation to Mr Cribb. That is, it is possible that Messrs Madden, McMaster, James and Cribb could be added to the list of persons who may have access to confidential documents, save in relation to certain enumerated documents (if those can be identified and agreed).
76. I therefore direct that the solicitors for Epic, Wester Power and AGL confer to attempt to agree an appropriate confidentiality regime in relation to Messrs Madden, McMaster, James and Cribb with a view to forwarding to me a minute of proposed consent orders within 14 days.
77. If the matter has not been resolved within that time frame I will arrange for the issue to be listed for directions. If that occurs I will require AGL to file and serve a detailed affidavit setting out in detail, inter alia:
- (a) the particular documents for which confidentiality is claimed;
 - (b) the basis on which the documents are said to be confidential;
 - (c) the reasons why such documents cannot be disclosed to the four individuals in question; and
 - (d) the detriment that AGL says it will suffer if the four individuals in question are shown the documents.
78. I am mindful that on 9 July 2004 I issued an order adding, inter alia, Messrs Madden, McMaster and James to the list of persons referred to in paragraph 5(a) of the orders and

directions. In light of the matters that I have raised above, that order ought to be rescinded for the time being. That order is therefore rescinded and replaced with the order that appears annexed to these reasons for decision.

Ruling

79. The Board is able to consider documents received pursuant to the exercise of the Regulator's power under subsection 41(1) of the Law and all notices issued in connection therewith.
80. The complete financial model and all related spreadsheets and calculations (including working papers) for the derivation of the reference tariffs set out in the access arrangement for the DBNGP, drafted and approved by the Regulator, form part of the reasons for the Regulator's decision and can be considered by the Board.

Directions

81. Directions reflecting the ruling and matters discussed above are annexed to these reasons for decision.

Dated the 19th day of July 2004

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RM EDEL
PRESIDING MEMBER
WESTERN AUSTRALIAN GAS REVIEW BOARD
APPEALS 1, 2, 3 AND 4 OF 2004