

Re An Application For Review Of The Decision By The Western
Australian Independent Gas pipelines Access Regulator
Dated 30 December 2003 To Approve His Own Access
Arrangement For The Dampier To Bunbury Natural Gas Pipeline

APPLICATION BY :

WESTERN POWER CORPORATION (WA 01 243 60E)

Applicant

**REASONS FOR DECISION ON APPLICATION
BY ECONOMIC REGULATION AUTHORITY
FOR ORDERS EXCLUDING MATTERS FROM REVIEW
PURSUANT TO SECTION 39(4) OF THE
GAS PIPELINES ACCESS (WESTERN AUSTRALIA) ACT 1998**

Member: Mr R M Edel, Presiding Member

Heard: 22 December 2004

Delivered: 2 February 2005

Representation:

Counsel:

Western Power

Economic Regulation Authority:

Epic Energy (WA) Nominees Pty Ltd and Epic

Energy (WA) Transmissions Pty Ltd

Mr W S Martin QC and Mr N P Gentilli

Mr S G Colvin SC

Mr G H Murphy SC

Solicitors

Western Power:

Economic Regulation Authority:

Epic Energy:

Jackson McDonald

Corrs Chambers Westgarth

Mallesons Stephen Jacques

Legislation referred to in judgment

Gas Pipelines (Western Australia) Act 1998

Background

1. By an application dated 17 November 2004 the Economic Regulation Authority (which has been granted leave to be a respondent and to appear at the hearing in relation to this

application for review) sought orders that grounds 2-7 (inclusive), 9-20 (inclusive), 22, 25-31 and 33 of Western Power's grounds of review filed on 14 January 2004 (**Appeal No 3**) be excluded from review pursuant to section 39(4) of the Gas Pipelines (Western Australia) Act 1998 (**Act**).

2. On Thursday 23 December 2004 I delivered my decision dismissing ERA's application for orders excluding certain matters from Appeal No 3 pursuant to section 39(4) of the Act and listed Appeal No 3 for hearing for seven days commencing on 3 March 2005 (concluding on 11 March). I indicated that written reasons for that decision would follow. I now set out those reasons.

Submissions of the parties

3. The Economic Regulation Authority (**ERA**) filed a written outline of submissions dated 18 November 2004. The ERA submitted inter alia that:
 - (a) Western Power had entered into a long term contract for the provision of gas transportation services by the pipeline owner (Epic Energy). As a result, it is the contract and not the access arrangement the subject of Appeal No 3 that will govern the terms upon which Western Power is provided with pipeline services;
 - (b) the contract secures contractual commitments that address all outstanding grounds of review raised by Western Power;
 - (c) Western Power sought to adjourn the appeal to allow an application for revision to the access arrangement to proceed;
 - (d) no other user supported the grounds of review advanced by Western Power;
 - (e) the Board has power to exclude from any review specified "facts, findings matters or actions" that are considered should be excluded having regard, inter alia, to the significance to the parties of those facts and any other matter that the Board considers relevant pursuant to section 39(4) of schedule 1 to the Act (**Law**);
 - (f) Western Power contends that the matters raised in its application for review continued to have significance in spite of it's contract because:
 - (i) in the event of the insolvency of the pipeline owner, a receiver, administrator or liquidator could disavow the contract in which case Western Power could only obtain access under the access arrangement (**Insolvency Point**); and

- (ii) in considering revisions to the access arrangement the Authority must take into account the provisions of the existing access arrangements (**Revision Point**);
 - (g) as to the Insolvency Point there is no evidence to support any likelihood of insolvency of Epic pending the revisions commencement date;
 - (h) as to the Revision Point, the ERA must take into account the existing access arrangement when considering the revision pursuant to section 2.46(b) of the Code. Accordingly, Western Power must elect whether to challenge the ERA's decision concerning the current access arrangement or not. Western Power is not entitled to participate in the revision process whilst purporting to reserve its right to challenge the access arrangement upon which that process proceeds if the outcome of the revision is not satisfactory to Western Power;
 - (i) the case which Western Power proposes could mean that the revision process could be completed by the ERA only for the whole process to be unwound as a result of the adjourned hearing of the application to review the current access arrangement being brought on and heard;
4. The ERA also submitted orally that:
- (a) section 39(4)(b) directs attention to the significance to the parties of the particular facts, findings, matters or actions in question, not to any person;
 - (b) it is unusual for a party who has secured a contractual position to raise some challenge either to legislation or to an administrative decision which has very limited significance for it;
 - (c) it is accepted that this is not a case where there are absolutely no issues that could possibly be relevant to Western Power that could be determined in this review. The question is whether the consequences that are raised by Western Power are significant enough to justify the cost and expense that would be required if the matter were to proceed;
 - (d) Western Power can raise a dispute in respect of the provisions of services and the terms and conditions of the supply of those services under the dispute resolution procedure in section 6 of the Gas Access Code. Western Power is not confirmed to the services that are the subject of the access arrangement. If the agreement that it has reached with the pipeline owner was disavowed by any administrator,

liquidator or receiver Western Power would have rights under the code to apply to an arbitrator to have any dispute determined and the terms of access provided for;

- (e) in relation to the Revision Point, Western Power is not confined as to the matters that it can raise in the revisions process. Therefore any consequence of not proceeding with the present review and being confined to a review of any future access arrangement is unlikely to be significant;
- (f) alternatively, it should be noted that Western Power's grounds of review deal with two main types of issues – firstly, issues as to the terms and conditions upon which particular services are to be provided and secondly, grounds of review relating to the particular services that might be provided. Where a service provider has contractually committed to providing certain services for between 10 and 15 years it would be difficult or unlikely that an arbitrator would find that it would be unreasonable to require those services to be provided in an access arrangement. If the Board does not accept the primary submission then in the alternative it ought to remove all of the grounds in Appeal No 3 which raise matters other than the particular service to be provided and this would leave only grounds 2, 3, 4, 5 and 6.

Submissions of Western Power

5. Western Power submitted, inter alia, that:

- (a) Western Power has entered into a long term contract (**Contract**) for the provision of gas transportation services by Epic Energy. However, the access arrangement will still apply to govern the terms upon which Western Power is provided with gas transportation services other than under the Contract;
- (b) the ERA must take into account the existing access arrangement when considering a revision to the access arrangement by reason of section 2.46(b) of the Gas Access Code;
- (c) in the event of the insolvency of Epic, a receiver, administrator or liquidator could disavow the Contract in which case Western Power would need to fall back on the terms of the access arrangement. Therefore, it cannot be said that the issues raised in this application for review are not significant to the parties;
- (d) Western Power may also wish to seek gas transportation services under the access arrangements in addition to the services available under its Contract. The Contract only provides for access to further capacity if Western Power takes such capacity

for a period of fifteen years. If Western Power wishes to take additional capacity for a period of say two or three years then it must fall back upon the terms of the access arrangement;

- (e) further, Western Power is not obligated to seek any additional capacity that it may require under this contract. If the terms and conditions of the access arrangement were more favourable to it, then it may choose to seek that further capacity under the access arrangement rather than under the contract. This means that the terms and condition of an access arrangement are of significance to Western Power;
- (f) it is misconceived to submit that the Insolvency Point is not valid because there is no evidence to support any likelihood of insolvency of Epic pending the revisions commencement date. The access arrangement does not contain a date when it will expire for the purposes of section 3.20 of the Code. Therefore the existing access arrangement is the basis of the next revision and will also be the basis of every following revision until the pipeline is no longer covered or the Code is amended or appealed. The access arrangement forms the basis for all succeeding revisions by reason of the operation of section 2.46(b) of the Code and the validity of the access arrangement in its original form can no longer be challenged other than through this application for review;
- (g) the fact that no other shipper of gas has sought to be joined in these proceedings does not mean that other shippers of gas do not support the grounds of review advanced by Western Power;
- (h) there is evidence that would support an inference that virtually all of the full haul shippers on the Dampier to Bunbury Natural Gas Pipeline (**DBNGP**) have an interest in the resolution of the terms of the access arrangement;
- (i) faced with the election of having its application dismissed or proceeding to a hearing date in March 2005 (prior to the completion of the review of the access arrangement) Western Power will proceed with its application in March 2005;
- (j) in relation to the ERA's submission that Western Power can seek additional services to those provided for in the access arrangement or the resolution of disputes about the services offered under the access arrangement under section 6 of the Code, it should be noted that under paragraph 6.15 of the Code the arbitrator must, subject to certain other provisions, apply the provisions of the access arrangement for the covered pipeline concerned. Further, paragraph 6.18 provides

that the arbitrator cannot make a decision that is inconsistent with the access arrangement;

- (k) in relation to the alternative submission of the ERA it is possible that Western Power may take additional capacity under the access arrangement and if that happens then the terms and conditions upon which that capacity is provided are matters of profound significance to Western Power.

Submissions of Epic Energy

6. Epic Energy submitted that:

- (a) the ERA does not contend that Western Power does not have an arguable case;
- (b) the question before the Board is whether the ERA has satisfied the Board that the issues raised in Western Power's application, if meritorious, are so insignificant to Western Power in its capacity as a shipper that it has no real or legitimate interest in seeking a determination of those issues by the Board. The absence of another shipper as a party to the proceedings is not a factor relevant to the question of whether an existing party has a real or legitimate interest in pursuant the review;
- (c) the regulator has not established any grounds that would warrant the exercise of the Board's summary powers under section 39(4);
- (d) where the Code requires an existing access arrangement to be taken into account for the purposes of a revised access arrangement there can be no dismissal of an application for review by a party in circumstances where the access arrangement at least arguably contains errors of fact or law.

7. After the hearing on 22 December 2003 I was provided with a copy of the Contract. It has, been, and will continue to be, treated as confidential.

Application to exclude matters pursuant to section 39(4)

8. Section 39(4) of the Law provides:

"In a review of a decision under this section, the relevant appeals body may give directions to the parties excluding from the review specified facts, findings, matters or actions that the relevant appeals body considers should be excluded having regard to:

- (a) the likelihood of the decision being varied or set aside on account of those facts, findings, matters or actions;

- (b) the significance to the parties of these facts, findings matters or actions;
 - (c) the amount of money involved;
 - (e) any other matters that the relevant appeals board considers relevant".
9. The ERA's application in this case was primarily founded upon section 39(4)(b) that is, that the significance to Western Power of the matters that are the subject of its application for review were not of sufficient significance to warrant the time and expense involved in continuing with the application for review;
10. It appeared to be common ground between the parties that the test for whether a matter can be said to be of "significance" within the meaning of section 39(4)(b) must be an objective test.
11. In my view the question to be asked is whether, in all the circumstances, it can reasonably be said that the facts, findings, matters or actions involved in the application for review are of significance to the parties.
12. The term "parties" must, in my view, mean the parties to the application for review. The parties to Appeal No 3 of 2004 are Western Power, Epic Energy and the ERA.
13. In my view, even if this is true, there are a number of reasons why Appeal No. 3 can reasonably be said to be significant to Western Power (and possibly also to Epic) even in light of the execution by Epic and Western Power of the Contract.
14. As Western Power has submitted, the Contract only provides an entitlement to additional capacity above a certain limit stipulated in the contract if Western Power is prepared to undertake to acquire that capacity for a minimum term of 15 years. It is possible that Western Power may require additional capacity beyond that stipulated in the Contract. If that occurs, it is not difficult to envisage that such additional capacity may not be required for a minimum term of 15 years. In those circumstances Western Power may need to fall back on the terms of the access arrangement.
15. It should also be noted that the terms of the access arrangement may, over the life of the contract, be more advantageous to Western Power or become (over time) more advantageous to Western Power. In those circumstances Western Power is free to take advantage of the terms set out in the access arrangement.
16. It is also important to note that a process of revision of the access arrangement is currently underway pursuant to the terms of the Code. Section 2.46 of the Code provides that:

"The Relevant Regulator may approve proposed revisions to an Access Arrangement only if it is satisfied the Access Arrangement as revised would contain the elements and satisfy the principles set out in section 3.1 to 3.20. The Relevant Regulator must not refuse to approve proposed revisions to the Access Arrangement solely for the reason that the Access Arrangement as revised would not address a matter that sections 3.1 to 3.20 do not require an Access Arrangement to address. In assessing proposed revisions to the Access Arrangement, the Relevant Regulator:

- (a) must take into account the facts described in section 2.24; and
- (b) must take into account the provisions of the Access Arrangement."

17. In light of that provision, it is difficult to see how it can be said that an application to review an Access Arrangement which contains alleged errors of fact or law is not of significance to Western Power in circumstances where Western Power will also be affected by the revised Access Arrangements.
18. Western Power will also have an interest in the services contained in the Access Arrangement and the terms and conditions on which those services are offered if the contract comes to an end for any reason. In oral argument a scenario whereby the pipeline owner became insolvent and the administrator, liquidator or receiver disavowed the contract was canvassed. That is one possibility. Many other potential scenarios whereby the contract would come to an end are also possible.
19. Again, such a consideration militates against the conclusion that Western Power has no ongoing interest in the context of the Access Arrangement.
20. As to the ERA's alternative submission (outlined above) as counsel for Western Power pointed out, the terms and conditions upon which the services under the Access Arrangement are available would appear to be of significance to Western Power as a shipper of natural gas.
21. For these reasons, I am not persuaded that the matters raised in Western Power's application for review are not of ongoing significance to the parties and the application to exclude grounds 2-7 inclusive, 9-20 (inclusive), 22, 25-31 and 33 of Western Power's grounds for review is therefore refused.

Date for hearing

22. An issue also arises as to when Appeal No 3 ought to be relisted for hearing. Originally, Appeal No 3 was listed for hearing in November 2004. When the DBNGP was sold, the hearing was adjourned with the consent of all parties, in order to give the parties an opportunity to review the position and determine whether it would be necessary to appeal with the appeal.
23. Western Power has asked that Appeal No 3 be adjourned pending the outcome of the revisions process to the current Access Arrangement governing the DBNGP. It has submitted that:
 - (a) there are no longer significant differences between Western Power and the owners of the DBNGP as to the services that should be offered to shippers and the terms and conditions on which those services might be available. This is evidenced by the execution by Western Power and the owners of the DBNGP of a long term contract for the transport of gas through the DBNGP. Western Power is confident that, at least in broad terms, the position that it will advance to the to the ERA on the question of the type of services that should be offered by the owners of the DBNGP and the terms and conditions on which those services will be made available will have the broad support of Epic;
 - (b) the revisions to the Access Arrangement may therefore have the effect that further prosecution of Appeal No 3 is unnecessary; and
 - (c) the Board should therefore adjourn the hearing of Appeal No. 3 until the conclusion of the Revision Process. If this process rendered Appeal No. 3 unnecessary, this would have the significant advantage of avoiding the incurrence of further significant costs.
24. Epic Energy supported Western Power's application in this regard.
25. The ERA submitted that if its application under section 39(4) was not successful then Appeal No. 3 should be listed for hearing in March 2005.
26. The ERA pointed out that under the course proposed by Western Power it was possible that the revision process could be completed but if there were aspects of it that were unsatisfactory to Western Power, it would still be open to Western Power to proceed with Appeal No. 3. If it were successful to some extent in Appeal No. 3 the revision process would effectively "be unwound" because it would have been based on an access

arrangement that has subsequently been found to contain errors of fact or law and which would subsequently have been amended.

27. In deciding when Appeal No. 3 ought to be listed for hearing, the statutory exhortation contained in section 38 of the Law should be borne in mind. Section 38(3) of the Law provides that the Board must make its determination on the review within ninety days of receiving the application for review. Section 38(4) provides power to extend that period where the Board considers that the matter cannot be dealt with properly without the extension either because of its complexity or because of other special circumstances.
28. In this case the 90 day period has been extended significantly due to the complexity and importance of the matters the subject of the application for review. However, the power to extend time and the fact that time has been significantly extended in this case does not detract from the conclusion that Parliament intended that applications for review such as Appeal No. 3 be dealt with as expeditiously as possible.
29. It should also be noted that Western Power has already filed very comprehensive submissions in support of its application for review. Those submissions have already been considered in detail by the Board.
30. Waiting for the delivery of a draft decision in relation to the revised access arrangement is likely to involve significant (and at this stage indeterminate) delay to the finalisation of Appeal No. 3.
31. If Western Power is not satisfied with the draft decision in relation to the revisions process it may decide to proceed with Appeal No. 3. This would be likely to cause the ERA to put its review process on hold until Appeal No. 3 is finalised. If the board upholds all or part of Appeal No. 3 and the original access arrangement is amended, the ERA may need to revisit its draft decision and issue an amended draft decision, causing further delay and costs.
32. If Appeal No. 3 were to be adjourned until after the draft decision then there may also be logistical difficulties in reconvening the Board (involving the same personnel) and assembling the same counsel and advisers for the Parties especially as the hearing may not be held until late 2005 or some time in 2006.
33. The main disadvantage associated with listing Appeal No. 3 for hearing in March 2005 is that this will incur additional costs which may prove to be unnecessary if the revision

process for the access arrangement produces an outcome that is satisfactory to Western Power.

34. It can be seen that both courses of action carry advantages and disadvantages. However, on balance, I have decided that the most appropriate course is to list Appeal No. 3 for hearing for 7 days commencing on 3 March 2005.

Ruling

35. The ERA's application for orders excluding matters pursuant to section 39(4) of the Gas Pipelines Access (Western Australia) Act 1998 is dismissed.
36. Appeal No. 3 will be listed for hearing for 7 days commencing on 3 March 2005.

**R M EDEL
PRESIDING MEMBER
WESTERN AUSTRALIAN GAS REVIEW BOARD
APPEAL NO.3 OF 2004**

DATED: FEBRUARY 2005