

IN THE WESTERN AUSTRALIAN GAS REVIEW BOARD

No. 1 of 2004

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 National Gas Pipeline owned and operated by the Applicants for review

Application by:

**EPIC ENERGY (WA) NOMINEES PTY LTD**  
**(ACN 081 609 289) (Receiver and Manager Appointed)**

and

**EPIC ENERGY (WA)**  
**TRANSMISSION PTY LTD (ACN 081 609 190)**  
**(Receiver and Manager Appointed)**

Applicants

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**SUPPLEMENTARY DECISION ON EPIC'S OBJECTION  
TO WESTERN POWER CORPORATION'S SUBMISSIONS**

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Members: Mr R M Edel, Presiding Member  
Dr F J Harman, Member  
Mr E A Woodley, Member

Heard: 18 and 19 October 2004

Delivered: 20 October 2004

Appearances:

Counsel for Epic Energy Mr C L Zelestis QC and JA Thomson  
Counsel for Western Power Corporation Mr WS Martin QC and Mr PK Walton

Solicitors for Epic Energy Mallesons Stephen Jaques  
Solicitors for Western Power Corporation Jackson McDonald

**BACKGROUND**

1. On Thursday 14 October 2004 Epic Energy (WA) Nominees Pty Ltd (Receiver and Manager Appointed) (Administrators Appointed) and Epic Energy (WA) Transmission Pty Ltd (Receiver and Manager Appointed) (Administrators Appointed) (together referred to as **Epic**) made submissions objecting to certain parts of Western Power Corporation's written outline of submissions. Oral submissions on 14 and 15 October were supplemented by written submissions from both Epic and Western Power on 16 October 2004.

2. On Monday 18 October 2004 the Board delivered its decision and reasons for decision in relation to Epic's objections. This decision dealt with the over arching principles relating to the application and was designed to set a framework for the parties to make further submission on the specific objections.
3. Further oral submissions on the specific objections were made on 18 and 19 October 2004. Epic stated that in light of the Board's reasons for decision dated 18 October 2004 it did not press its objection to those parts of Western Power Corporation's submissions referred to in paragraphs 2, 4, 6, 9 and 10 of its outline of objections dated 15 October 2004. Submissions were therefore confined to paragraphs 1, 3, 5, 7 and 8.
4. One of the questions raised by counsel for Epic was the degree of generality or specificity that is required to satisfy the criteria which the Board outlined in its reasons dated 18 October 2004. In the Board's view, it is necessary for the Board to be satisfied that the relevant portions of Western Power's submissions could fairly be said to be a response to grounds of appeal or submissions in support of those grounds of appeal relied upon by Epic. In the Board's view, this necessitates a close examination of Epic's grounds of appeal, its submissions in support of those grounds and Western Power's submissions. Other documents, such as particulars of grounds, may also be relevant. The Board has conducted such an examination.

#### **Paragraph 1 of Epic's Objections to Western Power Corporation's Submissions**

5. Epic objected to paragraphs 19-28 of Western Power's written outline of submissions.
6. Western Power submitted that these submissions were responsive to numerous grounds raised by Epic in its appeal. Whilst the Board does not agree that paragraphs 19-28 of Western Power's outline of submissions fairly respond to all of those grounds claimed by Western Power, it is satisfied that those submissions fairly respond to certain grounds including 4(i), 4(m), 6(c), 12(a) and (b), 18(b)(i) and (ii), 18(h) and 18(j) of Epic's grounds of appeal. Further, paragraphs 19-28 of Western Power's submissions, in our view, fairly respond to paragraphs 23 and 39 in section A of Epic's written outline of submissions and paragraph 17 in section F of Epic's written outline of submissions.

#### **Paragraph 3 of Epic's Objections to Western Power Corporation's Submissions**

7. Epic objected to paragraphs 56-63 and 173-178 of Western Power's written outline of submissions. Western Power referred to a number of paragraphs in Epic's grounds of appeal as well as sections of Epic's written outline of submissions and the transcript that these passages were said to respond to.

8. In our view, paragraphs 56-63 of Western Power's written outline of submissions fairly respond at least to grounds 18(h), 18(b)(i) and (ii), 4(i) and 12(a) and (b) of Epic's grounds of appeal.
9. In our view, paragraphs 173-178 of Western Power's written outline of submissions fairly respond at least to grounds 7(a), 17(a) of Epic's grounds of appeal and paragraphs 22 and 23 in section F of Epic's written outline of submissions.

**Paragraph 5 of Epic's Objections to Western Power Corporation's submissions**

10. Epic objected to paragraphs 98-104 of Western Power's written outline of submissions. Western Power submitted that this section of its submissions responded to paragraph 38(e) in section F of Epic's written outline of submissions. Western Power also submitted that these paragraphs responded to submissions that Epic had made in relation to the proper construction of section 8.10 of the National Third Party Access Code for Natural Gas Pipelines Systems (**Code**) and that the material in question was further relevant to the enquiry that the Board must necessarily undertake in the event that errors are demonstrated in the reasons of the Regulator.
11. On their face, paragraphs 98-104 of Western Power's written outline of submissions appear to raise a separate ground of appeal in relation to paragraph 183 of the Regulator's Final Decision.
12. It is clearly not permissible for Western Power to raise a new ground of appeal in its outline of submissions in responding to Epic's written outline of submissions.
13. However, in our view the material in paragraphs 101-104 is fairly responsive to matters raised in section 38(e) of Epic's written outline of submissions and paragraph 13(d) of Epic's grounds of appeal.
14. Accordingly, it is our view that Epic's objection ought be upheld in relation to paragraphs 98, 99 and 100 of Western Power's outline of submissions, and to the words "the first error made by the Regulator is that" in paragraph 101 and the words "the second error is that" in paragraph 102.
15. In the Board's opinion, that material is not fairly responsive to any ground or submission raised by Epic and is not relevant to any consideration that the Board would need to embark upon in the event that error is demonstrated (alleging as it does a separate error by the Regulator). The Board will therefore not have regard to this material in considering Western Power's submissions.

**Paragraph 7 of Epic's Objections to Western Power Corporation's Submissions**

16. Epic objected to paragraphs 187, 190, 192-195, 197, 200-203, 205, 206-213, 216-233 of Western Power's outline of submissions. During the course of oral submissions, Epic made it clear that, following the Board's decision of 18 October 2004, the objection was not now pressed in relation to these paragraphs insofar as they referred to the report by Allen's Consulting Group.
17. In the Board's view, those paragraphs of Western Power's submission fairly respond at least to grounds 4(i), 12(a) and (b) and 13(h) and (i) of Epic's grounds of appeal, as well as paragraphs 79-82 of section E of Epic's written outline of submissions.

**Paragraph 8 of Epic's objections to Western Power Corporation's Submissions**

18. Epic objected to paragraphs 243-246 of Western Power's written outline of submissions.
19. In the Board's view paragraphs 243-246 of Western Power's written outline of submissions fairly respond at least to grounds 4(i), 12(a) and (b) and 13(h) and (i) of Epic's written outline of submissions as well as paragraphs 79-82 in section E of Epic's written outline of submissions.

**Decision**

20. The Board declines to uphold paragraphs 1, 3, 7 and 8 of Epic's objections to Western Power Corporation's written outline of submissions.
21. In relation to paragraph 5 of Epic's objection to Western Power Corporation's written outline of submissions, the Board upholds the objection in relation to paragraphs 98, 99 and 100 and in relation to the words "The first error made by the Regulator is that" in paragraph 101 and the words "The second error is that" in paragraph 102. The Board will not have regard to that material.

**MR ROBERT EDEL, PRESIDING MEMBER**

**DR F HARMAN, MEMBER**

**MR E A WOODLEY, MEMBER**

**WESTERN AUSTRALIAN GAS REVIEW BOARD  
APPEALS 1, 2, 3 AND 4 OF 2004**