

IN THE WESTERN AUSTRALIA ENERGY REVIEW BOARD

NO 2 of 2005

RE: AN APPLICATION FOR A REVIEW OF THE DECISION OF  
OF THE DECISION BY THE WESTERN AUSTRALIAN ECONOMIC  
REGULATION AUTHORITY MADE ON 15 DECEMBER 2005 TO  
APPROVE ITS OWN REVISED ACCESS ARRANGEMENT FOR  
THE DAMPIER TO BUNBURY NATURAL GAS PIPELINE

DBNGP (WA) TRANSMISSION PTY LTD (ACN 081 609 109) and  
DBNGP (WA) NOMINEES PTY LTD (ACN 081 609 289)

Applicants

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REASONS FOR DECISION CONCERNING  
THE COSTS OF THE WA  
ENERGY REVIEW BOARD

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**MEMBER** Mr R M Edel, Presiding Member

**HEARD**

**DATE OF DOCUMENT:** 10 August 2007

**Legislation referred to in Judgment:**

Gas Pipelines (Western Australia) Act 1998

**Background**

- 1 On 1 March 2007 the Board made an order with the consent of all parties to an application for review no 2 of 2005 (**Appeal No 2**) that the application be discontinued and that each party bear its own costs. The question of the liability of the parties to pay the Board's costs was reserved.
- 2 The parties have agreed amongst themselves that each party should bear their own costs of and relating to Appeal No 2.

- 3 The Board is now required to determine whether there should be an order that some or all of the parties pay the Board's costs incurred in relation to Appeal No 2.
- 4 The parties to Appeal No 2 (namely the Applicants, Northwest Shelf Gas Pty Ltd, Electricity Generation Corporation, Electricity Retail Corporation and APT Parmelia Pty Ltd) each filed written submissions in relation to the issue of whether the Board should make an order for the payment of its own costs by any of the parties to the proceedings. By agreement between the parties, no oral submissions were made on this subject to the Board.
- 5 The hearing in this matter was originally listed for 5 days commencing on 23 February 2007. Orders were made by the Board for the exchange of submissions and relevant documents. The process of the exchange of the submissions was completed on 5 January 2007. On 30 January 2007 the Board was notified that the parties had agreed that the proceedings should be settled and that, as part of the settlement, the proceedings should be discontinued.

### **Legislative provisions**

- 6 Regulation 9 of the Gas Pipelines Access (Western Australia) (Funding) Regulations 1999 (**Regulation 9**) provides that:
  - (1) In this Regulation:

'proceedings' includes proceedings that are commenced but discontinued or otherwise not brought to finality.
  - (2) The Board may fix an amount that represents the cost and expenses incurred by the Board in connection with the hearing and determination of the particular proceedings before it.
  - (3) The Board may determine:

- (a) which of the parties to the proceedings is liable for payment of the whole or part of an amount fixed under sub regulation (2); and
- (b) the manner in which and the time within which, payment is to be made'.

7 Section 38(10) of schedule 1 to the Gas Pipelines Access (Western Australia) Act 1998 (**the Law**) provides:

'The relevant appeals body may make such orders (if any) as to costs in respect of the proceeding as it thinks fit'.

8 It is plain that the Energy Review Board has power to make an order for payment of some or all of its costs or expenses incurred in relation to proceedings. This power clearly arises under Regulation 9 of the Gas Pipelines Access (WA) (Funding) Regulations 1999 and arguably also arises under section 38(10) of the Law.

9 In deciding whether or not to exercise the discretion contained in Regulation 9 of section 38(10) of the Law the Board ought to have regard to a variety of factors including those listed at paragraphs 25 and 26 of the decision of the Board in Application No 1 of 2004 by Epic Energy (WA) Nominees Pty Ltd (Receivers and Managers Appointed) (Administrators Appointed) and Applications 2 and 4 of 2004 by Northwest Shelf Gas Pty Ltd dated 20 April 2005. Those factors were also determined to be relevant to an exercise of discretion under Regulation 9 by the Presiding Member of the Gas Review Board (as it then was) in Application No 5 of 2004 - Southern Cross Pipelines Australia Pty Ltd v WMC Resources Ltd & Ors (delivered 11 May 2006). Those factors include the following:

- 9.1 The reasonableness of the conduct of the parties in proceedings before the Board.

- 9.2 The outcome of the proceedings before the Board.
  - 9.3 The need to ensure that there are no barriers to the resolution of proceedings before the Board.
  - 9.4 The extent to which the determination would be consistent with an approach whereby those for whose benefit the regulatory scheme exists should bear the costs.
  - 9.5 The extent to which there were any authorities capable of providing guidance to the parties on the issues arising in the proceedings.
  - 9.6 The importance of the proceedings in the public interest generally.
- 10 As pointed out by the Presiding Member in the Southern Cross decision the parties should not consider that they conduct proceedings before the Board without a real risk of an order being made that some or all of them bear the costs of the Board incurred in connection with the proceedings. If proceedings are delayed unreasonably by a party or parties, or if issues are raised which are unnecessary or have no real prospect of success or if the matter is not prosecuted diligently then circumstances will arise when the Board will exercise its power to make an appropriate costs order to recover some or all of the Board's costs. It ought to be borne in mind that those costs are otherwise borne by the State.
- 11 In the present case:
- 11.1 The Board is not aware of any unreasonable conduct, delay or lack of diligence by any party to the proceedings.
  - 11.2 The application gave rise to a number of matters of substantial public interest and importance, including the proper construction of sections 2.47 and 3.3 of the Gas Access Code as well as complicated technical issues concerning the likely ramifications of a changing gas specification.

11.3 The proceedings were settled within a reasonable period after the exchange of submissions (which exchange enabled the parties to re-assess the relative merits of their cases and the likely outcome of proceedings).

11.4 The settlement of the proceedings has avoided the cost and expense of a 5 day hearing.

12 I have therefore decided that there is no proper basis in the present case to make an order pursuant to Regulation 9 or section 38(10) of the Law to make any order that any party should bear some or all of the Board's costs of these proceedings.

### **Orders**

13 The Board makes no order as to its own costs incurred in or in connection with Application for Review No 2 of 2005.

**ROBERT EDEL  
PRESIDING MEMBER  
WESTERN AUSTRALIAN GAS REVIEW BOARD  
APPEAL NO 2 OF 2005**

DATED: 10 August 2007