



DAMPIER TO BUNBURY NATURAL GAS PIPELINE

PROPOSED ACCESS ARRANGEMENT UNDER THE NATIONAL ACCESS CODE

RESPONSE TO COURT DECISION PUBLIC VERSION

Submission CDS#3: The Process for the Sale of the DBNGP

11 December 2002

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1. Introduction

- 1.1 This submission is one of a number of submissions being made to the Regulator in response to the decision of the Full Court of the Supreme Court of Western Australia ("Court") on 23 August 2002 in relation to Epic Energy's legal challenge of the Regulator's draft decision issued on 21 June 2001 ("Court Decision").¹
- 1.2 In response to the Court's reasons for decision, the Regulator issued an Information Paper on 2 September 2002 which outlines the process the Regulator intends to follow in light of the Court's decision.
- 1.3 The Information Paper provides (as suggested by the Court Decision) that the regulatory decision making process should proceed in accordance with the Code subject to the Regulator allowing all interested parties a reasonable time to prepare and provide submissions to the Regulator which have regard to the reasons in the Court Decision and their effects on matters identified in the Draft Decision as being the reasons for requiring amendments to the proposed Access Arrangement.
- 1.4 As part of that process, the Regulator required all submissions to be provided to him by a specified date (being 8 November 2002).
- 1.5 The Regulator closed the public consultation period, notwithstanding the fact that the declaratory orders remained to be finalised.
- 1.6 Nevertheless, Epic Energy has elected to participate in the public consultation process because it is driven by expediency. It has proceeded on the basis that the Court's declaratory Orders will be as set out in paragraph 223 of the Court decision.
- 1.7 In doing so, Epic Energy has not had access to all the information which the Regulator has relied on to date. Furthermore, there is additional information which Epic Energy believes the Regulator should obtain but which Epic Energy has been unable to for one reason or another.
- 1.8 Therefore, because:
- (1) the Full Court has not yet made final orders in the above proceedings;
 - (2) the Regulator has not disclosed all information that he has relied upon or intends to rely upon; and
 - (3) Epic Energy has urged the Regulator to exercise his information collection powers under Schedule 1 to the Gas Pipelines Access (Western Australia) Act 1998 (WA) ("Act");
- Epic Energy reserves the right to file further submissions after the final form of declaration is known and the information is released.
- 1.9 The complete package of submissions being filed with the Regulator are as follows:

¹ Re Dr Ken Michael AM; Ex parte Epic Energy (WA) Nominees Pty Ltd & Anor [2002] WASCA 231
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1.10 The new submissions associated with the present submissions are as follows:

Identifier	Submission Title
CDS#1	Overarching Submission
CDS#2	Substantive submissions concerning the Regulator's assessment of the Reference Tariff and the Reference Tariff Policy
CDS#3	DBNGP Sale Process
CDS#4	The Deferred Recovery Account
CDS#5	Response to Draft Decision Amendments
CDS#6	Response to Third Party Submissions

1.11 As a final introductory matter, Epic Energy requests that it be afforded an opportunity to meet with the Regulator to discuss aspects of the information contained in this and the accompanying submissions. In this respect, Epic Energy will contact the Regulator to arrange a mutually convenient time for this meeting.

2. Purpose of this submission

- 2.1 As Epic Energy has already gone to great lengths to explain to the Regulator both before and following the release of his draft decision, Epic Energy's proposed Access Arrangement is intrinsically linked to and fundamentally underpinned by the circumstances surrounding the sale of the DBNGP². This is particularly the case in relation to the reference tariff and reference tariff policy components of the proposed Access Arrangement.
- 2.2 In essence, Epic Energy claims that those circumstances gave rise to certain expectations and understandings, not only on the part of Epic Energy but also, it believes, on the part of the other entities involved in the process relating to the sale of the DBNGP.
- 2.3 As a result, Epic Energy has maintained that the Regulator should accept an Access Arrangement that reflects those expectations and understandings because that is what is required on a proper construction and application of the Code as part of this assessment process.
- 2.4 The Court has also made it quite clear that it is open for the Regulator to accept such an Access Arrangement, particularly one that seeks to establish the initial Capital Base by reference to the price paid by Epic Energy for the purchase of the pipeline.
- 2.5 In carrying out this assessment process, the Court did not hold that considerations of economic theory should be accorded any overarching significance. Rather, the Court emphasised that it is the factors in s.2.24 (a)-(g) which are to be given weight as fundamental elements of the assessment process, and these may accommodate wider considerations than simply economic policy objectives, such as "embracing the protection of the interests of owners of pipelines", which may extend to "the assurance of fair and reasonable conditions being provided where [the] private rights [of pipeline owners] are overborne by a statutory scheme".³
- 2.6 The factual matters which Epic Energy submits should be recognised as having fundamental weight throughout the entire assessment process (subject to particular provisions of the Code) due to the operation of s.2.24 are outlined in detail in this submission. The detailed analysis of the Court's decision is set out in Submission CDS#2, filed simultaneously with this Submission.
- 2.7 Notwithstanding the above, in his draft decision, the Regulator required amendments to be made to the parts of Epic Energy's proposed Access Arrangement that were fundamentally underpinned by the circumstances relating to the sales process – that is the establishment of the initial Capital Base ("ICB") and the reference tariffs.

² For details of all relevant references see section 5.1 of this submission.

³ Reasons para 134, see also for example, paras 130-133, 179-184, 205-206, 223.

- 2.8 In particular, the Regulator required Epic Energy to amend its proposed Access Arrangement and Access Arrangement information document in the following material respects:
- In relation to the establishment of the ICB - he rejected Epic Energy's proposal that the value of the ICB be established by reference to the price paid by Epic Energy to the State when it purchased the pipeline in 1998 and in its place he required that it be set at a value of \$1,233.66million as at 31 December 1999, being equivalent to the Regulator's assessment of the DORC value of the DBNGP at the time.⁴
 - In relation to the reference tariffs and reference tariff policy – he rejected Epic Energy's proposal that the tariffs be those contained in Schedule 39 of the Asset Sale Agreement notwithstanding the fact that they could be justified having regard to one of the methodologies for tariff calculation as provided for in the Code.
- 2.9 In relation to the ICB amendment, a summary of the Regulator's reasons for rejecting Epic Energy's proposal are that⁵:
- He did not consider there to be any reason to value the ICB outside the range of values contemplated by section 8.11 of the Code, that is the range of values between DAC and DORC;
 - In particular, he did not consider there to be any reason to value the ICB in excess of a DORC value;
 - There were valid economic reasons for not valuing the ICB in excess of DORC value; and
 - The sales process for the DBNGP, as evidenced by the Information Memorandum, would have led to the reasonable expectation that firstly the asset valuation for the DBNGP under the Code would not be in excess of a DORC value and secondly, that it would have been a DORC value.
- 2.10 At the public forum held by the Regulator on 2 August 2001, Dr Ray Challen, then of Environmental Resources Management of Australia and OffGAR's principal consultant for the purposes of the Draft Decision, made the following comment:
- "In looking at this range of possible values for the initial capital base, the regulator had some key considerations. Firstly within the context of the Dampier to Bunbury pipeline, there are sound economic reasons to not value the pipeline at greater than the depreciated optimised replacement cost. Secondly, there were difficulties with a valuation based on a sale price. In particular, the absence of information available to the regulator that may indicate that the sale price had some justification in terms of a conventional and rigorous asset valuation methodology and the existence also of a range of factors that may affect the sale price of an asset such as the DBNGP including various strategic commercial considerations in the purchase of such an asset and also the fact that the regulated entity's cost of capital may*

⁴ Western Australia Independent Gas Pipelines Access Regulator Draft Decision: Proposed Access Arrangement Dampier to Bunbury Natural Gas Pipeline, dated 21 June 2001, Amendment 52, page B156.

⁵ Ibid, section 5.3.4.13, page B154.

actually differ from that considered by the regulator in the setting of tariffs. Thirdly, the regulator did give attention to the process of the Dampier to Bunbury pipeline sale and a very strong indication to prospective purchasers of the pipeline that the asset valuation established under the code would not be in excess of a depreciated optimised replacement cost valuation. It is largely on this basis that the regulator determined an appropriate value to be based on a DORC valuation and to be \$1,233.66 million, which is in fact based upon the DORC valuation presented to prospective purchasers of the pipeline.”

- 2.11 It is also important to note that at the public forum, Dr Challen also provided the following slide on this issue:

“Draft Decision

- *There is no evidence for purported agreements on tariffs.*
- *Epic Energy’s purported “regulatory compact” would not in any case have justified the proposed asset value.*
- *The Reference Tariff was revised in accordance with guidelines established by the Code, with which Epic Energy was familiar at the time of the DBNGP purchase.”⁶*

- 2.12 He subsequently clarified that slide in response to a further question from an attendee at the Public Forum in the following manner:

“I think I will answer the question related to the point you made on the slide that I presented, and that you say that if there was evidence for the regulatory compact as described by Epic Energy, it wouldn’t have made a difference anyway. That wasn’t quite what I indicated in the presentation. I said that if there was a regulatory compact as set out by Epic Energy, it wouldn’t necessarily have given rise to the capital base proposed by Epic Energy in their Access Arrangement.”⁷

- 2.13 It is of fundamental importance to note that these reasons for rejecting the use of a purchase price as the ICB were all overturned by the Court in the Court Decision. An analysis of the Court’s reasons on this issue is outlined in detail in Epic Energy’s Submission CDS#2, filed simultaneously with this Submission.
- 2.14 As the Full Court’s reasons make clear, there is nothing, on the proper construction of the Code, which would compel the conclusion that a DORC value should be selected for the establishment of the Initial Capital Base. The Regulator’s selection of DORC in the draft decision reflected a misconstruction of the Code and a “significant misapprehension” of his statutory function.⁸

⁶ Slide 29 of the Slide Show Presentation for the Public Forum.

⁷ Page 29 of Transcript of Public Forum

⁸ Reasons paras 204-207.

- 2.15 Another of the reasons advanced by the Regulator on the last occasion to reject purchase price in favour of a DORC value, viz the question of Epic's allowance for capital expenditure to accommodate increased quantities, has been shown to be in error.⁹
- 2.16 The other reason advanced by the Regulator on the last occasion for adopting a DORC value was that he purported to attribute to Epic an expectation that an amount in excess of DORC would not be allowed under the Code.¹⁰ As the Court noted, however, the basis for attributing that expectation to Epic could not be sustained:
- first and foremost, this was because it involved a serious misapprehension of the effect of the Code;
 - second, a DORC valuation could not be supported on the reasoning of the Draft Decision. At one point, the Regulator had said that the Information Memorandum in the sale "would have" led to such an expectation. In other parts, he said it only "may have". The latter statement was inconsistent with the former and provided no basis for the conclusion that Epic in fact held such an expectation.¹¹
 - third, it is clear, although not expressed in terms, that the Court regarded the Information Memorandum as providing an insufficient basis for concluding that Epic held an expectation of the kind which the Regulator attributed to it. In this regard the Court observed that Price Waterhouse's brief was confined to valuing the pipeline using DAC and DORC methodologies, that they went on to express the view that a DORC type valuation "would be supportable" under the Code, and that all such information was in any event the subject of clear and express disclaimers.¹² Just as the Court found that those materials alone did not warrant a finding that Epic reasonably expected a tariff of \$1 per GJ under the Code, it is equally clear that the Court rejected the suggestion that those matters provided evidence from which to conclude that Epic must reasonably have expected the pipeline to be valued at no more than DORC.¹³
- 2.17 To the extent that it may be relevant, the true position was that Epic expected a Reference Tariff which would be \$1 per GJ to Perth, based on the official statements of Minister Barnett and representations by the GPSSC.
- 2.18 The Full Court concluded that there was no basis on the materials before the Regulator on which it could properly be concluded that while Epic anticipated revenue from transmitting gas volumes that exceeded the existing capacity of the DBNGP, it had failed to provide for the costs of increasing the capacity of the pipeline. This error was the primary reason given by the Regulator for the critical decision not to accept that the price paid by Epic for the DNBGP represented a reasonable market valuation of the pipeline. A further direct

⁹ Reasons paras 208-211.

¹⁰ Reasons para 213.

¹¹ Reasons para 213.

¹² Reasons paras 198 and 213.

¹³ See generally Reasons, paras 198-200 and 213.

consequence was that the Regulator was unpersuaded that a reasonable market valuation for the DBNGP was in excess of DORC valuation.¹⁴ Hence, that finding coupled with the absence of any other material to suggest that a DORC valuation (at least which has been provided to Epic), means that it would again be an error for the Regulator to adopt a DORC valuation in establishing the initial capital base in his final decision.

- 2.19 In summary it is clear that none of the Regulator's reasons for advancing DORC over purchase price in the establishment of the Initial Capital Base under section 8.10, were valid. No other reasons were suggested or claimed by the Regulator on the last occasion for adopting a DORC value. Once the original reasons are shown to be invalid, and no others exist, and where a number of factors under s.8.10 point to the adoption of the purchase price, there is no basis for confining the Initial Capital base to DORC value. The insistence on DORC in those circumstances would serve to elevate the theory of economic efficiency to a position of paramountcy, which it does not have under the Code, and would reflect a repetition of the serious misapprehension under which the Regulator laboured in the Draft Decision.
- 2.20 What however, is clear from the Court Decision, is that Epic Energy may need to provide the Regulator with additional information if the Regulator is to be satisfied that he should rely upon the circumstances surrounding the sales process as the basis for accepting Epic Energy's proposed Access Arrangement. It is important to recognise that the Court merely referred to a couple of documents in making its observations and not the full gamut of material already provided to the Regulator. That is not surprising as the Court was not taken to that material in the hearing last November.
- 2.21 Having said that though, the reasons in the Court Decision make it clear that the Regulator must take into account the Service Provider's investment and legitimate business interests into account and give those factors weight as fundamental elements in assessing Epic Energy's proposed Access Arrangement. In this respect, Epic Energy refers the Regulator to its submission CDS#2 - Substantive submission on Reference Tariff and Reference Tariff Policy, filed simultaneously with this submission.
- 2.22 In the Court Decision the Court concluded that Epic Energy's investment and its legitimate business interests properly extend to the recovery of that price, together with an appropriate return on the investment.
- 2.23 Furthermore, it concluded that the purchase price paid is a relevant consideration to the establishment (not mere valuation) of the initial Capital Base, even where the purchase anticipated some monopoly profits. The Court also concluded that the significance of the purchase price paid is not to be evaluated by reference to, or denied on account of, economic notions of efficiency (see para 176 of Court Decision).
- 2.24 It is therefore critical for the Regulator to properly understand the circumstances surrounding the sale. As mentioned above, while Epic Energy has provided this explanation on numerous occasions in prior submissions, it

¹⁴ Reasons para 211.

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is important to provide it in a single source document and also because there is further relevant information that Epic Energy wishes to provide to the Regulator.

- 2.25 Accordingly, Epic Energy considers that it is necessary to provide the Regulator with the following information:
- A comprehensive explanation of Epic Energy's perspective of the circumstances surrounding the purchase of the DBNGP, including the stated Government policy at the time.
 - The relevance of certain documents produced as part of the sales process.
 - Other Bidders' perspectives of the circumstances surrounding the sales process, particularly in relation to the objectives of the sale and the tariff expectations under the proposed Code;
 - Certain users' perspectives of the circumstances surrounding the sales process, particularly their tariff expectations;
 - Details as to how Epic Energy derived the purchase price that formed the basis of its successful bid, including the financing arrangements entered into; and
 - The benefits that accrued to the State as a result of the pipeline sale.
- 2.26 This submission also contains an opinion from Epic Energy's regulatory advisors, KPMG Consulting, as to why the use of a price derived from a competitive tender process conducted by a Government is an appropriate valuation methodology.

3. Preliminary Issue – there is no written agreement or guarantee as to tariffs or ICB post 1/1/2000

- 3.1 As a preliminary issue Epic Energy considers it is important that an issue of potential confusion is clarified. This is particularly the case because of the comments of the Court in the Court Decision:

“Nevertheless, having regard to what is before this Court, the material before the Regulator appears to fall short of establishing the proposition that the State and Epic contracted on the basis, or in the expectation, that the primary Dampier to Perth tariff under the Code would be in the order of \$1.00 per GJ from 1 January 2000.”¹⁵

- 3.2 Epic Energy has been at pains to state to the Regulator throughout the regulatory approval process that it does not allege that there was any formal agreement or guarantee by the State that Epic Energy would be able to charge the tariffs set out in Schedule 39 of the DBNGP Asset Sale Agreement.¹⁶
- 3.3 The above comment of the Court appears to have been based upon reference to the Information Memorandum. The Court observed that the information memorandum appeared to have been directed to alerting tenderers that the existing tariff levels in 1997 could not be expected to be maintained and, by January 2000 when the introduction of the Code regime was expected, could well be down to \$1 per GJ to Perth. It considered that it was not apparent from the information memorandum (considered by itself) that a tariff level of \$1 would apply under the Code, rather than by the anticipated time of the Code’s advent.¹⁷
- 3.4 The Court also referred to a report prepared by Price Waterhouse in 1997, who were retained by the GPSSC. It considered that this report could not form the basis for any reasonable anticipation by Epic Energy that the tariff levels advocated by the State would be applied by an independent Regulator.
- 3.5 In responding to the matters raised by the Court, it is necessary to re-iterate that it dealt with these matters on a very limited factual basis. In fact, there is a wide range of factual material which is relevant to the propositions advanced by Epic Energy, and which should be considered by the Regulator. Further, Epic Energy emphasises that the Court was merely making tentative observations, not giving firm indications about how this matter should be considered by the Regulator when it was remitted for further consideration. This point was emphasised by Parker J at the hearing on 28 November 2002¹⁸
- 3.6 What is relevant is the basis upon which the State decided to sell the DBNGP (namely seeking the highest price, not lowest tariff) and on which it did obtain

¹⁵ Ibid, para 200

¹⁶ See, for example, Additional Paper 4: Regulatory Compact at page 2; Submission 1, at page 14; Submission 4 at paragraphs 2.1, 4.10 and 4.12; and Additional Paper DDS5 at paragraphs 2.6 to 2.10

¹⁷ Reasons, para 196.

¹⁸ This is discussed in detail in Epic Energy’s Submission CDS#2 – see section 4

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a very substantial benefit. Moreover, while the \$1/GJ to Perth tariff and Schedule 39 of the Asset Sale Agreement could not directly bind the Regulator, because it did not have contractual force as between Epic Energy and the State, the \$1/GJ to Perth tariff is certainly relevant to the application of the Code and is a consideration which should be given significant weight in determining the application of s.2.24 to the facts of this case.

- 3.7 It is also important to note that the Court itself noted the limited importance of, in particular, the Price Waterhouse Report ("PW Report"). At paragraph 198 of the Court Decision, it states:

"The Sale Steering Committee had also retained Price Waterhouse in 1997 to provide inter alia an opinion as to the valuation of the DBNGP on either (what was essentially though differently described) the DAC and DORC methodologies, and on the assumed basis that the Code had come into force. Price Waterhouse gave its opinion of a DORC equivalent value as at 31 December 1997 on this basis of \$1.124 billion, expressing its opinion that a valuation on that basis "would be supportable" to an independent regulator. Having reached that opinion, Price Waterhouse went on also to express its opinion that a gas transmission charge of around \$1 per GJ, commencing from 1 January 2000, "was reasonable and a supportable tariff", but added that its analysis "suggested that the tariff could lie anywhere within the broad range of \$0.71/GJ to \$1.12/GJ ... and that values between \$0.88/GJ to \$0.98/GJ could be argued". There were clear and express disclaimers in respect of all of this information by the Sale Steering Committee, and given the anticipated role of an independent regulator it is not apparent that information of the nature indicated as to tariffs at or from 1 January 2000 had either any level of assurance or provided a reasonable basis for expectation. Indeed, the range indicated by Price Waterhouse ought have made evident that there was uncertainty as to what might be expected under the Code, even were the independent regulator to apply a DORC type valuation."

- 3.8 That makes it quite clear that all the PW Report was aimed at achieving was demonstrating what tariff was supportable based on an ICB derived by reference to a DORC valuation. While it stated that a DORC derived value would be supported under the Code, the PW Report also made reference to the fact that a purchase price could be utilised. It can not be reasonably concluded that a DORC value was a maximum value that could be utilised for the purposes of setting the value of the ICB. Clearly Price Waterhouse did not, at the time, have a purchase price to work with. This is discussed at para 213 of the Court Decision as follows:

"... in addition to his conclusion noted above that there was no reason to consider a reasonable market valuation to be in excess of a DORC value for the unsupported reason discussed, at Part B: p 154 the Regulator gave two other reasons for concluding that there was no reason to value the initial Capital Base in excess of a DORC value. This was in the context of his consideration of s8.11. The first reason was what the Regulator described as "the economic arguments". The second reason was that the sale process for the DBNGP, as evidenced by the information memorandum, "would have led to the reasonable expectation that the asset valuation for the DBNGP under

the Code would not be in excess of a DORC value." The second of these other reasons is apparently founded on a factual conclusion as to the effect of the information memorandum that was part of the sale process. Earlier, I have dealt with what appears to be the only relevant part of that information memorandum. This is the inclusion by the Sale Steering Committee of an indicative valuation prepared by Price Waterhouse which was based upon a DORC valuation. As already noted Price Waterhouse had been briefed to prepare either a DAC type or a DORC type valuation. Price Waterhouse went on to express the view that a DORC type valuation would be supportable under the Code. I will not repeat what has been said earlier about this. However, at Part B: p 154 of the draft decision the Regulator suggests that this "would have led to the reasonable expectation" that the asset valuation would not be in excess of a DORC value. In Part A: p 18 - p 19 the Regulator deals with the same subject matter. There the Regulator expresses that view and, a few lines later, the different view that "this may have led to reasonable expectations" of a DORC valuation under the Code being likely. There is a significant difference between these two expressions of view, if they are to be relied on to support the conclusion that Epic had that expectation."

- 3.9 This issue is equally relevant to the issue of Epic Energy's expectations and understandings in relation to the tariff and tariff path.
- 3.10 It is equally important to note that the Regulator's conclusion that Epic Energy has an expectation that the ICB would be a value derived by a DORC methodology does not deal with Epic Energy's legitimate business interest in obtaining a return on the purchase price on the basis that the tariff and tariff path set out in Schedule 39 of the Asset Sale Agreement were reasonable, nor does it deal with other elements contained in the PW Report such as the calculation of the WACC.
- 3.11 As has been outlined to the Regulator before, and will be again in this submission, there was much more than the Information Memorandum alone and also the sale process itself which led to the creation of expectations and understandings from the sales process.
- 3.12 It should also be noted that the Office of the Auditor General prepared a report in May 1998 and which was tabled in Parliament in June 1998. A copy of that report is contained in **Attachment 6**.
- 3.13 The report referred to in paragraph 3.12 above ("Audit Report") was produced by the Auditor General on 20 May 1998 and was made pursuant to s.53 of the *Dampier to Bunbury Pipeline Act 1997*.
- 3.14 Section 53 provides:

" 53. Auditor General to report on certain matters

(1) The Auditor General must examine and report to the Parliament within 60 days of the settlement of the agreement contemplated in Part 3 on the following matters -

(a) any obligations, duties or liabilities imposed on the State;

(b) any indemnities or guarantees given by the State; and

(c) any other matter which arises out of or is connected with the matters mentioned in paragraphs (a) and (b).

(2) If in any year any indemnity or guarantee given under section 21(1) remains outstanding, the Auditor General may include in his or her report under section 95 of the Financial Administration and Audit Act 1985 a report on the extent of the liability of the State under those indemnities and guarantees.”

3.15 The Regulator will note the narrow terms of that section. The part that is relevant here is s.53(1)(b) which refers to “indemnities or guarantees” only – not representations or expectations or understandings or the sales process itself. The limited nature of the charter for the Auditor General is borne out in his report.

3.16 Unfortunately those who have been quoting passages from the Audit Report have been selective in their quotations and have failed to point out to the Regulator the basis on which the Audit Report was prepared. Epic Energy commends the Regulator to read the Audit Report in full. In particular the Regulator will note:

- *“Based on legal advice, it was concluded that the term “State” excludes AlintaGas and all other Government agencies because the Section only envisages guarantees or indemnities given at a whole-of-government level.”¹⁹*
- *“This report does not address the tender process followed in effecting the sale of the pipeline, nor the quantum of sale proceeds or costs incurred.”²⁰*
- *“The approach adopted primarily involved a review of the Asset Sale Agreement, aspects of the tenders and minutes of Gas Pipeline Sale Steering Committee (GPSSC) meetings. Complementing this has been the obtaining of legal advice and, interviews with key staff and consultants supporting the GPSSC, with key staff from AlintaGas and those agencies responsible for implementing the regulatory framework.”²¹*
- *“The obligations, duties and liabilities imposed on the State are essentially procedural matters which have all been satisfied and are reported in Appendix A.”²²*

3.17 The Regulator will note the qualifications provided by the Auditor General disclosing that essentially his was an in house investigation. On the face of

¹⁹ page 1 of the Audit Report.

²⁰ Op cit, page 2.

²¹ Op cit, page 2.

²² Op cit, page 4.

the documentation, as Epic Energy has said in the numerous papers put to the Regulator previously, there was nothing expressly stating a guarantee or otherwise in relation to the tariff. Hence it is not surprising that the Auditor General reached the conclusion that he did.

- 3.18 However, as has been previously indicated to the Regulator, Epic Energy needs to point out that it can categorically state that it was not approached by the Auditor General to provide evidence for or comment on his report nor did it provide any information to him. In particular, as the Auditor General expressly states himself, the Auditor General did not look at the sales process nor what may have occurred during the sales process. The Audit Report is an honest report.
- 3.19 However, the Regulator will well and truly appreciate, Epic Energy's argument has not been about assurances stated in writing, but about the way the sales process was conducted. To use the Audit Report in the way it has been referred to to date is mischievous. As a result the Audit Report has little relevance on this aspect.

4. The circumstances surrounding Epic Energy's purchase of the DBNGP

Information already put to the Regulator

- 4.1 It should be noted that Epic Energy has already provided the Regulator with extensive material on the circumstances surrounding the sale of the DBNGP. As indicated in Epic Energy's paper to the Regulator entitled Additional Information DD5 – DBNGP Sale Process which was filed on 30 November 2001, in addition to that document, this material can be found in the following documents:
- Access Arrangement Information (Amended Version) dated 28 July 2000 at pages 4, 13, 16 – 19 and 20 – 29;
 - Submission 1 (Confidential Version) dated 15 December 1999 at sections 3 – 7 and 10;
 - Submission 3 dated 17 March 2000 at paragraphs 4.3.4 – 4.3.5;
 - Submission 4: Regulatory Compact (Confidential Version) dated 12 May 2000 in its entirety;
 - Submission 5: Capital Base, Depreciation and WACC dated 12 May 2000 at paragraphs 2.2 – 2.3;
 - Additional Paper 3: Comments on AlintaGas' Fourth Submission dated 8 September 2000 at section 2 and paragraph 3.5 and 5.7;
 - Additional Paper 4: Regulatory Compact (Confidential Version) dated 8 September 2000 in its entirety; and
 - Additional Paper 5: Code Compliance (Confidential Version) dated 25 October 2000 at paragraph 4.11.
- 4.2 The circumstances surrounding the sale comprise the following:
- The status, as at the time of sale, of the regulatory framework that was to apply post 1 January 2000;
 - Statements by the Government and media releases both at the time of the sale and following it relating to the tariffs beyond 1 January 2000 in relation to Government Policy;
 - The actual process relating to the sale of the DBNGP, including but not limited to, the documentation provided by the State to interested parties and Epic Energy's dealings with the Gas Pipeline Sales Steering Committee; and
 - The expectations and understandings of entities involved in the sales process, particularly in relation to the expected tariffs and tariff path as from 1 January 2000.

Statements of Government Policy – Maximising Sale Price and Tariff Certainty

- 4.3 It is critical to first obtain a proper understanding of the Government's policy at the time of the sale. As Epic Energy has previously stated, a full appreciation of Epic Energy's proposed Access Arrangement, particularly in relation to the establishment of the initial capital base and the reference tariff and tariff path requires an understanding of policies being pursued by the Government of Western Australia, during 1997 and 1998, in the process of its selling the

DBNGP.²³ In addition to justifying the tariff and tariff path adopted by Epic Energy (in this respect see submission CDS#2), this information will go a substantial way to justifying not only the price paid by Epic Energy but also the use of that price for the purpose of establishing the initial Capital Base.

- 4.4 The clearest announcement of the Government's policy surrounding the sale of the pipeline is outlined in parliamentary debate involving the then Minister for Energy, Colin Barnett on 14 June 2000. A copy of the Hansard of that debate has been previously provided to the Regulator. Nonetheless, a copy is **attached as Attachment 1**. It must be noted that at no time has Mr Barnett resiled from those statements. Epic Energy assumes that the Regulator has spoken to Mr Barnett about these statements and he has not retracted them. At no stage has Epic Energy been made aware that Mr Barnett misled Parliament and hence the Regulator should regard them as highly relevant and persuasive.
- 4.5 While the letter sent to interested bidders by the Gas Pipeline Sales Steering Committee ("GPSSC") on behalf of the State on 8 September 1997 set out a number of objectives the State was seeking to achieve with the sale of the pipeline, the key objective of the Government was to maximise the sales proceeds. In addition, the State wanted to reduce the tariffs to \$1.00/GJ to Perth, to promote the expansion of the DBNGP and the development of the gas industry in the State. These were clear policy decisions of the State at the time of the sale. This has been confirmed in a number of statements made by the then Minister for Energy, Mr Colin Barnett.
- 4.6 **Attached as Attachment 2** are copies of these statements. An example is the following comment he made in Parliament on 14 March 2000 in response to the following question posed by Mr Eric Ripper, now the Minister for Energy, Treasurer and Deputy Premier:

Mr Ripper:

- (1) *is it the case that the Government when considering the sale to Epic Energy of the Dampier to Bunbury Natural Gas Pipeline, had three options before it: a high gas transmission tariff and high sale price; a medium gas transmission tariff and a medium sale price; and a low gas transmission tariff and low sale price?*
- (2) *If not, what options did the government have before it on the issues of gas transmission tariffs and pipeline sale prices?*
- (3) *Why did the government choose the high tariff-high sale price scenario for the sale of the DBNGP?*

Mr Barnett:

- (1) – (3) *I thank the Deputy Leader of the Opposition for the question. I do not have all the details in my head and he did not give me prior notice of the question. However, I can explain the broad background to the sale and what occurred. The bidders, including Epic Energy, were asked to bid on a number of features. One obvious one and **the most important component***

²³ See revised Access Arrangement Information, section 3.1, filed with Regulator on 28 July 2000.
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*was price; a second related to service standards and the like; a third related to the price, not only what they would pay for it but the cost of the transport of gas; a fourth related to commitments to expanding the pipeline capacity. Therefore **the price paid for the pipeline was by far the most important criteria.** However there were three other components: first was the bid of \$2,407m; the second was a commitment to spend some \$875m on effectively expanding and duplicating the pipeline capacity over an eight year period; and the third related to the transport tariff. At the time of the sale, the cost of gas was \$1.19/GJ to the south west. Under the bid put in by Epic, the price would fall from \$1.19 to \$1.10 to \$1 and that has happened; in other words, the bid was composed of price, top dollar, an expansion commitment on investment and a 20% reduction in tariff. I put in place regulations prior to Christmas to bring in the regulated tariff of \$1. **Yes it is true that we could have traded off. We could have gone back to Epic and said that we would take a lower price for the State in exchange for giving transporters of gas a lower tariff.....***

***we made the judgement that a high price for taxpayers and the community of Western Australia was the first and most important component.** If at the same time we doubled the pipeline capacity and delivered a 20% cut in transport tariffs, it was a very good deal.”²⁴ [emphasis added]*

- 4.7 This has been confirmed by the GPSSC in its report on the sale of the Dampier to Bunbury Natural Gas Pipeline submitted to Parliament in May 1998 where the following comment is made in relation to the basis for the sale methodology adopted by the State:

”A trade sale would be likely to generate greater sale proceeds for the State than an initial public offering or combined trade sale/initial public offering given the strategic infrastructure investors would attribute greater strategic, financial and business value to the asset than institutional and retail investors.

A four phase trade sale process would maximise competition, and therefore sale proceeds, from the process by involving a broad range of bidders who would utilise a diverse range of approaches in seeking to acquire the DBNGP.”²⁵

- 4.8 The actual process relating to the sale of the DBNGP will be detailed later on in this submission. However, it is important to provide a short summary to properly understand the basis for the Government’s policy decisions. The first steps toward sale of the DBNGP were announced by the Minister for Energy in August 1996. A steering committee was to be set up to examine a range of issues, including whether the sale would be a full or partial privatisation. The steering committee which, for the substantive part of the process, comprised the chief executive officers of the Treasury, the Office of Energy and the Department of Resources Development, was to report to the Minister for Energy. Later, legislation authorising the sale and dealing with procedural

²⁴ Hansard, 14 March 2000, pages 4962 and 4963

²⁵ GPSSC Report on the Sale of the DBNGP Submission to Parliament, May 1998, page 8. A copy of the report can be found at Attachment 4

matters was introduced into Parliament. The form of the sale process was also determined.

4.9 The sale of the Pipeline was, as the then Minister for Energy has observed, a “large and complex transaction”.²⁶ A number of significant policy issues had to be dealt with including guaranteed third party access, future competition in pipeline transportation and in downstream markets, expansion of pipeline capacity to meet the needs of industry in the State, lower gas transportation tariffs, and protection for consumers. These policy issues were matters for the Government, and for the Minister, who had overall control of the sale process.²⁷

4.10 Bids for the DBNGP were to comprise a bid price, proposed tariffs and a tariff path for the purpose of enabling the Gas Pipeline Sale Steering Committee (“GPSSC”) to ascertain whether bidders could deliver reductions in tariffs sought by the Government in a way that was consistent with receiving an acceptable return on investment in the DBNGP and maintaining future financial viability. Bids were also to indicate plans for Pipeline expansion. As the Minister for Energy later explained:

“The Government did not want to sell a pipeline that never expanded”.²⁸

“Attachments to the bid were included to be scrutinised so that the bidders could be questioned by the steering committee to ensure the bid stacked up; that is, the bid price was consistent with reasonable future tariff changes and the expanding capacity of the pipeline.”²⁹

4.11 Gas transportation tariffs were a critical matter. There was uncertainty about future tariffs due to the foreshadowed introduction of the third party access regime of Code, which had not at the time of sale been brought to the Parliament of Western Australia for consideration (see paragraphs 4.29 et seq below).

4.12 In addition, the Code was new to Australia and there was very little publicly known about how it, or third party access regulation in general for that matter, would operate (although even with the limited number of regulatory decisions that were publicised at the time of the sale, the values applied by Epic Energy in deriving the total revenue for regulatory purposes was consistent – this is discussed in more detail below (see section 5)). It may well be that the Government or those developing the Code had something in mind, but it was not in the public domain. Epic Energy and the other bidders only had what was in the public domain to go on. Epic Energy dealt with the Government, the one who would have the best idea as to what was intended or expected, and it relied upon what the Government represented to it. After all, it was the State that was bringing in its own legislation, legislation that was to contain

²⁶ Hansard, 14 June 2000, page 7655.

²⁷ Hansard, 14 June 2000, pages 7655, 7661 and 7662. The Minister advised Parliament: *“The sale process was overseen by me, as minister, and reporting to me was a gas pipeline sale steering committee which consisted of the chief executive officers of Treasury, the Office of Energy and the Department of Resources Development”* (Hansard, 14 June 2000, page 7662).

²⁸ Hansard, 14 June 2000, page 7656.

²⁹ Hansard, 14 June 2000, page 7656.

differences from that to apply in the Eastern States of Australia. In particular, the Government had foreshadowed that it would have its own regulator in order to not be linked to the Eastern States' regulator's decisions and to ensure that development in the State was encouraged³⁰.

- 4.13 It should also be noted that what was in the public domain as to how the Code would be construed and applied, clearly demonstrated that it would be flexible and enable the specific circumstances of a particular pipeline to be taken into account. This is best demonstrated in the Policy Information Paper for the National Gas Access Regime, prepared by the Gas Reform Implementation Group in July 1997. It provides as follows:

"The pricing principles provide a high level of discretion and flexibility for the regulator to take into account pipeline specific circumstances. The principles relating to valuation of assets and depreciation for instance, are designed to provide guidance for regulator in approving reference tariffs rather than dictating a single outcome.

.....

*The full spectrum of methodologies, including past asset valuations and tariffs, is available to the regulator to assess the initial capital value of an asset."*³¹

- 4.14 The Government knew that any uncertainty about tariffs could severely impact on the price that bidders would be prepared to pay for the DBNGP. In addition there was also the risk to the Government that the purchaser might ultimately obtain a higher tariff than the Government had spent some time prior to the sale saying it was expecting.

- 4.15 The tariff was therefore one of the policy issues that the Minister had to resolve as part of the sales process. As the Minister said in Parliamentary debate on 14 June 2000:

*"We sold [the DBNGP] subject to a range of policy issues designed to guarantee the business continued and to deliver a 20 per cent cut in tariff which was put in place by me by regulation. A host of matters were contained in a schedule that would guarantee protection for consumers. It was a sale that would guarantee other people multi-user third party access under the National Third Party Access Code for Natural Gas Pipeline Systems."*³²

- 4.16 The Government's policy decision was quite clear – it wanted tariffs to be around \$1/GJ to Perth.³³

³⁰ Hansard, 16 September 1998 at pages 1475 - 1476

³¹ Policy Information paper – National Access Regime for the Natural Gas Industry, Gas Reform Implementation Group, dated July 1997, page 12.

³² Hansard, 14 June 2000, page 7655.

³³ See statements by the Minister for Energy in the debate on 14 June 2000:

"The Government's position, which was reflected in various announcements and all the tender documentation, was that the price of gas transport should fall by 20 per cent at the point of sale from \$1.20 to \$1.11, then to \$1." (Hansard, 14 June 2000, page 7656.)

- 4.17 The Government sought to ensure that bidder's bids were assessed on both price and compliance with the tariff policy. Bidders were required to set out their tariff structure in their bids and this tariff structure then formed part of the Asset Sale Agreement as Schedule 39.
- 4.18 Subsequently, the GPSSC subjected the bids it received to close scrutiny to determine whether the proposed tariff structure and the proposed purchase price, along with the bidder's financing structure meant it would be viable. Epic Energy's bid was understood by the Minister, and was subjected to such scrutiny. As the Minister for Energy explained in the debate on 14 June 2000:

*"Epic Energy's proposed tariff would come down to \$1, so it complied with the policy position of the Government. There was no argument about that; it would be \$1 and that is why I regulated for \$1. It foreshadowed that it would be proposing tariff increases of two-thirds of the consumer price index in subsequent years. Two-thirds of CPI means that if inflation is 3 per cent, tariffs might go up 2 per cent. That is what it foreshadowed. With regard to a long-term price strategy that it might pursue, I have said publicly that I was comfortable with that, because it implied that the real cost of gas transport would continuously fall. It had fallen 20 per cent by the sale process and it would continue to fall year after year by one-third of CPI, because its increase could be only two-thirds."*³⁴

*"They were required to do that to demonstrate to the gas sale steering committee that, given the price they bid and the price they proposed as tariffs, they would receive an acceptable rate of return on the asset. In other words, they had to demonstrate that they could not only buy the asset, **but also operate it profitably and not expose anyone to an unforeseen risk of failure of the business or unanticipated demands for tariff increases.**"*³⁵
[emphasis added]

"In its requirements on bidders, the sale steering committee, through its information memorandum and whatever other documentation was involved, also required that people provide indications on such issues as tariff, expansion capacities and the like. The reason for that was to check the veracity and the robustness, if one likes, of the bid. The Government would not accept a bid which could not be sustained. Therefore, it would have to know what that bid implied, and the bidders would have to demonstrate a proposed scenario of tariffs which would stack up and demonstrate to the sales committee that such a scenario of tariffs would give a return which would enable the money, the \$2 407m, to be serviced. In other words, the Government was not about setting up the gas industry in this State for a

"As I explained, a number of policy matters during the sale process were reflected by the sale steering committee. The major policy matter was the decline in tariffs, which was subsequently regulated from \$1.20 to \$1." (Hansard, 14 June 2000, page 7660.)

"The Government's policy decision that bidders would bid on a set of conditions was put out to all bidders. The prime condition was that transport tariffs would fall to \$1 for the national access code." (Hansard, 14 June 2000, page 7661.)

³⁴ Hansard, 14 June 2000, page 7657.

³⁵ Hansard, 14 June 2000, page 7655.

shock. On gas tariffs, it wanted to be satisfied that the bidders' scenario was compatible with the price. It also wanted to be satisfied about capacity.”³⁶

- 4.19 The Government was quite definite that it was not interested in tariffs either lower or higher than the policy decision of \$1/GJ to Perth. As the Minister put it, they only wanted people bidding on price:

*“Mr BARNETT: And we made a decision to drop it to a dollar. That is the commitment. It was possible to bid a high price and a high transport charge or a low price and a low transport charge. Surely members opposite do not think I did not realise that in 1997. We did not want people bidding on price and transport; therefore, logically, the Government made a policy decision on the transport charge which was to go from \$1.20 to \$1. Members opposite could argue we should have made the charge 90¢. That would be a fair argument. Right or wrong I made a policy decision, supported by Cabinet, that we **reduce the tariff from \$1.20 to \$1 and invited people to bid against that.** We wanted them to bid against one area on price. We did not want them bidding on a range of criteria.*

Mr Ripper: They would be expecting to earn a rate of return on their investment over a considerable period, so they would have understood that policy decision would last.

*Mr BARNETT: Why does the member for Belmont think they were not challenged? That is why the sale steering committee required people to indicate a scenario, not a contractual issue, for tariffs. **We wanted to ensure their bid was sustainable.** These are not my calculations; they are based on Epic's financial modelling. Epic prepared a model of the value of the pipeline, its contracts and its prospects for growth, and fed in assumptions about the Australian dollar, interest rates and many other factors. It came up with a figure - I do not know whether it added to it - of \$2 407m based against a certain fall in tariff from \$1.20 to \$1.”³⁷ [emphasis added]*

- 4.20 The Minister made it very clear that he and the GPSSC were satisfied that what Epic Energy put forward in Schedule 39 met the policy criteria in relation to maximising the sale price, the level and path of the tariff and sustainability.³⁸ In fact he went further and indicated that a bid of less than \$1/GJ to Perth was not acceptable to the Government, as it would represent a moving of the goal posts:

“The Government's policy decision that bidders would bid on a set of conditions was put out to all bidders. The prime condition was that transport tariffs would fall to \$1 for the national access code. One does not, at the conclusion of a sale process, suddenly change the rules of the game. To

³⁶ Hansard, 14 June 2000, page 7660.

³⁷ Hansard, 14 June 2000, page 7662.

³⁸ See the Minister for Energy's comments in the debate on 14 June 2000 quoted above and also where he said, “[Epic] came up with a figure - I do not know whether it added to it - of \$2 407m based against a certain fall in tariff from \$1.20 to \$1. Epic justified that to the sale steering committee based on a price scenario with which we were compatible.” (Hansard, 14 June 2000, page 7662.)

entertain bids on a range of issues or criteria would have changed the rules of the game and would have aborted the sales process.”³⁹

“Mr Ripper: You are keeping secret the potential for having accepted a lower price for the pipeline and a lower transport tariff. You are not revealing the trade offers the Government had before it on this matter.

Mr BARNETT: I was not conducting a sale process that was subject to alteration halfway through.”⁴⁰

- 4.21 Nor was a bid of higher than that set out in Schedule 39 of the Asset Sale Agreement acceptable:

“Epic justified that to the sale steering committee based on a price scenario with which we were compatible. Had Epic said it would pay \$2 407m, but it would need to increase gas transport by 10 per cent a year, clearly, its bid would not have been accepted. That was the process.”⁴¹

- 4.22 Epic Energy has sought with the Access Arrangement to do no more than was contained in Schedule 39 to the DBNGP Asset Sale Agreement, with some refinement coming from experience. As the Minister for Energy himself acknowledged:

“I do not have any problem personally with what Epic proposes, . . . ”⁴²

- 4.23 **Attached as Attachment 3** are a series of press releases and pages from Hansard which corroborate the above comments. They comprise:

- Media Statements from Colin Barnett, Minister for Energy, dated 22 May 1997, 24 July 1997, 7 September 1997, 3 March 1998;
- Hansard, Debate on the Gas Pipelines Access (Western Australia) Act 1998, 16 September 1998;
- Hansard, answer to question from Mr Ripper, 14 March 2000;
- Hansard, 16 March 2000;
- Hansard, second reading speech of the Dampier to Bunbury Pipeline Bill 1997, 11 November 1997, pages 7523 – 7524.

- 4.24 It is also important to draw the Regulator’s attention to Mr Barnett’s second reading speech in relation to the Gas Corporation (Business Disposal) Bill 1999, where he made the following comment about privatisations:

*“Some key issues must be considered; one clearly is the sale process on behalf of the State. The Government is keen to maximise returns; it is not the sole objective, but it must be a prime objective in **any** privitisation.”⁴³*
(emphasis added)

³⁹ Hansard, 14 June 2000, page. 7661.

⁴⁰ Hansard, 14 June 2000, page 7662.

⁴¹ Hansard, 14 June 2000, page 7662.

⁴² Hansard, 14 June 2000, page 7658.

⁴³ Hansard, legislative Assembly, 16 September 1999, page 1324

- 4.25 While this comment is admittedly in relation to the privatisation of the remainder of AlintaGas following the sale of the DBNGP, it is important to note the fundamental importance placed by the State on the objective of achieving a high price in any privatisation. Given the above comments, this clearly applied in the case of the sale of the DBNGP.
- 4.26 In addition to seeking to maximise the sale price, it could also be argued on the basis of Ministerial Statements made at the time of the sale and subsequent debate in Parliament, that the Government thought that a \$1.00/GJ tariff to Perth was a reasonable outworking of the Code and that the need to have an Access Arrangement approved by the Regulator was to ensure that tariffs were not increased.
- 4.27 This is apparent from the following statements made by the then Minister for Energy, Mr Colin Barnett:
- "The sale provision addresses the issue of what happens to transport charges post 1 January 2000. A schedule [Schedule 39] requires that any increases will be below the consumer price index. Therefore, one will continue to see falling real transport charges.*
- Also, on 1 January, this area all comes under the national access code, and any application for **an increase in charges** would need to be justified...."⁴⁴*
[emphasis added]
- 4.28 This last statement from Mr Barnett also shows clearly that the Government was expecting the tariff and tariff path in Schedule 39 and that the real reason for the Code was to ensure that prices could not be increased without appropriate justification.
- 4.29 As has been stated above, the regulatory regime at the time of the sale of the DBNGP was uncertain. Given that the Government's prime focus was on maximising the sale price, certainty was required.
- 4.30 As also stated above, the Government stated categorically on at least 14 June 2000⁴⁵ that the Government made a policy decision that the tariff should be \$1.00/GJ to Perth⁴⁶.
- 4.31 Mr Barnett has also said, as quoted in the Amended Access Arrangement Information⁴⁷, the role of the Regulator is to be a regulator, not to be a price or policy maker, that is the province of the Government that has to reflect a range and a balance of economic and social objectives.
- 4.32 That position was made very clear in the debates on the *Gas Pipelines Access (Western Australia) Bill* by the then Minister for Energy, Mr Barnett, when he said:

⁴⁴ Hansard, Legislative Assembly, 10 March 1998, page 333 and 334

⁴⁵ Epic Energy Additional Paper No. 4: Regulatory Compact at paragraphs 3.7, 3.8 and 3.9

⁴⁶ see also Epic Energy Additional Paper No.4: Regulatory Compact at Attachment 3, p.20

⁴⁷ See Amended Access Arrangement Information dated 28 July 2000 at p.28

"The code is about the rules of the game; it is as simple as that. The regulator, whether it be the Australian Competition and Consumer Commission or anyone else, must administer the rules of the game to resolve disputes, help set tariffs, if that be the case, and make sure the system is open and fair. The role of the regulator is not to set policy. That is the difference.

"What I fear will happen with the ACCC, and certainly given its prior conduct I have some justification for this, is that it will effectively become the energy policy maker of Australia. That perhaps does not matter so much for the other States because they have mature grids and pipeline systems; their systems are developed; and in fact they have 30 per cent excess capacity in power generation. WA is the only State that needs to do some innovative things to its own energy system. If the ACCC were made regulator, I might as well hand in the portfolio of Energy now and the member opposite might as well wipe it off his shadow portfolio list because we would never again have an effective Minister for Energy. We are not about to do that because we have too much to do in the Energy portfolio."⁴⁸

- 4.33 The Government was clearly concerned how the Code would or should be applied and hence determined that the State should have its own regulator in order to apply the Code in a way best suited to the State. An example of this appeared later in the debate where Mr Barnett said:

"Members should not underestimate the potential at all. The member for Albany would like to see gas delivered to Albany, and that is probably subeconomic. Gas delivery into the mid-west is subeconomic, and that is why the Government is assisting Western Power in that provision. Does the member for Cockburn think that arrangement would pass through the Australian Competition and Consumer Commission and the National Competition Council? Could we have gained approval for the goldfields pipeline through the ACCC? No way. We gave rights and privileges to investors in the pipeline. That would not happen under the Australian Competition and Consumer Commission.

"I accept the rules of the game for open, third party and non-discriminatory access. I am happy for that to be regulated in terms of fairness between players. However, I want that done in the context of energy policy in this State. As a Government, we will not cede energy policy to the ACCC.

"Other issues are involved. We have uniformity of regulation requirements. We have agreement Acts and issues which need to be honoured and respected. A local regulator will need to take into account the circumstances of the State. We have a small grid, great development potential and the need for new infrastructure. An ACCC regulator looking at a Sydney and Melbourne market will not be attuned to our circumstances."⁴⁹

"Essentially, we make a clear distinction between policy in a growing energy system and the right of a State Government to set policy and achieve

⁴⁸ Hansard, 16 September 1998 at p.1475

⁴⁹ Hansard, 16 September 1998, p.1475-1476

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*development for the State. The regulation and setting of the rules of the game is for an independent party. However, its role is not to set policy and take a proactive role, as the ACCC is inclined to do. This is the right decision. The Government opposes the amendments of the Opposition. We will have a regulator working in Western Australia close to WA industry and government. He will act consistently with the policy set by the State Government, which is achieving 60 per cent of overall industry investment and has an expanding energy industry. The Opposition would simply hand over responsibility to the feds and give up the right to control an independent and positive development policy in this State.*⁵⁰

- 4.34 In the same debate Mr Barnett later demonstrated that he was not expecting a result from the WA Regulator similar to that which prevailed in Victoria shortly after the DBNGP sale. The following quotation shows that in introducing the *Gas Pipelines Access (Western Australia) Bill*, the WA Government was not intending that it produce tariffs lower than what had been determined as a policy decision for the DBNGP (that position has been supported by Mr Barnett's recent submission to the Regulator⁵¹):

"Mr GRILL: The member for Cockburn is correct: This clause brings Western Australia within the ambit of the national scheme. I found it amazing to hear the minister say that to appoint an interstate regulator or the ACCC would detract from his powers and responsibilities. I find that hard to believe. His powers and responsibilities are set out clearly in this legislation.

*Mr Barnett: One recent example is the Victorian Government's decision to privatise its gas utility, which is now under threat because of an ACCC ruling. Imagine trying to get a goldfields gas pipeline under way; it would not happen.*⁵²

- 4.35 In this case the Government set the policy framework back in 1998 to not only seek to maximise the price paid for the purchase of the DBNGP but also to engender certainty that the tariff on the DBNGP, as owned by Epic Energy, would be as set out in Schedule 39 of the Asset Sale Agreement.
- 4.36 The reasonableness of Epic Energy's expectations as to the tariffs beyond 1 January 2000 is given further credibility by the quantum of the reduction in tariffs from 1997 to 1998. As has been referred to above, the tariffs were to be reduced over 20% from 1997 to 1 January 2000. **Attachment 22** contains a detailed history of the tariffs. Even if the Regulator were to disregard the position stated above in relation to the Government's policy on tariffs, in light of this reduction from 1997 to 1999, a further 25% reduction as proposed by the Regulator in his draft decision could not have been reasonably foreseen.

⁵⁰ Hansard, 16 September 1998, p.1476

⁵¹ At page 3 of his submission dated 19 September 2001 to the Regulator, Mr Barnett said:

"Having said that, I might observe that most within the industry, including myself, had an expectation that the regulated tariff would be reasonably close to the \$1 per gigajoule figure for gas transmission to the Perth metropolitan areas. It was a figure that was generally considered to be "in the ball park". Some observers may have suggested it should be lower. I expected the regulated tariff to be in the broad range of \$0.90 to say \$1.05."

⁵² Hansard, 16 September 1998, p.1479

- 4.37 As a final issue on the Government's policy as to tariffs, comment has also been made about whether the tariff of \$1.00/GJ was to apply at a single point in time at 1 January 2000 or whether it was to apply as from 1 January 2000 as a result of the application of the Code. The Court itself said that it was possible to interpret the information memorandum as saying that the Government predicted that a tariff level of \$1/GJ to Perth might apply prior to the introduction of the Code, rather than by reason of the application of the Code.
- 4.38 Epic Energy rejects this interpretation for a number of reasons. First, as stated above in paragraph 4.36, given the reduction in tariffs during the period 1997 to 1 January 2000, it would be illogical for the conclusion to be drawn that the tariff of \$1.00/GJ to Perth were not to apply beyond 1 January 2000.
- 4.39 Second, such a conclusion is also inconsistent with the comments made by the Government and the GPSSC at the time of the sale.
- 4.40 Mr Barnett said in Parliament on 14 June 2000, that the transitional tariff path set out pursuant to the DBNGP regulations was the lowest sustainable level which could be expected prior to the introduction of the Code.⁵³
- 4.41 Further, in August 1997, Mr Ian Baker, the then chairman of the GPSSC gave a presentation at a forum hosted by the WA Office of Energy on behalf of the Gas Transmission Consultation committee. Mr Baker presented the GPSSC view on its requirements on a tariff profile, in a slide reproduced below. This confirmed that the tariff of \$1/GJ was to commence under the Code regime, and that the Court was not correct in thinking that the information memorandum may have been suggesting that the relevant tariff path would have reached \$1 per GJ to Perth prior to the commencement of the Code.

Tariff Cap Progression (T1 - Full Haul - 100% Load) (illustrative)

	To 31.12.97	1.1.98 to 31.12.98	1.1.99 to 31.12.99	From 1.1.2000
Dollars per GJ				
Reservation	1.03	0.97	0.85	?
Commodity	0.23	0.27	0.27	?
Total	1.26	1.24	1.12	1.00?
Basis	EIG Method	EIG Redetermination	Interpolate	Expected NAC (IGRT)*

* Indicative Global Reference Tariff

National Access Code

- 4.42 As well, to the extent that it may be suggested that the tariff of \$1/GJ was a starting point under the Code regime, which could be lowered as part of a further transitional process, it must be said that this ignores the commercial reality of the situation. The sale of the DBNGP was the privatisation of the largest infrastructure asset in Western Australia. The purpose of the sale process and the Code was to create a certain and stable environment within

⁵³ See Hansard, 14 June 2000, pp 7660, 7665.

which the DBNGP could be operated by a private commercial operator. It is entirely contrary to that purpose to suggest that the tariff level promoted by the State Government on all occasions leading up to the sale of the DBNGP was the end point of a transitional phase, rather than the commencement of a long term independent period of regulation. Otherwise, the outcome of the sale of the DBNGP would have been entirely uncertain. That was not a result which was intended by the State Government, as is evident from the quote set out above from Minister Barnett.

- 4.43 Also, there were clear expectations from users and other bidders that the tariff of \$1.00/GJ to Perth was to be the starting point under the Code. This is elaborated upon in sections 8 & 9 of this submission.
- 4.44 Lastly, the GPSSC was required to evaluate all bids to ensure that, based on the price paid and the proposed tariffs, the bidders would receive an acceptable return on the DBNGP. In other words, bidders had to demonstrate that they could not only buy the DBNGP, but also that they could operate it, expand it and not expose anyone to an unforeseen risk of business failure or increased tariffs.⁵⁴
- 4.45 The desire of the Government to foster the expectation of a stable regulated environment prompted it to obtain the report from Price Waterhouse concerning the possible outcomes of independent regulation of the DBNGP. This occurred at a time when the terms of the Code had not yet been finalised. The Price Waterhouse report was intended to provide independent justification and approval of the statements made by the Minister for Energy concerning the appropriate tariff levels which might apply under independent regulation.
- 4.46 The Price Waterhouse report itself acknowledges this. It says:
- "In performing our work we have had to consider the implications of the present pricing regime on the gas transmission company's ability to achieve an appropriate level of return taking into account the likely financial and operating implications for a new pipeline operator. In addition, the objectives of complying with the Draft National Gas Code...as specified by the Office of Energy, and the significant reduction in gas transmission prices suggested by the Minister for Energy over a two year transition period will require a careful balance such that a purchaser of the DBNGP can be assured of acquiring an asset subject to stable regulation allowing the development of viable and stable business."*⁵⁵
- 4.47 Epic Energy strongly believes that the Regulator should confirm the purpose of the Price Waterhouse report and therefore exercise his compulsory powers to obtain information concerning the reason why it was commissioned, from the relevant people involved in preparing the report, for example Mr Paul Baxter (PriceWaterhouseCoopers). Further, the Regulator should obtain the correspondence leading to the terms of reference for the preparation of the report, including the initial letter of engagement and the subsequent letter

⁵⁴ Minister Barnett. Hansard, 14 June 2000, p 7665.

⁵⁵ "Dampier to Bunbury Natural Gas Pipeline, Regulatory report on revenue requirement and future price path", August 1997 (Price Waterhouse) at page 4.

refining the initial terms of engagement (which Epic Energy understands was dated 8 July 1997).

- 4.48 In summary these policies were set prior to the introduction and enactment of the Code legislation in Western Australia. They are now policies which, in the public interest, should be seen through and implemented by the Regulator, particularly given the Court decision which requires the Regulator to give weight to the public interest factor as a matter of fundamental importance.
- 4.49 This is even more important given the recent submissions made by various stakeholders since the draft decision calling on a timely resolution of the matter and an outcome which promotes incentives for the expansion of the DBNGP. Following is an extract from the most recent submission of the Department of Mineral & Petroleum Resources to the Regulator (dated 4 November 2002) which succinctly deals with these issues:

Timing is critical. Delays in finalising the gas tariff issue are damaging Western Australia both in terms of negotiating for the development of new industry and in terms of the global view of Western Australia as a safe and stable place within which to invest. Gas related development in many cases will remain on hold in the South West while the tariff issue remains outstanding.

With respect to the level of the tariff, from the viewpoint of needing to encourage new industry to develop within Western Australia the lower the tariff the better.

A low tariff, however, may impact on EPIC's future financial viability. Further Court cases notwithstanding, the inability of EPIC to service its borrowings on the pipeline could eventually lead to the sale of the pipeline to a new owner, admittedly at sale price that will reflect and support the new tariff regime. Our concern, however, under this scenario is that there is the possibility of delaying any commitment for increasing Dampier to Bunbury Natural Gas Pipeline capacity for perhaps 12 – 24 months. Such an hiatus in decision making on future gas availability in the South West would severely constrain the State's ability to attract new investment.

5. The Structure of the DBNGP Sales Process

- 5.1 There has been much debate and information disclosed by Epic Energy to the Regulator concerning the integrity of the sales process both at the time of the sale itself and subsequently, the most recent being Epic Energy's paper DDS 5: Sales Process, filed with the Regulator on 30 November 2001 (confidential version).⁵⁶
- 5.2 However, as was the case with the information in relation to the Government policy surrounding the sale, it is important that this information be provided to the Regulator in a single source document.
- 5.3 The DBNGP was constructed and initially operated by SECWA. On 1 January 1995, SECWA's gas transmission assets, including the DBNGP, were transferred to the Gas Corporation, a State-owned enterprise created by the Gas Corporation Act 1994 ("1994 Act"). The Gas Corporation, trading as AlintaGas, operated the DBNGP under a third party access regime established by the 1994 Act and the GTRs. Prior to 1 January 1995, there were no effective statutory third party access rights to the DBNGP⁵⁷. The Pipeline had been constructed and operated by SECWA for the purpose of transporting its own gas. SECWA had, however, entered into contracts with three parties which granted those parties rights to have gas transported using the DBNGP.
- 5.4 Epic Energy acquired the DBNGP from AlintaGas on 25 March 1998.
- 5.5 The sale of the DBNGP was not a typical commercial transaction, but required legislative sanction. Part 2 of the Dampier to Bunbury Pipeline Act ("DBP Act") provided the legislative mechanism governing the sale process for the DBNGP.
- 5.6 Although it was the seller of the DBNGP, AlintaGas was formally directed to make the sale, by the Minister for Energy, in accordance with Section 6(2) of the Dampier to Bunbury Pipeline Act 1997 ("DBP Act"). AlintaGas did not manage or control the process of Pipeline sale.
- 5.7 Section 6 of the DBP Act provided for a committee to guide the sale process. The Gas Pipeline Sales Steering Committee ("GPSSC") fulfilled that role. The GPSSC was directly accountable to, and received directions from, the Minister. In turn, the terms of any direction made by the Minister had to be laid before, and scrutinised by, each House of Parliament. Section 8 required the proceeds from the disposal of the DBNGP to be paid to the State Treasurer, to the extent that this was specified in a direction made pursuant to that section.⁵⁸
- 5.8 The terms of reference for the GPSSC, prescribed by the Minister, were widely framed. Essentially, after considering a number of material issues and receiving guidance from the Minister, the objective was to negotiate with

⁵⁶ see the other submissions listed in paragraph 4.1 of this submission

⁵⁷ There were limited but ineffectual rights under the Petroleum Pipelines Act

⁵⁸ Reasons, para 11.

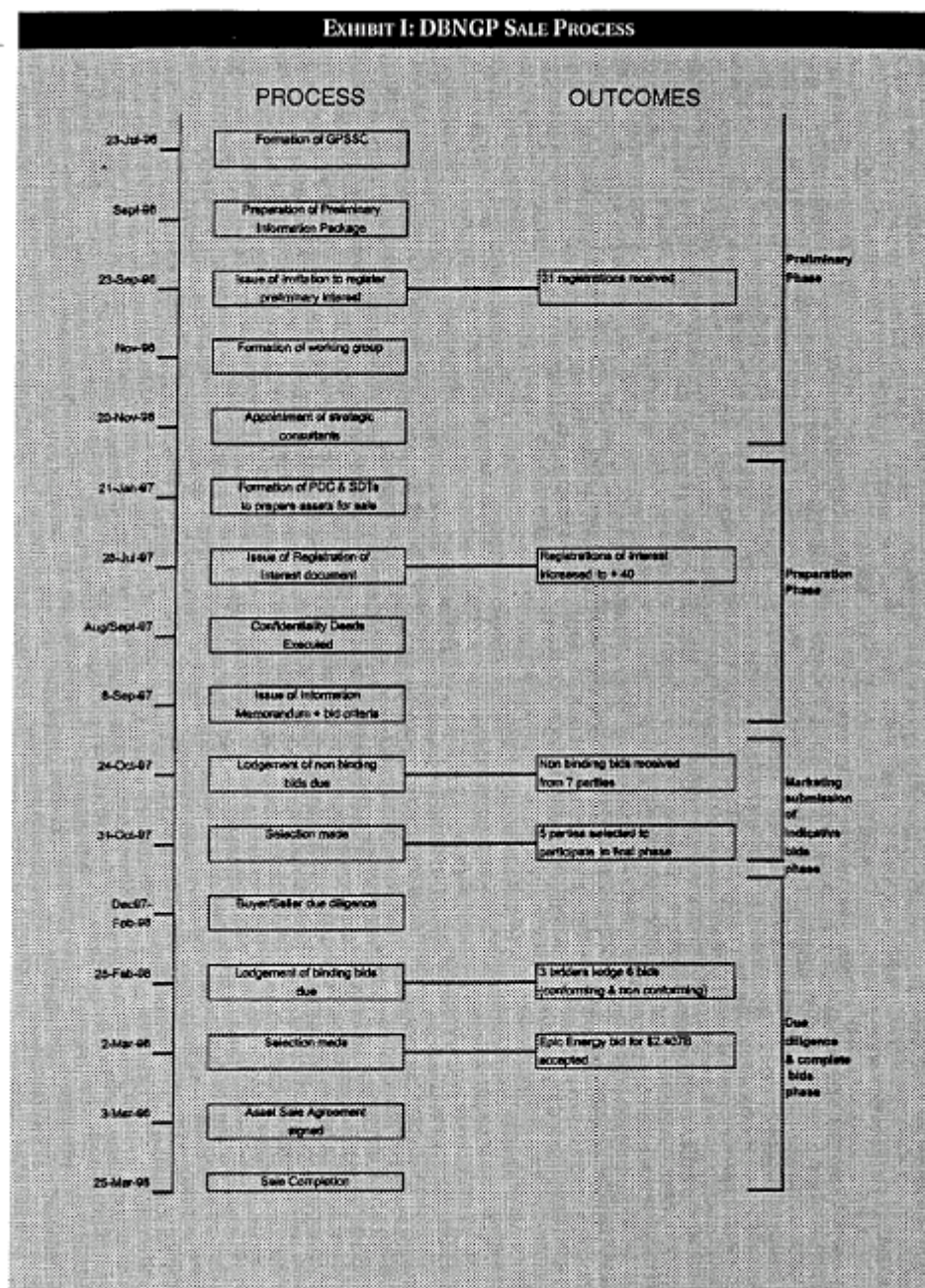
potential purchasers and develop a contract of sale for submission to the West Australian State Cabinet. The GPSSC kept the Minister for Energy and the Premier closely advised as to each stage in the sale process. This occurred through briefings and presentations. Ultimately, final approval for the sale of the pipeline was a matter which required the sanction of State Cabinet, which was granted on 3 March 1998.

- 5.9 Therefore, while the GPSSC was responsible for the day to day operation of the sale process, the State Government prescribed and co-ordinated this process, and, through the operation of section 6 of the DBP Act and the Minister for Energy, was able to direct the whole process. As a consequence, the intention of State Cabinet, the Premier and the Minister for Energy, as disclosed in various public statements made by the Premier and the Minister for Energy (both in and out of Parliament) should be taken as reflecting the intention of the sale process.
- 5.10 The GPSSC comprised senior officers within Government; it was not an AlintaGas committee (although it did have some representation on the GPSSC in the Committee's early formative stages). Although AlintaGas was the initial recipient of the sale proceeds, it was directed by the Minister for Energy to disburse the net proceeds (after retirement of DBNGP debt) to the State.
- 5.11 The legal entity that sold the DBNGP was AlintaGas, but, as stated above, the method by which the Pipeline was sold, and the final terms and conditions on which it was acquired by Epic Energy, were determined by the Government of Western Australia through the GPSSC.
- 5.12 As stated above, while the State was responsible for the sale process, the GPSSC was the committee responsible for the day to day conduct of the sale process. Bidders had to deal with the GPSSC. The GPSSC was essentially the "agent" for the State in the process and bidders therefore had to rely on what was said by the GPSSC.
- 5.13 A report was prepared by the GPSSC to the then Minister for Energy, Colin Barnett, outlining the sale process. It was prepared for the purpose of informing Parliament on and to provide costs of the sale of the DBNGP. A copy of that report is contained in **Attachment 4**.
- 5.14 That report is a comprehensive report and Epic Energy commends the Regulator to read it in its entirety to the extent that he has not done so already.⁵⁹
- 5.15 Regard should also be had to a letter sent by the GPSSC to all interested bidders who registered their interest in lodging an indicative bid. Epic Energy's letter was sent to it on 8 September 1997. A copy of this letter is contained in **Attachment 5**.

⁵⁹ There appears to be a typographical or formatting error on page 10 of the report. Epic Energy has been unable to confirm whether this error has ever been amended by the GPSSC.

- 5.16 Without wanting to detract from the details of the processes outlined in the documents contained in Attachments 4 & 5, the key features of the process are outlined in the following paragraphs:
- 5.17 The DBNGP was sold through a multi-stage competitive bidding process. The number of bidders was progressively reduced through the stages.
- 5.18 The Government's objectives in selling the Pipeline through this multi-stage competitive process were set out in the GPSCC's letter covering transmittal of copies of the sale Information Memorandum to Epic Energy (see attachment 5). Maximising the sale price was of prime importance.
- 5.19 This is demonstrated in the GPSSC letter to Epic Energy, dated 8 September 1997, where it advised that the Government was seeking to maximise the proceeds from the sale of the DBNGP within the context of pursuing certain other policy objectives. These other objectives were:
- enhancing the operating efficiency and utilisation of the pipeline;
 - reducing gas transmission prices;
 - reducing future demands on State capital;
 - reducing the State's exposure to the business risks of the DBNGP;
 - minimising the impact of the sale on the workforce of AlintaGas' transmission division; and
 - reducing the potential for conflicts of interest which might potentially compromise the efficient operation of the DBNGP and the operation of a competitive gas market in the State.
- 5.20 The same letter also set out the form of the sale process. The process was to comprise the following four phases:
- Phase I: a preliminary phase which developed the structure of the sale methodology
 - Phase II: interested parties to register interest;
 - Phase III: submission of non-binding bids; and
 - Phase IV: due diligence and submission of final bids.
- 5.21 A Process chart follows. This outlined on page 7 of the GPSSC report submitted to Parliament (See Attachment 4).

**PROPOSED ACCESS ARRANGEMENT
PUBLIC VERSION
Court Decision Submission CDS#3 -
DBNGP Sales Process**



5.22 A non-binding bid submitted during Phase II was to indicate, among other things:

- the price offered for the DBNGP;
- the estimated path of tariffs for the next 10 years and the principal assumptions underlying those tariffs;
- the assumed growth in demand for gas transportation capacity in the DBNGP over the next 10 years; and
- Pipeline expansion plans indicating a readiness to support economic development in the State.

- 5.23 In evaluating the non-binding bids, and in determining the parties to be invited to participate in Phase III, the Government indicated that it would consider the bid price and the bidder's ability to best meet the other objectives set for the sale process.
- 5.24 As stated above in section 4, among these other objectives, a reduction in gas transmission prices was of major importance to the Government. As stated, a complying non-binding bid was required to set out the estimated path of tariffs for the next 10 years, and the principal assumptions underlying those tariffs under the Government's Transitional Access Regime, and under the new regulatory regime that was expected to govern future ownership and operation of the DBNGP. The GPSSC advised:
- "The tariffs detailed under this requirement will not be binding upon the Acquirer but will be used by the GPSSC to evaluate the deliverability of Non Binding Bids and the consistency of Non Binding Bids with the State's objectives."*⁶⁰
- 5.25 While indicating that such tariffs would not be binding, under the sale process as structured, these tariffs would become the proposed tariffs of a Final Bid unless they were expressly modified in the final bid document. As is discussed below, they would become, in accordance with part (b) of clause 9 to Schedule 5 of the Dampier to Bunbury Natural Gas Pipeline Asset Sale Agreement ("Asset Sale Agreement"), tariffs that the Government might freely disclose in proceedings before the Regulator.⁶¹
- 5.26 As has been stated in this submission on several occasions, both the bid price, and future Pipeline tariffs, were critical factors in the Government's decision making for its sale of the DBNGP. The importance of the bid price was made clear by the Minister for Energy in a media statement issued on 22 May 1997. The Minister stated:
- "It is imperative the Government sells the pipeline to deliver the highest possible return to WA taxpayers who have owned this asset since it was built in 1984."*
- 5.27 At the same time, the Government was concerned with securing lower gas transmission tariffs. In his 22 May 1997 media statement, the Minister continued:
- "As well, new regulations would enforce a set of reference tariffs for the first two years of operation under private ownership, declining over the period 1998 to 2000. This would see transport costs decline from around \$1.25 per gigajoule at present to around \$1 per gigajoule by the year 2000."*
- 5.28 The Government was of the view that it could achieve both a high sale price for the DBNGP, and a significant reduction in gas transmission tariffs, and was expecting those tariffs to fall to about \$1.00/GJ.

⁶⁰ 7 September 1997.

⁶¹ The Asset Sale Agreement is discussed in section 3.1(c) below.

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- 5.29 This view was reinforced by the Minister for Energy in the media statement that announced the issue of the sale Information Memorandum. The Minister stated:

“The sale of the Dampier-to-Bunbury Natural Gas Pipeline has the potential to realise the highest sale price for a State-owned asset in WA’s history.”⁶²

- 5.30 He further commented:

“I am confident the sale will deliver a substantial return to WA taxpayers on their investment. The price at which the pipeline eventually sells will depend on its future earnings potential as determined by the prospective bidders which have registered their interest.”

- 5.31 Prospective bidders were directed, by the Minister, to focus on the DBNGP as a strategic asset servicing the requirements of gas users in the State so that they might fully recognise this future earnings potential in their bid prices.

- 5.32 The Minister also advised:

“Based on preliminary work undertaken by AlintaGas and work independently commissioned by the Gas Pipeline Sale Steering Committee, it is currently anticipated that the cap on tariffs for a full haul firm service at a 100 per cent load factor will be \$1.24/GJ for 1998 and \$1.12/GJ for 1999. From the year 2000, the State is planning to adopt the National Access Code and tariffs could fall to around \$1/GJ.”

- 5.33 The lowering of the gas transmission tariff to about \$1.00/GJ would, in the Government’s view, encourage downstream processing activities using gas, protect long term gas supplies, and maintain prices at which gas could be delivered to households and small businesses.

- 5.34 In its structuring and execution of the DBNGP sale process, the Government of Western Australia sought to achieve the highest possible sale price for the Pipeline, and a reduction in gas transmission tariffs to about \$1.00/GJ.

- 5.35 Turning to each of the four phases of the sale process in some more detail.

Phase I

- 5.36 This stage began in August 1996 which primarily involved the following:

- The establishment of the GPSSC;
- The preparation and release to interested parties of a preliminary information package;
- The formation of a working group and appointment of a strategic consultant (JP Morgan/Hartley Poynton) to consider the various alternative sale methodologies which could be employed for the sale and recommend the most appropriate methodology.

⁶² 7 September 1997.

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- 5.37 The GPSSC was established by the Minister for Energy well before the DBP Act came into existence and the Act merely recognised it and gave it credibility without even specifically referring to it. The composition of the GPSSC is set out on page 4 of Attachment 4. It is important to note that half way through the assessment process, its composition altered to remove all AlintaGas members of the committee, in particular, Mr Ian Baker (who was the chairman) and Mr John Shawley. Mr Baker's position as chairman was assumed by Dr Des Kelley.
- 5.38 According to the report prepared by the GPSSC and submitted to Parliament (see Attachment 4), 31 parties registered their interest in the sale as a result of the release of the preliminary information package which contained limited information. It is unclear when this package was released.

Phase II

- 5.39 Phase II involved the following steps:
- the preparation of the asset for sale and the compilation of the Information Memorandum which was essentially the marketing document.
 - The establishment of a Due Diligence Committee in May 1997.
 - The preparation of a Registration of Interests document.
 - The issue of the IM to interested parties together with the bid criteria and an outline of the remaining steps in the process.
- 5.40 To prepare the asset for sale and finalise the Information Memorandum, the GPSSC established a Process Development Committee ("PDC") which comprised the members of the working group referred to above and the alternate representatives to the GPSSC. It reported to the GPSSC. Also formed under the PDC were 8 Structure Development Teams which were formed to undertake assigned tasks and report back to the PDC. One of the Teams was SDT 4 which included representation from the Office of Energy. Epic Energy understands that Mr Peter Kolf was a member of this team. Its tasks included the following⁶³:
- To compile a comprehensive Information Memorandum by the end of Phase II on the basis of which potential acquirers can make credible indicative bids;
 - To conduct detailed analysis of the market for gas transportation services in Western Australia which captures the upside potential represented by the transmission business; and
 - Include detailed commentary in the Information Memorandum of all matters affecting the transmission business including the regulatory environment, political structure and function, taxation, gas quality etc.
- 5.41 A Due Diligence Committee was also established at this stage by the GPSSC. It was tasked to review various aspects of the sale including the contents of the Information Memorandum and other information provided to potential purchasers of the pipeline.

⁶³ See Attachment 2 to the report contained in Attachment 4 of this submission
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- 5.42 The Registration of Interests Document was prepared as a marketing document in order to generate interest in the sale from parties who had not yet registered their interest. A copy of this document is contained in attachment 3 to Attachment 4 of this submission.
- 5.43 The Information Memorandum ("IM") was apparently completed on 28 July 1997. A copy of it is contained in **Attachment 7**. The IM was only released to those parties who signed a Confidentiality Undertaking, a copy of which is contained in **Attachment 8**. It is important to note that the IM did not contain such documents as the Price Waterhouse report, which is discussed in section 4 of this submission. Those documents were only released much later on in the sales process via the data room.
- 5.44 The IM was released by the GPSSC together with a letter calling for indicative non binding bids to be made⁶⁴. Based on media reports at the time (for example a news report on 6GN news on 13 November 1997) that the IM was released to approximately 40 interested parties.
- 5.45 The stated purpose of the IM was to assist bidders in preparing and submitting indicative non-binding bids for the acquisition of the DBNGP and, if selected, proceeding to the next stage of sale by tender process.
- 5.46 It is Epic Energy's understanding, which is confirmed by the above purpose and the fact that a data room was established following a short listing of candidates, that the IM was intended to have a limited life after the first round of bids. However it still remained a relevant document.
- 5.47 Furthermore, the IM stated that the GPSSC considered the information in the IM to be materially accurate as at 18 August 1997.
- 5.48 Although the IM contained a lot of technical data and information concerning the DBNGP, part of the IM was devoted to the regulatory regime which the State proposed to implement to govern the transmission tariffs that could be charged by the owner of the DBNGP:
- "after the transfer from Gas Corporation, but before the implementation of the proposed National Third Party Access Code for Natural Gas Pipeline Systems ("Code"), which was intended to be enacted by the State through legislation to be introduced. This period was identified by the IM as being between 1 January 1998 and 31 December 1999; and after the implementation of the Code and the commencement of the DBNGP Access Arrangement, which was identified by the IM as commencing on 1 January 2000."*
- 5.49 As the transmission tariff that could be charged by the owner of the DBNGP was the key component of the purchase price modelling being conducted by all bidders, including Epic Energy, this part of the IM was of critical importance.

⁶⁴ Letter from GPSSC to Epic Energy dated 8 September 1997, contained in Attachment 5
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- 5.50 As has been stated in section 4 of this submission, given that the declared key objectives of the State in selling the DBNGP were to maximise the sale proceeds while reducing tariffs and promoting the expansion of the capacity of the DBNGP, the balance that the State was seeking to strike between these competing objectives could only be determined by statements concerning the level of tariff.
- 5.51 In particular, the IM referred to a “detailed analysis” commissioned by the GPSSC to provide an “Indicative Global Reference Tariff” to aid bidders in formulating their bids. This is a reference to a report commissioned by the GPSSC from Price Waterhouse (“PW Report”) entitled “Dampier to Bunbury Natural Gas Pipeline Regulatory report on Revenue Requirement and Future Price Path”. This report was not provided to bidders until the second stage of the sale process, at which time it was placed in the data room set up by the GPSSC for due diligence by the short listed bidders.
- 5.52 Given the timing of the release of the PW Report coupled with the stated Government policies referred to in section 5 of this Submission, one can therefore infer that the report was prepared to legitimise a tariff of \$1.00/GJ to Perth as the proper outworking of the Code. This has already been discussed in section 4 of this submission.
- 5.53 The letter enclosing the IM also outlined the criteria to be applied by the GPSSC in evaluating bids and the remainder of the process to be followed. Epic Energy’s letter was sent to it on 8 September 1997. A copy of it is contained in **Attachment 5**.
- 5.54 However, it is also important to note that the objectives the Government was seeking to achieve in relation to the sale were also outlined⁶⁵. These were expressed as including the following:
- Maximising the proceeds from the sale of the DBNGP assets⁶⁶ within the context of the objectives listed below;
 - Enhancing the operating efficiency and utilisation of the DBNGP assets;
 - Reducing transmission prices;
 - Reducing future demands upon State capital;
 - Reducing the State’s exposure to the business risks of the DBNGP assets;
 - Minimising the impact of the sale upon the Transmission Division’s workforce;
 - Facilitating the ongoing viability of the remaining AlintaGas businesses;
 - Reducing the potential conflicts of interest which might potentially compromise the efficient operation of the DBNGP assets and the operation of a competitive gas market in the State.
- 5.55 In addition however, the Government also sought to achieve the following other objective which, while not listed in the letter under the heading of “the

⁶⁵ Item 1 of GPSSC letter to bidders dated 8 September 1997, page 2

⁶⁶ Terms such as “DBNGP assets” had the meanings given to them in the Information Memorandum, as outlined in the GPSSC letter to bidders, dated 8 September 1997.

objectives of the sale”, was nonetheless stated elsewhere in the letter as being major considerations of the State:

To ensure that gas transmission capacity will be readily available to support economic development in the State. [To this end, the State was seeking a purchaser which could] demonstrate expertise in enhancing the pipeline capacity (including relevant examples), their commitment to enhancing the capacity of the DBNGP and their ability to access the financial resources required to support such future capacity expansion.”⁶⁷

5.56 As set out in the letter, strict rules applied to each phase of the bidding process. For bidders to be eligible for short listing and therefore to be able to participate in Phase IV, they were required to lodge a non binding bid. Section 3 of the GPSSC letter to all registered interested parties set out the matters that had to be addressed in a bid for it to be a Complying Non Binding Bid. For the purposes of this submission, it was a condition of the sale process that bids contain detailed information on the key qualitative and quantitative assumptions supporting the bid price. In particular, the bid was required to contain:

- Financial information to demonstrate the financial ability and capacity of the purchaser to not only finance its participation in the acquisition but also to remain a viable operator of the DBNGP assets.
- An outline of the management structure of the pipeline operator in order to demonstrate how the pipeline would be effectively operated.
- Key assumptions supporting the bid price. In particular (for the purposes of this submission), this included the following matters:
 - The tariff path – critically, bidders were required to submit bids outlining the tariff path for the first 10 years following the purchase and the principal assumptions underlying those tariffs under the Transitional Access Regime (recognising the proposed capped tariff arrangements) **and the new regulatory regimes that are expected to govern future ownership and operation of the pipeline.** While it was outlined that these would not be binding on the purchaser, they were to be used to evaluate the deliverability of bids and also the consistency of bids with the State’s objectives;
 - Pipeline capacity demand over the first 10 years following acquisition;
 - Pipeline expansion plans – as outlined above, this was one of the key objectives of the State.
- Intended operating experience and credentials – this was required to enable the State to assess a bidder’s ability to realise the State’s objectives relating to ongoing operation and expansion of the pipeline capacity. Critically, bidders were required that they possessed expertise in providing reliable gas transmission services and in ensuring security of supply.
- The plans for financing the final bid proposal. It was a prerequisite that final bids could not be conditional upon finance approval.

⁶⁷ Item 3.3.3 of GPSSC letter to bidders dated 8 September 1997, page 4
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- 5.57 All non binding bids were to be evaluated having regard to a number of stated factors, including, without limitation, *“the price indicated, the bidders financial and operating strength and reputation and the bidder’s ability to consummate a transaction with the State in a manner which will best meet the State’s objectives as set out above.”*⁶⁸

Phase III – Marketing and submission of bids for preselection stage

- 5.58 This stage involved:

- Preliminary preparation for buyer due diligence and the setting up of data rooms;
- The lodgement by bidders of non binding bids; and
- The evaluation of non binding bids by the GPSSC; and
- The selection of short listed bidders.

- 5.59 It is important to note that a non binding bid was required to set out the estimated tariff paths for the next 10 years and the principal assumptions underlying those tariffs under the Government’s Transitional Access Regime and under the new regulatory regime that was expected to govern future ownership and operation of the DBNGP. In its letter to Epic Energy of 8 September 1997, the GPSSC advised:

*“The tariffs detailed under this requirement will not be binding upon the Acquirer but will be used by the GPSSC to evaluate the deliverability of Non Binding Bids and the consistency of [them] with the State’s objectives.”*⁶⁹

- 5.60 What is equally important to note however, is that the tariffs and tariff path included in the Final Conforming Bid were binding on Epic Energy.
- 5.61 In addition to the issue of tariff and tariff path, it is important to note that the GPSSC stressed to bidders that this was their only opportunity to put their best bid forward to qualify for the last phase of the sale and consequently they should take the opportunity to submit indicative bid proposals to best meet the objectives of the State.
- 5.62 All bids had to be lodged by 5pm on Friday 24 October 1997. Epic Energy’s indicative bid was lodged with the GPSSC on that date. A copy of it is **attached as Attachment 25**.
- 5.63 It is unclear how many indicative non binding bids were lodged. This information is absent from the report in Attachment 4.
- 5.64 However, on 12 November 1997, the then Energy Minister, announced that the following 5 consortia had been short listed to participate in the final bid phase of the sale of the DBNGP:
- Epic Energy;
 - Australian Gas Light Company in conjunction with CMS Energy;

⁶⁸ Section 3.9 of GPSSC letter to bidders dated 7 September 1997, page 7

⁶⁹ GPSSC letter to Epic Energy of 8 September 1997 enclosing the Information Memorandum
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- Nova Gas Australia in conjunction with Uni Super;
- Pacific Gas and Electrical Corporation;
- Wesfarmers Energy in conjunction with Williams Pipeline Company.

Phase IV – Due diligence and Final Bids

- 5.65 The GPSSC letter to bidders detailed the process and the requirements for the submission of final bids.⁷⁰ This was supplemented by a further letter from the GPSSC to bidders, Epic Energy's copy of which was sent on 21 November 1997. A copy of the latter letter is contained in **Attachment 15**.
- 5.66 In particular, candidates were required to indicate any material variations in any assumptions on any other matter which candidates made for the purpose of the final bid when compared with their non binding bid.
- 5.67 It was further stated (at page 5 of the 8 September 1997 letter) that the State expected bidders, in their final bid, to "identify the potential to enhance the capacity and operating efficiency of the DBNGP and to reflect the value of that enhancement potential in their final bid".
- 5.68 It was also a rule that bidding parties did not, in connection with the sale of the DBNGP Assets, without the prior written authority of the GPSSC, contact any Minister, AlintaGas, including its management and employees, relevant unions, relevant employees of the State, relevant department or agencies of the State. Thus, the circumstances of the purchase of the DBNGP were effectively governed by the GPSSC, and bidders were, apart from press releases and media statements issued by the then relevant Minister (the Honourable Mr Colin Barnett), totally reliant on the GPSSC for information concerning the DBNGP and indications as to whether the State's objectives of the sale process would be satisfied by a proposed bid.
- 5.69 In late 1997, the GPSSC data room was opened for inspection by representatives and advisors of the short listed bidders. The conditions of access to the data room prohibited photocopying or transcribing of documents. This meant that, effectively, the due diligence for the purchase of the DBNGP had to be conducted within the walls of the data room. The data room was open until 19 December 1997 and then was reopened in mid January 1998 until late February 1998 (the latter period being extended because of the late provision of key gas transportation contracts and other documents which were finalised during this period).
- 5.70 In January 1998, bidders were provided with a draft asset sale agreement which for the purposes of lodging a complying final binding bid, was not negotiable in terms of the risk allocation under representation and warranties.
- 5.71 In accordance with the GPSSC letter, bidders were able to lodge, along with their complying final bid, one or more non complying final binding bids providing an opportunity to suggest variations to the terms and conditions of the Asset Sale Agreement. These variations could include variations to the value of the bid in order to encourage innovative bid proposals.

⁷⁰ Sections 4 & 5 of GPSSC letter to bidders dated 7 September 1997, page 7 - 9
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- 5.72 During the above period, representatives of Epic Energy conducted due diligence on the DBNGP through, among other things, a review of the data room documents. However, other than the PW Report, the only relevant information contained in the data room relating to tariffs beyond 1 January 2000 were:
- The CMPS&F report that was used to derive an optimised replacement cost value for the pipeline. This was used in the PW Report;
 - Existing transportation contracts; and
 - the Access Manual.
- 5.73 It is important to note that the Access Manual did stipulate the tariffs post 1 January 2000 at \$1.00/GJ.
- 5.74 This meant that bidders had to obtain information on this issue from other sources.
- 5.75 In this regard, during the above period, bidders were given the opportunity, through formal question and answer protocols and through meetings with the GPSSC, to obtain further specific information from the GPSSC which was relevant to their due diligence or the preparation of their bids. Epic Energy has not been able to locate its own copies of any questions it posed of the GPSSC nor for that matter, has it been able to obtain copies of these questions or any other questions in relation to tariff that may have been asked of the GPSSC by other bidders. It is noted however that the draft decision refers to them at page B132. It is noted that in response to Epic Energy's request, the Regulator has advised that he has copies of all Question and Answers and relied upon them for the purposes of the draft decision.
- 5.76 Epic Energy previously requested that it have access to these question and answers. It was referred to the Coordinator of Energy. Epic Energy's approaches to the Coordinator have not enabled access to them.
- 5.77 Epic Energy requests the Regulator again that it be provided with access to those question and answers to enable it to make a full submission in support of the proposed Access Arrangement on this point. To the extent that he does not already have this information, Epic Energy urges the Regulator to exercise his powers under Schedule 1 to the Gas Pipelines Access (Western Australia) Act 1998 to disclose these documents.

6. Epic Energy's involvement in the DBNGP Sales Process

- 6.1 As is outlined in section 5 of this submission, during and after the sale process, various statements were made by Ministers, both in Parliament and in the press which confirmed the State's requirement that bids be based on a tariff of \$1/GJ to Perth **from** 1 January 2000.
- 6.2 A lot of what has been said is based on what is contained in the documents attached to this Submission. However, it is equally important that the Regulator take into account Epic Energy's own account of the sale process, in particular, its dealings with the GPSSC, especially given that the members of the GPSSC were the Government's "agent".
- 6.3 In this respect, Epic Energy has recently provided the Regulator, on a confidential basis, with a copy of a draft confidential statement prepared by David Bradley dealing with his involvement in the sales process. As mentioned in that statement, Mr Bradley was the key member of the Epic Energy bid team in Western Australia during the process for the sale of the DBNGP – in fact he was the key interface in dealings with the GPSSC.
- 6.4 When Epic Energy provided the draft statement to the Regulator, it informed the Regulator that Mr Bradley would be available to meet with the Regulator to further clarify any aspect covered in the draft statement and any other aspects of the sale process with respect to which Mr Bradley was involved.
- 6.5 Epic Energy has encouraged the Regulator to take up Epic Energy's invitation. To date, neither Epic Energy nor Mr Bradley has been approached by the Regulator or his office. Epic Energy would like to once again strongly recommend that the Regulator discuss matters further with Mr Bradley. To this extent, Mr Bradley is now based in Perth and accordingly, we are able to facilitate a meeting with greater ease than was previously the case when he was not based in Perth.
- 6.6 As mentioned above, Mr Bradley's position required him to act as the principal interface between Epic Energy and the GPSSC.
- 6.7 All bidders were prohibited from dealing with the Government in any other form, be it through the Minister's office or through AlintaGas.
- 6.8 While Mr Bradley was the principal interface with the GPSSC, he was part of a bid team within Epic Energy (including consultants for various issues) established in Perth for the purposes of the bid. Mr Bradley was the lead for that team.

Structure of Epic Energy's bid team

- 6.9 As the lead of that team he participated in and reported to a committee comprising representatives from the likely investors in the bid and the relevant advisers ("owners' steering committee"). The owners' steering committee comprised the following personnel:

- Hugh James - Epic Energy

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- Jay Carpenter - Epic Energy
- Tim Skerman - Epic Energy
- David Bradley - Epic Energy
- Holly Keller Koeppel – CNG
- Tom McKean – CNG
- James Thomson - CNG
- Bob Baker – El Paso
- Brad Lingo – El Paso
- John Hushon – El Paso
- Graham Drummond – Allgas
- Roger Herring – Allgas
- Danny Latham – AMP
- Felicity Gates – Axiom (now Deutsche)
- Matt Williams – Hastings
- David Maloney – Allen Allen & Hemsley
- Alan James – Deutsche Morgan Grenfell
- Ross Johnstone – Deutsche Morgan Grenfell

6.10 This reflected the ownership structure of the Epic Energy group of companies at the time along with the key advisers. At the time that Phase III of the sales process commenced, the companies that are the service providers of the DBNGP had not been incorporated. The ultimate shareholding of the Epic Energy group of companies at the time was as follows:

El Paso –	30%
CNG -	30%
AMP Asset Management	10%
Axiom Funds Management	10%
Hastings Funds Management	10%
Allgas Energy	10%

6.11 It should be noted that after the indicative bid being lodged but prior to the final bid's lodgement, Allgas Energy withdrew from the Epic Energy bid group for the DBNGP. The financial structure proposed are outlined in both the indicative and final bid documents.

6.12 deleted - confidential

6.13 deleted - confidential

6.14 . deleted -confidential.

Acquisition Model

6.15 deleted – confidential.

6.16 deleted – confidential.

6.17 deleted – confidential.

6.18 deleted – confidential.

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6.19 deleted – confidential.

6.20 deleted – confidential.

6.21 deleted – confidential.

6.22 deleted – confidential.

6.23 deleted – confidential.

Due Diligence

6.24 The assumptions used in the acquisition model were derived following a rigorous and comprehensive due diligence program covering technical legal, financial, operational, insurance, market, regulatory and environmental matters pertaining to the pipeline. This process culminated in the provision of a preliminary due diligence report in January 1998 followed by a final report in February 1998. The preliminary report was prepared when the GPSSC data room was closed over the Christmas/New Year break. A copy of the executive summary of the preliminary due diligence report is contained in **Attachment 11**. The documents comprise 4 volumes (together with a 3 volume set of volume forecasts) and accordingly have not been provided in full to the Regulator. However, if necessary, Epic Energy is able to make available copies of the report.

6.25 The critical assumptions that are relevant for the purposes of this Submission relate to the demand forecasts and the tariffs. These were the subject of distinct reports in the due diligence process and copies of these sections of the due diligence reports are contained in **Attachment 12 & Attachment 13**.

6.26 deleted – confidential..

6.27 It should be noted that at the time of preparation of the preliminary due diligence report, there were significant items missing from the data room, including the Asset Sale Agreement and various transportation contracts. They are listed on page 8 of the executive summary.

6.28 In relation to the commercial/demand forecast analysis, Epic Energy's commercial/marketing team carried out the following analysis:

- A review of all requests for capacity lodged with AlintaGas;
- A review of additional information that became available in the data room
- In depth interviews with key customers;
- A review of the market demand forecast that had been prepared;
- Understanding the key influences on demand and their related application to the Forecast;
- A supply evaluation – identifying opportunities and threats;
- A review of the historical results and forecasts contained in Exhibit 11A of the Information Memorandum;
- Understanding competition from other pipelines.

- 6.29 At the time of the Non Binding Indicative Bid, Epic Energy had produced a throughput forecast for the DBNGP which was based on a variety of public and private forecasts. [deleted – confidential].
- 6.30 Reports had also been obtained from [deleted – confidential] on gas demand for electricity generation and [deleted – confidential] had also reported in relation to the alumina refinery and electric generation demand. These reports contained similar results to those contained in the [deleted – confidential]
- 6.31 The forecast contained a base case, low case and high case set of forecasts for the period 1997 to 2007. Certain assumptions were made in relation to particular projects, including their probability of being realised. [deleted – confidential]. As Epic Energy has already noted to the Regulator in a prior submission, this was entirely consistent with the view being taken by the State at the time as it was actively promoting the project.
- 6.32 deleted – confidential.
- 6.33 Together with the above analysis, the commercial team had developed a plan that was focused on being marketing and customer oriented. Coupled with this, it was believed that the reduction in tariffs over the transitional regime would be attractive to incremental business. This was to meet the Government's stated objectives to expand the pipeline.
- 6.34 In relation to the tariff/regulatory analysis, given the lack of a stable regulatory regime, 2 reports were prepared by independent consultants:
- A report on regulatory issues provided by [deleted – confidential] (see **Attachment 19**); and
 - A tariff report prepared by [deleted – confidential] (see **Attachment 20**).
- 6.35 deleted – confidential.
- 6.36 Nonetheless, the regulatory issues report dealt with the following issues:
- Regulatory environment at the time of sale
 - The Transitional Regime that was to apply up until 1 January 2000;
 - The regime likely to apply after 1 January 2000.
- 6.37 It should also be noted that this report identified the fact that while the State would have to introduce legislation giving effect to the 1997 Intergovernmental Agreement on Gas Pipelines Systems, it was unclear exactly what form the regime would take. There was a conclusion reached that because the Information Memorandum details key aspects of the national Access Code that will be reflected in the Western Australian Access Model, their inclusion in the IM suggested that the Western Australian Access Model may vary from the National Access Code.
- 6.38 deleted – confidential.

6.39 deleted – confidential.

6.40 deleted – confidential.

6.41 deleted – confidential.

6.42 As was the case with the PW Report, this report was simply one illustration of the way the Code could be applied to achieve the tariffs being promoted by the Government at the time. There were many ways that the tariff could be arrived at. However, the critical issue to remember is that the tariff was the key “foundation stone” that the Government, through its own representations and those of the GPSSC, had set.

6.43 deleted – confidential.

Owners’ Steering Committee deliberations

6.44 As mentioned above, the owners’ steering committee met on a regular basis to discuss aspects of the bids. It was established in September 1997.

6.45 At each meeting, the Committee discussed a range of issues, including the following:

- Competitor analyses;
- Investment structure;
- Bid timing;
- Due diligence status reports;
- Finance planning.

6.46 deleted – confidential.

6.47 deleted – confidential.

Dealings with GPSSC

6.48 As the lead of the WA based bid team, Mr Bradley attended what were frequent meetings with the GPSSC from late 1997 to discuss issues arising out of the sales process, including discussion concerning concepts and considerations that would be attractive to the State, or would differentiate Epic Energy from other bidders. The structure and role of the GPSSC has been noted above.

6.49 Generally a broad agenda was set for each weekly meeting including such items as corporate structure intended for bid, demonstrations of pipeline operations competency with Alcoa as an audience, and any outstanding issues in the asset sale share agreement.

6.50 Mr Bradley would generally be accompanied by Epic Energy’s legal representative, [deleted – confidential], at these meetings, although often Mr Bradley attended on his own. [deleted – confidential]. Although Ian Baker was

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driving the sale process for so long as he remained on the GPSSC, at the meetings Des Kelly would take the chair and Rohan Skea would handle any legal questions. A representative from JP Morgan (the GPSSC's strategic adviser) was also present and took notes of the meetings.

- 6.51 After the indicative bid stage, Epic Energy was short listed to a group of 5 bidders which included the following groups:
- Epic Energy;
 - AGL/CMS;
 - Nova Gas and Uni Super;
 - Wesfarmers and Williams Brothers;
 - PG&E Corporation.
- 6.52 deleted – confidential.
- 6.53 Epic Energy's Final Bid was lodged on 28 February 1998. In early February Epic Energy watched constantly for the addition of documents to the data room and particularly the responses to any due diligence questions. Ashley Kellett from Epic Energy attended the data room daily to review questions and answers. The GPSSC stated that they would give all bidders access to any questions and answers from bidders regarding the sale, subject to the proviso that the GPSSC would reserve the right to withhold its reply to the questions to specific bidders at its discretion.
- 6.54 By January and February 1998, as the bidding process was approaching the final bid date, the GPSSC emphasised that they wanted advance knowledge of key bid components such as bidding vehicle structure, tariffs, deviations from the Asset Sale Agreement, etc. The purpose of this advance knowledge was to allow the GPSSC the opportunity to achieve a more timely closure of the sales process by giving them the chance to discuss and consider non-conforming issues within the State's sales group or related Government entities (as the case may be) before final bids were submitted.
- 6.55 In particular, as the sales process approached conclusion, the GPSSC advised that they would appreciate some advance understanding of Epic Energy's thinking toward future tariff path as this was obviously a critical component of the sales process. Toward this end, Epic Energy determined it was appropriate to disclose its thinking on tariff level and tariff path, particularly in relation to a "creative" alternative which Epic Energy believed may be of significant value to the State.
- 6.56 In determining future tariffs, Epic Energy carefully analysed the Government's objectives for the process. One of the primary objectives emphasised in the Information Memorandum as well as in Ministerial Statements made before and throughout the bidding process (and which has been subsequently confirmed in public and parliamentary statements made by the then Minister for Energy), was enabling future Industrial development to occur through lower transmission tariffs.

6.57 At the time, the transmission tariffs being charged for transmission of gas through the DBNGP was \$1.27/GJ⁷¹. Although Colin Barnett, as the then Minister responsible for the sale process, was talking at the time about the benefits of possibly reducing that tariff to \$1.00/GJ, Epic Energy thought that a bid which incorporated an even lower tariff than this proposed figure may be of significant appeal to the State. The logical result of a lower tariff would of course be a lower offered purchase price and a lower offered price for the asset raised concerns with Epic Energy about the competitiveness of Epic Energy's bid. [deleted – confidential].

6.58 deleted – confidential.

6.59 deleted – confidential.

6.60 deleted – confidential.

6.61 deleted – confidential.

6.62 deleted – confidential.

6.63 deleted - confidential.

Financing arrangements

6.64 In accordance with the requirements for indicative bids, details of the funding arrangements were provided to the GPSSC in Epic Energy's Indicative Non Binding Bid. This required Epic Energy and other bidders to have a well developed financing structure by this time - ie by the end of October 1997.

6.65 The details of the arrangements entered into to finance the purchase price have been outlined in Epic Energy's confidential submission DDS#1: Financial Viability, filed with the Regulator on 20 September 2001

6.66 deleted – confidential.

6.67 deleted – confidential.

6.68 A detailed list of the banks and their proportionate contribution to the facility, as it currently stands, follows. [Deleted – confidential].

⁷¹ see attachment 22 for detailed tariff history on DBNGP since 1995
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[illegible]

- 6.69 Copies of the following Facility Agreements are contained in **Attachment 23** - [deleted – confidential]. These should be read in conjunction with Epic Energy's Submission DDS1: Financial Viability [confidential version]. These documents contained in the attachment 23 are strictly confidential and have been provided to the Regulator solely for the purposes of assessing Epic Energy's proposed Access Arrangement. They are to be provided only to staff of his office who are involved in the assessment process (to the extent that they are not removed from this aspect of the process because of a conflict) and require it for the purposes of the assessment process. On no other bases are they to be released or disclosed to a third party without Epic Energy's consent, including to any consultants engaged by the Regulator or his office.
- 6.70 As outlined in Epic Energy's earlier submission,⁷² following the sale the foundation lending banks syndicated part of the amount advanced to Epic Energy to another 23 banks.
- 6.71 Presently, the principal amount currently outstanding is approximately [deleted – confidential], and the annual interest repayments are approximately [deleted – confidential] .

⁷² Ibid.

- 6.72 deleted – confidential.
- 6.73 deleted – confidential.
- 6.74 Epic Energy knew that it took the risk on the volume's materialising, but to the extent that it considered these volume assumptions to be reasonably derived, it did not expect it would be at any risk with the tariffs, save in connection with showing the Regulator how it complies with the Code. As a result Epic Energy structured its financing of the acquisition on that basis. Given the statements above in relation to Government policy and a range of other factors, the risk of the tariffs being other than those proposed in Schedule 39 of the Asset Sale Agreement was considered minimal at the time.
- 6.75 To assist the banks in their decision to lend funds for the purchase and future expansions, Epic Energy provided the banks with details of Epic Energy's own due diligence enquiries. A detailed presentation was made to the banks [deleted – confidential].
- 6.76 In addition, the banks independently verified the forecasts and assumptions used by Epic Energy to support the purchase price. [deleted – confidential].
- 6.77 The fact that the above 29 leading international banks "signed off" on the decision to lend \$1.91 billion to Epic Energy is further compelling evidence of the reasonableness of Epic Energy's assumptions in formulating the bid.
- 6.78 In addition, given the size of the facility, its term and the nature of the lending arrangement, these factors suggest that the banks expected the Regulator to assess the initial capital base at significantly more than \$1.9 billion and that the banks' expectations arising out of the sale process were not materially different to those held by Epic Energy and other bidders.
- 6.79 To the extent that Epic Energy has been unable to obtain certain confidential information from the banks, the Regulator may obtain this information by directly approaching the banks, who have indicated to Epic Energy (and, Epic Energy understands, to the Regulator) that they would be willing to assist the Regulator.
- 6.80 Epic Energy has stated on many occasions to date that the Draft Decision, if implemented, will have a significantly adverse impact on:
- its financial viability to continue operating the DBNGP ;
 - its financing arrangements; and
 - its ability to expand the pipeline over 10 years as outlined to the State when it purchased the pipeline.
- 6.81 In addition, it has also stated that the Regulator must approve the Access Arrangement as proposed by Epic Energy or at least the tariff structure proposed by Epic Energy, as to not do so, may place Epic Energy in a position of not being financially viable.
- 6.82 deleted – confidential.

6.83 Claims relating to the financial viability were put to the Regulator in a number of submissions and papers put to the Regulator as well as in discussions with the Regulator and staff of and consultants to OffGAR. References to the financial issue can be found in the following papers already submitted by Epic Energy:

- Submission 1 dated 15 December 1999 – p.2 (public version dated 28 February 2000):

“To not approve the Access Arrangement in the form put to the Regulator would fail to take into account Epic Energy’s legitimate business interests, and the investment Epic Energy has already made in the DBNGP.

To require a different structure, which would produce a lower revenue, would impose a regime in which operation of the DBNGP was no longer financially viable.

It would place at risk future investment in pipeline capacity required to support economic development in Western Australia.”

- Submission 1 dated 15 December 1999 – p.24-25 (public version dated 28 February 2000):

“The Regulator must approve the Access Arrangement which implements Epic Energy’s regulatory compact with the Government of Western Australia.

To proceed in any other way would be inconsistent with the regulatory compact.

.....

It may well remove Epic Energy’s financial capability to continue pipeline operation, and to meet its commitments to make the investments in the additional pipeline capacity required to support economic development in the State.”

- Additional Paper 4: Regulatory Compact dated 8 September 2000 at paragraph 5.8 on page 15:

“Only by implementing the regulatory compact, would the Regulator take into account Epic Energy’s legitimate business interests and the investment its shareholders have made in the Pipeline... .. Moreover, the Regulator may well remove Epic Energy’s financial capability to continue pipeline operation, and to deliver on its commitment to make the investments in the additional pipeline capacity required to support economic development in the State.”

- Additional Paper 4: Regulatory Compact dated 8 September 2000 at paragraph 5.9 on page 15:

“Were the Regulator to proceed in any other way, ... Were the State and the Regulator to now ignore the regulatory compact, Epic Energy’s shareholders would be exposed to “asymmetric risk”. That risk may significantly deter future private sector investment in infrastructure assets in Western Australia. Future potential investors would realise that they could be exposed to substantial financial loss while, at the same time, they had no prospect of securing the superior financial returns required to compensate for the risk of that loss.”

- Additional Paper 5: Code Compliance dated 25 October 2000 at paragraphs 4.5 and 4.6 on page 19:
 - “4.5 While the forecast volumes have not yet materialised, a downside which Epic Energy must live with, but which provides it with an incentive to work to grow those volumes, any reduction in the tariffs as set out in Schedule 39 would impose severe financial stress on Epic Energy. It believes that with the proposed Access Arrangement it could, with some reasonable equity injection to cover the shortfall in volumes, meet its financial covenants. However, once the tariffs are reduced below that level Epic Energy is placed into serious trouble with those covenants and in scenarios proposed by AlintaGas it would be put into default of its debt facilities. More significantly its entire equity would be written off and it would be placed into negative shareholders funds.
 - 4.6 Clearly that is a significant consequence for Epic Energy and one not expected given the manner in which the State sold the DBNGP. It would be clearly contrary to section 2.24(a) if the proposed Access Arrangement was not approved.”
- Additional Paper 7: Actual Revenue Differences dated 9 April 2001 at paragraph 2.10 on page 4:

“Epic Energy is, however, unable to accept tariffs lower than those of the tariff and the tariff path of the regulatory compact. Those tariffs are essential to the long term viability of Epic Energy’s investment in the DBNGP in circumstances where revenue from a major customer – Alcoa – will fall significantly in well under 10 years from the date of its acquisition of the Pipeline.”
- Additional Paper 10: Financial Viability dated 20 June 2001 – the entire paper.

Write down of shareholders’ values

- 6.84 As has been stated previously, Epic Energy calculated the purchase price based on assumptions relating to three critical factors:
- The tariffs and tariff path would be as set out in Schedule 39;
 - The contracted and throughput volumes would be as Epic Energy forecast; and

- The likely capital expenditure required for future expansions of the pipeline.
- 6.85 Epic Energy shareholders therefore agreed on a financing package where the banking syndicate provided \$1.91 billion towards the purchase price. The shareholders therefore provided the balance.
- 6.86 It is a matter of fact that the forecast volumes have not yet materialised. This is a downside which Epic Energy must live with, but which provides it with an incentive to work to grow those volumes. However any reduction in the tariffs as set out in Schedule 39 would impose severe financial stress on Epic Energy.
- 6.87 Submission DDS#1 – Financial Viability (confidential version) deals also with the issue of the equity injection that would be required by shareholders to refinance the DBNGP business in order to cover the reduction in the enterprise value of the DBNGP resulting from the lack of growth in volumes even based on the tariffs proposed by Epic Energy in its proposed Access Arrangement.
- 6.88 deleted – confidential.
- 6.89 The need to protect the legitimate business interests of Epic Energy therefore relates directly to the interests of Epic Energy’s shareholders and the Banks.
- 6.90 It is noted that one of Epic Energy’s shareholders, the Utilities Trust of Australia (which is represented through Hastings Funds Management Limited), has already written off its equity value in Epic Energy on the basis of the Draft Decision. This is a matter of public record in the trust’s annual report⁷³.
- 6.91 deleted – confidential.

Final Bid – Financial Analysis

- 6.92 Before discussing the financial analysis undertaken by Epic Energy as part of the Conforming Final Bid, it is important to note that the Code requires (as concluded by the Court) the Regulator to give fundamental weight to the factor of the service provider’s legitimate business interests when assessing an Access Arrangement.
- 6.93 Epic Energy’s legitimate business interests in the case of the DBNGP extends to being entitled to:
- earn a return which allows it sufficient profits to operate as a viable commercial business, to the extent that it has made reasonable appropriate forecasts as to future demand and costs;
 - earn a return which allows it to invest in the future expansion of the pipeline; and

⁷³ See annual report for 2001/2002 financial year, a copy of which has been provided to the Regulator by Hastings Funds Management directly under cover of letter dated 13 June 2002.

- be afforded the opportunity to recover its investment once-over.
- 6.94 This was emphasised by Mr Barnett at the time of the sale as being one of the key objectives of the sale.⁷⁴ The appropriate level of profits to be allowed to Epic Energy is something which is discussed in detail in Epic Energy's submission CDS#2 lodged together with this submission
- 6.95 As is stated in CDS#2, there is a temporal aspect in judging the legitimacy of Epic Energy's return on investment. Taking, for example, the question of projected volumes and the increase in the DBNGP's capacity. At the time of purchase, the shareholders of Epic Energy were prepared to bear the risk that the forecast volumes would not materialise. Epic Energy now merely seeks the **opportunity** to recover its investment based on tariffs consistent with the expectation during the DBNGP sale process. If Epic Energy is not now given the **opportunity** to recover its purchase price, having regard to the reasonable expectations it formed at the time of the sale process, its shareholders will have substantially diminished incentives to further invest in the DBNGP and expand the pipeline capacity, and this will provide a further signal to Australian and international markets that Australian regulatory frameworks are generally detrimental to promoting the investment and efficient development of infrastructure. Neither of these potential outcomes is conducive to the further economic development of Western Australia (or, for that matter, Australia).
- 6.96 Given that Epic Energy's expansion commitment was a fundamental element of its bid for the purchase of the DBNGP as were the tariffs as set out in Schedule 39 of the Asset Sale Agreement, if the tariffs set out in Schedule 39 are not implemented, Epic Energy would not consider itself bound by expansion program and associated tariff path outlined in Schedule 39 of the Asset Sale Agreement.
- 6.97 Turning to Epic Energy's analysis conducted to arrive at the final purchase price. As set out in the letter sent to prospective purchasers together with the IM inviting indicative non binding bids to be made, for bidders to be eligible for short listing and therefore to be able to participate in Phase IV, they were required to lodge an indicative non binding bid. Paragraph 5.56 of this Submission outlines what was required to be included in an Indicative Non Binding Bid.
- 6.98 Quite clearly then, the issue of a bidder's financial capability to not only operate the pipeline but also to expand it was critical to the GPSSC's assessment process. To enable the GPSSC to properly do this, they had to make some judgment call about the tariffs beyond January 2000, particularly when bidders were required to lodge detailed information for the first 10 years of ownership.
- 6.99 deleted – confidential.
- 6.100 deleted – confidential.

⁷⁴ Hansard, 14 June 2000, pp 7660-7

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- 6.101 Central to these analyses, Epic Energy calculated the purchase price based on assumptions relating to two critical factors:
- The tariffs and tariff path would be as set out in Schedule 39 of the Asset Sale Agreement it signed with the State; and
 - The contracted and throughput volumes would be as Epic Energy forecast. Related to this was that the capital expenditure for the future expansions required to meet the throughput growth would be as Epic Energy forecast.
- 6.102 Epic Energy therefore structured its financing of the acquisition on the above basis (as is outlined above). Given the statements above in relation to Government policy and a range of other factors, the risk of the tariffs being other than those proposed in Schedule 39 of the Asset Sale Agreement was considered minimal.
- 6.103 Given the detailed due diligence analysis undertaken by Epic Energy and which is referred to earlier on in this section of the submission, the Regulator must accept Epic Energy's proposal in order to have properly had regard to Epic Energy's legitimate business interests.

Tariff Path

- 6.104 deleted – confidential.
- 6.105 It is noted that Epic Energy's proposed Access Arrangement contains a flat escalation of 67% of CPI.

Final Bid – lodgement and selection of successful bidder

- 6.106 Epic Energy filed its Final Bid⁷⁵ with the GPSSC on 28 February 1998.[deleted – confidential].
- 6.107 deleted – confidential.
- 6.108 Deleted – confidential.
- 6.109 On 3 March 1998 the GPSSC informed Epic Energy that the State had accepted its Final Complying Bid and Epic Energy was announced as the successful bidder for the purchase of the DBNGP. For example, in the Australian Financial Review of 6 March 1998 there was the following report:

*"West Australian Resources Minister Mr Colin Barnett has assured customers throughout the State **of competitive gas pricing in the future despite the \$2.4 billion paid this week by US-based Epic Energy for the Dampier-to-Bunbury natural gas pipeline.***

⁷⁵ Sale of the Dampier to Bunbury Natural Gas Pipeline Final Bid Submission by Epic Energy ("Final Bid") together with covering letter dated 28 February 1998, contained in Attachment 26.

*He said while the pipeline sale agreement foreshadowed a price drop of 20 per cent – from \$1.19 to \$1.00 per gigajoule – **by the year 2000, beyond that time any increases were required to be less than the CPI.....***

But he said real competition in the gas industry would come from more producers and consumers using the existing pipeline, with Epic Energy committed to doubling its size by spending \$857 million over the next nine years.”[emphasis added]

7. Other Bidders' expectations in relation to the sales process

- 7.1 The expectations and understandings of entities involved in the sales process, particularly in relation to the expected tariffs and tariff path as from 1 January 2000 is a critical aspect for the Regulator to examine and test in order to determine the legitimacy of Epic Energy's proposal, particularly in relation to the proposed tariff of \$1.00/GJ to Perth and the tariff path.
- 7.2 Accordingly, Epic Energy considers that the Regulator must have regard to, among other things:
- the key features and assumptions of the unsuccessful candidates' bids to demonstrate their consistency with Epic Energy's bid that was accepted by the State; and
 - the expectations and understandings of the other candidates that arose from the sales process to understand the bases upon which their bids were derived.
- 7.3 It should be noted that Epic Energy has on many occasions urged the Regulator to make his own enquiries of the other candidates in these respects. To date, Epic Energy is not aware that the Regulator has made such enquiries. As the Regulator would appreciate, it is not an easy matter for Epic Energy to access this information to which it has no legal right of access to in this process. However, the Regulator does have such rights.
- 7.4 Notwithstanding the information being provided in this submission however, and given the potential limitations brought about by the second confidentiality issue raised below, Epic Energy urges the Regulator to make his own enquiries of the unsuccessful candidates to:
- satisfy himself of the veracity of the information that Epic Energy has provided in this submission; and
 - any additional information the Regulator may think relevant in relation to their bids or the sales process that is relevant for the purposes of assessing the Access Arrangement

Confidentiality Issues

- 7.5 Before assisting the Regulator in this regard, there are 2 preliminary confidentiality issues that need to be detailed.
- 7.6 First, it should be noted that all bidders in the sales process were required by the State to sign a confidentiality undertaking in relation to their participation in the sales process.
- 7.7 The confidentiality undertaking was in a standard form. A copy of it is **attached as Attachment 8**. While parties other than Epic Energy were required to destroy all documentation relating to the sale process (in accordance with the confidentiality undertaking), clause 13 of the undertaking, at the relevant parts, provides as follows:

"The Covenantor agrees that:

- (a) *the obligations of confidence on the part of the Covenantor in this Deed shall continue:*

.....

- (ii) *in the case of all other Confidential Information, for a period of 3 years from the date hereof,*

notwithstanding any withdrawal of the Covenantor from, or that the Covenantor is not selected to participate in any stage of, the Proposed Sale or any sale of, or decision not to sell, the DBNGP Assets"

7.8 That 3 year period has well and truly expired. Hence it is Epic Energy's understanding that all participants in the sales process are able to talk fully about their recollections of the sales process.

7.9 deleted - confidential.

7.10 deleted – confidential.

7.11 The second confidentiality issue relates to the extent of the information provided to Epic Energy and as outlined in this submission. It should be noted that Epic Energy has not been able to obtain all relevant information from all candidates it has spoken to due to the commercially sensitive nature of some of the information relating to the sales process. It has also been unable to speak with some of the other bidders who lodged final binding bids.

7.12 It is noted that at the public forum held by the Regulator on 2 August 2001, the Regulator said:

*"I think it's not for the regulator to demonstrate the existence of such agreement or regulatory compact as we have heard. It certainly is, as I see it, for the service provider or anybody else to provide us with sufficient information that we can examine to determine the robustness of it and to what impact it may have. It really depends on the quality of the information. You can't and I can't just take comments that have been quoted or said or expected and I don't think I would be fair to the process, I don't think I would be fair to the industry nor to the service provider in that respect in just reflecting on what might have been said or what expectation there might be."*⁷⁶

7.13 This submission is yet another attempt to do just that. However, as indicated many times previously, there is certain highly relevant information that Epic Energy simply can not access, but the Regulator can and it will therefore be necessary for the Regulator to use his information collection powers to obtain. The categories of information are outlined in Epic Energy's submission CDS#1. However, Epic Energy would be happy to assist in this respect by

⁷⁶ Page 27 of Transcript of the Public Forum.

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drafting the necessary section 41 notices to access this information. The Regulator will appreciate that that is not dissimilar to the issue of summonses in a Court process.

- 7.14 However, given that Epic Energy has not been able to obtain all relevant information from all other candidates and that there are no confidentiality restrictions remaining in relation to the sale process itself, the Regulator should approach all other bidders which lodged final binding bids and be free to openly discuss and obtain all relevant information relating to all aspects of the sale process with those entities. To this extent, Epic Energy expects that the Regulator should use his powers under section 41 of Schedule 1 to the Gas Pipelines Access (Western Australia) Act 1998 where appropriate.

Public Comments made by Bidders to date

- 7.15 As part of the regulatory approval process to date, there have been a number of submissions made by parties involved in the sales process in relation to the sales process and in particular relating to the expectations as to the tariffs beyond 1 January 2000.
- 7.16 As was demonstrated in Submission DDS#5 – Sales Process, Epic Energy notes the submission of CMS Energy to the Regulator where they said:

“CMS is of the view that it might be worthwhile to consider Epic Energy’s apparently optimistic ICB proposal in context.

In establishing the purchase price which it was prepared to bid for the DBNGP, Epic was faced with a known tariff expectation (publicised by the State Minister for Energy and Resource Development) which, in accordance with standard valuation methodology, would have been combined with assumptions about required rates of return, risk acceptance and load and market growth potential. If Epic chose to be more aggressive than its rivals in these assumptions, then that may be considered a reasonable commercial prerogative. However, in the context of regulatory compliance, Epic’s requirement to claim such a high capital base is a direct reflection upon the regulatory adoption of unrealistic rates of return (as a consequence of basing outcomes on erroneous assumptions and slavishly following inappropriate precedents) as well as the ‘cherry picking’ of parameters by Regulators to achieve their own preconceived outcomes.

In a regulatory environment which permits only such unattractively low rates of return, Epic have little choice but to claim the ICB which they have in order to attempt to sustain the tariff outcomes which have been preordained for them (notably without the benefit of any quantitative economic rationale) and upon which, presumably, their purchase of the DBNGP was justified. In accepting this valuation of the DBNGP, the Western Australian Government implicitly accepted this as the basis upon which future tariffs would be determined. Clearly, the current expectation of regulatory outcomes does little to promote economic efficiency, either directly by

mandatory imposition or by the stimulation of competition and development.”⁷⁷ (emphasis added)

7.17 deleted – confidential.

7.18 Clearly the expectations created with other bidders for the DBNGP is relevant here. As evidenced by the above, that expectation went beyond just Epic Energy. Even shippers had that expectation as shown below in the next section of this paper.

Recollections of some other bidders

7.19 Epic Energy has also spoken to some of the bidders who were shortlisted by the GPSSC for the purposes of the final phase of the sales process.

7.20 As outlined above, the groups that were shortlisted were listed and invited to participate in Phase III. However, only the following entities lodged final binding bids:

- deleted – confidential.

7.21 Epic Energy understands that the other 2 bidders who were shortlisted for the second stage of the sale process who did not lodge final bids were:

- deleted – confidential.

7.22 Three complying and three non complying bids were lodged by the remaining 3 bidders.⁷⁸

Key features and assumptions of Unsuccessful Final Bidders’ bids

7.23 As stated above, it is important to understand the key features and assumptions of the unsuccessful Final Bidders to determine their consistency with Epic Energy’s successful bid.

7.24 deleted – confidential.

7.25 deleted – confidential.

7.26 deleted - confidential.

7.27 deleted – confidential.

7.28 deleted – confidential.

7.29 deleted – confidential.

⁷⁷ Submission of CMS Energy Gas Transmission published by OffGAR of 17 March 2000 at p.5

⁷⁸ GPSSC Report on the Sale of the DBNGP Submission to Parliament provided to Minister for Energy on 20 May 1998, page 11

11 December 2002

- 7.30 Epic Energy has not obtained the complete details of each bidders' complying and non complying final bids or their Indicative Bids. This is particularly the case in relation to the purchase price bid. At the time of the sale there was significant speculation in the press regarding the price paid by the unsuccessful bidders. This information was just that – mere speculation.
- 7.31 deleted - confidential.
- 7.32 The only reliable source that can be relied upon is the GPSSC and the Government. Once again, Epic Energy urges the Regulator to use his information collection powers under the GPAL in this respect.
- 7.33 Lastly, Epic Energy conducted its own ex post facto analysis of whether it had paid a reasonable price compared to the second complying bidder. The result of this analysis, conducted by [deleted – confidential], was that Epic Energy had paid approximately [deleted – confidential] more than the second highest complying bidder. [deleted – confidential] concluded that this difference compared to the second highest bidder was within an acceptable and normal range, based on other recent privatisations of regulated infrastructure assets throughout Australia. This analysis is contained in **Attachment 24**. Epic Energy can not vouch for the veracity of the figures quoted in this attachment in so far as they detail other prices bid by other entities for the DBNGP. In that respect, Epic Energy urges the Regulator to once again exercise his information collection powers.

8. Other stakeholders' expectations

- 8.1 In addition to the need to understand the expectations of other bidders, Epic Energy considers that the Regulator must have regard to the expectations of users and prospective users at least in relation to the likely tariff and tariff path beyond 1 January 2000.

Public Comments made by users to date

- 8.2 As part of the regulatory approval process to date, there have been a number of submissions made by parties involved in the sales process in relation to the sales process and in particular relating to the expectations as to the tariffs beyond 1 January 2000.
- 8.3 The submissions made prior to the Court decision were outlined in Epic Energy's Submission # 7 – Reference Tariff and Incentive Mechanism and its additional information paper DDS#5 – DBNGP Sales Process. For the sake of completeness, they are restated below:
- 8.4 In its Third Submission to Regulator on the DBNGP Access Arrangement, AlintaGas stated that section 8.10(f) of the Code requires the Regulator to consider, when establishing the initial capital base for an existing pipeline, the basis on which tariffs have been (or appear to have been) set in the past. Furthermore, AlintaGas said that section 8.10(g) requires that the Regulator consider the reasonable expectations of persons under the regulatory regime that applied to the pipeline prior to the commencement of the Code. AlintaGas has stated that a depreciated actual cost method was the basis for setting DBNGP tariffs in the past, and that current expectations are for full haul tariff of \$1.00/GJ as has been indicated by the Minister for Energy. AlintaGas stated that:

"Under the Dampier to Bunbury Pipeline Regulations 1998, [the 1998 tariff of \$1.19/GJ] was further reduced in 1999 to \$1.09 per GJ in 1999 and to \$1.00 per GJ in 2000,"⁷⁹

and maintained:

" . . . the Regulator can form a view that existing users , including AlintaGas, reasonably expect a T1-equivalent postage stamp service tariff of no more than \$1.00 per GJ under the National Access Code."⁸⁰

- 8.5 North West Shelf Gas has noted that:

"During the sale of the DBNGP, statements were made that "firm full haul (Dampier to Bunbury) tariff at 100 percent load factor will fall from A\$1.19 per GJ to A\$1.00 per GJ by the year 2000. . . .

⁷⁹ AlintaGas Third Submission, p26.

⁸⁰ AlintaGas Third Submission, p26.

*One could contend that it was the Government's intention that the A\$1.00 per GJ tariff should be applied to all full haul customers including those south of the Perth Metropolitan region. Indeed, the recently promulgated regulations for the period between 1 January 2000 and the start date of the new DBNGP AA have been set by the Minister at A\$1.00 per GJ full haul ie including Zone 10. To allow an 8% increase as a result of the AA would seem retrograde and unfair."*⁸¹

8.6 In its submission, Worsley Alumina advised:

"Worsley had "reasonable expectations" with respect to pipeline tariff from the Minister for Energy's second reading speech in connection with the 'Gas Pipelines (Western Australia) Act' in which he stated that "Firm full haul tariff at 100per cent load factor will fall from \$1.19 per gigajoule to \$1.00 per gigajoule by the year 2000".

*Worsley's expected pipeline charge at 1/1/2000 was \$1/Gj of which more than 70% would be fixed and less than 30% escalated at CPI. Worsley anticipated that it would not pay any more than this under an approved regime."*⁸²

8.7 The Government's view on tariffs crystallised with the signing of the DBNGP Asset Sale Agreement. Schedule 39 indicated a tariff of \$1.00 per GJ for gas transportation from Zone 1 (the production/gathering zone) to Zone 9 (the Perth metropolitan area), and a tariff of about \$1.08/GJ from Zone 1 to Zone 10 (downstream of Kwinana Junction). Epic Energy questions, in these circumstances, the reasonableness of AlintaGas's claim to having formed the expectations referred to in paragraph 3.1.2 above. AlintaGas was the sole party that signed the Asset Sale Agreement as Vendor. It was clearly in possession of the Asset Sale Agreement and it itself has released Schedule 39 which sets out those tariffs. Clearly it has known what Epic Energy expected since at least March 1998.

8.8 Epic Energy totally rejects any implication in the arguments advanced by AlintaGas, and North West Shelf Gas, that the reasonableness of \$1.00 per GJ can be inferred from the \$1.00 per GJ currently applicable under the Dampier to Bunbury Pipeline Regulations 1998. In fact, no such tariff appears in those regulations. The \$1.00 per GJ was promulgated at 3.45pm on 31 December 1999 (some 21 months after the sale) by the Government using the powers under the Gas Pipelines Access (West Australia) Act 1998 to amend the "repealed access regime". That tariff was set against Epic Energy's opposition and without its agreement or any consideration being given to Epic Energy's business position. Epic Energy continues to maintain that in doing that, the State has acted contrary to its expectations and understandings.

8.9 In addition to the above, references to similar expectations have been put to the Regulator by the following.

⁸¹ North West Shelf Gas Submission, p8.

⁸² Worsley's Submission, p6-7.

Cockburn Cement Limited:

“Cockburn had “reasonable expectations” with respect to pipeline tariff from the Minister for Energy’s second reading speech in connection with the ‘Gas Pipelines Access (Western Australia) Act’ in which he stated that “Firm full-haul tariff at 100 per cent load factor will fall from \$1.19 per gigajoule to \$1.00 per gigajoule by the year 2000.

The Australian Cement Industry is under threat from cheap cement imports and the Industry has recently lodged an anti-dumping application which is currently being examined. The price of energy is the most important factor in the industry’s competitiveness and forecasts and recent investment in both cement and lime have been based on the expected price of \$1/Gj.”⁸³

CMS Gas Transmission of Australia – referenced in section 9 of this submission.

Bunbury Chamber of Commerce:

“The proposal tariff is contrary to users’ and prospective users’ “Reasonable expectations” as defined by the Minister for Energy in his second reading speech to the Gas Pipelines Access Bill in which he stated that: “Firm full-haul (Dampier to Bunbury) tariff at 100 per cent load factor will fall from \$1.19 per gigajoule to \$1.00 per gigajoule by the year 2000.”⁸⁴

Wesfarmers Limited:

“The proposed division of the network into 10 zones for tariff purposes, and in particular, the proposed boundaries of “zone 10”, result in a transportation tariff for the majority of gas delivered via the DBNGP (being to delivery points in the proposed zone 10) of over \$1.08/GJ. This outcome appears at odds with the intention of the Western Australian parliament at the time of consideration of the Gas Pipelines Access (Western Australia) Act 1998 when the Minister stated:

*“Firm full-haul tariff at 100% load will fall from \$1.19 per gigajoule to \$1.00 per gigajoule by the year 2000.”
(Second reading speech in respect of section 96 of the Gas Pipelines Access (Western Australia) Act 1998): 18 June 1998).”⁸⁵*

Wesfarmers CSBP Ltd:

“as a result of the deregulation process and the privatisation of the DBNGP, both initiated by the WA Government, the industrial market for gas has been given an expectation that full haul tariffs to all users would reduce to no more than \$1.00 per GJ in current dollars;

.....

⁸³ Submission from Cockburn Cement Limited to Regulator dated 17 March 2000 at p.2

⁸⁴ Submission from Bunbury Chamber of Commerce to Regulator dated 29 February 2000 at p.2

⁸⁵ Submission from Wesfarmers Limited to Regulator dated 16 March 2000 at p.3

In the context of announcements by the WA Government on reductions in transmission tariffs, CSBP proceeded with construction of a new \$150million ammonia manufacture plant at Kwinana, to support downstream production of fertilisers and chemicals and for ammonia supply to the mineral processing industry.

Similarly, forward budgeting and planning for other operations at CSBP, and no doubt for other WA industries, have been based on the progressive reduction of gas transmission tariffs to the \$1.00/GJ level.”⁸⁶

South West Development Commission:

“Finally the Commission notes the general industry expectation that the price of the full haul tariff from Dampier to Bunbury would fall to \$1.00 per gigajoule by the Year 2000 (Hon Minister for Energy, 2 nd Reading Gas Pipelines Access Bill). This expectation was clear at the time of the sale.”⁸⁷

Mr C Barnett:

“Having said that, I might observe that most within the industry, including myself, had an expectation that the regulated tariff would be reasonably close to the \$1 per gigajoule figure for gas transmission to the Perth metropolitan areas. It was a figure that was generally considered to be “in the ball park”. ”⁸⁸

8.10 These comments were further confirmed by recent submissions by parties since the Court decision. They include the following submissions:

8.11 Almost identical submissions from Wesfarmers CSBP (8 November 2002), Coogee Chemicals (8 November 2002), Nufarm Australia Pty Ltd (8 November 2002), all of which contained the following text:

As detailed in the separate submission by Wesfarmers Limited dated 24 October 2002 and in our earlier submission of 16 March 2000, statements by the State Government and other relevant authorities related to the sale of the DBNGP resulted in a general expectation by WA industry that gas transmission tariffs would fall to \$1 per GJ in 2000 and continue to fall in real terms over time. In addition, there was no indication in those Government statements that a premium might apply to gas users in Kwinana, where significant gas volumes are consumed.

Investment decisions were made and business planning was undertaken in this context. To change the context of these decisions by endorsing Epic’s proposal to apply higher tariffs in the Kwinana industrial area in excess of \$1 per GJ would be contrary to the interests of users (s 2.24(f)).

8.12 Wesfarmers Limited submission of 24 October 2002 which contained the following similar text:

⁸⁶ Submission from Wesfarmers CSBP Limited to Regulator dated 16 March 2000 at p.2

⁸⁷ Submission from South West Development Commission to Regulator dated 17 March 2000 at p.3

⁸⁸ Submission from Mr C Barnett to Regulator dated 19 September 2001 at p.3

When announcing the sale of the DBNGP in March 1998, the State Government announced that DBNGP tariffs would fall to \$1 (nominal)/GJ in 2000 with the National Access Code to be applied for determination of tariffs thereafter. At that time, there was a general expectation by Western Australian industry, based on announcements and other statements from the State Government and other relevant authorities, that DBNGP transmission tariffs would continue to fall in real terms over time. It was further noted that these figures represented caps, with potential for competition and economies of scale giving lower tariffs. Further, there was not, at that time, any industry expectation of a significant premium to be paid by gas users in Kwinana, where most gas is consumed, over the DBNGP headline tariff as stated.

- 8.13 Based on these submissions, there was a definite expectation from users that the tariffs as from 1 January 2000 would be \$1.00/GJ to Perth (at least) under the Code and that they would only reduce in real terms from that point onwards. As reasoned in section 5 of this submission, it can not be logically argued that the \$1.00/GJ tariff to Perth was simply the end point of the transitional regime.

9. The Benefits to the State achieved from the receipt of the purchase price

- 9.1 Epic Energy has on many previous occasions outlined to the Regulator the benefits to the State achieved from the payment of the purchase price by Epic Energy. However, for the sake of completeness it is important that this information be set out again in one source document together with the complete argument justifying the use of the purchase as the initial capital base.
- 9.2 Through the way in which it structured and executed the sale process, the Government of Western Australia was able to secure a purchase price of \$2,407.0 million for the DBNGP. With the money it received, the Government has been able to:
- repay some \$1.8 billion of State debt and significantly reduce the burden of public debt on all Western Australians; and
 - fund education, health and infrastructure initiatives⁸⁹ in the 1998/99 and 1999/2000 State Budgets without the need for concomitant increases in State debt.⁹⁰
- 9.3 The Disposal Orders made by the Minister to AlintaGas clearly set out the allocation of the sale proceeds.

⁸⁹ Note also the Premier's announcement, on 4 July 2000, of the Perth Convention and Exhibition Centre to be funded using \$110 million of the proceeds from the DBNGP sale.

⁹⁰ The importance of the proceeds from DBNGP sale for achieving a reduction in State debt was discussed by the Premier in his 1998 Budget Speech. The subsequent use the Government has made, on behalf of the community, of the proceeds from pipeline sale was discussed by the Minister for Energy in recent Parliamentary debate on the proposed sale of AlintaGas:

"Yes. We retired a significant part of direct and general government debt out of the sale of the Dampier-Bunbury natural gas pipeline. One can assume part of the proceeds will be used to retire government debt. I hope the temptation to rush out and spend it all is resisted. The proceeds should also allow some worthwhile works to be undertaken within the community. That is a decision for Cabinet to make at the appropriate time. As a result of the sale of the Dampier-Bunbury natural gas pipeline, two broader community benefits were achieved. A total of \$100m was put into computers, technology and schools. We put 26 000 computers into government schools over four years and 6 000 computers into non-government schools. In a sense, the pipeline was a community-owned asset and the distribution of the proceeds went to everyone, both government and non-government schoolchildren. That program has very strong community support and is producing substantial educational benefits. It was decided to allocate \$100m to the development of a convention centre for Perth. There is some controversy about that, but there is no doubt that the one piece of major tourism infrastructure lacking in this State is a convention centre. Such a facility is important to attract conferences and activities to Perth the benefits of which will then feed out into regional areas. No convention centre in Australia has been built without public support. They are in the nature of infrastructure items. Convention centres are not basic infrastructure like roads, railways and power stations, but they fall into that spectrum. A world-class convention centre is essential for the development of the tourism and convention business within the State. It will not be profitable on its own; it will require support. Given public support which ultimately may be recovered, the convention centre will be competitive in bidding for events and it will bring great economic benefits to the members of the community who use it." (Hansard, 9 September 1999.)

- 9.4 The State budget papers for 1998-99 set out, in some detail, the way the Government intended to use the proceeds from the sale of the DBNGP. Feature 1 in the *Economic and Fiscal Overview* summarised:

“A major influence on the 1998-99 and outyear expenditure estimates was the sale of the Dampier to Bunbury Natural Gas Pipeline which provided the budget flexibility to implement the following measures:

- *The payment of \$1.8 billion towards retirement of public sector debt;*
- *An injection of \$244 million into the State Development Fund to be applied towards infrastructure developments and capital projects over the forward estimates period, including \$100 million for computers in schools, \$100 million for a Convention and Exhibition Centre, \$20 million for capital projects in regional Western Australia, and \$10 million for the Community Sporting and Recreation Facilities Fund; and*
- *Additional funding of \$295 million over the forward estimates period for the introduction of full concurrent funding of the West State Super Scheme for all liabilities incurred after 30 June 1998.*

Additional funding of \$43 million has also been provided to clear the estimated outstanding liability in the Government Insurance Fund over the forward estimates period. This initiative completes the final phase of the establishment of fully funded insurance arrangements, known as RiskCover, for public sector agencies.”⁹¹

- 9.5 The budget papers for the following year further emphasised the benefits to the State from the Pipeline sale. The *Economic and Fiscal Overview* for 1999-00 noted:

“The sale of the Dampier to Bunbury natural gas pipeline in 1997-98 enabled public sector net debt to decline to \$4,694 million at 30 June 1998. This was the lowest net debt level recorded.”⁹²

- 9.6 As the Minister for Energy acknowledged in a statement to Parliament on conclusion of the sale process on 11 June 1998:

“The sale is widely recognised as an outstanding success for this State in realising value back to the community from its substantial investment over time to establish energy infrastructure.”

- 9.7 In a statement by Mr Barnett in Parliament, he outlined the following:

“The DBNGP and associated assets were sold to Epic Energy. Proceeds received by AlintaGas totalled \$2,302,551,086.50. Associated revenue in respect of stamp duty paid directly to Government totalled approximately

⁹¹ *Budget 1998-99 “Economic and Fiscal Overview”, Chapter 3, Financial Projections Statement, page 60.*

⁹² *Budget 1999-2000 “Economic and Fiscal Overview”, Chapter 6, Uniform Reporting of Public Sector Finances, page 214.*

\$104 million. Of the sale proceeds received by AlintaGas, \$1,023,742,000 was applied to the repayment of DBNGP related debt. On 26 March 1998, \$1,026,000,000 was paid to State Treasury and the remaining proceeds will be paid to the State Treasury in accordance with the Gas Pipeline Sale Process Direction 1998, No 3 issued by the Minister for Energy on 25 March 1998. Costs incurred by AlintaGas to date in the sale process total approximately \$13.2 million.”

- 9.8 Copies of the above Hansard and relevant pages of the Budget papers are contained in **Attachment 17**.
- 9.9 For its part, Epic Energy indicated that it committed to make further investments in the DBNGP as economic development in other sectors of the State's economy created new demand for gas transmission capacity. At the time, based on the Government's own forecasts, Epic Energy predicted that investments in pipeline expansion could total \$875 million by 2007.
- 9.10 Epic Energy's commitment to expansion was noted by the Premier in his media statement on the outcome of Pipeline sale issued on 3 March 1998. Subsequently, the Minister for Energy advised Parliament that:
- “Epic Energy Australia has also made a commitment to spend up to \$874 m through to the year 2007 in order to double the capacity of the pipeline to meet the potential growth in the demand for gas in the mid west and south west of the State.”⁹³*
- 9.11 It is useful to note that by adopting this, the State was endorsing the forward estimates made by Epic Energy as to volume growth.
- 9.12 Shortly after its acquisition, Epic Energy commenced delivering on its commitments based on the expectation of the tariff and tariff path in Schedule 39 of the Asset Sale Agreement. It has completed a further expansion of DBNGP capacity requiring investment of over \$120 million in additional compression plant and looping of the Pipeline. The expansion provided the gas transportation capacity needed to meet new industrial demands in 1999 and 2000. It should be noted that all the firm capacity created by that expansion has been taken up.
- 9.13 To further support its focus on Western Australia, Epic Energy committed to moving its corporate office to Perth, and that move has now been completed.
- 9.14 Not only has this ensured greater security of employment for those AlintaGas employees whose employment arrangements were assumed by Epic Energy as a result of the sale, it has also resulted in a significant national business being headquartered in Perth. Epic Energy's corporate activities and the daily control of all of its pipelines throughout Australia (valued at \$3.6 billion) are coordinated from the Perth office. As a result, this has led to an increase in employee numbers in these areas and the engagement of local consultancy firms assisting Epic Energy in not only matters pertinent to the DBNGP, but also matters of national importance. To date, Epic Energy has engaged the

⁹³ Ministerial Statement, 10 March 1998, Hansard, page 138.

services of local consultancy firms practising for example, in the fields of law, regulation, accountancy, information technology, economics, engineering, human resources recruitment and environmental science.

- 9.15 Significant funds have been invested by Epic Energy to date in these firms, totalling in 2001, for example, over \$3 million. It is more than likely that this investment in these Western Australian firms would not have occurred had Epic Energy not relocated its head office to Perth.
- 9.16 The State obviously considers it of significant importance to have large companies' corporate headquarters located in Perth. This is demonstrated by the requirement in the privatisation of AlintaGas for its headquarters to remain in Perth and for its CEO to also be based out of Perth, which is enshrined in legislation.
- 9.17 The benefits to the broader community from the reduction in State debt, and from the Government's education, health and infrastructure initiatives have been made possible by Epic Energy's purchase price of \$2,407.0 million. The continued expansion of the DBNGP will also assist the economic development of Western Australia. All of this was and would in the future be done on the basis of the tariff and tariff path set out in Schedule 39 of the Asset Sale Agreement.
- 9.18 Epic Energy has always acknowledged that there was no express contractual provision agreeing to the tariff and tariff path being as set out in the Asset Sale Agreement or in any other document. That is equally true of the other Epic Energy "commitments" referred to above.
- 9.19 The sale process for the DBNGP was conducted in unusual circumstances. The owners of Epic Energy believed that as they were dealing with a Government in Australia, they were able to rely on the representations made by the Government and its representatives in the GPSSC, particularly when the GPSSC was established as the only point of contact for the sale process.
- 9.20 As a result, it assumed that the purpose of Schedule 39 of the Asset Sales Agreement was to spell out the tariff and tariff path that was to be locked away. That was consistent with the discussions held with the GPSSC and the Government's public statements. If the Government's intent at that time was not that, then clearly the Government, AlintaGas and the persons coordinating the sale at the time deliberately misled Epic Energy and the other bidders. If they did not, then it is compelling that the State's intent, and hence the public of Western Australia, was that the tariff and tariff path should be as in Schedule 39 of the Asset Sale Agreement. For if it were not, then the State, AlintaGas and the people of Western Australia took the purchase price paid by Epic Energy under false pretences. This is a significant issue when looking at the public interest.
- 9.21 Epic Energy accepts the risk that, at least in the short term, economic development in Western Australia might not support – and, in fact, has not supported - the substantial growth in gas demand indicated by forecasts made during the DBNGP sale process. That is, Epic Energy has always accepted the risk that the growth in gas demand may not yield a revenue

stream consistent with the price it paid for the Pipeline. Acceptance, by the buyer of an asset, of the risk that forecasts of future demand for the asset's services may not be realised, is normal commercial practice.

- 9.22 As Mr Barnett stated in Parliament on 14 June 2000, the Government could have structured and executed the pipeline sale process in a different way. It could have sought lower gas transmission tariffs by reducing the emphasis it placed on achieving the highest possible sale price. Alternatively, it could have sought a higher price by accepting a lower reduction – or even an increase in – gas transmission tariffs.
- 9.23 In any event, the Government of Western Australia chose to structure and execute the DBNGP sale process in a way that delivered the sale price, and tariffs and tariff path supporting that sale price, now reflected in the Asset Sale Agreement. There may have been an element of monopoly rents being gained in the way in which the sale process was structured and executed, but any such rents have been gained by the State through the receipt of the purchase price. However, as the Minister for Energy has strongly argued, this is an issue of public policy making. It is an issue that must be dealt with by the Government itself, and not by the Regulator:

“The role of the regulator is to be a regulator, not to be a price or policy maker. We have to be very conscious that the regulatory regime and the regulator does not start to become the policy maker. That is a province of Government, not in a selfish way, but it is something that has to reflect a range and a balance of economic and social objectives.”⁹⁴

- 9.24 Epic Energy notes that the Government and the Regulator continue to refer to the elements of the regulatory compact. It also again demonstrates Epic Energy's concern that the Regulator is interpreting the term “regulatory compact” as connoting some form of agreement, which as again pointed out above Epic Energy completely rejects and has always rejected.
- 9.25 The Government refers to the common understandings and expectations that developed between it and prospective purchasers of the DBNGP during the Pipeline sale process (and without which the sale process could not have proceeded). For example, in responding to questions from the Opposition on 14 March 2000, the Minister for Energy advised:

“I can explain the broad background to the sale and what occurred. The bidders, including Epic Energy, were asked to bid on a number of features. One obvious one and the most important component was price; a second related to service standards and the like; a third related to the price, not only what they would pay for it but the cost of the transport of gas; a fourth related to commitments to expanding pipeline capacity. Therefore the price paid for the pipeline was by far the most important criteria. However, there were three other components: The first was the bid of \$2 407m; the second was a commitment to spend some \$875m on effectively expanding and duplicating the pipeline capacity over an eight-year period; and the third related to the

⁹⁴ Australian Institute of Energy. *Address by the Hon Colin Barnett, Western Australian Minister for Energy.* Perth, Friday 26 March 1999.

transport tariff. At the time of the sale, the cost of transporting gas was \$1.19 per gigajoule to the south west. Under the bid put in by Epic Energy, the price would fall from \$1.19 to \$1.10 to \$1, and that has happened; in other words, the bid was composed of price, top dollar, an expansion commitment on investment and a 20 per cent reduction in tariff . . . Yes, it is true that we could have traded off. We could have gone back to Epic Energy and said that we would take a lower price for the State in exchange for giving transporters of gas a lower tariff.”⁹⁵

“We made the judgment that a high price for taxpayers and the community of Western Australia was the first and most important component. If at the same time we doubled the pipeline capacity and delivered a 20 per cent cut in transport tariffs, it was a very good deal.”⁹⁶

“The tariff schedule put in by Epic Energy included a proposal that the price of gas would fall from \$1.20 to \$1.10 to \$1. That was a schedule that was generally put forward by Government to all bidders as an expectation. That was the broad understanding.”⁹⁷

- 9.26 At the time of the DBNGP sale process, both Epic Energy and the Government of Western Australia believed that the core of their expectations and understandings was consistent with the requirements of the Code. In particular, the tariffs and the tariff path were believed to be consistent with application of the Code’s cost of service approach based on a common set of forecasts of future gas demand, a depreciated optimised replacement cost valuation of the pipeline, a rate of return determined in accordance with then accepted methods, and estimates which had been made of future non-capital costs. However, as has been outlined above, this was but one of many methods of complying with the Code. The State’s advisors, Price Waterhouse, acknowledged that. Furthermore, the very body charged by the Council of Australian Governments with developing the Code, the Gas Reform Implementation Group, acknowledged that in its own policy information paper.⁹⁸
- 9.27 Circumstances have now changed in a number of respects. Forecasts of gas demand have been revised downward consistent with a lower than anticipated level of activity in the Western Australian economy. Hindsight is a wonderful thing! The process of sale has placed a value on the DBNGP.
- 9.28 Nevertheless, Epic Energy’s expectations and understandings with the Government of Western Australia remain. Epic Energy has recognised that in the establishing the initial capital base for the DBNGP.

⁹⁵ Hansard, 14 March 2000, page 4963, question no. 543.

⁹⁶ Hansard, 14 March 2000, page 4963, question no. 543.

⁹⁷ Hansard, 16 March 2000, page 5198, question no. 575.

⁹⁸ See paragraph 4.13 of this Submission

10. Can the Price paid under a competitive tender process be relied upon as a market valuation?

- 10.1 As is stated in Epic Energy's proposed Access Arrangement, Epic Energy has called on the Regulator to have fundamental regard to section 8.10(c) and 8.10(d) of the Code in establishing the initial Capital Base of the DBNGP. Section 8.10(c) provides that the Regulator should consider "the value that would result from applying other well recognised asset valuation methodologies in valuing" the DBNGP.
- 10.2 **Attachment 18** is a paper prepared by Epic Energy's regulatory advisers, KPMG which concludes that a price paid under a competitive tender process can be relied upon as a well recognised asset valuation methodology.
- 10.3 On the basis of the information provided in the prior sections of this submission, it has been demonstrated that:
- the process relating to the sale of the DBNGP was a competitive tender process;
 - such a process is well recognised asset valuation methodology; and
 - the price that was paid by Epic Energy is one that can be relied upon as a appropriate value that for the purposes of section 8.10(c) of the Code
- 10.4 This concept is evaluated in further detail in Epic Energy's submission CDS#2, filed simultaneously with this submission.

11. Deleted - Confidential

11.1 Deleted – confidential.

11.2 Deleted – confidential.



PROPOSED ACCESS ARRANGEMENT
PUBLIC VERSION
Court Decision Submission CDS#3 -
DNBGP Sales Process

Attachment 1

Hansard of 14 June 2000

Attachment 2

Ministerial Statements on Maximising Sale Price

- Hansard, 14 March 2000, pages 4962 & 4963
- Hansard, 16 September 1999 pages 1322 to 1324, especially page 1324

Attachment 3

**Further Corroboration of policies aimed at maximising sale price and
creating certainty on tariffs**

- Media Statements from Colin Barnett, Minister for Energy, dated 22 May 1997, 24 July 1997, 7 September 1997, 3 March 1998
- Hansard, Debate on the Gas Pipelines Access (Western Australia) Act 1998, 16 September 1998
- Hansard, answer to question from Mr Ripper, 14 March 2000
- Hansard, 16 March 2000
- Hansard, second reading speech of the Dampier to Bunbury Pipeline Bill 1997, 11 November 1997, pages 7523 – 7524

Attachment 4

Report on the sale of the DBNGP – Submission to Parliament May 1998

See Attached.



**PROPOSED ACCESS ARRANGEMENT
PUBLIC VERSION
Court Decision Submission CDS#3 -
DBNGP Sales Process**

Attachment 5

Letter GPSSC to Epic Energy dated 8 September 1997

See attached

Attachment 6

**Special Report of the Western Australian Auditor General – Sale of the
Dampier to Bunbury Natural Gas Pipeline, dated May 1998**

See attached.



**PROPOSED ACCESS ARRANGEMENT
PUBLIC VERSION
Court Decision Submission CDS#3 -
DBNGP Sales Process**

Attachment 7

Information Memorandum

See attached – [deleted confidential].



**PROPOSED ACCESS ARRANGEMENT
PUBLIC VERSION
Court Decision Submission CDS#3 -
DNBP Sales Process**

Attachment 8

**Pro Forma Confidentiality Deed signed prior to release of Information
Memorandum**

See attached



**PROPOSED ACCESS ARRANGEMENT
PUBLIC VERSION
Court Decision Submission CDS#3 -
DNBGP Sales Process**

Attachment 9

Epic Energy Acquisition Model

See attached. [deleted – Confidential].

Attachment 10

Explanation of Acquisition Model

[deleted – confidential]



**PROPOSED ACCESS ARRANGEMENT
PUBLIC VERSION
Court Decision Submission CDS#3 -
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Attachment 11

**Executive Summary of Epic Energy Preliminary Due Diligence Report –
January 1998**

See attached - [deleted – confidential]



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**Attachment 12
Commercial Sections of Epic Energy Preliminary Due Diligence Report –
January 1998**

See attached - [deleted – confidential]



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Attachment 13

**Regulatory/Tariff Sections of Epic Energy Preliminary Due Diligence Report –
January 1998**

See attached - [deleted – confidential]

Attachment 14
Table of Regulatory Decisions at time of Sale

See attached



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Attachment 15

Letter GPSSC to Epic Energy re Phases III & IV of bid process

See attached.

Attachment 16

Coopers and Lybrand Financial Model Audit report dated 27 February 1998

See attached. - [deleted – confidential]

Attachment 17

Hansard and Budget Papers in relation to the application of the sale proceeds

See attached.

Attachment 18

**KPMG report on justifying competitive tender process as an appropriate
valuation methodology**

See attached.

Attachment 19

[deleted – confidential] report on tariff regulatory issues

See attached. – deleted - confidential



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Attachment 20

[deleted – confidential] tariff/regulatory analysis

See attached. – deleted - confidential

Attachment 21

**Letter Epic Energy to Felicity Gates of Deutsche Asset Management Pty Ltd
dated 20 November 2002**

See attached. – deleted - confidential

Attachment 22

DBNGP tariff history from 1995

See attached.



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Attachment 23

See attached. - [deleted – confidential]

Attachment 24

**[deleted – confidential] Analysis of unsuccessful bidders for DBNGP and
comparing price paid with other similar privatisations**

See attached. – deleted - confidential



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Attachment 25

Epic Energy Non Binding Bid of 24 October 1997

See Attached - [deleted – confidential]



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Attachment 26

Epic Energy Final Bid of 28 February 1998 and covering letter

See Attached - [deleted – confidential]