DAMPIER TO BUNBURY NATURAL GAS PIPELINE

PROPOSED ACCESS ARRANGEMENT UNDER THE NATIONAL ACCESS CODE

Submission 8: Should a T1 Service be Offered?
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1. Introduction

1.1 On 20 April 2000, the Office of Gas Access Regulation ("OffGAR") released a further four submissions in respect of the proposed Access Arrangement for the Dampier to Bunbury Natural Gas Pipeline (the "DBNGP") lodged, by Epic Energy, on 15 December 1999. In a notice accompanying the release, the Western Australian Independent Gas Access Regulator (the "Regulator") advised that he would open a further period during which submissions might be made to him concerning the proposed Access Arrangement and, in particular, matters raised in the four submissions.

1.2 One of the four submissions released by OffGAR was a submission from Epic Energy ("Epic Submission 1"), which among other things, described in some detail the process of the sale through which it acquired the DBNGP from the State of Western Australia. The version of that submission released by OffGAR is a modified version of the submission lodged with the Access Arrangement on 15 December 1999, which has not been released by OffGAR. The modifications are the deletion of certain information covered by confidentiality obligations. The submission sets out Epic Energy's arguments as to why the Regulator should consider, in his assessment of the proposed Access Arrangement, the way in which the DBNGP sale process was structured and executed. This has been added to by a third submission ("Epic Submission 3") which was lodged with the Regulator on 17 March 2000 and has only recently been made public.

1.3 Two of the other submissions were from AlintaGas, the Government's agent in the sale process, and the third was a joint submission from State Treasury and the Office of Energy. These three submissions tend to cover the majority of the points raised by other interested parties in submissions filed with the Regulator. Therefore by commenting on them Epic Energy believes it will be able to also cover most of the points raised in the other submissions. Where they have not been covered by Epic Submission 3, Epic Energy will endeavour to cover them in other submissions.

1.4 Epic Energy's further comments are made in six separate submissions, each dealing with a particular set of issues. Those submissions are:

4 regulatory compact;
5 capital base, depreciation and WACC;
6 the reference service and other services;
7 the reference tariff and incentive mechanism;
8 the offer of a T1 Service; and
9 gaining access to the DBNGP.

1.5 The matters dealt with in this Submission have been touched on briefly in section 2.8 of the Epic Submission 3. The points made in that should be taken with those set out in this Submission.

2. What is a T1 Service?

2.1 Interested parties who have filed submissions with the Regulator, in referring to a "T1 Service", have tended to mean the service and the terms and conditions associated with that service for T1 capacity as AlintaGas was required to grant under the *Gas Transmission Regulations 1994*, immediately prior to their repeal on 25 March 1998 ("GTRs") or as Epic Energy is required to grant under the "repealed access scheme" as defined in clause 9(3) of Schedule 3 to the *Gas Pipelines Access (Western Australia) Act 1998* at present.

2.2 The terms applying under the latter are, in the main, set out in the Access Manual, which was approved by the Coordinator of Energy under the *Dampier to Bunbury Pipeline Act 1997* on 10 March 1998 ("Access Manual"). The Access Manual has not been amended since that time.

2.3 For the purposes of this submission it is assumed that the "T1 Service" is as prescribed under the Access Manual, that being the most recent statement of such service and not being significantly different from that contained in the repealed GTRs.

Issues raised in submissions to the Regulator

3.1 A number of submissions have suggested that the Reference Service set out in the Access Arrangement should be a T1 Service or at the least there should be an additional Reference Service to the Firm Service which is a T1 Service. In short these submissions have suggested that the T1 Service is the yardstick to be used or that due to the requirements of section 20 of the *Dampier to Bunbury Pipeline Act 1997* there is an obligation for Epic Energy to include a T1 Service as a Reference Service.

3.2 Without wanting to detract from the veracity of the arguments put by other interested parties, the arguments are put in some detail in the AlintaGas No.2 and 3 submissions and it is proposed to simply address those submissions in dealing with this issue. It is not proposed to deal in this submission with suggestions that the zone 10 tariff should also be $1.00/GJ as that is what the public was lead to believe by the Minister for Energy. Whether the public was mislead on that and whether the Regulator should take that into account is a matter for other submissions.

3.3 In the AlintaGas No.2 Submission, AlintaGas reach the conclusion that the Firm Service is "materially different" from the T1 Service. Epic Energy does not agree with that conclusion (that will be dealt with in other submissions), but does agree that there are some differences between the two. Those are due primarily to the fundamental difference that the Access Arrangement does not adopt a tranche capacity structure. That difference was foreshadowed in Schedule 39 of the Asset Sale Agreement.

3.4 This submission first deals with the legal argument based on section 20 of the *Dampier to Bunbury Pipeline Act 1997* ("DBPA") and associated provisions in other legislation, before dealing with the need from a Code perspective to have the Reference Service or a Reference Service that closely resembles the T1 Service.

4. The legal requirement for a T1 Service

4.1 In AlintaGas's view, Epic Energy is required to include a T1-equivalent Reference Service in its Access Arrangement, for the following reasons:

- The effect of section 20 of the DBPA is that Epic Energy is obliged to include a T1-equivalent service in its Access Arrangement ("Statutory price argument").
- At the time of the sale of the DBNGP, Epic Energy represented to AlintaGas that it would include a T1 service and tariff ("Representation argument").
- Section 3 of the Code provides ample scope for the Regulator to require Epic Energy to include a T1-equivalent Service or Reference Service, if he considers it appropriate.

AlintaGas submits (amongst other things) that AlintaGas constitutes a significant part of the market and will be seeking a T1 service from Epic under its existing contracts on and from the date when the Access Arrangement comes into effect ("Regulator's discretion argument").

4.2 Threshold problem with AlintaGas's Second Submission

4.2.1 The basic proposition that emerges from the various arguments in AlintaGas No.2 Submission is that Epic Energy must include a T1 equivalent Reference Service in its Access Arrangement because this is the service currently offered under the pre-Access Arrangement regime.

4.2.2 This is inconsistent at a very basic level with the *Gas Pipeline Access (Western Australia) Act 1998* ("GPAA") and the Code. One of the key objectives stated in the Introduction to the Code is to:

> *"provide rights of access to natural gas pipelines on conditions that are fair and reasonable for both service providers and users."*

4.2.3 This general objective cannot be reconciled with a one-sided view that Epic Energy has no choice but to offer a T1 Service as a Reference Service on the terms and conditions already provided under the existing regime - regardless of the nature of those terms and regardless of how unacceptable and unfair they may be to Epic.

4.2.4 The view that Epic Energy is compelled to offer a T1 Service as a Reference Service is also inconsistent with the principle stated in the Introduction to the Code that the Access Arrangement:

> *"…is designed to allow the owner or operator of the Covered Pipeline to develop its own Tariffs and other terms and conditions under which access will be made available, subject to the requirements of the Code."*

The T1 Service was not developed by Epic Energy but was prescribed by government regulation prior to Epic Energy acquiring the DBNGP. That did not evolve out of an open regulatory process such as is being conducted by the Regulator in this case, with its particular emphasis on giving the pipeline operator the ability to run its own business as it wants, within broad parameters. The previous regime was one prescribed by the Government of the day and, at least in the case of the GTRs provided the then pipeline operator no room to move outside of that. It would be a strange result if the complex new national access regime established by the GPAA and the Code, and all the changes to the law associated with the introduction of that regime, simply resulted in Epic Energy being bound to offer the same form of service (on the same terms and conditions) prescribed by the previous regulatory regime. Not only would that operate against the spirit of the Code, but would also stifle any opportunity to improve the access regime.

4.2.5 We are no longer operating in an environment where the Government is operating the business of the DBNGP. Transportation of gas is not a core function of Government as was recognised by the State when it sold the DBNGP to Epic Energy. Consequently the regime that applied when the Government, through AlintaGas, ran the DBNGP is not necessarily appropriate for the new private sector operator, Epic Energy, and should not be foisted on it.

4.2.6 This is a general problem with each of the arguments in the AlintaGas No.2 Submission. The particular problems with each of the three key arguments in that submission are dealt with in turn below.

4.3 Statutory price argument

AlintaGas's submission

4.3.1 In essence, AlintaGas's Statutory Price argument is as follows.

- Section 20 of the DBPA obliges Epic Energy to offer to vary the price under the existing transmission contracts (eg, AlintaGas Trading's GTR Contract with Epic Energy ("AlintaGas Contract")) to a price not exceeding the "statutory price" applicable from time to time.
- "Statutory price" is defined to mean the price that a person could insist on paying if the person were, at the time concerned, entering into a contract for the service concerned.
- For section 20 of the DBPA to achieve its objective, the statutory price must be determinable after the Access Arrangement is approved.
- Section 96(1) of the GPAA states that "*the Code does not affect the continuance or operation of a contract to which this section applies*" (being contracts in existence before the approval of the Access Arrangement).
- However, section 96(2) of the GPAA states that "*nothing in subsection (1) affects the operation of section 20 of the [DBPA]*". Read together with section 96(1), this means that, to the extent required by section 20 of the DBPA, the Code **does affect** the operation of an existing contract.
- The only way a Code provision could affect an existing contract is by specifying a suitable Reference Tariff which is to apply as the "statutory price", which would be a Reference Tariff for a T1-equivalent Reference Service and possibly a T2-equivalent Reference Service.
- Accordingly, Epic Energy is under a statutory obligation to include in its Access Arrangement a Reference Service which is materially the same as a T1 Service and to set a Reference Tariff for that service.
- This statutory obligation is in addition to the requirements of the Code and there is no policy or legal difficulty with the GPAA augmenting the Code in this respect.

Analysis of the relevant legislative provisions

4.3.2 The relevant provisions are:

- Section 96 of the GPAA applies to access contracts in existence immediately before the approval of the Access Arrangement.
- Sections 96(1) and (2)(a) of the GPAA provide:

> *"(1) The Code does not affect the continuance or operation of a contract to which this section applies.*
>
> *(2) Nothing in subsection (1) -*
>
> *(a) affects the operation of section 20 of the DBPA."*

- Section 20(1) of the DBPA provides:

  > *"Despite anything to the contrary in a contract under which an assignee assumes the position of the corporation under this Part, the assignee is to offer to vary the price for access to which a person is entitled under the contract to a price not exceeding the statutory price applicable from time to time for the service provided for in the contract."*

- "Statutory price" is defined in section 20(5) of the DBPA to mean "*the price that a person could insist on paying if the person were, at the time concerned, entering into a contract for the service concerned*."

4.3.3 AlintaGas's argument is built upon two propositions: first, that section 96(2) can only be given meaning if section 20 of the DBPA and the Code actually affect the operation of existing contracts; and second, that the only way a Code provision could affect an existing contract is by specifying a suitable Reference Tariff which is to apply as the "statutory price", which would be a Reference Tariff for a T1-equivalent Reference Service and possibly a T2-equivalent Reference Service.

The first proposition

4.3.4 This first proposition is wrong because it ignores the obvious point that section 96(2) can clearly be given meaning in so far as it allows for the **possibility** that section 20 of the DBPA and the Code might affect the operation of existing contracts. At the time Parliament enacted section 96(2) there was clearly a possibility that section 20 together with the Code might have the effect, once the Access Arrangement was approved, of requiring Epic Energy to offer a statutory price determined by reference to its Access Arrangement (eg, this would be the case if Epic had decided to include a T1 reference service with an accompanying reference tariff in its Access Arrangement).

4.3.5 To emphasise the fact that this is or was a possibility only:

- There is nothing in section 20 itself or the GPAA or the Code that expressly requires the Access Arrangement to be structured in a way that ensures that a "statutory price" can be derived from the Access Arrangement once introduced. The definition of "statutory price" is and remains very general in character rather than specifically linked to the Access Arrangement, the Code or otherwise.

- Section 20(1) refers to the "statutory price **applicable from time to time**". This section does not require that a statutory price always exist. If a statutory price does not exist, section 96(2) of the GPAA is unlikely to have any operative effect.

- On the other hand, a statutory price may exist but have nothing to do with the Code (for example, if legislation is passed in respect of the grandfathered GTR contracts which prescribes a statutory price). Again, section 96(2) of the GPAA would not have any practical effect.

- A legislative provision is only operative to the extent that the circumstances it relates to exist. It is not the case that a legislative provision must operate at all times and so it is quite possible that at a particular point in time a section may not have any practical effect.

4.3.6 Returning to the key issue. To the extent the possibility existed that the Code and section 20 might operate together to affect existing contracts, section 96(2) was necessary to resolve any potential conflict. That is done by making it clear that if a statutory price became determinable by reference to the Code then the general rule in section 96(1) (ie, that the Code does not affect the operation of existing contracts) would be overridden, because Epic would be obliged to offer the Code statutory price to the existing contract customers despite the terms of their contracts.

4.3.7 It is quite something different to say that the necessary inference arising from section 96(2) is that the Code and section 20 of the DBPA **must** operate to affect the operation of existing contracts. No such inference arises from the section.

4.3.8 If no such inference arises, then there is no foundation for the next step in the AlintaGas argument. That is to say, if there is no inference that section 20 of the DBPA and the Code must operate to affect existing contracts, it cannot be argued that the Access Arrangement must by structured to ensure that section 20 and the Code affect existing contracts.

The second proposition

4.3.9 Even if the first proposition is accepted, the second proposition is wrong.

4.3.10 AlintaGas suggests that the only way a Code provision could affect a GTR contract under section 20(1) of the DBPA is by specifying a suitable Reference Tariff which is to apply as a "statutory price". AlintaGas says that section 96(2) of the GPAA is there to ensure that the Access Arrangement specifies Reference Tariffs for a T1 equivalent Reference Service, which is to be picked up by the offer under section 20 of the DBPA.

4.3.11 If this is its purpose, it is hard to imagine why (given the importance of the point) it was drafted to achieve it in such an oblique way. This is particularly interesting given the Government's original intent as stated in the Information Memorandum provided to potential bidders for the DBNGP. Reference is made on this point to paragraphs 2.8.2 – 2.8.5 of Epic Submission 3.

4.3.12 Leaving this to one side, there **are** other ways the Code could affect existing contracts. A GTR customer could use the Code (indirectly) to derive a "statutory price" for a T1 service, even if the Access Arrangement does not include a T1 reference service. A GTR customer (or Epic Energy) could utilise the *Gas Referee Regulations 1995*, together with section 20 of the DBPA, to require the Arbitrator (appointed under the *GPAA*) to determine a statutory price. This would be done by reference to what kind of decision he would make if the customer applied for a T1 service (being a **non-**reference service) under section 6 of the Code, and he decided to order Epic Energy to provide such a service after taking into account the requirements of sections 6.15 and 6.18 of the Code.

4.3.13 This being the case, it is wrong to say that the **only way** a Code provision could affect a GTR contract is where the Access Arrangement includes a Reference Tariff for a T1 service.

Reference to Parliamentary Debates

4.3.14 In paragraph 19 of its Submission No.2, AlintaGas relies on Hansard extracts to support its argument.

4.3.15 What is not acknowledged in that Submission is that the extract is from a debate occurring some time after section 20 was enacted. Further it is inappropriate to have regard to parliamentary debates or other extrinsic evidence to "create" the existence of a positive obligation by implication. The rules of statutory interpretation provide that extrinsic evidence (including parliamentary debates) should only be used to confirm that the meaning of a provision is its ordinary meaning or to determine the meaning of a provision if it is ambiguous or obscure, or if its ordinary meaning leads to a manifestly absurd or unreasonable result.[1]

4.3.16 Epic Energy does not believe there is any ambiguity or obscurity in section 96(2). If anything, the debate quoted by AlintaGas suggests that the law as drafted did not reflect the Minister's comments in relation to its effect. However, Hansard cannot be used to create ambiguity where there is none on the face of the law, which is the case here.

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[1] Section 19 of the *Interpretation Act 1984* provides:
"(1)Subject to subsection (3), in the interpretation of a provision of a written law*, if any material not forming part of the* written law *is capable of assisting in the ascertainment of the meaning of the provision, consideration may be given to that material –*

(a) *to confirm that the meaning of the provision is the ordinary meaning conveyed by the text of the provision taking into account its context in the written law and the purpose or object* underlying *the* written law*; or*

(b) *to determine the meaning of the provision when –*

(i) *the provision is ambiguous or obscure; or*

(ii) *the ordinary meaning conveyed by the text of the provision taking into account its context in the* written law *and the purpose or object* underlying *the* written law *leads to a result that is manifestly absurd or is unreasonable.*

(2) Without limiting the generality of subsection (1), the material that maybe considered in accordance with *that subsection in the interpretation of a provision of a* written law *includes –*

(a) *all matters not forming part of the* written law *that are set out in the* document *containing the text of the* written law *as printed by the* Government Printer*;*

(b) *any relevant report of a Royal Commission, Law Reform Commission, committee of inquiry or* other similar *body that was laid before either House of* Parliament *before the time when the provision was enacted;*

(c) *any relevant report of a committee of* Parliament *or of either House of* Parliament *that was made to* Parliament *or that House of* Parliament *before the time when the provision was enacted;*

(d) *any treaty or* other *international agreement that is referred to in the* written law*;*

(e) *any explanatory memorandum relating to the Bill containing the provision, or any* other *relevant* document*, that was laid before, or furnished to the members of, either House of* Parliament *by a* Minister *before the time when the provision was enacted;*

(f) *the speech made to a House of* Parliament *by a* Minister *on the occasion of the moving of a motion that the Bill containing the provision be read a second time in that House;*

(g) *any* document *(whether or not a* document *to which a preceding paragraph applies) that is declared by the* written law *to be a relevant* document *for the purposes of this section; and*

(h) *any relevant material in any official record of proceedings in either House of* Parliament*.*

(3) In determining whether consideration should be given to any material in accordance with *subsection (1), or in considering the weight to be given to any such material, regard shall be had, in addition to any* other *relevant matters, to –*

(a) *the desirability of* persons *being able to rely on the ordinary meaning conveyed by the text of the provision taking into account its context in the* written law *and the purpose or object* underlying *the* written law*; and*

(b) *the need to avoid prolonging legal or* other *proceedings without compensating advantage."*

Conclusion

4.3.17 In summary, section 96(2) of the GPAA preserves the operation of section 20 of the DBPA, which in turn uses a concept of "statutory price" to the extent (*if any*) that the statutory price is determinable at any time by reference to the Code. Neither section 96(2) nor Epic Energy's statutory obligation under section 20(1) of the DBPA extends so far as to require the Access Arrangement to provide a Reference Service on substantially the same terms as the T1 Service and a Reference Tariff for that service.

4.3.18 Finally, it is worth noting that, based on the definition of "statutory price" in section 20(5) of the GPAA, the statutory price is to be determined in respect of "*the service concerned*". To the extent that it is possible for different "services" to be offered under the GTR contracts, if AlintaGas's interpretation were upheld, Epic Energy would need to include in its Access Arrangement, Reference Services for each of the different contracts that exist so that a statutory price for each of those services could be determined. This cannot have been intended by Parliament.

4.4 Representation argument

AlintaGas's submission

4.4.1 AlintaGas submits that the Regulator may, in exercising his discretion under section 3 of the Code (discussed below), have regard to the representations made by Epic Energy to AlintaGas at the time of the sale of the DBNGP. Specifically, AlintaGas alleges there was a representation (contained in Schedule 39 of the Asset Sale Agreement) that Epic would include a T1 equivalent Reference Service in its Access Arrangement.

4.4.2 In addition, AlintaGas submits that Epic Energy's proposed ancillary charges and the surcharges embedded in the Firm Service will mean that, contrary to representations made by Epic Energy in Schedule 39, the Firm Service will not constitute a price reduction when compared with the $1.09/GJ tariff imposed for the T1 service in 1999.

4.4.3 What was not clear from AlintaGas' submission was whether in asserting that Schedule 39 amounted to a representation by Epic Energy to AlintaGas which AlintaGas wished to rely on, AlintaGas accepted that the Reference Service should therefore be consistent with all elements of Schedule 39, including the stated tariff and tariff path. It is now clear from AlintaGas' Submission No. 3 that they are only picking and choosing aspects of Schedule 39, which suit them as, among other things, they suggest that the tariff applying to the DBNGP, should be between $0.79/GJ and $0.84/GJ not as stated in Schedule 39.[2]

4.4.4 AlintaGas also submits that the Regulator is precluded by section 2.25 of the Code from approving an Access Arrangement which would deprive AlintaGas of the benefit of a contractual representation.

Representations by Epic

4.4.5 AlintaGas relies on the following statements appearing on page 3 of Schedule 39:

[2] See Section 5.4 – "AlintaGas estimates an appropriate tariff to be about $0.84 per GJ" in AlintaGas Submission No.3. Note also section 5.5 of the same submission, which suggests it should be further reduced.

"Epic will offer two classes of transportation service:

- *Forward Haul Firm Transportation Service (T1 equivalent service) …"*

and

"…the proposed Standard Forward Haul Firm Tariff is $1.00/gj on a combined basis (at 100% load factor) based on a receipt point upstream of the inlet side of CS1 and a delivery point at Kwinana Junction … The Forward Haul Firm Tariff would represent a substantial discount to the current T1 tariffs…"

4.4.6 AlintaGas states that the use of the term "T1 equivalent reference service", together with the other statements quoted above, amount to a representation by Epic that it would include in its Access Arrangement a Reference Service which was materially equivalent to the T1 service.

4.4.7 The words "T1 equivalent reference service" cannot be read in isolation and must be considered in light of the whole of Schedule 39 of the Asset Sale Agreement. On a complete reading of Schedule 39, it is clear that the words "T1 equivalent service" are used in a broad sense so that "T1 equivalent service" is synonymous with "firm haulage service" which is what the T1 Service was.

4.4.8 It is also clear, on a reading Schedule 39, that the terms and conditions of the service proposed in Schedule 39 are **different** to those for the T1 Service. For example, on page 3 of Schedule 39, it states that "*Epic will continue to offer the existing T1, T2 and T3 reference services during the transition period up to 31 December 1999 to meet the Transitional Access Regime*". Epic Energy then proceeds to describe its proposed new service. As mentioned above, Schedule 39 makes it quite clear that the tranche methodology will not be used.[3]

4.4.9 Although Schedule 39 of the Asset Sale Agreement contains references to a "T1 equivalent service", the particulars given in Schedule 39 do not correspond with a T1 service. Examples of the differences between the T1 Service, the Firm Service and the "Schedule 39 service" are:

- Schedule 39 provides that the tranche methodology will *not be used* to define the capacity of the pipeline. This methodology is *fundamental* to the definition of T1 capacity. This alone indicates that the new service would be something that was distinguishable from T1 capacity

- Schedule 39 refers to the Schedule 39 service incorporating provisions which will allow Epic Energy to enhance operating efficiency and utilisation of the asset.[4]

- Incentives would be put in place to encourage uniform customer conduct on the system (eg unauthorised overruns/imbalances).[5]

- Clearly the structure of the tariffs and the tariff path were quite different to those for the T1 Service.

[3] See page 2 of Schedule 39 under "Tariff Principles".
[4] See page 2 of Schedule 39 under "General Principles and Guidelines".
[5] See page 3 of Schedule 39 under "Proposed Transportation Services".

4.4.10 Given these clear indications that the new service would be defined without reference to the tranche methodology and would be priced quite differently (and the fact that no T2 service would be offered), the correct view is that the use of the term "T1 equivalent reference service" in Schedule 39 was only intended to mean that this service would be a species of "firm service" (as is "T1") as distinct from a species of "interruptible" service" (such as T3). In that sense, the comparison with T1 was only intended to be a general comparison. This is clear when Schedule 39 is read as a whole.

Representation as to price reduction

4.4.11 As mentioned above, in paragraph 36 of AlintaGas Submission No.2, AlintaGas refers to a representation by Epic in Schedule 39 of the Asset Sale Agreement, that:

> *"the proposed Standard Forward Haul Firm Tariff is $1.00/gj on a combined basis (at 100% load factor) based on a receipt point upstream of the inlet side of CS1 and a delivery point at Kwinana Junction … The Forward Haul Firm Tariff would represent a substantial discount to the current T1 tariffs…"*

4.4.12 In addition, AlintaGas states that because of the tariff structure, ancillary charges and surcharges embedded in the Firm Service, which are further inflated by supplemental service charges, there will not be a reduction in tariff prices from the $1.09/GJ payable for a T1 service in 1999.

4.4.13 Epic Energy's statement should be given its simple and ordinary meaning. That is, the Forward Haul Firm Tariff would represent a substantial discount to the current T1 tariffs. Overrun charges, relocation charges and imbalance surcharges are not part of the "Forward Haul Firm Tariff". Clearly Epic Energy's reference is to the base tariff which in the case of both zone 9 and zone 10 is less than the 1999 rate of $1.09/GJ.

Sections 2.24(b) and 2.25 of the Code

4.4.14 Section 2.24 (b) of the Code requires that the Regulator take into account any firm and binding contractual obligations of the service provider or other persons already using the pipeline in assessing any Access Arrangement.

4.4.15 Section 2.25 of the Code prohibits the Regulator from approving an Access Arrangement, if to do so would deprive a person of a contractual right in existence prior to the date the proposed Access Arrangement was submitted.

4.4.16 There is only one warranty that was given by Epic Energy to AlintaGas in the Asset Sale Agreement relevant to this matter, which is the warranty referred to by AlintaGas in paragraph 33 of AlintaGas Submission No.2, namely clause 9(a) of Schedule 5 of the Asset Sale Agreement, which provides as follows:

> *"The Final Bid Information contains details of the tariff rates for gas transmission and tariff path which the Buyer has indicated to the Seller it proposes to apply in the conduct of business with the DBNGP Assets … which, based upon all information available to the Buyer, reflect tariffs for gas transmission that will provide the Buyer with an acceptable return on investment.*"

4.4.17 Pursuant to clause 10.1(a) of the Asset Sale Agreement, Epic Energy warranted to AlintaGas that each of Epic Energy's warranties was true and correct as at 3 March 1998 and the Completion Date (as defined in the Asset Sale Agreement).

4.4.18 The warranty given by Epic Energy is not a covenant, but a mere representation. In order for AlintaGas to recover damages for its breach, it must prove that it has suffered loss or damage.

4.4.19 AlintaGas will not be deprived of its contractual rights if the Access Arrangement is approved. It will continue to have a right to claim damages against Epic Energy for any misrepresentation, if applicable.

4.4.20 In any event, Epic's representation is a representation as to a future matter. Epic Energy will not be in breach of this obligation if the specific terms of its Firm Service do not accord with the proposed tariff rates and tariff path, so long as at the time of making the representation Epic Energy had reasonable grounds for making the representation. As outlined in Epic Submission 1, Epic Energy has included all of the essential elements of the services described in Schedule 39 but has modified those services to take into account experience it has subsequently acquired.

Conclusion

4.4.21 The term "T1 equivalent service" in Schedule 39 of the Asset Sale Agreement is used in a broad sense to mean "firm haulage service". It is clear from the remainder of Schedule 39 that the proposed service under the Schedule is not identical to the T1 Service. Therefore there has not been any misrepresentation by Epic Energy in failing to include a T1 Reference Service in its Access Arrangement.

4.4.22 Further, AlintaGas will not be deprived of a contractual right if the Access Arrangement is approved. If it could prove Epic Energy was in breach of the warranty relating to Schedule 39 (which is not accepted) and that AlintaGas has suffered loss or damage, it would have a cause of action against Epic Energy. It cannot, and never would have been entitled to, seek a court order requiring Epic Energy to include a T1 Service in the Access Arrangement, because Epic Energy did not promise or covenant (as distinct from represent or warrant) that it would do so. It follows that AlintaGas will not be deprived of any contractual right.

4.5 Regulator's discretion in respect of "Services" under the Code

AlintaGas's submission

4.5.1 AlintaGas has submitted that the Regulator's discretion under sections 3.2 and 3.3 of the Code is sufficiently wide to entitle the Regulator to require Epic Energy to include a T1-equivalent service in its Access Arrangement and a T1 Reference Tariff and (by implication) that the Regulator ought to exercise his discretion in this way.

4.5.2 More specifically, AlintaGas argues that:

- Under section 3.2 of the Code the Regulator has a discretion to require Epic to include a T1 equivalent service in the Access Arrangement if he is of the view that such a service should be included.

- Under section 3.3 of the Code the Access Arrangement must include a Reference Tariff for each service that is "*likely to be sought by a significant part of the market and for which the…Regulator considers a Reference Tariff should be included*"

- AlintaGas on its own is a significant part of the market. All GTR customers are, collectively, undoubtedly a significant part of the market.

- The T1 Service is "sought" by AlintaGas (and other GTR customers) in the following senses: that they seek and will continue to seek that service through their existing contracts; that they need that service in order to be able to determine the "statutory price" under section 20 of the DBPA after the Access Arrangement is approved; and that if AlintaGas were to contract for any further capacity it is likely that they would seek a T1 service.

4.5.3 There are two problems with these arguments. The first relates to the meaning of the term "Service" when used in sections 3.2 and 3.3 of the Code. The second relates to the words "likely to be sought by a significant section of the market".

The meaning of "Service"

4.5.4 "Services" is defined in the Code to mean *"a service provided by means of a Covered Pipeline … including (without limitation):*

(a) haulage services (such as firm haulage, interruptible haulage, spot haulage and backhaul);

(b) the right to interconnect with the Covered Pipeline; and

(c) services ancillary to the provisions of such services,

but does not include the production, sale and purchasing of Natural Gas."

4.5.5 It is possible to interpret the term "Service" in either a broad or a narrow sense.

4.5.6 The broad view is that the meaning of "service" is the general nature of the service, that is, a firm haulage service or an interruptible haulage service, without regard to the differences in the terms and conditions on which the service is provided. According to this view, Epic Energy's "Firm Service" and the T1 Service are merely different forms of "firm haulage services" and it is immaterial that the Firm Service differs, even in significant respects, from the T1 Service.

4.5.7 This broad interpretation of "service" is supported by the breadth of the definition of "service" in the Code. That definition makes no mention of the need to examine the particular terms and conditions of any service. Indeed, the examples it gives of "services" that fall within its meaning are services described in a very general way, such as "firm haulage, interruptible haulage, spot haulage and backhaul". These examples are very general - suggesting that a "Service" should be characterised by its general nature rather than its specific terms and conditions.

4.5.8 This broad approach is also supported by the definitions of "firm service" and "interruptible service in the *Manual of Oil and Gas Terms* (Williams & Meyers, 1994, 9th ed). This United States publication defines "Firm service" to mean "*a higher priced service for gas which is continuous without curtailment except under occasional, extraordinary circumstances"*.[6] This is to be distinguished from an "Interruptible service" which is defined as :"*a lower priced service to utility customers which may be interrupted, eg, upon two hours' notice.*

[6] See *Granite City Steel Co. v Federal Energy Regulatory Commission*, 824 F. 2d 981 at 1013.

This service is on a "when available'" basis and may be interrupted frequently in winter periods when the demand for gas is greatest."[7]

4.5.9 The narrow view of the term "Service" is that "service" means exactly the same service taking into account all the terms and conditions that comprise, define and limit the scope of the service. Applying this view, to the extent that there are any significant differences between the terms and conditions of the Firm Service and the T1 Service, they represent different services.

4.5.10 If the narrow view were to prevail, then to the extent that there are significant differences between the terms and conditions of the services offered under the GTR contracts (which is the case, particularly in AlintaGas's case), each GTR contract and each Access Manual contract would give rise to a different service. This could mean that there are about 12 different "GTR services" in existence, which would be a bizarre result.

4.5.11 The better view is that the broad interpretation is correct. When sections 3.2 and 3.3 refer to a "Service" likely to be sought by a significant part of the market, they are referring to the general character of the service - such as "firm" or "interruptible" in the broad senses those terms are understood in the industry. This being the case, all Epic Energy needs to assess is whether a significant part of the market is likely to seek a higher priced service that provides for continuous capacity except in the case of extraordinary or exceptional circumstances, ie. a firm service. Epic Energy does not need to assess the more specific question of what precise terms and conditions the market may seek for a firm or priority service. According to this view, the only relevance of the T1 Service is that it indicates users to date have shown strong demand for a form of "firm service" (ie, T1). However, bearing in mind it was the only service able to be offered prior to 25 March 1998, the strength of that line weakens. It may suggest that Epic Energy should itself be offering a species of "firm service" (which it is) but it does not mean that Epic Energy must offer a firm service on precisely the same basis and terms and conditions as T1 Service.

Significant part of the market test

4.5.12 Assuming for the sake of argument that the position put on this first issue above is wrong, and that therefore Firm Service and the T1 Service are different Services, the test which the Regulator will need to apply to determine whether Epic is required to offer a T1 equivalent Reference Service is whether the T1 Service is likely to be sought by a significant part of the market.

4.5.13 In response to the three arguments raised by AlintaGas on this point:

- The words "likely to be sought" are intended to refer to services likely to be applied for and provided under the Access Arrangement itself - not services that the service provider is forced to continue providing pursuant to grandfathered contracts. According to this view, neither AlintaGas nor other GTR customer can be included in any assessment of what service is likely to be sought by a significant part of the market as they are not "part of the market" because the term of nearly all of the grandfathered GTR access contracts extends beyond the term of the Access Arrangement.

- It is wrong to say that AlintaGas "seeks" (within the meaning of sections 3.2 and 3.3 of the Code) a T1-equivalent Reference Service in order to enable it to determine the

[7] See *Granite City Steel Co. v Federal Energy Regulatory Commission*, 824 F. 2d 981 at 1013; *Arkansas Power & Light Co, v Federal Power Commission*, 517 F. 2d 1223.

"statutory price" under section 20 of the DBPA after the Access Arrangement is approved. The word "seeks" in the context of sections 3.2 and 3.3 means that the user is actually seeking a service in the sense of wanting to apply for, be granted and **utilise** the service under the Access Arrangement. AlintaGas does not seek a T1 Reference Service in this sense. Instead, it seeks the **inclusion** of a T1 equivalent Reference Service in the Access Arrangement (as distinct from wanting to apply for, be granted and utilise a new T1 service) so that it can have an easy point of reference for determining the statutory price to apply to the existing service being provided (and which it will continue to utilise) under its grandfathered contract. In fact Epic Energy is not aware that AlintaGas has any expectation of a need for additional capacity during the Access Arrangement Period.

- AlintaGas has referred to the possibility that it might want to contract for further capacity and if so it would want further T1 capacity. This is an irrelevant consideration unless AlintaGas can show (which it has not) that it is likely to seek additional capacity within the Access Arrangement Period and that the volume of additional capacity is likely to constitute a significant part of the market.

- AlintaGas has not demonstrated that it is happy with or wants the terms and conditions of the T1 Service. This aspect is commented on further below.

Conclusion

4.5.14 AlintaGas's arguments to the effect that Epic Energy must include, and/or that the Regulator ought to require Epic Energy to include, a T1-equivalent Reference Service in the Access Arrangement are not well founded. In fact it would not be a valid exercise of power for the Regulator to require Epic Energy to include such a Reference Service.

4.5.15 Finally, even if that is not correct, there is no basis in the Code or otherwise at law for AlintaGas's submission that the Reference Tariff to be determined for the T1 equivalent Reference Service must not involve a "*material price shock*" (having regard to the nature and value of the service) from the tariffs currently payable under the DBPA for the T1 Service.

5. T1 Service as a yardstick

5.1 In section 2.3 of the AlintaGas Submission No.2, AlintaGas looks at the history of the development of the GTRs prior to their repeal on 25 March 1998. It notes the extensive development period carried out by the Government during a number of years leading both to the enactment of the GTRs in 1994 and the substantive changes made to them in 1997. The Submission also notes that essentially the final version of the GTRs "flowed through" to the "1998 Regime" and that Epic Energy has "contracted with a number of users for T1 services".

5.2 The issues of demand by a significant part of the market have been dealt with above and it is not proposed to revisit that in this section. However, it is the assertions of AlintaGas that the T1 Service is a yardstick and sets the appropriate set of terms and conditions that is addressed.

5.3 As will be drawn from the potted history provided by AlintaGas in this Submission, the GTRs were developed to fit circumstances totally different from those which are now being dealt with. To add to that history it is useful to add the potted history provided by the

Minister for Energy in the Second Reading speech of the *Dampier to Bunbury Pipeline Bill 1997*:

> *"Prior to the construction of the Dampier to Bunbury natural gas pipeline, gas was supplied to Perth from the Dongara area gas fields and through the Wang pipeline. In the late 1970s, the Dongara field was producing to capacity and it was expected this field would be depleted in 1986. Restrictions were being imposed on industrial sales and expanding industries were required to use imported oil or coal.*
>
> *The discoveries of large quantities of gas off the North West Shelf opened up the opportunity for new supplies of gas to the domestic market. The Government of the day played a major role in underwriting the development of the gas fields by entering into the North West Gas Development (Woodside) Agreement 1979. This agreement involved the then State Energy Commission of Western Australia contracting for around 414 terajoules of gas per day over a 20 year period with 95 per cent of this quantity being on a take or pay basis and SECWA's having the exclusive market for this gas in Western Australia. This agreement was negotiated during a period of high oil prices and risks to oil supplies from the Middle East. The demand for gas was expected to grow as Western Australia developed its resources.*
>
> *This agreement had a number of benefits for Western Australia. It provided a long term secure supply of an environmentally friendly source of energy. It also contributed in a fundamental way to the development of Western Australia's vast gas reserves in the Carnarvon Basin. Today we are benefiting from this project through exports, jobs and royalties.*
>
> *To transport the gas from Dampier to Perth the State, through its agency, SECWA, constructed a 1 500 kilometre pipeline. This involved borrowing approximately $1b when interest rates were historically high and when the Australian dollar had a high value on the world money market. The borrowings and the take or pay gas commitments involved considerable risk and represented a substantial investment by the State.*
>
> *The construction of the pipeline commenced in 1983 and in August 1984 gas from the North West Shelf was transported for the first time. In 1985 the installation of five compressor stations marked the completion of the initial construction of the pipeline. Subsequently, a further four compressor stations have been built.*
>
> *As I indicated earlier, the Government has decided to sell the pipeline as part of its ongoing process to reform the energy sector. It was appropriate 14 years ago for the State to construct and own the pipeline, in order to underwrite a major development and guarantee gas supplies to the community. However, it is no longer necessary for the State to retain ownership.*
>
> *The separation of the gas transportation function from AlintaGas and its sale to a private owner and operator will enhance competition in downstream and upstream markets. Provisions are contained in the Bill to ensure the new owner is not involved in any conflicting manner in the upstream or downstream gas business and thus the new owner will have straightforward goals to maximise use of the pipeline. It is expected the new owner will focus on optimising and expanding the capacity utilisation of the pipeline.*

> *I am confident that the sale will deliver a substantial return to the Western Australian community. It has the potential to realise the highest sale price for a state-owned asset in Western Australia's history.*
>
> *On the basis of the level of interest shown by potential buyers, I expect the sale price to be substantially above the book value of the pipeline. This will allow the State to pay back debt in addition to the debt associated with the pipeline. Not only existing state debt is impacted by the sale. The transportation of gas is not a core function of government and with the private sector providing this service, it reduces the need for the State, through its corporation, to borrow large sums of money to maintain and expand this service.*
>
> *When the pipeline was first built, the private sector was not prepared to raise the risk capital and secure debt funding for such a massive infrastructure project. It required foresight and leadership by the Government of the day. We are at a stage now where the State's best interest is clearly served by selling the pipeline to the private sector and by moving towards an open access regime for all users of the pipeline."*[8]

5.4 The Government was faced with breaking up SECWA into two new State owned utilities and to provide open access to the gas and electricity infrastructure over time. In the case of gas transmission, that was done straight up from 1 January 1995. The Government chose to do that by a totally prescribed system so that there was little room for the pipeline operator to negotiate transport contracts. In fact for the bulk of the capacity transport contracts were deemed to have commenced from 1 January 1995, so clearly there could be no negotiation. It was also necessary to ensure that users were comfortable that they were not taken advantage of.

5.5 A very long and involved **and closed** process then ensued with a review and change to the GTRs. The GTRs at the time represented a very detailed, complex and inflexible system comprising some 125 pages of terms and conditions. The 1997 amendments then in themselves comprised a further 94 pages.

5.6 AlintaGas suggests that these changes were warmly received by the shippers then holding GTR contracts. What they neglect to mention is that the changes did not automatically flow into the existing GTR contracts and could only apply if the shipper and the pipeline operator agreed. History shows that there were two shippers who did not move – North West Shelf Gas, in respect of its 31 December 1994 Pilbara contract – which remains at the original 1 January 1995 version – and, more notably, **AlintaGas** in relation to the whole of its then contracted capacity.

5.7 Despite what AlintaGas might suggest, clearly they did not consider the GTRs as amended to be a suitable set of terms and conditions. It is therefore somewhat surprising that they should make the assertions they do in AlintaGas Submission No.3.

5.8 In respect to AlintaGas's comments regarding Epic Energy entering into Access Manual contracts, it needs to be noted that the applications for the access ultimately granted by Epic Energy through Access Manual contracts, had been received by AlintaGas sometime before the sale of the DBNGP. AlintaGas had progressed the negotiation of those contracts to near finalisation by the time the DBNGP was sold to Epic Energy. Epic Energy then took over those applications and finalised them. It was not Epic Energy's intention to

[8] Hansard, 11 November 1997 at page 7524.

try to reinvent the wheel with customers who had been waiting for some time to obtain their contracts.

5.9 In addition it needs to be remembered that if an applicant applied for capacity in the terms of the Access Manual contract (in a similar way to if an applicant requests capacity in the terms of the Reference Service), then Epic Energy must grant that capacity on those terms. The Access Manual contracts did not significantly depart from that in the Access Manual. The Access Manual and the form of contract annexed to it were developed by the Government and not Epic Energy.

5.10 On acquiring the DBNGP, Epic Energy had more than enough to keep itself occupied. It also wanted to experience the operation of the DBNGP and the regime provided by the Access Manual. The Access Arrangement is the result of that and other experience and in fact does not present the radical departure from the Access Manual contract that is suggested by a number of the interested parties. That aspect is dealt with in other Epic Energy submissions.

5.11 In summary, this is not a matter of looking for a yardstick. Even if there was a need, the T1 Service is not necessarily it given its pedigree. In fact it is suggested that the underlying driver for all of the existing shippers who have made submissions to that effect, is the desire to have a directly comparable service for the purposes of the "statutory price" flow on pursuant to offers under section 20 of the *Dampier to Bunbury Pipeline Act 1997*. That is not an appropriate consideration for the determination of the access arrangement to apply for new transport contracts entered into over the next 5 years.