

BLAKE DAWSON WALDRON

L A W Y E R S

Submission to the Gas Access Regulator on the T1-Equivalent Reference Service

AlintaGas Sales Pty Ltd

Apache Energy

North West Shelf Gas Pty Ltd

Wesfarmers CSBP Limited

WMC Resources Ltd

Western Power Corporation

Worsley Alumina Pty Ltd



15 August 2001

SUBMISSION TO THE GAS ACCESS REGULATOR ON THE T1-EQUIVALENT REFERENCE SERVICE

Executive Summary

One of the most important issues addressed in the Draft Decision on Epic Energy's proposed Access Arrangement for the Dampier to Bunbury Natural Gas Pipeline ("**DBNGP**") is whether the Regulator should require Epic Energy to amend the Access Arrangement and include a "T1-Equivalent Reference Service", in addition to the proposed Firm Service.

It is an important issue because, to properly implement the intended operation of section 20 of the *Dampier to Bunbury Gas Pipeline Act 1998* ("**DBP Act**"), certainty is required as to what is the "statutory price".

Section 20 is the statutory mechanism that, once the Access Arrangement is approved, is intended to give the majority of non-exempt DBNGP shippers the benefit of a "statutory price" that is based upon the methodologies and principles of the Code, for the service provided to them under their existing contracts, on the terms and conditions of their existing contracts. Unless a T1-Equivalent Reference Service is a reference service under the Access Arrangement with an approved reference tariff (which would clearly be the statutory price), there could be considerable uncertainty as to what is the statutory price. The statutory price may then have to be determined by expensive and potentially long running litigation or arbitration.

Despite submissions from a number of interested persons on the T1-Equivalent Reference Service issue, the Draft Decision indicates that the Regulator does not intend to require that Epic Energy include a T1-Equivalent Reference Service in the Access Arrangement.

AlintaGas Sales Pty Ltd, Apache Energy Limited, North West Shelf Gas Pty Ltd, Wesfarmers CSBP Limited, WMC Resources Ltd, Western Power Corporation and Worsley Alumina Pty Ltd (the "**Pre-Sale Shippers**") have significant concerns about the Draft Decision's conclusions in relation to the T1-Equivalent Reference Service issue. The Pre-Sale Shippers have contractual rights, either directly or indirectly, to about 350 TJ/day of full-haul capacity on the DBNGP. The majority of this capacity is from existing transmission access contracts ("**T1 Service**") that were entered into under the *Gas Transmission Regulations 1994* ("**GTRs**"). The Pre-Sale Shippers believe that their legitimate business interests may be materially adversely affected if the Regulator does not require the inclusion of a T1-Equivalent Reference Service in the Access Arrangement.

The Pre-Sale Shippers recognise that the Regulator has given this matter much consideration since receiving the proposed Access Arrangement in December 1999. However, they believe the objective behind submissions made by some of the Pre-Sale Shippers is of critical importance. The objective has always been to achieve legal and contractual certainty in relation to the price that the Pre-Sale Shippers are required to pay Epic Energy for the T1 Service under their existing transportation contracts. A lack of certainty would be undesirable for the Pre-Sale Shippers and the gas industry, inconsistent with the intentions of Parliament in enacting section 20, and contrary to the understandings of the State and the Pre-Sale Shippers at the time of the enactment of section 20.

The Pre-Sale Shippers believe that the Regulator has the capacity and an opportunity to obviate the potential uncertainty associated with the section 20 statutory price by requiring the inclusion of a T1-Equivalent Reference Service in the Access Arrangement. It would ensure that the Pre-

Sale Shippers can appropriately exercise and protect their statutory and contractual rights in the simplest and most transparent manner possible. It would give clear effect to, and promote Parliament's intention in enacting, section 20 of the DBP Act, and would appropriately balance the competing interests that the Regulator is required to consider under section 2.24 of the *National Third Party Access Code for Natural Gas Pipeline Systems* ("**Code**").

This submission details the reasons why the Pre-Sale Shippers continue to consider it appropriate and acceptable for the Regulator to require Epic Energy to include a T1-Equivalent Reference Service as an additional reference service in the Access Arrangement.

The Pre-Sale Shippers would welcome the opportunity to discuss this submission and the T1-Equivalent Reference Service issue generally with the Regulator and the Office of Gas Access Regulation.

SUBMISSION TO THE GAS ACCESS REGULATOR ON THE T1-EQUIVALENT REFERENCE SERVICE

1. INTRODUCTION

This Submission has been prepared in response to a request from the Western Australian Independent Gas Pipelines Access Regulator ("**Regulator**") for submissions from interested parties concerning the Regulator's Draft Decision ("**Draft Decision**") on Epic Energy's proposed Access Arrangement ("**Access Arrangement**") for the Dampier to Bunbury Natural Gas Pipeline ("**DBNGP**").

The Submission is jointly submitted by a number of DBNGP shippers ("**Pre-Sale Shippers**") which have existing transmission access contracts for the T1 Service that were entered into under the *Gas Transmission Regulations 1994* ("**GTRs**") or persons who are affected by such contracts. It has been jointly submitted to ensure that the Regulator is fully aware of significant industry concern about the proposed decision to not require Epic Energy to include a "T1-Equivalent Reference Service" (described below) within the Access Arrangement.

It is the strong submission of the Pre-Sale Shippers, that the Regulator should require Epic Energy to include a T1-Equivalent Reference Service in the Access Arrangement. The reasons for that submission are set out below.

Together, the Pre-Sale Shippers have contractual rights to about 350 TJ/day of contracted full-haul capacity on the DBNGP. About 80% of that capacity is provided under contracts for the T1 Service and on the "statutory price" pursuant to section 20 of the *Dampier to Bunbury Pipeline Act 1998* ("**DBP Act**"). The Pre-Sale Shippers are by far the most significant users of services provided by means of the DBNGP. The Pre-Sale Shippers are:

- AlintaGas Sales Pty Ltd;
- Apache Energy Limited;
- North West Shelf Gas Pty Ltd;
- Wesfarmers CSBP Limited;
- WMC Resources Ltd;
- Western Power Corporation; and
- Worsley Alumina Pty Ltd.

The Pre-Sale Shippers may make further, individual submissions in relation to the Draft Decision. However, this Submission contains the submissions of each of the Pre-Sale Shippers in relation to the T1-Equivalent Reference Service issue.

2. CONCLUDING THE ACCESS ARRANGEMENT PROCESS

In making this Submission, the Pre-Sale Shippers wish to highlight the importance of bringing the approval process for the Access Arrangement to an end as soon as possible.

Under their existing contracts for the T1 Service, a number of Pre-Sale Shippers have one or more options to extend the term of their contracts. The options must be exercised not earlier than 4 years, and not later than 3 years, before the end of the contract term. Pre-Sale Shippers with contracts that terminate on 30 June 2005 have until 30 June 2002 to exercise options to extend the term of their T1 Service contracts. Without the price certainty associated with an appropriate Access Arrangement for the DBNGP, Pre-Sale Shippers that are contemplating extending the term of their T1 Service contracts will be required to take an unacceptable and unnecessary risk when making a decision about whether to exercise their options.

It is also reasonable to expect, given the Regulator's Draft Decision, that the price Pre-Sale Shippers will be required to pay Epic Energy will reduce once the Access Arrangement is approved. The Pre-Sale Shippers are, therefore, naturally anxious to receive the benefit of the price reductions as soon as possible.

3. BACKGROUND TO THE T1-EQUIVALENT REFERENCE SERVICE ISSUE

One of the most important issues addressed by the Regulator in the Draft Decision concerns whether the Regulator should require that Epic Energy amend the Access Arrangement so that it includes a reference service ("**T1-Equivalent Reference Service**") that is not materially different to the T1 Service established under the GTRs and *Dampier to Bunbury Gas Pipeline Regulations 1998* ("**DBPRs**"): refer to the discussion at section 4.2.3.2 of the Draft Decision. A number of Pre-Sale Shippers made extensive submissions on this issue.

It is an important issue because, to properly implement the intended operation of section 20 of the *Dampier to Bunbury Gas Pipeline Act 1998* ("**DBP Act**"), certainty is required as to what is the "statutory price".

Section 20 of the DBP Act is the statutory mechanism that, once the Access Arrangement is approved, is intended to give the majority of non-exempt DBNGP shippers the benefit of contract prices that are based upon the methodologies and principles of the Code, for the service provided to them under their existing contracts, on the terms and conditions of those existing contracts. The price so determined is the "statutory price". If there is no T1-Equivalent Reference Service as a reference service under the Access Arrangement, with an approved reference tariff (which would clearly be the statutory price), then the statutory price will have to be determined by other means. This could involve expensive and potentially long running litigation or arbitration.

The central argument advanced by the Pre-Sale Shippers in their submissions was that the Regulator should require that the Access Arrangement include a T1-Equivalent Reference Service as a reference service. There were two key aspects to that argument, namely:

- (a) that the T1-Equivalent Reference Service would be a reference service in addition to the Firm Service; and
- (b) that the T1-Equivalent Reference Service should be equivalent or "not materially different" to the T1 Service.

Importantly, the inclusion of a T1-Equivalent Reference Service was not intended to replace, or limit Epic Energy's ability to offer, the Firm Service proposed as a reference service in the Access Arrangement. In addition, the Pre-Sale Shippers did not suggest that the T1-Equivalent Reference Service should be precisely the same as the T1 Service. Rather, it suggested that the service should be "equivalent" to the T1 Service.

A number of grounds of argument were advanced to support the need for a T1-Equivalent Reference Service. These grounds included that:

- (a) Epic Energy is required, as a matter of law, to include a T1-Equivalent Reference Service as a reference service in the Access Arrangement;
- (b) the Regulator should exercise his discretions under sections 3.2(a)(ii) and 3.3(b) of the *National Third Party Access Code for Natural Gas Pipeline Systems* ("**Code**") to require that Epic Energy include a T1-Equivalent Reference Service; and
- (c) it would provide certainty for Pre-Sale Shippers on the statutory price.

Based on the Draft Decision, it appears that the Regulator is currently of the view that:

- (a) Epic Energy is not under an obligation by virtue of section 20 of the DBP Act and, or, section 96 of the *Gas Pipelines Access (Western Australia) Act 1998* ("**Access Act**") to provide in its Access Arrangement a reference service that is precisely the same as the T1 Service: Draft Decision, Part B:35;
- (b) the asset sale agreement for the sale of the DBNGP to Epic Energy does not place Epic Energy under a contractual obligation to provide a reference service under the Access Arrangement that is precisely the same as the T1 Service: Draft Decision, Part B:36;
- (c) "in the circumstances", it would not be appropriate to require Epic Energy to offer a reference service that is precisely the same as the T1 Service: Draft Decision, Part B:37; and
- (d) by virtue of the Seasonal Service being combined with the Firm Service and offered as a reference service, and the Secondary Market Service offered as a non-reference service, a similar suite of generic services is available to Users under the proposed Access Arrangement as was available as part of the T1 Service – to the extent that the Services Policy generally describes the services offered, it provides for the delivery of services that collectively may be regarded as equivalent to the T1 Service: Draft Decision, Part B:32.

Ultimately, the Draft Decision indicates that the Regulator is inclined not to accept the Pre-Sale Shippers' major submissions on the T1-Equivalent Service issue.

4. **PRE-SALE SHIPPERS' RESPONSE ON THE T1-EQUIVALENT REFERENCE SERVICE ISSUE**

The Pre-Sale Shippers have significant concerns about the Regulator's conclusions on the T1-Equivalent Reference Service issue and request that he reconsider their earlier submissions and consider the additional issues discussed in this submission. The Pre-Sale Shippers strongly submit that the Regulator should require Epic Energy to include a T1-Equivalent Reference Service as a reference service in the Access Arrangement. The Regulator should do so to ensure that the statutory and contractual rights of all Pre-Sale

Shippers can be appropriately exercised and protected in a straightforward and transparent manner.

The Pre-Sale Shippers recognise that the Regulator has given this matter careful consideration since receiving the proposed Access Arrangement in December 1999. However, the Pre-Sale Shippers believe that the Draft Decision does not appropriately take into account the objective behind the Pre-Sale Shippers' submissions or the importance of achieving that objective - not just in the interests of the Pre-Sale Shippers, but in the interests of effectively implementing a statutory regime in the manner in which it was intended to be implemented by Parliament for the benefit of Pre-Sale Shippers which have transmission contracts that were entered into before the sale of the DBNGP.

As a result, the Pre-Sale Shippers believe that it is necessary and appropriate to re-state what they request the Regulator to do in relation to the T1-Equivalent Reference Service issue, and why they think the Regulator should do it. Section 5 of this submission sets out what the Regulator should do, and Section 6 explains why the Regulator should do those things. Section 7 provides comments clarifying the extent to which the Pre-Sale Shippers believe it is necessary to change the Access Arrangement.

5. **PROPOSAL**

The Pre-Sale Shippers believe that the Regulator should require Epic Energy to include a T1-Equivalent Reference Service in the Access Arrangement. More particularly, the Regulator should ensure that the Access Arrangement:

- (a) includes a T1-Equivalent Reference Service:
 - (i) using the discretion provided under section 3.2(a)(ii) of the Code that permits the Regulator to require the inclusion of any service or services which in his opinion should be included in the Services Policy; and
 - (ii) which is available to Pre-Sale Shippers for the purpose of ascertaining the "statutory price" that is applicable, pursuant to section 20 of the DBP Act, to their existing T1 Service contracts for the transportation of gas through the DBNGP; and
- (b) includes a reference tariff for the T1-Equivalent Reference Service using the discretion under section 3.3(b) of the Code that allows the Regulator to require the inclusion of 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; and
- (c) includes reasonable terms and conditions on which Epic Energy will supply the T1-Equivalent Service.

In making this submission, the Pre-Sale Shippers do not suggest:

- (a) that the Firm Service proposed by Epic Energy should be further amended to more closely reflect the T1-Service, as the Pre-Sale Shippers are requesting that the Regulator require the inclusion of an additional reference service;
- (b) that the T1-Equivalent Reference Service should be precisely the same as the T1 Service, as it is sufficient that the services be equivalent; or

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- (c) that the Firm Service proposed by Epic Energy, as amended by the Draft Decision, is materially different to the T1 Service.

The Pre-Sale Shippers request that the Regulator require the inclusion of the T1-Equivalent Service as a reference service regardless of his conclusions as to whether Epic Energy is under a legal obligation to do so.

The Pre-Sale Shippers further submit that the Final Decision to be issued by the Regulator in relation to the Access Arrangement should ensure that the T1-Equivalent Reference Service is included by specifying that Epic Energy must amend the Access Arrangement accordingly.

6. **WHY THE REGULATOR SHOULD REQUIRE THE INCLUSION OF A T1-EQUIVALENT REFERENCE SERVICE**

The Pre-Sale Shippers request that the Regulator require the inclusion of a T1-Equivalent Reference Service with a clearly specified reference tariff so that there is a straight-forward means of identifying the "statutory price" for T1 Shippers. Doing so will promote the operation of section 20 of the DBP Act and ensure that the statutory and contractual rights of Pre-Sale Shippers are able to be appropriately exercised and protected in the simplest and quickest manner possible.

The Pre-Sale Shippers request the Regulator to require the inclusion of a T1-Equivalent Reference Service in the Access Arrangement as it is reasonable for the Regulator to form the view that such a service should be included because:

- (i) it will give clear effect to, and promote Parliament's intention in enacting, section 20 of the DBP Act; and
- (ii) it will provide contractual certainty to major participants in the Western Australian gas industry; and
- (iii) a T1-Equivalent Reference Service is a service that is likely to be sought by a significant part of the market.

The following sections 6.1, 6.2 and 6.3 explain each of these three points in detail and why the Regulator should re-consider the position set out in the Draft Decision.

In addition, the Pre-Sale Shippers believe that the inclusion of a T1-Equivalent Reference Service would ensure that the Services Policy in the Access Arrangement appropriately balances the competing interests that the Regulator is required to consider under section 2.24 of the Code.

6.1 **Section 20 of the DBP Act**

In its 3rd Submission, AlintaGas outlined the basis upon which the Western Australian Parliament enacted section 20 of the DBP Act: for example, see page 4. While the Regulator recognised and accepted that basis in the Draft Decision (see Draft Decision, Part B:7), the Pre-Sale Shippers are concerned that the interpretation of section 20 in the Draft Decision indicates that the Regulator may not have fully appreciated the objective that the provision was enacted to achieve, particularly in respect of his conclusion that there does not always have to be a statutory price. For that reason, the Pre-Sale Shippers believe that it is appropriate to more fully inform the Regulator of the context in which section 20 was enacted and of the proper interpretation of the provision.

6.1.1 The objective behind section 20

As recognised by the Regulator (Draft Decision, Part B:7), section 20 provides a mechanism by which Pre-Sale Shippers with existing contracts for the transportation of gas in the DBNGP, that were entered into under the GTRs, can obtain the benefit of reducing prices for the transportation of gas. It was enacted because the State Government:

- (A) anticipated that DBNGP gas transportation prices would significantly decline following the sale of the pipeline; and
- (B) wanted to ensure that the purchaser of the DBNGP would be compelled by law to make an offer to those existing users to vary their contract price (but not the other terms and conditions of the contracts which detailed the service provided to them) so they could capture the benefits of the declining gas transportation prices.

The ability of existing users to obtain the benefits of declining gas transportation prices was important to the achievement of the State's objective of achieving lower gas costs in the Western Australian gas market: for example, see the Second Reading Speech for the *Dampier to Bunbury Pipeline Bill 1998* in Hansard at page 7522. As Pre-Sale Shippers had access rights to all the non-Alcoa capacity in the DBNGP, the benefits of reducing gas transportation prices would have been largely illusory unless they were passed on to Pre-Sale Shippers. It was, therefore, necessary for the State to place an obligation upon the purchaser of the DBNGP to pass price reductions on to the Pre-Sale Shippers, without requiring them to change any other element of their contract. Section 20 is the means by which that is to be achieved.

An important factor underlying section 20 is the requirement that there will at all times be a price for the services provided under the existing contracts. That price is to be established or determined in a transparent and open way. Initially, the price was to be set by reference to transitional tariffs prescribed under the DBP Act and DBPRs. When an Access Arrangement for the DBNGP was approved under the Code, the DBPRs and parts of the DBP Act (but not section 20) were to fall away so that the price could be set by reference to a reference tariff specified in the Access Arrangement for the service that was provided under the existing contracts. This was the mechanical transition that was designed to allow the Pre-Sale Shippers to capture the reduced prices under the Code.

The very clear and reasonable expectation was that the Access Arrangement would include, amongst the other services to be offered as reference services, a T1 Service as a reference service. The inclusion of such a reference service in the Access Arrangement was expected to provide the highest possible level of certainty as to the price that the Pre-Sale Shippers would pay, and which the purchaser was entitled to charge, for gas transportation. It was intended to provide a very clear and unambiguous mechanism by which the relevant price could be identified without recourse to arbitration, litigation or other dispute resolution mechanisms.

To reflect the State's objectives, a number of important elements were included in section 20, including the following:

1. The purchaser of the pipeline is required to make one offer to each existing user. That element is contained in the following words in section 20(1):

"...the assignee is to offer to vary...."

There was to be one, and only one, offer to each Pre-Sale Shipper.

2. The offer is to be an offer, capable of being accepted by the Pre-Sale Shipper, 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...": section 20(1).

The phrase "applicable from time to time" means that the statutory price may vary over time. When read with the broad definition of "statutory price" in section 20(5), it is clear that there is always a statutory price (this sensibly ensures that there is always certainty as to the price under existing contracts). This is also made abundantly clear by the words of section 20(2), which provide that, no matter when the offer is made or accepted, the varied price applies from the time of sale of the DBNGP. If there was a delay in making the offer under section 20, Parliament cannot have intended that there would be a gap in the varied price which a Pre-Sale Shipper would be required to pay for the service once that Pre-Sale Shipper accepted the offer. The chief purpose of section 20(2) is that, because section 20 does not put a timeframe on the making of the offer, the contract once varied is to have a price which is no greater than the statutory price from time to time back to the time of the sale. There must always be a statutory price.

3. The "statutory price" is 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.

6.1.2 The proper interpretation of section 20

In the Draft Decision, the Regulator sets out his views about the interpretation of section 20. Those views form the foundation for a number of decisions in relation to the T1-Equivalent Reference Service issue.

The Pre-Sale Shippers have some difficulties with the interpretation of section 20 in the Draft Decision. In essence, the Pre-Sale Shippers believe that the interpretation of section 20 in the Draft Decision is not legally correct in relation to a number of important issues. Particular material issues are as follows:

1. One of the primary lines of reasoning employed in the Draft Decision concerns the nature of the "statutory price". In this regard, the Draft Decision argues that that statutory price must be:

"specified in such a way that a User will have an enforceable right to pay no more than that price": Draft Decision, Part B:34. [Emphasis added]

The Draft Decision then proceeds to identify a number of means by which the statutory price might be specified. There are basically two means, namely:

- (a) direct specification – in a contract, legislation, regulations (currently the DBPRs) or an access arrangement; and
- (b) indirect specification - by deriving a statutory price from any of the sources identified in (a) above: Draft Decision, Part B:34.

The Draft Decision concludes that a statutory price might not exist at all. That is, if the statutory price is not directly or indirectly specified (as identified in the Draft Decision), there is no statutory price.

The Pre-Sale Shippers do not agree with the reasoning and conclusion in the Draft Decision because:

- (a) it is clear from the legislative purpose and from the language and structure of section 20 that there must always be a statutory price;
- (b) it is clear from section 20(2) and the definition of "statutory price" in section 20(5) that a statutory price will always exist, regardless of whether it is directly or indirectly specified as described in the Draft Decision; and
- (c) most significantly, for an infrastructure asset that is subject to a third party access and pricing regime, there must always be a price which a third party seeking access to the asset can insist on paying, although it may be ascertained or determined in different ways; that is the essential nature of such regimes, and the DBNGP was simply moving from one third party access and pricing regime to another.

There must always be a statutory price

Section 20 is plainly drafted on the basis that there must always be a statutory price. That is the case even if the price is not directly or indirectly specified as described in the Draft Decision.

The idea that Parliament, in the context outlined above, would have provided Pre-Sale Shippers with the right to transfer from certain pre-DBNGP privatisation contract prices to a statutory price that may or may not exist is untenable. Inherent in such a construction is the unacceptable proposition that Parliament intended to implement a scheme which could deprive the largest users of the DBNGP of price certainty.

An interpretation that promotes the purpose, or objective, of the legislation is to be preferred over one that does not. The Pre-Sale Shippers submit that the interpretation set out in the Draft Decision does not promote the objective of section 20.

The Pre-Sale Shippers further submit that it is beyond doubt that Parliament intended to provide existing users with an ongoing statutory price. That is plainly evidenced in the language and structure of section 20

and is consistent with the promotion of the purpose or objective of the legislation.

Definition of "statutory price"

The wording makes it clear that the statutory price is the "price a person could insist upon paying if the person were, at the time concerned, entering into a contract for the service concerned". It is clear that that definition is not limited by the concepts of direct and indirect specification identified in the Draft Decision.

In situations in which the statutory price is not specified, it can be derived in any number of other ways. For example, it may be possible to obtain a declaration from the Supreme Court as to the statutory price or to arbitrate such a price.

2. The Draft Decision then examines the meaning of "applicable from time to time". It identifies two ways of interpreting the phrase, namely:
 - (a) that there will always be a statutory price but that it may vary from time to time; or
 - (b) that there may or may not be a statutory price and that, if there is one, it may vary: Draft Decision, Part B:34.

The Draft Decision settles upon the second interpretation. It reasons that it is the correct interpretation because the DBPRs (which contain the existing statutory price) will cease to operate once the Access Arrangement is approved. Although the Draft Decision does not say so, it seems that there is a view that the fact that the DBPRs will cease operating (and, therefore, cease providing a statutory price) is evidence that the DBP Act (which continues to operate) must have contemplated that there might not be a statutory price. The Pre-Sale Shippers submit that such a view is not correct, as the purpose of section 20 is to provide for a transition from the pricing structure of the GTRs and DBPR's to reference tariffs under the Code for those Pre-Sale Shippers that accept a section 20 offer. The cessation of the DBPR's is part of the legislative scheme that requires there to be a statutory price.

The Pre-Sale Shippers submit that there must always be a statutory price and that:

- (a) the fact that the DBPR's will cease operating upon the commencement of the Access Arrangement does not affect the interpretation of section 20, which clearly requires that there always be a statutory price. In this context, the operation of the subsidiary legislation does not dictate the meaning of the primary legislation under which it is made;
- (b) a literal reading of the term "applicable from time to time" suggests that the first interpretation applies, rather than the strained and artificial interpretation promoted by the second interpretation; and

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- (c) as a matter of interpretation, the phrase "applicable from time to time" has no bearing upon whether or not a statutory price must exist – that is a matter determined by reference to the purpose of the provision, section 20(2) and the definition of statutory price provided in section 20(5).

3. The Draft Decision suggests that, following the repeal of the DBPRs and parts of the DBP Act (but not section 20), section 20 will obligate Epic Energy to:

"...offer to vary the price for access under existing contracts to a Reference Tariff for a Reference Service if Reference Services exist that are considered equivalent to the T1 Service and/or T2 Service." : Draft Decision, Part B:8. [Emphasis added]

That suggestion is inconsistent with the nature of Epic Energy's obligation under section 20. The Pre-Sale Shippers contend that Epic Energy's obligation is not conditional upon whether there is a reference service that is equivalent to the T1 Service or T2 Service. Epic Energy must make an offer under section 20 regardless of whether such equivalent services exist under the Access Arrangement. Section 20 cannot be construed in any other way than that it is mandatory and absolute.

Epic Energy has already made, and the Pre-Sale Shippers have accepted, a section 20 offer for the T1 Service (although Epic Energy disputes this). The accepted offer offered the price then payable under the DBPRs, which was at that time clearly the statutory price. Accordingly, the price that Pre-Sale Shippers are required to pay, and which Epic Energy is entitled to charge, for the T1-Service is the statutory price. Epic Energy will not need to make a further offer. If an equivalent reference service is included in the Access Arrangement, the reference tariff for that reference service will constitute the statutory price for the T1 Service.

Based on the discussion above, it is clear that section 20 was intended to obligate the purchaser of the DBNGP (ie. Epic Energy) to pass on to existing shippers the benefit of declining gas transportation tariffs. That is to occur by means of Epic Energy making an offer to each shipper to shift to a price not exceeding the statutory price, where that statutory price was intended to be the price that a person would be entitled to if that person were entering into a contract for the service concerned.

Although section 20 does not expressly state it, at the time of enacting the provision (as part of the legislation to privatise the DBNGP) the intention of Parliament and the State, and the understanding of the Pre-Sale Shippers, was that the reference tariff for a T1-Equivalent Reference Service determined by the independent Regulator under the Code would be the statutory price.

The Pre-Sale Shippers request the Regulator to require the inclusion of a T1-Equivalent Reference Service in order to give clear effect to, and promote the objectives and intentions behind the enactment of section 20 of the DBP Act.

In making this submission, the Pre-Sale Shippers should not be taken as saying that there will not be a statutory price if there is not a T1-Equivalent Reference Service. As noted above, there will always be a statutory price – the difficulty may be in ascertaining what it is. The Pre-Sale Shippers are simply submitting that the Regulator should help clearly

identify the statutory price by requiring the inclusion of a T1-Equivalent Reference Service with a reference tariff.

The Pre-Sale Shippers should also not be taken as saying that the Firm Service as amended in the Draft Decision, is materially different to the T1 Service. The Pre-Sale Shippers consider the two services to be very similar. In fact, a T1-Equivalent Reference Service with a reference tariff is required to achieve certainty, expedition and procedural simplicity for the purposes of section 20 of the DBP Act. The Pre-Sale Shippers do not suggest that the T1-Equivalent Reference Service need be available to anyone other than the Pre-Sale Shippers.

6.2 Certainty for Existing Users

If the Regulator does not require the inclusion of a T1-Equivalent Reference Service with a specified reference tariff, there may be considerable uncertainty about the price that the Pre-Sale Shippers are required to pay for the transportation of gas through the DBNGP until a statutory price is determined by some other means. Such an outcome would be disruptive and damaging to the Western Australian gas industry.

Determining the statutory price by some other means may lead to disputes, arbitration or litigation amongst some of Western Australia's largest enterprises. That will, in turn, divert attention away from the development of efficient and competitive gas markets, cause significant uncertainty for market participants and result in costly and protracted legal action. The Pre-Sale Shippers submit that such an outcome can hardly have been what the State and Parliament intended to occur as the result of the enactment of section 20, and that it cannot be considered desirable today.

The Pre-Sale Shippers stress that it is important for the Regulator to appreciate that this is a real issue of significant risk. Recent press reports have raised the possibility of disputes in this respect. For example, a recent article in the *Australian Financial Review* on Epic Energy's response to the Draft Decision stated:

"Meanwhile, the draft ruling is expected to trigger an arbitration process to resolve a dispute between Epic and two of its big customers, Western Power and the privatised AlintaGas, over their entitlements to statutory pricing arrangements." AFR 26 June 2001

The Pre-Sale Shippers submit that, in these circumstances, it is reasonable for the Regulator to require the inclusion of a T1-Equivalent Reference Service. Doing so would diffuse the possibility for dispute between Epic Energy and the Pre-Sale Shippers. It would provide certainty to a major part of the gas market and would not require that the Regulator act outside his jurisdiction.

The Pre-Sale Shippers urge the Regulator to provide certainty to shippers by using his discretion and the power available to him to require the inclusion of a T1-Equivalent Reference Service. By exercising that power, the Regulator would deliver contractual certainty to major participants in the Western Australian gas industry and achieve an appropriate balance of the interests specified in section 2.24 of the Code.

6.3 Market demand

In its 3rd Submission, AlintaGas argued that a T1-Equivalent Reference Service is likely to be sought by a significant part of the market: see section 2.3. The Pre-Sale Shippers support and reiterate that submission.

The issue of whether a T1-Equivalent Reference Service is likely to be sought by a significant part of the market was addressed by the Regulator in the Draft Decision: Part B:35 - 37. Ultimately, the Draft Decision concluded that:

- (a) Epic Energy must incorporate its proposed "Seasonal Service" into the proposed Firm Service, thereby making the Firm Service "substantially equivalent" to the T1 Service; and
- (b) it would be inappropriate to require Epic Energy to offer a reference service that is "precisely the same" as the T1 Service: B:37.

The following sections of this Submission provide comments on those conclusions and demonstrate why a T1-Equivalent Reference Service is required by a significant part of the market. Based on the comments, the Pre-Sale Shippers submit that it is appropriate for the Regulator to require Epic Energy to offer a T1-Equivalent Reference Service.

6.3.1 Equivalent reference service

The Draft Decision examined the issue of whether a service "precisely the same" as the T1 Service should be offered as a Reference Service: Part B:36 and 37.

The Pre-Sale Shippers wish to stress that they do not request the inclusion of a reference service that is "precisely the same" as the T1 Service. As outlined above, the Pre-Sale Shippers have always requested the inclusion of a service that is "equivalent" to the T1 Service.

6.3.2 "Sought by a significant part of the market"

The Draft Decision is equivocal about whether the "likely to be sought by a significant part of the market" element of section 3.3(b) of the Code is established. The Draft Decision states:

"The Regulator accepts the view that there is likely to be some demand for a service with at least the fundamental components of the T1 Service": Draft Decision, Part B:36.

The Pre-Sale Shippers again submit that a T1-Equivalent Reference Service is likely to be sought by a significant part of the market. The Pre-Sale Shippers make that submission for the reasons stated in section 2.3 of AlintaGas's 3rd Submission. There can be no doubt that the Pre-Sale Shippers in and of themselves, both individually and collectively, constitute a significant part of the market.

6.3.3 The service that is likely to be sought by a significant part of the market

The Pre-Sale Shippers' previous submissions stated that the Pre-Sale Shippers are likely to seek a T1-Equivalent Reference Service. They drew a clear distinction between their demand for a T1-Equivalent Reference Service and the proposed Firm Service.

Despite that, the Draft Decision states:

"On balance, the Regulator has taken the view that the stated demand for the T1 Service only demonstrates demand for a service of the general type of the T1

Service (ie a service for firm capacity) rather than a service that is precisely the same as the T1 Service": Draft Decision, Part B:36

The Pre-Sale Shippers request that the Regulator reconsider that conclusion. The Pre-Sale Shippers submit that such a finding is not open to the Regulator and that it is inconsistent with the actual nature of the demand for gas transportation services.

To put the matter beyond doubt, the Pre-Sale Shippers advise the Regulator that:

- (a) as a matter of fact, each of the Pre-Sale Shippers requires a T1-Equivalent Reference Service;
- (b) the Pre-Sale Shippers' demand for a T1-Equivalent Reference Service exists principally for the reason that they require a clearly identifiable statutory price; and
- (c) the Pre-Sale Shippers' demand for a T1-Equivalent Reference Service does not demonstrate demand for a service of the general type of the T1 Service (ie. a service for firm capacity) – as literally stated, it is demand for a T1-Equivalent Reference Service.

The Pre-Sale Shippers have contracts which contain terms and conditions which define with particularity the nature of the service. Some Pre-Sale Shippers have options to extend these contracts on the same contractual terms and conditions. There is no doubt that the service defined by these terms and conditions (the T1 Service) will, at the time of the exercise of the options discussed above, be required by a significant part of the market.

Finally, the Pre-Sale Shippers submit that the Regulator is free to require the inclusion of a reference service which is of the same general character as a reference service which is already offered in the Access Arrangement. There is nothing in the Code to prevent the Regulator from doing so and there is no good reason for refusing to do so if the inclusion of that service will resolve serious problems for a significant part of the market.

7. THE EXTENT OF CHANGES REQUIRED TO THE ACCESS ARRANGEMENT

The Pre-Sale Shippers believe that the inclusion of a T1-Equivalent Reference Service in the Access Arrangement will not require a significant change to the Access Arrangement, will not increase Epic Energy's risk exposure and will not require substantially more work on the part of Epic Energy.

The Access Arrangement would not need to be significantly changed to accommodate a T1-Equivalent Reference Service. Epic Energy would need to include a description of the reference service, identify the reference tariff, explain how the reference tariff was derived and provide reasonable terms and conditions.

The description of the reference service would not be difficult. Effectively, the Regulator would only be requiring Epic Energy to more accurately define the nature of the non-reference service already described in clause 6.1(b)(ii) of Epic Energy's proposed Access Arrangement.

The Pre-Sale Shippers submit that the reference tariff for the Firm Service would also be an appropriate reference tariff for the T1-Equivalent Reference Service. Given the similarity of the two reference services and the general nature of the reference tariff principles in section 8 of the Code, the reference tariff for the T1-Equivalent Service would reasonably be expected to be the same as, or only marginally different to, the reference tariff for the Firm Service, regardless of any differences in the terms and conditions.

The Pre-Sale Shippers also submit that the terms and conditions of the T1-Equivalent Reference Service could be handled quite easily. The Access Arrangement could state that the terms and conditions are the terms and conditions that would have applied to a GTR transmission access contract had that regime not been repealed.

The Pre-Sale Shippers do not believe that Epic Energy would face a material increase in risk as a result of including the T1-Equivalent Reference Service. The reference service will only be available to Pre-Sale Shippers and only for the purposes of determining the statutory price and exercising options (to ensure that Pre-Sale Shippers continue to have access to the services provided to them under their extended contracts).

To the best of the Pre-Sale Shippers' knowledge, Epic Energy has not demonstrated that the inclusion of a T1-Equivalent Reference Service will affect its legitimate business interests. On the other hand, the Pre-Sale Shippers' legitimate business interests are likely to be adversely affected if a T1-Equivalent Service is not included.

In this respect, the Pre-Sale Shippers note that Epic Energy has expressly acknowledged that it has an obligation to comply with section 20 of the DBP Act. In its Submission 9, Epic Energy recognised the "special rights" conferred upon grandfathered contracts by virtue of "the requirements of Epic Energy to comply with section 20...": quoted in the Draft Decision at Part B: 292. Given this express acknowledgment, the Pre-Sale Shippers submit that it is reasonable to expect Epic Energy's cooperation in clearly identifying the statutory price by means of the inclusion of a T1-Equivalent Reference Service.

Finally, the Pre-Sale Shippers point out that, as the T1-Equivalent Reference Service will not replace the proposed Firm Service, but exist alongside it, Epic Energy will be free to innovate in the new services it offers. Significantly, Epic Energy is already compelled to provide the T1 Service to all Pre-Sale Shippers which have T1 capacity.