IN THE WESTERN AUSTRALIAN GAS REVIEW BOARD

[No. of 2005]

Re Application for review of the decision by the Western Australian Economic Regulation Authority dated 15 December 2005 to approve the Economic Regulation Authority's own revised Access Arrangement for the Dampier to Bunbury Natural Gas Pipeline

Application by:

WESTERN POWER CORPORATION Applicant

APPLICATION FOR REVIEW

Date of document: 28 December 2005

Filed on behalf of: The Applicant

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Pursuant to s.39(1) of Schedule 1 to the *Gas Pipelines Access (Western Australia) Act 1998* (**"the Act"**), and s.2.48 of the National Third Party Access Code for Natural Gas Pipeline Systems (as set out in Schedule 2 to the Act) (**"the Code"**), the applicant applies for review of the decision dated 15 December 2005 by the Western Australian Economic Regulation Authority (**"Regulator"**) and placed on the public register kept by the Code Registrar under the Code on or about 15 December 2005 whereby the Regulator approved the Regulator's own revised Access Arrangement for the Dampier to Bunbury Natural Gas Pipeline in place of the proposed revised Access Arrangement submitted by DBNGP (WA) Transmission Pty Limited (**"DBP"**) on 30 November 2005 pursuant to s.2.42 of the Code and all decisions relating thereto.

The applicant seeks the following final orders:-

1. The decision of the Regulator under s.2.42 of the Code whereby the Regulator purported to approve its own revised Access Arrangement for the Dampier to

Bunbury Natural Gas Pipeline be set aside or varied to give effect to the matters asserted in the grounds of this application.

2. Further or alternatively, the Gas Review Board draft and approve a revised Access Arrangement which gives effect to the matters asserted in the grounds of this application.

3. All necessary and consequential amendments be made to the Access Arrangement and Access Arrangement Information.

4. Orders providing for the costs of these proceedings.

The grounds of this application are annexed.

Solicitors for the Applicant

GROUNDS

1. The Regulator erred in its finding of facts or the exercise of its discretion was incorrect or was unreasonable having regard to all the circumstances in approving clause 5 of the Access Arrangement when this clause is inconsistent with the objectives and sections 2.24, 3.4, 3.6, 3.12, 3.13, 5, 6.24 and 8 of the Code in that:

   (a) the Regulator mis-characterised the material in clauses 5.1 to 5.3 as matters unrelated to sections 3.1 to 3.20 of the Code, when in fact that material forms part of the Queuing Policy under clause 3.12 of the Code, and accordingly in approving it the Regulator should have applied the tests which under the Code are relevant to the Queuing Policy but did not do so;

   (b) it provides in clause 5.3(d)(i) that an Access Contract for a Reference Service on Access Contract Terms and Conditions comes into effect immediately upon acceptance by DBP (rather than the culmination of the application process being an offer from DBP which the shipper may then accept or reject);

   (c) it does not impose obligations on DBP to act:

      (i) promptly or (except in clause 5.3(a)) within any specified period;

      (ii) as a reasonable and prudent person (except in clauses 5.3(e)(iii) and (viii)); or

      (iii) otherwise in good faith or (except in clauses 5.2(c)(iii), 5.3(b), 5.3(d), 5.4(e) and 5.4(k)(i)) reasonably,

      in managing the queue and in assessing, responding to, negotiating and otherwise acting in connection with Access Requests;

   (d) clause 5.3(e)(vii) is unnecessary, unworkable and of uncertain effect;

   (e) clause 5.3(e)(viii) is unnecessary and open to abuse by DBP;

   (f) it does not include a provision for a Prospective User to appeal or otherwise query the rejection of its Access Request;

(g) it does not prohibit DBP from rejecting an Access Request merely on the basis of a technical defect, a defect in form or any other defect which is not material;

(h) clause 5.4(e) only provides one opportunity for Shipper to remedy any deficiencies notified to it by DBP without losing priority;

(i) it does not provide for:

(i) maintaining the position of a Prospective User's Access Request in the queue pending resolution of the Prospective User appealing or querying the rejection or proposed rejection of its Access Request; or

(ii) the subsequent reinstatement of a Prospective User's rejected Access Request to its former position in the queue upon resolution in favour of the Prospective User of the Prospective User's appeal or query of the rejection;

(j) as to the time limits in clause 5.4(f);

(i) the period of 40 business days in clause 5.4(f)(i) and the period of 60 business days in clause 5.4(f)(ii) are too short;

(ii) the effect of these time limits is to create an incentive for a shipper to commence a dispute in order to preserve the priority of its Access Request whether or not there are any, or any unresolvable, points of difference between the shipper and DBP; and

(iii) the time period of 4 months from the Referral Date has been set without taking into account that the period of 3 months in section 6.11 of the Code can be extended under sections 6.12 and 7.19 of the Code;

(k) the critical test of "materially different" in clause 5.4(g)(i) is unacceptably vague or alternatively is otiose given clause 5.4(g)(ii);

(l) clause 5.4(i) refers to "prior AA Access Requests" which are "Access Requests" made prior to the revisions to the Access Arrangement coming into effect. This is unworkable because "Access Request" is

defined in the Access Arrangement as a request for access to a service provided by means of the DBNGP as described in clause 5.2, and an application made before the approval date would not comply with clause 5.2 and therefore would not fall in the definition of prior AA Access Requests and therefore by reason of clause 5.4(i) would not be placed in the queue;

(m) clause 5.4 should provide a means to enable a Shipper to enquire of DBP whether a proposed amendment will result in an Access Request not meeting the requirements in clause 5.4(k)(i) for preservation of its priority, so that the Shipper may determine whether to proceed with the proposed amendment;

(n) further or alternatively to Ground 1(m), clause 5.4(k) does not:

(i) require DBP to notify the Prospective Shipper in advance that a proposed amendment will have the effect of removing the Access Request from the queue and re-entering it with a priority date being the date of the amendment;

(ii) require DBP to give the Shipper the opportunity within a certain time to elect to proceed with the amended Access Request or abandon the amended Access Request with the effect of retaining the original Access Request's position in the queue;

(o) clause 5.4(k)(i) provides that a change in the requested Commencement Date does not affect an Access Request's priority, when in fact this should be limited to a change which defers the Commencement Date, because changing it to an earlier date may adversely and inappropriately affect other applicants whose Access Requests have lower priority.

2. The Regulator erred in its finding of facts or the exercise of its discretion was incorrect or was unreasonable having regard to all the circumstances in approving clauses 6.2, 6.3 (also referred to as clause 6.2A) and 6.4 (also referred to as clause 6.2B) of the Access Arrangement when these clauses are inconsistent with the objectives and sections 2.24, 3.3, 3.4, 3.6 and 8 of the Code in that they provide that the relevant Reference Service is provided by DBP "subject to availability of Capacity", where:

(a) these words are inconsistent with the separate requirement in these clauses that the services are to be provided "without interruption or curtailment except as permitted by the Access Contract";

(b) these words are inconsistent with the specific curtailment provisions in the Access Contract terms and conditions for each of the T1, P1 and B1 Reference Services.

3. The Regulator erred in its finding of facts or the exercise of its discretion was incorrect or was unreasonable having regard to all the circumstances in approving clauses 6.2, 6.2A and 6.2B of the Access Arrangement when these clauses are inconsistent with the objectives and sections 2.24, 3.3, 3.4, 3.6 and 8 of the Code in that these clauses:

(a) refer to Spare Capacity of the DBNGP "as it is configured at the time of approval of this Access Arrangement" when during the term of the approved Access Arrangement and any subsequent revised Access Arrangements, the DBNGP may be configured differently from its configuration at the time of approval of the Access Arrangement, resulting in the availability of additional spare capacity which should be made available on the same terms as Spare Capacity so defined;

(b) do not provide any reference to spare capacity of the DBNGP as it is configured at any date after the time of approval of the Access Arrangement; and/or

(c) refers to the approval of the Access Arrangement which occurred on 13 January 2004.

4. The Regulator erred in its finding of facts or the exercise of its discretion was incorrect or was unreasonable having regard to all the circumstances in approving the definition of "Capacity" in clause 14 of the Access Arrangement when that definition is limited to "capacity in the DBNGP, as it is configured at the commencement of the Access Arrangement" when this definition is inconsistent with the objectives and sections 2.24, 3.3, 3.4, 3.6 and 8 of the Code in that:

(a) the definition produces a meaningless result in clause 5.4(l) and in the definition of "Capacity Expansion Option" in clause 14;

(b) during the term of the approved Access Arrangement and any subsequent revised Access Arrangements, the DBNGP may be configured differently from its configuration at the time of approval of the Access Arrangement, resulting in the availability of additional capacity which should come within the definition of Capacity so defined;

(c) the definition does not provide any reference to capacity of the DBNGP as it is configured at any date after the time of approval of the Access Arrangement; and/or

(d) the definition refers to the approval of the Access Arrangement which occurred on 13 January 2004.

5. The Regulator erred in its finding of facts or the exercise of its discretion was incorrect or was unreasonable having regard to all the circumstances in approving clauses 6.2(a), 6.2A(a) and 6.2B(a) of the Access Arrangement when these clauses are inconsistent with the objectives and sections 2.24, 3.3, 3.4, 3.6 and 8 of the Code in that each of them require daily repayment of imbalances, which is inconsistent with the balancing provisions of the relevant Reference Service terms and conditions.

6. The Regulator erred in its finding of facts or the exercise of its discretion was incorrect or was unreasonable having regard to all the circumstances in approving clause 6.5(c)(iv) of the Access Arrangement when this clause is inconsistent with the objectives and sections 2.24, 2.25, 3.4, 3.6 and 8 of the Code in that it sets the Minimum Bid Price according to the Base T1 Tariff in a standard shipper contract on DBP's website, effectively allowing DBP to set the Minimum Bid Price in an unregulated manner.

7. The Regulator erred in its finding of facts or the exercise of its discretion was incorrect or was unreasonable having regard to all the circumstances in approving the fixed principle in clause 7.13(a)(ii) of the Access Arrangement when clause 7.13(a)(ii) is inconsistent with the objectives and sections 2.24, 2.25, 3.4, 3.5 and 8 of the Code.

8. The Regulator erred in its finding of facts or the exercise of its discretion was incorrect or was unreasonable having regard to all the circumstances in approving clause 7.13(b) of the Access Arrangement when clause 7.13(b) is inconsistent with the objectives and sections 2.24, 3.4, 3.5 and 8 of the Code in

that it provides for a Fixed Period ending on 31 December 2031 which is unreasonably long.

9. The Regulator erred in its finding of facts or the exercise of its discretion was incorrect or was unreasonable having regard to all the circumstances in approving the Access Arrangement without an appropriate rebate mechanism for Non-Reference Service revenue when this is inconsistent with the objectives and sections 2.24, 3.4, 3.5 and 8 of the Code in that:

   (a) Non-Reference Service revenue could be a material revenue source for DBP, part of which should be proportionally rebated to users;

   (b) it creates inappropriate incentives for DBP.

10. The Regulator erred in its finding of facts or the exercise of its discretion was incorrect or was unreasonable having regard to all the circumstances in approving the Access Arrangement without an appropriate rebate mechanism for penalty revenue when this is inconsistent with the objectives and sections 2.24, 3.4, 3.5 and 8 of the Code in that:

   (a) penalty revenue could be a material revenue source for DBP, part of which should be proportionally rebated to users;

   (b) it creates inappropriate incentives for DBP.

11. The Regulator erred in its finding of facts or the exercise of its discretion was incorrect or was unreasonable having regard to all the circumstances in approving clause 11.1 of the Access Arrangement when it is inconsistent with the objectives and sections 2.24, 3.4, 3.6, 6 and 8 of the Code in that it leaves to DBP's subjective discretion the determination of whether the tests in section 6.22 of the Code have been satisfied.

12. The Regulator erred in its finding of facts or the exercise of its discretion was incorrect or was unreasonable having regard to all the circumstances in approving clauses 5.4(l) and 11 of the Access Arrangement when they are inconsistent with the objectives and sections 2.24, 3.4, 3.6, 3.13 and 8 of the Code in that:

   (a) these clauses are ambiguous, uncertain and lack sufficient detail as to how Capacity Expansion Options operate, particularly in relation to:

(i) how DBP will prioritise Capacity Expansion Options;

(ii) how Capacity Expansion Options are acquired;

(iii) how the purchase price and terms and conditions for Capacity Expansion Options are determined; and

(iv) what provisions govern the trading of Capacity Expansion Options; and

(b) the treatment of Capacity Expansion Options in the Access Arrangement lacks transparency in that there is no way for the holder of a Capacity Expansion Option to know its priority and other rights as against any other holder of a Capacity Expansion Option.

13. The Regulator erred in its finding of facts or the exercise of its discretion was incorrect or was unreasonable having regard to all the circumstances in approving the Reference Service terms and conditions set out in Appendix 1 of the Access Arrangement when these terms and conditions are inconsistent with the objectives and sections 2.24, 2.25, 3.4, 3.6 and 8 of the Code as set out in the Schedule to these Grounds.

14. The Regulator erred in its finding of facts or the exercise of its discretion was incorrect or was unreasonable having regard to all the circumstances in approving the definition of “Access Contract Terms and Conditions” in clause 14 of the Access Arrangement, when that definition is inconsistent with the objectives and sections 2.24, 3.4, 3.6 and 8 of the Code and clause 9.3 of the Access Arrangement because it grants to DBP a unilateral ability to modify the Access Contract Terms and Conditions when in fact this ability should be limited to an ability to vary them in accordance with section 2 of the Code.

15. The Regulator erred in its finding of facts or the exercise of its discretion was incorrect or was unreasonable having regard to all the circumstances in approving DBP’s proposed non-capital costs when this is inconsistent with the objectives and sections 2.24, 3.4, 3.5, 4, 7.1, 8, 10.1 and 10.2 of the Code in that:

(a) it failed to properly consider all management, operating and maintenance agreements and other arrangements between DBP and Alinta Network Services Pty Ltd (ABN 52 104 352 650) and its related

bodies corporate (individually and collectively **"Alinta"**) which involve the payment of fees or provision of other benefits to Alinta;

(b) it included in Total Revenue amounts in respect of Alinta associated with the agreements or arrangements referred to in Ground 15(a) which should not have been included.

16. The Regulator erred in its finding of facts or the exercise of its discretion was incorrect or was unreasonable having regard to all the circumstances in approving DBP's proposed non-capital costs when this is inconsistent with the objectives and sections 2.24, 3.4, 3.5, 4, 7.1, 8, 10.1 and 10.2 of the Code in that:

(a) it should have determined that Alinta Network Services Pty Ltd is a Service Provider for the purposes of the Code; and/or

(b) it should have determined that DBNGP (WA) Nominees Pty Ltd as trustee for the DBNGP WA Pipeline Trust is a Service Provider for the purposes of the Code.

17. The Regulator erred in its finding of facts or the exercise of its discretion was incorrect or was unreasonable having regard to all the circumstances in approving DBP's proposed new facilities investment as being compliant with section 8.16 of the Code for the reasons contained in paragraph 223 of the Final Decision when this is inconsistent with the objectives and sections 2.24, 3.4, 3.5 and 8 of the Code in that:

(a) its assessment of incentives in paragraph 223 was incorrect generally, and in particular because it failed to take into account as a relevant consideration the higher pricing likely to apply in respect of any developable capacity made available to shippers during the access arrangement period;

(b) it incorrectly substituted the assessment of incentives in paragraph 223 for a proper application of the relevant Code provisions as fundamental elements.

18. The Regulator erred in its finding of facts or the exercise of its discretion was incorrect or was unreasonable having regard to all the circumstances in approving the Access Arrangement when this is inconsistent with the objectives and sections 2.24, 3.4, 3.5 and 8 of the Code in that it does not apportion

capital costs of the pipeline and expansions South of CS10 to only those shippers located South of CS10.

19. The Regulator erred in its finding of facts or the exercise of its discretion was incorrect or was unreasonable having regard to all the circumstances in approving the Access Arrangement without a redundant capital mechanism (or an alternative mechanism to similar effect) when this is inconsistent with the objectives and sections 2.24, 3.4, 3.5 and 8 of the Code in that there is a material likelihood during the access arrangement period of there being a substantial value of assets which cease to contribute in any way to the delivery of Services.

SCHEDULE

(See Ground 13)

Erroneous treatment of differences between T1, P1 and B1

1. (**Inconsistent definitions**) The definition of T1 Service in clause 1 of the P1 and B1 terms and conditions describes T1 Service as a Full Haul Gas transportation service which is inconsistent with:

   (a) clause 3.2 of the P1 terms and conditions describes P1 Service as a Part Haul Gas transportation service "that is a category of T1 Service"; and

   (b) clause 3.2 of the B1 terms and conditions describes B1 Service as a Back Haul Gas transportation service "that is a category of T1 Service".

2. The meaning of the words "that is a category of T1 Service" in clause 3.2 of the P1 and B1 terms and conditions is unclear.

3. It is unclear how (if at all) clause 3.2(b) of the P1 and B1 terms and conditions, which sets out the T1 Cut-off, applies to P1 or B1 Services.

4. (**Nominations and Curtailment Priorities**) Clauses 3.2(a), 8.9 and 17.9 and Schedules 7 and 8 of the P1 and B1 terms and conditions treat P1 and B1 Services as a type T1 Service for the purposes of:

   (a) nominations; and

   (b) curtailments.

   However, in each case this is inconsistent with existing shipper contracts and new full haul contracts based on the T1 Service (which do not expressly treat P1 and B1 as a type of T1 Service for the purpose of nominations and curtailments).

5. (**Allocation Priorities**) Clause 6.5(d) of the T1, P1 and B1 terms and conditions sets out an order of allocations which takes no account of the possibility that a shipper may have 2 or more of T1, P1 and B1 capacity at a given outlet point. Accordingly, in such a circumstance each of the clauses 6.5(d) in the T1, P1

and B1 contracts (and the corresponding provision in existing shipper contracts) will be inconsistent with each other.

6. (**Inconsistent Aggregation Rights**) Clause 8 of the P1 and B1 terms and conditions provides for P1 and B1 aggregation rights on the same terms as clause 8 of the T1 terms and conditions. This disregards the physical limitations of the pipeline (for example, it purportedly entitles a shipper with capacity at an outlet point in the Pilbara to aggregate the capacity to an outlet point in the Mid West) which jeopardises the rights of shippers under existing contracts and under new T1, P1 and B1 contracts.

7. (**Inconsistent Peaking Rights**) Clause 10 of the P1 and B1 terms and conditions provides for P1 and B1 peaking rights on the same terms as clause 10 of the T1 terms and conditions. This disregards the physical limitations of the pipeline (for example, it purportedly entitles a shipper with capacity at outlet points in both the Pilbara and the Mid West to accumulate its peaking rights across both outlet points) which jeopardises the rights of shippers under existing contracts and under new T1, P1 and B1 contracts.

Tariff escalation

8. Clause 20.5(c) in the T1, P1 and B1 terms and conditions will, if there is no T1 Reference Service included in the next Access Arrangement (or a subsequent Access Arrangement), have the effect that a shipper with an Access Contract which extends past the present Access Arrangement Period will likely have its contractual tariff escalate on a path substantially above what would have been the corresponding reference tariff.

Warranty uncertainty for curtailment and nominations priority

9. Clause 30.1(a)(xii) of the T1, P1 and B1 terms and conditions is expressed to be “subject to a contrary provision in the Access Arrangement”. This is unreasonable because it means that a shipper’s certainty as to its nominations and curtailment priority can be undermined by future Access Arrangement revisions.

Erroneous capitalisation of defined terms

10. The standard shipper contract on which many existing shippers’ contracts were based used capitalisation of the expressions “[i]nlet [p]oint” and “[o]utlet [p]oint” to distinguish between:

(a) inlet points and outlet points specified in the contract (which were capitalised); and

(b) other inlet points and outlet points on the DBNGP (which were not capitalised).

The T1, P1 and B1 terms and conditions capitalise the expressions "[i]nlet [p]oint" and "[o]utlet [p]oint" in a way which is:

(c) different from the standard shipper contract in a way which materially changes the commercial effect of the contract;

(d) internally inconsistent within each of the T1, P1 and B1 terms and conditions; and

(e) inconsistent as between the T1, P1 and B1 terms and conditions.

This:

(f) is unreasonable because it is uncertain; and

(g) is inconsistent with paragraphs 468 and 511 of the Final Decision.