

RE AN APPLICATION FOR REVIEW OF THE  
DECISION BY THE WESTERN AUSTRALIAN  
INDEPENDENT GAS PIPELINES ACCESS  
REGULATOR DATED 30 DECEMBER 2003  
TO APPROVE HIS OWN ACCESS ARRANGEMENT  
FOR THE DAMPIER TO BUNBURY NATURAL  
GAS PIPELINE (**DBNGP**)

APPLICATION BY:

ELECTRICITY GENERATION CORPORATION

Applicant

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**REASONS FOR DECISION ON APPLICATION BY:  
THE ECONOMIC REGULATION AUTHORITY  
FOR ORDERS EXCLUDING MATTERS FROM REVIEW  
PURSUANT TO SECTION 39(4) OF SCHEDULE 1 TO THE  
GAS PIPELINES ACCESS (WESTERN AUSTRALIA) ACT 1998**

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**MEMBER:** MR R M EDEL, PRESIDING MEMBER  
**HEARD:** 28 JULY 2006  
**DELIVERED:** 26 OCTOBER 2006

**Representation:**

**Counsel**

Electricity Generation Corporation (EGC):	Mr K Martin QC and Mr N P Gentilli
Economic Regulation Authority (ERA):	Mr S G Colvin SC
DBNGP:	Mr J Thomson

**Solicitors:**

Electricity Generation Corporation:	Jackson McDonald
Economic Regulation Authority:	Lavan Legal
DBNGP:	Allens Arthur Robinson

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**Legislation referred to in judgment**

Gas Pipelines Access (Western Australia) Act 1998

**Background**

1. By an application dated 8 May 2006 the Economic Regulation Authority (**ERA**) sought an order that all of the remaining matters the subject of proceedings in Appeal No. 3 of 2004 by the Electricity Generation Corporation (**EGC**) be excluded from being heard by

the Board pursuant to section 39(4) of Schedule 1 to the Gas Pipelines Access (Western Australia) Act 1998 (**Law**).

2. During the hearing on 28 July 2006 Counsel for the EGC handed up a chronology of proceedings from November 2004 until the present time. Counsel for the ERA suggested some amendments to that chronology. I have reproduced the amended chronology and attach it as Annexure A. The chronology sets out the factual background to the application brought by the ERA.

### **Submissions of the parties**

3. The ERA filed a written outline of submissions and supplemented those submissions with oral submissions. The ERA submitted, inter alia, that:
  - (a) the power of the Board to make orders affirming or setting aside or varying the Regulator's decision pursuant to section 38(9) of Schedule 1 to the Gas Pipelines Access Act (Western Australia) 1998 (**Act**) is prospective. It does not provide for the Board to make a retrospective order concerning an access arrangement;
  - (b) the First Access Arrangement is no longer operative, having been replaced by the Revised Access Arrangement which commenced on 30 December 2005;
  - (c) since the First Access Arrangement is no longer operative, any order made by the Board in these proceedings purporting to vary or set aside the First Access Arrangement would need to have retrospective effect and therefore be beyond the Board's power in section 38(9) of Schedule 1 to the Act;
  - (d) the terms contained in the First Access Arrangement have been the subject of a review under the Code and have been affirmed or varied by the Regulator in the Revised Access Arrangement, which commenced on 30 December 2005. The Board has no power in these proceedings to vary or set aside the terms of the Revised Access Arrangement, which is the subject of separate appeals in Appeals No. 1 and 2 of 2005;
  - (e) even if the Board does have power to set aside or vary the First Access Arrangement, the orders of the Board will have no practical effect as any decision by the Board concerning the terms and conditions of the First Access Arrangement cannot be "rolled forward" to the Revised Access Arrangement. The process of assessment of the revisions to the First Access Arrangement involves consideration of new submissions in evidence which may affect the conclusions of the Regulator and the Board;

- (f) even if the Board were to find in these proceedings that the Regulator's First Access Arrangement contained errors of law in relation to terms that are the subject of Appeal No. 1 of 2005 brought by the EGC, it would not have been wrong for the Regulator to take into account those provisions in its assessment of the Revised Access Arrangement;
- (g) the amended application for review in Appeal No. 3 of 2004 substantially overlaps with the application for review in Appeal No. 1 of 2005 and to the extent that there is overlap the issues are appropriately dealt with in Appeal No. 1 of 2005;
- (h) further significant costs will be involved in preparing for and appearing at a hearing on Appeal No. 3 of 2004;
- (i) the EGC did not seek orders from any court or any other body to prevent the Regulator from commencing and concluding the process of reviewing and revising the First Access Arrangement;
- (j) as a result of these matters there is no likelihood that the decision of the Regulator to draft and approve the First Access Arrangement will be varied or set aside as a result of these proceedings. Alternately, even if there were, any such decision would have no practical effect.

4. The EGC submitted in reply, inter alia, that:

- (a) the ERA must take into account the First Access Arrangement when considering a revision to the access arrangement by reason of section 2.46(b) of the Code and the revision process must proceed on the basis of the First Access Arrangement;
- (b) the First Access Arrangement, as varied from time to time, must be considered in all succeeding revisions by reason of the operation of section 2.46(b) of the National Third Party Access Code for Natural Gas Pipeline Systems (**Code**);
- (c) an application to review an access arrangement which contains alleged errors of fact and law is of significance to the EGC in circumstances where EGC will also be affected by the Revised Access Arrangement;
- (d) the access arrangement continues indefinitely as varied from time to time and therefore it is not beyond the power of the Board to amend the First Access Arrangement merely because variations to it have since been approved by the ERA;

- (e) section 38(9) of Schedule 1 permits a retrospective order setting aside all or part of a decision under review. Even if it does not so permit, but an order is otherwise justified, no retrospective order will be made and a prospective order will be made;
- (f) it is not correct to say that because part of the First Access Arrangement has since been varied, a subsisting appeal against that part of the decision approving the First Access Arrangement must result in a retrospective order. If the order of the Board operates from the date it is made, the First Access Arrangement will be varied by that order of the Board;
- (g) if Appeal No. 3 of 2004 is successful this would not result in the ERA becoming obliged to commence the revisions process again – the Board decides both appeals under section 38(9) of Schedule 1;
- (h) the EGC has not alleged in Appeal No. 1 of 2005 that any aspect of the Revised Access Arrangement was incorrect on the basis of the Regulator's reliance on provisions of the First Access Arrangement that are the subject of Appeal No. 3 of 2004;
- (i) however, if the First Access Arrangement is assessed by the Board in Appeal No. 3 of 2004 to contain errors, then to the extent that the Regulator proceeded upon the basis of those errors (as he was required to do) in drafting and approving the Revised Access Arrangement, the Revised Access Arrangement will perpetuate the same or like errors;
- (j) the live grounds of review in Appeal No. 3 of 2004 relate to matters which are equivalently put in issue in Appeal No. 1 of 2005 and there is a high degree of overlap between the two appeals;
- (k) if an order is made varying or setting aside any part of the First Access Arrangement then it would follow that an order should be made varying or setting aside the Revised Access Arrangement to the extent that it takes into account any part of the First Access Arrangement which has been varied or set aside;
- (l) a large proportion of the cost of preparing for the hearing of the matters in dispute in this appeal has already been incurred and the parties have retained the same solicitors throughout these proceedings, with the ERA and the DBNGP parties having retained the same counsel;

- (m) EGC has substantially narrowed its grounds of review and is pursuing only those grounds that are absolutely necessary by reason of their in principle ongoing relevance.
5. The DBNGP parties adopted the written and oral submissions of the ERA and submitted, inter alia that:
- (a) no useful purpose would be served by proceeding with Appeal No. 3 of 2004 as the First Access Arrangement ceased to have effect on 30 December 2005. Hence, this falls squarely within the circumstances contemplated by section 39(4) of Schedule 1 of the Law. Alternately, the Board should refuse to proceed with the review as it would be trivial (section 38(11) of Schedule 1 of the Law).
  - (b) the purpose of section 2.46 of the Code, and in particular section 2.46(b), is to ensure consistency and continuity in the regime to which the parties are subjected and to ensure that there are no dramatic practical changes to which the parties the subject to that regime are subject;
  - (c) the proper construction of section 2.46(b) is that the Regulator must take into account the provisions of the access arrangement as they have actually applied to the parties because the whole purpose of that provision is to ensure there is a smooth change over from the Initial Access Arrangement to any subsequent regime;
  - (d) the EGC's construction of section 2.46(b) is that the Regulator must take into account the provisions of the access arrangement as it is revised and disregarding the way in which it may actually have applied to the parties and this is not an accurate construction of section 2.46(b);
6. The ERA submitted in reply, inter alia, that:
- (a) if the EGC was to proceed with and succeed in Appeal No. 3 of 2004 the process of review of the First Access Arrangement would not recommence and therefore interested parties could not have a further opportunity to make submissions as part of that process;
  - (b) if the EGC is entitled to continue with Appeal No. 3 of 2004 there would be inordinate delay of the review process;

- (c) the EGC overstates the consequences of the requirement that the ERA must take into account the provisions of the First Access Arrangement in assessing the proposed revisions to that Access Arrangement;
- (d) Appeal No. 3 of 2004 could not result in any retrospective amendment to the operation of the First Access Arrangement;
- (e) where the review process has been concluded there is insufficient significance to Appeal No. 3 of 2004 to require its determination.

### **The right to a review of the Regulator's decision**

- 7. Pursuant to section 38(3) (which applies to appeals under section 39 by virtue of section 39(6) of the Law) the Board must make its determination on the review within 90 days after receiving the application for review. That period may be extended by the Board pursuant to the power conferred on it in section 38(4).
- 8. It is plain that a person falling within section 39(1)(c) or (d) of the Law has a right to apply to the Board for a review of the Regulator's own access arrangement or revisions of an access arrangement. Further, the Board has an obligation to conduct a review unless the application for review is withdrawn or the Board makes orders pursuant to section 39(4) of the Law.

### **Power to exclude matters from review**

- 9. Section 39(1) of Schedule 1 to the Law gives certain persons a right to apply to the Board for a review of a Regulator's decision to approve the Regulator's own access arrangement or own revisions of an access arrangement. Section 39(1) provides that:

*"If the relevant Regulator makes a decision under the Code to approve the Regulator's own access arrangement or the Regulator's own revisions of an access arrangement:*

- (a) *in place of an access arrangement or revisions submitted for approval by a service provider; or*
- (b) *because a service provider fails to submit an access arrangement or revisions as required by the Code,*

*the following persons may apply to the relevant appeals body for a review of the decision:*

- (c) *the service provider;*

(d) *a person who made a submission to the relevant Regulator on the access arrangement or revisions submitted by the service provider or drafted by the Regulator and whose interests are adversely affected by the decision".*

10. Section 39(4) of Schedule 1 to the Law states:

*"In a review of a decision under this section, the relevant appeals body may give directions to the parties excluding from the review specified facts, findings, matters or actions that the relevant appeals body considers should be excluded having regard to:*

(a) *the likelihood of the decision being varied or set aside on account of those facts, findings, matters or actions;*

(b) *the significance to the parties of those facts, findings, matters or actions;*

(c) *the amount of money involved;*

(d) *any other matters that the relevant appeals board considers relevant".*

11. The first question for determination is whether the Board has power to make the type of order sought by the ERA.

12. Section 39(4) is expressed in very broad terms. In my view, section 39(4)(a) and/or section 39(4)(d) gives the Board the power to make the orders sought by the ERA. In particular, section 39(4)(d) (which gives the Board the power to exclude a matter on the basis of any matter that the Board considers relevant) provides a very broad discretion.

13. In my view the discretion ought to be exercised cautiously because it would restrict or terminate the statutory right of an interested party to bring an application for review (provided the appropriate conditions are met). The Board would not exercise any power under section 39(4) unless it is convinced there are good reasons to restrict or terminate an appeal, especially when an appeal had been on foot for some time.

### **Retrospectivity**

14. One of the central submissions advanced by the ERA in support of its application was that if the Board upheld any part of Appeal No. 3 of 2004 and decided to vary or set aside the First Access Arrangement in any respect, that order would necessarily need to have retrospective effect.

15. If the Board were to proceed with Appeal No. 3 of 2004 and vary or set aside any part of the First Access Arrangement, the Board's order, in accordance with section 38(9)

of Schedule 1 of the Law would operate immediately or as from a specified future date. It could not seek to vary the terms and conditions applicable to any parties bound by the First Access Arrangement or who may have utilised it in the past. It would leave unaffected the rights and obligations of parties prior to the order.

16. It seems to me that the consequence of the Board deciding to vary or set aside part of the First Access Arrangement in Appeal No. 3 of 2004 is of relevance for those terms and conditions of the Revised Access Arrangements that are the subject of attack in Appeal No. 1 of 2005 and that have been carried forward from the First Access Arrangement into the Revised Access Arrangement.

### **Other Considerations**

17. It is not suggested by any party that the Board has any power in Appeal No. 3 of 2004 to vary or set aside the terms of the Revised Access Arrangement which is the subject of separate appeals in Appeal No. 1 and Appeal No. 2 of 2005. Further, it is not suggested that the Regulator has fallen into error by taking into account the provisions of the First Access Arrangement as they currently stand in determining the Revised Access Arrangement.
18. In my view, if the Board does uphold some or all of Appeal No. 3 of 2004 in relation to the First Access Arrangement, this will not require the Regulator to recommence the process of revising the First Access Arrangement. As stated above, in my view it will simply mean that any terms in the First Access Arrangement that have been varied or set aside but which were carried over into the Revised Access Arrangement may be the subject of review in Appeal No.1 and Appeal No. 2 of 2005.
19. It was common ground between the parties that if Appeal No. 3 was upheld in whole or in part, it would not be necessary for the Regulator to recommence the process of review of the First Access Arrangement. Parties with an interest in the review of the First Access Arrangement have had an opportunity to participate in the review through the review process conducted by the Regulator and have further had an opportunity to be heard in relation to Appeal No 3 of 2005 (provided that they can demonstrate a sufficient interest).
20. There is a significant overlap between the issues relating to the First Access Arrangement ventilated in Appeal No. 3 of 2004 and those which the EGC seeks to raise in Appeal No. 1 of 2005 for the Revised Access Arrangement. This means that any variation or setting aside of terms and conditions in the First Access Arrangement pursuant to Appeal No. 3 of 2004 has relevance for and can be dealt with in Appeal No. 1 of 2005.



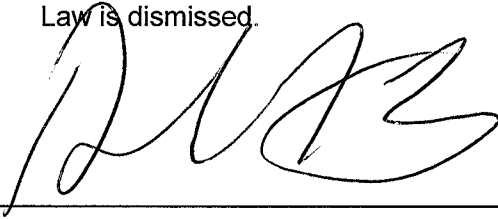
21. Appeal No. 3 of 2004 has been substantially reduced in scope as a result of the EGC dropping various grounds. Appeal No. 3 in its original form (including all of the grounds currently relied upon) was partly heard in December 2004. Detailed appeal grounds have been prepared, discovery in relation to relevant issues has been given and detailed submissions have been exchanged. The parties have retained common solicitors and (with the exception of senior counsel for EGC) the same counsel during the proceedings. A significant portion of the cost that will be incurred by the parties in conducting Appeal No 3 has already been incurred.
22. The fact that there is significant overlap between the issues in Appeal No. 3 of 2004 and Appeal No. 1 of 2005 means that there will be little additional cost incurred in dealing with the issues in Appeal No. 3 of 2004. The issues in Appeal No. 3 will need to be dealt with in any event.
23. Further, I do not accept that if the Board were to proceed to hear Appeal No 3 of 2004, there would be an unacceptable delay of the review process. As noted above, Appeal No 3 in its original form was originally listed for hearing in December 2004. The appeal was adjourned with the consent of all parties to enable discussions about a possible resolution of the matter to proceed and to enable the EGC to review the Revised Access Arrangement with a view to determining whether the matters in contention between it and the ERA could be reduced or removed altogether. That process has led to a significant reduction in the number of appeal grounds, but not to a complete elimination of all grounds of review. In the circumstances, the EGC and the DBNGP parties cannot be heard to complain about delay. Appeal No. 3 of 2004 and Appeal No. 1 of 2005 will be heard "back to back" in February 2007.
24. The question also arises as to whether there is any utility in proceeding with Appeal No 3 of 2004 given the high degree of overlap of issues with Appeal No 1 of 2005. The EGC pointed to the fact that the failure to determine Appeal No 3 might leave it exposed to an argument that failing to prosecute Appeal No 3 of 2004 to its conclusion might in some way prevent or affect it prosecuting Appeal No 1 of 2005. It also submitted that it was concerned to ensure that the Board had as broad a range of powers at options to grant appropriate relief in the event that EGC was successful in the issues that it had raised before the Board. EGC submitted that if Appeal No. 3 of 2004 was dismissed then the Board's powers pursuant to section 38(9) to vary or set aside the parts of the Access Arrangement under review would be restricted.
25. In my view, these risks are small and therefore do not carry great weight. Nonetheless, I accept that there is utility in proceeding to determine Appeal No 3 of 2004. If nothing else, that course will avoid the risk referred to and I am not persuaded

avoid the risk referred to and I am not persuaded that there is any particular reason that should prevent the Board from adopting that course.

26. For these reasons, I am not satisfied that the Board ought to exercise its power pursuant to section 39(4) of Schedule 1 to the Law to exclude any or all of the grounds of Appeal No. 3 of 2004 as submitted by the ERA.

**Ruling**

27. The ERA's application to exclude the subject matter of the proceedings of Appeal No. 3 of 2004 from being heard by the Board pursuant to section 39(4) of Schedule 1 to the Law is dismissed.



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**ROBERT EDEL  
PRESIDING MEMBER  
WESTERN AUSTRALIAN GAS REVIEW BOARD  
APPEAL 3 OF 2004**

DATED 26<sup>th</sup> DAY OF OCTOBER 2006

## ANNEXURE A

- 01/11/04 Hearing of appeal listed to commence on 1 November 2004 is vacated, due to the sale of 27 October 2004 of the DBNGP and DBP and Western Power entering into a long term Shipper Contract and Deed of Settlement-Gas Review Board Disputes.  
Adjourned for directions on 11 November 2004 and 26 November 2004.
- 22/12/04 ERA's previous application under s39(4) heard.
- 26/01/05 ERA publishes DBP's proposed revisions to Access Arrangement .
- 02/02/05 Gas Review Board dismisses application by ERA to exclude from review Western Power's remaining grounds of review.  
Hearing listed to commence on 3 March 2005.
- 14/02/05 Gas Review Board hears application for adjournment of hearing listed to commence on 3 March 2005, due to the possibility of Western Power and DBP resolving their dispute regarding the revisions to the Access Arrangement. All parties consent to adjournment.
- 15/02/05 Gas Review Board orders that hearing listed to commence on 3 March 2005 be vacated and relisted to commence on 1 June 2005 and that time for determination of appeal be extended from 25 March 2005 to 21 September 2005.  
Western Power and Epic ordered to file a written report by 7 March 2005 outlining the outcome of discussions between the parties concerning a possible resolution of Appeal No. 3.
- 08/03/05 Western Power and DBP file a written report by 7 March 2005 outlining the outcome of discussions between the parties concerning possible resolution of Appeal No. 3.  
Report that discussions ongoing, and that a further report will be filed by 21 March 2005.
- 21/03/05 Further report.
- 04/05/05 Gas Review Board hears application to vacate hearing listed for 1 June 2005. All parties consent to adjournment - issues re 2 appeals being heard together canvassed.
- 11/05/05 ERA publishes Draft Decision on revisions.
- 24/05/05 Undertaking by Western Power Corporation that:  
  1. it will decide within 28 days after the Final Decision whether to proceed with this appeal or apply to discontinue it;
  2. in the event that the Economic Regulation Authority makes a decision upon the proposed revisions to which s.2.48 of the Code applies and Western Power Corporation applies to the Gas Review Board to review that decision, then Western Power Corporation will agree to and take steps to facilitate that application for review and this appeal being heard together; and
  3. in the event that Western Power Corporation applies to any Court to

have the Final Decision reviewed, it will agree to and take steps to facilitate the hearing of this appeal being determined before the hearing of such a review by the Court.

- 24/05/05 Orders made vacating hearing listed for 1 June 2005.
- Western Power ordered to advise the Gas Review Board and the respondents, within 21 days of the ERA publishing the Draft Decision, of any grounds of appeal which it does not intend to pursue.
- Listed for status conference on 19 July 2005.
- 19/07/05 Matter adjourned sine die.
- 30/08/05 Gas Review Board extends time for determination of appeal from 21 September 2005 to 20 March 2006.
- 11/11/05 ERA publishes Final Decision on revisions.
- 24/11/05 Pursuant to its undertaking dated 24 May 2005, Western Power advises the Gas Review Board and the respondents that it proposes to abandon grounds 2, 3, 4, 5, 6, 7, 10, 12, 13, 14, 15(a), (j) and (n), 18, 22, 25, 30 and 34 of the application for review. Accordingly, the remaining grounds of appeal will be 15 (other than (a), (j) and (n)), 16, 17, 19, 28, 29, 31 and 33.
- 15/12/05 Further final decision.
- 30/12/05 Revised Access Arrangement commences.
- 14/03/06 Gas Review Board extends time for determination of appeal from 17 March 2006 to 18 September 2006.
- 24/04/06 Directions hearing for Appeal 3 of 2004 and appeals 1 and 2 of 2005. Time for determination of appeal extended from 18 September 2006 to 17 March 2007.