

IN THE WESTERN AUSTRALIAN GAS REVIEW BOARD

No. 5 of 2004

In the matter of the decision of the Honourable Eric Stephen Ripper MLA, Minister for Energy, made on 2 July 2004 that Coverage of the Goldfields Gas Pipeline System under the *Gas Pipelines Access Law* is not revoked

And in the matter of an application under section 38(1) of Schedule 1 of the *Gas Pipelines Access (Western Australia) Act* 1998 for review of that decision.

Application by:

SOUTHERN CROSS PIPELINES AUSTRALIA PTY LTD
(ACN 084 521 997)
SOUTHERN CROSS PIPELINES (NPL) AUSTRALIA PTY LTD
(ACN 085 991 948)
ALINTA DEWAP PTY LTD (ACN 058 070 689)

Applicants

and

WMC RESOURCES LTD

First Respondent

and

NEWMONT AUSTRALIA LTD

Second Respondent

**REASONS FOR DECISION ON APPLICATION
BY NATIONAL COMPETITION COUNCIL
FOR LEAVE TO BE JOINED AS A RESPONDENT AND TO BE HEARD**

Members: Mr C.P. Stevenson, Presiding Member
Heard: 20 December 2004
Delivered: 31 January 2005

Representation:

Counsel:

Applicants:	Mr P. C. S. Van Hattem
First Respondent:	Mr G. H. Murphy SC
Second Respondent:	Mr C. W. Lockhart
National Competition Council:	Mr E. M. Corboy SC

Solicitors:

Applicants:	Minter Ellison
First Respondent:	Clayton Utz
Second Respondent:	Maxim Litigation Consultants
National Competition Council:	Phillips Fox

Cases referred to in judgment:

1. *Duke v Eastern Gas Pipeline Pty Ltd* (2001) ATPR ¶ 41-827 (4 July 2001)
2. *National Competition Council v Hamersley Iron Pty Ltd* (1999) 167 ALR 109.
3. *BTR Plc v Westinghouse Brake & Signal Co (Australia) Ltd* (1992) 106 ALR 35
4. *Re Queensland Co-Operative Milling Association* (1975) 25 FLR 169
5. *Re EFTPOS Interchange Fees Agreement* [2004] AcompT 7 (25 May 2004)
6. *Onus v Alcoa of Australia Ltd* (1981) 149 CLR 27
7. *Levy v The State of Victoria* (1997) 189 CLR 579
8. *R v Australian Broadcasting Tribunal; Ex parte Hardiman* (1980) 144 CLR 13

Legislation referred to in judgment:

1. *Gas Pipelines Access (Western Australia) Act 1998*;
2. *National Third Party Access Gas Code for Natural Gas Pipeline Systems*;
3. *Trade Practices Act 1974* (Cth)

Cases also cited:

1. *Boyce v Munro & Anor* [1998] 4 VR 773;
2. *Fagan v Crims Compensation Tribunal* (1982) 150 CLR 666;
3. *TXU Electricity Limited v The Office of the Regulator general and Ors* [2001] VSC 4 (30 January 2001)
4. *Re Epic Energy (WA) Nominees and others No's 1,2 and 3 of 2004* (16 April 2004)

REASONS FOR DECISION

Background

1. By an application dated 22 October 2004 the National Competition Council (**NCC**) seeks leave to be joined as a respondent and to be heard in these proceedings (**the application**). The application is opposed by the Applicants. The application was heard on 20 December 2004 during the second directions hearing in this matter. After hearing oral submissions by counsel for the Applicants and the NCC in support of their written submissions I reserved my decision.

2. These proceedings were instituted by the Applicants on 21 July 2004 pursuant to s 38(1) of Schedule 1 of the *Gas Pipelines Access (Western Australia) Act 1998* (**the Act**). The Applicants apply as of right to the Western Australian Gas Review Board (**the Board**) for review of the decision of the Honourable Eric Stephen Ripper MLA, Minister for Energy (**the Minister**), that Coverage of the Goldfields Gas Pipeline System (**the GGP**) under the *Gas Pipelines Access Law* should not be revoked (**the Review Application**). The decision of the Minister was made on 2 July 2004 (**the Decision**).
3. On 20 December 2004 programming directions were made for various interlocutory matters. The directions included a direction that the Review Application is provisionally listed for hearing commencing on 17 October 2005 for a period of 4 weeks. The directions also included a direction for the joinder of WMC Resources Ltd (**WMC**) and Newmont Australia Ltd (**Newmont**) as first and second respondents, respectively. The applications by WMC and Newmont for leave to be a respondent and to be heard in these proceedings, both dated 1 November 2004, were not opposed by the Applicants.
4. I have given consideration to the written and oral submissions made, and the affidavit evidence filed in respect of the application by the NCC for leave to be joined as a respondent and to be heard in these proceedings. The reasons for decision of the Board on the application by the NCC are set out below.

Grounds relied upon by the National Competition Council for joinder

5. The grounds relied upon by the NCC for leave to be joined and heard as a respondent are set out in the application and the supporting affidavit of Robert John Feil sworn 1 November 2004. Mr Feil is the Executive Director of the NCC. The NCC also filed a written outline of submissions in reply dated 13 December 2004. These materials were supplemented by oral submissions by counsel at the hearing on 20 December 2004.
6. The NCC contends that it should be granted leave to be joined as a respondent on the following grounds:
 - (a) it has an interest in the determination of the Review Application;

- (b) it is desirable and would be of benefit to the Board if the NCC played the role of contradictor, especially in relation to matters of relevance to the public interest;
- (c) issues concerning the interpretation and application of the National Third Party Access Gas Code for Natural Gas Pipeline Systems (**Gas Code**) raise important matters of public interest, and the NCC is the entity best able to ensure such issues are properly identified and put fully before the Board for its consideration; and
- (d) it has a significant interest in the Board's determination as the Review Application raises important questions of construction of the Gas Code that may have significance for the ongoing administration by the NCC of:
 - (i) the coverage provisions of the Gas Code both in Western Australia and in other jurisdictions; and
 - (ii) the declaration provisions of the national access regime for essential services established by Part IIIA of the *Trade Practices Act* 1974 (Cth), which provisions establish substantively similar criteria for declaration of essential services to those established by the Gas Code for coverage of gas pipelines.

7. It is readily discernable from the grounds relied upon by the NCC, that the NCC submits it should be joined as a party and allowed to participate in the proceedings, because significant matters of public interest are raised by the Review Application. The NCC contends, *inter alia*, that it has a sufficient interest given its statutory role and functions which interest is said to arise out of the public interest aspects raised by the Review Application. The NCC contrasts this interest with the private commercial interests of the Applicants and the other respondents, and relies on the submission that the general principles which characterise normal *inter partes* litigation do not apply in every respect to proceedings of this nature. The grounds relied upon are considered more fully in the reasons which follow.

8. The NCC also seeks to rely on the fact that the State Solicitors Office has advised the Board by letter dated 27 October 2004 that the Minister for Energy supports the NCC's application for joinder, and that if the NCC is permitted to participate in the proceedings the Minister does not intend to apply to be heard. The Board has not taken account of

the Minister's position in arriving at its decision on the application. It is of course open to the Minister for Energy to make an application to the Board to be heard at any stage of the proceedings, and in my opinion the lack of an application at this stage is not relevant to whether the NCC should be allowed to participate in the proceedings.

Role proposed by the National Competition Council and its reasons for wishing to participate

9. In the context of the grounds relied upon for joinder, Mr Feil in his affidavit sworn 1 November 2004 deposes that the NCC is concerned to ensure that any material put before the Board by the Applicants in this matter is properly tested. For this reason, Mr Feil deposes that the NCC seeks leave to appear to assist the Board to:

- “(a) examine any statements or facts or contentions put before the Board by the Applicants or any other party to ensure that all material facts and considerations are fully and fairly presented;
- (b) furnish to the Board such information as the Council considers to be material to the issues before the Board;
- (c) assist the Board to evaluate information furnished to it by such means as are appropriate, including the cross-examination of witnesses and the production of additional material having the effect of correcting, qualifying or contradicting information already supplied; and
- (d) if appropriate, make submissions to the Board about the issues arising out of the application for review, particularly where those issues impact on the public interest in competition and access matters.”

(Paragraph 14 of Mr Feil's affidavit)

10. In oral submissions, Mr Corboy SC on behalf of the NCC described the proposed role of the NCC as follows:

“In terms of the role to be performed by the [NCC] as a party, we don't of course seek to usurp in any way the Board's role. No party can. When we talk about assistance, we mean as Hely J observed in *Duke* ensuring that all relevant

matters and, in particular, matters relevant to the public interest in this application are properly elucidated.

...

It may be that we do in the end, as I have said, adopt a passive role because we consider that all of the relevant evidence has been adduced and all of the questions that ought to have been asked of witnesses have been asked, but it may be in fact that more needs to be done to ensure that the Board has all relevant matters before it. It's that role that we seek to perform." (Transcript page 26)

and

"Can I say that we are sensitive of course to our role...we would seek to fill gaps, as it were. We would see, for example, that the directions that are sought by WMC Resources to be appropriate because what's suggested under those directions is that we would, in effect, go last, both in terms of filing statements of facts and issues and contentions and in terms of adducing evidence.

That's appropriate, we say, because we would seek to fill gaps, as it were. We would seek to follow the other parties to ensure that the other parties have indeed identified what we would regard as being all of the relevant issues and it may be that we have very little to say. It may be we choose not to adduce evidence or it may be that we consider that the Board would be assisted by additional evidence and by additional contentions and issues being identified by us." (Transcript page 6)

11. Mr Corboy SC also explained the proposed role of the NCC by attempting to distinguish it from the role that would be played by the Applicants and the other respondents. He said:

"Each of the parties who come before the Board have got their own particular commercial interests to protect or advance. They're entitled to do so and it may be that in the course of detecting and advancing their commercial interests they raise - in fact it's almost inevitable that they will raise matters that go to the public interest, but equally and quite properly they may feel that they do not wish to pursue certain aspects of, for example, the public interest as it relates to this application. It would be as we see it our role then to identify those additional matters or, for instance, to elaborate further on issues that have been identified by the other parties, either by way of additional evidence or by way

of cross-examination or the experts and other witnesses called by the parties or by way simply of submission. All we seek is to be able to fully participate, consistent with our role, and we are cognisant of our role, our statutory function.” (Transcript page 6)

12. It was submitted on behalf of the NCC that this proposed role is consistent with the way in which the NCC has been joined as a respondent in other similar review applications and has been allowed to participate in those proceedings: see paragraph 18 - 20 of Mr Feil’s affidavit and paragraph 4 of the NCC’s written submissions dated 22 October 2004. The NCC relied on *National Competition Council v Hamersley Iron Pty Ltd* (1999) 167 ALR 109 at 114 where the Full Federal Court recognised that it was appropriate for the NCC to appear as a party in appellate proceedings, at least where the impartiality of the NCC was not in issue. Reliance was also placed on *BTR Plc v Westinghouse Brake & Signal Co (Australia) Ltd* (1992) 106 ALR 35 at 53. It is common ground that this is not a matter to which the principle of *R v Australian Broadcasting Tribunal; Ex parte Hardiman* (1980) 144 CLR 13 applies.
13. The NCC opposed the Applicants’ contention that the NCC’s role should be limited by relying inter alia on *Duke Eastern Gas Pipeline Pty Ltd* (2001) ATPR ¶ 41-827 at 43,196, where the Tribunal expressly recognised that the role of the NCC in assisting the Tribunal in a review of a coverage decision under the Gas Code was akin to that of the Trade Practices Commission as outlined in *Re Queensland Co-Operative Milling Association* (1975) 25 FLR 169 at 173. It is submitted by the NCC that the role encompasses making submissions and adducing evidence, and acting as a contradictor in the public interest. The NCC also relied on *Re EFTPOS Interchange Fees Agreement* [2004] Acompt 7 (25 May 2004) at [28-9] as a further example: in that case the Australian Competition & Consumer Commission was granted leave to intervene to assist the Australian Competition Tribunal to determine the matter before it.

Applicant’s submissions in opposition

14. The Applicants filed written submissions dated 8 December 2004 opposing the application. These submissions were supplemented by counsel in oral submissions on 20 December 2004. Like the NCC, the Applicants made submissions on the legislative scheme and submitted, inter alia, that:

- (a) in the absence of any statutory procedure, the joinder of a person seeking to be a party is to be determined by reference to the law relating to procedural fairness;
- (b) the Board must have implied power to join a person, who is not an applicant, but only if the requirements of fairness so demand;
- (c) the power of joinder must be confined to people who are entitled, as a matter of procedural fairness, to be heard by the Board before it makes its decision; that is, the Board must be satisfied that it would be unfair to the person seeking joinder to determine the matter without affording that person a hearing;
- (d) whether a person has a sufficient interest in a particular case to invoke the exercise of the discretion is a question of degree, not a question of discretion: see *Onus v Alcoa of Australia Ltd* (1981) 149 CLR 27 at 75;
- (e) a person whose interests could be adversely affected by the Board's decision on coverage has a sufficient interest: see *Levy v The State of Victoria* (1997) 189 CLR 579 at 602; and
- (f) the class of persons entitled to be heard, and therefore joined as a party, is probably not any wider than the class of potential applicants. (I assume the Applicants contend this excludes the NCC).

15. On this basis, and in response to the NCC's submissions of 22 October 2004, the Applicants contend in their written submissions of 8 December 2004, inter alia, that:

- (a) the NCC does not have any legal right which will be affected by any decision of the Board or any legal interest which would ground an application for leave to intervene: see *Levy v The State of Victoria* (1997) 189 CLR 579 at 602;
- (b) WMC and Newmont as respondents will be able to play the role of bona fide contradictors, and that no foundation has been laid to infer otherwise;
- (c) the Board can inform itself as it thinks fit, and at an appropriate stage if the need arises then invite a submission from the NCC on the relevant public interest issues, as opposed to allowing the NCC to fully participate in the

proceedings as a respondent party; at the relevant time the NCC would need to demonstrate a sufficient interest and show that the parties have not presented fully the submissions on a particular issue;

- (d) the NCC has not yet demonstrated that it has a sufficient interest, nor that there is any likelihood that the parties may not present full submissions on any particular issue;
- (e) the NCC has fulfilled all its functions under the Gas Code relating to the Applicants' application for revocation of coverage; the Board has the NCC's recommendation to the Minister for its consideration, and therefore the NCC has no further function in relation to the question of coverage of the GGP under the Gas Code; and
- (f) if leave to intervene is granted it should be on condition that the NCC bear the costs of the other parties occasioned by its intervention, on a party and party basis: *Levy v The State of Victoria* (1997) 189 CLR 579 at 650; alternatively the Board should exercise its discretion to invite submissions from the NCC sparingly in view of the fact that any such involvement will necessarily increase the time and costs incurred by the Board and other parties.

16. The Applicants approach is to first ask whether or not the NCC may be a party to these proceedings and, if so, what, if any, should be the level of participation by the NCC, whether it be as a party or a non-party. In approaching the matter, Mr van Hattem sought to draw a distinction between a power, a duty and a discretion when construing the legislative framework. Mr van Hattem submitted that any power to permit the NCC to participate in the proceedings should only be exercised if it does not result in unfairness to the Applicants because of the overriding duty of the Board to conduct the proceedings fairly and in accordance with equity and good conscience.

17. It is common ground that there is no express power of joinder. The Applicants submit that the statutory requirement for the Board to act in accordance with equity and good conscience carries with it an implied duty to act in accordance with the rules of procedural fairness. The Applicants accept that the Board has the power to allow the NCC to participate in the proceedings as a party but do not accept that circumstances have arisen in the present case making it appropriate for the power to be exercised.

The legislative framework

18. Section 38 (1) of Schedule 1 of the *Gas Pipelines Access (Western Australia) Act 1998* provides that a person adversely affected by a decision to which the section applies may apply, in this case to the Board, for a review of the decision in accordance with Part 6 of the Schedule and any applicable law governing the practice and procedure of the Board. Pursuant to s 38 (13) (a) of Schedule 1 the Decision is a relevant decision to which the section applies.
19. Section 38 (7) of Schedule 1 provides the Board may on the application of “a party” to the proceedings conduct the proceedings in the absence of the public. It is significant that Parliament has used the phrase “a party” and not “the person seeking the review”. It follows implicitly that Parliament intended there may be other parties involved in the review proceedings, other than the applicant for review. This is in contradistinction to s 38 (5) of Schedule 1 which in the context of notifying any extension of the statutory period for making a determination of the review application, requires the Board to inform “the applicant”, not “the parties” to the proceedings, of the extension.
20. Section 38 (8) of Schedule 1 provides the Board may require the relevant Regulator, in this case the Economic Regulation Authority, to give information and other assistance, and to make reports as specified to the Board. In my view it is likely that the legislature did not intend that the Economic Regulation Authority would become a party to the review proceedings because it has expressly provided for its involvement in the manner set out. It is also important to note that the role of the Economic Regulation Authority is different to that of the NCC in the decision making process which resulted in the making of the decision under review. Nevertheless, it is also relevant to note that the legislature perceived a potential need for the Board to be provided with information and other assistance by the regulator, in exactly the same way as provided by s 1.35 of the Gas Code for the Minister to require assistance of the NCC (see 24 below).
21. Section 38 (9) of Schedule 1 provides that the Board may make an order affirming, setting aside or varying immediately or as from a specified future date, the decision under review and, for the purposes of the review, may exercise the same powers with respect to the subject matter of the decision as may be exercised with respect to that subject matter by the person who made the decision (in this case the Minister for Energy).

22. It is therefore necessary (and as we shall see instructive) to consider the process and powers which applied to the Minister, the person who made the Decision which is subject to review by these proceedings. This is to be found in sections 1.34 to 1.39 of the Gas Code (Schedule 2 of the *Gas Pipelines Access (Western Australia) Act 1998*). The Minister is required to make a decision on a revocation recommendation within 21 days of receiving it from the NCC (s 1.34 of the Gas Code) and must promptly provide a copy of the decision and reasons for decision to the NCC, the Relevant Regulator, the Service Provider, the applicant, each person who made a submission to the NCC and any other person who requests a copy (s 1.37 of the Gas Code).
23. The Minister in making the decision does not appear to have any relevant express powers concerning the joinder of parties, and in my view none is necessary. The legitimate interests and expectations of parties (other than the applicant) are provided for and otherwise accommodated by the notice, submission and recommendation procedures which apply to the NCC as set out in s 1.24 *ff* of the Gas Code.
24. It is common ground between the Applicants and the NCC that the Board may invoke the provisions of s 1.35 of the Gas Code thereby involving the NCC if the Board considers it appropriate for the purpose of determining the Review Application. Section 1.35 of the Gas Code provides:
- “The Relevant Minister may require the NCC to provide such information, reports and other assistance as the Relevant Minister considers appropriate for the purpose of considering the application.”
25. The Applicants submit that at this stage of the proceedings there is no basis for the Board to use this power, or alternatively to exercise its discretion to seek the assistance of the NCC in the manner contemplated. In my opinion there is no temporal restriction on the application of this section. The Board has been apprised of the issues that the proceedings will give rise to from the grounds set out in the Review Application. In my view it is open to the Board to form an opinion from the grounds set out in the Review Application and what role the NCC says it proposes to perform to determine (at this point in time) whether it considers the NCC’s assistance is appropriate and necessary.
26. It is relevant to note the obligation which is imposed on the NCC by s 1.26(b) (i) of the Gas Code as part of the recommendation process to the Minister. This requires the NCC within 14 days after receipt of the application to inform, *inter alia*, each person

known to the NCC and who the NCC believes has “*a sufficient interest*” in the matter that it has received the application. This arguably suggests that provided a person has a “*sufficient interest*” in the outcome of the application for review, then it should prima facie be entitled to be a respondent party in any review proceedings. Such an interest would be even more demonstrable if the person had made a bona fide submission to the NCC as part of its recommendation process. This is why the Board considered it necessary to contact those parties who made a submission during the NCC’s recommendation process, and advertised nationally, to ensure all parties who believed they had an interest in the case had an opportunity to express that interest. But this does not directly assist in determining whether the NCC has an interest, or sufficient interest to warrant its joinder as a party to the Review Application. In my view, the third party interests referred to here are a reference to the private rights and interests which might, in appropriate circumstances, give rise to a legitimate interest or expectation known to the law of procedural fairness. But what about the public interest in the context of the function and duties of the NCC in the recommendation process leading up to the ultimate decision maker’s (i.e. the Board’s) decision?

27. Section 38 (10) of Schedule 1 provides that the Board may make such orders (if any) as to costs in respect of a proceeding as it thinks fit. Such a power is obviously based on the premise that there may be parties to the proceedings other than the applicant seeking review. As an administrative body, the power to order costs is an extremely important tool which can be used to ensure the orderly and efficient management of the proceedings. This will always be a matter of vital interest to the parties. Indeed the Applicants contend in this case that if the NCC is granted leave to be joined as a respondent then it should as a condition of such leave indemnify the other parties for any legal and other costs incurred as a result of its participation.
28. It is necessary to turn to the *Gas Pipelines Access (Western Australia) Act 1998* to consider the “applicable law governing the practice and procedure” of the Board referred to in s 38 (1) of Schedule 1 of the Act.
29. Proceedings before the Board are governed by Subdivision 3 of the Act. Section 57 sets out the principles governing hearings. It provides:

“(1) Subject to the *Gas Pipelines Access (Western Australia) Law* and any determination of the Board, proceedings before the Board are to be conducted

by way of a fresh hearing and for that purpose the Board may receive evidence given orally or, if the Board determines, by affidavit.

- (2) The Board –
 - (a) is not bound by the rules of evidence and may inform itself as it thinks fit; and
 - (b) must act according to equity, good conscience and the substantial merits of the case and without regard to technicalities and forms.
- (3) Questions of law or procedure arising before the Board are to be determined by the presiding member and other questions by unanimous or majority decision of the members.”

30. Section 58 of the Act provides the Board with powers, inter alia, to issue a summons to compel the attendance of persons before the Board, to require the production of relevant documents, to compel a person to take an oath or affirmation to answer questions truly and to compel a person to answer questions. Failure to comply is deemed to be an offence and may result in a penalty being imposed of up to \$10,000. It follows that although the Board is acting administratively in the discharge of its functions, it is required at the same time to act judicially in the exercise of its powers.

31. Other matters relevant to the practice and procedure of the Board are contained in s 59 of the Act. Section 59 provides:

- “(1) The Board may –
 - (a) sit at any time or place;
 - (b) adjourn proceedings from time to time and from place to place;
 - (c) refer a matter to an expert for report and accept the expert’s report in evidence.
- (2) The Board must give the parties to proceedings reasonable notice of the time and place of the proceedings.

- (3) A party is entitled to appear before the Board personally or by counsel or other representative.
 - (4) Subject to the Gas Pipelines Access (Western Australia) Law, a party must be allowed a reasonable opportunity to call or give evidence, to examine or cross-examine witnesses and to make submissions to the Board.
 - (5) The Board may make a determination in any proceedings in the absence of a party to the proceedings if satisfied that the party was given reasonable opportunity to appear but failed to do so.
 - (6) At the conclusion of proceedings, the Board must give to each party a written statement of the reasons for its decision.”
32. The provisions of s 59 of the Act obviously envisage that proceedings before the Board may involve parties other than the applicant for review. This is common ground. What is in issue is whether the NCC should be permitted to be a party in the circumstances of this matter.
33. The Act provides that the Review Application shall “be conducted by way of a fresh hearing” and clearly contemplates that the hearing may involve parties other than the applicant. The Act does not say who may be a party or expressly state any criteria for determining whether a person should be granted leave to be a party, and if so on what conditions. In my view the fact that it contemplates a fresh hearing suggests that any person who has been involved in or played a part or role in the process leading up to the making of the decision which is being reviewed should prima facie be entitled to be a party to the review proceedings. Indeed, in the context of a fresh hearing, there may be circumstances where a person who was not involved in the process which resulted in the Decision may be able to demonstrate a sufficient interest to be joined.

The Review Application and the issues raised for determination by the Board

34. It is necessary to consider the substance of the Review Application and to reflect on the matters which will be in issue when the matter is heard by the Board.

35. The Applicants contend, in relation to the GGP, that there is no basis in fact or law on which the Board can reasonably be satisfied as to each of the matters in s 1.9 of the Gas Code, that is to say:
- (a) that access (or increased access) to Services provided by means of the GGP would promote competition in at least one market (whether or not in Australia), other than the market for the Services provided by means of the GGP;
 - (b) that it would be uneconomic for anyone to develop another pipeline to provide the Services provided by means of the GGP;
 - (c) that access (or increased access) to the Services provided by means of the GGP can be provided without undue risk to human health or safety; and
 - (d) that access (or increased access) to the Services provided by means of the GGP would not be contrary to the public interest.
36. The Applicants also contend that, in relation to the GGP, the Board should be positively satisfied:
- (a) that access (or increased access) to Services provided by means of the GGP would not promote competition in any market (whether or not in Australia), other than the market for the Services provided by means of the GGP;
 - (b) that it would not be uneconomic for anyone to develop another pipeline to provide the Services provided by means of the GGP; and
 - (c) that access (or increased access) to the Services provided by means of the GGP would be contrary to the public interest.

Discussion

37. The Act and Gas Code each contain relevant provisions which, in my view, enable the Board to allow the NCC to participate in the proceedings as an interested party in the manner proposed by the NCC.

38. Section 57(2) (a) of the Act provides that the Board is not bound by the rules of evidence and may inform itself as it thinks fit. Arguably this power would permit the Board to engage its own expert witnesses and advisers. This power is constrained by the requirement in the same subsection that the Board must act according to equity, good conscience and the substantial merits of the case, and without regard to technicalities and forms. In my view, these provisions, on their own, permit the Board to allow the NCC to participate in the proceedings as an interested party, if the Board is satisfied there is proper reason for doing so.
39. It is important to remember that the Review Application is being considered *de novo* by the Board. The Board's proceedings and determination are conducted by way of a fresh hearing. The result is that the Board is required to determine for itself whether coverage of the GGP under the *Gas Pipelines Access Law* should be revoked. The Board is not limited to a consideration of the submissions and material put before it by the parties, but obviously as a matter of procedural fairness is required to inform the parties of any other information relied upon and to give the parties an opportunity to comment on it.
40. If the submission of the Applicants is that the NCC should not be allowed to participate in the proceedings, or alternatively only on a limited basis, because of its preceding role in providing a recommendation to the Minister for Energy (s 1.29 of the Gas Code) then the Board does not agree. The Board is of course required to conduct its proceedings fairly and efficiently and will be vigilant to ensure that the NCC, in whatever role it is allowed to play, does not abuse the privilege of its participation. This consideration, of course, applies to all parties.
41. It is common ground that the Board may invoke the assistance of the NCC in the proceedings by reference to s 38(9) of Schedule 1 which confers on the Board the same powers with respect to the subject matter of the decision as the Minister had. In this regard, relevantly, the Minister was entitled pursuant to s 1.35 of the Gas Code to require the NCC "to provide such information, reports and other assistance as [it] considers appropriate for the purpose of considering the application."
42. For these reasons it is clearly open to the Board to allow the NCC to participate in the proceedings as a party. The question then is whether there should be any constraint on such participation and, if so, what conditions or restrictions should apply.

43. It is relevant to consider the interests which the NCC propounds as a reason for its participation in the proceedings. Mr Feil in his affidavit contends that the NCC has a “significant interest” in the Board’s determination because it raises important questions of construction of the Gas Code that may have significance for the ongoing administration by the NCC of the coverage provisions of the Gas Code both in Western Australia and in other jurisdictions; and secondly, because of the declaration provisions of the National Access Regime for essential services established by Part IIIA of the *Trade Practices Act 1974* (Cth). The NCC considers that its joinder will ensure the objectives of the *Gas Pipelines Access Law* are advanced because other parties to the proceedings cannot be relied on necessarily to represent fully the public interest.
44. In my opinion, there is considerable force in the submission by the NCC that its participation in the proceedings will ensure that there is a better chance that all issues concerning the public interest in this matter are fully identified and canvassed. With respect, it is perhaps simplistic to expect the private respondent parties, however well-resourced, to be able to bring the focus, scrutiny and expertise that the NCC can on public interest issues which must be at the root of the performance of its statutory functions.
45. The Review Application is concerned with whether coverage of the GGP should be revoked. At the core of the matter will be substantial public interest issues and general principles of competition policy reform in the context of State and Commonwealth legislation.
46. In my opinion, the Applicants have not shown any reason why the NCC should be constrained in its participation in the proceedings at this stage. The NCC has described its proposed role and will no doubt be challenged by the Applicants if it purports to act inappropriately or beyond its suggested role of assisting the Board. It is open to the Applicants to complain at any stage of the proceedings if they consider the conduct of the NCC is in any way inappropriate. At that time, if there is merit in the Applicants contentions the NCC’s role or proposed actions will be appropriately controlled by the Board.
47. For the same reasons, it is not appropriate, in my opinion, to invoke the costs power of the Board to condition the participation of the NCC in the proceedings as contended by the Applicants. Whether the NCC is joined as a party to the proceedings or alternatively asked at each relevant stage of the proceedings to assist the Board by

provision of its own views and comments as the case may be seems, in my opinion, to be semantical. In my view, the practicalities and efficient disposition of the proceedings are best served by allowing the NCC to participate as a respondent party. The role proposed by the NCC is the assistance which the Board considers appropriate, at this point in time, for the purpose of considering the Review Application.

48. In this regard, the Board is mindful that the proposed future directions may be drafted with the NCC's role as a contradictor and as identifying those additional matters or to elaborate further on issues that have been identified by the other parties, either by way of additional evidence or by way of cross-examination of the experts and other witnesses called by the parties or by way simply of submission. The Board is satisfied that the NCC is cognisant of its role and its statutory function and has no doubt that the Applicants will identify to the Board any matter that may affect the proceedings and their disposition fairly having regard to the Applicants' interests.
49. I am not persuaded that the Applicants' analogy which focuses on notions of legitimate expectations and rights, which usually arise in the context of private interests, is appropriate in the context of this matter. It may be arguable that the interests which the NCC has identified as having in the proceedings are sufficient to give it a legitimate expectation to be heard. In the end, the correctness or otherwise of this approach is not determinative of the matter because it is common ground between the parties that the Board may allow the NCC, in the exercise of its discretion, to participate in the proceedings if it believes it will be assisted by the NCC in doing so.
50. The public and national interest which the NCC is concerned to have identified and considered by the Board is set out in paragraph 1 to 7 of the NCC's submissions in reply dated 13 December 2004. It is clear that the Act and the issues central to this matter are not directly concerned with private interests but also with the wider concepts of competition, markets, present and future access to transmission facilities and the public interest in those matters. In this context the NCC is a national body of considerable importance in the statutory scheme and should have the opportunity to be heard in the proceedings. The role the NCC proposes will, in the opinion of the Board, assist the Board to perform its function to determine the Review Application.
51. The Board is satisfied that the NCC has a sufficient interest in the proceedings such that it should be granted leave to be joined as a respondent party and to be heard. The interest arises out of the NCC's role, scope and purpose of the statutory functions it is

required to perform. This finding is in addition to the Board also being satisfied, in the exercise of its discretion arising out of s 1.35 of the Gas Code, that the assistance of the NCC in the manner proposed is both necessary and appropriate to enable the Board to consider and determine the Review Application.

52. In the Board’s opinion the role sought to be played by the NCC in these proceedings is analogous to the Trade Practice Commission’s role of assisting the Trade Practices Tribunal which was described as follows in *re Queensland Co-Operative Milling Association* (1976) at 25 FLR 169 and at 174:

“It should assist the tribunal, which does not have investigative staff or counsel assisting it, in the ways indicated above. This will normally put counsel for the commission in a position whereby, to secure a balanced presentation to the tribunal, they must test the evidence of applicants, present contrary material and make submissions putting an opposite point of view to that put on behalf of applicants. In doing so they will necessarily be tending to support the commission’s decision. But none of this should be done in a partisan fashion. Since instructions are given by the commission, its counsel are not in the same position as counsel formally appointed to assist the tribunal would be. In practice, however, the difference should not be very great.”

53. The Board has placed weight on the reasons for decision of the Australian Competition Tribunal in *Duke v Eastern Gas Pipeline Pty Ltd* (2001) ATPR ¶ 41-827 (4 July 2001) which although concerned with a motion for a costs order, discusses the nature of these types of proceedings. In particular, the Tribunal said:

“[5] The Tribunal’s decision is administrative in character. It does not resolve any legal rights of, or controversy between, AGL and Duke. Nor is the focus of the Tribunal’s enquiry upon the narrow commercial interests of particular persons. The decision is concerned with the wider question of whether the coverage criteria are met, so as justify regulation of the Pipeline in aid of the promotion of competition in relevant markets.

‘Any person may initiate the administrative process which accumulates in the Tribunal’s decision. As the proceedings before the Tribunal are not either in substance or in form, *inter partes* litigation, there is no

particular reason for applying principles developed in connection with such litigation to proceedings before the Tribunal.’

...[7] Whether the statutory criteria for coverage of a pipeline are met will often be, as the present case illustrates, a matter on which there can be different points of view and legitimate differences of opinion. It is important that the Tribunal be acquainted with all factors which are potentially relevant to its determination. Responsible intervention by interested parties who have a worthwhile contribution to make ought not to be discouraged by fear of adverse costs orders. The review process benefits from such participation. Nor should a pipeline operator be discouraged from exercising its statutory right of review by fear that costs orders may be made against it if unsuccessful, potentially in favour of multiple parties. For these reasons, the adoption of a general rule applicable in the case of inter partes litigation to the proceedings before the Tribunal would not be conducive to the effective discharge by the Tribunal of its statutory functions.”

54. The previous actions taken by the NCC resulting in its final recommendation to the Minister on 27 November 2003 that coverage of the GGP should not be revoked are set out in Mr Feil’s affidavit. In my view, this statutory function of the NCC does not preclude it from participating in the Review Application proceedings. Obviously the Board must be careful to ensure that the NCC, to the extent that it is permitted to participate in the proceedings, does not adopt an adversarial role in the traditional sense with respect to the issues, or one which might be characterised as defensive of its final recommendation of 27 November 2003. In this case, there is no possibility of the Board referring the matter back to the NCC as a final decision maker because the Review Application is in the nature of a fresh hearing and determination of the matter. It must be remembered that the Board is not concerned with identifying an error by the Minister, nor is it limited to considering only those matters that the Applicants or other parties may choose to advance as being relevant to the review.
55. I am not persuaded there is any inherent or tangible unfairness to the Applicants in the common law procedural fairness sense or by reason of the statutory obligation in s 57 of the Act which requires the Board to act according to equity, good conscience and the substantial merits of the case by allowing the NCC to participate as a party in the proceedings when it has already expressed a view in the performance of its statutory functions. The ultimate decision which resulted from that process is of course the

Decision which is now the subject of a fresh hearing and future determination by the Board in these proceedings. It is the Ministers Decision and not the NCC's final recommendation which gives rise to these proceedings. Even then the parties may or may not seek in the course of the Boards hearing to rely upon any matters contained in the NCC's final recommendation.

Conclusion

56. The Board is of the opinion that it will be assisted in its determination of the Review Application by the NCC participating in the proceedings on the basis outlined by the NCC. It is the Board's view that this role will facilitate the efficient and effective disposition of its consideration and determination of certain aspects of the issues which will arise in these proceedings.
57. For these reasons, the Board grants the application by the NCC for leave to be a respondent and to be heard as a party in these proceedings.
58. A direction reflecting this ruling is annexed to these reasons for decision.

Dated the 31st day of January 2005

C. P. Stevenson

**C P Stevenson
Presiding Member
Western Australian Gas Review Board
Appeal No. 5 of 2004**