IN THE WESTERN AUSTRALIA GAS REVIEW BOARD

No. 1 of 2004

Re application for review of the decision by the Western Australia Independent Gas Pipelines Access Regulator published on 30 December 2003 to approve its own Access Arrangement for the Dampier to Bunbury National Gas Pipeline owned and operated by the Applicants

Application by:

EPIC ENERGY (WA) NOMINEES PTY LTD (RECEIVERS AND MANAGERS APPOINTED) (ADMINISTRATORS APPOINTED) (ACN 081 609 289)

and

EPIC ENERGY (WA) TRANSMISSION PTY LTD (RECEIVERS AND MANAGERS APPOINTED) (ADMINISTRATORS APPOINTED) (ACN 081 609 190) Applicants

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REASONS FOR DECISION ON OBJECTION BY EPIC ENERGY TO PORTIONS OF WESTERN POWER CORPORATION'S WRITTEN SUBMISSIONS

Members:	Mr RM Edel, Presiding Member Dr F Harman, Member Mr EA Woodley, Member
Date of Hearing:	14 & 15 October 2004
Date of Decision:	18 October 2004

Appearances:

Counsel for Epic Energy	Mr C L Zelestis QC and JA Thomson
Counsel for Western Power Corporation	Mr WS Martin QC and Mr PK Walton
Solicitors for Epic Energy	Mallesons Stephen Jaques
Solicitors for Western Power Corporation	Jackson McDonald

Cases Referred to in Judgment:

1. *Application by Epic Energy South Australia Pty Ltd* (2003) ATPR 41-932 at para 24

2. *Application by GasNet Australia (Operations) Pty Ltd* (2004) ATPR 41-978 at para 32

3. *Duke Eastern Gas Pipeline* [2001] ACompT 2

4. *Re Michael; ex parte Epic Energy (WA) Nominees Pty Ltd* (2002) WAR 511

Legislation Referred to in Judgment:

1. Gas Pipelines Access (Western Australia) Act 1998

2. National Third Party Access Code for Natural Gas Pipeline Systems

Background

1. On 14 October 2004, at the conclusion of its submissions to the Board in support of its application for review, Epic Energy (WA) Nominees Pty Ltd (Receiver & Manager Appointed) (Administrator Appointed) and Epic Energy (WA) Transmission Pty Ltd (Receiver & Manager Appointed) (Administrator Appointed) (together referred to as **Epic**) raised an objection to significant portions of Western Power Corporation's outline of submissions filed in opposition to the application for review. Argument on the matter was heard on 14 and 15 October 2004.

Issues

2. Both parties filed written outlines of submissions supplemented by oral submissions. The Board has given careful consideration to all of the submissions made. The summary set out below is not intended to be exhaustive but sets out an outline of some of the key issues raised during the course of argument.

3. Epic submitted that:

   (a) the issue is whether, as a respondent in Appeal No 1 of 2004, Western Power may make new submissions which it did not previously make to the Regulator, which:

      (i) contend that the initial capital base proposed by Epic Energy for the Regulator was unreasonably high for various distinct reasons, including in particular that it did not take into account the risk that volumes of transported gas would not grow as rapidly as Epic Energy predicted at the time when it purchased the pipeline; and

      (ii) are based largely upon a draft report prepared by a consultant (Allens Consulting Group) for the Regulator, a copy of which was not disclosed to Epic or any other interested person prior to the present proceedings;

   (b) section 39(5) of Schedule 1 to the Gas Pipelines Access (Western Australia) Act 1998 (**the Law**) states exclusively the list of "matters" which the Board may consider in reviewing the Regulator's decision in this case;

(c) section 39 of the Law and the National Third Party Access Code for Natural Gas Pipeline Systems (**the Code**) should be construed together;

(d) the Code establishes a detailed system of decision making and public consultation in relation to an access arrangement which is capable of involving a considerable number of topics and a considerable number of issues relating to each topic;

(e) the contrast between sections 38 and 39 of the Law demonstrates that Parliament's intention was that review of a Regulator's decision in relation to an access arrangement should be limited in scope, both in relation to the issues which may be raised and in relation to material from which the issues can be drawn;

(f) the intention and effect of the statutory scheme is that a Regulator's final or further final decision, and approval of an access arrangement, should have enduring legal effect under section 2.24 of the Code, save to the extent that it is found to involve error within section 39(2). If error is found, then the role of the Board is to correct the particular error made;

(g) if a user or other interested party makes submissions to the Regulator, which are expressly rejected in a Regulator's decision, or implicitly rejected by not being mentioned in the decision, then the person concerned may seek review of that rejection under section 39 on the ground of error;

(h) in an appeal, an appellant's grounds and submissions are confined to matters raised by it before the Regulator: section 39(2), (5)(a). Arguments in relation to matters previously raised may be refined and restated in a different manner: *Application by Epic Energy South Australia Pty Ltd* (2003) ATPR 41-932 (**Epic Energy**) at para 24;

(i) a like principle applies to an interested party which becomes a respondent to an appeal. It is also confined by the material which it submitted to the Regulator: *Application by GasNet Australia (Operations) Pty Ltd* (2004) ATPR 41-978 at para 32;

(j) unless an interested party is confined by the material which it has submitted to the Regulator, an odd situation may arise:

(i) Western Power is a respondent in Epic Energy's appeal and is an appellant in Appeal No 3 of 2004. In Epic's appeal, it maintains that the pipeline's

initial capital base should not be increased. In its own appeal, it claims the pipeline's initial capital base should be reduced;

(ii) in its own appeal, Western Power is clearly confined to matters which it raised in submissions to the Regulator. However, if it were not similarly confined as a respondent to Epic Energy's appeal, then it is possible the Board could reach the view (contrary to Epic Energy's submissions) that the initial capital base should not be increased for a reason not raised in Western Power's submissions. The Board could not then act on that view in Western Power's own appeal;

(iii) in those circumstances, the Board is at risk of being placed in the invidious position of deciding effectively the same point in Epic's appeal and Western Power's appeal, for different and inconsistent reasons;

(k) alternatively, an interested party is confined by the scope of all of the submissions made below;

(l) this is so for reasons of procedural fairness. During the various stages of the decision making process, an appellant will have the opportunity to respond to:

(i) material obtained by the Regulator, upon which the Regulator proposes to rely (as this material will be disclosed in the Regulator's draft or final decision);

(ii) material put by other interested parties, which is disclosed in submissions;

(iii) an appellant will not have had the opportunity to respond to material not raised by an interested party and material on which the Regulator has not relied in the draft or final decision or otherwise disclosed. Accordingly, when a service provider challenges a particular aspect of a Regulator's decision, and the Board finds that there was vitiating error in that respect, it is not open to the Regulator or other person to seek to support the impugned particular conclusion:

(A) on grounds not found in the relevant decision, not the subject of a separate application for review or not relied upon by that person below; or

(B) alternatively, on grounds not relied upon by any participant below;

(m) the word "matter" in section 39(5) is a word of wide import, but what constitutes a relevant matter in a given case will involve a question of degree and will be decided in the context of the particular case. The application of the word "matters" will itself be informed by principles of procedural fairness;

(n) for example, if the Regulator disproves the WACC for some particular reason and the service provider seeks review of that decision on the grounds that the reason given was erroneous, the fact that the ground of review necessarily relates to the overall approval of the WACC (and the particular error) does not open up all aspects of the WACC calculation. It does not entitle other persons or the Regulator to seek to support the Regulator's proposed WACC for new reasons. This is made clear by the *GasNet* decision;

(o) on the proper construction of section 39(5)(c), the reference to reports relied upon by the Regulator is a reference to those parts of any reports which the Regulator has used in reaching the relevant decision. Such reliance must appear from a relevant decision. The Regulator has no power to supplement a decision by somehow informing the Board that, in addition to the material contained within his decisions, he relied upon reports or past reports which are not reflected in the decision and deal with particular issues not touched upon in the decision. Given the elaborate system of decision making expressly provided for in section 2 of the Code, there is no scope for the implication of an additional power to supplement reasons in any substantive manner;

(p) it is impossible to attribute to the Parliament an intention that, through section 39(5)(c), a service provider could be confronted with new issues for the first time in the Gas Review Board proceedings;

(q) accordingly, Western Power should not be permitted to raise any new point, particularly issues concerning volume risk or issues arising out of the Allens Consulting Group report. If the Regulator is found to have erred in his criticism of Epic's purchase price, then the conclusion that the price was unsound cannot be supported by reasons not advocated by a party below;

(r) Western Power should not be permitted to use a report or parts of a report that raise topics that were not the subject of the Regulator's final decision. To take a further

example, assume that the Regulator never took issue with Epic's volume forecasts that were used in calculating its proposed WACC and the purchase price for the Dampier to Bunbury Natural Gas Pipeline (**DBNGP**). Assume further that Western Power did not attack the volume forecasts either (because it was not aware of them). It is not now open to Western Power to attack the volume forecasts used by Epic as part of the criticism that the purchase price paid was too high or that Epic acted unreasonably in paying it in circumstances where Epic have never been put on notice that this would be an issue either in these proceedings, or before the Regulator below. In particular, Western Power may not use a report or extracts of a report that raise such an issue in support of such an argument. To allow Western Power to use material falling within section 39(5) in relation to an issue on which Epic has never been put on notice by the Regulator, would be unfair because it is now too late for Epic to obtain its own evidence to counter the allegations made by Western Power;

(s) there are two reasons for this:

(i) Western Power are confined by the submissions they put to the Regulator below; and

(ii) subsection 39(5)(c) is confined to those parts of reports that the Regulator relied upon in the sense that he used them or adopted them in some means that is visible in his final decision;

(t) there needs to be some specificity in what is put below and what is dealt with by the Regulator and what reaches the Review Board. Parties cannot run a better and larger case on appeal than they put below. The agitation of issues is to happen before the Regulator. It is not to happen in any way before the Board;

(u) the true foundation for the ability of Western Power to be before the Board is to be found in the fact that section 39(5)(ad) contemplates the material before the Board will include any written submissions made to the relevant Regulator. That means any written submissions made by anyone and so there is a foothold in the very review provision. As a matter of statutory construction, Parliament must have contemplated that other persons would be heard in addition to the applicant. This is supported by natural justice principles but it is not natural justice alone which gives the right;

(v) simply because Epic's grounds concern the initial capital base, parties cannot raise anything they wish to put in relation to initial capital base if it was not put below and was not dealt with by the Regulator.

4. Western Power submitted, inter alia, that:

(a) the proposition that section 39(5)(c) (which provides that the Board may consider any reports relied upon by the relevant Regulator before the decision was made) must be read as referring to only those parts of the reports that the Regulator relied on must be rejected because it is contrary to the clear language of legislation;

(b) the interpretation propounded by Epic would have the undesirable consequence of requiring the Board to compare each report with each part of the draft, final and further final decisions promulgated by the Regulator and compare them to see if an inference can be drawn to the effect the particular part of the report has been used in the Regulator's decision or draft decision to some extent. This is a course which is so impractical that it would only be followed by the Board if it were compelled by the clear language of the legislation. The legislation does not require such a course;

(c) Western Power, as a respondent in the appeal, is entitled to put submissions to the Board at two levels:

(i) responding to material upon which Epic relies to assert error on the part of the Regulator; and

(ii) making submissions relevant to the Board's consideration if it accedes to Epic's application and sets aside the decision of the Regulator and embarks upon its own determination;

(d) an intervenor (or respondent such as Western Power) is entitled to make such submissions as it wishes in respect of matters ultimately relied upon by an appellant to obtain the relief the appellant seeks. Further, an intervenor or respondent may make submissions in relation to the decision the Board ought to make once error has been demonstrated in the Regulator's reasons: *GasNet* (supra);

(e) a respondent is not constrained by reference to the submissions it made below. The constraint on a respondent is by reference to the scope of Epic's appeal, not Western Power's own submissions. Western Power's right to appear before the

Board is dependent upon the rules of procedural fairness. Western Power appears as a party with a sufficient interest to make submissions in relation to the decision of the Regulator, provided they fall within the scope of the issues raised in Epic's appeal;

(f) further, the Board must consider all material properly before the Regulator in order to determine whether or not the Regulator was in error in rejecting the propositions put by Epic as to the appropriate initial capital base. It is a mistake to go to a level of detail below that and to say the Board can only look at the particular issues which Epic now ventilates;

(g) by way of example, in relation to the issue of projected volumes that Epic anticipated and which form part of the basis on which it paid the price it paid for the DBNGP, Western Power did not know what the volume forecasts were in any detail and had not seen Epic's internal models which had been used and which contained this information. Western Power had no way of putting submissions before the Regulator in relation to the process the Regulator undertook at the time of evaluating the bid. It is unfair to prevent Western Power from making submissions on that topic because it did not make a submission to the Regulator below in circumstances where Western Power could not have made any meaningful submission below because it did not have access to the relevant information;

(h) the issue ought not to be drawn narrowly. One of the issues raised by Epic is whether the price it paid for the pipeline was reasonable. Western Power is entitled to oppose that proposition by reference to any material that was before the Regulator falling within section 39(5);

(i) in any event, the matters raised by Western Power are also relevant to the enquiry the Board must embark upon if error is demonstrated by Epic and the Board finds that the Regulator erred in rejecting Epic's proposed initial capital base;

(j) the decision in *Duke Eastern Gas Pipeline* [2001] ACompT 2 makes it clear that Western Power, if it is to perform the role of contradictor, must be able to join issue within matters put in issue by the applicant for a review, and to put submissions before the Board on any material that is properly before the Board under section 39(5) of the Law;

(k) in *Epic Energy*, the Tribunal said:

> *"Thus, if any matter, whether by way of argument or evidentiary material, cannot be identified as broadly arising out of a matter fairly raised in the submissions to the relevant regulator before the decision under review was made, it will not be permitted to be raised in the review. This is not to say that a reformulation of an argument or contention previously put to the relevant regulator on material which is before it before the decision was made would be excluded."*

(l) the same decision makes it clear that if material was either before a relevant Regulator or relied upon by the applicant for review, it is properly before the Board and can be taken into account;

(m) Epic has previously submitted to the Board that:

(i) the Board ought to allow a person who has made a submission to the Regulator and whose interests are adversely affected by the decision under review to become a party;

(ii) each party is entitled to make submissions either for or against the grounds of review so long as those submissions are based on material before the Board in accordance with section 39(5). Section 39(5) does not purport to deal with the nature of submissions which may be made;

(iii) procedural fairness includes the right to comment by way of submission upon adverse material from other sources which has been put before the decision maker;

(iv) each party is entitled to have access to the material before the Board in accordance with section 39(5) so that it can make appropriate submissions;

(v) it is evident that Parliament intended that the Board should accord natural justice to the parties before it. Section 39(5) does not purport to limit the material upon which a particular party's submission may be based;

(n) submissions that Epic has previously made to the Board on the question of which parties may appear before the Board and the content of the submissions that may be made make it clear that the restrictions it now seeks to place on the role of Western Power as respondent cannot be upheld;

(o) Western Power's right to make submissions to the Board is founded upon the principles of procedural fairness and is confined to matters that Epic have raised on appeal;

(p) there is no anomaly between the position arising in relation to Application 1 and Application 3 before the Board. In Application 1 as a contradictor, Western Power can make submissions to the Board in relation to any material before the Board relevant to an issue raised by Epic. This is not inconsistent with the Board's jurisdiction being confined by Epic's grounds of appeal, which are in turn confined by submissions made to the Regulator. By contrast, in Western Power's appeal to the Board (Appeal No 3), the Board has ruled that Western Power is confined by issues raised in its submissions to the Regulator. In its own appeal, on the basis of the Board's ruling, Western Power can only rely upon those matters for the purpose of demonstrating error;

(q) Epic's submissions in relation to procedural fairness are misconceived. As a party whose interests may obviously be adversely affected by the decision of the Board, procedural fairness requires that Western Power may be able to put submissions to the Board in relation to all matters within its jurisdiction and in respect of all matters before it relating to issues upon which the determination of the Board may have an adverse effect upon Western Power's interests. Epic has a similar right and therefore neither party is disadvantaged.

5. The Economic Regulation Authority also made submissions to the Board on the topic, and submitted that:

(a) materials set out in section 39(5) of the Law are now available to the parties and the Board to the extent that they concern the subject matter of Epic's grounds of appeal;

(b) Epic itself can rely on all of the section 39(5) material to the extent that it is relevant to its own grounds of appeal and cannot say that other parties and the Regulator (in its role of drawing the Board's attention to matters relevant to the subject matter of the appeal) are confined and cannot refer to the same breadth of material within section 39(5);

(c) it is an error to use the terms of the final decision of the Regulator to confine the subject matter of these proceedings. The appeal was confined only by the grounds that have been raised by Epic and the section 39(5) materials;

(d) each party has the burden of raising submissions about matters that it considers the Regulator should take into account and therefore there is no prospect of Epic having to face an issue in this appeal which it did not raise in its submissions;

(e) the Full Court of the Supreme Court of Western Australia in ***Re Michael*** held that the failure of the Regulator before publishing his draft decision to notify Epic and provide it with an opportunity to supply further information and to exercise the Regulator's own powers to obtain further information, constituted a failure to accord procedural fairness. The issue related to the question of whether the price paid for the DBNGP represented the then market value of the pipeline. Epic could not reasonably have failed to foresee, in the view of the Full Court, that for its purposes it was necessary to satisfy the Regulator that the price paid represented the then market value;

(f) the Court found squarely that Epic knew that the issue of market value was an issue that had to be addressed and had an opportunity to put materials to the Regulator on that subject;

(g) the decisions made by the Regulator are not the pleadings in the process – they are the outcome of the process. There is an opportunity given to interested parties such as Epic to know the topics to be the subject of what is to be addressed, and that is done through the draft decision process. It is fundamentally an administrative process in which the parties know by the draft decision what the issues will be and have an opportunity to make submissions on the topic. In this case, Epic had an adequate opportunity;

(h) if error is demonstrated in the reasons for the decision, the Board must not be constrained from reviewing material relevant to its decision. There is a difficulty in knowing what material to receive on the basis that it may be relevant to correcting any error that is found in the Regulator's decision. In issues such as deciding what market value is, there is a weighing process involved and it is difficult to see how the Board can undertake that weighing process without moving to consider other materials. The proper process to be followed is to receive the material and then understand its significance in the context of the grounds and then make a decision about whether it is properly raised and falls within the subject matter of the grounds;

(i) if the Board finds error, then it is not confined by the Regulator's decision or the other party's submissions to the Regulator in doing so. Rather, it can refer to any part of the section 39(5) documents on the subject matter raised by the appeal;

(j) if the Board were to split the hearing into two parts – firstly to deal with the question of whether there is error, and secondly to deal with how that error should be corrected – then there may be a risk of duplication in material and submissions. Further, Epic has now substantially presented its case on both aspects so the Board has before it material that relates not only to error but also, from Epic's point of view, material that relates to the final decision that should be made.

Decision

6. Decisions of the Australian Competition Tribunal appear to suggest that intervenors (and thus respondents) in applications for review under section 39 of the Law may make submissions to the Tribunal in relation to matters the subject of the application for review. In *GasNet* (supra), the Australian Competition Tribunal appears to have permitted an intervenor to:

(a) make submissions to the Tribunal as to whether the Regulator had committed some error in the decision under review. It appears from the report of that decision that the intervenor's right to make submissions was only limited to matters ultimately relied upon by the appellant to obtain the relief sought; and

(b) make submissions as to the decision the Tribunal should make in the event that error was demonstrated.

7. It is clear that the intervenor was permitted to make submissions to the Tribunal on the question of what decision the Tribunal should make in the event that error was demonstrated. However, it is not entirely clear whether the intervenor was confined in this regard to submissions that it had made to the Regulator. In the Board's view, it is unlikely that the Tribunal would have allowed the intervenor to make submissions as to whether the Regulator had made any error that were constrained only by the scope of the matters relied upon by the applicant to obtain the relief sought but, on the other hand, have limited the right to make submissions to the Tribunal on the decision that the Tribunal should make if error was demonstrated to submissions that the intervenor itself had made on this topic to the Regulator. In our view, the proper construction of the Tribunal's decision in *GasNet* was that the intervenor was entitled to make submissions to the Tribunal concerning all of the matters in relation to which the appellant sought relief (including the decision that the Tribunal should make if error was demonstrated) and that such submissions were only to be

constrained by reference to matters that the appellant relied upon to obtain the relief sought.

8. If the Board is wrong in its interpretation of the *GasNet* decision on this point, and the decision supports the proposition that an intervenor (or respondent) may not go beyond the submissions that it made to the Regulator below, then the Board would respectfully decline to follow the decision.

9. In *Duke Eastern Gas Pipeline Pty Ltd* [2001] ACompT 2, it appears that intervenors were given broad rights to make submissions to the Tribunal. However, care should be taken before attaching significance to the rights to make submissions enjoyed by intervenors in that case since it constituted a review under section 38 of the Law, not section 39. It appears that the scope of the review undertaken pursuant to section 38 is broader than the review undertaken pursuant to section 39 and is not subject to the same restrictions.

10. Western Power made an application to the Board to become a respondent to these proceedings in March 2004. The Board, with the consent of Epic, directed that Western Power be at liberty to be a respondent in these proceedings. Both Epic and Western Power submitted that considerations of procedural fairness required that parties such as Western Power whose interests might be affected by the decision of the Board, ought to be given an opportunity to be heard before the Board made its decision. Those submissions were accepted by the Board.

11. Western Power's rights as a respondent in these proceedings depend primarily, in our view, on the rules relating to procedural fairness. Naturally, Western Power's rights in these proceedings will also be affected by the provisions of the Law, particularly section 39.

12. Principles of procedural fairness require that a person who is potentially adversely affected by administrative decisions (such as the decision of the Board) have an opportunity to:

    (a) know the case they are required to meet; and

    (b) be given an adequate opportunity to be heard before the decision maker makes his decision.

13. Section 39 of the Law contains no express provisions relating to the position of respondents in applications for review.

14. In our view, a respondent in proceedings brought under section 39(1) of the Law may only make submissions to the Board that can fairly be said to relate to one or more of the

grounds of appeal relied upon by the applicant for review. Those grounds of appeal are in turn confined to matters the applicant raised in submissions to the Regulator before the decision was made (section 39(2)(b) of the Law). Further, since the Board may not have regard to any material other than that set out in section 39(5) of the Law, submissions by a respondent many not refer to any material falling outside the bounds of section 39(5).

15. It will therefore be a question in each case as to whether a particular submission made by a respondent fairly responds to one or more of the grounds raised by the applicant for review.

16. We do not agree that a respondent is confined to submissions (if any) that it made to the Regulator below. There is nothing in section 39 or the Law generally that could lead the Board to such a conclusion.

17. Further, such a construction of section 39 and the Law could lead to significant unfairness and breach of the rules relating to procedural fairness in circumstances where a respondent had not made any submission to the Regulator below. In the Board's opinion, a person may be made a respondent to an application for review under section 39 of the Law regardless of whether they have made a submission to the Regulator below or not. The test to be applied in deciding whether a person ought to be given leave to appear as a respondent is to be found in the rules of procedural fairness. The Board would be failing to observe the rules of procedural fairness if it denied a respondent who had a proper interest and had properly been joined as a respondent in proceedings the right to make submissions simply because it had not made any submissions to the Regulator below. It would require clear language in the Law or some other statute before the Board could be justified in coming to such a conclusion and depriving a respondent of the right to be heard. The Board can find no such clear language in the Law or any other statute that would lead it to such a conclusion.

18. The Board was also unable to accept the limitation on the scope of section 39(5)(c) suggested by Epic, namely that the Board and parties before the Board (including respondents) should only be permitted to have regard to those portions of reports received by the Regulator that were actually relied upon by the Regulator in his decision.

19. We can find no justification in the language of section 39 or the Law generally to justify such a limitation.

20. Further, in our opinion, it is unnecessary to imply such a limitation on section 39(5)(c) in light of our decision outlined above that a respondent will be confined in the submissions

that it may make to the Board to issues that can fairly be said to be a response to issues raised by the applicant for review in it's appeal.

21. If Western Power wishes to make a submission to the Board which is supported by all or part of a report that falls within section 39(5) of the Law, it would only be permitted to make that submission and refer to the report if its submission fairly relates to an issue raised by Epic in its appeal. As pointed out above, this will be a decision that can only be made on a case by case basis. If the submission and use of the report goes beyond what would be a fair response to an issue raised by Epic in its appeal, then the submission and use of the report will not be permitted.

22. As set out above, Epic pointed out to the Board that a situation may arise where Epic makes a submission to the Regulator (for example, on volume forecasts) which is accepted by the Regulator and is not the subject of any adverse comment or criticism, even though the Regulator has obtained a report which is not disclosed to Epic and which contains material critical of Epic's volume forecasts. Epic could potentially face a situation where that report (falling within section 39(5)) is obtained by a respondent which seeks to use it against Epic in submissions to the Board. Provided that the submissions and the report fairly relate to an issue raised by Epic in its appeal, this would be permissible.

23. There are two points to note in relation to such a scenario.

24. Firstly, in our experience, it is likely that a service provider will have made extensive submissions to a Regulator explaining the basis of its proposed access arrangement and the forecasts and assumptions used. It is therefore unlikely that a situation would arise whereby a service provider is faced with having to respond to an issue on which it has not made any submission at all to the Regulator. If such a situation did arise, it would most likely be as a result of a decision by the service provider not to place information relevant to the proposed access arrangement before the Regulator.

25. The Board also notes that if the type of scenario that Epic describes did eventuate, it will be as a result of the processes that occurred below pursuant to section 2 of the Code and the procedure adopted by the Regulator. If, for the sake of argument, the Regulator did act on material that was not disclosed to Epic, and this constituted a breach of the rules relating to procedural fairness, this is not an error that can be corrected by the Board. The Board has no jurisdiction or power to engage in judicial review of the administrative processes adopted by the Regulator below. That is the role of the courts.

26. Further, to deny a respondent an opportunity to make submissions on the topic of the report in question and refer the Board to it may well deny that respondent procedural fairness.

27. It is also appropriate to comment on Epic's submission set out at paragraph 3(j) above. The answer to the suggested conundrum, in our view, is that Western Power will not, in its own appeal, be entitled to contend that the initial capital base should not be increased unless it had made such a submission to the Regulator below. If it had done so, there would be no restriction (even on Epic's view) in making such a submission in Western Power's appeal. If it had not made such a submission below, the issue does not arise.

28. It is also necessary to say something briefly about the content of paragraph 50 of the Board's decision on preliminary issues dated 16 April 2004. At paragraph 50, the Board stated that:

> "*I consider that any submissions in opposition to the application for review must be similarly constrained. That is to say, such submissions may not raise any matters, as that term is described in Epic No 1, that were not raised in submissions to the relevant Regulator before the decision was made.*"

29. During the course of submissions in relation to the present application, Epic suggested that this passage should be interpreted to mean that a respondent in an application for review was confined to submissions that it had made to the Regulator before the Regulator made his decision.

30. The Board did not intend to convey the meaning suggested by Epic. The issue as to whether a respondent was to be confined by its own submissions was not the subject of submissions to the Board in relation to that application.

31. It follows from the decision set out above that the question of whether Western Power's submissions go beyond what can fairly be raised, will be a decision that can only be made by comparing Epic's grounds of appeal with the submissions that Western Power seeks to make (possibly assisted by Epic's submissions in support of its grounds of appeal). This must be done on a case by case basis. The parties have not addressed the Board on those issues and should obviously be given an opportunity to do so before any decision is made. Epic's application in relation to Western Power's submissions will therefore be adjourned pending the receipt of further submissions before the Board makes a final ruling.

Dated the day of 2004

MR RM EDEL
PRESIDING MEMBER

DR F HARMAN
MEMBER

MR EA WOODLEY
MEMBER

WESTERN AUSTRALIAN GAS REVIEW BOARD
APPEAL NO 1 OF 2004