

**APPLICATION FOR REVIEW BY
THE WESTERN AUSTRALIAN ELECTRICITY REVIEW BOARD**

IN THE WESTERN AUSTRALIAN ELECTRICITY REVIEW BOARD

File No of 2010

Re: Application under section 39(1) of Schedule 1 of the *Gas Pipelines Access (Western Australia) Act 1998* (which provision continues to apply by reason of section 28(4) of Schedule 3 of the *National Gas Access (WA) Act 2009*) for a review of the decision of the Economic Regulation Authority to draft and approve revisions of the access arrangement to apply to the Goldfields Gas Pipeline in place of the access arrangement revisions submitted for approval by Goldfields Gas Transmission Pty Ltd on behalf of the Goldfields Gas Transmission Joint Venture

Applicant: Southern Cross Pipelines Australia Pty Limited, Southern Cross Pipelines (NPL) Australia Pty Ltd, Alinta DEWAP Pty Ltd and Goldfields Gas Transmission Pty Ltd

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Applicant: Australia Place
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Filed as agent for Gilbert + Tobin on behalf of the Applicant by:

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A. INTRODUCTION

A.1 GGT

1 The Goldfields Gas Pipeline (**GGP**, or **Pipeline**) is owned by Southern Cross Pipelines Australia Pty Limited, Southern Cross Pipelines (NPL) Australia Pty Ltd and Alinta DEWAP Pty Ltd, each of which is a member of the Goldfields Gas Transmission Joint Venture (**GGTJV**). By agreement, Goldfields Gas Transmission Pty Ltd (ABN 87 004 273 241) (**GGT**) acts in all respects for and on behalf of the GGTJV participants in relation to the operation of the Pipeline. GGT lodged the proposed revisions to the access arrangement applying to the GGP (**Access Arrangement**), and made submissions in relation to these revisions, on behalf of the GGTJV participants.

2 This application for review is lodged by the GGTJV and GGT.

A.2 ERA Access Arrangement Process

3 On 23 March 2009, GGT submitted proposed revisions to its Access Arrangement (**Proposed Revisions**) pursuant to section 2.28 of the *National Third Party Access Code for Natural Gas Pipeline Systems (Code)*.

4 On 9 October 2009, the Economic Regulation Authority (**ERA**) issued a Draft Decision in respect of GGT's Proposed Revisions pursuant to section 2.35 of the Code. The ERA's Draft Decision was to propose not to approve the revisions to the Access Arrangement.

5 On 22 April 2010, GGT submitted an amended version of its Proposed Revisions (**Amended Proposed Revisions**) pursuant to section 2.37A of the Code.

6 On 13 May 2010, the ERA issued a Final Decision pursuant to section 2.38 of the Code which was to not approve GGT's Amended Proposed Revisions (**Final Decision**).

7 On 4 June 2010, GGT submitted a further amended version of the Proposed Revisions (**Further Amended Proposed Revisions**) along with supporting submissions and an expert report from Greg Houston of NERA dated 4 June 2010 (**Supporting Documents**) pursuant to section 2.40 of the Code.

8 On 5 August 2010, the ERA issued a further final decision pursuant to section 2.41 of the Code, whereby the ERA decided not to approve GGT's Further Amended Proposed Revisions to the Access Arrangement for the Pipeline and to draft and approve a revised Access Arrangement for that pipeline (**Further Final Decision**). In its reasons, the ERA indicated that it had resolved not to consider the Supporting Documents before making the Further Final Decision or for the purpose of the drafting and approval by the Authority of a revised Access Arrangement for the Pipeline.

B. APPLICATION FOR REVIEW

- 9 GGTJV and GGT apply for review under section 39(1) of Schedule 1 of the *Gas Pipelines Access (Western Australia) Act 1998* (which provision continues to apply by reason of section 28(4) of Schedule 3 of the *National Gas Access (WA) Act 2009*) of the Further Final Decision.
- 10 The Applicants are the owners of the Pipeline and as such are the service providers (as that term is defined in the *Gas Pipelines Access (Western Australia) Act 1998*) whose interests are adversely affected and therefore may apply to the Western Australian Electricity Review Board for review of the Further Final Decision under section 39(1) of Schedule 1 of the *Gas Pipelines Access (Western Australia) Act 1998*. GGT is the operator of the Pipeline and acts in all respects for and on behalf of GGTJV.

C. GROUNDS OF REVIEW

C.1 Exercise of discretion incorrect and/or unreasonable by misconstruction and misapplication of Code

- 11 The exercise of the ERA's discretion was incorrect and/or was unreasonable having regard to all the circumstances, in that the ERA misconstrued and misapplied the Code, in the respects set out below.

EEP

- 12 The ERA:
- (a) failed to construe and apply the Code as permitting GGT to select the elements of a complying extensions and expansions policy within the range of elements which were capable of complying with the Code, and failed to construe and apply the Code as only requiring an assessment of whether the policy put forward by GGT in the Proposed Revisions and in the Further Amended Proposed Revisions (**GGT's Proposed EEP**) included elements which complied with the Code;
 - (b) failed to determine whether the elements of GGT's Proposed EEP were within the range of elements which complied with the Code;
 - (c) instead wrongly construed and applied the Code as if compliance with section 3.16 of the Code depended upon identification and adoption of a single uniquely correct policy;
- and as a result of those errors, the ERA:
- (d) failed to determine the applicable complying ranges for extensions and expansions policies and their elements;

- (e) failed to approve GGT's Proposed EEP as being within the permitted range of complying outcomes, as was the case with those EEPs;
- (f) rejected GGT's Proposed EEPs when there was no evidence before the ERA and no basis from which it could reasonably be concluded that GGT's Proposed EEPs fell beyond the permitted complying ranges.

13 Further or in the alternative, the ERA:

- (a) failed to find that on the proper construction and application of the Code the extensions and expansions policy submitted by GGT in the Further Amended Proposed Revisions (**GGT's Further Revised EEP**) otherwise addressed the matters identified in the Final Decision as being the reasons for requiring Amendment 18 under section 2.41(b) of the Code and this should have been accepted; and
- (b) instead adopted an extensions and expansions policy (**ERA's EEP**) which does not comply with the Code, on its proper construction, in that it does not:
 - (i) set out a method to be applied to determine whether any expansion of the capacity of the Pipeline should be treated as part of the covered pipeline or should not be treated as part of the covered pipeline under section 3.16(a) of the Code;
 - (ii) satisfy the requirement of section 2.24(a) of the Code relating to the Service Provider's legitimate business interests and investment in the Covered Pipeline and extensions and expansions of it, in that it discourages investment in extensions and expansions in certain circumstances including by reason of the likely adverse impact of the ERA's EEP on Total Revenue following an expansion or extension;
 - (iii) satisfy the requirement of section 2.24(f) of the Code relating to the interests of Users and Prospective Users, in that it discourages the provision of extra capacity in certain circumstances; and/or
 - (iv) satisfy the requirements of section 2.24(e), in that it fails to encourage competition in downstream markets.

14 Further, or in the alternative, the ERA:

- (a) failed to construe and apply the Code as requiring it to consider the Supporting Documents in so far as those documents dealt with the extensions and expansions policy before making the Further Final Decision or for the purpose of drafting and approving a revised Access Arrangement for the Pipeline; and

- (b) instead resolved not to consider the Supporting Documents before making the Further Final Decision or for the purpose of the drafting and approval by the ERA of a revised Access Arrangement for the Pipeline.

15 Had the ERA not made the errors referred to in paragraphs 12 to 14 above, the ERA would and should have accepted GGT's Further Revised EEP.

Non-Capital Costs

16 The ERA:

- (a) failed to construe and apply the Code as requiring it to consider the Supporting Documents in so far as those documents dealt with the Non-Capital Costs before making the Further Final Decision or for the purpose of drafting and approving a revised Access Arrangement for the Pipeline; and
- (b) instead resolved not to consider the Supporting Documents before making the Further Final Decision or for the purpose of the drafting and approval by the ERA of a revised Access Arrangement for the Pipeline;

and as a result of those errors, the ERA:

- (c) rejected the proposed reference tariffs set out in the Further Amended Proposed Revisions which reference tariffs should have been accepted as they were within the applicable range of proper outcomes on a proper construction and application of the Code.

17 The ERA:

- (a) failed to construe and apply the Code as requiring it to incorporate the Further Amended Proposed Revisions in relation to Non-Capital Costs if these otherwise addressed the matters which the ERA identified in the Final Decision as being the reasons for requiring Amendment 8 to the Access Arrangement Information under section 2.41(b) of the Code;
- (b) failed to consider whether, and failed to find that, the Non-Capital Costs and the Further Amended Proposed Revisions in relation to Non-Capital Costs, submitted by GGT, otherwise did address the matters identified by the ERA in the Final Decision as being the reasons for requiring Amendment 8 to the Access Arrangement Information under section 2.41(b) of the Code; and
- (c) as a result of those errors failed to accept the proposed reference tariffs set out in the Further Amended Proposed Revisions.

Pre-tax rate of return

18 The ERA:

- (a) failed to construe and apply the Code as permitting a range of pre-tax Rates of Return and as requiring an assessment as to whether the pre-tax Rate of Return put forward by GGT fell within the permitted range of complying pre-tax Rates of Return;
- (b) instead applied the Code as if compliance with the various aspects of section 8 of the Code relating to Reference Tariffs depended upon identification and adoption of a single uniquely correct pre-tax Rate of Return; and
- (c) failed to provide for a Rate of Return that was consistent with the requirements of the Code, including the requirement in section 8.30 of the Code to provide a rate of return that is commensurate with prevailing conditions in the market for funds and the risk involved in delivering the Reference Service,

and as a result of those errors, the ERA:

- (d) whilst it determined an applicable range for the pre-tax Rate of Return in the Final Decision and the pre-tax Rate of Return adopted by GGT was within that range, rejected the proposed Reference Tariffs, for amongst other reasons, that the pre-Tax Rate of Return was not the pre-tax Rate of Return adopted by the ERA in the Final Decision, whereas the proposed Reference Tariffs should have been accepted as they were within the applicable range of proper outcomes on a proper construction and application of the Code.

19 Further, or in the alternative, the ERA:

- (a) failed to construe and apply the Code as requiring it to consider the Supporting Documents in so far as those documents dealt with the pre-tax Rate of Return before making the Further Final Decision or for the purpose of drafting and approving a revised Access Arrangement for the Pipeline; and
- (b) instead resolved not to consider the Supporting Documents before making the Further Final Decision or for the purpose of drafting and approval by the ERA of a revised Access Arrangement for the Pipeline.

C.2 Exercise of discretion otherwise incorrect and/or unreasonable

- 20 The exercise of the ERA's discretion was incorrect and/or was unreasonable having regard to all the circumstances, in the respects set out below.**

EEP

21 The ERA:

- (a) adopted an extreme and unreasonable position in relation to extensions and expansions, that made no allowance for any relevant circumstances that may arise in the future in relation to proposed or contemplated extensions or expansions of the Pipeline; and
- (b) drafted and approved the ERA EEP based on this unreasonable approach;
- (c) adopted an extensions and expansions policy which arose from attributing paramount significance to the possible degree of market power which might be exercisable by GGT in the future, when there was not sufficient evidence to support that conclusion;
- (d) unreasonably failed to provide for proposed or contemplated extensions or expansions to be assessed on a case by case basis in the future according to prevailing circumstances; and
- (e) unreasonably assumed that future circumstances, over the entire 5 years (unless revised earlier) would necessarily justify coverage of expansions of the Pipeline.

Non-Capital Costs

- 22
- (a) The ERA failed to take into account GGT's forecast of Non-Capital Costs provided with its April 2010 Submission which included updated information as compared with the forecast of Non-Capital Costs provided with its December 2009 submission.
 - (b) Further, having required Amendment 8 in respect of Non-Capital Costs for the stated reason that those costs were not sufficiently justified, failed to make any assessment as to whether those Non-Capital Costs were in fact justified and failed to determine that they were justified.

Pre-tax Rate of Return

23 The ERA:

- (a) failed to take into account, or to have proper regard to, the risks associated with errors in estimating the Rate of Return in deciding not to adopt a nominal pre-tax Rate of Return at the upper end of the range of values identified by the ERA as being "a reasonable range of values",
- (b) failed to take into account, or to have proper regard to, the risks associated with the provision of Reference Services on the GGP in deciding not to adopt a nominal pre-tax

Rate of Return at the upper end of the range of values identified by the ERA as being “a reasonable range of values”,

- (c) adopted a rate that was not otherwise consistent with the objectives set out in section 8.1 of the Code including the objective of allowing the Service Provider an opportunity to earn a stream of revenue that recovers the efficient costs of delivering the Reference Service over the expected life of the assets used in delivering that Service under subsection 8.1(a) of the Code and not distorting investment decisions in Pipeline transportation systems under subsection 8.1(d) of the Code;
- (d) adopted a rate that was not consistent with section 8.30 of the Code as it did not provide a return which is commensurate with prevailing conditions in the market for funds and the risk involved in delivering the Reference Service;
- (e) wrongly rejected the proposed Reference Tariff set out in the Further Amended Proposed Revisions that was within the permissible range that complied with the Code; and
- (f) wrongly rejected the nominal pre-tax Rate of Return that was within the permissible range which complied with the Code.

C.3 The occasion of exercising the discretion did not arise

- 24 The ERA purported to exercise a discretion where the occasion for exercising a discretion did not arise in the respects set out below.

EEP

- 25 The EEP rejected GGT's Proposed EEPs when there was no occasion to do so, because there were no grounds for finding that such did not comply with the Code.
- 26 The ERA:
- (a) purported to exercise a discretion in relation to the failure to accept either of GGT's Proposed EEPs when the occasion for exercising the discretion did not arise, by reason that each of those policies complied with section 3.16 of the Code (and if necessary 2.24 of the Code) and as a consequence, the ERA was required to accept them and had no discretion to substitute those policies with the ERA's EEP; and
 - (b) wrongly rejected the proposed reference tariffs set out in the Further Amended Proposed Revisions which reference tariffs should have been accepted.

Pre-tax Rate of Return

27 The ERA:

- (a) purported to exercise a discretion in relation to the setting of a nominal pre-tax Rate of Return, when the occasion for exercising the discretion did not arise, by reason that the nominal pre-tax Rate of Return adopted by GGT, on the ERA's own admission, was within the reasonable range of nominal pre-tax Rate of Returns adopted by the ERA in the Final Decision; and
- (b) wrongly rejected the proposed reference tariffs set out in the Further Amended Proposed Revisions which reference tariffs should have been accepted.

D. ORDERS SOUGHT

The Applicants seek orders that:

- (a) The decision of the ERA, insofar as it:
 - (i) did not approve GGT's Further Revised EEP and instead drafted and approved an Access Arrangement containing the ERA's EEP;
 - (ii) adopted a nominal pre-tax rate of return of 10.48 per cent rather than 11.3 per cent; and
 - (iii) adopted Non-Capital Costs of \$113.5 million instead of \$115.5 million,be set aside or varied as from 20 August 2010.
- (b) In lieu thereof, the proposed Access Arrangement be revised as follows:
 - (i) The ERA's EEP be replaced by GGT's Further Revised EEP;
 - (ii) The Reference Tariffs be recalculated by adopting:
 - (A) A nominal pre-tax rate of return of 11.3 per cent; and
 - (B) Non-Capital Costs of \$115.5 million;

It is noted that the Applicants do not seek any amendment to the date on which the Access Arrangement took effect (being 20 August 2010) and as a consequence they seek that the revisions identified in (b) above take effect on and from that date.

This application was prepared by C L Zelestis QC, Joshua Thomson and Gilbert + Tobin.

Address for Service

Address for Service of Documents:

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Dated 19 August 2010

Signed on behalf of the Applicants

Catherine Dermody
Solicitor for the Applicants