IN THE WESTERN AUSTRALIAN GAS REVIEW BOARD

No of 2004

Re Application for review of the decision by the Western Australian Independent Gas Pipelines Access Regulator dated 30 December 2003 to approve the Regulator's own Access Arrangement for the Dampier to Bunbury Natural Gas Pipeline

Application by:

WESTERN POWER CORPORATION Applicant

APPLICATION FOR REVIEW

Date of document: 14 January 2004

Filed on behalf of: The Applicant

Prepared by:

JACKSON McDONALD
Barristers & Solicitors
Level 9
81 St Georges Terrace
PERTH WA 6000

Telephone: (08) 9426 6611
Facsimile: (08) 9322 4299
Reference: NPG:1167165

Pursuant to s.39(1) of Schedule 1 to the *Gas Pipelines Access (Western Australia) Act 1998* (the Act), and s.2.26 of the National Third Party Access Code for Natural Gas Pipeline Systems (as set out in Schedule 2 to the Act) (the Code), the applicant applies for review of the decision dated 30 December 2003 by the Western Australian Independent Gas Pipelines Access Regulator and placed on the public register kept by the Code Registrar under the Code on 31 December 2003 alternatively 7 January 2004 whereby the Regulator approved the Regulator's own Access Arrangement for the Dampier to Bunbury Natural Gas Pipeline in place of the revised Proposed Access Arrangement submitted by Epic Energy (WA) Nominees Pty Ltd on 8 August 2003 pursuant to s.2.20(a) of the Code and all decisions relating thereto.

The applicant seeks the following final orders:-

1. The decision of the Western Australian Independent Gas Pipelines Access Regulator under s.2.20(a) of the National Third Party Access Code for Natural Gas Pipeline Systems whereby the Regulator purported to approve its own Access Arrangement for the Dampier to Bunbury Natural Gas Pipeline be set aside or varied to take into account the grounds of this application.
2. Further or alternatively, the Gas Review Board draft and approve an Access Arrangement which takes into account the grounds of this application.
3. All necessary and consequential amendments be made to the Access Arrangement and Access Arrangement Information.
4. Orders providing for the costs of these proceedings.

The grounds of this application are annexed.

Solicitors for the Applicant

GROUNDS

1. The Regulator did not approve an Access Arrangement which he had drafted instead of the Access Arrangement proposed by the Service Provider as required by s.2.20(a) of the Code. He did no more than make amendments to the Access Arrangement drafted by the Service Provider and accordingly the exercise of his discretion was incorrect or was unreasonable having regard to all the circumstances or the occasion for exercising his discretion did not arise.

2. The Regulator erred in his finding of facts or the exercise of his discretion was incorrect or was unreasonable having regard to all the circumstances in approving an Access Arrangement including the Firm Service as the only Reference Service since the Firm Service (including the terms and conditions upon which it was proposed to be offered) was not likely to be sought by a significant part of the market (particularly if a T1 service as referred to in the following ground were available as a Reference Service) and further, there was express and uncontradicted evidence that it would not be sought by a significant part of the market.

3. The Regulator erred in his finding of facts or the exercise of his discretion was incorrect or was unreasonable having regard to all the circumstances in that he failed to approve a Reference Tariff in the Access Arrangement for each of:-

   (a) the T1 Service (being a service of the nature of the T1 Service established under the Gas Transmission Regulations 1994 under the Gas Corporation Act, 1994 and the Access Manual ("Access Manual") and Dampier to Bunbury Pipeline Regulations 1998) under the Dampier to Bunbury Pipeline Act 1997; and/or

   (b) the ancillary services provided to date as part of the T1 Service; and/or

   (c) the Non-Reference Services described in clause 6.1 of the Access Arrangement

   in that each of these services were services which were likely to be sought by a significant part of the market and for which the Regulator should have considered a Reference Tariff should be included.

4. Further or alternatively to Ground 3 above, the Regulator erred in his finding of facts or the exercise of his discretion was incorrect or

unreasonable having regard to all the circumstances in failing to approve a Reference Tariff for each of the services described in the preceding ground in that he failed to take into account:-

(a) that the provision of a Reference Tariff for each of those Services would replicate the outcome of a competitive market consistently with the objectives of the Code and s.8.1(b) of the Code;

(b) the inefficiency flowing from the failure to provide a Reference Tariff for each of the services for which there is likely to be a significant demand contrary to the objectives of the Code and s.8.1(e) of the Code;

(c) the fact that failure to provide a Reference Tariff for each of those services will hinder the development of the market for them contrary to the objectives of the Code and s.8.1(f) of the Code;

(d) as a fundamental element (as required by s.2.24(b) of the Code) the contractual obligations of the Service Provider or Users in that the provision of a Reference Tariff for each of the services referred to in (a) and (b) in the previous ground would significantly impact upon the rights and obligations of such persons;

(e) as a fundamental element (as required by s.2.24(e) of the Code) the public interest in:-

  (i) providing a Reference Tariff for the services for which there is likely to be a significant demand;

  (ii) reducing arbitration under the Code;

  (iii) reducing disputes generally;

  (iv) having competition in markets including upstream and downstream markets as a consequence of the provision of a Reference Tariff for services for which there will be a significant demand;

(f) as a fundamental element (as required by s.2.24(f) of the Code) the interests of Users and prospective Users in having a Reference Tariff provided for all services for which there was likely to be a significant demand;

(g) that in the event a Reference Tariff is not provided for a service it is not possible for the Regulator to require the terms and conditions of that service to be specified.

5. (previously unnumbered)The Regulator erred in his finding of facts or the exercise of his discretion was incorrect or unreasonable having regard to all the circumstances in failing to approve in the Access Arrangement a Reference Tariff for each of the services described in Ground 3(a) and (b) above in that his failure to do so was based upon the finding (paras 63 and 78 of his final decision made on 23 May 2003 ("final decision")) that provided that the Services Policy describes the services offered, this will make available the delivery of services that collectively may be regarded as equivalent to the T1 service when in fact that would not be the result because:-

(a) the Services are not sufficiently described;

(b) the Terms and Conditions upon which the Services will be supplied are (in the absence of arbitration) entirely within the discretion of the Service Provider;

(c) there are at least the following differences between the T1 Service and the Access Arrangement proposed.

(i) Seasonal Service

A. the Seasonal Service ("type (a) seasonal service") proposed by the service provider (access arrangement information (pp5 - 6) and proposed access guide (pp9 – 10)) is based upon seasonal variations in the capacity of the DBNGP (as a result of compressor stations operating more efficiently in winter when the ambient temperature is cooler);

B. the Seasonal Service ("type (b) seasonal service") established as a component of the T1 Service allows users to contract for higher levels of capacity for different parts of the year (para 50) according to their needs and the available (whether for seasonal reasons or otherwise) capacity of the DBNGP;

(ii) Nominations

A. Clause 4.3 of the proposed Access Terms and Conditions ("Terms and Conditions") only allows

users to amend nominations for a Day not later than 14.00 hours on the preceding day;

B. Clause 116 of the pro forma contract contained in the Schedule to the Access Manual and Gas Transmission Regulation 172 allow 3 renominations in each Day;

C. Clause 4.4 of the Terms and Conditions imposes a penalty for more than 10% variance between nominated and supplied or delivered quantities of gas in certain circumstances;

D. neither the pro forma contract contained in the Schedule to the Access Manual nor the Gas Transmission Regulations contain any penalty for variance from nominations;

(iii) Overrun

A. Clause 5.1 of the Terms and Conditions provides that overrun is any gas delivered to Shipper at a Delivery Point which is in excess of the Shipper's Delivery Point MDQ or at Delivery Points which in aggregate exceeds the Shipper's MDQ;

B. Clause 33 of the pro forma contract contained in the Schedule to the Access Manual provides in effect that overrun only occurs if a User's total MDQ aggregated across all delivery points regardless of location on the DBNGP is exceeded;

C. Clause 5.2 of the Terms and Conditions provide that the price payable for overrun capacity is 110% of the Capacity Charges and Gas Receipt Charges otherwise payable or 110% of the highest price payable on the Secondary Market plus the Compressor Fuel Charge and the Delivery Point Charge;

D. Clause 33 of the pro forma contract contained in the Schedule to the Access Manual provides that

the price payable for overrun capacity is the same price as is payable for spot capacity;

(iv) Imbalance

A. Clause 6.4 of the Terms and Conditions imposes an excess imbalance charge;

B. No imbalance penalties apply under the pro forma contract contained in the Schedule to the Access Manual or under the Gas Transmission Regulations;

(v) Peaking

A. Clause 7.1 of the Terms and Conditions allows a Shipper to take hourly deliveries of quantities of gas at a Delivery Point on a Day not exceeding 120% of one twenty-fourth of the Shippers Delivery Point MDQ at that delivery point before the Peaking Surcharge applies;

B. The Regulator in his final decision found that:-

(para 735) “the proposed Access Contract Terms and Conditions should be amended to provide for a User’s liability for the Peaking Surcharge to be assessed on the basis of that User’s Maximum Hourly Quantity and hourly delivery of gas in aggregate across all of that User’s Delivery Points in a pipeline zone for Delivery Points in Zones 1 to 9, and on each lateral pipeline in Zone 10 (Amendment 22)”; and

(para 592) the Peaking Surcharge of $15/GJ proposed in the Access Arrangement was unreasonable and (para 730) that the maximum rate for the Peaking Surcharge should be 350 percent of the relevant 100 percent load factor Reference Tariff:

C. The pro forma contract contained in the Schedule to the Access Manual in Clause 130 and the Gas Transmission Regulations in Regulation 185

provide that, subject to the right of the DBNGP operator to refuse to accept or deliver gas if those limits are exceeded, a Shipper's hourly quantity may exceed in winter 125% and in summer 120% of one twenty fourth of the Shipper's total contracted capacity;

D. The pro forma contract contained in the Schedule to the Access Manual clause 77 and Regulation 189 of the Gas Transmission Regulations provide that the surcharge for peaking is nil.

6. Further or alternatively to Grounds 3, 4 and 5 above, the Regulator erred in his finding of facts or the exercise of his discretion was incorrect or was unreasonable having regard to all the circumstances in that the Access Arrangement does not adequately describe the Non Reference Services included therein and the terms and conditions upon which those services will be supplied are (in the absence of arbitration) entirely within the discretion of the service provider.

7. The Regulator erred in his finding of facts or the exercise of his discretion was incorrect or was unreasonable having regard to all the circumstances in approving clause 5.4 of the Access Contract Terms and Conditions when that clause permits an unavailability notice to be issued in the unfettered discretion of Epic Energy.

8. The Regulator erred in his finding of facts or the exercise of his discretion was incorrect or unreasonable having regard to all the circumstances in approving those parts of clause 2.4 Out of Specification Gas Charge, clause 4.4 Nomination Surcharge, clause 5.4 Unavailability Charge, clause 6.4 Excess Imbalance Charge, clause 7.1 Peaking Surcharge and Schedule 1 of the Access Contract Terms and Conditions which permit the imposition of surcharges which are unlawful penalties because they are not genuine pre-estimates of loss or alternatively because those penalties are too high by reference to industry standards and/or alternatively because those provisions are drafted in such a way in the Access Arrangement that they will not achieve their stated objectives.

9. The Regulator erred in his finding of facts or the exercise of his discretion was incorrect or unreasonable having regard to all the circumstances in

approving the zonal structure contained in clause 7.11 of the Access Arrangement and in particular the proposed boundary between Zones 9 and 10 in that he failed to take into account:

(a) the fact that the outcome of a competitive market would not result in Users paying charges calculated by reference to cost of pipeline not being used by them contrary to the requirements of the objective in s.8.1(b) of the Code;

(b) the fact that the zonal boundary is likely to distort investment decisions in Pipeline transportation systems and in upstream and downstream industries contrary to s.8.1(d) of the Code;

(c) the fact that requiring users to pay charges by reference to pipeline which they are not using will cause inefficiency contrary to the objectives in s.8.1(e) of the Code;

(d) the fact that requiring users to pay a cost calculated by reference to pipeline which they are not using fails to produce any incentive to the Service Provider to reduce costs contrary to the objective in s.8.1(f) of the Code;

(e) as a fundamental element (required by s.2.24(e) of the Code) the public interest:-

  (i) in requiring users to pay charges calculated by reference to costs which they are incurring; and

  (ii) in having competition in markets, which interest is hindered by requiring users to pay a charge calculated by reference to costs of pipeline which they are not using; and

(f) as a fundamental element (required by s.2.24(f) of the Code) the interests of Users, in particular the interests of Users in not paying a charge calculated by reference to costs of pipeline which they are not using;

(g) the principles set out in ss.2.24, 3.4, 3.6 and 8 of the Code, construed in the light of the Objectives and the subject matter scope and purpose of the Code; and

(h) the Regulator took into account irrelevant considerations (para 399, 404 final decision) in that he considered that it was unlikely that the Pipeline Capacity Charge in Zones 9 and 10 in the proposed Access Arrangement would exceed the

corresponding costs of a stand-alone service for any user in coming to his decision (para 400, 406 final decision) that the zonal structure of the Pipeline Capacity Charge is 'equitable'.

10. The Regulator erred in his finding of facts or in the exercise of his discretion was incorrect or was unreasonable having regard to all the circumstances in approving clause 2.3 of the Access Contract Terms and Conditions without requiring that the clause be subject to a requirement of reasonableness because:-

(a) a requirement of reasonableness would replicate the outcome of a competitive market consistently with the objective of the Code and s.8.1(b) of the Code;

(b) inefficiency resulting from the failure to include a requirement of reasonableness is contrary to the objectives of the Code and s.8.1(e) of the Code;

(c) the failure to include a requirement of reasonableness would not provide an incentive to the Service Provider to reduce costs and to develop the market for Reference and other Services contrary to the objectives of the Code and s.8.1(f) of the Code;

(d) such a requirement is part of a fundamental element (as required by s.2.24(d) of the Code) being the economically efficient operation of the DBNGP;

(e) such a requirement is part of a fundamental element (as required by s.2.24(e) of the Code) being the public interest including the public interest in:-

(i) development of gas fields;

(ii) ensuring as much gas as was likely to be required by Users and prospective Users was available to Users;

(iii) reducing arbitration under the Code;

(iv) reducing disputes generally; and

(v) having competition in markets including upstream and downstream markets;

(f) such a requirement is part of a fundamental element (as required by s.2.24(f) of the Code) being the interests of Users and Prospective Users in:-

(i) development of gas fields;

(ii) ensuring as much gas as was likely to be required by Users and prospective Users was available to Users;

(iii) reducing arbitration under the Code;

(iv) reducing disputes generally; and

(v) having competition in markets including upstream and downstream markets;

(g) reasonableness does provide greater certainty to shippers by imposing an objective test;

(h) an obligation to act reasonably would not compromise safe and reliable operation of the DBNGP; and

(i) an obligation to act reasonably does recognise the pre-existing contractual requirements imposed upon the Service Provider in relation to gas specification.

11. The Regulator erred in his finding of facts or the exercise of his discretion was incorrect or was unreasonable having regard to all the circumstances in approving clause 2 of the Access Contract Terms and Conditions in a form which failed to take into account that gas transportation contracts entered into under the Access Arrangement could be for any period agreed between the parties (including a period after the expiry of the contractual arrangements of the Service Provider relating to the delivery of gas to the Wesfarmers LPG plant).

12. The Regulator erred in his finding of facts or the exercise of his discretion was incorrect or was unreasonable having regard to all the circumstances in approving Clause 4 of the Access Contract Terms and Conditions in that:

(a) after a Variance Notice has been issued under Clause 4.4 of the Terms and Conditions, Users are exposed to liability to pay the Nomination Surcharge whenever the quantities of gas supplied or delivered at a receipt or delivery point differ from the Shipper's nomination for that day, regardless of the Shipper's MDQ or good faith;

(b) the clause does not take into account imbalance arising as a result of circumstances arising in a gas day and the Regulator's finding (para 581 final decision) that "for at least two large Users of the DBNGP (Western Power and AlintaGas), gas deliveries are subject

to factors outside of the User's control (particularly weather conditions) and further;

(c) once a User has been made the subject of a Variance Notice that User is exposed to liability to pay the Variance Charge regardless of the User's MDQ upon the basis of a nomination made on the previous gas day.

13. The Regulator erred in his finding of facts or the exercise of his discretion was incorrect or was unreasonable having regard to all the circumstances in failing to identify that Clause 5.3(b)(i) of the Access Contract Terms and Conditions is in conflict with Clause 33 of the Terms and Conditions.

14. The Regulator erred in his finding of facts or the exercise of his discretion was incorrect or was unreasonable having regard to all the circumstances in approving clause 13.4 of the Access Contract Terms and Conditions when that clause imposes liability upon the Shipper for any loss or damage howsoever or by whomsoever caused other than loss or damage caused by Epic Energy and does not satisfy the requirements of ss2.24, 3.3, 3.4, 3.6 or 8 or the subject matter scope and purpose of the Code and is unreasonable.

15. The Regulator erred in his finding of facts or the exercise of his discretion was incorrect or was unreasonable having regard to all the circumstances in that he approved clause 5 of the Access Arrangement which is inconsistent with the objectives and sections 2.24, 3.4, 3.6 , 3.13 and 8 of the Code in that:

(a) it is generally inadequately drafted and thus creates uncertainty and scope for dispute;

(b) it provides (as stated in the proposed Access Guide and implied by the definition of "Access Contract" in clause 1.1 of the Access Arrangement Terms and Conditions) that an Access Request is an offer capable of acceptance by Epic Energy to form a binding contract (rather than the culmination of the application process being an offer from Epic Energy which the shipper may then accept or reject) and if this is the effect of the clause:

(i) this is not a commercially workable approach to access applications; and

(ii) it is not consistent with the policy of the Code as apparent from section 6.24 of the Code; and

(iii) it is a disincentive to shippers applying for capacity and enables Epic to more effectively control, and exercise monopoly power in, the access negotiation process.

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

(i) promptly or within any specified period;

(ii) as a reasonable and prudent person; or

(iii) otherwise in good faith,

in managing the queue and assessing and negotiating Access Requests, when a failure by Epic Energy to do those things can materially undermine the effectiveness of the Queuing Policy and hence the entire access regime.

(d) it does not include a provision for a Prospective User to appeal or otherwise query the rejection of an Access Request that it has lodged;

(e) it does not prohibit Epic Energy from rejecting an Access Request merely on the basis of a technical defect or defect in form;

(f) it does not include a provision by which Epic Energy must notify the applicant of a technical defect or defect in form within a certain time after lodgement of an Access Request and give the applicant time to remedy the defect without losing priority;

(g) it does not provide for:

(i) the maintenance of the position of a Prospective User's Access Request in the queue of Access Requests pending resolution of the User appealing or querying the rejection or proposed rejection of an Access Request lodged by it, or

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

(h) the critical test of "materially different" in clause 5.3(c)(i) is unacceptably vague

(i) sub-clause 5.3(d):

(i) refers to "Access Requests" made Prior to the Access Arrangement coming into effect, which is unclear given that "Access Request" as defined in the Access Arrangement means a request made in the form set out in the Access Guide because an application made before the approval date would not comply with the Access Guide.

(ii) does not provide for prior AA Access Requests which do not comply with all requirements for a complying Access Request contained in the Access Guide and such prior AA Access Requests would therefore by reason of clause 5.3(e) not be placed in the queue;

(iii) is insufficiently clear as to Service terms and conditions and tariff deemed to be sought under the Access Arrangement by Prior AA Access Requests.

(j) in clause 5.3(i)(i) the words "limited to a reduction in a change in requested commencement date" do not make sense.

(k) clause 5.3(i)(ii) should provide a means to enable a Shipper to enquire of Epic Energy whether a proposed amendment will result in an Access Request not complying with clause 5.3(i)(i) so that the Shipper may determine whether to proceed with the proposed amendment.

(l) clause 5.3(i)(ii) does not:

(i) require Epic Energy to notify the Prospective Shipper of any determination by Epic Energy that an amended Access Request is materially different from the Original Access Request to the extent that another Prospective Shipper whose Access Request has a position in the queue after the Original Access Request is materially prejudiced;

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

(iii) does not cover the situation in which the amendment does not fall within sub-clause 5.3(i)(i) but Epic Energy does not determine in accordance with sub-clause 5.3(i)(ii).

(m) as to clause 5.3(k)

(i) Capacity Expansion Option is defined in clause 12.7 of the Access Arrangement as an option "for capacity on the DBNGP which require expansions" and therefore cannot relate to existing Spare Capacity, thus making clause 5.3(k)(ii) otiose, confusing or uncertain in its meaning or effect; and

(ii) the Queuing Policy in clause 5 and the Extensions/Expansions Policy in clause 12 have the combined commercial effect of forcing Shippers who may require Developable Capacity in the future to buy Capacity Expansion Options rather than risk using the queue because an application for Developable Capacity which is in the queue can lose priority to a subsequently granted Capacity Expansion Option. This is unfair and unreasonable because:

A. the terms and price of Capacity Expansion Options are unregulated and thus subject to Epic Energy's arbitrary discretion unless the Shipper undertakes an arbitration;

B. there is no guarantee that a market in Capacity Expansion Options will develop and the options thus acquired may be valueless if a Shipper ultimately does not utilise them itself; and

C. as a result Epic Energy can manufacture an artificial market for these secondary products, to its own commercial advantage, which is not consistent with the Code's objectives.

(n) clause 5.3(l) does not specify a time within which Epic Energy must notify a Prospective Shipper of information in accordance with clause 5 of the Code.

16. The Regulator's exercise of his discretion was incorrect or was unreasonable having regard to all the circumstances in that he approved that part of clause 6.2 of the Access Arrangement which provides that Firm Service is a Service provided by Epic Energy "subject to availability of Capacity" when those words are inconsistent with the provision in clause 6.2 that the Firm Service is to be provided "without interruption or curtailment".

17. The Regulator erred in his finding of facts or the exercise of his discretion was incorrect or was unreasonable having regard to all the circumstances in that he approved:

    (a) that part of clause 6.2 of the Access Arrangement which refers to Spare Capacity of the DBNGP "as it is configured at the time of approval of this Access Arrangement" when during the term of the approved Access Arrangement and any subsequent revised Access Arrangements, the DBNGP may be configured differently from its configuration at the time of approval of the Access Arrangement, resulting in the availability of additional Spare Capacity; and/or

    (b) clause 6.2 in a form which did not provide any reference to Spare Capacity of the DBNGP as it is configured at any date after the time of approval of the Access Arrangement.

18. The Regulator's exercise of his discretion was incorrect or was unreasonable having regard to all the circumstances in that he approved that part of clause 6.2 of the Access Arrangement which requires a shipper applying for Developable Capacity to nominate a minimum term of 20 years when such a requirement is inconsistent with the objectives and sections 2.24. 3.4, 3.6 and 8 of the Code.

19. The Regulator's exercise of his discretion was incorrect or was unreasonable having regard to all the circumstances in that he approved clause 6.2(a)(ii) of the Access Arrangement which requires daily repayment of imbalances when such a provision is unreasonable and is inconsistent with the objectives and sections 2.24, 3.4, 3.6 and 8 of the Code. A more appropriate provision is a rolling cumulative imbalance regime.

20. The Regulator's exercise of his discretion was incorrect or was unreasonable in all the circumstances in that he approved clause 6.3 of the

Access Arrangement which is unreasonable and inappropriate because it does not provide that Epic Energy may only restrict deliveries to the extent that Upstream Deliveries cannot be maintained and provides no limit upon Epic Energy's discretion in deciding to restrict Upstream Deliveries.

21. The Regulator erred in his finding of facts or the exercise of his discretion was incorrect or was unreasonable having regard to all the circumstances in that he approved clause 7.3 of the Access Arrangement which is unclear in its operation, ambiguous and uncertain because it refers to the "physical asset account balance" when this term is not defined or described in the Access Arrangement or linked in any way to the Initial Capital Base referred to in clause 7.9(a), resulting in uncertainty as to the Tariffs which are to apply to the DBNGP, contrary to the objectives and sections 2.24, 3.4, 3.6 and 8 of the Code.

22. The Regulator's exercise of his discretion was incorrect or was unreasonable having regard to all the circumstances in that he approved clause 7.3(b) of the Access Arrangement which provides for adjustment of the "physical asset account balance" at the end of each year of an Access Arrangement Period when either:

    (a) the Code does not provide for or permit adjustment of the Capital Base within an Access Arrangement Period; or

    (b) if the Code does permit adjustment of the Capital Base within an Access Arrangement Period, then the Regulator has failed to provide for deduction of Redundant Capital as part of that adjustment as required by subsection 8.9(d) and 8.27 to 8.29 of the Code.

23. The Regulator erred in his finding of facts or the exercise of his discretion was incorrect or was unreasonable having regard to all the circumstances in that he approved clause 7.8(a) of the Access Arrangement which:

    (a) has the effect of supplanting or fettering a determination in respect of s. 8.16 of the Code without going through the procedures set out in s. 8.20 to 8.22 of the Code; or

    (b) contains a different version of the test in s. 8.16 of the Code and hence is inconsistent with s. 3.4 and s. 8 of the Code; or alternatively

(c) does not make sense and serves no purpose.

24. The Regulator erred in his finding of facts or the exercise of his discretion was incorrect or was unreasonable having regard to all the circumstances (and in particular having regard to section 8.11 of the Code) in that he approved subclause 7.9(a) of the Access Arrangement providing that the Initial Capital Base for the DBNGP is $1,550,000,000 (incorrectly stated as $1,550.00) when that Initial Capital Base was incorrect or was unreasonable in all the circumstances, in particular that it is higher than both:

(a) the Initial Capital Base of the DBNGP determined by applying the depreciated actual cost methodology under subsection 8.10(a) of the Code ($874,000,000); and

(b) the Initial Capital Base of the DBNGP determined by applying the depreciated optimised replacement cost methodology under subsection 8.10(b) of the Code ($1,227,000,000 or alternatively $1,230,000,000 $\pm$ $200,000,000).

25. The Regulator erred in his finding of facts or the exercise of his discretion was incorrect or was unreasonable having regard to all the circumstances in that he approved clause 7.16 of the Access Arrangement when clause 7.16 does not provide for a specified period during which the Fixed Principle referred to therein may not be changed ("Fixed Period") as required by s.8.47 of the Code.

26. The Regulator's exercise of his discretion was incorrect or was unreasonable having regard to all the circumstances in that he approved clause 7.17(a) of the Access Arrangement:

(a) which:

(i) allows Epic Energy and the Funding Shipper to determine the rebate formula; and

(ii) makes no provision as to the method of determination of the amount payable by the Paying Shippers; and

(iii) places no constraint of reasonableness or otherwise of the capital costs of the Delivery Point,

and which as a result can operate to the disadvantage of a subsequent Paying Shipper and is inconsistent with the objectives and sections 2.24, 3.4, 3.6 and 8 of the Code; and/or

(b) when, in the absence of an agreement between Epic Energy and the Funding Shipper relating to the funding of the Delivery Point, clause 7.17(a) provides for a rebate of 95% to the Funding Shipper regardless of the Funding Shipper's actual contribution to the capital costs associated with the Delivery Point, potentially allowing a Funding Shipper to receive more by way of rebates than that Shipper provided as capital costs.

27. The Regulator's exercise of his discretion was incorrect or was unreasonable having regard to all the circumstances in that he approved clause 8.3(d) of the Access Arrangement which provides that where gas is "delivered to more than one Shipper at a Delivery Point, the Delivery Point Charge is shared between Shippers on the basis of the Total Shippers MDQs at the Delivery Point" when such apportionment is unreasonable and should be by reference to volumes actually delivered to Shippers because apportionment by reference only to Shippers' MDQ's can result in a Shipper without MDQ at the delivery point not paying any part of the Delivery Point Charge.

28. The Regulator's exercise of his discretion was incorrect or was unreasonable having regard to all the circumstances in approving clause 9 of the Access Arrangement which is inconsistent with the objectives and sections 2.24, 3.4, 3.6 and 8 of the Code because the clause:

(a) is difficult if not impossible to comprehend;

(b) is arbitrary in its application in that it applies to 3 specified Non-Reference Services and "any other Service nominated by Epic Energy";

(c) is unfair in its application in that Shippers under Prior Contracts do not share in Rebateable Revenue;

(d) is unfair in its application in that the 3 specified Non-Reference Services were part of the standard T1 service available prior to the Access Arrangement;

(e) contains no obligation upon Epic Energy to calculate Rebateable Revenue within any particular time;

(f) contains an obligation upon Epic Energy to deduct amounts due to a Shipper by way of Rebateable Revenue from "the Shipper's next invoice following calculation of the Rebateable Revenue at the

end of a Year" which is meaningless having regard to the definition of "Year";

(g) contains an error in sub-clause 9.4(a) which refers to sub-clause 9.2(b)(ii)(A) which does not exist.

29. The Regulator's exercise of his discretion was incorrect or was unreasonable having regard to all the circumstances in approving sub-clause 9.5 of the Access Arrangement which is inconsistent with the objectives and sections 2.24, 3.4, 3.6 and 8 of the Code because that clause:-

(a) operates to distribute moneys obtained by the imposition of unlawful penalties upon Shippers;

(b) by allowing the distribution of such revenue to a Shipper's competitors in fact imposes a double penalty upon a Shipper who is obliged to pay such a penalty;

(c) in the case of the Applicant which, due to its statutory role in the supply of electricity to the most volatile sections of the electricity market is likely to incur the Nomination Surcharge, Excess Imbalance Charge, Penalty Surcharge and Unavailability Charge more frequently than other Shippers, operates unfairly and prejudicially to it in that the clause operates to subsidise the Applicant's competitors who compete with it in the less volatile and more profitable parts of the electricity market.

30. The Regulator erred in his finding of facts or the exercise of his discretion was incorrect or was unreasonable having regard to all the circumstances (including the fact that he required in his final decision amendment 34 to the proposed Access Arrangement that there should be "a description of the Secondary Market Service, sufficient to describe the rights of users to trade capacity") in approving clause 11.3 of the Access Arrangement which is inconsistent with the objectives and sections 2.24, 3.4, 3.6 and 8 of the Code because:-

(a) the only change which he made to the draft Access Arrangement was the addition of the second and third sentences to clause 11.3(b) and these amendments do not achieve the stated objectives of amendment 34 or make clause 11.3(b) comply with the Code; and

(b) the secondary market rules and terms and conditions are not part of the Access Arrangement and can be varied in the discretion of Epic Energy;

(c) sub-clause 11.3 states that "There will not be an interruptible service or an authorised overrun service available to Shippers" when the Regulator should not have approved an Access Arrangement which prohibits such services and further should have found from the evidence before him that there would be demand for such services either as part of a T1 equivalent Reference Service or as Reference Services.

31. The Regulator's exercise of his discretion was incorrect or was unreasonable having regard to all the circumstances in that he approved clause 12.1 (as renumbered by the Corrigenda to his decision the subject of this appeal) of the Access Arrangement which is unreasonable and inappropriate and inconsistent with the objectives and sections 2.24, 3.4, 3.6 and 8 of the Code in that it leaves to Epic Energy's discretion the determination of whether the tests in section 6.22 of the Code have been satisfied:

(a) when that determination should be made objectively and not subjectively; and

(b) when the effect of this provision, read with section 6.18(a) of the Code, is to fetter the Arbitrator's discretion in forming his own view under section 6.22 of the Code or to remove his jurisdiction to do so; and

(c) alternatively, if the matter is within Epic Energy's discretion, that discretion should be subject to an obligation to act reasonably and in good faith, or as a reasonable and prudent person.

32. The Regulator's exercise of his discretion was incorrect or was unreasonable having regard to all the circumstances in that he approved clause 12.5 (as renumbered by the Corrigenda to his decision the subject of this appeal) of the Access Arrangement which is unreasonable and inappropriate and inconsistent with the objectives and sections 2.24, 3.4, 3.6 and 8 of the Code as that clause does not:

(a) specify that Epic Energy may only levy a surcharge on Users of Incremental Capacity; and

(b) require that Epic Energy's notice to the Regulator include details of the amount of the Surcharge and details of its apportionment amongst Users of Incremental Capacity.

33. The Regulator's exercise of his discretion was incorrect or was unreasonable having regard to all the circumstances in that he approved clause 12.8 of the Access Arrangement which is unreasonable and illogical because it should restrict the grant of a Capacity Expansion Option to Developable Capacity only.

34. The Regulator's:

(a) finding of fact that each of the Access Arrangement: Access Contract Terms and Conditions referred to in the schedule hereto was reasonable was in error; and/or

(b) exercise of his discretion to approve each of the Access Arrangement: Access Contract Terms and Conditions referred to in the schedule was incorrect or unreasonable in all the circumstances,

in that each of the Access Arrangement: Access Contract Terms and Conditions referred to in the schedule:

(c) is inadequately drafted and/or;

(d) contains material ambiguities, omissions and inconsistencies and/or;

(e) is not sufficient for the task of forming a gas transportation contract of the likely financial magnitude of a DBNGP haulage contract;

as set out in the schedule and accordingly and in any event is likely to result in uncertainty and disputation and is unreasonable and inconsistent with the objectives and section 2.24, 3.4, 3.6 and 8 of the Code.