IN THE WESTERN AUSTRALIAN ENERGY REVIEW BOARD **NO 1 OF 2005**

Re Application for Review of the Decision by the Western Australian Economic Regulation Authority dated 15 December 2005 to approve the Economic Regulation Authority's own revised Access Arrangement for the Dampier to Bunbury Natural Gas Pipeline

Application by:

Electricity Generation Corporation **Applicant**

REASONS FOR DECISION
ON APPLICATION BY ALINTA ASSET MANAGEMENT PTY LTD
TO EXCLUDE GROUND 16(a) OF THE APPLICATION FOR REVIEW
DATED 28 DECEMBER 2005 FROM REVIEW BY THE BOARD

MEMBER: Mr R M Edel, Presiding Member
HEARD: 27 July 2007
DELIVERED: 5 October 2007

Representation:
Counsel:

Electricity Generation Corporation:	Mr K J Martin QC with Mr N P Gentilli
Economic Regulation Authority:	Mr C G Colvin SC
DBNGP (WA) Transmission Pty Limited and DBNGP (WA) Nominees Pty Limited:	Mr J Thompson
Alinta Asset Management Pty Ltd:	Mr G Murphy with Mr M N Solomon

Solicitors:

Electricity Generation Corporation:	Jackson McDonald
Economic Regulation Authority:	Lavan Legal
DBNGP (WA) Transmission Pty Limited and DBNGP (WA) Nominees Pty Limited:	Allens Arthur Robinson
Alinta Asset Management Pty Ltd:	Blake Dawson Waldron

Cases referred to in Judgment

Re Michael; ex parte Epic Energy (WA) Nominees Pty Ltd (2002) 25 WAR 511

Application by Epic Energy South Australia Pty Ltd (2003) ATPR 41-932 at [20]

Re Ranger Uranium Mines Pty Ltd; ex parte Federated Miscellaneous Workers Union of Australia (1987) 163 CLR 656 at 666

Re Cram; ex parte Newcastle Wallsend Coal Co Pty Ltd (1987) 163 CLR 140 at 148–149

Legislation referred to in Judgment

Gas Pipelines Access (Western Australia) Act 1998

Background

1 On 15 December 2005 the Western Australian Economic Regulation Authority (**ERA**) published its own revised Access Arrangement for the Dampier to Bunbury Natural Gas Pipeline (**DBNGP**).

2 On 28 December 2005 the Electricity Generation Corporation (**EGC**) brought an application pursuant to section 39(1) of Schedule 1 (**the Law**) to the *Gas Pipelines Access (Western Australia) Act* 1998 (**the Act**) for review of the ERA's decision of 15 December 2005 (**the Application**).

3 Ground 16(a) of the Application states that:

> *"The Regulator erred in its finding of facts or the exercise of its discretion was incorrect or was unreasonable having regard to all of the circumstances in approving DBP's proposed non-capital costs when this is inconsistent with the objectives and sections of 2.24, 3.4, 3.5, 4, 7.1, 8, 10.1 and 10.2 of the Code in that:*
>
> *(a) it should have determined that Alinta Network Services Pty Ltd is a Service Provider for the purposes of the Code."*

4 Alinta Network Services Pty Ltd has since changed its name to Alinta Asset Management Pty Ltd (**AAM**), and all references in this decision will be to AAM.

5 During the course of oral submissions from the parties in relation to Ground 16(a) of the Application in February 2007, it emerged that AAM had not been aware of EGC's allegation that the ERA should have determined that AAM was a Service Provider for the purposes of the Code.

6 Submissions in relation to Ground 16(a) and also Ground 15 were suspended whilst AAM was notified of the content of those grounds. AAM subsequently indicated a desire to be heard in relation to those grounds and has been granted leave by the Board to be heard in respect of the matters.

7 By an application dated 1 March 2007, AAM sought, inter alia, orders that Ground 16(a) of the application be excluded from review by the Board pursuant to section 39(4) of Schedule 1 to the Act on the basis that the Board did not have jurisdiction to determine the subject matter of Ground 16(a).

Submissions of the Parties

8 AAM submitted, inter alia, that:

8.1 a determination as to who is a Service Provider within the meaning of the Code involves a judicial determination of fact and law;

8.2 the Regulator is an administrative body and has no power to "determine" that a person is a Service Provider for the purposes of the Code; and

8.3 the Gas Review Board is an administrative body with power to review an administrative decision and accordingly has no power to determine who is a Service Provider within the meaning of the Code.

8.4 Therefore, the contention that the ERA failed to determine authoritatively that AAM was a Service Provider within the meaning of the Code, or that

the Board should now so find, is legally meaningless. There has been no proper invocation of jurisdiction.

8.5 In the present case, the ERA decided (pursuant to section 2.42 of the Code) to draft and approve its own revisions to the Access Arrangement, instead of accepting the revisions proposed by DBNGP (WA) Transmission Pty Limited (**DBP**). That is the decision under review. Any view reached by the regulator as to who is a Service Provider of the covered pipeline within the meaning of the Code, is not a decision to approve the Regulator's own Access Arrangement or revisions as contemplated by section 39(1) of Schedule 1 to the Act (**Law**) and section 2.20(a), 2.23, 2.42 and 2.45 of the Code. Therefore, it is not a decision within the Board's power of review under section 39(1) of the Law.

8.6 Prior to drafting its own proposed Access Arrangement or revisions or embarking upon the approval process in respect of a proposed Access Arrangement or revisions submitted by a Service Provider, the Regulator must necessarily form a "non binding" view as to who are the Service Providers of the covered pipeline in question. The occasion for forming such an opinion arises when the Regulator is required to form the view as to whether it has received from the Service Providers a proposed Access Arrangement, or proposed revisions, as detailed in section 2 of the Code. If it does not receive a proposed Access Arrangement or proposed revisions from or on behalf of all of the Service Providers, then the Regulator will either be required to seek to compel, by injunction, the submission of a proposed Access Arrangement or revisions from all the Service Providers, or draft its own Access Arrangement or revisions so as to include the Service Providers who have not submitted an Access Arrangement or revisions.

8.7 The formation of the opinion by the Regulator occurs prior to any decision by the Regulator to approve an Access Arrangement or revisions. It is not itself a decision to approve an Access Arrangement or revisions and is therefore not the subject of an appeal pursuant to section 39(1) of the Law.

8.8 Further or alternatively, insofar as Ground 16(a) contends that in this case, not all Service Providers within the meaning of the Code submitted an Access Arrangement or revisions for approval by the Regulator, it necessarily involves the proposition that there has been no decision of the Regulator to approve an Access Arrangement or revisions within the meaning of section 2.20(a) or section 2.42 and there is therefore no reviewable decision under section 39(1) of the Law.

8.9 Further or alternatively, no error within the meaning of section 39(2) can arise where what is alleged is that the Access Arrangement or revisions should have identified different or additional Service Providers to those named in the approved Access Arrangement because the consultative process undertaken for the purpose of approval and the decision to approve itself involves a consideration and application of sections 3.1 - 3.20 and section 2.24 and 2.46 of the Code.

8.10 In relation to non capital costs, under section 8.36 and 8.37 of the Code, such costs exclude "any such costs that would not be incurred by a prudent

Service Provider". Accordingly, even if there was a "failure" to determine that AAM is a Service Provider within the meaning of the Code, this is not an error because the non capital costs for which allowance may properly be made are those of a hypothetical "prudent" Service Provider. Any "failure" to determine that AAM was a Service Provider within the meaning of the Code could not adversely affect the proper implementation of sections 8.36 and 8.37 and would not give rise to any error of fact or error in the exercise of discretion, as required under section 39(2) of Schedule 1.

8.11 The Energy Review Board, in an administrative review of an Access Arrangement or revisions to an Access Arrangement, may not, on the proper construction of section 38(9), simply "amend" the Access Arrangement so as to include other persons as named Service Providers in respect of that Access Arrangement. Any Access Arrangement is not to affect a Service Provider without that Service Provider's legitimate business interest being taken into account and being given weight as a fundamental element in assessing the arrangement: *Re Michael; ex parte Epic Energy (WA) Nominees Pty Ltd* (2002) 25 WAR 511.

8.12 If there are other Service Providers within the meaning of the Code that should be covered by an Access Arrangement, then that Access Arrangement or revisions affecting such Service Provider would need to have been formulated through the process set out in section 2 of the Code. That process did not happen in relation to AAM and cannot now happen.

8.13 Further, the decision the ERA took pursuant to section 2.42 of the Code to draft its own amended revisions to the Access Arrangement marks the end point of a process. In particular, decisions about who the Service Provider(s) is or are for the purposes of the Code were made with ERA a long time prior to its decision to draft its own amended revisions to the Access Arrangement under section 2.42 of the Code.

8.14 The Board is asked to review the revisions made by the ERA. The decision as to who the relevant Service Provider was is not part of that decision under review, since it was made well before the decision by the ERA to prepare its own revisions to the Access Arrangement and does not relate directly to the revisions of the Access Arrangement. It is therefore not open to the Board in a review conducted in section 39(1) to review or consider additional Service Providers due to limitations set out in section 39(5) of the Law.

8.15 If other persons were Service Providers within the meaning of the Code any Access Arrangement or revisions affecting them would need to have been formulated, developed and approved through the process under section 2 of the Code, ie advertising, consultation and the issuing of the Regulator's draft decision, final decision and further final decision. The Board's powers do not extend to, in effect, usurping the role of the Regulator and commencing the whole consultative and approval process under section 2 afresh or purporting to determine the issue without the necessary process having occurred.

9 EGC submitted, inter alia, that:

9.1 During the process of revising the Access Arrangement, EGC submitted to the ERA that AAM was a "Service Provider" for the purpose of the Code and should both lodge and be bound by the proposed revised Access Arrangement.

9.2 EGC's contention was based on its view that AAM was effectively the "operator" of the pipeline, as demonstrated by the Operating Services Agreement between DBP and AAM and, as such, should have been determined as a Service Provider within the meaning of section 10 of the Code. However, the Authority did not appear to have considered this issue at all in the draft decision or the final decision.

9.3 AAM is not a party to these proceedings and therefore cannot be bound by the outcome of these proceedings in the sense of being asked to do or not do something or by some declaration of the Board as to AAM's rights or obligations.

9.4 However, an issue has arisen in the proceedings as to the level of DBP's non capital costs approved by the ERA (with a corresponding impact on tariff levels under the revised Access Arrangement).

9.5 There is no conceptual difficulty under the Code with AAM being assessed as an additional Service Provider since an operator can be a Service Provider within the meaning of the Code.

9.6 Resolution by the Board as to whether AAM is a Service Provider or not will not be legally binding upon AAM but the outcome of a resolution of this issue could still have some ramifications for AAM in a purely commercial and pragmatic sense.

9.7 The Board could consider whether there was error by the ERA in failing to consider whether the reasonableness of costs were properly taken into account because there were profits associated with a non-arm's length transaction and because AAM was a Service Provider but this would not extend to being able to form any binding view that AAM was a Service Provider. The Board could not "determine" that AAM was a Service Provider in any binding sense but could do so for the purpose of considering whether there had been a failure to assess the reasonableness of certain costs properly.

9.8 The Regulator is required to determine or find who is a Service Provider within the meaning of the Code. Accordingly, it is something that the Board may also do as and when required as part of an application for review or appeal.

9.9 The identification of the Service Provider is an integral part of the task of drafting and approving an Access Arrangement, including for the purpose of section 2.42 of the Code.

9.10 If the Regulator does not form a correct view as to the identity of the Service Provider(s) for the purpose of sections 8.36 and 8.37 of the Code,

then the increased costs of subcontracting may be found by the Regulator to be "prudent" when they should not have been so assessed.

9.11 Section 38(8) and 38(9) of the Law can be exercised in relation to both Grounds 15 and 16 and the Board may use the powers conferred in those sections in connection with a review in relation to Grounds 15 and 16. There is no need to commence the whole consultative and approval process under section 2 of the Code afresh if a Service Provider has not been identified as such and should have been.

10 The ERA submitted, inter alia, that:

10.1 The Board does not have jurisdiction to review the process followed by the Regulator in gathering materials and receiving submissions that provided the basis upon which the Regulator's decision was reached - the power to review under section 39(1) of the Law assumes that procedural fairness has been extended in that process.

10.2 The Board is empowered to review the decision made on the basis that the materials and submissions were before the Regulator at the time. It does not have an inquisitorial role and takes everything outside of the decision itself at face value. It must accept that the Access Arrangement was submitted by or on behalf of a Service Provider as required by the Code and that the Regulator acted properly in the steps in took in requiring materials and information to be submitted.

10.3 If a party has a complaint concerning the process that has been followed in gathering the materials to be considered or whether the correct party has submitted them, then that is a matter to be raised in the Courts, not before the Board.

10.4 However, this does not mean that the Board does not have jurisdiction to scrutinise whether the Regulator's reasoning concerning non capital costs was in error because of the approach it took to reviewing costs subject to a services or management contract between the Service Provider and a third party. If the reasoning is shown to be in error and submissions were made in relation to that issue and the issue has also been raised as a ground of appeal, then the Board can review the decision having regard to the materials that were before the Regulator.

10.5 This is not the issue raised by Ground 16, which rather alleges that the Regulator erred in approving proposed non capital costs simply because it should have determined that AAM was a Service Provider. The Board's jurisdiction requires it to assume that the Access Arrangement was properly submitted for approval.

10.6 The submissions by the EGC suggest that the real complaint is that the Regulator should have obtained more information about the operating arrangement so as to subject it to "proper scrutiny".

10.7 It is not necessary for the Board to determine whether AAM is a Service Provider in order to determine whether the Regulator's reasoning as to non capital costs was in error. The issue concerns the reasonableness of those

costs, not the characterisation of the person who is providing them. Whether AAM was a Service Provider will not make those costs more or less reasonable. The issue is whether the costs were properly assessed on the material before the Board.

10.8 The EGC submissions are inconsistent - on the one hand, it agrees that the Board does not have jurisdiction to finally determine whether AAM is a Service Provider (in a legally binding sense) but on the other hand, invites the Board to make that determination and express the determination in some form of order.

10.9 If the Board did make an order determining the status of AAM as a Service Provider and amended the Access Arrangement accordingly, then the application of that order is not confined to the parties to the proceedings. It would affect all interested parties, particularly users of the DBNGP. Therefore, EGC's submission to the effect that an exercise of jurisdiction by the Board would only affect the parties before the Board should be rejected.

11 DBP supported the matters set out in the submissions made by AAM and repeated the submissions it made in its outline of submissions dated 20 February 2007 at paragraphs 4 to 20 concerning the general nature of Access Arrangements and the review process. In particular, DBP submitted that:

11.1 an Access Arrangement is a public instrument with binding effect beyond simply two parties – the owner and operator of the pipeline. It creates general rights and obligations which bind all Users and Prospective Users of a covered pipeline such as the DBNGP;

11.2 Access Arrangements are determined by publicly appointed economically experienced regulators after extensive public consultation;

11.3 Access Arrangements are subject to limited forms of review by the Board; and

11.4 it is not for the Board to attempt to determine an Access Arrangement itself because:

11.4.1 the Board will not necessarily consider submissions to it from all parties interested in the disputed matter before the Board;

11.4.2 the Board will not necessarily have before it all of the submissions made to the Regulator upon the matter in dispute, as the submissions before the Board are selected by the parties appearing;

11.4.3 the Board will not publicly consult about any proposed redrafting of the Access Arrangement, unlike the Regulator; and

11.4.4 the Board is not intended to be the last stage of a process of determining an Access Arrangement - it is intended to be a tribunal of review.

11.5 DBP also submitted that if AAM is a Service Provider and has failed to submit an Access Arrangement, then the Regulator must draft and approve

its own Access Arrangement for AAM pursuant to section 2.23 of the Code. If the Regulator does not do this, then an interested person could apply for an order for mandamus compelling the Regulator to do so.

11.6 On the other hand, if the Regulator drafted an Access Arrangement for AAM on the basis of its belief that AAM was a Service Provider, then AAM would have a right of appeal under section 39(1)(b) of the Law.

11.7 EGC proposes that the Board has the power to bypass the structure of the Code and impose obligations on a Service Provider directly on AAM. If the Board were to amend the revised Access Arrangement to make AAM a Service Provider, this would bind AAM because the Access Arrangement is a public instrument.

Relevant provisions of the Code

12 The preamble to section 2 of the Code provides:

> *"Where a Pipeline is Covered, this section of the Code requires a Service Provider to establish an Access Arrangement to the satisfaction of the Relevant Regulator for that Covered Pipeline. An Access Arrangement is a statement of the policies and the basic terms and conditions which apply to third party access to a covered pipeline.*
>
> ...
>
> *The process whereby a compulsory Access Arrangement is approved can be summarised as follows:*
>
> - *The Service Provider submits a proposed Access Arrangement, together with the Access Arrangement Information, to the Relevant Regulator.*
> - *The Relevant Regulator may require the service provide to amend and resubmit the Access Arrangement Information.*
> - *The Relevant Regulator publishes a public notice and seeks submissions on the application.*
> - *The Relevant Regulator considers the submissions, issues a draft decision and then, after considering any submissions received on the draft, makes a final decision which either:*
>   - *approves the proposed Access Arrangement; or*
>   - *does not approve the proposed Access Arrangement and states the revisions to the Access Arrangement which would be required before the Relevant Regulator would approve it; or*
>   - *approves a revised Access Arrangement submitted by the Service Provider which incorporates amendments specified by the Relevant Regulator in its draft decision.*
> - *If the Relevant Regulator does not approve the Access Arrangement, the Service Provider may propose an amended Access Arrangement which incorporates the revisions required by the Relevant Regulator. If the Service Provider does not do so, the Relevant Regulator can impose its own Access Arrangement.*

- *The Gas Pipeline Access Law provides a mechanism for the review of a decision by the Relevant Regulator to impose an Access Arrangement.*

...

An Access Arrangement must include a date for a review. ... If revisions to the Access Arrangement are proposed, a process of public consultation and approval by the Relevant Regulator, similar to that followed for approving a compulsory Access Arrangement, must be followed."

13 The term "*Service Provider*" is defined in the Code to have the same meaning as in the Law. The Law, in turn, defines "*Service Provider*" as follows:

> *"In relation to a pipeline or proposed pipeline, means the person who is, or is to be, the owner or operator of the whole or any part of the pipeline or proposed pipeline*".

14 It is helpful to set out the basic structure of the review process for the development of Access Arrangements and revisions to Access Arrangements set out in the Code.

15 Section 2.2 of the Code requires Service Providers (in respect of covered pipelines) to submit a proposed Access Arrangement, together with applicable Access Arrangement information to the relevant regulator within a certain timeframe.

16 Section 2.10 of the Code provides that after receiving a proposed Access Arrangement, the relevant regulator must:

16.1 inform each person known to the relevant regulator who the relevant regulator believes has a sufficient interest in the matter that it has received the proposed Access Arrangement and Access Arrangement information; and

16.2 publish a notice in a national daily newspaper which at least:

16.2.1 describes the covered pipeline to which the proposed Access Arrangement relates;

16.2.2 states how copies of the proposed Access Arrangement and the Access Arrangement information may be obtained; and

16.2.3 requests submissions by a date specified in the notice.

17 Section 2.12 provides that the relevant regulator must consider any submissions received by the date specified in the notice published under section 2.10(b) and it may (but is not obliged) to consider any submissions received after that date.

18 After consideration of submissions received by the date specified in the notice published under section 2.10(b)(iii), the relevant regulator must issue a draft decision which either proposes to approve the Access Arrangement or proposes not to approve the Access Arrangement and states the amendments which would have to be made to the Access Arrangement in order for the relevant regulator to approve it (see section 2.13 of the Code).

19 Pursuant to section 2.15A, the Service Provider may, after the date of the draft decision, resubmit the Access Arrangement, revised so as to incorporate or

substantially incorporate the amendments specified by the relevant regulator in its draft decision, or otherwise address the matters the relevant regulator identified in its draft decision as being the reasons for requiring the amendments specified in its draft decision.

20 Pursuant to section 2.16, the relevant regulator then issues a final decision that:

20.1 approves the Access Arrangement originally proposed for the Service Provider; or

20.2 does not approve the Access Arrangement and states the amendments the relevant regulator requires in order to approve it.

21 If the relevant regulator decides not to approve the Access Arrangement the Service Provider must submit a revised Access Arrangement to the relevant regulator by a specified date (section 2.18).

22 By section 2.19, if the Service Provider submits a revised Access Arrangement by the date specified, then the relevant regulator must issue a further final decision that either approves the revised Access Arrangement or does not approve the revised Access Arrangement.

23 If the Service Provider does not submit a revised Access Arrangement or the relevant regulator does not approve the revised Access Arrangement submitted by the Service Provider, then the relevant regulator must draft and approve its own Access Arrangement instead of the Access Arrangement proposed by the Service Provider (or in the case of an Access Arrangement submitted voluntarily, not approve the Access Arrangement) (section 2.20).

24 Section 2.24 of the Code states that the relevant regulator may approve a proposed Access Arrangement only if it is satisfied that the Access Arrangement contains the elements and satisfies the principles set out in sections 3.1 to 3.20. Section 2.24 of the Code also requires the relevant regulator to take into account certain specified matters at 2.24(a) to (g).

25 Sections 2.28 to 2.48 of the Code set out the procedure that the relevant regulator must follow in relation to the review of an Access Arrangement.

26 In essence, pursuant to section 2.28 of the Code, by the date provided for in the Access Arrangement, the Service Provider must submit to the relevant regulator proposed revisions to the Access Arrangement, together with the applicable Access Arrangement information.

27 By section 2.31, after receiving a proposed revision to an Access Arrangement, the relevant regulator must:

27.1 inform each person known to the relevant regulator who the relevant regulator believes has a sufficient interest in the matter that it has received the proposed revision; and

27.2 publish a notice in a national daily newspaper to the same effect as that described above.

28 Thereafter, a very similar process applies in relation to proposed revised Access Arrangements as is applicable to initial Access Arrangements.

29 By section 2.42, after the issue of a further final decision, if the Service Provider does not submit amended revisions to the Access Arrangement by the date specified under section 2.38(a)(ii) or (b)(ii), or the relevant regulator does not approve the amended revisions to the Access Arrangement under section 2.41, the relevant regulator must draft and approve its own amended revisions to the Access Arrangement, instead of the revisions proposed by the Service Provider.

30 In the present case, the relevant regulator did not approve the amended revisions to the Access Arrangement presented by DBP and drafted and approved its own amended revisions to the Access Arrangement.

31 It is that revised Access Arrangement amended and approved by the regulator itself, that is the subject of a review in these proceedings.

32 Sections 10.1 and 10.2 of the Code make it plain that there can be more than one Service Provider in connection with a covered pipeline. Further, the obligation to submit an Access Arrangement can be satisfied by one Service Provider on behalf of itself and all other Service Providers.

10.1 (a) This section 10.1 applies if there is more than one Service Provider in connection with a Covered Pipeline, including if:

(i) the Covered Pipeline is owned or operated by two or more persons as a joint venture or partnership; or

(ii) the Covered Pipeline is owned and operated by different persons; or

(iii) a Covered Pipeline is legally owned by a person or persons on trust for others.

In such a case each Service Provider in connection with the Covered Pipeline is referred to in this section 10.1 as a "Participant".

(b) If this Code requires or permits something to be done by the Service Provider, that thing may be done by one of the Participants on behalf of all the Participants. So, for example, a proposed Access Arrangement may be submitted under section 2.2 by one Participant on behalf of all Participants.

(c) If a provision of this Code refers to the Service Provider bearing any costs, the provision applies as if the provision referred to any of the Participants bearing any costs.

(d) If a provision of this Code, other than section 4, refers to the Service Provider doing something, the provision applies as if the provision referred to one or more of the Participants doing the thing on behalf of all the Participants.

10.2 Where:

(a) there is more than one Service Provider in connection with a Covered Pipeline;

(b) one is the owner and another is the operator; and

(c) *responsibility for complying with the obligations imposed by this Code on the Service Provider is allocated among them by their Access Arrangements or their Access Arrangement,*

each Service Provider is responsible for complying with the obligations allocated to it.

33 The Access Arrangement information which is required to be provided to the Regulator under section 2.2 must contain the information contained in Attachment A (see section 2.7). Attachment A requires the disclosure of costs and other information by all persons who are Service Providers within the meaning of the Code.

34 Sections 2.36 and 2.39 of the Code require the Regulator to provide certain information and notices to the Service Provider. In order to be able to do this, it is necessary for the Service Provider(s) to be identified.

35 It is also necessary to identify the Service Providers in order for the Regulator to be able to properly assess the proposed Access Arrangement for compliance with section 2.24(a) and (b) and section 8 of the Code.

36 It is clear from the provisions of the Code that the consultative process described in section 2 for both initial Access Arrangements and all subsequent revisions to Access Arrangements can only operate properly if all of the Service Providers are identified.

Relevant provisions of the Law

37 This is an appeal pursuant to section 39(1)(a) of the Law which provides as follows:

> *"If the relevant Regulator makes a decision under the Code to approve the Regulator's own access arrangement or the Regulator's own revisions of an access arrangement:*
>
> *(a) in place of an access arrangement or revision submitted for approval by a service provider; or*
>
> *(b) because a service provider fails to submit an access arrangement or revisions as required by the Code,*
>
> *the following persons may apply to the relevant appeals body for a review of the decision:*
>
> *(c) the service provider;*
>
> *(d) a person who made a submission to the relevant Regulator on the access arrangement or revisions submitted by the service provider or drafted by the Regulator and whose interests are adversely affected by the decision."*

38 Section 39(2) provides:

> *"An application under this section:*
>
> *(a) may be made only on the grounds, to be established by the applicant:*
>
> *(i) of an error in the relevant Regulator's finding of facts; or*
>
> *(ii) that the exercise of the relevant Regulator's discretion was incorrect or was unreasonable having regard to all the circumstances; or*
>
> *(iii) that the occasion for exercising the discretion did not arise;*
>
> *and*

(b) *in the case of an application under subsection (1), may not raise any matter that was not raised in submissions to the relevant Regulator before the decision was made."*

39 Section 39(4) provides:

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

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

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

(c) *the amount of money involved;*

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

40 Section 39(5) provides that:

"The relevant appeals body, in reviewing a decision under this section, must not consider any matter other than:

(a) *the application for review and submissions in support of the application (other than, in the case of an application under subsection (1), any matter not raised in submissions to the relevant regulator before the decision was made);*

(ab) *the relevant access arrangement or proposed access arrangement or revision or proposed revision of an access arrangement, together with any related access arrangement information or proposed access arrangement information;*

...

(ad) *any written submissions made to the relevant regulator before the decision was made;*

...

(c) *any reports relied on by the relevant regulator before the decision was made;*

(d) *any draft decision, and any submissions on any draft decision made to the relevant regulator;*

(e) *the decision of the relevant regulator and the written record of it and any reasons for it;*

(f) *the transcript (if any) of any hearing conducted by the relevant regulator."*

41 It is clear that the nature of the review conducted by the Board is confined to a merits review for the correction of error by the Regulator: *Application by Epic Energy South Australia Pty Ltd* (2003) ATPR 41-932 at [20]. The review is not a hearing de novo.

Reasoning

42 In my view it is clear that neither the Regulator nor the Energy Review Board have power to authoritatively "determine" in a binding legal sense, that a person is a Service Provider for the purposes of the Code: *Re Ranger Uranium Mines Pty Ltd; ex parte Federated Miscellaneous Workers Union of Australia* (1987) 163 CLR 656 at 666; *Re Cram; ex parte Newcastle Wallsend Coal Co Pty Ltd* (1987) 163 CLR 140 at 148–149. I accept the submission by AAM that a determination as to who is a

Service Provider within the meaning of the Code involves a judicial determination of fact and law.

43 In that sense any exercise engaged in by the Board to "determine" that AAM is a Service Provider is, in a legal sense, meaningless in that such a decision could not operate to legally bind AAM as a Service Provider or act to impose legally binding obligations on AAM as a Service Provider. Nor would it entitle third parties to treat AAM as a Service Provider.

44 Further, the provisions of the Code recited above set out a detailed process for taking into account the interests of persons affected by an Access Arrangement, including those of Service Providers. Third parties who may be affected by the inclusion (or exclusion) of a person as a Service Provider are entitled to make submissions and have those submissions taken into account by the Regulator.

45 The Regulator is required to take into account a Service Provider's legitimate business interests and give those interests weight as a fundamental element in assessing an Access Arrangement (or revisions to such an Access Arrangement): *Re Michael; ex parte Epic Energy (WA) Nominees Pty Ltd* (supra).

46 Where a person is not identified as a Service Provider in revisions to an Access Arrangement submitted for approval by the Regulator, then that person's legitimate business interests will not have been the subject of submissions or proper consideration as required by the Code during the process of approval. This consideration suggests that the Board was not intended to have jurisdiction to add a party as a Service Provider pursuant to a review under section 39(1) of the Law.

47 EGC, however, submitted that the Board had extensive powers pursuant to section 38(8) and section 38(9) of the Law and that pursuant to those powers it could do everything that the Regulator could do, including conducting an examination of the issue of who was a Service Provider and (presumably) running a process similar to that described in section 2.28 to section 2.42 of the Code. EGC submitted that these powers gave the Board the ability to call for reports and conduct an appropriate investigation.

48 EGC also submitted that the Board could amend the Access Arrangement to include AAM as a Service Provider and that the various rights and obligations contained in the Code applicable to Service Providers would then operate in relation to AAM, including the ring fencing obligations, obligations to disclose accounts, etc.

49 In my view, there are a number of difficulties with that submission. Those difficulties stem from section 39(5) of the Law which limits the material that the Board can have regard to in the course of a review under section 39(1) to, essentially, the material that was before the Regulator at or before the time the decision under review was made.

50 In the present case, the Regulator does not appear to have engaged in any discussions or investigation of whether AAM was a Service Provider or not. There is no mention or discussion of the issue in the draft decision, the final decision or the further final decision. The process of revising the Access Arrangement seems to have been commenced by DBNGP (WA) Transmission Pty Limited submitting proposed revisions to the Access Arrangement. It seems implicit in the process that

the Regulator only identified one Service Provider, namely DBNGP (WA) Transmission Pty Limited.

51 The only material before the Board that would appear to bear on the issue is the submission to the Regulator from EGC that AAM was a Service Provider and the Operating Services Agreement pursuant to which AAM provided operation and management services in respect of the Dampier to Bunbury Natural Gas Pipeline (**OSA**). It would appear that the OSA provides some evidence in support of a claim that AAM is a Service Provider within the meaning of the Code. However, there is no evidence before the Board that the issue was fully canvassed by the Regulator and the Board has no other material before it upon which to base a decision. In particular, AAM does not appear to have been heard on the issue to date and does not appear to have been asked by the Regulator to provide relevant material that might bear on the question. Additionally, third parties who may have an interest in the issue do not appear to have been given an opportunity to be heard on the issue.

52 If the Board were to decide to proceed to a determination as to whether or not AAM was a Service Provider it would need, pursuant to the rules of procedural fairness, to give AAM and other interested parties an opportunity to present material and be heard on the question. As soon as it heard those submissions or considered any additional material the Board would be in breach of the limitations set out in section 39(5) of the Law.

53 There is also the question of compliance with the procedure set down in section 2 of the Code for the revision of Access Arrangements. If the Board took the view that it was entitled to exercise the powers of the Regulator contained in section 2 of the Code and undertook the process described in the Code in sections 2.28 to 2.42, it is likely that additional material would be generated which the Board could not consider pursuant to section 39(5) of the Law. Such a consideration suggests that it was not intended that sections 38(8) and 38(9) of the Law were to be given such a broad construction as to allow the Board to exercise those particular powers of the Regulator. Such a role would appear to be inconsistent with the scheme of a review under section 39(1) which appears to envisage a limited review for the purpose of correction of error conducted only on the basis of materials before the Regulator at the time he made the decision under review.

54 Having submitted to the Regulator that AAM was a Service Provider it was open to EGC after delivery of the final decision or the further final decision (and publication of the Access Arrangement) to seek to compel the Regulator to deal with the issue through an application for prerogative and other relief in the Supreme Court of Western Australia. In my view, that would have been the appropriate course of action in the present case if EGC wished to compel the Regulator to deal with the question of whether AAM was a Service Provider or not.

55 For these reasons, I have come to the view that the Board does not have jurisdiction in these proceedings to determine that AAM is a Service Provider within the meaning of the Code and for the purposes of the revised Access Arrangement.

Section 39(4) of the Law

56 Pursuant to section 39(4)(a) of the Law the Board is entitled to exclude from review certain matters having regard to, inter alia:

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

...

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

57 It emerged during oral submissions both at the substantive hearing in February 2007 and on 27 July 2007 that the thrust of the attack behind Ground 16(a) was an attack on the Regulator's assessment and approval of DBP's proposed non-capital costs. In particular, the issue is whether the Regulator gave sufficient scrutiny as to whether those costs were reasonable or not.

58 The Board does not need to determine whether or not AAM was a Service Provider in order to scrutinise the Regulator's handling of the non-capital costs issue. Whether or not AAM was a Service Provider, the Board is still able to make an assessment (based on the materials before the Regulator) as to whether the non-capital costs were reasonable or not and, in fact, it is required to do so when considering Ground 15 of the Application.

59 In my view the Board is entitled to exclude Ground 16(a) from further consideration pursuant to section 39(4)(d) of the Law.

60 Section 39(4)(a) would also justify exclusion of Ground 16(a) from further consideration on the basis that it does not appear that the Board has all of the information before it that it would require in order to make a proper determination whilst at the same time giving interested parties an opportunity to be heard on the issue. In my view, there is no real likelihood of the decision being varied or set aside on the basis of the matters raised at paragraph 16(a) of the Application because the Board does not appear to have all of the relevant information before it that it would require to make a proper decision (even if it did have jurisdiction).

61 EGC has submitted that if AAM were to be found to be a Service Provider then it could be compelled to divulge additional information which would assist in the scrutiny of the non-capital costs. However, as pointed out above, this would lead the Board to act in contravention of section 39(5) of the Law and is therefore not a course of action open to the Board. The Board is bound to proceed on the materials that were before the Regulator.

62 For the reasons at paragraphs 57 to 61, the Board is of the view that Ground 16(a) ought to be excluded from consideration pursuant to section 39(4)(a), alternatively, section 39(4)(d) of the Law.

Decision

63 Ground 16(a) of the Application is excluded from review by the Energy Review Board on the basis that the Board does not have jurisdiction to determine the subject matter of Ground 16(a); alternatively on the basis of section 39(4)(a) and/or (d) of the Law.

Dated the 5th day of October 2007.

R M EDEL
PRESIDING MEMBER
WESTERN AUSTRALIAN ENERGY REVIEW BOARD
APPEAL NO 1 OF 2005