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Mr Russell Phillips
Acting General Manager
Regulatory Affairs - Gas
Australian Competition and Consumer Commission
PO Box 1199
Dickson ACT 2602

Dear Mr Phillips

Duke Energy International (DEI) welcomes the opportunity to comment on the issues paper released by the Australian Competition and Consumer Commission (ACCC) on 11 November 2002 in which it is seeking comments on two issues relating to East Australia Pipeline Limited's Access Arrangement for the Moomba to Sydney Pipeline (MSP) system.

Balancing arrangements

DEI does not wish to raise any issues with respect to the proposed balancing arrangements for the MSP.

Epic Decision

The Western Australian Supreme Court decision in respect of Epic's Dampier to Bunbury Natural Gas Pipeline (the Epic Decision) addressed a number of critical issues in the interpretation and application of the National Third Party Access Code for Natural Gas Pipeline Systems (the Code). The Epic Decision has significant implications for the regulation of pipeline assets in Australia.

A significant finding of the Epic decision was the requirement for the relevant regulator to take into account, as fundamental elements, the factors contained in s2.24 of the Code in determining reference tariffs and reference tariff policy. Of particular relevance in the Epic decision was s2.24(a), which states that the regulator must consider the service provider's legitimate business interests and investment in the covered pipeline. It also challenged the traditionally held view that the initial capital base (ICB) should necessarily lie between the depreciated actual cost and the depreciated optimised replacement cost values.

In the light of the Epic Decision, DEI believes the ACCC has erred in its application of the Code, in particular in its determination of the ICB. Specifically, in determining the ICB, the ACCC:

- incorrectly treated the depreciated optimised replacement cost valuation as a maximum; and
- failed to give adequate weight to EAPL's legitimate business interests.

Accordingly, the ACCC should undertake a full reassessment of the ICB.

DEI understands that, after considering submissions arising from the issues paper, the ACCC's intended approach is to release its final decision. DEI strongly believes that a more appropriate approach would be for the ACCC to release a further draft decision prior to the release of a final decision. DEI considers that this approach is preferable as:

- the significant revisions made in the revised EAPL Access Arrangement on 30 April 2002 have meant that the ACCC's previous draft decision of 19 December 2000 is now largely redundant;
- the Epic Decision will have important ramifications for the interpretation of the Code and decisions made by regulators; and
- it would afford interested parties the opportunity to consider and comment on the ACCC's interpretation and application of the Epic Decision, prior to it reaching its Final Decision.

If you have any further queries, please do not hesitate to call me on (03) 9685 1061.

Yours sincerely

Stephen Livens
Senior Regulatory Analyst