BALLERA TO WALLUMBILLA NATURAL GAS PIPELINE ("SWQP")

PROPOSED ACCESS ARRANGEMENT UNDER THE NATIONAL ACCESS CODE

FINAL DECISION SUBMISSION #2 (FDS2) CODE COMPLIANCE

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1. Introduction

1.1 The Regulator released its final decision in relation to the proposed access arrangement for the Ballera to Wallumbilla Natural Gas Pipeline in South-West Queensland ("SWQP") on 28 November 2001.

1.2 In the final decision, the Regulator requires Epic Energy to make 8 amendments or changes in the nature of amendments to the proposed access arrangement before it will be approved.

1.3 Epic Energy submits that the final decision (or at the very least, certain amendments contained in it) manifests a failure by the Regulator to properly construe the provisions of the Code.

1.4 This misconstruction arises in 2 respects:

- Firstly the Regulator has sought to exercise its discretion under certain sections of the Code, where by virtue of the *Gas Pipelines Access (Queensland) Act 1998* ("Act"), it has no power to do so.
- Secondly, the Regulator has misconstrued the role that the factors, principles and considerations listed in section 2.24 of the Code have in both the interpretation of the applicable sections of the Code and, as a result, in the Regulator's assessment of the access arrangement for the SWQP.

1.5 Accordingly, this papers serves two purposes:

- It outlines Epic Energy's views on the sections of the Code that are able to be taken into account by the Regulator when assessing the access arrangement for the SWQP. Although it should be noted that:
  - Epic Energy has already made submissions in this regard to the Regulator, particularly in relation to amendment 3.8 contained in the final decision[1]; and
  - this issue is currently the subject of an application before the Australian Competition Tribunal (the "DEI Application), so far as it relates to the Regulator's powers under section 3.17 of the Code[2].
- It outlines Epic Energy's views on the importance of the factors, considerations and principles in section 2.24 in the Regulator's assessment of the access arrangement. It should also be noted that in August 2001, Epic Energy commenced legal proceedings in the Full Court of the Supreme Court of Western Australia seeking to set

[1] Epic Energy Submissions to the Regulator, dated 16 October 2001

[2] Application by DEI Queensland Pipeline Pty Ltd, Duke Queensland Pipeline Pty Ltd and Duke Australia Operations Pty Ltd concerning an access arrangement for the Wallumbilla to Rockhampton Pipeline System – File No. 1of 2001

aside the Western Australian Independent Gas Access Regulator's draft decision on the access arrangement for the Dampier to Bunbury Natural Gas Pipeline ("legal challenge")[3]. A central ground to Epic Energy's legal challenge is that the relevant regulator misconstrued the Code, particularly in relation to the role that section 2.24 of the Code has to play in the assessment of an access arrangement under the Code.

1.6 It should be noted that the arguments put forward in this submission are in addition to arguments raised by Epic Energy in its previous submissions to the Regulator and therefore this submission should be read in conjunction with the prior submissions.

1.7 Furthermore, given that there are other fora where some of the issues the subject of this submission are being considered and will shortly be determined, this submission sets out valid grounds for why the Regulator should await the outcome of these decisions before progressing further with its assessment of the access arrangement for the SWQP.

1.8 As a final preliminary matter, Epic Energy requests that the Regulator exercises its discretion and considers this submission as part of its assessment of the access arrangement for the SWQP.

[3] In the matter of an application for a writ of certiorari, a writ of prohibition and a writ of mandamus against Dr Ken Michael AM, the Independent Gas Pipelines Access Regulator in Western Australia – CIV No. 2166 of 2001

2. The Code as it applies to the SWQP Access Arrangement

2.1 In its final decision, the Regulator seeks to outline the regulatory framework that applies to the assessment of the SWQP[4].

2.2 Epic Energy submits that an understanding of the regulatory framework that applies to the assessment of the SWQP access arrangement is critical to assessing the appropriateness of amendments A3.1, A3.7 and A3.8 (at the very least) in the final decision.

2.3 In summary, the application of the Code to the assessment of the access arrangement of the SWQP is modified by the existence of section 58 of the Act.

2.4 In essence, the effect of section 58 of the Act is that the first access arrangement for the SWQP (among other pipelines) is derogated from complying with sections 3.3, 3.4, 3.5, 3.17, 3.18 and 3.19 of the Code:

2.5 Accordingly, an access arrangement must only contain the elements and satisfy the principles set out in the following sections of the Code:

- Services policy – sections 3.1 and 3.2
- Terms and conditions – section 3.6
- Capacity management policy – sections 3.7 and 3.8
- Trading policy – sections 3.9 to 3.11
- Queuing policy – sections 3.12 to 3.15

2.6 Therefore, the sections referred to in paragraph 2.4 above (the "derogations") have no role to play in the assessment of the SWQP access arrangement (or the access arrangements for any of the derogated pipelines for that matter).

2.7 With that interpretation of the legal framework in mind, the appropriateness and validity of each of the amendments referred to in paragraph 2.2 of this submission needs to be analysed individually.

Effect of Regulatory Framework on Amendment A3.8

2.8 Amendment A3.8 in the final decision requires Epic Energy to include a list of specific major events that will trigger a review of the non-tariff elements of the access arrangement.

2.9 In the final decision, the Regulator argues the power to require this amendment is found in section 3.17 of the Code. It argues that section

[4] ACCC Final Decision on the access arrangement proposed by Epic Energy for the SWQP, dated 28 November 2001, pages 1, 2, 10, 11 and 24 to 28

3.17 of the Code still has a role to play in the assessment of the access arrangement for the SWQP - albeit a qualified one.

2.10 It interprets section 3.17 of the Code as having 2 independent limbs. The first limb deals with what the Regulator may require when deciding whether to approve the revisions submission date and the revisions commencement date. In this regard, the ACCC accepts that it has no role to play by virtue of section 58 of the Act.

2.11 However, it then argues that the second limb deals with what the Regulator may require when "making its decision on an access arrangement". This limb, it argues, is independent of the operation of the first limb of section 3.17 of the Code. The Regulator concludes that section 58 of the Act does not affect the operation of this limb of section 3.17 of the Code.

2.12 Epic Energy has, it considers, adequately dealt with this argument in its submission of 16 October 2001.

2.13 Having said that however, the Regulator's conclusion is based on legal advice that states that there is no basis for concluding that the inclusion of revisions submission and revisions commencement dates in a tariff arrangement approved under section 58 of the Act excludes the whole of the power of the Regulator under section 3.17 (particularly under the second limb of section 3.17), to require that specific events be defined that trigger an obligation to submit revisions to an access arrangement prior to the revisions submission date. It goes on to state that were such a result intended to follow from the operation of section 58 of the Act, it could easily have been expressly provided for.

2.14 Epic Energy considers that it was intended that section 58 of the Act had that result. The Regulator's argument ignores an important piece of information which points to the proper interpretation of both section 58 of the Act and section 3.17 of the Code being that it was the intention of the Queensland parliament that section 3.17 of the Code had no role to play in the Regulator's assessment of the access arrangements for the derogated pipelines (including the SWQP). That is the State of Queensland, in its submission to the Regulator, confirms that it was not the intention that section 3.17 of the Code had a role to play in the Regulator's assessment of the access arrangement. While it is accepted that a submission can not ordinarily be used as a tool for statutory interpretation purposes, it offers an invaluable insight into the State's intentions.

2.15 This argument is given further force and effect by the fact that the State was a party to the intergovernmental agreement that contained the derogations. The aim of the intergovernmental agreement was to establish a national 3rd party access framework that:

- facilitates the development and operation of a national market for gas
- prevents abuse of monopoly power
- promotes a competitive market for natural gas pipelines on conditions that are fair and reasonable for bother users and the service provider
- provides for resolution of disputes

2.16 The concerns that have caused the Regulator to include amendment A3.8 in the final decision therefore appear on their face to be at odds with what the intergovernmental agreement was attempting to achieve. If the State, by becoming a party to the intergovernmental agreement, was attempting to promote a competitive market for gas pipelines on conditions that are fair and reasonable for both users and the service provider, then clearly it could not have considered it consistent to allow that any aspect of the access arrangement could be reopened prior to the revisions commencement date.

2.17 It is also noted that in reaching the conclusion it has in relation to its power under section 3.17 of the Code, the Regulator dismisses an argument contained in the submissions of Duke Energy International (in relation to the assessment of the QGP access arrangement in respect of a similar amendment), the Queensland Government and Epic Energy that even if there were a second limb to section 3.17 of the Code whose operation was not nullified by section 58 of the Act, it was not intended to apply to enable the Regulator to require the inclusion of non tariff trigger events.

2.18 The thrust of this argument in these submissions is that even if one were to accept that section 3.17 of the Code has 2 limbs (which Epic Energy does not accept), the second limb only can be utilised having regard to the principles in section 8.1 of the Code. But because these principles are tariff related principles and the Regulator has no role to play in the assessment of tariff related aspects of this access arrangement (because of section 58 of the Act), the second limb of section 3.17 can not be relied upon to require an amendment of the kind contained in amendment A3.8 of the final decision.

2.19 The Regulator dismisses this argument on the basis of its legal advice which concludes that the section 8.1 objectives, “although framed as objectives to be achieved in designing a reference tariff and a reference tariff policy, are with one exception generic in their content so as to be readily applied to designing other aspects of an access arrangement”.

2.20 Clearly the objectives in section 8.1 are tariff related. Epic Energy has already made submissions in this respect to the regulator. Epic Energy also seeks to rely upon the submissions of Duke Energy International and its legal advice on this issue, copies of which have already been

provided to the Regulator as part of the regulatory approval process for the Queensland Gas Pipeline.

2.21 It is noted that the DEI Application seeks to challenge the ability of the Regulator to impose in the access arrangement for the Queensland Gas Pipeline an amendment almost identical to the one contained in amendment A3.8 of the final decision for the SWQP. It is also noted that Epic Energy has been granted leave to appear in the application on the basis that the outcome will have a direct relevance to the assessment of the access arrangement for the SWQP.

2.22 Given the direct relevance that the outcome of the DEI Application will have on the SWQP access arrangement (given the inclusion of amendment A3.8 in the final decision), Epic Energy has unsuccessfully requested that the Regulator delay its assessment of the access arrangement until the outcome of the DEI Application is known. Epic Energy reiterates its request, particularly given that the DEI Application is to be heard by the Tribunal in only a few weeks on 8 and 9 April 2002 and any prejudice that a party may suffer as a result of the delay in the Regulator's further final decision on the SWQP access arrangement (which Epic Energy can not envisage) will be outweighed by the certainty that it will afford to the regulatory approval process itself, not to mention the costs that both Epic Energy and the Regulator may have to incur in potentially unnecessary applications under the GPAL.

Effect of Regulatory Framework on Amendment A3.1

2.23 Epic Energy reiterates its comments made in its submissions dated 13 July and 16 October 2001 in respect of this amendment.

Effect of Regulatory Framework on Amendment A3.7

2.24 Epic Energy reiterates its comments made in previous submissions in relation to this amendment.

3. Construction of the Code – Section 2.24

3.1 Given the arguments raised in section 2 of this paper, the Regulator's role in assessing access arrangements for the pipelines identified in sections 57, 58 and 59 of the *Gas Pipelines Access (Queensland) Act 1998* differs to the role that the Regulator would normally play when assessing an access arrangement under the Code.

3.2 Having said that, the Regulator, in its final decision, acknowledges that:

"In considering whether an access arrangement complies with the Code, the regulator must (pursuant to section [2.24] of the Code) take into account:

- *the service provider's legitimate business interests and investment in the pipeline;*
- *firm and binding contractual obligations of the service provider or other persons (or both) already using the covered pipeline;*
- *the operational and technical requirements necessary for the safe and reliable operation of the covered pipeline;*
- *the economically efficient operation of the covered pipeline;*
- *the public interest, including the public interest in having competition in markets (whether or not in Australia);*
- *the interests of users and prospective users; and*
- *any other matters that the Commission considers are relevant."*[5]

3.3 For the purposes of this submission, this list of considerations will be referred to as the "section 2.24 factors".

3.4 Epic Energy contends that the section 2.24 factors are the paramount and overriding factors to be taken into account and balanced by the Regulator when assessing an access arrangement. They are to be accorded fundamental significance by the regulator in assessing whether a proposed access arrangement, including a proposed reference tariff, fulfils the principles in sections 3.1, 3.2, 3.6 to 3.16 and 3.20 of the Code and should be approved.

3.5 In August 2001, Epic Energy commenced legal proceedings in the Full Court of the Supreme Court of Western Australia seeking to set aside the Western Australian Independent Gas Access Regulator's draft decision on the access arrangement for the Dampier to Bunbury Natural Gas Pipeline ("legal challenge"). A central ground to Epic Energy's legal challenge is that the relevant regulator misconstrued the Code, particularly in relation to the role of the section 2.24 factors.

[5] ACCC Final Decision on the SWQP Access Arrangement, dated 28 November 2001, page 5

3.6 The legal challenge therefore raises important issues about the construction of the Code.

3.7 Epic Energy's application was heard by the Full Court in November 2001 and a decision of the Court is expected to be handed down soon.

3.8 Epic Energy considers that if the Court accepts Epic Energy's grounds of review, the decision will have direct relevance to the Regulator's assessment of not only the SWQP access arrangement but all other access arrangements to be assessed under the Code.

3.9 It is important therefore to reassess some of the particular amendments in the final decision in light of the paramount role that, Epic Energy contends, section 2.24 of the Code has to play in the Regulator's assessment of an access arrangement.

Amendment A3.8

3.10 It is important that when assessing an access arrangement, it must be assessed as a package. Therefore there is a direct relationship between all elements of an access arrangement. This is particularly the case in respect of the terms and conditions of an access arrangement, the services policy and the reference tariff policy. The amendment of one will therefore have a direct impact on the others.

3.11 However, in the case of the SWQP, as indicated above in section 2 of this submission, the Regulator has no role to play in the assessment of the reference tariff policy. This fact has been accepted by the Regulator in its final decision.

3.12 Nonetheless, the Regulator by seeking to include amendment A3.8, will be having a direct impact on the reference tariffs should a trigger event occur.

3.13 Even if one were to agree that the section 3.17 has a role to play in the assessment of the access arrangement for the SWQP, the nature of the amendment does not seem to be in the legitimate business interests of either the service provider or users or prospective users. There are primarily two reasons for this.

3.14 Firstly, the nature of trigger events that the Regulator is seeking to require is such that there would only be a requirement of the service provider to lodge a revised access arrangement in the event of the introduction of a significant new gas supply source or a new pipeline interconnects with the SWQP. It is well accepted that there are only 4 possible new sources – a new source in the Cooper Eromanga basin, new sources of coal seam methane gas from the Surat Basin, Timor Sea gas or gas from Papua New Guinea.

3.15 In the case of Timor Sea gas or Cooper Eromanga gas coming on line, they would use existing interconnections to the SWQP at Ballera. In such an instance, any user would still be bound to take the reference tariff for a forward haul service in the event that negotiations breakdown and the matter is referred to arbitration.

3.16 In the case of Surat Basin gas or PNG gas, this would most likely reverse the flow and in such an instance, the financial pressures on Epic Energy would be such that it would reverse the flow.

3.17 The second reason is that it is most likely that transportation contracts for gas from any of these sources would be long term contracts (at least beyond 5 years) because the transportation contracts would most likely need to be tied to the gas sale agreements. These gas sale agreements themselves, given history, are almost certainly to be long term contracts (beyond 5 years). As such, based on the current arrangements contained in the access arrangement, Epic Energy would be prejudiced because of the revenue sharing mechanism in place under the access arrangement for transportation contracts with a term beyond 5 years.

3.18 For the above reasons, it can not be argued that there is a need to require trigger events in order to protect the interests of the service provider, users or prospective users. On that basis, one must question whether the amendment reflects a proper consideration of the section 2.24 factors.

Amendment A3.1

3.19 Epic Energy reiterates its comments made in previous submissions in relation to this amendment.

Amendment A3.7

3.20 Epic Energy reiterates its comments made in previous submissions in relation to this amendment.