

Freehills

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27 September 2001

Our ref EJL:JR
Phone 08 9211 7801
File no 80118343
Doc no 012560423V9

~~ACCC~~
28 SEP 2001
~~PERTH~~

The Regional Director
Australian Competition and Consumer Commission
3rd Floor
East Point Plaza
223 Adelaide Terrace
PERTH WA 6000

By courier

Dear Sir

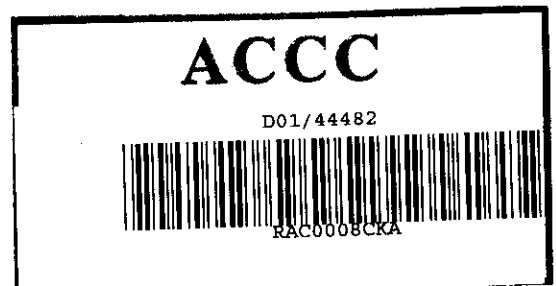
Notification - Western Power Corporation

We act for Western Power Corporation.

Please find enclosed the following -

- (a) 3 x Form G Notification;
- (b) application fee in the sum of \$2,500; and
- (c) Power Purchase Agreement. For reasons stated below, it is requested that this agreement be treated as confidential, and excluded from the public register.

In November 1998 our client called for expressions of interest for the supply to it of electricity in the Mid West region of Western Australia. The companies named in paragraph 3(c) of the enclosed Notification responded to the request for expressions of interest, and, after a tender process and negotiations, our client agreed to contract with StateWest Power Pty Ltd (described in the enclosed notification as the "Supplier"). The contract that resulted is the confidential enclosure to this letter. Confidentiality is sought in respect of the contract because our client is at present in the process of arranging a further two regional power procurement agreements. Our client is concerned that, if the terms of the enclosed contract were made public, this would prejudice the bidding process and negotiation of terms of those other power procurement agreements with a potentially adverse financial affect on our client's interests. The issues (both in relation to price and other terms and conditions) in the other power procurement



agreements are not necessarily the same as those addressed in the contractual provisions of the enclosed contract. For those reasons, it is submitted that it would not be in the interest of the parties or the public for the provisions of the enclosed contract to be made public at present.

As regards the conduct the subject of the notification, our client has lodged the notification out of an abundance of caution, but submits that it is most unlikely that the relevant conduct could have any significant impact on competition in any market. Our client wishes to make the following preliminary observations in relation to any assessment of the competition implications of the conduct.

We should add that the relevant conduct is very similar to that notified to the ACCC under cover at our letter of 19 January 2001 and notification dated 25 January 2001, and in respect of which the ACCC responded that it will not make inquiries concerning the notified conduct (your reference in that matter is C2001/167 – Jewel Gilbert/Tim Grimwade).

- (a) **Curtailments** - Our client hopes that the curtailment provisions in clause 10.3 of the Power Purchase Agreement (which effectively give our client priority over non-Western Power Corporation customers of the Supplier, in the event of power curtailments) will be of little practical consequence, on the basis that no significant power curtailments are expected to occur. As you will see, the contract has very extensive requirements in relation to reliability, repair, operation and maintenance of facilities and quality of supply, which it is hoped will minimise the risk of curtailments. In any event, the intent of the provision is to ensure that our client can, wherever possible, continue supplies to its customers (who at the date of this letter represent the vast majority of the population in the Mid West region including small business and residential consumers). Our client is concerned with maintaining supply to its customers for a number of reasons, including ensuring the discharge of its statutory functions under the Electricity Corporation Act. The continuation of such supplies is, it is submitted, clearly in the public interest.
- (b) **Long Term of Contract** - In respect of the term of the contract, our client instructs us that the term of 10 years is no longer than necessary to enable the Supplier to recoup its investment in infrastructure while at the same time keeping charges and tariffs to a reasonable level so far as our client is concerned. The 10 year term matches the life of the diesel fired plant used by the Supplier.
- (c) **Market Impact** - From the point of view of market impact, our client submits that the most relevant market is the market for provision and operation of electricity generation and reticulation facilities. This is plainly a national market. Our client advertised nationally for proposals – placing an advertisement in the “Australian” - and received proposals from companies based in Victoria, New South Wales and Queensland, and even as far away as Jakarta, reflective of the fact that the market is one in which (as our client understands it) suppliers compete on a national (and even international) basis. The very nature of the product/service is such that suppliers can tender for, and arrange for the installation and operation of,

electricity generation and reticulation facilities, from, and to, any location in Australia.

- (d) While our client is a significant purchaser of the relevant product/service, the contract in question is only one of 4 regional power generation agreements in place or in the process of being put in place, in Western Australia alone, and in terms of total energy demand is substantially less than 1% of the total State demand. The contract involves installed capacity of approximately 6.4 megawatts. By way of comparison, the installed capacity for the provision of power for the South West Interconnected System of Western Australia is in excess of 3000 megawatts.
- (e) When put in a national context, our client submits that the letting of this contract for a 10 year term will not (because of its relatively small size) have any significant impact on competition in the national market.
- (f) As regards other relevant markets, there is, on our instructions, a strictly regional market for the purchase and supply of electricity in the Mid West region (which is too remote to be supplied with electricity from outside the region). However, aspects of the contract (noted in paragraph 2(b) of the Notification) have been drafted with the express purpose of minimising the possibility of any lessening of competition at this level. In particular, the contract does not prevent the Supplier from supplying to purchasers additional to our client, and there is an express acknowledgment that there are "contestable customers" who have access to the power system and to whom the Supplier can supply in competition to our client (clauses 9.4 and 9.5).
- (g) Note that there are also provisions allowing for our client to buy out of its obligations under the Power Purchase Agreement in circumstances including where cheaper alternative suppliers are available (clause 25) and allow our client the opportunity to buy some of its requirements from other suppliers where renewable energy is involved (clause 9.1).
- (h) If one compares the likely benefits and detriments of the contract, it is submitted that there is an overwhelming public benefit to the contract, including as to its term. A shorter term would mean higher tariffs and charges. The availability of a substantial term has maximised the likelihood that the tender process and outcome were competitive (the results of which will directly benefit the public in terms of price, quality of service, etc). It is, by comparison, difficult to articulate any substantial detriment arising from the contract, notwithstanding the 10 year term.

The above is of course, only a very brief summary of our client's position in this matter. Please do not hesitate to contact us if the ACCC takes the view that more detailed submissions, at this stage, would be of assistance.

Yours faithfully

Freehills

per:

A handwritten signature in black ink, appearing to read 'S. Standing', enclosed within a large, loopy oval flourish.

Steven Standing
Senior Associate

COMMONWEALTH OF AUSTRALIA
Trade Practices Act 1974 - Sub-section 93(1)

EXCLUSIVE DEALING
NOTIFICATION

To the Australian Competition and Consumer Commission:

Notice is hereby given, in accordance with sub-section 93(1) of the Trade Practices Act 1974, of particulars of proposed conduct of a kind referred to in sub-section 47(2) or(4) of that Act in which the person giving notice proposes to engage.

1 (a) **Name of person giving notice**

Western Power Corporation ("WPC")
363 Wellington Street, Perth WA 6000

(b) **Short description of business carried on by that person**

WPC is a statutory corporation under the Electricity Corporation Act 1994 (WA), and owns and operates electricity supply, generation and transmission facilities.

(c) **Address in Australia for service of documents on that person**

C/- Freehills
Level 22
AMP Building
140 St Georges Terrace
PERTH WA 6000
Attention: Steven Standing/Erica Lampard

2 (a) **Description of the goods or services in relation to the supply or acquisition to which this notice relates**

The supply by StateWest Power Pty Ltd (the "Supplier") of electricity to WPC in the Mid West region of Western Australia, and more particularly, the towns of Meekatharra, Mount Magnet, Yalgoo, Sandstone, Cue and Wiluna from generation facilities to be constructed, owned and operated by the Supplier.

(b) **Description of the conduct or proposed conduct**

Curtailments

Under clause 10.3 of a Power Purchase Agreement between WPC and the Supplier, in the event of a curtailment in supply of electricity such that the Supplier is not able to meet both WPC's requirements and the instantaneous demand of each non-WPC customer then:

- (a) if the curtailment was caused by the Supplier failing to install sufficient capacity to meet the maximum instantaneous demand of all non-WPC customers in addition to WPC's contracted maximum demand, then WPC has priority in supply of electricity, up to its contracted maximum demand level, over the supply of electricity to non-WPC customers; and
- (i) if the Supplier has installed sufficient capacity to meet the maximum instantaneous demand of non-WPC customers and the contracted maximum demand of WPC, then, during the curtailment, WPC shall have priority over any non-WPC customer up to certain prescribed levels during the period of the curtailment.

Long Term

Further, the Power Purchase Agreement is for a term of 10 years, being a realistic period for the earning by the Supplier of a reasonable return on its capital investment whilst keeping charges and tariffs to a reasonable level. 10 years matches the life of the diesel fired plant that the Supplier will be using in this contract.

Note, also that the Power Purchase Agreement

- (i) does not prevent the Supplier from supplying to purchasers other than WPC;
- (ii) expressly acknowledges that there are "contestable customers" who have access to the relevant regional power system (and are thus able to purchase electricity from power suppliers other than WPC) and to whom the Supplier can supply (clause 9.4);
- (iii) allows for a buyout by WPC of the Power Purchase Agreement in certain circumstances including when cheaper alternative supplies are available (clause 25); and
- (iv) allows WPC the opportunity to buy some of its requirements from other suppliers in relation to renewable energy sources (clause 9.1) and others (9.5).

3 (a) **Class or classes of persons to which the conduct relates**

- (i) in relation to clause 10.3, other customers of the Supplier, whose electricity requirements during any curtailment will, in defined circumstances, not have priority to WPC's supply requirements; and
- (ii) in relation to the term of the contract, other actual or potential power producers who might seek to supply power to WPC in the Mid West region in lieu of the Supplier.

(b) **Number of those persons -**

In respect of (a) (i), WPC is (because of uncertainty as to the actual scope and effect of any power curtailment) unable to estimate the number of persons (if any) who might, on any occasion, be affected by the operation of clause 10.3.

In respect of (a) (ii), 11 (being those parties who responded to the request for Expressions of Interest for the Supply of Electricity to WPC in the Mid West Region).

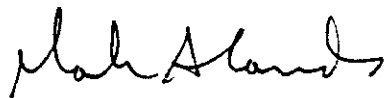
(c) **Where number of persons stated in item 3(b) is less than 50, their names and addresses**

Modra Electric Power	527 Abernethy Road, Kewdale, WA
Burns and Roe Worley	Level 4, QVI Building, 250 St Georges Terrace, Perth, WA
Beacons Consulting International Pty Ltd (consortium comprising TNB Nasional Berhad of Malaysia, Indkom Holding Sdn. Berhad of Malaysia and Beacons Consulting International Pty Ltd of Australia)	PO Box 133, Forrestfield, WA
Clarke Energy Limited	12 Victor Street, Beaumaris, Melbourne, VIC
Tidal Power Australia Ltd	Lot 7 Albany Highway, Kojonup, WA
Aggreko Generator Rentals Pty Ltd	97 Dowd Street, Welshpool, WA
Energy Developments	848 Boundary Road, Richlands, QLD
Balcke-Durr RG	Permata Hijau Blok G No 39, Jakarta, Indonesia
New World Projects	PO Box 11, Morisset, NSW
Western Power Corporation and the Australian Gas Light Company	363 Wellington Street, Perth, WA
HRL Projects Pty Ltd	677 Springvale Road, Mulgrave, VIC

4 **Name and address of person authorised by the person giving this notice to provide additional information in relation to this notice**

Freehills
 Level 22
 AMP Building
 140 St Georges Terrace
 PERTH WA 6000
 Attention: Steven Standing/Erica Lampard

Dated 27th September 2001



Signed by Mark Hands
 General Counsel
 duly authorised to sign this notice
 for and on behalf of
 Western Power Corporation

ACCC
 28 SEP 2001
PERTH

[Back Form]

DIRECTIONS

- 1 If there is insufficient space on this form for the required information, the information is to be shown on separate sheets, numbered consecutively and signed by or on behalf of the person giving the notice.
- 2 If the notice is given by or on behalf of a corporation, the name of the corporation is to be inserted in item 1(a), not the name of the person signing the notice and the notice is to be signed by a person authorised by the corporation to do so.
- 3 In item 1(b), describe that part of the business of the person giving the notice in the course of which the conduct is engaged in.
- 4 If particulars of a condition or of a reason of the type referred to in sub-section 47(2), (3), (4), (5), (6), (7), (8) or (9) of the *Trade Practices Act* 1974 have been reduced in whole or in part to writing, a copy of the writing is to be furnished with the notice.
- 5 In item 3(a), describe the nature of the business carried on by the persons referred to in that item.
- 6 In item 3(b)(ii), state an estimate of the highest number of persons with whom the person giving the notice is likely to deal in the course of engaging in the conduct at any time during the next year.

NOTICE

If this notification is in respect of conduct of a kind referred to in sub-section 47(6) or (7) or paragraph 47(8)(c) or (9)(d) of the *Trade Practices Act* 1974 ("the Act"), it comes into force at the end of the period prescribed for the purposes of the sub-section 93(7A) of the Act ("the prescribed period") unless the Commission gives a notice under sub-section 93A(2) of the Act within the prescribed period, or this notification is withdrawn.

The prescribed period is 21 days (if this notification is given on or before 30 June 1996) or 14 days (if this notification is given after 30 June 1996), starting on the day when this notification is given.

If the Commission gives a notice under sub-section 93A(2) of the Act within the prescribed period, this notification will not come into force unless the Commission, after completing the procedures in section 93A of the Act, decides not to give a notice under subsection 93(3A) of the Act. The notification comes into force when that decision is made.

If this notification is in respect of conduct of a kind referred to in subsection 47(2), (3), (4) or (5), or paragraph 47(8)(a) or (b) or (9)(a), (b) or (c), of the Act, it comes into force when it is given.

“ ANNEXURE — 1 ”
Midwest Power
Purchase Agreement.

RESTRICTION OF PUBLICATION

- CLAIMED
- GRANTED
- DECISION PENDING