

# Freehills

AUST. COMPETITION &  
CONSUMER COMMISSION  
PERTH

06 JAN 2005

5 January 2005

Phone +61 8 9211 7544  
Email Erica.Lampard@freehills.com  
Matter no 80707273  
Doc no Perth\003856283

The Regional Director  
Australian Competition & Consumer Commission  
3rd Floor Eastpoint Plaza  
223 Adelaide Terrace  
PERTH WA 6000

By courier

**ACCC**

MARS#: .....  
DOC ID: 005/442.....  
FILE: 20943.....

Dear Sir

## Notification - Western Power Corporation – Remote Towns PPA

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;
- (c) power purchase agreement. For reasons stated below, it is requested that this agreement be treated as confidential, and excluded from the public register.

The contract between the Supplier and our client is the power purchase agreement which is enclosed, and for which confidentiality is sought. Confidentiality is sought because our client is proposing to tender for power station proposals in respect of remote towns and communities in other areas of Western Australia. Our client intends to use a pro forma power purchase agreement in relation to these tenders which has similarities to the enclosed agreement. Our client is concerned that its negotiating position in relation to these tender processes may be prejudiced if potential bidders have access to, and can take advantage of, knowledge of our client's final negotiated position for this project. Further, not all of the issues (in relation to price and other matters) are the same for the other proposals, and our client is concerned that bidders will erroneously assume that all of the terms and conditions of this agreement should be applicable in relation to the other tender processes.

Our client also wishes to preserve its negotiating position in the event that the power purchase agreement fails to become unconditional (as was the case with the West Kimberley power purchase agreement signed in December 2000) and new negotiations need to be entered into.

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.

On 1 April 2004 our client advertised in "The West Australian" inviting interested parties to register with it to receive the request for proposal for the supply to it of electricity to the remote Towns of Marble Bar, Nullagine, Laverton, Menzies and Gascoyne Junction. Twenty companies were issued with the request for proposal documentation on 19 April 2004.

Only the companies named in item 3(c) of the enclosed notification, in addition to the Supplier, responded to the request for proposal, 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") for the supply of that electricity. The contract between the Supplier and our client is the power purchase agreement which is enclosed.

Our client has lodged the notification out of an abundance of caution, but submits that it is most unlikely that the power purchase agreement could have any significant impact on competition in any market, or could cause any public detriments that would derogate from the obvious benefits which it creates for the public. Our client wishes to make the following preliminary observations to assist you in understanding the background to the notification and in relation to any assessment of the competition and public benefits implications of the power purchase agreement.

(a) **Curtailments**

Our client hopes that the curtailment in clause 11.4 of the power purchase agreement (which effectively gives our client priority over non-Western Power customers of the Supplier, in the event of power curtailments) will be of little practical consequence, on the basis that no significant power curtailments will actually occur. The contract has very extensive requirements in relation to reliability, repair, operation and maintenance of facility and quality of supply, which it is hoped will minimise the risk of curtailments. In any event, the intention of the provision is to ensure that our client can, wherever possible, continue supplies to its customers (who will represent the vast majority of the population in the Towns). A continuation of such supplies is, it is submitted, clearly a matter of overriding public interest.

(b) **Long term of contract**

In respect of the term of the contract, our client instructs us that the 10 year Operating Period (see clause 7.1) is no longer than necessary to enable the Supplier to recoup its investment in infrastructure while at the same time keeping charges and tariffs at a reasonable level so far as our client is concerned.

(c) 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. Despite only advertising in "The West Australia", this is a national market, as is attested by the fact that one of the responses to the request for proposals came from a Queensland-based company. 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 (wherever based) can tender for, and arrange for the installation and operation of, electricity and 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 four regional power general agreements being put in place in Western Australia, and the agreement for the remote Towns represents less than 0.1% of total State demand. The four other regional power generation agreements that have already been notified to the ACCC are: Mid West in September 2001, Esperance in July 2002, Exmouth in September 2003 and West Kimberley in July 2004. The power purchase agreement involves total installed capacity of approximately 3 megawatts. By way of comparison the installed capacity for the procurement of power for the South West interconnected system in 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 for these remote Towns (this area being too remote to be supplied with electricity from outside the area). However, aspects of the contract, noted in item 2(b) of the notification, have been drafted with the express purpose of maximising the potential for competition at this level. In particular, the contract allows the Supplier to supply to purchasers additional to our client (provided that our client consents to the additional purchasers). There is an express acknowledgment that there are contestable customers to whom the Supplier may be able to supply in competition to our client (see clauses 10.5 and 11.1).
- (g) Note that there are also provisions allowing our client to purchase electricity from third parties; this entitlement is substantial, and could be up to 10% of our client's total annual electricity requirements for the remote Towns (see clause 10.1(b)). Clause 10.4(a) also stipulates that our client is not obliged to purchase any minimum quantity of electricity from the Supplier.
- (h) Note that there are also provisions for the early termination of the Agreement (see clauses 25.8, 27.3(a)(3), 27.4(a)(3), 27.5(c)(2), 28 and 30) and in which case the facilities may be transferred to another supplier (see clause 7.4). Either party may also assign its rights under the Agreement with the consent of the other party (see clause 32).
- (i) Given the extremely high capital costs of power generation, and the limited size of the remote towns market for purchase of power, it is submitted that it is most unlikely that this agreement could be said to be likely to have any anti-competitive effect. Further, if one compares the likely benefits and detriments of the agreement, it is submitted that there is an overwhelming public benefit to the agreement, including as to its term. A shorter term would mean higher tariffs and charges (which would

increase our client's loss in the remote towns area which would be funded by the State of Western Australia). The availability of a substantial term has maximised the likelihood of there being a competitive tender process and outcome, the result of which will directly benefit the public in terms of price, quality of service etc.

- (j) It is, by comparison, difficult to articulate any substantial detriment arising from the agreement.

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

Yours faithfully  
Freehills  
per:



Erica Lampard  
Senior Associate

Jason Ricketts  
Partner

**FORM G**

Regulation 9

[Front of Form]

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 conduct or of proposed conduct of a kind referred to in sub-section 47(2), (3), (4), (5), (6) or (7), or paragraph 47 (8) (a), (b) or (c) or (9) (a), (b), (c) or (d), of that Act in which the person giving notice engages or proposes to engage.

---

(PLEASE READ DIRECTIONS AND NOTICES ON BACK OF FORM)

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

Western Power Corporation (“WPC”)  
 363 Wellington Street  
 PERTH WA 6000

(See Direction 2 on the back of this Form)

**(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 36  
 QV1 Building  
 250 St Georges Terrace  
 PERTH WA 6000  
 Attention: Erica Lampard

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

The supply by StateWest Power Pty Ltd (“Supplier”) of electricity (to be generated at facilities constructed, owned and operated by the Supplier) to WPC sufficient to meet the demand of customers taking power in the towns of Marble Bar, Nullagine, Laverton, Menzies and Gascoyne Junction (“Towns”).

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

*Curtailment*

Clause 11.4 of the Power Purchase Agreement between WPC and the Supplier (“Agreement”) provides that if there is a curtailment in the supply of electricity by the Supplier, the supply of electricity to meet WPC’s requirements must take priority over the supply of electricity to third parties.

*Long Term*

Under clause 7.1 of the Agreement, the term of the Agreement is for 10 years from when the facilities have been determined to operate reliably, subject to extension or early termination.

Under clause 7.2, WPC may extend the Agreement for a period of 5 years, or such other period as negotiated between WPC and the Supplier.

However:

(i) clause 10.1(b) of the Agreement allows WPC to acquire up to 10% of its requirements from renewable energy providers, and such providers are to use WPC's remote power system (clause 10.2);

(ii) clause 10.4(a) of the Agreement stipulates that WPC is not obliged to purchase any minimum quantity of electricity from the Supplier;

(iii) clause 10.5(a) of the Agreement provides that in the event of new customers in the Towns, WPC is not required to supply them through the relevant remote power system;

(iv) clause 11.1 allows the Supplier to use the facilities to supply electricity to third parties if WPC consents to such supply;

(v) the Agreement may be terminated early by reason of force majeure (clause 25.8), the Supplier's default under the Agreement (clauses 27.3(a)(3), 27.4(a)(3) and 27.5(c)(2)), the exercise of WPC's step-in rights (clause 28) or technological obsolescence of the facilities (clause 30); and

(vii) clause 32 of the Agreement provides that either party may assign its rights under the Agreement with the consent of the other party, and that consent is not to be unreasonably withheld.

(See Direction 4 on the back of this Form)

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

(i) In relation to the term of the Agreement, other actual or potential power producers who might seek to supply power to WPC for the Towns in lieu of the Supplier.

(ii) In relation to clauses 9.3(b), 11.4 and 14.4(d)(1), other customers of the Supplier, whose electricity requirements during any curtailment in supply or additional demand by WPC will, in defined circumstances, not have priority to WPC's supply requirements.

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

**(i) At present time**

In respect of item 3(a)(i), 2 persons being the number of parties (other than the Supplier) who responded to the request for proposal to supply electricity to WPC for the Towns.

In respect of item 3(a)(ii), WPC is (because of uncertainty as to the actual scope and effect of any power curtailment or unanticipated additional demand) unable to estimate the number of persons (if any) who might, on any occasion, be affected by the operation of clauses 9.3(b), 11.4 or 14.4(d)(1).

**(ii) Estimated within the next year**

As stated in item 3(b)(i).

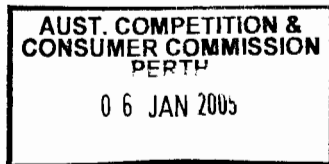
- (c) Where number of persons stated in item 3 (b) (i) is less than 50, their names and addresses

Burns & Roe Worley Pty Ltd	Level 4, QV.1 Building, 250 St George's Terrace, Perth WA 6000
Energy Developments Ltd	848 Boundary Road, Richlands, Queensland, 4077

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

Freehills  
 Level 36  
 QV.1 Building  
 250 St George's Terrace  
 PERTH WA 6000  
 Attention: Erica Lampard

Dated.....*24th December*....., 2004



Signed by on behalf of the applicant giving notice

*[Handwritten Signature]*

.....  
 (Signature)

.....Mark Hands.....  
 (Full Name)

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

(Description)

[Back of 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 provided 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 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 sub-section 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 sub-section 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.



Confidentiality is granted for the Remote Towns Power  
Purchase Agreement between Western Power Corporation and  
StateWest Power Pty Ltd