RioTinto

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To: Pilbara ISOCo Limited
(Submitted online at www.pilbaraisoco.com.au)

1 November 2024

Dear Sir/Madam

Review of Subchapter 7.3 and 7.4 of the Pilbara Networks Rules – Draft Decision

I refer to Pilbara ISOCo's "Draft Decision: Review of Subchapter 7.3 and 7.4 of the Pilbara Networks Rules" dated 4 October 2024 (**Draft Decision**)[1]. Pilbara ISOCo seeks written submissions on that document.

In the Draft Decision, Pilbara ISOCo proposes to make significant changes to Subchapters 7.3 and 7.4 of the *Pilbara Networks Rules* (**PNRs**). It states that the changes are "substantial" and that "[m]inor tweaking will not be adequate" to address the issues that Pilbara ISOCo has identified in relation to those Subchapters.[2] Some of the changes appear to be inconsistent with the conceptual model that underpinned the initial justification for, and development and implementation of, the PNRs.

Despite the significance of the changes, Pilbara ISOCo has provided interested parties a period of only 4 weeks in which to analyse the Draft Decision and make submissions. That period is not sufficient for parties, such as Pilbara Iron Pty Ltd (**PI**), whose interest in the PNRs and North West Interconnected System (**NWIS**) is a secondary, rather than primary, aspect of their business operations.

As a result, PI is not currently in a position to express a view about whether it supports the Draft Decision and its 20 recommendations. PI therefore reserves its position and will wait for Pilbara ISOCo to make a final decision and publish proposals for detailed rule changes before it expresses a view.

Having said that, PI wishes to make a number of general comments about the Draft Decision. It submits that Pilbara ISOCo should take them into account, and give them weight as fundamental elements, in making its final decision and formulating any consequent rule change proposals. They are as follows.

1. RTIO Power System not the same as the Horizon and APA systems

PI is concerned that material parts of the Draft Decision proceed from an incorrect premise: that the RTIO Power System is, and Rio Tinto's associated business activities are, essentially the same as Horizon and APA's electricity systems and associated business activities.

The plain fact is that the RTIO Power System it is not the same.

The existence of a weak distribution level interconnection between the RTIO Network and Horizon Power Network does not change that fact.

As PI has consistently pointed out, Rio Tinto operates, maintains and develops the RTIO power system under and subject to various ratified Western Australian State Agreements for the sole

[1] Available at www.pilbaraisoco.com.au
[2] Draft Decision, Appendix 1: Stakeholder Feedback on Issues Paper, Item 7., ISO response.

purpose of supporting its extensive and economically significant State Agreement operations in the Pilbara region. It does not participate in, and has never participated in, Pilbara electricity markets, including generation, wholesale, transmission and retail markets.[3] As such, it's involvement in the NWIS is a secondary, rather than primary, aspect of its operations.

Importantly, the RTIO Power System is part of a highly efficient, vertically integrated iron ore production system that is one of the largest contributors to the State economy. It exists to ensure and promote the safety, security, reliability and efficiency of Rio Tinto's State Agreement developed operations, including related purposes (e.g. supply to remote Pilbara towns[4]). It does not exist to, and is not used to, engage in an electricity business.

Rio Tinto does not operate a conventional, commercial electricity utility business. This is in stark contrast to Horizon Power and APA, which operate their businesses as commercial electricity generation, transmission, marketing and retailing utilities.

This difference is of fundamental importance because it means that the incentives of Rio Tinto in respect of the RTIO Power System differ from those of Horizon Power and APA in respect of their systems. While Horizon Power and APA may have an incentive to use their power systems to optimise returns associated with their utility businesses, Rio Tinto does not. Rio Tinto's incentive is to optimise returns associated with its overall integrated State Agreement developed operations.

While there might be a theoretical risk that other vertically integrated network operators will use their position to favour their upstream or downstream business and customers (or to disadvantage each other) because they may compete, that risk is negligible (if not non-existent) in respect of Rio Tinto. That is because Rio Tinto does not have an interest in unfairly discriminating against other electricity generators or retailers (i.e. because it only serves its own demand). It does not compete in generation or supply markets and is only concerned with ensuring that the power system that it developed, operates and maintains is available to supply electricity to its iron ore production system and for related purposes.

Further, PI does not accept any suggestion – express or implied – that it has any interest in using its position as the operator of the RTIO Network to discriminate against other participants in downstream or upstream markets, such as other iron ore market participants. PI's activities in respect of the RTIO Power System are directed, as legally entitled, toward ensuring that it has a secure, reliable and safe supply of electricity for Rio Tinto's iron ore mining operations that is not compromised by the conduct of others; it is not concerned in the operation of the system with what others are doing in upstream or downstream markets. Rio Tinto could not and would not use its resources and time to misuse its position under Subchapters 3.4 or 3.5 (or otherwise) in a discriminatory manner.

PI is concerned that the justification advanced by Pilbara ISOCo for denying PI rights that it currently has to make important decisions about the security of the RTIO Power System, and giving itself the power to make those decisions, is based (at least in part) on a desire to address issues that stem from the vertical integration of the competing utility businesses of Horizon Power and APA.[5] PI considers that depriving it of the ability to control key aspects of the operation and maintenance of the RTIO Power System cannot be reasonably justified to the extent that it is driven by such an objective.

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[3] *The minor exceptions to this are in relation to (i) the provision of essential system services to the NWIS, procured by Pilbara ISOCo pursuant to Chapter 8 of the Pilbara Network Rules and (ii) supply to retail consumers in a number of remote townships pursuant to the State Agreements. The provision of essential systems services by PI to Pilbara ISOCo is primarily concerned with supporting Rio Tinto Group's iron ore business and not with conducting a commercial electricity business or participating in electricity markets. There is no other supplier to retail consumers in the remote townships supplied pursuant to the State Agreements.*

[4] *Remote towns developed under relevant Rio Tinto Group State Agreements: Dampier, Pannawonica, Paraburdoo, Tom Price and Wickham.*

[5] For example, see Draft Decision, paras 4.2.1 to 4.2.4.

Accordingly, PI requests that Pilbara ISOCo reconsider its position on this matter and not make a Final Decision that derogates from PI's power to make decisions about the security of its own power system.

In considering PI's request, and as a separate matter in its own right, Pilbara ISOCo should take into account the unique character of the RTIO Network and its important role in supporting Rio Tinto's broader and economically significant Pilbara iron ore operations. PI submits that Pilbara ISOCo must, to satisfy the objective of Part 8A of the *Electricity Industry Act 1994* (WA)[6](**EIA**) and give effect to regulation 4 of the *Electricity Industry (Pilbara Networks) Regulations 2021* (WA)(**Regulations**),[7] recognise and give fundamental weight to the importance of not having an adverse effect on the security, efficiency and effectiveness of Rio Tinto's State Agreement operations. That requires Pilbara ISOCo to preserve PI's ability to make the key decisions that it needs to make in relation to the RTIO Power System in connection with Subchapters 7.3 and 7.4 of the PNRs, rather than just handing those powers to itself.

The unique position of the Pilbara resources industry, of which the RTIO Power System is a significant part, has long been recognised as being a central concern in the design and operation of the PNRs and broader "Pilbara regime". For example, it was or is recognised by or in (as the case may be) the following:

- the Parliament of Western Australia, when it considered and passed the *Electricity Industry Bill 2019* (WA)(**2019 Bill**), the legislation that enacted Part 8A of the *Electricity Industry Act 2004* (WA) and which provides the statutory power under which the PNRs function,[8]
- the Explanatory Memorandum to the 2019 Bill,[9]
- section 119 of the *EIA*,
- regulation 4 of the Regulations, and
- rule 5 of the PNRs.

Its position is something that should and must be respected and protected as the PNRs evolve.

PI proposes to oppose changes to the PNRs that adversely affects the security, effectiveness and efficiency of the Rio Tinto group's broader operations by reducing PI's ability to control a key aspect of its vertically integrated production process.

2. Abandoning the administrative model

Rio Tinto initially supported the establishment of the Pilbara regime, including the PNRs, because it applied a fit for purpose and cost effective regulatory model (reflected in the "administrative model" and other arrangements). A fundamental part of that model was that it recognised the unique nature of electricity networks in the Pilbara region and the fact (as discussed above) that the RTIO Power System exists in order to support the group's State Agreement operations, including for related purposes such as supporting towns.

PI is now concerned that the broad direction outlined in the Draft Decision has the potential to undermine the integrity of that model, in that Pilbara ISOCo will effectively take control in relation to key aspects of the operation and maintenance of the RTIO Power System. As discussed above, PI fears that this will result in the RTIO Power System being operated in a way that is sub-optimal for the safety, security, reliability and efficiency of the system and Rio Tinto's broader iron ore business.

[6] See section 3 of this letter below.
[7] See section 3 of this letter.
[8] Parliament of Western Australia, *Hansard*, Assembly – Wednesday 27 November 2019 p9425c-927a, Mr Bill Johnston.
[9] For example, see sections 2.3, 2.8, 7.1.3

If the integrity of the administrative model is undermined, then PI may need to reconsider its ongoing support for and participation in the NWIS as a whole.

3. Consistency with Rio Tinto's rights and obligations under State Agreements

As discussed in section 1 of this letter, Rio Tinto operates, maintains and develops the RTIO power system, including the RTIO Network under and subject to various State Agreements. Those State Agreements are the subject of a number of Acts of the Parliament of Western Australia (**State Agreement Ratification Acts**).

The State Agreements provide the legal foundation for the Rio Tinto Group's Pilbara iron ore operations. They define the terms of the agreement between the State of Western Australia and the Rio Tinto Group in relation to the development, operation and maintenance of iron ore projects that are of national and State significance. They also set out the rights and obligations of the State and members of the Rio Tinto Group in relation to those projects, with the key intention of providing certainty to facilitate significant investments in the Pilbara region.

PI is, therefore, deeply concerned about the potential for inconsistency between material aspects of the Draft Decision and the Rio Tinto Group's rights and obligations under the State Agreements. In particular and as discussed in section 1 of this letter, it is concerned with those aspects of the Draft Decision that indicate that Pilbara ISOCo proposes to deprive it of the ability to control key aspects of the operation and maintenance of the RTIO Power System.[10]

Under the State Agreements, Rio Tinto has submitted multiple detailed proposals over many decades in relation to how it will mine, transport and ship iron ore, including in respect of how these activities are supported by the RTIO Power System. Once approved by the Minister for State and Industry Development, Rio Tinto is obligated to implement its proposals in accordance with their terms, and to comply with them on an ongoing basis.[11] It is not free to depart from the terms of the approved proposals and any requirement that it do so would put it at risk of engaging in a breach of the requirements of relevant State Agreement or Agreements, with potentially serious consequences. PI is concerned that the changes proposed in the Draft Decision, as highlighted above, could erode its ability to operate the RTIO Power System in accordance with its approved proposals and thereby put it in a position in which it may be in breach of its State Agreement obligations. This would not be acceptable to PI or the broader Rio Tinto Group. Nor, in PI's view, is it likely to be acceptable to the State. PI also notes that the provisions in the State Agreements that specify Rio Tinto's rights to generate, transmit and supply electricity using the RTIO Power System make it expressly clear that it is the Minister for State and Industry Development who has the power to determine how and to what extent Rio Tinto may or may not utilise the RTIO Power System.[12]

As such, PI submits that it may be beyond Pilbara ISOCo's power under the rule 178 of the PNRs to recommend changes, or make rule change proposals, that result in inconsistency between the PNRs (in this case Subchapters 7.3 and 7.4) and the provisions of the relevant State Agreements. A provision of the PNRs that requires PI or the broader Rio Tinto group to act in a way that is inconsistent with the terms of the relevant State Agreements or approved proposals under those State Agreements would be invalid and unenforceable.

PI requests Pilbara ISCO to consider whether it should, and has the power to, make a decision of the type it proposes.

Finally, PI notes that the State Agreements provide that the State must not take, or permit any State authority (i.e. agencies or instrumentalities or local or other authorities) to take,

[10] For example, recommendations 8, 11, 12, 13, 14, 15 and 16.

[11] For example, see HR Act, section 8B(6).

[12] For example, see HR Act, clause 11(a).

discriminatory action that would deprive Rio Tinto of full enjoyment of the rights granted under the the Agreement.[13]

4. The Pilbara resources industry is a fundamental factor in decision making

PI is concerned that Pilbara ISOCo may have proceeded on the basis that it need only consider the RTIO Network and RTIO Power System, and the effect of the Draft Recommendation proposals on them, when:

- it comes to undertake the detailed drafting of rule change proposals that are made after Pilbara ISOCo makes its final decision, and/or
- in the making of subsidiary instruments that follow the commencement of rule changes.

The Draft Decision seems to treat "integrated mining networks" and the "integrated mining systems" of which they are part – both of which are significant parts of the Pilbara resources industry - as peripheral, residual or subsidiary factors, rather than as something that is a fundamental consideration in the performance of Pilbara ISOCo's function under PNR rules 178(1) to (3).[14]

Pilbara ISOCo must properly consider the position and interests of integrated mining networks and integrated mining systems (including the RTIO Network and RTIO Power System) now, when it is undertaking its review of Sub-chapters 7.3 and 7.4. It must not be left to a later stage or instrument in the process, after a decision is made. It should also, as a matter of good administrative decision making, explain and publish in its draft and final decisions that it has done so, how it has done so, and the weight it has attached to all relevant factors.

In this regard, PI notes that regulation 4 of the Regulations states that:

> "For the purposes of section 119(3) of the Act, the following are the matters a person or body that performs a function under Part 8A of the Act is to have regard to in determining whether the performance of the function meets the Pilbara electricity objective —
>
> (a) the contribution of the Pilbara resources industry to the State's economy;
>
> (b) the nature and scale of investment in the Pilbara resources industry;
>
> (c) the importance to the Pilbara resources industry of a secure and reliable electricity supply;
>
> (d) the nature of electricity supply in the Pilbara region, including whether or not regulatory approaches used outside the Pilbara region are appropriate for the region, Pilbara network users and Pilbara networks;
>
> (e) any other matter the person or body considers relevant."

That regulation clearly requires Pilbara ISOCo to have regard to the factors set out in paras (a) to (e) when performing its functions under PNR rule 178, not at some later time.

Further, PI submits that Pilbara ISOCo must not only have regard to the Pilbara resources industry factors set out in regulation 4 in making its decision, but that it must also give them weight as fundamental elements. They must be at the front of Pilbara ISOCo's thinking when it considers and makes its decision. They are not something to be merely considered, but are matters that are, by their nature, highly material to the task being undertaken by Pilbara ISOCo, given the legislative purpose and objects of Part 8A of the *Electricity Industry Act 2004* and PNRs.[15]

PI submits that acting in line with these requirements, including by having regard to the specific matters set out in sections 1 to 3 of this letter, is likely to lead Pilbara ISOCo to reach conclusions

[13] For example, see HR Act, clause 9(4)(d).
[14] For example, see Draft Decision, paras 7.3.7 and 7.3.8.
[15] See *Re Dr Ken Michael AM; Ex Parte Epic Energy (WA) Nominees Ptd & Anor* [2002] WASCA at para 55 in relation to a similar provision under the *National Third Party Access Code for Natural Gas Pipeline Systems*.

that are different to those set out in the Draft Decision in respect of how the RTIO Network and RTIO Power System should be treated under Sub-chapters 7.3 and 7.4.

For instance, proper consideration and weighting of the specific matters set out in sections 1 to 3 of this letter may lead Pilbara ISOCo to the conclusion that the decision (or parts of the decision) it has proposed in the Draft Decision (such as for its recommended process or parts of it to apply to integrated mining networks and integrated power systems) do not meet the Pilbara electricity objective and must not be made.

Accordingly, PI submits that Pilbara ISOCo must reconsider the position set out in the Draft Decision and make its final decision according to law, consistent with the submissions set out above.

5. Competition law as justification for changes

PI is generally inclined to support changes to the PNRs that have the effect of removing or reducing the risk for NWIS participants of contravening competition law prohibitions because they participate in the NWIS or comply with the PNRs.

On the other hand, PI does not consider that changes should be made if they have, or are likely to have, an adverse effect on the integrity, effectiveness and efficiency of the scheme that underpins the PNRs. If changes have that effect, then the better approach is for the PNRs to be left intact and for competition law concerns to be appropriately addressed by the use of a statutory exemption[16] or authorisation granted by the ACCC.

Consistent with this, PI is concerned about the Draft Decision to the extent that Pilbara ISOCo seeks to justify, by reference to competition law concerns, the core proposal of moving "central decision-making responsibility under Subchapters 7.3 and 7.4 from the NSP's collectively, to the ISO…"[17]. That is because the proposed move to central decision-making would be a major change to the PNRs that is likely to have the effect of depriving network service providers of their ability to control the operation, maintenance and development of their own networks. Competition law concerns alone do not justify such a significant change; Pilbara ISOCo should instead focus on securing an appropriate form of immunity from competition law liability.

If Pilbara ISOCo wishes to obtain further information from PI in relation to this matter, please email me at anirban.choudhury@riotinto.com.

Yours sincerely

Anirban Choudhury
Manager Operations - Utilities
Pilbara Iron Pty Ltd

[16] That is, by means of a State law that expressly authorises the relevant conduct for the purposes of competition law, as contemplated by the *Competition and Consumer Act 2010* (Cth), section 51.
[17] Draft Decision, para 4.2.11.