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22 May 2024

Naomi Menon
Director, Competition Exemptions
Australian Competition and Consumer Commission
Level 27, 135 King Street
Sydney NSW 2000

Dear Ms Menon

Pilbara ISOCo Ltd – application for authorisation AA1000666

We refer to:

- (a) Pilbara ISOCo Ltd (the **Company**)'s application for authorisation AA1000666 dated 28 March 2024 (**Application**);
- (b) the submissions received by the Australian Competition and Consumer Commission (**ACCC**) in respect of the Application, comprising the letters from:
 - (i) Energy Policy WA to the ACCC dated 23 April 2024 (**EPWA Submission**);
 - (ii) Woodside Power to the ACCC dated 7 May 2024 (**Woodside Submission**);
 - (iii) BHP to the ACCC dated 7 May 2024 (**BHP Submission**); and
 - (iv) Horizon Power to the ACCC dated 14 May 2024 (**Horizon Submission**),
(together, the **Submissions**).

The Company thanks the ACCC for the opportunity to respond to the Submissions and thanks EPWA, Woodside, BHP and Horizon Power for their comments.

The Company's views regarding the Submissions are set out in **Annexure 1** to this letter.

We would be pleased to discuss any queries the ACCC may have, or otherwise provide any assistance the ACCC may require, in respect of this letter or the Application generally.

Yours sincerely

Elizabeth Tylich
Partner
Jackson McDonald

Annexure 1 – The Company's views regarding the Submissions

Unless otherwise indicated, defined terms used in this submission have the same meaning as in the Application.

Issues raised in the Submissions

The Company seeks to respond to the following broad underlying issues that are raised in the Woodside Submission and BHP Submission:

- (a) Issue 1 – Internal disclosures of commercially sensitive information: the risk of Participants *internally* disclosing information obtained in the course of engaging in the Proposed Conduct for an anti-competitive purpose (where there are no existing requirements in the Pilbara regime preventing internal disclosure); and
- (b) Issue 2 – Gaps in the PNR's transparency regime: proposed Condition 2 does not make every instance of the Proposed Conduct subject to transparency requirements.

Where these issues are raised, the Woodside Submission and BHP Submission recommend that the ACCC address them by imposing additional conditions on any authorisation of the Proposed Conduct.

The Company disagrees for the following reasons.

How the Application addresses Issue 1

The Company's view is that the limitations on the Proposed Conduct, the Company's governance controls, and other Pilbara regime controls set out in the Application effectively manage risks associated with Issue 1.

Limitations on the Proposed Conduct

In seeking authorisation, the Company's intention is that the Proposed Conduct only captures genuinely operationally-based conduct that is made in good faith. Any conduct by Participants in using commercially sensitive information in the manner contemplated by Issue 1 above would be outside the scope of the Proposed Conduct and so is not included in the Company's request for authorisation.

The Proposed Conduct is defined so that authorisation only applies where the relevant Participant:

1. is performing a function under (i.e. in accordance with) the Pilbara regime (or, where the Participant is a Connection Applicant, participating in the Pilbara regime's connection process);¹
2. has the purpose of maintaining or improving the NWIS's safety, security or reliability;²
3. does not share any information regarding prices, bids, costs, margins;³ and
4. complies with all Pilbara regime requirements regarding (among other things) the protection of, and limitations on use and sharing of, confidential and commercially

¹ Authorisation paragraph 75(1).

² Authorisation paragraph 75(2).

³ Authorisation paragraph 125.

sensitive information,⁴ including requirements in the PNR for recipients of Confidential Information to:

- (a) use the Confidential Information only for the purposes of performing Pilbara regime functions, as required or permitted by the Pilbara regime, and for no other purpose,⁵
- (b) not disclose the Confidential Information except as permitted under specific PNR rules,⁶ and not without complying with the PNR's pre-disclosure processes;⁷
- (c) where the recipient obtains Confidential Information in a meeting or discussion under Subchapters 7.3 or 7.4 — ensure it is not disclosed or accessible beyond the person's operational staff (with exceptions for audit, compliance and governance purposes) and not used, stored, analysed or disseminated for any purpose other than the purposes of Subchapter 7.3 or 7.4, or otherwise to achieve the System Security Objective.⁸

For example, conduct by an operational staff member of an NSP in disclosing commercially sensitive information obtained by it in the course of engaging in the Proposed Conduct to a staff member of the NSP's retail business would:

- (a) not be done in the performance of any Pilbara regime function;
- (b) not have the purpose of maintaining or improving the NWIS' safety, security or reliability; and
- (c) not involve a use of the information for the purpose of performing a Pilbara regime function or as otherwise as required or permitted by the Pilbara regime,

and as such would not fall within the scope of Proposed Conduct and not be authorised. Clearly, the same would apply in respect of any further use of the information by the NSP's retail business for a commercial purpose.

NSP Nominee Directors and the Company's governance

The Woodside Submission raises concerns particularly in respect of internal disclosures of commercially sensitive information within the Company, given that the Registered NSPs appoint directors to sit on the Company's Board (**NSP Nominee Directors**).

The Company wishes to reiterate that, as per the governance documents lodged with the Application, the commercially sensitive information of Pilbara regime participants that it obtains in the performance of its functions is never shared or discussed with NSP Nominee Directors. In particular, the operational activities of the Company (including as they relate to specific connection applications) are not discussed at Board level, nor is any related information in respect of them made available to or otherwise accessible by the NSP Nominee Directors.

For example, the Board's Conflicts of Interest & Information Protocol contains:

- (a) restrictions on the release of sensitive information to Directors;⁹

⁴ Authorisation paragraph 125(c).

⁵ PNR rule 297.

⁶ PNR rule 298.

⁷ PNR rule 303.

⁸ PNR rule 176.

⁹ Conflicts of Interest & Information Protocol section 5.

- (b) processes in respect of identifying Director conflicts of interest;¹⁰
- (c) processes to exclude conflicted Directors from receiving information and Board papers relating to matters in respect of which they are conflicted;¹¹
- (d) continuing obligations on Directors to maintain the confidentiality of Board papers and matters discussed at Board meetings;¹²
- (e) where an NSP Nominee Director is or is likely to be in competition with the Company or one of the Members — a prohibition on the discussion or exchange of information with other Directors in respect of commercially sensitive matters;¹³
- (f) where the Company receives confidential and sensitive information (including from connection applicants or network users), and one or more the Members are or are likely to be in competition with the discloser of that information — a prohibition on the provision of the information to the relevant NSP Nominee Directors and an obligation to ensure the protection of the confidentiality of the information by the establishment of adequate internal arrangements;¹⁴ and
- (g) obligations for NSP Nominee Directors, Members and Company management to object to matters in (e) and (f) being raised for discussion or where information in respect of them is sought to be exchanged, and to cease participation in the meeting and record a file note of the event if the objection is not complied with.¹⁵

In addition to the Company's various governance controls, the NSP Nominee Directors owe directors duties and must comply with the law. Despite any authorisation of the Proposed Conduct, they must still comply with the CCA in respect of conduct that is not authorised. As per the above, the Company's view is that the Proposed Conduct is scoped such that non-operational or any genuinely anti-competitively purposed conduct by the NSP Nominee Directors would not be authorised.

The Company also restates the controls outlined in paragraphs 297 – 317 of the Application, and in particular, that the Company's tenure as Pilbara ISOC is controlled by the Western Australian government, and that the Pilbara regime is subject to a rule change processes which enable any person to propose a rule or procedure/protocol change.¹⁶

Conditions regarding the Company's governance structures are not appropriate

The Company acknowledges that the Woodside Submission proposes conditions in respect of the Company's governance, including ACCC approval of the Company's governance documents, requirements regarding the composition of its Board (and therefore the content of its Constitution), and requirements to make the Board's decisions and decision-making processes public.

As per the above, the Company's view is that the Application adequately deals with risks associated with internal disclosure of confidential information within Participants.

While the Company acknowledges concerns raised in respect of the potential for the Company to remove or weaken its governance measures after receiving any authorisation, it believes that these risks are materially alleviated by:

¹⁰ Conflicts of Interest & Information Protocol section 6.

¹¹ Conflicts of Interest & Information Protocol section 7.

¹² Conflicts of Interest & Information Protocol section 12.1.

¹³ Conflicts of Interests & Information Protocol section 12.4(a).

¹⁴ Conflicts of Interests & Information Protocol section 12.4(b).

¹⁵ Conflicts of Interests & Information Protocol section 12.4(c).

¹⁶ PNR rule A2.5.1.

- (a) the further measures discussed above, particularly the Western Australian government's control of the Company's tenure and the ability for any person to propose rule changes;
- (b) the fact that the Company has made its governance documents public and has published them on the Company's website (on an ongoing basis);¹⁷ and
- (c) in the event that all other controls fails, the ability of a person to request the revocation of granted authorisation under section 91B of the CCA.

Additionally, the Company believes that the ACCC should not impose any condition that interferes with the Company's governance for the following reasons.

Inconsistency with Pilbara regime design and future reform

As per the Application and the EPWA Submission,¹⁸ the Pilbara regime was specifically designed with an administrative ISO model in mind. The allocation of roles and responsibilities throughout the entire Pilbara regime, and the appointment of the Company as Pilbara ISOCO, are based on the enablement of this model and the attainment of cost efficiency objectives.

As such, the Company's view is that any changes to the Company's governance structures must be accompanied by a policy review of the Pilbara regime as a whole, and therefore can only be appropriately undertaken by the Western Australian government.

The Company notes that the EPWA Submission sets out:¹⁹

- (a) "further work to efficiently and effectively elevate transparency and governance controls may be required to ensure and protect ISO's independence";
- (b) that the Evolution of the Pilbara Networks Rules Project will "include a detailed review of the Pilbara Networks Rules to ensure they remain fit-for-purpose for the into the future"; and
- (c) "examining, and where necessary, improving the transparency of the regime and governance is a priority for this project".

Governance relevant beyond the Application

Further, the Company's governance measures are relevant to every function the Company performs — not just its functions as the Pilbara ISOCO, and not just those elements of its functions that involve or relate to the Proposed Conduct. The Company's governance measures support all its ordinary functions as, for example, a corporation, an employer, a holder of personal information, a person engaging contractors and suppliers, and as a person subject to the jurisdiction and monitoring of many other regulators such as ASIC, the ATO, the ERA, etc.

Like all companies, the Company's governance structures may need to change regularly and at short notice to ensure the Company's compliance with laws, to accommodate the Company's evolving internal objectives, and in seeking continuous improvement of the Company's processes over time.

Any requirement for the Company's governance measures or Constitution to be subject to ACCC approvals may present an inappropriate intrusion into the Company's ability to manage its day-to-day affairs and compliance with laws.

¹⁷ Published here: <https://pilbaraisoco.com.au/about-us//>.

¹⁸ EPWA Submission page 2.

¹⁹ EPWA Submission page 2.

The Company's views regarding Issue 2

The BHP Submission raises concerns in respect of the PNR's transparency regime, and in particular that gaps in that regime mean that Condition 2 will not 'cover the field' of the scope of the Proposed Conduct.²⁰

Confidentiality more appropriate than transparency in some circumstances

Paragraph 265 of the Application explains that there are circumstances in which instances of the Proposed Conduct are subject to confidentiality requirements or are appropriately quarantined to operational employees.²¹ Depending on the context, sharing information broadly through transparency measures can lessen competition issues or worsen them.

In the former context — transparency requirements are appropriate (i.e. the information should be shared). In the latter — confidentiality requirements are appropriate (i.e. the information should be quarantined and/or subject to use and disclosure restrictions).

The Company's view is that some of the transparency gaps identified by BHP (system coordination meetings and network access contracts) fall in the latter category, and the imposition of additional transparency requirements in respect of them are more likely to worsen competition than improve it. In particular:

- (a) *The requirements for system coordination meeting exchanges to be documented and disclosed to Registered NSPs and ESS Providers do not extend to Registered Controllers.*²²
 - (i) The PNR requires the production of the System Coordination Report for an operational purpose. Recipients of the System Coordination Report are subject to the confidential information regime, and the operational staff quarantining mechanism in rule 176. Sharing this information freely amongst Registered Controllers:
 - (A) would have no purpose, given the information can only be used for operational purposes and there are no associated Pilbara regime functions of Registered Controllers (that are not also ESS Providers) that would require them to have access to this information; and
 - (B) if shared absent any appropriate quarantining obligations — could have a negative impact on competition by providing those Registered Controllers with confidential information regarding e.g. when their competitor's facilities will be non-operational.
 - (ii) Further, an appropriate level of transparency in respect of these matters is already achieved by the Company's publication of the system coordination bulletin at least once every quarter (and more frequently as required) — which, subject to the Confidential Information regime,²³ sets out (among other things) brief information about System Coordination Report matters which may impact the operational and commercial decisions of Pilbara electricity market participants.²⁴

²⁰ BHP Submission page 6.

²¹ The reference at paragraph 265 of the Application to information obtained in instances of the Proposed Conduct being "appropriately quarantined to operational employees" is a reference to rule 176, which will have that effect in respect of instances of the Proposed Conduct occurring during discussions and exchanges under Subchapters 7.3 and 7.4 of the PNR.

²² BHP Submission page 7.

²³ PNR rule 288(3).

²⁴ PNR rule 288.

- (b) *There are limited transparency requirements applying to network access contracts:*²⁵
- (i) the content and particulars of network access contracts, and in some cases the fact that access is being sought, can be confidential and should not be made subject to any transparency requirements. If any such requirement was imposed in respect of the confidential aspects of the connection process or access contracts, access seekers might be disincentivised from seeking access.

Remaining gaps in the Pilbara transparency regime

The Company agrees with BHP that the PNR's transparency regime does not provide for transparency in respect of every single instance of the Proposed Conduct. However, the Company's view is that existing measures outlined in 264 to 295 of the Application will cover a significant number of the key and most impactful instances of the Proposed Conduct.

As per discussion above, the Proposed Conduct has been scoped to only capture legitimate, operationally purposed conduct. The presence of some gaps in transparency does not mean that any conduct outside of the scope of the Proposed Conduct is authorised. As such, the Company's view is that even in despite of minor gaps in the transparency regime, the Proposed Conduct and proposed Conditions together still result in a public benefit that significantly outweighs any public detriment.

PNR deficiencies can and should be addressed in the PNR, not by ACCC conditions

To the extent that any gaps in the Pilbara regime's transparency regime are of concern to any person, that person is entitled to propose a PNR rule change to correct them.²⁶

Any deficiencies in the PNR's transparency regime should be addressed by the existing processes contemplated by the PNR, contained within the PNR, and be enforced through the same mechanisms as other PNR obligations. An expansion of the PNR's transparency processes should not sit outside of the Pilbara regime or be imposed by a separate regulator (i.e. the ACCC).

The Company again notes that the EPWA Submission states that EPWA "recognises that further work to efficiently and effectively elevate transparency and governance controls may be required", and that "improving the transparency of the regime and ISO's governance is a priority for the [Evolution of the Pilbara Networks Rules Project]".²⁷

Independence of conditions not necessary

The Company does not agree that, as per the BHP Submission, the conditions of the authorisation should be "capable of being independently understood and scrutinised without requiring a detailed understanding of the underlying State-based Pilbara regime".²⁸

Due to the complexity of the Pilbara regime, it is not possible to independently understand and scrutinise the context of the Application, or even the scope of the Proposed Conduct itself without a detailed understanding of the Pilbara regime. Given this, the Company sees no reason why any preference should be afforded to certain conditions on the basis that they are capable of being understood without any Pilbara regime knowledge.

Further, the Company does not consider it onerous or inappropriate to require Participants to "carefully trace through the various requirements relating to transparency, ringfencing and confidential information contained in the PNR and the PNAC in order to ensure that any

²⁵ BHP Submission page 7.

²⁶ PNR rule A2.5.1.

²⁷ EPWA Submission page 7.

²⁸ BHP Submission page 2.

Proposed Conduct is authorised and is not otherwise liable to contravene the relevant provisions of Part IV of the CCA".²⁹ Given that the Proposed Conduct necessarily involves the performance of Pilbara regime functions,³⁰ these requirements legally bind the Participant in any event. Participants must have processes in place to ensure their compliance with them regardless of whether a condition of any authorisation refers to them.

The Company's view is that the simplest and most comprehensible approach would be to require Participants to comply with and understand a single, complete transparency regime, rather than two regimes: one in the PNR and enforced by a set of State-based authorities,³¹ and the other in conditions to a competition authorisation enforced by the ACCC.

Uncertainty given PNR's ability to change not a unique issue

The BHP Submission raises that the PNR's ability to change means that separate conditions of authorisation are appropriate.³²

However, the PNR's ability to change affects the entirety of the Proposed Conduct, not just any conditions, and therefore the Company again does not see any reason to treat conditions differently.

The risks of materially changing circumstances exists in respect of all authorisations, not just the authorisation requested by the Company. Perhaps unlike other authorisations, the ability for the PNR to change means there is an easily understandable avenue via which such changes could foreseeably occur. However, the Company's view is that this does not automatically mean that the likelihood of such a change occurring is so materially increased that the mechanisms in the CCA designed to deal with change (i.e. ss 91B and 91C) are uniquely insufficient in respect of the Company's requested authorisation.

Ultimately, it is possible (but highly unlikely) that the PNR could change in a way that materially increases any public detriment emerging from any authorised conduct, or materially decreases the effectiveness of any conditions. This is an unavoidable issue in the same way change is an unavoidable issue with all authorisations. However, specifically in respect of the Proposed Conduct, these risks are mitigated by the fact that:

- (a) it is particularly unlikely that a regime under the custodianship of the Western Australian government would be amended to have such an effect;
- (b) a PNR Amending Rule cannot be made unless the Coordinator of Energy is satisfied that that the amended rules are consistent with the Pilbara Electricity Objective,³³ and therefore consistent with the objective of advancing the long-term interests of consumers of electricity in the Pilbara region;³⁴
- (c) all non-urgent and non-trivial rule change proposals are subject to public consultation,³⁵ putting all potentially effected parties on notice of the change and allowing them to comment;
- (d) proposed Condition 3 will simultaneously notify the ACCC of the rule change proposal; and

²⁹ BHP Submission page 8.

³⁰ Application paragraph 75(1)(a).

³¹ The Company, the Economic Regulation Authority and the Electricity Review Board each have PNR enforcement functions: PNR Subchapter 12.1.

³² BHP Submission pages 7 – 8.

³³ PNR rule A2.4.A2.

³⁴ *Electricity Industry Act 2004 (WA)* s 119(2).

³⁵ PNR rule A2.5.9B and A2.7.1.

- (e) if such a change occurred regardless of the above controls, the revocation and review mechanisms in s 91B and 91C of the CCA stand as safeguards (and the efficacy of these safeguards are increased by the fact that paragraphs (c) and (d) above mean all relevant parties will be fully informed of the change from the moment it is proposed).

Further, in respect of transparency, it is highly unlikely that any PNR amendments would *decrease* or *remove* transparency requirements. As per the EPWA Submission, EPWA's objective in the Evolution of the Pilbara Networks Rules Project is to "efficiently and effectively elevate transparency".³⁶ In any event, a rule change proposal to *decrease* or *remove* existing transparency requirements would be subject to the controls in paragraphs (a) to (e) above.

Rule change process not inappropriately lengthy and onerous

The Woodside Submission states that "the alternative to imposing conditions on the Proposed Conduct would involve seeking amendments to the regulations underpinning the Pilbara regime, which involves an onerous and lengthy process. This means that without strong safeguards at the outset, any detriments arising from the Proposed Conduct may not be addressed for some time".³⁷

The Company does not agree with this statement. For clarity, any gaps could be addressed by amendments to the PNR and PNAC and should not require any amendments to the PN Regs. The PNR rule change process is not inappropriately onerous or lengthy in the Company's view.

Abridged rule change processes are available in some circumstances (generally, on PAC recommendation or where amendments are trivial or urgent).³⁸ For standard rule change processes, typical formal consultation processes apply. The PNR sets out specific timelines for consultation.³⁹

The Company believes these timelines are not inappropriately lengthy as they result in rule changes of significantly improved quality and provide the opportunity for all stakeholders to assess the proposed changes in light of their interests, and to put forward their views for public consideration.

The Company's view is that the ability of a condition of authorisation to avoid this process is a detriment associated with that option, not a benefit. That is, skipping public consultation and reducing the overall time invested by stakeholders in assessing the proposed requirement are not good reasons for a condition of authorisation to be preferred to a formal PNR rule change.

The EPWA Submission states that the Evolution of the Pilbara Networks Rules Project will include a "detailed review of the Pilbara Networks Rules" and is "expected to culminate in a public consultation process later this year and a reform implementation plan in February 2025".⁴⁰

However, the Company notes that there is nothing preventing any person from proposing any rule changes immediately and commencing the relevant processes sooner.

³⁶ EPWA Submission page 7.

³⁷ Woodside Submission page 8.

³⁸ PNR Rule A2.5.9A.

³⁹ PNR Appendix 2.

⁴⁰ EPWA Submission page 7.