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7 May 2009

Mr Jeremy Threlfall
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PO Box 8469
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Dear Jeremy

Draft Determination: The Pilbara Infrastructure Pty Ltd's Proposed Train Path Policy

The North West Iron Ore Alliance (NWIOA) is pleased to respond to the Economic Regulation Authority's (Authority) Draft Determination on The Pilbara Infrastructure Pty Ltd's (TPI) Proposed Train Path Policy (TPP).

In responding to the Draft Determination, there are several matters the NWIOA requests the Authority consider before issuing a Final Determination. These matters pertain to:

▪ **Required Amendment 1 - Non-Code Access Agreements Are Outside the Railway (Access) Code 2000**

The NWIOA had previously submitted that the TPP be applicable to all operators and hence give full visibility of the demand on the network. The NWIOA notes the Draft Determination in that the Code does not imply an obligation to apply the TPP to agreements negotiated outside the Code and makes the following comment:

1. The issue of coverage of all arrangements, whether negotiated inside or outside the Code, is fundamental to maintaining a non-discriminatory order of priority for all rail operators, promote efficient investment and use of services infrastructure, promote effective market competition and maintain consistency at a national level.
2. WestNet Rail (WNR) volunteered coverage across all agreements whether negotiated inside or outside the Code in its 2006 TPP and it is relevant to review the WNR TPP chronology and note the key points which are as follows:
 - (a) In WNR's original submission filed in November 2001¹, WNR suggested the Code should only apply to Code negotiated agreements and was silent on non-Code agreements.

¹ http://www.era.wa.gov.au/cproot/3391/2/pathpol_151101.pdf

- (b) Extensive public submissions filed in early 2002 made the point that all applications for access must be treated consistently and fairly and no distinction should be made between negotiations made inside or outside the Code to ensure consistency and fairness (see p.9 of the ORAR Draft Determination dated August 2002)².
 - (c) In the August 2002 Draft Determination, the ORAR agreed that "...the TPP needs to be consistent and applicable for each allocated train path regardless of whether access applications are made inside or outside the Code. The Regulator understands that WNR will apply the TPP to all access agreements negotiated outside the Code. Accordingly, a statement to confirm this intent should be included in the TPP" (p.12, bullet point 4).
 - (d) In its response in September 2002, WNR³ "volunteered" the inclusion of all Code and non-Code negotiated access agreements.
3. It is also notable that throughout the submissions stage, Australian Rail Track Corporation (ARTC) (one of the few comparable rail operators) indicates that its own undertaking from 2002 had been accepted by the ACCC on the basis that it should lay the foundation for a consistent national rail access regime (see for example pp. 1-2 of the February 2006 submission)⁴.
 4. ARTC also made the very important observation in its original submission in January 2002 (see pp 1-2) that the West Australian Government had sought to have the Code certified by the National Competition Council (NCC) as an effective access regime under Part IIIA of the Trade Practices Act 1974, but withdrew from the certification process - one of the main issues raised by the NCC was to specifically request that the Code be amended to ensure a nationally consistent approach be taken to rail access terms and conditions;
 5. The ARTC undertaking (as do other access undertakings to infrastructure such as ports - for example the Dalrymple Bay Coal Terminal undertaking) ensures there is consistency across all access agreements by ensuring indicative terms of access form part of its undertaking. In so doing, all access agreements negotiated are subject to the same principles - this would be the effect if the TPP extended to access agreements negotiated inside or outside the Code;
 6. The NWIOA believes there is a genuine risk to those seeking access under the Code of inconsistent and unfair treatment by TPI relative to those who negotiate access outside the Code. This amounts to a significant circumvention of both:
 - (a) The Authority’s ability to exercise sufficient regulatory oversight; and
 - (b) The object of the Railways (Access) Act 1998 that is the source legislation for the Code, namely "...to establish a rail access regime that encourages efficient use of, and investment in, railway facilities by facilitating a contestable market for rail operations".
 7. Exclusion of agreements negotiated outside the Code creates a "dual" system that distinguishes coverage by the TPP and it is difficult to see how such a system promotes efficient investment, the use of services infrastructure or facilitates a contestable market for rail operations. It is also strongly

² <http://www.era.wa.gov.au/cproot/5811/2/WNR%20Draft%20of%20the%20TPP%20Determination.pdf>

³ http://www.era.wa.gov.au/cproot/3409/2/wnr_trainpath0902.pdf

⁴ [http://www.era.wa.gov.au/cproot/5346/2/Submission%20\(ARTC\)5.pdf](http://www.era.wa.gov.au/cproot/5346/2/Submission%20(ARTC)5.pdf)

arguable that to allow this situation to exist is inconsistent with the objectives of Part IIIA of the Trade Practices Act, i.e. "to promote economically efficient operation of, use of and investment in the infrastructure by which services are provided, thereby promoting effective competition in upstream and downstream markets; and provide framework and guiding principles to encourage a consistent approach to access regulation in each industry".

▪ **Required Amendment 3 – The Use of GTK to Measure Capacity**

The NWIOA notes the Authority’s assessment that there are few compelling reasons to adopt a GTK approach, compared to a train path approach, as used in WNR’s 2006 TPP. The Authority is unconvinced the GTK approach will result in better use of the railway track and notes the TPI submission that the GTK approach is not used on similar railways in Australia⁵.

The NWIOA believes the GTK approach is used on similar railways in Australia and that a comparison with the WNR network is unhelpful and ineffective since the WNR network is generally not capacity constrained and train types not homogenous. This is in marked contrast with public statements by FMG regarding expansion plans and plans by other access seekers that the TPI Railway Network will be capacity constrained. If one accepts FMG’s public statements, it follows that the GTK approach possesses considerable merit since it defines capacity as both a train path plus the capacity the train can carry as defined by the network infrastructure and standards. That is, for a given mix of train types, the design payload of those train paths is calculated to properly reflect the capacity of the section. The payload must reflect design capacity of the iron ore wagons as this is a single purpose railway primarily dedicated to haulage of iron ore (with a lesser usage by construction, maintenance and fuel trains).

The GTK approach is used by the ARTC for the Hunter Valley coal chain and the NWIOA refers the Authority to the ARTC Hunter Valley Corridor 2007-2012 Capacity Strategy⁶. The Hunter Valley network exports in excess of 100m tonnes per annum from a series of mines and loaders strung out along the network using several rail haul operators. Under the section *How the Strategy was Developed*, the strategy identifies constraints on the network and options to resolve these. The strategy also examines operational delay on the network and operational robustness of the network, to highlight opportunities for improved operational performance on top of the provision of sufficient capacity.

The capacity calculation makes assumptions about average train sizes, the disposition of volumes from load points and the ability of participants to maintain constant throughputs at high levels of reliability. Average capacity per train is estimated based on the average number of wagon rakes per train (e.g. 18 trains of ‘120 tonne’ wagons and 12 trains of ‘100 tonne’ wagons) and average capacity is around 5,900 tonnes per train. Average train speed of the network is also calculated and the calculation of theoretical daily capacity is adjusted by a factor of what a section of line can practically carry to calculate practical capacity.

The ARTC then computes model timetables based on basic infrastructure at track level, less safe working delay, and trains are entered specifying departure time, length and section running time. That is, the ARTC consider a given infrastructure scenario, average train size and train paths in determining optimal capacity. As a consequence, the NWIOA submits that full consideration of the GTK approach is both relevant and warranted, and that the Hunter Valley coal chain is a very similar comparator to the TPI Railway Network. (For the record we note that comparisons with the BHP Billiton and Rio Tinto rail networks, who use train

⁵ Economic Regulation Authority, The Pilbara Infrastructure Pty Ltd, Draft Determination on the Proposed (revised) Train Path Policy, 27 March 2009, para 81.

⁶ <http://www.artc.com.au> ; Investment Strategies, Hunter Valley, 2007-2012 Hunter Valley Strategy – Consultation Document.

paths, is also not valid. As canvassed in other jurisdictions, these railways are used to optimise the supply chain at the port end).

▪ **Required Amendment 4 - Transparency of the Regime**

As discussed earlier in this submission, the exclusion of non-Code agreements reduces transparency. However, there are other significant transparency issues the NWIOA considers should be addressed, particularly if the regime were to exclude non-Code agreements.

The NWIOA submission to the Issues Paper on the TPI TPP requested the Authority set parameters or models for each item of information to provide third party access seekers the transparency to negotiate with TPI effectively. As a consequence, the NWIOA supports the Draft Determination Amendment 4 that TPI take account of the need for the capacity analysis process to be transparent.

However, the NWIOA strongly believes the procedural basis must also be structured to facilitate this direction toward transparency. Under section 15 the proponent must show the proposed train path can be accommodated on the route or if not, provide the railway owner with a preliminary assessment, based on information reasonably available to the proponent, showing that the proposed extension or expansion:

- (a) Can be carried out in a technically and economically feasible way; and
- (b) Will be consistent with the carrying on of safe and reliable rail operations on the route.

The NWIOA understands the procedure for an initial access application to be that the proponent can seek from the owner information regarding the network capacity (under section 7 of the Code) including the working timetables for the route (under section 7 (c) of the Code). The Draft Determination Amendment 4 also requires TPI to incorporate into section 2.2.3 wording similar to section 2.2.2 of the WestNet Rail (WNR) 2006 TPP. The suggested wording is along the lines of TPI referring to the Master Control Diagram (MCD) and reviewing the train paths to determine if the path can be accommodated per se, or by adjusting other paths, and if the path is not feasible, then offering alternative paths.

The NWIOA submits that the above procedural wording is clearly less specific than the wording of section 7 (c) and will inevitably lead to an absence of transparency, and failure to visibly demonstrate any capacity analysis calculations. The NWIOA therefore requests that, in the event the final regime excludes non-Code agreements, this Amendment should include the requirement that TPI make available to the proponent:

- (a) The MCD at the time of the capacity analysis; or
- (b) In accordance with section 7(c), the daily working timetables at the time of the capacity analysis.

These requirements will encourage greater transparency in the analysis. Further, such information is:

- (a) Critical for the proponent to meet the requirements of section 15 of the Code; and
- (b) Assists in ensuring the railway owner meets the obligation of section 16 (2) for the railway owner not to unfairly discriminate against access seekers under the Code.

The NWIOA also submitted that the operating regime be transparent and notes that the Authority considers these matters to be covered by section 7 of the Code or the Train Management Guidelines.

▪ **Required Amendment 14 – Compliance and Review Issues**

The NWIOA notes the Authority has dealt with additional submissions regarding compliance and review inclusions under the heading ‘Additional Issues’. Additional Issue 4: Compliance and Review (of the Draft Determination) indicates that the Authority’s monitoring functions do not extend beyond monitoring a railway owners’ compliance with the Act and the Code, and that the Authority will undertake two yearly reviews.

The NWIOA supports the Authority’s Draft Determination to have shorter review periods than those proposed in the Issue Paper submissions and the Authority’s requirement for a Compliance and Review section (4.5). However, the NWIOA remains concerned with the issue of how section 16(2) could ever be monitored and/or enforced, particularly if non-Code agreements are treated as being outside the Code? As a consequence, the NWIOA re-submits that the intent of section 16 (2) be incorporated into the proposed section (4.5) of the TPP.

In closing, the NWIOA extends its thanks to the Authority for preparing and issuing their Draft Determination on TPI’s proposed TPP. We appreciate the opportunity to provide comment and look forward to the Authority’s recommendations for the remaining Part 5 instruments.

Yours faithfully

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Deputy Chairman & Chief Executive