electricity networks aotearoa

# ENA submission on proposed changes to the default distribution agreement template

## Submission to the Electricity Authority

DATE
**14 November 2023**

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# 1 Introduction

Electricity Networks Aotearoa (ENA) appreciates the opportunity to make a submission to the Electricity Authority (Authority) on its proposed changes to the default distribution agreement (DDA).

ENA represents the 27 electricity distribution businesses (EDBs) in New Zealand (see Appendix A) which provide local and regional electricity networks. EDBs employ 10,000 people and deliver energy to more than two million homes and businesses.

# 2 Executive Summary

ENA welcomes the Authority's recognition of the benefits of the ENA/ERANZ data template being embedded in the Electricity Industry Participation Code (the Code). ENA continues to support the codification and use of the ENA/ERANZ data template.

ENA appreciates that the Authority's proposal to remove recorded terms from the DDA is a direct response to the findings of the 2022 investigator's examination of several EDBs recorded terms[1] and subsequent changes to the Electricity Industry Act 2010 (EIA). ENA believes the Authority has erred in its reaction to these events and views the arbitrary use of Core terms to replace the recorded terms as an overreaction.

While the amended EIA provides the Authority with the ability to regulate quality, the Authority's proposed amendments to the DDA do not consider the price-quality trade-offs that are implicit in the regulation of service quality.

ENA's view is that two of the proposed Core terms are not within the Authority's jurisdiction and directly interfere with the Commerce Commission's (Commission's) powers in relation to setting maximum prices/revenues. The EIA explicitly prohibits the Authority using the Code to *"purport to do or regulate anything that the Commerce Commission is authorised or required to do or regulate under Part 3 or 4 of the Commerce Act 1986" which includes* determining maximum prices[2] or revenues.

The Authority's proposed use of Core terms to mandate the refund of charges not only goes beyond its jurisdiction but fails to recognise that the provision of line services does not stop during an outage, nor do transmission services and the associated transmission charges. Restoration of supply is a core service, which lines charges funds; accordingly, proposing a mechanism to reduce funding to a core service mechanistically is illogical. Further, this change fails the cost-benefit test and the absence of a similar obligation on Traders means any refund would not necessarily be passed to consumers.

The Authority's proposed clause 24.5 fails to strike an appropriate balance for the apportionment of risk. Under the proposed changes to this clause EDBs may no longer be able to expressly exclude liability for:

- originating in embedded networks and embedded generators;
- origination in Transpower's network;
- due to extreme weather events (only 'natural disasters' are referenced and would be interpreted very narrowly);
- due to vegetation and animals; or
- Trader's negligence or breach of Good Electricity Industry Practice.

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1 Electricity Authority, 2022, Notice of the Authority's decision under regulation 29 of the Electricity Industry (Enforcement) Regulations 2010, https://www.ea.govt.nz/documents/1808/Authority_decision_-_DDA_investigations_-_notice_under_Regulation_29.pdf

2 The Commission's functions in relation to electricity distribution do not extend to setting pricing methodologies, which has always been the Authority's responsibility.

ENA's response to the discussion paper consultation questions can be found in Appendix B of this paper.

# 3 Codification of the ENA/ERANZ data template is welcomed

ENA welcomes the Authority's proposal to codify the ENA/ERANZ data template. It will ensure that EDBs and Traders no longer must negotiate data access on a case-by-case basis for everyday tasks that ultimately deliver benefits to consumers.

The development of the ENA/ERANZ data template is a great example of the industry coming together in good faith to resolve the challenges facing the sector. ENA and its members were disappointed at the Authority's decision to not codify the jointly developed template at the time it was proposed.

In the absence of the codified template, each EDB and Trader has had to individually negotiate and agree on whether the ENA/ERANZ data template was to be adopted and or modified. While this has largely been accomplished it required significant effort by legal and executive level teams from Traders and EDBs, consuming time and resources that would have been better spent elsewhere.

While we welcome the Authority's proposal to codify the ENA/ERANZ data template, we are of the view that though this is an improvement to the status quo, it is still not the solution to EDB access to smart meter data in the longer term. As we stated in our response to MBIE's recent consultation on *Measures for Transition to an Expanded and Highly Renewable Electricity System*, we urge the Authority to ensure that EDBs can access smart meter data in a frictionless and cost-effective way.

# 4 Two clauses exceed the Authority's jurisdiction

ENA is concerned that the Authority is proposal to amend clauses 7.3 and 9.10 of the DDA goes further than permitted under the amendment in s32(4) of the EIA and therefore infringes on the Commerce Commission's (Commission's) regulatory jurisdiction for the determination of maximum prices and revenues under part 4 of the Commerce Act 1986.

## 4.1 Clause 7.3

The proposed clause 7.3 prevents EDBs from making price changes more than once in any 12-month period. This cuts across both:

1. the Commission's role in setting maximum prices/revenues through price-quality determinations; and
2. the process for demonstrating annual compliance with the price path in clauses 11.1-11.3 of the Default Price-quality Path determination.3

Specifying the manner in which prices can be changed directly infringes on the Commission's function to specify prices/revenues and is outside the Authority's jurisdiction.[4]

Moreover, as currently drafted this clause would mean that if a price for a specific customer was changed, it would prevent all other price changes for 12 months.

In addition, where a mid-year price increase was to occur due to a material change in a cost that is a pass-through cost or a recoverable cost as determined by the Commerce Commission it would then

[3] It is also the clause that the Authority previously offered as an example of a matter falling within the Commission's jurisdiction, we infer because it related to price.

[4] Clause 7.3 also intersects with the Commission's information disclosure requirements for EDBs, which specify disclosure requirements when distributors change prices: cl 2.4.19. Because amended s 32 permits the Authority to set information requirements, that overlap is no longer prohibited.

inappropriately, prevent a price increase the following 1 April, effectively locking in an annual cycle of price changes that deviates from 1 April.

If the Authority decides to overlook the jurisdictional issues and pushes ahead with clause 7.3, ENA believes that it should be drafted as below:

> *7.3 Price changes: Unless otherwise agreed with the Trader, the Distributor may not change its Prices more than once in any 12-month period ending on 31 March, unless a change:*
>
> *(a) results from a material change in a cost that is a pass-through cost or a recoverable cost specified in a determination of an input methodology by the Commerce Commission under Part 4 of the Commerce Act 1986 in respect of the services provided by the Distributor;*
>
> *(b) relates to the Distributor providing new Distribution Services or materially changing existing Distribution Services, provided that any proposed Price change must only apply to ICPs affected by the new or changed Distribution Services; or*
>
> *(c) results from a change in the law.*
>
> *Nothing in this clause prevents the Distributor from changing a Price at any time with the agreement of the Trader.*

### 4.2 Clause 9.10

As drafted, clause 9.10 requires EDBs to refund Traders for charges in respect of ICPs that experience a continuous interruption for 24 hours or longer. Clause 9.10 infringes on the Commission's exclusive jurisdiction in relation to prices/revenues because it prevents distributors from charging prices to Traders in circumstances where supply is interrupted. In effect this mandates EDBs to under-recover lines charge revenue in circumstances where supply is interrupted for more than 24 hours.

ENA believes that the effect of this provision is to prevent distributors from charging for their services and therefore goes beyond simply regulating quality and constitutes regulating maximum prices/revenues.

The provision of line services does not stop during an outage, in many cases quite the opposite. EDBs mobilise and expend significant resources to restore power during outages. This network restoration work is a core component of the lines service. As demonstrated by EDB's responses to the impact of Cyclone Gabrielle.[5]

Not only does the proposed clause breach the EIA, it is burdensome and fails the cost-benefit test. The cost of monitoring, reporting and issuance of refunds to Traders is likely to be far in excess of the value of the refunds made to Customers which could be as little as 45 cents[6].

In addition, there is no guarantee that the Trader will pass any refunds on to the relevant Customer. If the true purpose of the amendments is to protect Customers, this omission of full Customer passthrough of refunds by Traders is contrary to the Authority's statutory objectives.

Finally, the treatment of these refunds under the Commission's price-quality path is not clear and would likely result in other consumers paying more.

## 5 Drafting amendments and new Core terms

### 5.1 ENA supports uncontroversial clauses

ENA supports many of the new proposed Core terms and their drafting including:

- Clause 4.11 Distributor to restore Distribution Services as soon as practicable

[5] For example see Unison Networks https://www.youtube.com/watch?v=vp2RpQVw7hM

[6] The current maximum fixed daily charge for a low user under the Low User Fixed Charge Regulations 2004

- Clause 5.7 Maintenance of Load Control Equipment
- Clause 5.8 Maintenance of Load Signalling Equipment
- Clause 9.5 Other invoices
- Clause 14.1 Provisions in Customer Agreements
- Clause 26.2 Claim against Trader in relation to breach of service standards by the Distributor
- Clause 33.2 Definitions "Default Interest".

## 5.2 Clause 24.5 inappropriately alters the risk allocation

ENA does not support the changes to clause 24.5. Under the proposed changes to this clause EDBs may be required to accept will no longer be able to expressly exclude liability for matters that are outside their reasonable control, and which are better borne by other participants, including:

- failures originating in embedded networks and embedded generators;
- failures originating in Transpower's network;
- failures due to extreme weather events (only 'natural disasters' are referenced (force majeure clause 21.1, and would be interpreted very narrowly);
- failures due to vegetation and animals; or
- liability arising from Trader's negligence or breach of Good Electricity Industry Practice.

This creates significant uncertainty for EDBs as to risk allocation, which has not been priced into the existing arrangements.

Further, compliance with Good Electricity Industry Practice does not necessarily protect the EDB from liability for defects or interruptions in supply. To the extent, that EDBs would seek to rely on the existing liability exclusions and force majeure clauses traditionally these have been narrowly interpreted by the Courts.

While the DDA template will continue to exclude EDB liability for failures arising from:

- Transpower's, generators' or grid owners' acts or omissions; and
- the Trader's breach of the DDA.

Under the proposed amendment, the allocation of risk for EDBs that supply (via Traders) to commercial Customers would change. EDBs could previously use the recorded terms, to establish a sensible liability position with respect to matters within their control and now they cannot. This is an inefficient allocation of risk that is not to the long-term benefits of consumers.

For all EDBs, the proposed liability exclusions do not go as far as the current DDA liability exclusions, leaving risks, particularly with respect of failures due to:

- extreme weather events, fire and flooding, etc; and
- vegetation, wildlife and animals.

It is ENA's view that the Authority overstates the extent to which EDBs can prevent or mitigate some of these risks and should therefore have to bear them.

## 5.3 ENA has other concerns over the new Core terms

In addition to the serious concerns detailed above, ENA believes that the drafting of several other new Core terms inappropriately places additional risks and liabilities upon EDBs which are not to the long-term benefit of consumers.

### 5.3.1 Clause 4.8 Distributor to schedule Planned Service Interruptions to minimise disruption

The proposed amendments will likely drive cost increases for EDBs, as scheduling Planned Service Interruptions at times that are convenient to Customers (for example, out of usual working hours, overnight) is likely to be more expensive. In addition, ENA notes individual Distribution feeders service a range of different types of Customers, each of which are likely to have different times that are convenient to them.

EDBs will be required to consider whether it is "reasonably practicable" to schedule Planned Service Interruptions at times that are less expensive, but would likely have a more significant impact for consumers. This change represents a delinking of the implicit price-quality trade-off, where the level of service is increased but with no consideration of the price /cost implications.

If EDB's costs increase as a result of contractual restrictions on when Planned Service Interruptions can be carried out, ultimately these inefficient costs will be borne by consumers.

Constraints on scheduling planned interruptions will create a barrier to undertaking planned work, which increases future risks to network reliability and safety. This is an inappropriate outcome. It would be more appropriate for EDBS to retain discretion over when to schedule Planned Service Interruptions by balancing the cost of that interruption against Customers' interests.

### 5.3.2 Clause 14.2 Customer concerns about power quality

This proposed clause will remove EDBs' discretion to decline to investigate any concern raised by Traders and Customers. It also requires EDBs to advise of the results of every investigation. Those concerns are not subject to a materiality threshold meaning that any momentary power quality fluctuations must be investigated regardless of Good Industry Practice and cost.

As a result of these changes, EDBs will need to allocate more resources to investigating concerns and complaints. The additional cost of these investigations will be borne by Consumers. Those EDBs covered by the Commission's Price-Quality determination are only funded for the current level of investigations and may have to forgo spending in other vital areas such as preventative maintenance to investigate and report on minor and inconsequential issues.

In our view, EDBs should retain discretion to decline to investigate concerns that are trivial, minor, or vexatious, and only be required to investigate suspected breaches of the Service Standards.

### 5.3.3 Schedule 1 Service Standards

Under the proposed Schedule 1 EDBs must now follow a prescribed process for dealing with notice from Traders or Customers of actual or suspected Service Standard breaches, which includes a requirement to investigate the suspected breach, and advise Traders and/or Customers (as applicable) of the result, and determine whether a Service Guarantee Payment is payable.

EDBs would also have to proactively advise Traders of Service Level breaches, and whether a Service Guarantee Payment is payable in respect of the breach – even where no complaint is received from the Trader or Customer.

If the breach involves ICPs, EDBs can either make Service Guarantee Payments to Customers (at the Customer's request) or can make them to Traders. Traders must pass the Service Guarantee on to Customers, less reasonable administrative costs.

The Authority has proposed a new clause limiting EBD's liability for breaches of Service Standards or Service Levels (and the procedural requirements in Schedule 1). The effect is that a breach of the Service Schedule does not constitute a breach of the DDA and that the Service Guarantee Payment is the Trader's sole remedy. ENA views this limitation of liability for Service Standard breaches as an improvement on the existing DDA.

The new requirement to proactively investigate and advise of breaches, as well as investigating each actual or suspected breach notified by Traders and Customers will likely consume more EDB time and resources.

ENA's view is that the Authority should include a materiality threshold so that EDBs would only be required to investigate actual breaches or suspected breaches that are non-trivial.

# 6 Proposed changes to Part 12A of the Code

The Authority has posed a series of changes to Part 12A which covers the processes for handling changes to DDAs. ENA supports these changes set out in clauses 11, and 11A of Schedule 12A.1.

ENA also supports the proposed changes to the DDA processes following changes to Core and Collateral terms as set out in clause 11A of Schedule 12A.4 and clause 12 of Schedule 12A.4 respectively.

ENA notes that the Authority can also now add, remove or change requirements for the DDA's operational terms under clause 12 of Schedule 12A.4. Every time the Authority exercises these powers over operational terms, each EDB must amend its own DDA to reflect the Authority amendments, and publish the updated DDA on its website within 15 business days. Existing agreements will be deemed to be amended within 15 business days following the updated DDA being made available.

ENA seeks to understand the Authority's expectations for consultation of the operational terms stemming from the current proposed amendment to the DDA. Are EDBs expected to consult before establishing the operational terms required to comply with new Core terms mandating the inclusion of service standards in Schedule 1**?** The cost of this consultation is absent from the Authority's Cost/benefit analysis of the proposed changes.

ENA notes that EDBs are required to consult with affected participants, even when changes to operational terms are initiated by the Authority adding, removing, or changing operational terms' requirements. ENA is of the view that this consultation is not necessary as any changes to the DDA by the Authority will undergo extensive consultation as part of the Code change process.

ENA's view is that the obligation for EDBs to consult on changes to operational terms should only apply to changes initiated by EDBs under clause 12 of Scheule 12A.4.

Clause 13 of Schedule 12A.4 sets out the effect of amendment to the Core, operational, and collateral terms, on existing agreement, and under subclause (4) states any recorded term in an existing agreement, is deemed to be removed. ENA understands that any amendments made by the Authority will come into effect on the 15th business day following the amended DDA being made available and that existing DDAs will be deemed to be amended on this date.

ENA has concerns that the Authority's ability to 'deem' changes to Core terms in existing agreements is likely to create confusion and potential disputes with Traders as to which terms are in effect. ENA suggests that the Authority be required to notify all Traders and EDBs of the deemed changes to the DDA and their effective date.

# 7 The cost of re-issuing current DDAs is not captured in the CBA

ENA has serious concerns about the robustness of the Authority's Cost Benefit Analysis (CBA). The Authority provides a single consolidated CBA that covers all three issues. ENA's view is that each issue is discrete and should be assessed on their individual merits. The adoption of the ERANZ/ENA data template has a significant benefit, but the other two issues are of marginal at best. Each individual issue needs to deliver a clear net positive outcome. By combining the CBAs the Authority could effectively introduce additional changes with

net costs of just under $200k and still get an overall positive net benefit, but this wouldn't be the best outcome for NZ consumers.

Additionally, the requirement for consultation new operational terms creates an unnecessary burden on EDBs and Traders, the cost of which is not accurately captured in the Authority's CBA.

The Authority's assumption that it will cost just $4,000 for 29 EDBs to update their respective DDAs is a material understatement. The internal processes for amending a DDA are not just a case of modifying a handful of terms in a document and posting it on the website. DDAs are foundational legal agreements and as such their amendment requires significant internal oversight and approval including:

- briefings to executive leadership and the Board on the legal ramifications of the changes
- peer review of the changes
- executive sign-off/approval of the changes to these agreements.

In addition to the cost to participants of changes to the DDA, the Authority should be accounting for its own project costs and the costs of stakeholders' engagement with the project, as these costs would not occur under the status quo. There are real costs associated with participants engaging in the Authority's processes and if after taking account of these costs the status quo is an (economically) cheaper option, the Authority will not have been acting in the long-term benefit of consumers. The Authority can't assume that the costs of consultation are zero.

The dynamic benefits of the proposed changes are immaterial. The five biggest EDBs account for about 2/3rds of all ICPs. As most of the population resides on these networks, the majority of benefits from competition will accrue in these areas. However, these EDBs all have at least 22 Traders on each of their networks. The dynamic efficiencies that would be gained from an additional Trader on these networks is effectively zero. There may be benefits from additional Traders on a smaller network, but even the smallest networks have enough incumbent Traders that the effect of any new entry will be limited. For example, Scanpower has 13 Traders. Given the incremental benefit of additional Traders is likely to diminish as the number of Traders grows, most of the competition benefits of new Trader entry will have been derived long ago, even on the smallest networks.

# Appendix A - ENA Membership

The Electricity Networks Aotearoa makes this submission along with the support of its members, listed below.

Alpine Energy

Aurora Energy

Buller Electricity

Centralines

Counties Energy

Electra

EA Networks

FirstLight Network

Horizon Energy Distribution

Mainpower NZ

Marlborough Lines

Nelson Electricity

Network Tasman

Network Waitaki

Northpower

Orion New Zealand

Powerco

PowerNet

Scanpower

The Lines Company

Top Energy

Unison Networks

Vector

Waipa Networks

WEL Networks

Wellington Electricity Lines

Westpower

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# Appendix B - Consultation Paper Questions

| Questions | Comment |
|---|---|
| Q1. Do you agree Issue 1, summarised in paragraph 2.21 and described in paragraphs 2.21 to 2.32 and Appendix B,, is worthy of attention? | ENA acknowledges the concerns raised by past investigations into DDA recorded terms and the recent changes to the Electricity Industry Act, which grants the Authority additional oversight powers.<br><br>ENA does not agree with the issues identified in paragraphs 2.25 and 2.26. |
| Q2. Do you have any feedback on the Authority's assessments of changes to recorded terms, as set out in Appendix B and Appendix C? | See above for feedback on the proposed Core changes to the Core terms. |
| Q3. Do you agree Issue 2 is worthy of attention? | ENA views the issue as non-material. The cost of providing the Authority copies of distributor agreements is negligible. |
| Q4. Do you agree Issue 3 is worthy of attention? | ENA agrees that the cost of obtaining consumption data using the existing data template needs to be addressed. ENA highlighted this issue when the Authority rebuffed the approach by ERANZ and ENA to codify the jointly developed data template. |
| Q5. Do you agree with the objective of the proposed Code amendment? If not, why not? | ENA agrees with the objectives (b)-(d) note that the benefits of objective (c) are not material.<br><br>While ENA notes the concerns raised by the investigators over the enforceability of recoded terms, the total abolishment of recorded terms is not an appropriate objective. |
| Q6. Do you agree the benefits of the proposed Code amendment outweigh its costs? | The Authority's assessment of cost and benefits severely understates the cost associated with the initial implementation of the Code changes especially in relation to the operational terms associated with the introduction of Schedule 1 as a Core term.<br><br>Each EDB will be required to consult with each and every Trader on operational terms. Each party will likely expend material effort in the legal and operational review of operational terms required by Schedule 1. |

| | |
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| Q7. Do you agree the proposed Code amendment is preferable to other options? If you disagree, please explain your preferred option in terms consistent with the Authority's statutory objectives in section 15 of the Act. | |
| Q8. Do you agree the proposed Code amendment complies with section 32 of the Act? | ENA's view is that the proposed clauses 7.3 and 9.1 fall outside the power afforded the Authority under the Electricity Industry Act. The proposed clauses, in effect, regulate the maximum revenues and prices of EDBs, which the Commerce Commission covers under Part 4 of the Commerce Act 1986. |
| Q9. Do you have any comments on the drafting of the proposed Code amendment? | See comments in the body of the submission |