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Carl Hansen
Electricity Authority
2 Hunter Street
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By email: submissions@ea.govt.nz

Dear Carl

Arrangements to manage a retailer default situation

Genesis Power Limited, trading as Genesis Energy, welcomes the opportunity to provide a submission to the Electricity Authority on the consultation paper "Arrangements to manage a retailer default situation" dated 18 June 2013.

Genesis Energy broadly supports the proposed steps for managing a retailer default situation. In particular, we support the introduction of a two stage tender process prior to the mandatory allocation stage as this better allows for a commercial resolution. However, in order for the tender process to be workable, it is critical that:

- the timeframes are sufficient to enable the tender step to be undertaken (at least three working days and five working days longer if customer information is not provided to a potential recipient retailer in advance);
- tender and customer information is provided by the Authority to a retailer who expresses an interest in the tender process as soon as possible after day eight; and
- the tender process is specified in the Code (as are all other key steps in the default situation).

Genesis Energy agrees in principle with the Authority having the ability to assign contracts from a defaulting retailer to a successful recipient retailer, provided that two key criteria are met. First, any such assignment ensures that the recipient retailer is not responsible for the obligations or liabilities that the default retailer

incurred prior to the time of assignment. Secondly, the recipient retailer has sufficient flexibility to match the customer type with their own normal terms and conditions.

We expand on this and other specific issues below. Our responses to the consultation questions are otherwise set out in **Appendix A**.

Timeframes must be achievable

The Authority proposes the following timetable once a default event is initiated:

- Phase one: commercial solution – 7 days (days 0 to 7);
- Phase two: encourage switching – 7 days (days 8 to 14); and
- Phase three: allocation of remaining consumers which comprises of three step process: (1) initial tender; (2) second tender; and (3) mandatory allocation – 3 days (days 15 to 17).

Genesis Energy strongly supports the proposed phase three tender process as this further allows for a commercial response to the default event before mandatory allocation is evoked. However, in our view, the 3 day timeframe proposed is simply not workable. In order for phase three to be feasible:

- The 3 day timeframe must be at least three working days. If day 14 fell on a Friday, it would be impossible to run the proposed tender process by the following Monday. If customer information is not provided to a retailer in advance of phase three, as recommended below, we consider that the timeframe would need to be extended to at least 5 working days.
- If retailers are to be able to engage in the tender process, they will require tender and customer information well in advance of day 14 in order to assess and determine whether to tender. The proposed amendments to the Code stipulate that the Authority must provide customer information to a recipient retailer if the Authority exercises its right to assign contracts. However, the decision to exercise assignment does not arise until the end of day 17, clearly too late to assist with the tender process. The paper suggests that tender documents would be available from day 8. It should be clarified in the Code that tender documents, together with any information that the Authority holds about customers, must be provided to retailers who express an interest in the tender process as soon as possible after day 8 and, say, no later than day 11. Updated information on remaining customers could then be provided to retailers closer to the tender date.

We understand that extending the timeframes impacts on prudential requirements calculated for the default exit period. However, we consider the impact on prudentials would be small relative to the benefits of implementing a workable process for managing a retailer default. A workable process is required in order to achieve the Authority's objectives, including to facilitate a commercial outcome where possible, and to maintain the confidence of both consumers and industry participants.

Phase three should be specified in the Code

We consider that it is essential that key steps of phase three are specified in the Code. The proposed amended Code expressly sets out the detail of phases one and two. However, in relation to phase three, only mandatory allocation is provided for. In relation to the tender process, the proposed drafting in the Code simply states that:

"Nothing in this clause prevents the Authority from deciding to give a notice under subclause (3) to 1 or more recipient retailers by undertaking a tender or competitive process."

Including phases one and two in the Code, but only one of the steps in phase three, is an unsatisfactory approach for the following reasons:

- It suggests that the tender process is not intended to be a one of the steps in the default event process, which is inconsistent with the position set out in the consultation paper and the guidelines. It is also internally inconsistent drafting to set out some stages of the process in the Code but not others. If the tender process is intended to be a step in the process, this should be clearly stated and reflected in the Code.
- The current drafting will create considerable uncertainty as to whether or not the tender process would ever be engaged. This uncertainty is likely to work against the Authority's stated objectives for the proposed Code changes. It is important that all affected participants have a clear understanding of the process the Authority will follow from the outset, particularly given the tight timeframes that apply once an event is triggered. There may be situations where the tender process is not required or appropriate (for example, where there are only a small number of consumers remaining following phase two). The circumstances where the tender process would not be triggered should be readily provided for in the Code and the guidelines.

Distributor agreement category should be limited to network area

The Authority proposes an additional category of default termination of use-of-system distributor agreement where the termination is due to serious financial breach and where all the other requirements apply. We have previously raised concerns about the inclusion of this category given distributors have the ability to access normal insolvency processes. On balance, we do not oppose this additional category if the "serious financial breach" and all other prerequisite requirements set out in the paper apply.

We also suggest that the default process should only apply to the network area where the default event arose. Importantly, this avoids a disproportionate response to issues confined to a single distribution network and also reduces the risk of creating a commercial negotiating advantage for distributors.

The Authority says that it has considered whether the process should be limited to the relevant distribution network area, but considers that limiting the process in this way would create incentives for retailers to "cherry pick" the process and shift uneconomic customers into the Authority process. We do not consider this is a strong argument given it is most unlikely retailers could in practice shift "uneconomic" customers.

Assignment of contracts

The proposed amendment to the Code would require contracts to permit the Authority to assign the rights and obligations of the default retailer to another retailer, and to permit the terms of the assigned contract "to be amended to the standard terms that the retailer would normally have offered to the customer immediately before the event of default occurred". We agree in principle to this requirement, provided that:

- **The recipient retailer will not be responsible for any rights, obligations or liabilities of the default retailer incurred prior to the time of assignment.** For example, we understand that the recipient retailer will not be responsible for any monies owed to distributors or other parties by the default retailer, nor will it be entitled to monies owed by the customer to the default retailer. We are concerned that this position is not sufficiently clear under the proposed drafting in the Code. We ask that the Authority provide further clarification about how assignment would work from a legal perspective and, if necessary, include further clarification in the Code.
- **The recipient retailer must have the flexibility to match the customer type with the terms and conditions that would usually be applied by the**

recipient retailer. We assume that this would also enable terms and conditions to be developed for "time of use" customers where these arrangements tend to be bespoke. To avoid uncertainty and confusion, we recommend that this position is further clarified in the guidance.

Dual fuel customers

We note that the consultation paper does not address dual fuel customers. We urge the Authority to work with the Gas Industry Company to develop a co-ordinated approach, particularly in relation to communications with customers. This would avoid confusion and duplication of information and is more likely to result in customers taking proactive steps to switch during phase two.

If you would like to discuss any of these matters further, please contact me on 04 495 3340.

Yours sincerely



Jeremy Stevenson-Wright
Regulatory Affairs Manager

Appendix A: Responses to Consultation Questions

QUESTION	COMMENT
<p>Q1 Has there been any development since submissions were received on the problem definition developed by the RAG that might warrant the Authority reconsidering its view as to the nature of the problem?</p>	<p>No</p>
<p>Q2 Do you agree with the objectives of the proposed amendment? If not, why not?</p>	<p>Yes. We particularly agree that the Authority should facilitate a commercial response where feasible and support the introduction of a tender process for this reason.</p>
<p>Q3 Do you agree with the proposed Code amendment which would introduce a new category of default when the following conditions are satisfied:</p>	<p>See covering letter</p>
<p>Q4 Do you agree that the proposed Code amendment should apply not only to the network or networks across which the event of default has occurred? If not, why not?</p>	<p>See covering letter</p>
<p>Q5 Do you agree that the trigger for the actions to be undertaken by the Authority should be limited to a breach of sub-clauses 14.55(a), 14.55(b), 14.55(f), and (the new) 14.55(h)? If not, why not?</p>	<p>Yes</p>
<p>Q6 Do you agree that the process for managing a retailer default should ensure that responsibility for all ICPs of the retailer in default, active and inactive, are transferred to another retailer? If not, why not</p>	<p>Yes. We also agree with the suggestion at the Authority's workshop that inactive ICPs should be allocated on a pro rata basis to avoid disproportionate allocation of uneconomic ICPs at the mandatory allocation phase.</p>

QUESTION	COMMENT
<p>Q7</p> <p>Do you agree that the process should accommodate situations where the default might not be resolved but an acceptable resolution has been agreed and all payments that should have been made have been made? If not, why not?</p>	<p>Yes</p>
<p>Q8</p> <p>Do you agree with the judgment arrived at by the RAG that a total period of 17 days for managing an event of default would provide a reasonable balance between the costs of too short a period and the costs of an extended period? If not, why not?</p>	<p>No. See covering letter</p>
<p>Q9</p> <p>If a period of 17 days is maintained, should this time be allocated as follows: seven days for a retailer to resolve the dispute or transfer its customer base, seven days for customers to voluntarily switch to another retailer, and a maximum of three days for communication with customers and ensuring all switches are processed?</p>	<p>See covering letter. We recommend seven days for phase one, seven days for phase two and, for phase three, either: (a) three <i>working</i> days if consumer and tender information is provided in advance of the tender process; or (b) at least five working days if consumer and tender information is not provided in advance of the tender process.</p>
<p>Q10</p> <p>Do you agree that the Code should be amended to require a retailer in default to provide information on its customers to the Authority and for the Authority to obtain this information from distribution networks and the registry if the information is not forthcoming from the defaulting retailer? If not, why not?</p>	<p>Yes</p>
<p>Q11</p> <p>Do you agree that the Code should be amended to provide for the registry to complete the switch of any customer of a retailer in default that chooses to switch to another retailer, if the retailer in default does not meet its obligations under the switching rules? If not, why not?</p>	<p>Yes</p>

QUESTION	COMMENT
<p>Q13</p> <p>Do you agree that the Authority should advise retailers and other interested parties that an event of default has occurred, and if it considers appropriate, identify the entity in default, to enable these parties to make necessary preparations? If not, why not?</p>	<p>Yes</p>
<p>Q14</p> <p>Do you agree that the Code should provide for the Authority to communicate directly with the customers of the retailer in default, including via mass media? If not, why not?</p>	<p>Yes</p>
<p>Q15</p> <p>Do you agree that the Code should provide for the Authority to provide customer information to the retailers to whom it transfers customers, should a mandatory transfer be required? If not, why not?</p>	<p>See covering letter. We agree Code should provide for the Authority to provide consumer information. However, we consider that customer and tender information should also be provided to recipient retailers who have expressed an interest in a tender as soon as possible after day 8 and no later than day 11.</p>
<p>Q16</p> <p>Do you agree that the Code should be amended to require that contracts between the retailer and its customers provide for the Authority to assign the contract to another retailer if an event of default is unresolved after 17 days? If not, why not?</p>	<p>See covering letter.</p>
<p>Q17</p> <p>Do you agree that the terms offered by recipient retailer (who is assigned customers by the Authority) should be those terms (including price) normally offered by the recipient retailer at the date the Authority was notified of the default? If not, why not?</p>	<p>See covering letter.</p>

QUESTION	COMMENT
<p>Q18</p> <p>Should the arrangements for managing an event of default provide for the Authority to tender the remaining customer base of the retailer in default after the Authority had exercised its rights to assign the contract on the terms of the recipient retailer? If not, why not?</p>	<p>See covering letter</p>
<p>Q19</p> <p>If a tender arrangement is provided for, should the Authority invite tenders on the basis of the prices that would be charged to the customers by the recipient retailer (but no higher than standard terms offered by that retailer) with the Authority assigning the customers on the basis of the lowest priced retailer? If not, why not?</p>	<p>Yes, see covering letter. We consider these steps should be in the Code.</p> <p>Paper and guidelines refer to tenders on the basis of the “standard tariff” and it is unclear what this means.</p> <p>For consistency the wording should be consistent with the wording in the Code for assignment of contractual terms (“standard terms the recipient retailer would normally have offered the customer immediately before the event of default”).</p>
<p>Q20</p> <p>Do you agree that, should the Authority be required to allocate customers of the retailer in default, it should do so on the basis of market share in the relevant networks but without any de minimus threshold? If not, why not?</p>	<p>Yes</p>
<p>Q21</p> <p>Do you agree that the arrangements for managing a retailer default should provide an opportunity for any retailer that is assigned customers to object on the basis that the assignment would threaten its financial viability, with the onus on the retailer to substantiate such a claim? If not, why not?</p>	<p>Yes – but “<i>serious threat to the financial viability of the recipient retailer</i>” is arguably too high a threshold to establish. We suggest “<i>threat to the financial viability of the recipient retailer</i>” is sufficient where such a threat is by definition serious.</p> <p>Given the timeframes, it will also be difficult for a retailer to make a case for not receiving customers particularly if consumer information is not provided as soon as possible after day 8 (see covering letter).</p>

QUESTION	COMMENT
<p>Q22</p> <p>Do you agree that the Code should require that the recipient retailer is responsible for notifying their assigned customers that they were now a customer of the recipient retailer, and advising the terms and conditions of their new contract? If not, why not?</p>	<p>Yes</p>
<p>Q23</p> <p>Do you agree that the Code should require that contracts between retailers and their customers should include provisions that: provide for the retailer to give customer details to the Authority in the event of a default; allow the contract to be assigned by the Authority in the event of default, with the terms and conditions to be replaced by the recipients retailers terms and conditions; provide for the retailer to assign the contract? If not, why not?</p>	<p>Yes</p>
<p>Q24</p> <p>Do you agree the proposed amendment is preferable to the other options? If you disagree, please explain your preferred option in terms consistent with the Authority's statutory objective in section 15 of the Electricity Industry Act? If not, why not?</p>	<p>See covering letter</p>