MIGHTY RIVER POWER

18 April 2016

Electricity Authority
via email: submissions@ea.govt.nz

Default Agreement for Distribution Services

We welcome the opportunity to provide a submission to the Electricity Authority ("the Authority") on the 'Default Agreement for Distribution Services Consultation Paper' ("the Paper"). We are a member of the Electricity Retailers Association of New Zealand (ERANZ) and we endorse its submission.

We support the Authority's proposal for more standardisation. The proposed approach in the paper is in line with our previous submissions on this topic and also our submission on the effects of emerging technologies.

In our view, standardisation of terms and pricing of distribution services contributes toward improved competitive outcomes and transparency and is consistent with the long term interests of consumers. Transpower currently operates under a standardised regime[1] similar to that proposed by the Authority for distribution which in our view works well to provide greater certainty and flexibility to market participants.

Allowing traders and distributors to agree alternative terms will give the parties the ability to innovate and/or have more favourable terms where possible.

We have set out below some suggestions which we consider could assist the Authority in finalising any Default Distribution Agreement (DDA).

Transition/timing

We consider that where parties are in real and meaningful negotiations, they should be able to mutually agree a negotiation period between themselves. If either party is not in agreement to negotiate, then the DDA would apply. We note ERANZ have also suggested removing the two month transition which we support.

Rulings Panel/ Other Alternative Dispute Resolution (ADR)

We agree that the Rulings Panel provides necessary oversight and accountability to ensure that operational terms are fair and reasonable. Generally speaking, the Rulings Panel is the most appropriate forum for resolving any issues that may arise. Also, this is consistent with the dispute regime for transmission agreements.[2]

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[1] Electricity Industry Participation Code 2010 clause 12.10.
[2] Electricity Industry Participation Code 2010 clause 12.45.

In addition to the Rulings Panel, we would be open to the Authority providing parties the option to refer the matter to mediation or arbitration by mutual agreement. This would avoid the Rulings Panel being the singular forum for disputes and would give the parties flexibility to form their own timeframe for resolution where appropriate. There are also benefits for consumers where parties are able to resolve matters themselves where practicable.

We have also provided feedback separately to the Authority relating to its review of the Rulings Panel Procedures this year. In our letter to the Authority of 24 March 2016 we suggested that the procedures align with the outcome of this consultation.

Alternative terms

We agree that the parties should be able to agree alternative terms to the DDA.

However, the Code should clarify that the parties can 'subsequently' agree alternative terms although the DDA has applied in default. We note that in relation to transmission, there is a particular provision allowing for subsequent agreements after the default transmission benchmark agreement has applied.[3] The wording is quite specific unlike the proposed clause 12A.10.

We suggest that clause 12A.10(1) be amended to align with clause 12.11 of the Code or, for the avoidance of doubt include the words "[A]t any time".

It is important for the parties to maintain flexibility as situations may arise post the DDA coming into force that would enable a better, more cost effective alternative. The parties will need to be at liberty to have the alternative agreement apply at the most appropriate time.

Requests for demand and energy information

We note that the Authority has expressed some concerns with the Vector Agreement around requests for demand and energy information. Accordingly, the Authority's proposed clause 31.2 aims to minimise contentious requests for consumption data.

The way clause 6.10 of the Vector Agreement is drafted may result in Vector acquiring commercially sensitive information. Some distributors are already offering competitive products such as batteries and/or solar to the consumer directly. Information required for network planning processes could also be used to advantage a monopoly distributor competing in these emerging markets which is not in the long term interests of consumers. As ring fencing provisions currently do not apply, we consider there is a potentially significant moral hazard in allowing access to commercially sensitive information.

We support the Authority excluding similar clause to 6.10 from the DDA. The proposed clause 31.2 should be narrowed down by defining the use for customer information and who can use this. Further, requests for customer information should be subject to Privacy Act laws. We suggest that this qualification is made explicit in the clause. This would ensure that the clause is not used for competitive purposes. ERANZ has provided a revised clause 31.2 in their submission which we support.

[3] Electricity Industry Participation Code 2010 clause 12.11.

Finally, gathering the requested information, formatting, and sending to distributors can be time-consuming and costly as system changes may be required. The trader should therefore be entitled to recover reasonable costs in carrying out this exercise.

We do note however, that while the clause may be narrowed, compliance monitoring is extremely difficult for the Trader, if not impossible which also poses challenges for the regulator.

Other terms

Our further specific amendments to the draft DDA are outlined in Appendix 2.

Concluding comments

We support the Authority's proposed DDA as providing outcomes consistent with promoting the long term interests of consumers.

We would welcome the Authority proposing a second round of consultation to comment more specifically on any finalised draft DDA should this be considered necessary.

Our response to the consultation paper's questions are provided at Appendix 1 to this submission.

If you have any questions please contact Rebekah McCrae, Regulatory Affairs Advisor, 09 308 8237, rebekah.mccrae@mightyriver.co.nz

Yours faithfully

Rebekah McCrae
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Appendix 1: Response to Questions

#	Question	Response
Q1	What is your view on the Authority's assessment of the arrangement that are currently in place governing the way distributors and retails develop, negotiate, and agree UoSAs, and of the issues that the Authority has identified? Please provide your reasons.	We agree with the Authority's assessment. More standardisation encourages efficient negotiations. Lack of standardisation could also act as a barrier to competition. The DDA would enable both incumbent and new entrant retailers to use its pre-established terms where that would be most cost-effective and practicable.
Q2	What feedback do you have on the information in section 3, which describes the Authority's proposed new Part 12A of the Code, which includes a DDA template, requirements to develop a DDA, and provisions that provide that each distributor's DDA is a tailored benchmark agreement?	<u>Default terms</u> We agree with the Authority's proposal to introduce a new Part 12A. Having a default standardised agreement would create the right incentives to encourage meaningful and efficient negotiation. We have some suggestions on particular terms in the DDA which we have set out in Appendix 2. <u>Operational terms</u> To make the consultations on operational terms fair and meaningful, we agree that the right to take disputed terms to the Rulings Panel provides the necessary regulatory oversight. We have also suggested other forms of ADR may be beneficial to both parties in additional to the Rulings Panel (see cover letter). We have some specific comments on some of the proposed operational terms guidance relating to outages which are set out in Appendix 2. <u>Alternative terms</u> We agree that allowing parties to negotiate alternative terms preserves flexibility and industry innovation. For the avoidance of doubt, clause 12A.10 should be amended to clarify that parties can agree alternative terms at any time (see cover letter). <u>Transition</u> We think that the parties should be able to mutually agree a negotiation period for an alternative agreement before the DDA applies in default. <u>Exclusions</u> We agree that the DDA initially should not apply to embedded networks given the separate issues around these arrangements. Their inclusion should be reconsidered following the current RAG process for evaluating the competition and efficiency issues for embedded networks.

#	Question	Response
Q3	What are your views of the Authority's assessment of the likely levels of demand for new and replacement UoSAs in coming years? Please support your response to this question with reasons and your alternative quantified assessment, if any.	We are unable to quantify the likely levels of demand for new and replacement UoSAs.
Q4	What are your views on the regulatory statement set out in section 4?	We agree that the Authority's proposal to deal with the problem definition supports the Authority's statutory objective. Retaining a voluntary arrangement could have long term negative effects on competition, efficiency, and regulatory certainty.
Q5	What are your views on the detailed drafting of the Code amendment provided in Appendix B and C?	Please see our cover letter and Appendix 2 below which sets out some drafting improvements.

Appendix 2: DDA terms

Clause	Issue	Response
Clause 2.3(i): summary of Trader's general obligations	Not all EIEPs are mandatory under the Code. Those voluntary ones should not be subject to a mandatory regime via the DDA.	Amend clause 2.3(i) as follows: "provide information in accordance with mandatory EIEPs and respond to requests from the Distributor for Customer details under clause 31 and Schedule 3."
Clause 4.3: Managing load on the Network during a System Emergency Event	There is no specific requirement on the Distributor to engage with Traders trading on its network if it updates the System Emergency Event management policy.	This clause should provide that the Distributor must consult with Traders trading in its Network if it wishes to update its System Emergency Event management policy set out in Schedule 4 to the DDA.
Clause 5.9: Assignment of Load Control Rights	For efficiency and transparency, both the customer and Trader should be notified of any assignment.	This clause should also require consent from the Trader.
Clause 8.7: Distributor's right to change Price Category if it considers a Price Category has been Incorrectly Allocated	We are sometimes approached by distributors to move a group of consumers off a low fixed user charge based on what is, in our view, insufficient analysis. Given that the Trader holds the relationship with the customer and we follow our own internal processes to determine whether a customer is entitled to a low fixed user charge or not, we consider it unreasonable and unrealistic for a distributor to require a Trader to request a statutory declaration (or a similar form of evidence) as proof of the fact that supply is to that consumers primary place of residence. The clause as currently drafted would require Traders to satisfy distributors' requirement for "evidence" and could result in large groups of customers being move to standard charges in the absence of 'proof'. We believe a 'carve out' for this aspect should be provided. Alternatively, If the distributor wants to carry out this exercise then they may do so, with Retailer consent, and provide the retailer with the evidence.	Clause 8.7 should be amended accordingly based on our concerns under 'Issue'.
Clause 9: Billing Information and Payment	The DDA has specified time frames for invoicing and payment which may not be realistic or preferred by the Distributor and Trader.	Any references to timeframes should be removed and left for the operational terms to give the parties some flexibility.

Clause 17.2: Information Exchange	Not all EIEPs are mandatory under the Code. Those voluntary ones should not be subject to a mandatory regime via the DDA.	The clause should be amended as follows: "When exchanging information related to a Network connection, the Distributor and Trader must comply with the relevant mandatory EIEPs set out in Schedule 3."
Clause 17.4: Medically dependant and vulnerable customers	The process for dealing with medically dependant customers is quite different to dealing with financially vulnerable consumers. Some consumers who have repeat payment defaults could be viewed as 'vulnerable' as defined in the Guidelines. However, we have robust credit processes to deal with these situations to produce the best outcomes for these customers. This process includes the offer of our prepaid service (GLOBUG), working with WINZ and other social agencies as appropriate, entering into payment arrangements, smooth payments and other such tools. We explore a range of options, with disconnection being a measure of last resort (as reflected in the EA's disconnection statistics). We do not consider consultation with networks is necessary or that vulnerable consumers be dealt with in this clause.	We propose that the references to vulnerable consumers be removed from the clause: "Medically dependant ~~and vulnerable~~ Customers: Despite any other provision in this Agreement (including Schedule 6), if the Trader identifies a Customer as being either a medically dependant customer ~~or a vulnerable customer~~ for the purposes of the Electricity Authority guidelines on arrangements to assist ~~vulnerable and~~ medically dependant customers, the Distributor and Trader must work together in good faith in respect of any proposed Temporary Disconnection of the Customer, and must comply with the notice requirements specified in those guidelines to the fullest extent practicable in the circumstances.
Clause 21: Force Majeure	The indemnity regime under clause 25 is satisfied, for example, where the Consumer Guarantees Act applies (section 46(1)), regardless of whether the distributor acted in accordance with Good Electricity Industry Practice or not. Clause 21 therefore needs to contain a carve-out for this triggering of the indemnity clause by statute; so that the distributor cannot plead that a force majeure event has arisen. Otherwise the clause would be inconsistent with statutory intent.	We propose a new clause 21.6 be added as follows "There will not be a Force Majeure Event if the conditions for a Distributor indemnity set out in clause 25(1) are satisfied".
Clause 24.10: distributor liabilities and customer agreements	While the customer must indemnify the distributor against any direct loss or damages in the said instances, the distributor has no such liability. This disparity in liability is something that the Commerce Commission may have an issue with in light of the new fair	We suggest that the Authority clarify the legality of this clause with the Commerce Commission.

	trading regime.	
Clause 25.1(a): Distributor indemnity	The clause makes no mention of how a failure under the clause is determined. The Consumer Guarantees Act in section 46A(1)(a) goes on to state that whether there has been a failure of the acceptable quality guarantee in the Consumer Guarantees Act is determined by the retailer, or by the EGCC Dispute Resolution Scheme, or by a Court of Disputes Tribunal. For closure on the application of Clause 25.1(a) there should be a similar determination clarification.	The clause should include the following wording: (a) there has been a failure of the acceptable quality guarantee in the Consumer Guarantees Act 1993 in the supply of electricity to a Customer by the Trader (a "Failure") <u>as determined by:</u> (i) <u>the Trader; or</u> (ii) <u>if the Trader does not make a determination or if the Trader's determination is challenged, by the Dispute Resolution Scheme following a complaint made under section 95 of the Electricity Industry Act 2010; or</u> (iii) <u>in accordance with clause 23, if the dispute is not accepted by the Electricity and Gas Complaints Commissioner</u>."
Clause 26	The DDA should reflect the Consumer Guarantees Act section 46A regime as closely as possible.	We support the ERANZ comment for this clause to be deleted and the Consumer Guarantees Act section 46A regimes apply as incorporated into clause 25.
Clause 27: Further Indemnity	The DDA appears to have omitted 'Rights of Indemnity' (clause 26.13) of the MUoSA.	Clause 26.13 of the MUoSA should be included in clause 27 of the DDA: <u>Rights of indemnity: The indemnities in clauses 27 are in addition to and without prejudice to the rights and remedies of each party under this agreement, the Rules or under statute, in law, equity or otherwise.</u>
Clause 29.2: Changes to Customer Agreements during term	This clause only refers to a change to the Agreement made in accordance with clause 22.1(d) (which relates to a change due to a change in law/regulation) as requiring the Trader to include a new provision in its Customer Agreements. Also, the clause only allows for a new provision when an amendment to an	This clause should also refer to a change made in accordance with clause 22.1(a) (a change by written agreement of the parties). Also, the provision should allow for the Trader to '<u>vary and existing provision or include a new provision</u>'.

	existing provision may be required.	

Operational terms

Clause	**Issue**	**Recommendation**
Clause 5:10: unplanned service interruptions	Some distributors have policies whereby they have no obligation to have direct contact with the customer or indeed prohibit such contact. These individual policy arrangements mean that the proposed clause 5.10 can have no effect.	The operational terms should require the distributor to have appropriate mechanisms in place to deal with consumers directly.
Clause 5.12: unplanned service interruptions	Traders need to receive notification in a certain form which allows relevant information to be quickly forwarded to relevant centres. There have been issues with notification in the past being received too late because the information was not directly or readily available.	We suggest that there be a clause which requires the distributor to adopt the traders preferred form of notification of an unplanned service interruption which is ultimately in the best interests of the consumer.
Clause 5.3: unplanned service interruptions	There have been issues with distributors not being forthcoming with information about unplanned outages.	We suggest that the operational terms include after information "(including but not limited to, a list of affected ICPs (where possible), and estimated restoration times)".
Clause 5.17: Planned service interruptions	Postal services have limited deliveries to twice a week.	The 10 working day time frame should be extended to 14 days in view of the fact that postal services are becoming less frequent.
Clause 5.18: Planned service interruptions	From our experiences customers contact us regarding changing dates for planned outages due to personal circumstances beyond the customer's control. The customer would not receive notification until at least day five of the retailer processing the planned outage letter.	The timeframe of two working days should be extended to 10 working days.