14 November 2023

Electricity Authority
By email: DDA@ea.govt.nz

Tēnā koe,

Consultation paper - Proposed changes to the default distributor agreement template, consumption data template, and related Part 12A clauses

We appreciate the opportunity to provide feedback on the Electricity Authority's consultation paper *Proposed changes to the default distributor agreement template, consumption data template, and related Part 12A clauses* dated 3 October 2023.

We support the changes to the consumption data template (and associated Code amendments) to align it with the template that was jointly developed by the Electricity Networks Aotearoa (ENA) and the Electricity Retailers' Association of New Zealand.

Our priority concerns on the changes proposed in the consultation paper are:

- Clause 7.3 (Price changes) of the Default Distributor Agreement (DDA) template is outside the Authority's jurisdiction to regulate and in any case the proposed change is not required.
- Clause 9.10 (Refund of charges) of the DDA template is outside the Authority's jurisdiction to regulate and in any case the costs associated with the proposed change far outweigh the benefits.
- Clause 14.2 (Customer concerns about power quality) should be amended so distributors may decline to investigate power quality concerns that are minor, trivial or vexatious.
- To avoid unnecessary and costly contract damages claims, clause 24.5 (Distributor not liable) should be amended to exclude liability for claims that the trader could have excluded in its contracts with customers.
- Schedule 1 (Service Standards) should be amended because significantly more time, cost and resource will be required to investigate and advise of breaches as well as investigate each actual or suspected breach.
- The costs of implementing the proposed changes are material and they should be considered in the Authority's cost-benefit analysis. With the exception of the proposed changes to the consumption data template, in our view the implementation costs of many of the proposed changes outweigh the benefits.

Attachment 1 provides more detail on our priority concerns.

We support the ENA's submission on, and answers to the Authority's questions in, the consultation paper.

If you have any questions about our submission, please contact Nathan Hill, Regulatory Advisor, at nathan.hill@powerco.co.nz.

Nāku noa, nā,

Stuart Dickson
General Manager Customer
POWERCO

Attachment 1: Powerco's priority concerns

DDA template cannot regulate maximum prices or revenues	As a result of the 2022 amendments to the Electricity Industry Act, the Authority has jurisdiction to include terms in the DDA template that regulate matters relating to quality or information requirements, irrespective of overlap with Part 4 of the Commerce Act. The Authority does not, however, have jurisdiction to include terms in the DDA template that purport to exercise or regulate the Commerce Commission's powers under Part 4 of the Commerce Act to set the maximum prices or revenues that distributors may charge. The latter is prohibited by section 32(2)(b) of the Electricity Industry Act and the 2022 amendments did not change that position. There appears to have been limited consultation between the Authority and the Commerce Commission on the proposed changes, and it is not clear whether this issue has been properly considered.
Clause 7.3 (Price changes) - proposed change outside Authority's jurisdiction and unnecessary	The proposed change to clause 7.3 of the DDA template (Price changes) is outside the Authority's jurisdiction because it overlaps with the Commerce Commission's role in setting maximum prices/revenues through a default or customised price path. We do not agree that the proposed change to clause 7.3 is required to ensure national consistency. There is a lot of consistency across the industry already under the existing regulatory regime. The DDA template has been in place for three years and we are not aware of any price increases outside the regular annual cycle that were inconsistent with the policy intent of the DDA template (despite clause 7.3 being a recorded term). This is not surprising given the practical challenges of changing distribution prices (which, as acknowledged in paragraph B.33 of the consultation paper, is a process that typically takes months rather than weeks).
Clause 9.10 (Refund of charges) - proposed change outside Authority's jurisdiction and poor cost-benefit	The proposed change in status of clause 9.10 (Refund of charges) is outside the Authority's power to regulate because the effect is to prevent distributors from charging for their services, which overlaps with the Commerce Commission's jurisdiction in relation to prices/revenue. As well as being outside the Authority's jurisdiction, we consider the rationale for the proposed change is not strong (because, as set out in

	the ENA's submission, the provision of lines services does not stop during an outage and in many instances will increase as distributors look to restore power) and also the significant compliance costs of monitoring and processing refunds far outweigh the benefit to consumers of receiving (potentially very small) refunds. ((We note that the proposed change to clause 9.10 does not include an obligation on the trader to pass on refunds to affected customers, which we assume is an error.)
Clause 14.2 (Customer concerns about power quality) - minor, trivial and vexatious concerns	We routinely investigate and respond to power quality concerns despite clause 14.2 not being included in our published DDA. Our concern with the proposed change is the increased costs and resources required to investigate and respond to **all** concerns. Distributors should have the ability to decline to investigate power quality concerns that are minor, trivial or vexatious. (We note the proposed change provides that the distributor must investigate power quality concerns *in accordance with Schedule 1* (Service Standards). Please see our comments on Service Standards below.)
Clause 25.5 (Distributor liability) - exclusion required	There is an unnecessary gap between the liability and indemnity regime in the DDA template in respect of the distributor's liability for claims against a trader where the trader could exclude such claim in its customer contract. This is a particular risk when distributors, through an interposed arrangement with retailers, supply commercial customers not covered by the acceptable quality guarantee in the Consumer Guarantees Act. Contracts with commercial customers are likely to be higher value and for a longer term, and the terms may be non-standard or heavily negotiated. Our strong view is that clause 24.5(c) should exclude the distributor's liability for claims against a trader where the trader could exclude such claim in its customer contract. Without such an exclusion, the distributor will be required to bring (lengthy and costly) contract damages claims if it suffers loss from a trader failing to exclude liability in its customer contracts in breach of clause 29 of the DDA template.

	It is reasonable to expect traders not to enter into contracts with commercial customers with unlimited liability and to contract out of commonly excluded types of losses (e.g., loss of profits, indirect loss etc) in contracts with commercial customers. Commercial customers can insure themselves against such losses (and do so as a matter of course).
Clause 24.5 (Distributor liability) – specific risks should be excluded	We consider it reasonable and appropriate for distributors to be able to expressly exclude liability for failures due to: • extreme weather events; • vegetation and animals; • a cyber attack. There is a heightened risk of disputes under the DDA if distributors are required to declare force majeure in respect of such events e.g., dispute as to whether such events were reasonably foreseeable.
Clause 24.5 (Distributor liability) – proposed new subclause	For the above reasons, we consider a new sub-clause (d)(i) and (ii) should be added to clause 24.5 as follows: *(d)* *(i) any liability arising out of a claim against the Trader by a Customer to the extent the liability could have been avoided had any contract between the Trader and Customer excluded, to the extent permitted by law, all liability of the Trader in respect of the provision of services, or conveyance of electricity, to the Customer; or* *(ii) any liability to the extent that it arises out of the Trader's breach of this Agreement, negligence or failure to exercise Good Electricity Industry Practice.*
Distributor liability - default position unclear	In our view the variations in the drafting of clause 24.5(c) in distributors' published DDAs are indicative of real confusion about the interpretation of clause 24 as a whole (and, in particular, the application of clauses 24.5 to 24.8 to the indemnities in clause 27, and the application of clause 24 to the indemnity in clause 29.3). We encountered this as an issue when we attempted to negotiate alternative agreements with two retailers. Both retailers had different views on the interpretation of the liability and indemnity provisions in the DDA template, and both of their interpretations were materially

	different to ours. It is very difficult to agree an alternative position when the default position is unclear. The Authority has noted the importance of allocating costs and risks to the party best placed to manage them. This needs to be done in a clear, unambiguous way in the DDA template so the parties understand and can effectively manage the costs and risks allocated to them. We are concerned that distributors and retailers will form their own, inconsistent, views about the interpretation of clause 24 and the risks allocated to them. It should not be left to the Court to resolve the ambiguity. We understand the liability and indemnity provisions in the DDA template are the same or substantially similar as those developed for the 2014 Model Use of System Agreement. When the Authority consulted on the DDA template three years ago, specific issues were raised by the industry about the liability and indemnity provisions, but we do not believe the drafting and workability of the provisions as a whole were considered (or, if they were, they were possibly overshadowed by broader issues considered at the time of implementation of the DDA template). We recommend a more targeted review, and request the opportunity to make submissions on, clause 24 of the DDA template, including the application of clauses 24.5 to 24.8 to the indemnities in clause 27, and the application of clause 24 to the indemnity in clause 29.3.
Schedule 1 (Service Standards)	In our view national consistency via the DDA template is not required or appropriate for Service Standards. It is not surprising that there is some variation in the Service Standards in distributors' published DDAs. We are separate businesses operating networks in different parts of the country with unique customers. (A rural network and customer base is markedly different to an urban one.) Some variation is to be expected (and, indeed, is preferable) in order for distributors to operate our networks efficiently and effectively, and so as to meet the needs of our customers. We have significant incentives to manage quality and reliability of supply and minimise disruption to consumers under existing regimes such as

	the Consumer Guarantees Act, the Commerce Commission's quality incentive scheme under the price quality, and annual reporting in the electricity information disclosures. In addition, we are concerned that the requirement for distributors to proactively investigate and advise of breaches, as well as investigating every actual and suspected breach notified by traders and customers, will take significantly more time and resources, require costly system upgrades. Should the proposed changes to Schedule 1 proceed, a materiality threshold should be added to the Service Standards so that distributors are only required to investigate actual or suspected breaches that (alone or taken together) are material.
Cost benefit analysis should consider implementation costs	As noted above, we are concerned that the Authority's cost benefit analysis does not properly consider the costs of implementing the changes proposed in the consultation paper. In our view the implementation costs outweigh the benefits (with the exception of the proposed changes to the consumption data template). In paragraph 5.39 of the consultation paper the Authority considers the costs associated with implementing updated DDA documentation (i.e., the very small aspect of updating the document) not the material costs of complying with the updated terms.