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Submissions
Electricity Authority
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By email: submissions@ea.govt.nz

Consultation Paper - Default Distribution Agreement

Genesis welcomes the opportunity to provide the Electricity Authority (**Authority**) with feedback on its proposed Default Distribution Agreement (**DDA**) and amendments to the Electricity Industry Participation Code (**Code**) required to implement it.

Genesis broadly supports the DDA proposal

In our March 2019 submission to the Electricity Price Review Panel (**Panel**), Genesis confirmed its support for standardised access to networks and called for this to be prioritised. The Panel has since recommended that this be expedited, stating that the lack of standard terms raises retailers' costs and impedes competition. The Panel also noted the substantial negotiating power enjoyed by distributors[1] and that default distribution terms should be ready for use within nine months. Their recommendation has been accepted by the Government, which has made clear that it supports the Authority's project and would like it completed.[2]

We agree with the Panel's recommendation and its comments concerning the significant power imbalance. We also agree with the Authority's views that the current framework of individually negotiated distribution agreements: is inefficient and costly; limits retail

1 Electricity Price Review Final Report dated 21 May 2019, p 35.
2 Ministerial statement dated 3 October 2019, and related cabinet paper.

competition; and hinders competition and innovation in the market for contestable services.

We are therefore pleased that the Authority's DDA proposal makes good progress in addressing these issues and we commend the Authority's proactive efforts to engage with the industry following its release.

Discussions on the appropriate framework for distribution agreements have been on foot since 2003; it is high time that these are concluded, and the concerns raised by retailers addressed. The Panel's recommendation and the Government's expectations in this regard are clear. We believe that the DDA proposal, with certain amendments discussed further below, presents the Authority with the opportunity to implement a key Panel recommendation prioritised by the Government, and significantly improve an area of the industry which has needed reform for some time. Accordingly, Genesis confirms its broad support for the DDA proposal.

We outline below four principal areas of the DDA proposal that we consider require improvement and we discuss these, and our responses to the four consultation questions, in more detail in the Appendix to this letter.

Retailer only opt-in right

At its heart, the DDA proposal recognises, and seeks to address, the significant imbalance in negotiating power faced by a party seeking access to services provided by a monopoly. While the DDA proposal makes good progress in this regard, it fails to do so in one key respect – the proposed opt in mechanism where there is an existing distribution agreement between the retailer and the distributor.

Given the significant imbalance in negotiating power, which has been accepted by the Panel and the Authority, the right to opt for a "fairer" agreement (whether the distributor's DDA or transitioning to an alternative agreement), should be given to the weaker negotiating party - the retailer. There is no logical reason to give the monopoly distributor that right as well. Further, doing so may inadvertently give distributors the ability to use the opt in right to force retailers who prefer to remain on an existing agreement into renegotiating that agreement and related agreements, some of which have taken significant time and cost to negotiate. In addition, a retailer on an existing agreement may wish to dispute operational terms in a proposed DDA and should be entitled to remain on their existing distribution agreement until that dispute is determined by the Rulings Panel and the retailer can make an informed decision on

whether to remain on the existing agreement, transition to the distributor's DDA or to an alternative agreement. In short, a retailer, particularly a smaller or new entrant retailer, is in the weaker negotiating position and should be given the option of choosing the form of distribution agreement that best meets the needs of it and its customers.

Clarity required on the process for continuing with existing distribution agreements

Where a retailer and distributor are to continue using an existing distribution agreement, the process for confirming this should be clear and efficient. Unfortunately, the DDA proposal is unclear on the exact process for doing so. It refers to "carrying over terms from an existing agreement into a new distributor agreement". If this means reformatting or transposing terms into the DDA format, this is unnecessary and costly. The policy intent can be met in a far simpler and efficient way, for example, by allowing the retailer to confirm by written notice to the relevant distributor and the Authority that the existing distribution agreement is to continue. Accordingly, we request that the Authority amend what is currently proposed to allow this.

Reasonable period to assess DDAs required

Under the proposal to implement the DDAs, the five largest distributors (and any others who wish to join this group), have 90 business days to develop, consult and publish their DDAs. (The remaining network companies will have 150 business days to do the same.) Retailers will then have 20 business days to review this and if considered necessary, dispute the operational terms set out in the DDA. In addition to the potential complexity with these terms and the prospect of multiple DDAs being published at the same time, retailers will likely also be assessing the implications of any proposed additional services, including any such services on alternative terms. Operational terms proposed by distributors cannot be considered in isolation and a 20 business day period is insufficient time to properly consider these, the DDAs and related agreements, and their respective implications. Three months would be the minimum reasonable period given the range and scale of the matters being considered and the number of retailers and distributors involved.

Safeguards supporting the provision of customer and consumption data are required

Retailers have raised for some time legitimate concerns around the protection and use of customer and consumption data in the hands of third parties, including distributors.

In relation to the provision of historical consumption information to distributors for network management purposes, we are pleased to see the progress reflected in the proposed Schedule 12A.1 Appendix C to try and address these concerns, including the data protection, assurance and indemnity rights granted to retailers in that Appendix. We agree that audit rights are a critical assurance measure that supports the disclosure of information to distributors, and the protection and proper use of that information by distributors. However, the proposed audit provisions in Appendix C should follow the audit framework set out in sections 11.10, 11.11 and Part 16A of the Code. This would allow these audits to be added to the distributor's annual audit, and allow retailers or the Authority to request an audit in the intervening period if they believe one is merited. This approach is already provided for in the Code and so should not be controversial or onerous, given the implications for retailers and their customers if there is unauthorised access or the information is misused.

In relation to customer information that is provided to distributors for income distribution, or trust and co-operative company purposes, we are very concerned that the proposed Code provisions do not provide retailers and their customers with the same rights and protections that they have for consumption data. The same financial and reputation risks arise, and there is no credible reason for the distinction. Accordingly, we do not support the applicable appendices to the proposed Schedule 12A.1 of the Code in their current form and request that they are amended so that they contain the same protections, including the enhanced audit provisions discussed in relation to Appendix C above.

We reiterate the point made in previous submissions that there must be safeguards which help ensure that the appropriate balance is struck between providing third parties access to this information and giving customers and retailers protection from unauthorised access to, or the misuse of, that information. These safeguards support trust and confidence in our industry's access and use of customer data, which are key underpinnings of our social licence to operate and must be protected. The amendments which we propose to these appendices are key safeguards and should be implemented.

If you wish to discuss any of these matters further, please contact me on 09 951 9299 or warwick.williams@genesisenergy.co.nz.

Yours sincerely

Warwick Williams
Senior Regulatory Counsel
and Group Insurance Manager

APPENDIX

Question	Genesis Response
Q1. What are your views on the problem definition? Specifically: **a. the efficiency problem;** **b. the competition in retail markets problem;** **c. the competition in related services problem.**	In our March 2019 submission to the Electricity Price Review Panel, Genesis confirmed its support for standardised access to networks and called for this to be prioritised. The Panel has since recommended that this be expedited, stating that the lack of standard terms raises retailers' costs and impedes competition. The Panel also noted the substantial negotiating power enjoyed by distributors and that default distribution terms should be ready for use within nine months. We agree with the Panel's recommendation and its comments concerning the significant power imbalance. We support the Authority's views that the current framework of individually negotiated distribution agreements: is inefficient and costly; limits retail competition; and hinders competition and innovation in the market for contestable services. Discussions on the appropriate framework for distribution agreements have been ongoing since 2003; it is high time that these are concluded, and the concerns raised by retailers addressed. We confirm our broad support for the DDA proposal which, with the amendments discussed below, presents the Authority with the opportunity to implement a key Panel recommendation that has been prioritised by the Government, and significantly improve an area of the industry which has needed reform for some time.
Q2. What are your views on the revised: **a. Part 12A proposal;**	We support the modular approach to the DDA set out in Part 12A and the DDA template proposed by the Authority, which overall, strike an appropriate balance between standardisation, flexibility and measures to address the imbalance in negotiating power between retailers and monopoly distributors.

b. DDA template proposal.	We do however have concerns which we set out below, together with proposed amendments to address. ***(a) Retailer only opt-in right – Schedules 12A.1, 12A.4:*** At its heart, the DDA proposal recognises, and seeks to address, the significant imbalance in negotiating power faced by a party seeking access to services provided by a monopoly. While the DDA proposal makes good progress in this regard, it fails to do so in one key respect – the proposed opt in mechanism where there is an existing distribution agreement between the retailer and the distributor. Given the significant imbalance in negotiating power, which has been accepted by the Panel and the Authority, the right to opt for a "fairer" agreement (whether the distributor's DDA or transitioning to an alternative agreement), should be given to the weaker negotiating party - the retailer. There is no logical reason to give the monopoly distributor that right as well. Further, doing so may inadvertently give distributors the ability to use the opt in right to force retailers who prefer to remain on an existing agreement into renegotiating that agreement and related agreements, some of which have taken significant time and cost to negotiate. In addition, a retailer with an existing distribution agreement may wish to dispute operational terms in a proposed DDA and should be entitled to remain on the existing distribution agreement until that dispute is determined by the Rulings Panel and it can make an informed decision. In short, a retailer, particularly a smaller or new entrant retailer, is in the weaker negotiating position and should be given the option of choosing the form of distribution agreement that best meets the needs of it and its customers. We request that the proposed Schedules 12A.1 and 12A.4 are amended to reflect this. ***(b) Clarity required on process for continuing with existing distribution agreements:*** Where a retailer and distributor are to continue using an existing distribution agreement, the process for confirming this should be clear and efficient. The DDA proposal is unclear on the exact process for doing so. It refers to "carrying over terms from an existing agreement into a new distributor agreement". If this means reformatting or transposing terms into the DDA format, this is unnecessary and costly. The policy intent can be met in far simpler and efficient way, for

	example, by allowing the retailer to confirm by written notice to the relevant distributor and the Authority that the existing distribution agreement is to continue. Accordingly, we request that the Authority amend the proposed Part 12A of the Code to allow a more efficient process along the lines that we propose. ***(c) Reasonable period for Retailers to assess DDAs – Schedules 12A.1, 12A.4:*** Under the proposal to implement the DDAs, the five largest distributors (and any others who wish to join this group), have 90 business days to develop, consult and publish their DDAs. (The remaining network companies will have 150 business days to do the same.) Retailers will then have 20 business days to review this and if considered necessary, dispute the operational terms set out in the DDA. We support the two phased approach which the Authority has proposed. This is a pragmatic approach that should lessen to an extent the time and cost impact on both retailers and distributors. However, in addition to the potential complexity with these terms and the prospect of multiple DDAs being published at the same time, retailers will likely also be assessing the implications of any proposed additional services, including any such services on alternative terms. Operational terms proposed by distributors cannot be considered in isolation and a 20-business day period is insufficient time to properly consider these, the DDAs and related agreements, and their respective implications. Three months would be the minimum reasonable period given the scale of the matters being considered and the number of retailers and distributors involved. Accordingly, we request that the Authority amend the proposal to provide retailers with a more reasonable period to consider these matters. To facilitate retailers' review of the DDAs, we also request that distributors be required to set out in a table accompanying their DDA a comparison showing where their proposed operational terms differ from the default operational terms in the DDA template, with the reasons for the departure.

	(a) Safeguards supporting the provision of customer and consumption data are required – Schedule 12A.1, Appendices A – C: Retailers have raised for some time legitimate concerns around the protection and use of customer and consumption data in the hands of third parties, including distributors. In relation to the provision of historical consumption information to distributors for network management purposes, we are pleased to see the progress reflected in the proposed Schedule 12A.1 Appendix C to try and address these concerns, including the data protection, assurance and indemnity rights granted to retailers in that Appendix. We agree that audit rights are a critical assurance measure that supports the disclosure of information to distributors, and the protection and proper use of that information by distributors. However, the propose audit provisions in Appendix C should follow the audit framework set out in sections 11.10, 11.11 and Part 16A of the Code. This would allow these audits to be added to the distributor's annual audit, and also allow retailers or the Authority to request an audit in the intervening period if they believe one is merited. This approach is already provided for in the Code and so this should not be controversial or onerous, given the implications for retailers and their customers if there is unauthorised access or the information is misused. In relation to customer information that is provided to distributors for income distribution or trust (Schedule 12A.1, Appendix A) and trust and co-operative company purposes (Schedule 12A.1, Appendix B), we are very concerned that the proposed appendices do not provide retailers and their customers with the same rights and protections that they have in relation to consumption data (Schedule 12A.1, Appendix C). For example, the prohibition on disclosing information to employees and others involved in competing services (see proposed amendments discussed further below), and the Privacy Act, data team, information security plan and data destruction provisions. The same financial and reputational risks arise for retailers and there is no credible reason for making this distinction between the schedules. We also note that there should be consistency in drafting between the appendices so that for example, the indemnity and confidentiality provisions, across all three appendices are substantially the same. Accordingly, we do not support the applicable

	appendices in their current form and request that they be amended so that they contain: (i) the same protections, including the enhanced audit provisions discussed above (ii) the amendments we propose further below. We reiterate the point made in previous submissions that there must be safeguards which help ensure that the appropriate balance is struck between providing third parties access to this information and giving customers and retailers protection from unauthorised access to, or the misuse of, that information. These safeguards support trust and confidence in our industry's access and use of customer data, which are key underpinnings of our social licence to operate and must be protected. The amendments which we propose in this submission are key safeguards and should be implemented. ***(b) Public disclosure of distribution and other agreements – Schedule 12A.1, clause 11:*** While there should be no concerns with providing the Authority with "alternative agreements" or alternative terms for "additional services" for the purposes of the Authority ensuring that these do not modify or are inconsistent with core terms in the DDA or the DDA itself, we do not support the Authority having an unfettered right to publish distribution agreements or other agreements provided to it as currently proposed by clause 11 of Schedule 12A.1. Any power to disclose these documents publicly or to third parties should be supported by evidence-based reasons, with clearly defined thresholds and procedures for disclosure. ***(c) Other comments:*** - *Schedule 12A.1, 12A.2 and 12A.4 (consultation):* We support the requirement for consultation but are concerned that the requirements for these are not prescribed (particularly, in relation to amendments after the DDAs are published). While there is a balance to be struck between timeliness of changes and sufficient time to properly consider changes, we consider that the Authority should be more prescriptive on the consultation

	process. A proper consultation process should help minimise the number of objections which would be in the interests of all parties. - *Schedule 12A.1, Appendix B, clause 2(a) (provision of information):* Clauses 2(a) and 3(1)(e) (to the extent that clause 3(1)(e) refers to the trust meeting its requirements under the relevant trust deed/constitution) are too wide and should be removed. Information should be provided and used solely for the limited purposes set out in clauses 3(1) and (2). - *Schedule 12A.1, Appendix C, clause 2(2):* 5 business days is insufficient particularly if the request is received at peak periods (e.g. at the same time as submissions, invoicing etc) and as there is often discussion concerning the data that can/will be supplied once the request is received. Further, the actual collating the required data files is not a quick task (time periods and the breadth of data requested can result is extremely large data files). We propose ten business days as a more reasonable period, which we note is consistent with the response time for requests made by distributors under Schedule 12A.1, Appendix A. - *Schedule 12A.1, Appendix C, clause 3(2) and definition of "Consumption Data" in clause 21:* Requests which we have received to date have varied in the type, level and granularity. The data exchange process should be as time and cost efficient as possible, and retailers should not have to incur undue costs in time and resources in repackaging data. Accordingly, the definition of Consumption Data should be amended as follows: ""Consumption Data" means electricity consumption data collected by the relevant MEP for each ICP the trader supplies, and which the trader holds or obtains …". - *Schedule 12A.1, Appendix C, clause 7 (Disclosure of Consumption Data):* • The words "to the extent such Consumption Data is required to be known by such persons in connection with the Permitted Purposes or Other Purposes" must be added to clause 7(1)(b).

	• Clause 7(1)(c) should be amended so that where disclosure is required, the distributor must notify the trader of the proposed disclosure, or if not reasonably practicable, promptly following such disclosure. • Clause 7(2) should be amended to: (i) extend the prohibition to related companies or affiliates of the distributor (and their respective directors, employees, contractors and advisers); (ii) refer to products and services that are not regulated under the Commerce Act; and (iii) clarify that nothing prevents the distributors from engaging in such activities provided that they do not use the Consumption Data to do so. - *Schedule 12A.1, clause 21 definitions: "*Other Purposes" should be a defined term as follows: "Other Purposes" means the purposes which the Trader and Distributor agree and record in the Data Agreement that the Consumption Data may be used for in addition to the Permitted Purposes." Clause 3(2) should be amended as a consequence so that it simply refers to "Any Other Purposes". - *Schedule 12A.4, clause 12 (Amendments to Operational Terms):* Currently, there is no requirement to notify participants that the amended operational term is available on their website. The provisions for consulting and notifying retailers of proposed amendments to operational terms should be the same as those set out in clauses 6(2) and 6(3). - *DDA Template, clause 12:* We disagree with the proposed undertakings in clauses 12.1, 12.3 and 12.5 in relation to customers for a six-month period after they cease to be a customer. Distributors will, to the extent that the customer remains at the relevant ICP, have the protection they require under the distribution agreement they have with the customer's new retailer. Removing this would also avoid confusion concerning the appropriate party that the distributor should seek redress from should damage occur after they have switched retailers. The appropriate party is the new retailer and /or the customer pursuant to that retailer's distribution agreement and the terms and conditions of the contract it has with that customer.

	- *DDA Template, definition of 'Vacant Site':* This should be defined as an ICP where the Trader does not have a Customer Agreement with a Customer. - *DDA Template, Schedule 2, S2.1:* The Schedule references half-hour metered ICPs to define use of EIEP3. With the advent of mass market HHR metering this construct is outmoded (which we acknowledge occurs in other places of the Code). In this case, it should reference defined use in EIEP3 itself. - *DDA Template, Schedule 3:* This should be updated to capture the recently mandated EIEPs.
Q3. What are your views on the draft Code, appended to this paper, which would introduce the proposal?	Please see our responses to Questions 1 and 2 above.
Q4. What are your views on the Regulatory Statement? Specifically: **a. the efficiency costs and benefits;** **b. the costs and benefits in the retail market;** **c. the costs and benefits in the related-services market.**	We agree with the stated objectives of the proposed amendment. As discussed above, these are consistent with the Electricity Price Review Panel's recommendation concerning network access and its comments concerning the unequal bargaining positions between retailers and monopoly distributors. While some of the longer-term benefits are difficult to quantify, the Authority's cost benefit analysis, from an efficiency, retail market and related services market perspective, appear reasonable. As between retailers, we suggest that the largest efficiencies and benefits potentially accrue to smaller retailers and new retailers.