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

Submission on Default Agreement for Distribution Services

Introduction

1. This is Vector's submission on the Electricity Authority's (the Authority) Consultation Paper on the Default Agreement for Distribution Services, released on 26 January 2016.

2. Vector's contact person for this submission is:

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3. No part of this submission is confidential and we are happy for it to be made publicly available.

Executive summary

4. The Authority proposes to regulate the contractual terms for distribution services between distributors and retailers through a Default Distribution Agreement (DDA). If implemented, the DDA will override all existing distribution arrangements, and parties that have already signed distribution agreements will be required to re-contract.

5. The Authority has not satisfactorily addressed serious concerns raised in earlier submissions on its (then) proposed model Use of System Agreement (model UoSA)[1] about its mandate to impose standardised terms, or the need for them.

6. The mandating of such a high number of prescriptive contractual terms of supply results in the Authority's proposal extending into matters squarely covered by the Commerce Commission's (the Commission's) jurisdiction for regulation of price-quality standards under Part 4 of the Commerce Act 1986.

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[1] See both *More standardisation of UoSAs – consultation paper, Response to legal/process issues raised in submissions*, 14 November 2014, and *More Standardisation of UoSAs, Response to submissions*; Electricity Authority, 24 February 2014; page 22 'Assessment of core terms'

Section 32(2) of the Electricity Industry Act 2010 (the Act) prohibits the Authority from regulating anything within the Commission's jurisdiction under Part 4, which means the Authority does not hold jurisdiction to impose the DDA even if there was a reasonable case to do so.

7. In addition, as a matter of basic statutory interpretation, if there was an intention for the Authority to be able to override commercially negotiated terms through imposing standardised terms, the Act would need to expressly provide for this power (as it has clearly done for equivalent transmission agreements).

8. In any event, there is no longer any clear case for regulatory intervention on the basis of limited retail competition. The Authority appears to be continuing to operate under a concern about retail competition held since it first commenced the model Use of System Agreement (UoSA) work stream. What the evidence now before the Authority reveals is a level of retail competition that questions both the case for, and scale of, regulation now proposed by the Authority.

9. The reality of the 2016 retail market also undermines the Authority's contention that the natural monopoly position of distributors is inhibiting competition. The status quo cannot credibly be argued to result in negative outcomes for consumers. On the contrary, we are seeing growing, and increasingly innovative, competition in Auckland and Vector has successfully negotiated a UoSA with 21 retailers now operating on Vector's Auckland networks. The Authority continues to overlook evidence previously provided, including the Sapere Research Group's independent report on the matter[2] (Sapere Report). This report and Vector's previous submissions demonstrate that the differences Vector and retailers negotiated into their UoSAs relative to the model UoSA do not impact on transaction costs or act as barriers to entry or expansion in the retail electricity market. A number of these changes have been expressly designed to enhance the security and reliability of the network and cannot be characterised as having had any detrimental effect on retail competition. Other changes have been included at the instigation of the retailer to better meet that retailer's operational requirements.

10. We do not believe that regulatory intervention will benefit consumers and in fact think it is likely to inhibit innovation and competition – to the long-term detriment of consumers. The robust consultation and negotiation process Vector has had (and continues to have) with retailers has resulted in a sound and balanced agreement. New entrants are, in effect, able to 'free-ride' on this

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[2] *Economic analysis of variations between the Vector Use of System Agreement and Model Use of System Agreement*, 18 March 2014.

rigorous development process. There are also clear advantages of flexibility and the freedom to tailor agreements to the specific needs of the parties.

11. Our initial[3] comments on the Authority's specific proposed amendments to Part 12A of the Electricity Industry Participation Code 2010 (Code) and to the provisions of the DDA are attached at **Appendix 1**.

12. To address the Authority's concern that not all distributors have a signed UoSA with their retailers, we recommend that the Authority amend part 12A to prescribe a deadline for all distributors to have signed distribution agreements in place. If the Authority still considers standardisation is desirable to assist with meeting that deadline, then it is best achieved voluntarily through industry collaboration, which could be facilitated by way of an Authority supported initiative.

Jurisdiction

13. Vector (and others) have previously raised concerns about the lack of jurisdiction of the Authority to regulate UoSAs, because of the clear overlap with the Commission's jurisdiction to undertake price-quality regulation of electricity lines services under Part 4 of the Commerce Act[4]. The Authority's response was that it would review each term and form a view and not include any terms which deal with matters that the Commission authorised or was required to regulate. As an example, the Authority indicated that while the regulation of certain matters such as connection standards and liability may not be price-quality regulation, the regulation of service standards could arguably be price-quality regulation[5].

14. This does not satisfactorily respond to the issue. A contract must be read as a whole, rather than a collection of severable clauses, some of which can simply be removed. A contract for the supply of distribution services necessarily governs the quality of supply, and clauses dealing with aspects such as liability are inextricably intertwined with the quality of service provided, the fees for that service, and the allocation of risk in relation to that service.

15. It is simplistic to suggest only certain terms may overlap, and the jurisdictional concerns can be resolved by simply removing certain terms from the DDA. The Authority has removed the service performance reporting provisions that were

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[3] Given our views on jurisdiction and process, we have endeavoured to limit our comments to certain key points and this is not a complete list of all drafting comments.

[4] *Vector Submission on More Standardisation of model use-of-systems-agreements*, 20 May 2014: para 8

[5] *More standardisation of UoSAs – consultation paper, Response to legal/process issues raised in submissions*; Electricity Authority, 14 November 2014: para 3.5

in the model UoSA[6] on the grounds it is able to be regulated by the Commission. However, the Authority has not removed the service standards and service guarantee payment regime, requiring distributors to notify retailers of any breach of a service level, and to pay any applicable service guarantee payment. These provisions directly relate to the quality of the distribution service, which is already regulated by the Commission.

16. Vector remains concerned that the Authority has not adequately addressed the previously raised concerns of submitters that if Parliament intended for the Authority to have the power to impose standardised terms it would have expressly provided for this. Section 44 of the Act specifically permits the Authority to set default terms for transmission agreements "without limiting section 32". The reference to section 32 simply means that in addition to setting benchmark terms for transmission agreements, the Authority can exercise section 32 to include other provisions in the Code relating to *transmission* arrangements. It cannot be read (as Vector understands the Authority has done) as providing a wider power to also set default terms for distribution agreements. If Parliament intended for the Authority to set default distribution terms, Parliament would have expressly provided for default distribution terms as it did for transmission terms in the Act.

There is no need for further regulatory intervention

Contract variation is evidence of good commercial negotiations

17. When the Authority first published its model UoSA, it was signalled as a starting point to provide guidance for commercial negotiations. In that context, many distributors and retailers began developing and negotiating their own fit-for-purpose UoSAs in good faith. However, the Authority has expressed concern at the extent to which these UoSAs vary from the model UoSA.

18. Deviation from the model UoSA is not evidence of a failure of the process but shows that parties have successfully negotiated terms that reflect their individual needs and the unique characteristics of each individual network and retail business. Parties to a commercial agreement are best placed to negotiate terms that meet their operational and commercial needs, including flexibility to accommodate future innovation. A one-size-fits-all contract with uniform standards has the potential to reduce service and product innovation and the cost-effectiveness and efficiency of customer's services. Though the Authority's proposed approach allows retailers and distributors to enter into alternative arrangements, the freedom to develop such alternative agreements is constrained by the amendments to the Code proposed by the Authority.

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[6] Model UoSA and DDA comparison: Schedule 1

19. Vector's UoSA process allows retailers to seek terms that are tailored to their individual circumstances. This means that we are currently negotiating the seventh version of our UoSA. Each version of Vector's UoSA is published online and easily accessible by retailers. Each retailer's UoSA gives them the right to "upgrade" to a newer published version of the UoSA if they want to. The fact that no retailer has exercised this right to date, is itself evidence that retailers are very comfortable with the form of the Vector UoSA that they have signed.

There is a high penetration of retailers in the electricity market

20. The retail market is booming now more than ever. There are approximately 25 retailers trading electricity across the country and as at 19 April 2016, all 21 retailers operating on Vector's network have signed to its UoSA. For the Authority to seek to justify that such extensive new regulation is needed in order to promote competition is increasingly tenuous, particularly in the context of a statutory objective of promoting reliable supply and efficient operation of the market for the long-term benefit of consumers.

21. In addition to the 21 retailers that have signed to Vector's UoSA, there are a number of other retail brands trading on Vector's network who provide further choice and competition for consumers. These additional retail brands are either wholly-owned subsidiaries of a retailer signed to Vector's UoSA, or they are trading as a "white label retailer" via a commercial agreement with a retailer signed to Vector's UoSA[7]. Vector's UoSA now recognises and caters for these white label arrangements, but equivalent provisions have not been included in the DDA.

22. Accordingly, there is no evidence that the natural monopoly position of distributors is posing barriers to new entry or inhibiting competition in retail markets.

23. New entrant retailers have commented on challenges of market entry. Small retailers have reflected to Vector that challenges around entering the market and competing effectively include compliance with the increasingly complex Code, risks around exposure to the wholesale spot market, and the challenge of satisfying prudential requirements. These challenges do not arise from the UoSA negotiation process.

24. Vector places a high value on maintaining strong relationships with retailers. We welcome the opportunity to work collaboratively with new retailers interested in trading in the Auckland region and meet their interests. New entrants are welcome to negotiate new terms with Vector, or forego incurring

[7] Vector UoSA: clause 27A.

additional transaction costs and select the version of Vector's UoSA which suits them best from those already negotiated with other retailers.

The DDA proposal does not benefit consumers

Consumers will face increased costs

25. The DDA proposal asks distributors and retailers to repeat negotiation processes, for no commercial benefit to either party. Costs of these contract negotiations will be borne as operational expenditure by distributors and retailers. Vector considers operational expenditure allowances would be far better spent further improving service to consumers.

26. Vector's robust negotiation with retailers over the last few years has resulted in a sound and balanced UoSA, which continues to be developed. We are concerned that the DDA has not been through a similar process, and aside from a limited ability to amend the operational provisions[8], does not allow for similar development. As a result, the drafting of the DDA is less than optimal in places and it is difficult to assess the effect of some provisions. This creates uncertainty and the likelihood of dispute, which will ultimately cost consumers.

27. For example, under Vector's UoSA, the performance obligations are linked to a clearly defined standard of Good Electricity Industry Practice, which dovetails with the force majeure regime and liability provisions. The DDA confuses this by introducing a new concept of "reasonably resisted" in the force majeure clause, and the concept of negligence to the liability regime.

28. **Appendix 1** sets out our initial[9] comments on specific provisions of the DDA and the proposed amendments to the Code.

Service standard regime not practical

29. The service standards regime in the Vector UoSA works to ensure that those consumers who are affected by a service level breach, can make a claim and will receive the applicable service guarantee payment directly from Vector. The DDA significantly shifts the onus in the regime to require distributors to positively notify all service level breaches within 10 working days of becoming aware of the breach and to pay each retailer the applicable service guarantee payment. The retailer is then required to pass that payment on to its customers after deducting an administration fee. This means that payments

[8] The Authority has chosen to describe these operational terms as a 'benchmark'. Any departure by distributors from such terms in negotiations will lead to multiple appeals to the Rulings Panel from retailers as they seek to reach the benchmark. Costs of these appeals will fall on the Authority, on retailers, and on distributors; ultimately all three parties are funded by consumers.

[9] See note 2 above

will be made even where consumers are minimally impacted, such as during outages which occur overnight, and where consumers are not impacted at all. This will also result in a significant increase in the cost of administering service guarantees, which will ultimately be borne by all consumers on a network. It makes no sense for all consumers on a network to be subsidising payments made to specific consumers who have suffered no real loss. This is an inefficient reallocation when compared with the status quo and not in the long term benefit of consumers.

30. Vector does not have visibility of exactly which ICPs at a low voltage are affected by an outage, and therefore it is not technically or operationally capable of notifying traders as described in the DDA. Implementing such capability, if possible, will incur significant cost. Even if it were feasible for Vector to comply technically and operationally, applying Vector's current service guarantee payment for unplanned outages, the DDA regime will require Vector to pay approximately $15 million per year to consumers. This is significantly more than current customer initiated claims. Such significant increase in annual costs will drive Vector to either:

    a. 'gold-plate' our network, resulting in a much higher cost to consumers; or

    b. seek to set the service guarantee payments at a lower value to offset the increase in both the number of payments and the administrative costs in respect of the DDA regime, which would mean that those consumers who do in fact suffer a loss and would have claimed and recovered under the Vector UoSA, will be worse off.

Dividend data not available under the DDA

31. The Auckland Energy Consumer Trust (AECT) is the majority owner of Vector. Vector currently contracts with retailers via the Vector UoSA so that AECT consumer data is provided, allowing the annual dividend to be paid out to beneficiaries. The DDA removes these provisions, and requires that distributors contract separately for this requirement. In its attempt to create a universal contract, the Authority will put at risk dividend payments worth $100M, which represent a direct injection into Auckland's economy, and are, in economic effect, a partial rebate of charges to a significant number of Vector's customers. A requirement to negotiate additional contracts for these services will create uncertainty and additional costs for all parties, including consumers.

Vector's recommendations

32. To address the Authority's concerns, Vector makes the following recommendations:

    a. *Deadline for signed UoSAs:* If the Authority believes that there is a problem with retail competition, Vector proposes that the best option available is to amend Part 12A of the Code to require all distributors and retailers to negotiate a signed UoSA within a reasonable mandated timeframe. We recommend the Authority consult on the timeframe. Under this option, all parties are able use the model UoSA to negotiate from. This avoids disrupting successfully negotiated agreements, and allows new negotiation to proceed freely. In employing this option, the Authority avoids the jurisdictional issue, and all parties avoid the operational inefficiency of the DDA. Finally, this path represents the least cost to consumers.

    b. *Core terms should be standardised by industry:* Notwithstanding Vector's view that the Authority cannot impose a DDA, and that a DDA is unnecessary, if it is determined by the Authority or the courts that the mandating of the DDA should progress, we suggest that the Authority establish a process by which core terms are agreed by participants. Vector has submitted its initial feedback on core and operational terms of the DDA in Appendix 1. However, to ensure an operationally successful outcome, industry participants must collaborate to define and set the core terms.

33. We welcome the opportunity to work with retailers, the Authority and the ENA further on the above recommendations.

Yours sincerely

Andre Botha
Chief Networks Officer
Vector Limited

Proposed DDA Template

Clause	Comment
General	**The DDA should not be referred to as a "benchmark":** The consultation paper refers to the DDA as a benchmark agreement for distribution services and includes operational terms. The core terms are prescribed, but the operational terms can be set by distributors, subject to meeting the principles in clause 12A.3. By using the term "benchmark", and setting out example operational terms in the DDA, the Authority is suggesting that those operational terms are a minimum standard and distributors would be constrained by those terms. Accordingly they are not truly operational terms which are open to be amended as best suits the parties. We recommend the DDA is referred to as the "template" and the operational terms in the Schedules are left blank.
General	**Drafting creates uncertainty:** The drafting of DDA is less than optimal in places and introduces some difficult interpretation issues. It is also challenging to assess the effect of some provisions, meaning the DDA is likely to lead to greater contractual uncertainty and disputes. We have not sought to identify all material drafting issues at this stage, given we consider there is a significant jurisdictional issue and, in the event that any standardised agreement is required, it should be prepared by industry participants.
General	**What is "core" and "operational" is unclear:** The DDA template is not clear as to which terms are core and which are operational. For example, "service guarantee payments" are referred to in clause 4.11 of the DDA, which suggests they are required as a core term. However, Schedule 1 sets out the detail as to the level of service guarantee payment, and when it applies, suggesting it can be negotiated on a case by case basis. A distributor and retailer should be able to agree whether and how service guarantee payments are applicable and the criteria for any such payments.
General	**Overall standard of Good Electricity Industry Practice:** Vector and retailers agreed in the Vector UoSA that the Good Electricity Industry Practice (GEIP) standard set and defined in the model UoSA, should apply widely to the performance of both parties' obligations. While the concept of GEIP is retained in the DDA, it is applied in a limited and less consistent manner. Applying a clear and well defined standard operates in the best interests of consumers and the industry as a whole as the standard of performance is understood by all participants. Importantly, the GEIP standard allows both the distributor and the retailer to behave in a manner that takes account of specific factors including economic management, regulation and the conditions of a comparable industry or network. Without this being explicit, there is more scope for dispute, as both the retailer and the distributor are faced with the uncertainty of being judged against standards that are not tailored to the context of New Zealand's market, regulation or assets.

Clause	Comment
	Similarly, under the Vector UoSA the GEIP standard dovetails neatly into the force majeure provisions giving the parties more certainty in emergency or other out-of-the-ordinary situations as well as providing greater alignment between the applicable contractual terms and the operational reality for the parties.
Clauses not included	There are a number of matters currently covered in Vector's UoSA that are not covered in the DDA and which may not be able to be covered under an alternative agreement (having regard to the proposed new clause 12A.10 of the Code): • **Additional services**: The Additional Services Schedule in Vector's UoSA provides an efficient and effective mechanism for the Auckland Electricity Consumer Trust (Vector's majority shareholder) to ensure its beneficiaries (being consumers on the Auckland network) receive their dividend. Under the DDA, transaction costs for retailers and distributors will be increased, by requiring a new contractual arrangement for what is already an established information transfer mechanism. We recommend the Authority reconsider removal of this schedule and the related proposed clauses of the Code restricting UoSAs from covering additional services. • **Third Party Retailer Relationship**: Clause 27A of Vector's UoSA provides for "white label" retailers which trade on Vector's network, but which do not have a direct contractual relationship with Vector. Rather they buy and sell distribution services from a retailer which has a UoSA with Vector. This clause allows the customers of secondary retailers to receive the same services as other retailers' customers and also helps ensure those white label retailers are bound by the network protection and connection standards for public safety. • **Access to consumer information for network management (not covered by Part 12A.20 or EIEP3)**: Clause 6.10 of the Vector UoSA was inserted to enable the distributor to request the retailer to provide consumers' demand and energy information to assist the distributor in managing and planning the network. This obligation is not considered to be onerous and smart-metering means retailers now have access to more information in relation to network performance than has previously been available. This information can help reduce costs for all parties, including consumers, and improve the quality of service by allowing timely identification and location of network issues, therefore delivering a better customer experience. • **Embedded networks**: Vector's UoSA contains a schedule for the retailer obligations in relation to the supply of electricity to embedded network consumers. This schedule simply and efficiently provides for appropriate risk allocation in respect of the trader's customers connected to embedded networks.

Clause	Comment
	Additionally, as set out in relation to the proposed new clause 12A.10 of the Code, distributors and traders will be restricted from including such provisions in an alternative agreement. • **Communications policies**: It is in the interests of both parties for communications to be measured against a standard of reasonable endeavours in any given context. This concept is missing from the DDA. In addition, the response times suggested in the DDA may pose an operational problem to distributors where a 10 minute target is unachievable.
3	**Conveyance only**: Clause 3.1 allows distributors to enter into an agreement directly with a consumer provided the consumer is not in a "fixed term agreement" with the trader. It is not clear whether "fixed term agreement" applies only to the supply of line services, or to the supply of electricity and line services. The more sensible interpretation is the former, as traders will often have a fixed term agreement for the supply of electricity with large consumers that may also have a direct contract with the distributor. The drafting of the DDA should be amended to make this clear.
5	**Load control**: Under the DDA, load control is available only where a consumer has elected to take up a retailer's price option incorporating the distributor's Controlled Load Option (i.e. the retailers corresponding price option). This means that where a retailer does not incorporate a distributor's Controlled Load Option customers miss out on a distributor's load control service. Vector's UoSA clause 6.1 allows the distributor to control load where it provides a Controlled Load Option and charges the retailer with respect to the customer. We recommend amending clause 5.1 to reflect Vector's clause to ensure that customers are offered distributor load control services. The DDA clause should also be expanded to reflect clause 6.1(b) of Vector's UoSA which encourages innovation by allowing for other services in respect of the consumer's load, which may be separate to the load control price option. Vector's UoSA also includes a provision at 6.11 which requires retailers to include terms in their customer contracts to protect the network in the event a third party is controlling the consumer's load. We recommend these are replicated in the DDA for network protection and security.
6	**Loss Factors**: Under the DDA the distributor must investigate abnormal losses. Distributors have limited ability to investigate abnormal trends in loss factors and Vector considers this is best addressed through industry energy reconciliation processes.
7	**Price changes containing an error**: Vector considers the following should be added to clause 7.7 of the DDA: "An error is not a price change for the purpose of clause 7.2". Without these additional words section 7 implies

Clause	Comment
	that an error can be fixed only once in any period of 12 months unless the agreement of the trader is obtained. This makes the obligation inappropriately one-sided in nature.
7	**Use of "Pricing Methodology"**: We understand this change of terminology may stem from the shift in term of "tariff" to "price". However, reference to "pricing methodology" may cause confusion, as distributors are required to publish a Pricing Methodology under their Commerce Commission Information Disclosure requirements. We recommend using the term "Price Structure", which is more consistent with the current term "Tariff Structure" and will less likely cause confusion.
8	**Allocation of Price Categories**: Clause 8.2 of the DDA allows traders to request a distributor re-allocate a Price Category for an ICP "at any time", whereas this is limited to once per year under Vector's UoSA. We are concerned this will encourage seasonal arbitrage of residential Price Categories, due to the Electricity (Low Fixed Charge Tariff Option for Domestic Consumers) Regulations 2004. We recommend restricting clause 8.2 so traders can only request this once per year for residential consumers (unless the ICP has a new customer). Prices are set by distributors once per year. If residential consumers were able to constantly switch distribution Price Categories it would lead to greater cross-subsidies within the market and enable seasonal arbitrage. Alternatively, the repeal of the Low Fixed Charge regulations would remove this issue.
9	**Billing**: Distributors' billing timeframes and procedures significantly different across networks. Vector operates multiple billing methods according to retailer preferences. In our view it will be difficult for the industry (distributors and retailers) to agree to a single approach that will fit all existing systems and operative practices. We recommend deeming this an "operational term" and move this to a schedule so that the existing billing methodologies preferred by traders may continue.
10	**Prudential requirements**: Under clause 12.8(d) of Vector's UoSA, Vector is not required to pay interest on any additional security provided by the trader in excess of the amount required by the distributor. This clause saves transaction costs and increases efficiency by allowing parties to mutually agree that the security provided over and above the actual security required will not be treated as security. This means that a trader experiencing growth can provide a larger amount of security (if it wishes), upfront and not have to arrange increases each time the additional security required increases as customers increase. At the same time, the

Clause	Comment
	distributor is not required to pay interest on the amount over and above the actual security it requires from the retailer, relative to its size. We recommend clause 10.10 of the DDA be amended to include a provision similar to Vector's UoSA clause 12.8(d).
11	**Access to customer's premises:** Clause 11 of the DDA limits the right to access customer's premises. We consider this clause should be amended to include access for legitimate purposes, such as purposes related to the provision of services under the agreement or to enable the Distributor to comply with the law (see Vector's clause 13.1(h)).
12	**Injecting into the network:** Clause 12.7 of the DDA requires traders to ensure a customer must not inject energy into the network without a connection contract in place between the distributed generator and distributor. We consider this clause should be future proofed and amended to be technology neutral.
21	**Force Majeure**: In both the Vector UoSA and the DDA a party may invoke the force majeure (FM) provisions and be excused from a default if a FM event has occurred. Again in both agreements, this option will not be available if the party did not act in accordance with GEIP. While this broad approach is the same in the two documents, the DDA approach significantly changes the risk profile of the parties in the case of FM. As recognised in the Sapere Report, the regime in the Vector UoSA works to "enhance operational efficiency". The DDA proposes to shift away from this regime by making four key changes discussed below: i) standard for foreseeable events; ii) no equivalent of Vector's network failure sub-clause (23.1(b)(v)); iii) "reasonable" control vs total control; and iv) changes to charges continuing. i. **Foreseeable events and GEIP:** For a failure to be an FM caused by an act of God, the event or circumstance: A. must be due to natural causes directly or indirectly and exclusively without human intervention; and B. could not have reasonably been foreseen or **if foreseen, could not reasonably have been resisted**... The standard of behaviour required to qualify for FM in the case of a foreseeable act of God differs between the DDA and the Vector UoSA. Under the Vector UoSA, if a party defaults on an obligation due to a foreseeable act of God (e.g. a lightning strike), it will be able to invoke FM if it acted in accordance with GEIP (see 23.1(b)(i)(C)). This

Clause	Comment
	is consistent with the overall requirement in both the DDA and the Vector UoSA that the default cannot be due to a failure to act in accordance with GEIP (23.2(c) of the Vector UoSA and 21.1(c) of the DDA). The DDA test for FM in the case of a foreseeable act of God, sets the standard of whether the lightning could have been reasonably resisted (DDA, 21.1(b)(i)(B)). The difference between what could be reasonably resisted and what could be avoided by the exercise of GEIP is not clear. This creates uncertainty on the application of this standard resulting in the potential for unnecessary (and expensive) disputes between industry participants. By way of example, it could well be determined that it would have been possible and reasonable to resist the lightning damage with $[20] million worth of protective equipment. A distributor, acting entirely in accordance with GEIP, may not have this high specification equipment and instead have a $[10] million system, which would meet the quality of service and security of supply standards applicable to distributors under their default price quality path but not prevent the lightning damage. In this example the distributor would not be able to invoke FM because the distributor could have reasonably resisted the lightening damage with the greater spend. Although the distributor was acting entirely in accordance with GEIP in using the $[10] million equipment, the overall test of GEIP (in limb (c)) would not even be considered because the distributor had failed on a reasonableness test. The GEIP approach developed by Vector and retailers reduces the uncertainty inherent in the untested "reasonably resisted" standard and does not match the commercial reality that distributors are limited by the amount of capital they can invest in the network and receive a return on and so in practice are unable to upgrade the network standard beyond the GEIP standard. In contrast, under the Vector UoSA, the standard for a foreseeable act of God and the overall test are consistent. In the example given, the distributor would be able to invoke FM because although it did not prevent the lightning damage, it had acted in accordance with GEIP in using the lesser value equipment. In other words, the difference in standard under the DDA exposes the parties to the risk of liability where they fail to take an action that would be required to reasonably resist something but that is not necessary under GEIP. ii. **Network failure and GEIP:** Under the Vector UoSA, the FM provisions will excuse a distributor from a failure of the network (or part of it) if the distributor can prove that the failure occurred even though the distributor had acted in accordance with GEIP (see 23.1(b)(v)). This provision is not included in the DDA

Clause	Comment
	and leaves the distributor without FM protection where the distributor has acted in accordance with GEIP but nevertheless the network has failed, where the event was arguably within the distributor's control. This protection is necessary to ensure a fair contractual balance between the parties. As owners and operators of the networks, distributors cannot be commercially and economically prepared for unlimited eventualities. As businesses, distributors need to be able to assess and manage risks within a defined spectrum of possible outcomes. The DDA approach of only offering FM to distributors where an event is outside of their control does not give adequate certainty to distributors. Under the Vector UoSA it is clear that so long as the distributor complies with GEIP, the applicability of FM will not turn on whether or not an event relating to network failure was in or out of the distributor's control. iii. **"Reasonable" control vs total control:** Parties to a DDA are exposed to further liability in the case of an unspecified FM event. Under the Vector UoSA (see 23.1(b)(vi)) this limb catches any other event beyond the "reasonable control" of a party. Conversely, the DDA uses an unqualified concept of control (see 21.1(b)(v)). This means that under the Vector UoSA, the question of whether it is reasonable to expect that a party should or should not have been able to control something would be considered. If it is unreasonable to expect that an event was within the control of a party, then FM would apply. Under the DDA, the parties lose the benefit of being judged against a reasonable standard. Instead, if it was possible that they could have controlled something (no matter how unreasonable that possibility might have been), then the protections contained in the FM clause would not be available. iv. **Changes to charges continue:** The Vector UoSA makes it clear in clause 23.6 that fixed charges continue in the case of an FM event. This is not explicit in the DDA. This is critical for distributors in relation to managing the risks and costs associated with their business, particularly in emergencies or extreme weather conditions where distributors expend considerable resources to ensure service is resumed as quickly as possible. Having certainty of payment in these cases reflects this standard of service.

Clause	Comment
24	**Liability**: i. **Limitation of liability and exclusions:** The Vector UoSA and the DDA limit the parties' liability to direct damage to physical property that results from a breach of the agreement (other than in relation to certain specified exceptions). In addition to breach of agreement, the DDA includes negligence and failure to exercise GEIP as triggers for the right to claim for such direct damage to physical property. In a contractual relationship such as this where the obligations are clearly defined, this is an inappropriate extension of the parties' potential liability. The parties should be responsible for their breaches of contract and not for failures under other standards of care or practice. This is not to say that standards do not have a place in the contract. The Vector UoSA (in contrast with the DDA) provides that the obligations of the parties are to be provided to the GEIP standard. Where a contractual obligation incorporates a specific standard, a party should be liable for its failure under this standard but only in relation to a breach of the obligation. Being held to a general standard of care or practice in relation to acts that are outside of the scope of performing the contractual obligations creates unnecessary uncertainty. It is very common in commercial contracts to exclude non-contracted liability for this reason. In addition, distributors require certainty that they will not liable for any failure to convey electricity if they act in accordance with GEIP and a failure still occurs (see Vector UoSA clause 26.5(b)(vii)). This general limitation is very important for real time network owners and operators such as electricity distributors so that they can be certain that it is not on risk for losses relating to the conveyance of electricity provided it always acts in accordance with GEIP. ***Exclusions to the limitation of liability (confidentiality examples):*** ***1. File transfer process:*** In both agreements, there are specific exclusions to the limitations of liability. For example, in both the Vector UoSA and the DDA liability for a breach of confidentiality is unlimited and consequential loss is not excluded. However, because the DDA omits certain obligations, the provisions are less nuanced and therefore less certain. In relation to confidentiality, the Vector UoSA contains specific provisions in relation to a secure file transfer process. These provisions are in the best interests of consumers but have

Clause	Comment
	been left out of the DDA. Under the Vector UoSA, in order to incentivise compliance with the secure file transfer process and to ensure consumers are protected, it follows that if the retailer requests action outside of the secure file transfer process, Vector should not be liable for unlimited and consequential losses and instead Vector's liability should be limited. ***2. Consumer information received in error by retailer:*** Similarly, the Vector UoSA contains a provision that where a retailer receives consumer information in error, it may not use this information to further its own interests. This obligation is made for the benefit of, and so as to be directly enforceable by, other retailers. This express consumer- and retailer-oriented protection is not included in the DDA. In contrast with the other confidentiality obligations set out in the Vector UoSA, for which the distributor faces uncapped liability without limitation, the distributor's liability in respect of a retailer's use of such consumer information was limited and capped in the Vector UoSA. The DDA does not make this fine distinction. Without these limitations, a retailer who receives consumer information in error is not incentivised to mitigate the damage caused by the disclosure. This will mean that mistakes relating to the transfer of information are much more likely to result in the retailer receiving the information making a windfall gain. In our view it is inappropriate for the DDA to facilitate this behaviour. ii. **Liability caps:** Under the DDA, the parties' aggregate liability to each other will only be limited on a per event basis. By contrast, the Vector UoSA provides generally higher caps on a per event basis overlaid with an aggregate liability cap for events in any 12 month period, with the amount of this annual cap calculated based on the number of active ICPs supplied by the retailer. This provides the parties with greater contractual certainty over their maximum liability exposure. The approach under the DDA is not a fair reflection of the way in which the industry works. For example, a distributor's network and service requirements do not change with the addition of new entrant retailers so it is not appropriate that a distributor's potential liability changes if a new retailer enters the market. We consider that Vector's UoSA presents a more appropriate and reasonable reflection of risk faced by both retailers and distributors. Below is Sapere's independent and economic assessment of Vector's UoSA liability cap (as stated on p4 of the Sapere Report):

Clause	Comment
	The [Vector UoSA] provides for a per-event liability cap and an annual aggregate liability cap, where the latter is proportionate to the percentage of the total number of ICPs connected to the Distributor's network that the Retailer is supplying as at 1 July each year. The cap on the Retailer's limitation of liability to the Distributor (clause 26.8) has been varied so that for retailers that supply more than 5% of the ICPs on Vector's network, the cap moves from $1.4m to a corresponding range of $2.1m to $9.1m. *On the other hand, for retailers that have below 5% of active ICPs, the aggregate liability limitation has fallen (from $2 million to $1.4 million). This variation is beneficial to these smaller retailers. Overall, the Retailer's potential liability exposure to the Distributor under the Vector UoSA could be considered to be more commercially even-handed than the position under the model UoSA.* *The variation reflects an attempt by Vector and Retailers to negotiate commercial arrangements that suit their risk profiles by linking the liability levels for Retailers to their level of activity on the network, and from Vector's perspective, by implementing a structure where its aggregate liability does not increase solely due to there being more retailers on its network.* *On balance, we consider that the variation to the Retailer's limitation of liability will not act as a barrier to entry for retailers, as it lowers the cost to retailers with small market share (<5% of total ICPs) who represent the new entrants.* We would expect that the Authority would have taken note of the above when it developed the DDA and drafted a liability regime conducive to encouraging entry by new traders. We recommend the Authority amend the liability caps clause of the DDA to reflect the liability cap approach taken in Vector's UoSA. In addition, the liability caps under the DDA don't apply to the further indemnities of the distributor under clause 27(a). As a result the caps have limited value. Consistent with the liability position in the Vector UoSA, the caps should apply to the indemnities in clause 27(a).

Clause	Comment
25	**Indemnity:** The Vector UoSA reflects the detailed nature of mutual indemnities by setting out express exclusions to certain categories of liability. For example, where a party could have excluded liability vis-à-vis a consumer, but failed to do so, the indemnity would be limited. This is a fair and reasonable position that recognises that the parties should take responsibility for managing risks where possible. The DDA adopts a less granular approach and does not expressly include all of these exclusions, which exposes the parties to liability that could be managed in more efficient ways. We recommend the DDA reflects the Vector UoSA indemnity.