19 April 2016

Submissions
Electricity Authority
PO Box 10041
Wellington 6143

Via email: submissions@ea.govt.nz

Submissions on Consultation Paper – Default agreement for distribution services

These submissions are submitted on behalf of Northpower Limited, Counties Power Limited, Top Energy Limited and Electra Limited (the **Submitters**), who have a combined customer base of around 170,000 ICPs. The Submitters all operate electricity distribution businesses within New Zealand and are interested in the proposed default distribution agreement (**DDA**) and amendments to Part 12A of the Electricity Industry Participation Code 2010 (the **Code**) as these will replace the commercial terms and conditions for interposed Use of System Agreements (**UoSAs**) under which they currently operate.

The Submitters appreciate the opportunity to submit to the Electricity Authority in respect of its Consultation Paper on a default agreement for distribution services.

The Submitters have had the opportunity to read the submissions prepared by Electricity Networks Association (**ENA**) and the submissions by PWC on behalf of a number of distributors and fully support the positions outlined in both those submissions.

As a result of the publishing of the Model UoSA by the Electricity Authority in 2012 (the **Model UoSA**) the Submitters are now jointly reviewing and updating their existing UoSAs. The review of the UoSAs was largely based on the experience of Unison Networks and other distributors who had already updated their UoSAs and built on agreements that were acceptable to both retailers and distributors. This process was efficient and most importantly, provided an opportunity to include contractual arrangements to future proof the UoSAs in anticipation of the changes likely to occur in the electricity industry in the near future including changes regarding load management, residential battery storage, photovoltaics, data collection and metering.

The Submitters consider that, given the rapid technological changes occurring in the electricity industry, it is critical that distributors and retailers have the ability to deal with such matters within these contractual frameworks. The Submitters have started to (or are about to) engage with retailers to consult on their new UoSAs however they have had limited engagement from retailers due to the proposed new DDA and the perception that any consultation is an inefficient use of time with the pending DDA.

On this basis the Submitters oppose the establishment of a DDA and the amendments proposed to Part 12A of the Code and disagree with the Electricity Authority's position that the problem definition set out by it supports intervention.

The Submitters would however support, as an alternative to the Electricity Authority's DDA proposal, a further review and update of the Model UoSA. This review should be conducted following further

consultation with the electricity industry which would allow enhancements made by electricity industry participants to date (both retailers and distributors) to be taken into account.

Notwithstanding that the Submitters do not support the Electricity Authority's DDA proposal, in the event the Electricity Authority decides to proceed with the DDA proposal, a number of provisions in the DDA could be updated from both an operational and commercial perspective. In addition to this the Submitters also have some concerns with the proposed amendments to Part 12A of the Code.

Attached as Annexure A to this letter are the Submitters detailed submissions on the specific questions raised by the Electricity Authority, the proposed amendments to Part 12A of the Code and the detailed drafting of the DDA.

Please direct any queries on this submission to Josie Boyd at josie.boyd@northpower.com or 09 265 4206.

Yours sincerely




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Electra Ltd	Counties Power Ltd	Top Energy Ltd	Northpower Ltd

Annexure A - Submissions

A.1 Responses to the Electricity Authority's specific questions:

Question No.	General comments in regards to the:	Your response
1	What is your view of the Authority's assessment of the arrangements that are currently in place governing the way distributors and retailers develop, negotiate, and agree UoSAs, and of the issues that the Authority has identified? Please provide your reasons.	We refer to the ENA submission and support the comments made. As more distributors update their UoSA, following consultation with retailers, there is likely to be convergence as the industry aligns and builds on existing industry agreements. In updating our UoSA we have used the Unison Networks' UoSA as a model and looked at other UoSAs already agreed between distributors and retailers and adopted clauses that more accurately reflected current practices, appropriately future proofed the agreement and which provided a fair allocation of risk. The resulting document is an improvement to the existing UoSA, taking on board changes that have been agreed in the industry. The approach we have taken supports the Electricity Authority's objective of "more standardisation". The Electricity Authority identifies at para 2.4.2(a) *Distributors may offer retailers in similar circumstances different terms, meaning that retailer with less favourable terms may be at a competitive disadvantage.* If the Electricity Authority considers discrimination and different terms between retailers is an issue (which we have not seen any evidence of), a more proportionate and targeted measure would be to include in the Code provisions requiring distributors: • to treat retailers on an equal access and non-discriminatory basis (rather than just the current "good faith" obligation); and/ or • to publically disclose on their website their UoSA, including any amendments and offer these terms to all traders/retailers (unless agreed otherwise with the Electricity Authority if it is commercially sensitive). This provides transparency, ensures that each distributor treats all retailers equally and enables retailers to migrate to newer terms or have the benefit of any amendments. Similar provisions are currently in the Model UoSA (cl 4), but by including such provisions in the Code means that distributors cannot contract out of the obligation and penalties apply for non-compliance.
2	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	We refer to the ENA submission and support the comments made.

	benchmark agreement?	
3	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. (As per page 44 – refers to 4.4.1 to 4.4.14 inclusive)	We all have seen an increase in retailers on our networks over the past 5 years, including smaller niche retailers. Top Energy has 16 retailers on the network, 5 of whom have joined in the last 5 years and 2 more are currently assessing its network area. Counties Power has 13 retailers on the network, with 4 joining in the last 5 years. Electra has 15 retailers, with 2 more looking to move into the area. Northpower has 13 retailers on its network, around 4 joining in the last 5 years (as well as two sub-brands), and 3 currently looking to join. We are unable to speculate whether this growth will continue, reach a saturation point, or whether retailers will begin to consolidate. In our view the savings relied on by the Electricity Authority if a DDA regime was implemented are overstated. In our experience the costs of negotiating individual UoSA per retailer is less than the $5,000 (the lower figure given by the Electricity Authority at para 4.4.21). To date, retailers have had limited comments, which have been addressed by management and each UoSA generally involves no more than 10 hours of distributor time per retailer. However, we have spent considerable time and cost as a group adopting the 2012 Model UoSA, looking to standardise with changes already adopted in the industry and operationalising the agreement for our networks (including engaging external legal input). Moving to a DDA arrangement would negate this work and mean incurring further cost in adopting an alternative agreement consistent with the DDA framework. These very real costs have not been adequately considered in the Electricity Authority's analysis, and would be considerably more than the $5,000 per distributor referenced at paragraph 4.4.35 in the Consultation Paper.
4	What are your views on the regulatory statement set out in section 4?	We refer to the ENA submission and support the comments made.
5	What are your views on the detailed drafting of the Code amendment provided in Appendix B and Appendix C.	We refer to the ENA submission and support the comments made. In addition, we raise the further points set out in section A.2 below.

A2. Comments on the detailed drafting of the Code amendment

Clause	General comments in regards to the:	Your response
12A.4 12A.12(5)	There appears to be an inconsistency between the timings in clauses 12A.4 and 12A.12(5). Clause 12A.4 gives distributors either 60 or 120 business days from the date on which clause 12A.4 comes into force to publish their default distribution agreement (**DDA**). However, under clause 12A.12(5) if a distributor and an existing trader cannot agree on the terms of a distribution agreement to replace their existing agreement within two (2) months of clause 12A.12(5) coming into force then the DDA will apply. Both clauses come into force on the date the amendments to Part 12A come into force and therefore it is possible (and probable) that a number of distributors will not have published their DDA by the time the DDA may be deemed to come into force under clause 12A.12(5) clearly frustrating the application of clause 12A.12(5).	We assume the intention was that distributors and existing traders would have two (2) months from the date the relevant DDA is published to agree the terms of an alternative agreement before the DDA is deemed to apply as a binding contract. As drafted the provisions are inconsistent and we suggest the timing in clause 12A.12(5) be changed accordingly.
12A.10	In accordance with clause 12A.10 alternative agreements can only relate to 'distribution' services and can only address the subject matter of the terms of the default distributor agreement. These requirements will severely restrict the ability of distributors and traders to adapt in the rapidly evolving electricity sector. Traders and distributors should be free to negotiate agreements that deal with distribution services and other related matters which do not come within the scope of 'distribution' services eg. metering. Allowing traders and distributors to freely agree their own alternative agreements gives parties the flexibility to effectively respond to changes in the electricity sector. This in turn should encourage innovation and competition in the electricity sector which should provide net benefits to customers who are the ultimate consumer of distribution services.	The requirements around the content of alternative agreements in clause 12A.10 should be removed and parties should be free to enter into alternative agreements which include terms that relate to matters other than distribution services.

A.3 Comments on the detailed drafting of the DDA

Capitalised terms have the meaning given to those terms in the Default Distribution Agreement

Clause	General comments in regards to the:	Your response
General	We note the comments made in the ENA submission and support the analysis and recommendations outlined in that submission. In addition, we outline below a number of amendments that we recommend are adopted. These are not exhaustive and we reiterate support for the ENA's submission that further consultation and engagement with the industry is required over the terms of a DDA or preferably (in our view), an updated Model UoSA taking into account the improvements made by retailers and distributors to date.	
2.2 2.3	The obligations of the parties throughout the DDA should be qualified by the obligation to act in accordance with Good Electricity Industry Practice (**GIEP**). This is a change that has generally been adopted in updated UoSA across the industry and provides both parties with certainty as to the standard required. While these clauses are stated not to create any binding obligations on the parties, qualifying that they are subject to GIEP provides clarity.	We strongly support the ENA submission in this respect. We suggest that all the obligations of Traders and Distributors be qualified with reference to GEIP.
6.1	Clause 6.1 is silent as to who is responsible for the costs associated with the Trader providing additional information required by the Distributor to enable it to calculate the Loss Factors. It would be unreasonable for the Distributor to be required to pay the costs associated providing information necessary to allow it to calculate the Loss Factors, particularly given the lack of control the Distributor has over these costs.	We suggest the following be added to end of clause 6.1: *"The Trader will provide all information requested by the Distributor pursuant to this clause 6.1, at no cost."*
6.6	There is no obligation on the Trader in clause 6.6 to provide the Distributor with information required to investigate any abnormal movement in Losses. It is reasonable and necessary to require the Trader to provide the Distributor with any information required to investigate abnormal movement in Losses.	We suggest the following be added to the end of clause 6.6: *"The Trader will provide the Distributor, at no cost, any additional information the Distributor reasonably requires in order to investigate abnormal movements in Losses.*"
9.10	**Risk of Force Majeure Interruption:** Under the current drafting of clause 9.10 the Distributor is required to refund the Distribution Services charges paid by the Trader in respect of the ICP(s) for a Customer for the period of extended interruption. This effectively means the Distributor bears all of the risk associated with continuous interruptions including those resulting from a Force Majeure Event or third party damage to the Network. The Distributor should be relieved of its obligation to refund the Distribution Services charges where the continuous interruption was the result of a Force Majeure Event or third party damage to the Network.	**Risk of Force Majeure Interruption:** We suggest the following words be inserted after the word 'Network' in the first sentence of clause 9.10: *"(not resulting from a Force Majeure Event or resulting from third party damage to the Network)"* **Benefit of Distribution Services Refunds:**

	<u>Benefit of Distribution Services Refunds:</u> In addition to this there is currently no obligation on the Trader to pass any refund of Distribution Services charges onto the Customer. The Customer is the party who is ultimately affected by a continuous interruption and therefore the Trader should be obliged to pass on any refund of Distribution Services charges received from the Distributor.	We suggest the following sentence be inserted at the end of clause 9.10: *"The Trader agrees to pass on to the relevant Customer any refund of Distribution Services charges made by the Distributor in respect of a continuous interruption for 24 hours or longer."*
14.2	Under clause 14.2 the Distributor must 'if appropriate' install equipment to measure power quality as part of investigations into power quality concerns raised by a Customer. As the Distributor is responsible for investigating power quality concerns this obligation should be qualified so that the Distributor is only required to install equipment if the Distributor themselves thinks it is appropriate in order to conduct investigations into power quality.	We suggest the words *"the Distributor considers it"* be inserted before the word 'appropriate' in clause 14.2.
18.4	Under clause 18.4 the Distributor's only option (if they are the non-breaching party) is to issue a notice of termination in accordance with clause 19.2. In addition to this the Distributor should be entitled, in light of the circumstances which trigger this Event of Default as set out in clause 18.4, to prohibit the Trader from using the Network to supply <u>any additional</u> Points of Connection that are not currently supplied. In addition to this either party (as the non-defaulting party) should also be entitled to exercise any other legal remedies available to it.	We suggest the remainder of clause 18.4 from the words 'set out in clause 18.1,' be deleted and replaced with the following: *"the non-breaching party may (at its election):* *(a) issue a notice of termination in accordance with clause 19.2;* *(b) in the case of an Event of Default by the Trader prohibit the Trader from using the Network to supply any Point of Connection which is not currently supplied by it;* *(c) exercise any other legal rights available to it; and/ or* *(d) if the breach is a Serious Financial Breach by the Trader, the Distributor may notify the Electricity Authority and/or the clearing manager that clause 14.41(h) of the Code applies.*"
19.1	Under the current draft of the Agreement the Distributor has no right to terminate the Agreement for convenience nor do they have the right to terminate the Agreement in the event they wish to move to a conveyance only form of use of system agreement. The decision to transfer to conveyance only should be able to be made by Distributors (and not required to be the subject of agreement with the relevant Retailers). The inclusion of a right for the Distributor to terminate the	We suggest the following new sub-clause (g) be added in clause 19.1: *"(g) **Conveyance only**: the Distributor may terminate this Agreement by giving the Trader at least 120 Working Days notice in writing of termination and the date on which this Agreement will terminate if the Distributor*

	Agreement where it wishes to move to a conveyance only form of use of system agreement provides the Distributor with flexibility around how it operates its network which should encourage innovation and provide net benefits for Customers who are the ultimate consumers of the services.	*proposes to move to a conveyance only form of distribution agreement. Where the Distributor issues a notice of termination to the Trader under this clause 19.1(g), the Distributor will at the same time provide any Customer that it proposes to move to a conveyance only arrangement with a copy of the standard distribution agreement (conveyance only) it proposes will apply between the Distributor and the Customer after termination of this Agreement. If the Customer wishes to continue using the Network, the parties will negotiate any amendments to the proposed new distribution agreement (conveyance) in good faith during the 120 Working Day notice period with a view to entering into a new distribution agreement effective from the termination of this Agreement.*
19.6	As the currently drafted it is possible that the Distributor may continue providing Distribution Services to a Customer of a Trader after the Agreement has been terminated (ie. where the Customer has not been switched to another trader or the ICP(s) have not been disconnected). While under clause 19.5 the Trader is liable for any Distribution Services charges that arise in relation to the provision of such services, the Agreement is silent as to what terms and conditions apply to the provision of the Distribution Services. It is reasonable that in this situation the provision of those services should be governed by the terms and conditions of the Agreement as if it had not been terminated until such time as the services cease being provided.	We suggest the following sentence be added to the end of clause 19.6: *"If the Distributor continues to charge the Trader for Distribution Services after the effective date of termination of this Agreement in accordance with clause 19.5, then the Trader will continue to be bound by the terms and conditions of this Agreement as if the Agreement had not been terminated for so long as the Trader is liable to pay such charges with respect to such connections."*
21.1	The current definition of Force Majeure Event in clause 21.1 needs clarifying as it does not cover all events or circumstances that should reasonably come within the scope of force majeure relief. It is unusual for force majeure events to be defined with reference to 'natural causes directly or indirectly and exclusively without human intervention'.	We suggest sub-clause 21.1(b)(i) be deleted and replaced with the following: *"(i) any event or circumstance by, or in consequence of, any act of God, being and event or circumstance:* *(A) due to natural causes; and* *(B) that was not reasonably foreseeable; or* *(C) if it was reasonably foreseeable, the failure did not occur as a result of the party involved invoking this clause 21*

		failing to act in accordance with Good Electricity Industry Practice or;" We suggest a new sub-clause 21.1(b)(v) be inserted as follows (and the current sub-clause (v) be renumbered appropriately): *"(v) failure of the Network or any part of it which can be reasonably proven by the Distributor to be an event that did not arise from Distributors failure to act in accordance with Good Electricity Industry Practice; or"* We suggest the word *"reasonable"* be inserted before the word 'control' in the current sub-clause (v) (if the above amendment is accept it will be sub-clause (vi)).
21	The Agreement is currently silent as to the payment obligations on the occurrence of a Force Majeure Event. A reasonable position regarding this is for the Trader to be liable for any fixed or capacity charges during a Force Majeure Event but not any variable charges. This position effectively shares the financial risks for Force Majeure Events between the Trader and the Distributor rather than requiring one party to bear the full risk.	We suggest the following new clause 21.6 be inserted: *"21.6 **Charges continue:** If a Force Majeure Event occurs:* *(a) the occurrence of such Force Majeure Event will not affect the parties' obligations in relation to the calculation and payment of fixed charges or capacity charges in relation to the Distribution Services (whether or not, in the case of charges relating to ICPs, the relevant ICP received a supply of electricity during the period of the Force Majeure Event); but* *(b) any variable charges applicable to ICPs will not be payable to the extent that the consumption of, or demand for, electricity at the ICP is reduced due to the Force Majeure Event."* We suggest this be accompanied with a consequent amendment to clause 21.2. The following should be inserted at the end of clause 21.2: *"(except with respect to payment of the charges in accordance with clause 21.6)"*
24.5	There is an incorrect clause reference in clause 24.5. The first sentence should refer to clause 25 not clause	We suggest the clause referencing error be corrected.

	24.9. In addition to this distributors should not be liable for a failure to convey electricity where they have acted in accordance with GEIP.	We also suggest that the following new sub-clause (vii) be added to clause 24.5(b): *"(vii) such failure has arisen notwithstanding that the Distributor has acted in accordance with Good Electricity Industry Practice;"*
24.8	The parties' liability under clauses 24.10 and 29.3 should be excluded from the liability cap in clause 24.7 and not be subject to the direct damage restriction or the consequential loss exclusion in clauses 24.2 and 24.3 respectively. In addition to this clause 24.4 should refer to liability under clause 29.3.	We suggest references to clauses 24.10 and 29.3 be included in clauses 24.2, 24.3 and 24.8. We also suggest a reference to clause 29.3 be included in clause 24.4.
25.1	The Distributor indemnity provision in clause 25.1 should be further aligned with the statutory position in section 46A of the Consumer Guarantees Act 1993.	We suggest the words *"section 7A of"* be inserted before the words 'Consumer Guarantees Act 1993' in clause 25.1(a). We also suggest the words *", as determined in accordance with section 46A(1) of the Consumer Guarantees Act 1993'* be inserted after the words '(a "**Failure**")' in clause 25.1(a).