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Dear Maree

'Interposed' guidelines and model contracts

Genesis Power Limited, trading as Genesis Energy, welcomes the opportunity to provide a submission to the Electricity Commission on its consultation document "Proposed changes to interposed model contracts" dated April 2008. This submission also reflects the views of Genesis Energy's wholly-owned subsidiary, Energy Online. Genesis Energy has reviewed the consultation paper and the suite of draft documents:

1. Guidelines for Domestic Contracts for Delivered Electricity - Interposed ("the contract guidelines");
2. Model Domestic Contract for Delivered Electricity – Interposed ("the MDC"); and
3. Model Use of System Agreement – Interposed ("the MUoSA").

Genesis Energy understands that the Electricity Commission seeks comment on the proposed amendments only and states in the consultation document that "any comments not related to the proposed amendments will be considered out of scope".¹ Genesis Energy considers this to be a very poor approach to consultation – especially with regard to changes that materially impact on distributors, retailers and electricity consumers.

¹ Consultation paper, paragraph 7.

Needless to say, Genesis Energy has not restricted comments to the proposed amendments and deals in this submission with the Electricity Commission's approach to guidelines and model contracts, as well as with the question of process alignment with the Electricity Commission's work on complaints resolution schemes. Genesis Energy would be very disappointed if the Electricity Commission were to ignore these material comments as "out of scope".

Comments on each of the documents are attached as an appendix.

Intended to be Mandatory?

The consultation document conveys an unusual approach to policy making and an unusual understanding of the status of guidelines and model contracts. Paragraph 17 of the document is particularly striking:

"In short, MDC Guidelines and DG Guidelines **are intended to be mandatory** and the MDC is an example of how the MDC Guidelines and DG Guidelines could be implemented." [emphasis added]

The document goes on to convey an expectation by the Electricity Commission that retailers will implement the contract guidelines. The Electricity Commission backs this expectation up with a plan to monitor uptake as set out in paragraph 71:

"Twelve months after the final MDC Guidelines are published, the Commission intends to undertake a review of retailers' interposed domestic consumer contracts to determine whether they implement the MDC Guidelines. Implementation of the MDC Guidelines is the priority given its direct impact on consumers. If the Commission considers that interposed domestic consumer contracts do not comprehensively implement the MDC Guidelines, the Commission will be obliged to consider recommending regulations."

Genesis Energy considers this approach to be unhelpful in several respects:

1. A document can not be "intended to be mandatory". Either it will be mandatory, or it won't. If a document is to be mandatory, then it needs to be supported by legislation (or contract). There might be strong institutional support for the contract guidelines, but that does not make them mandatory;
2. The Electricity Commission should not prejudge that a retailer choosing not to "comprehensively implement" the guidelines would indicate a problem. This would simply indicate a difference between the Electricity Commission's initial view of the optimal approach to consumer contracts, and the view of the retailer;
3. The MUoSA shouldn't be a lower priority than the contract guidelines. Distributors' contract terms have a direct impact on retailers and consumers. There should be a stronger presumption in favour of regulation with respect to the MUoSA due to the

benefits that uniformity would bring to retailers and consumers, due to the bargaining power distributors enjoy by virtue of their natural monopolies, and due to the lack of choice consumers face in the market for lines services.

Regulation of contract terms should be considered where market arrangements are delivering poor outcomes, and the poor outcomes are likely to persist, and regulation is likely to improve outcomes, and regulation is not likely to cause other problems that outweigh the benefits to be gained. Making the call to regulate requires judgement and it requires information.

Genesis Energy considers that the Electricity Commission should treat the exercise of publishing contract guidelines and monitoring market participants' responses as primarily being about gathering information. That is, the guidelines should be considered an information tool to assist future policy decisions. They should not be treated as a form of soft coercion.

The value of the contract guidelines as an information tool is not that it lets the Electricity Commission see how non-compliant the retailers are. The value of the contract guidelines is that it reveals where there are gaps between the Electricity Commission's current view of an optimal contract and the view of individual retailers. The Electricity Commission can then use that information to examine whether or not such gaps indicate a problem, whether that problem is likely to endure, and whether or not regulation would be likely to be a welfare-enhancing response in the long-run.

If the Electricity Commission did identify some gaps that warranted regulation, it would not automatically follow that it is necessary to regulate consumer contracts more broadly. That is, regulation should aim to target identified problems and leave retailers and consumers free to form their own contracts on other matters.

Consumer guidelines can also add value as a way for the Electricity Commission to communicate its current view of what an optimal set of arrangements would look like. Genesis Energy expects that retailers are generally receptive to understanding the Electricity Commission's view and to reviewing whether they can improve the contracts that they form with their customers. This is the other way in which Genesis Energy considers the consumer guidelines to be an information tool.

One of the problems of treating guidelines as a form of soft coercion is that the process for setting guidelines isn't as robust as that required for setting regulations or rules. Also, guidelines don't directly carry any authority. A further problem is that the Electricity Commission's overall approach treats regulation as a form of punishment, rather than as simply a potentially useful tool for improving consumer outcomes.

In terms of the MUoSA, Genesis Energy considers that there is a strong case for taking a more fit-for-purpose approach that can counter natural

monopoly bargaining power and improve consistency across the country. Genesis Energy's experience is that lines businesses won't voluntarily adopt a model agreement. We have been able to sign only two contracts that are based on the MUoSA and have been negotiating with one other lines business for over 18 months. One large lines business refuses to entertain MUoSA-based negotiations at all. Some smaller lines businesses are willing to enter into dialogue. The overall outcome is that the MUoSA hasn't improved consistency and has been ineffective at countervailing market power. A firmer approach is required.

Form Should Reflect Function

The contract guidelines are presented in a very stark form. Long after the consultation document has been forgotten, the contract guidelines will still exist. However, the draft document doesn't provide the reader with any context. Genesis Energy recommends that the contract guidelines document should include a short introductory section that sets out what the guidelines are for, what the model contract is for, and how the documents fit in with other elements of the regulatory landscape.

Genesis Energy also considers that use of the strict imperative "must" in the contract guidelines is not appropriate and would mislead readers as to the authority of the guidelines. At a minimum, it would be appropriate to replace "must" with "should". For example, "the retailer must comply" could be rewritten as "the retailer should comply". This would convey that the guidelines relate to what is desirable, rather than to what is obligatory.

Of course, it is fine for the guidelines to use "must" when describing requirements that actually are legally binding. For example, paragraph 9 states that "Interposed domestic contracts must comply with the provisions of the Privacy Act 1993...". This is a statement of fact, and may be useful information to provide to prospective retailers. However, the guidelines couldn't realistically seek to set out all statutory obligations. This means that the Electricity Commission is being selective in what statutory obligations it chooses to set out, and should take care to ensure that prospective retailers don't form the impression that the guidelines contain a comprehensive description of retailers' legal obligations. Genesis Energy suggests that it would be preferable for references to general legislative obligations to be shifted to a preamble.

Adopting "should" for true guidelines and "must" for statutory obligations would improve the legibility and usability of the contract guidelines document.

Interface with Consumer Complaints Work Stream

Genesis Energy is concerned that the consultation document gives the impression that there is an element of predetermination to the Electricity Commission's consumer complaints work stream. In particular, the consultation document states that:

"...the requirements from the EGCC Code which are appropriate for the MDC have been individually listed in the MDC Guidelines and have been made mandatory."²

Aside from conveying a curiously loose view on how something gets 'made mandatory', this suggests that the Electricity Commission has a fairly fixed view on how its complaint resolution work will conclude. The Electricity Commission seems to quite clearly favour approval of the EGCC above any other scheme (or other non-approval-based options).

The consultation document also includes the statement that:

"The Commission is currently working with the Gas Industry Company...to approve one provider of a consumer complaints resolution scheme, as required by the Electricity Act 1999, the Gas Act 1992, and the respective Government Policy Statements..."³

This is incorrect, as the Acts do not require approval of any scheme (let alone a single scheme across sectors). The government policy statements do not strictly compel such an approach either.

Interface with the Vulnerable Consumer Guidelines

The contracts guidelines also seem to purport to make the Electricity Commission's 2007 "Guideline on arrangements to assist low income and vulnerable consumer" (vulnerable consumer guidelines) mandatory.

Genesis Energy's main concerns with this are that:

1. Where the vulnerable consumer guidelines conflict with legislation, the legislation must prevail.

This is okay where guidelines truly are voluntary, but is problematic if the Electricity Commission treats the guidelines as if they are 'mandatory'.

2. The guidelines are not binding on third parties.

Even though guidelines may exert some moral force on electricity sector participants, they are likely to be held in lesser regard by third parties.

Together, these concerns can make aspects of the vulnerable consumer guidelines problematic for retailers and their customers. In particular, there can be a tension between the Privacy Act and the vulnerable consumer guidelines when it comes to referring consumers to social agencies for financial assistance. As well, the guidelines themselves are not binding on social agencies or health boards.

² Consultation paper, paragraph 61.

³ Consultation paper, paragraph 55.

In other words, treating guidelines as mandatory creates one-sided obligations that can be difficult to fulfil. It is preferable to either treat guidelines as guidelines, or to regulate. Properly done, regulation should force resolution of conflicting policy imperatives rather than leaving participants to muddle through.

Having said that, Genesis Energy supports the Electricity Commission's apparent view (as demonstrated by paragraph 18 - 21 of the model domestic contract) that it is not necessary to seek explicit consent from consumers before consulting Work and Income, provided such consent is covered by general contract.

If you would like to discuss any of these matters further, please contact me on 04 495 6357.

Yours sincerely

A handwritten signature in black ink, appearing to read 'J Carnegie'.

John A Carnegie
Regulatory Affairs Manager
Genesis Energy

Appendix One – Comments on the Draft Documents

Guidelines for Model Domestic Contract	
PARAGRAPH	COMMENT
<p><u>Force Majeure</u></p> <p>12. Interposed Domestic Contracts must define the situations covered under Force Majeure clauses and explain how a Retailer will respond in such circumstances</p>	<p>This paragraph seems to imply that retailers should seek to define every foreseeable type of force majeure event and set out how they will respond. This would not be workable due to the very nature of force majeure events (that is, events beyond the retailer's control).</p> <p>A more appropriate approach would be for retailers to undertake to "make reasonable endeavours to work with the relevant lines business to restore supply".</p>
<p><u>Changes to price</u></p> <p>15. Interposed Domestic Contracts must describe how the Retailer will communicate any increases in the price of electricity. If the increase in price is more than 5%, then a separate notice of the increase must be individually communicated to the Consumer in writing as soon as practicable</p>	<p>While this approach appears reasonable, Genesis Energy suggests that the notification requirements could become problematic in future if retailers develop particular types of sophisticated tariff offerings supported by advanced metering infrastructures.</p>
<p>21. Interposed Domestic Contracts must contain clauses no less favourable to the Consumer than clauses 42 and 43 [of the model domestic contract for delivered electricity (interposed)].</p>	<p>Genesis Energy suggests that the guidelines would function better without any cross-references to the model contract.</p> <p>As a first-best approach voluntary guidelines should not be so prescriptive. Where prescription is the only way of expressing a guideline, then that prescription should be within the guideline itself.</p>

Guidelines for Model Domestic Contract	
PARAGRAPH	COMMENT
22. The Retailer's invoice must include the name of the Distributor.	<p>Genesis Energy queries the rationale for this guideline and has two objections:</p> <ol style="list-style-type: none"> 1. this is only likely to confuse consumers who aren't familiar with the electricity sector's lines-energy separation; and 2. Genesis Energy will not wish to provide free advertising to distributors that choose to enter the retail market following amendment of the Electricity Industry Reform Act. <p>Genesis Energy considers it is preferable for customers to have a single point of contact for energy services.</p>
43. The Retailer must supply information (on request) to the Consumer about the Consumer's electricity supply that explains where the Distributor's ownership and responsibilities end in relation to the network.	<p>Genesis Energy considers that distributors are far better placed to provide this information and would refer any such queries accordingly.</p> <p>As the Electricity Commission is well aware, there is no simple universal answer to the question of where a distributor's ownership responsibilities end, so a case-by-case response is required.</p>
44. Interposed Domestic Contracts must set out the responsibilities of the Consumer, the Retailer and the Distributor in relation to ownership of equipment.	<p>Genesis Energy suggests that this list should include the meter owner.</p>
45. Interposed Domestic Contracts must explain the Consumer's responsibilities for compliance with all Line Function Services safety and technical requirements under regulations and codes of practice.	<p>Genesis Energy considers that to provide an exhaustive description of consumers' responsibilities would be an unreasonable and unworkable obligation.</p> <p>It would be preferable for retailers to include a more general statement referring to consumers' obligations to ensure that all electrical work (with minor exceptions) is carried out or inspected by registered electricians.</p>

Guidelines for Model Domestic Contract	
PARAGRAPH	COMMENT
53. Without limiting paragraph 3 of these guidelines, Interposed Domestic Contracts must state that a Retailer may only disconnect the Consumer for non-payment where the non-payment relates to invoices (including a Bond) associated with the supply of Retail Services, Line Function Services, and/or electrical energy	Genesis Energy considers this guideline to be impractical for dual- or multi-fuel customers as partial payments cannot necessarily be attributed to one or another service. The consultation document does not provide any rationale for this guideline.
55. Without limiting paragraph 3 of these guidelines, the Consumer should not be disconnected on the basis of an estimated account unless it is fair and reasonable in the circumstances to do so.	Genesis Energy suggests that there will be many shades of grey when it comes to monitoring this guideline.
58. Temporary disconnection and/or reconnection charges should not be more than the level required to meet the overall costs of the disconnection and/or reconnection service.	Genesis Energy considers that it would be impractical to provide individualised charges for each disconnection and reconnection. The rates that retailers face vary by region and from job to job. Administering multiple charges would simply increase costs.
<u>Termination</u> 64. Interposed Domestic Contracts must not include any provisions allowing the Retailer to terminate the contract other than: (a) for material breach of the contract by the Consumer; and (b) if the Retailer ceases to have an agreement with the Distributor for the provision of lines services in relation to the network.	Genesis Energy is very concerned by the implication in paragraph 64(b) that a distributor could withhold services from a retailer and cause termination of that retailer's domestic contracts. Genesis Energy firmly believes that the guidelines shouldn't entertain this prospect. It would be preferable for the guidelines to retain the <i>assignment</i> paragraph only, as any other form of mass-termination ought to be unconscionable. Genesis Energy is particularly concerned about this guideline in the context of distributor entry into retail markets.

Guidelines for Model Domestic Contract	
PARAGRAPH	COMMENT
<p><u>Consumer complaint resolution</u> 65. Retailers must accept Consumer complaints... ... 68. Retailers must also...</p>	<p>Genesis Energy considers that this section should be removed in favour of a guideline simply requiring retailers to describe the nature of the complaints handling processes.</p> <p>This section presupposes the outcome of the Electricity Commission's work on complaints resolution. It also duplicates material that should ultimately be contained elsewhere (either within complaint resolution schemes' codes, or in regulations). Such duplication is likely to lead to divergence and inconsistency and ultimately just creates a maintenance problem for the Electricity Commission.</p>
<p>Assignment 72. The Retailer must notify the Consumer of a transfer or assignment of the Retailer's rights and obligations under an Interposed Domestic Contract.</p>	<p>Genesis Energy suggests that this paragraph should be relocated so that it follows immediately on from the paragraph on termination. This would provide a better logical flow (refer also to above comments on paragraph 64).</p>

**Model Domestic Contract for Delivered Electricity
(Interposed)**

Genesis Energy has not reviewed this model contract in depth.

Genesis Energy suggests that it would be useful for the Electricity Commission to clarify the purpose of this document. In particular, as the Electricity Commission's intended monitoring activities relate to the guidelines, the contract has limited value. Genesis Energy considers that it is worth revisiting whether the model contract adds sufficient value to warrant its continued upkeep.

Genesis Energy considers that one area where the model contract may potentially provide value is as a starting point for new entrant retailers.

Model Use of Systems Agreement (Interposed)	
CLAUSE	COMMENT
<p>2.2 Distributor’s other services and obligations: The Distributor will:</p> <p>...</p> <p>(g) where a Consumer raises concerns regarding the voltage of their supply, install equipment at the Consumer’s Point of Connection to measure voltage sags and provide the results of such measurements to the Retailer.</p>	<p>Genesis Energy suggests that “...raises concerns” could be too vague as a test. It would be preferable to use the test “...has requested”.</p>
<p>19.7 Notice of disconnection where event is outside the Consumer’s control: Where the Distributor intends to perform a Temporary Disconnection under clause 19.5(c) or (g), the Distributor will give each of the Retailer’s customers:</p> <p>(a) at least [9] days’ notice of warning of disconnection before any disconnection;</p> <p>(b) a final warning not less than 48 hours nor more than [8] days before the disconnection. The final warning must provide the timeframes for disconnection. This will be a separate notice to the one provided at least [9] days prior to disconnection;</p> <p>(c) if disconnection is not completed within the timeframes notified, the Distributor will issue another final warning not less than 48 hours nor more than [8] days before disconnection.</p>	<p>Genesis Energy is concerned about this proposed clause in the context of the vulnerable consumer guidelines, and in the context of distributor entry into retail markets.</p> <p>Genesis Energy also considers that it would be difficult in practice for distributors to identify a particular retailer’s customers at a point in time.</p> <p>Genesis Energy suggests that the Electricity Commission needs to take a more thorough look at the larger question of revocation of essential lines services, rather than making ad hoc changes to the MUoSA and the contract guidelines.</p>

Model Use of Systems Agreement (Interposed)	
CLAUSE	COMMENT
<p>26.10 Distributor liabilities and Consumer agreements: The Retailer will, subject to clause 27.1, procure in its agreements with Consumers clear and unambiguous clauses that:</p> <p>(a) the Consumer will indemnify the Distributor against any direct loss or damage which is caused or contributed to by the fraud, dishonesty or wilful breach of the agreement between the Retailer and the Consumer of the Consumer or its officers, employees, agents or invitees arising out of, or in connection with, the Services provided under this agreement; and</p> <p>(b) To the extent permitted by law, the Distributor shall have no liability to the Consumer in contract, tort (including negligence) or otherwise in respect of the supply of electricity to the Consumer under the agreement between the Retailer and the Consumer.</p>	<p>Genesis Energy considers this clause to be totally unacceptable. It provides for a one-sided allocation of risk in favour of distributors and against the interests of consumers.</p> <p>Genesis Energy is disappointed that the Electricity Commission would propose an arrangement so detrimental to the interests of consumers.</p> <p>Genesis Energy strongly recommends that there needs to be a more equitable allocation of risks between distributors and consumers. In particular, there should at least be a reasonable cap on the level of liability that the distributor has to the consumer (such as that set out in clause 26.7).</p> <p>However, Genesis Energy also queries whether it is appropriate at all for a consumer entering an interposed contract with a retailer to indemnify the distributor directly. This clause 'leap-frogs' the contractual chain illustrated in paragraph 30 of the consultation document.</p>

Model Use of Systems Agreement (Interposed)	
CLAUSE	COMMENT
<p>31.2 Interpretation: In this agreement, unless the context otherwise requires:</p> <p>...</p> <p>"Good Industry Practice" means:</p> <p>(a) in the case of the Distributor, the exercise of that degree of skill, diligence, prudence, foresight and economic management which would reasonably be expected from a skilled and experienced electricity network owner engaged in the distribution of electricity under conditions comparable to those applicable to the Network consistent with applicable law, safety and environmental protection. The determination of comparable conditions is to take into account factors such as the relative size, duty, age and technological status of the Network and the applicable law; and</p> <p>(b) in the case of the Retailer, ...</p>	<p>Genesis Energy queries whether this definition could be strengthened using reference to aspects of the Commerce Commission's work on the quality standards and asset management practices for lines businesses.</p>
<p>SCHEDULE 7 Connection Policies</p>	<p>This section does not include any distributor service standards, other than the livening and reconnection timeframes in clauses 9 and 10.</p> <p>Genesis Energy considers that it would be appropriate for the model contract to set out some reasonable service standards.</p>

Model Use of Systems Agreement (Interposed)	
CLAUSE	COMMENT
<p>TIME FOR LIVENING STANDARD NEW CONNECTIONS</p> <p>9. The time for “livening” standard new connections (where all necessary equipment is in place, line upgrades or extensions are not required and other requirements are met) will be [x] Working Days. The time for livening all other connections will be as agreed between the parties.</p>	<p>Genesis Energy considers that a reasonable figure for ‘x’ would be 2 working days.</p> <p>It is appropriate for a model contract to include a specific number of days, as this should (in theory) form the starting point for negotiations between retailers and distributors.</p>
<p>RECONNECTIONS</p> <p>10. Once a Consumer has satisfied the conditions for reconnection a reconnection will occur as soon as reasonably practicable.</p>	<p>Genesis Energy considers that “...as soon as reasonably practicable” should be replaced with “...within 24 hours”.</p> <p>It is not unreasonable to expect distributors to make customer reconnections a high priority.</p>