
Report for the Electricity Networks Association

Recommended Approach to Address Customer Service Lines Issues

Stuart Shepherd and Vhari McWha

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Wellington Level 9, 1 Willeston St PO Box 587 Wellington 6140 Ph: +64 4 915 7590 Fax: +64 4 915 7596	Auckland Level 17, 3-5 Albert St PO Box 2475 Auckland 1140 Ph: +64 9 913 6240 Fax: +64 9 913 6241	
Sydney Level 14, 68 Pitt St GPO Box 220 NSW 2001 Ph: + 61 2 9234 0200 Fax: + 61 2 9234 0201	Canberra Unit 3, 97 Northbourne Ave Turner ACT 2612 GPO Box 252 Canberra City, ACT 2601 Ph: +61 2 6267 2700 Fax: +61 2 6267 2710	Melbourne Level 2, 65 Southbank Boulevard GPO Box 3179 Melbourne, VIC 3001 Ph: + 61 3 9626 4333 Fax: + 61 3 9626 4231

For information on this report please contact:

Name: Stuart Shepherd
 Telephone: 09 280 4166
 Mobile: 021 469 510
 Email: sshepherd@srgexpert.com

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1. Introduction

1. The customer service lines of an electricity network extend from the “point of supply” (usually located at the property boundary) to the entrance of the building. Many customers perceive that the electricity network business (ENB) is responsible for the monitoring, maintenance and replacement of the customer service line. On the contrary, in general the service line is the responsibility of the customer, although there are many exceptions to this general case. Most customers pay little attention to their service line until it ceases to function properly, at which time a dispute often ensues as to whose responsibility it is to fix it.
2. The aging of customer service lines and the lack of routine monitoring of their condition has and is leading to a public safety issue. The Electricity Networks Association (ENA) has identified this existing and increasing public safety issue, and the widely held misperception by customers that the ENB is responsible for the service line, as a significant industry-wide issue. It has resolved to play a leadership role to address it.
3. The ENA commissioned a report from Energia (summary in Appendix 1) to outline the problems with customer service lines and to propose a workable solution to address those problems. This report:
 - Estimated the average age of customer service lines at 27 years. Failure rates can be expected to increase rapidly as service lines age, giving rise to material public safety issues if not managed properly.
 - Estimated the cost to replace ‘at risk’ service lines nationally over the next twelve years at \$370 million, and maintenance over the same period at an additional \$230 million.
 - Considered that the lack of attention and the age profile of these assets will lead to a material public safety risk if not addressed.
 - Found 25% of complaints to the Electricity and Gas Complaints Commission (EGCC) related to ENBs that progressed to the dispute resolution stage relate to customer service lines.
4. Unfortunately there are already examples of the public safety issue. For example, earlier this year in the Waikato a girl’s hands were badly burned when she touched a farm fence onto which the customer service line had fallen.
5. The Energia report recommended:

An improvement in Service Lines public safety risk management is necessary and this review recommends that the situation would be best managed by the industry through the adoption of a two-tier approach:

 1. *For domestic customers, public safety would be most efficiently managed through Electricity Distribution Businesses (“EDBs”) inspecting, maintaining and replacing Service Lines. The associated costs would be socialised through distribution prices.*

- 2. For commercial customers, EDBs are the most competent party to inspect Service Lines, to notify commercial customers of the need for maintenance or replacement, and to enforce safety standards should customers fail to rectify hazardous situations in a timely manner.*
6. We refer to the first approach as “Inspect, Maintain & Replace” and to the second as “Inspect, Notify & Enforce”.
7. The ENA requested Sapere develop an implementation path from a regulatory and commercial perspective for the two approaches recommended by Energia, within existing legislative and regulatory settings. The overall thrust of legislative and regulatory changes in 1984, 1992 and 2001 has been to shift responsibility for customer service lines from ENBs to customers. Unfortunately the resulting definitions of responsibilities and obligations for customer service lines are unduly complex and lack clarity. We consider the legislative and regulatory settings could be considerably improved to provide greater clarity and ease of use, but the scope of our task does not extend to a review of these settings so we do not pursue that issue further in this report.
8. In our earlier report we considered the only practical way to implement the Energia proposals (given existing legislative and regulatory settings) was to find a way of doing so that did not depend on establishing the point of supply or ownership of the service line at each and every location. To that end the ENA then sought a legal opinion on issues related to the definition of the point of supply, the obligations that would arise for ENBs from providing the recommended two services, potential access issues, and the relationship under Part 4 of the Commerce Act between these services and the regulated electricity lines service. The legal opinions from Russell McVeagh on these matters are in Appendix 2 and 3.
9. We set out our recommendations to implement the Energia proposal in section two.

2. Implementation of Energia proposal

10. The Energia report proposes ENBs provide an Inspect, Monitor & Enforce or a Inspect, Maintain & Replace service to address existing customer service line issues. We outline below a recommended way to implement this proposal in terms of:
 - The nature of the service
 - Charging for the service
 - Communicating with stakeholders

Nature of the service

Differentiation of the service

11. The Energia report proposes a two-tiered service approach that would be differentiated with respect to domestic customers (who would be offered the Inspect, Maintain & Replace service) and commercial customers (who would be offered the Inspect, Monitor & Enforce service). We support the two-tiered service, but consider it would be preferable to allow the ENB to determine the basis for the differentiation (which may be something other than a domestic/commercial split), as this would provide ENBs greater flexibility to implement these two services in the way that works best for their circumstances. Thus we recommend the two services be defined as “Inspect, Maintain & Replace” and “Inspect, Notify & Enforce” with the ENB having discretion as to which service is offered to which customer group.

Definition of the service and implications for obligations

12. The ENA sought a legal opinion from Russell McVeagh on the change in obligations that would arise for ENBs pursuant to the Electricity Act 1992, the Consumer Guarantees Act 2003 and the Electricity (Safety) Regulation 2010 from supplying these additional services (see Appendix 2). In summary their opinion is that the supply of these additional services would, in general, result in most of the existing obligations of an ENB with respect to its network being extended to customer service lines, with the extent of each particular obligation being dependent on the precise content and detail of the service being offered by the ENB.
13. To take these issues forward we recommend the ENA has service definitions for each of the proposed two services developed that are designed to fit within the Model Use of System Agreements (MUoSAs), and have Russell McVeagh clarify what obligations would arise for an ENB on the basis of those service definitions.
14. We understand there is little information on the condition of customer service lines and we expect it will take ENBs some time to gather condition information on these assets and bring them up to an acceptable standard. This transition raises issues of obligations for ENBs in the period from offering services related to customer service

lines but prior to them completing the work to ensure the assets are fit for purpose. We recommend the ENA develops some form of transition in the onset of these obligations to provide ENBs time to undertake the necessary inspection and upgrade work. This work could be included in that mentioned above in relation to service definitions and identifying the obligations that would arise from offering these services.

15. Given the Electricity Authority's (EA) responsibility for MUoSAs we suggest it would be useful to inform them of the service definitions once they are developed with a view to having them incorporated in future revisions of the MUoSAs.

Access issues

16. The ENA sought a legal opinion from Russell McVeagh on the issue of access to private property that an ENB would require in order to provide the proposed Inspect, Monitor & Enforce or a Inspect, Maintain & Replace services to customer service lines (see section 7 of their report in Appendix 2). In summary, they found that the existing access rights in the Electricity Act 1992 and the MuoSA are insufficient to provide the required access as these access rights relate to ENB owned equipment. As customer service lines are in general not owned by the ENB (or ownership is ambiguous) these rights do not apply to undertaking work on customer service lines.
17. The opinion explores ways of addressing access rights by way of a change to an ENB's UoSA (and possibly the MUoSA), the Code, or by way of legislative change, and they suggest possible ways to address the access issue in each case. One of the shortcomings in using the UoSA or the Code to procure the necessary access rights is there are instances where the electricity customer (with whom the retailer has a supply contract) and the property owner who needs to be providing the access rights are not the same entity, and therefore any solution that relies on this contractual connection is not capable to providing the necessary access.¹ While the contractual solution may address most situations, they suggest in the interim (i.e. prior to a legislative solution) that the ENB's responsibilities to provide the proposed services could be limited with respect to the necessary access being made available.
18. We recommend the ENA engages with the EA on this issue of obtaining access via a change to the MUoSA or the Code, with a view to identifying a way to resolve the access issue as comprehensively as possible in the medium term.
19. We also recommend the ENA engages with Ministry of Business, Innovation and Employment (MBIE) to seek a legislative change for this access issue for the long term.

¹ For example, in some multi-tenanted buildings where the body corporate or building owner owns the customer service line but the tenant holds the contract for the supply of electricity with the electricity retailer.

Public policy in relation to electrical safety issues

20. MBIE is responsible for public policy related to electrical safety issues. We consider it would be prudent for the ENA to raise with MBIE the issues that have been identified with customer service lines and the proposed way to address them, with a view to securing MBIE support for this initiative.

Charging for the additional services

21. ENBs, as commercial businesses, will need to be able to recover their costs if they are to provide these additional services. We consider the most efficient and equitable way to recover these costs is through the electricity lines charge. This is on the basis that the direct beneficiaries of these services is the same group that pays the lines charges, and that recovering these costs through the existing lines charge means there would be no additional administrative and compliance costs that would arise if these costs were recovered in a new charge.
22. The ENA sought a legal opinion from Russell McVeagh as to whether the costs arising from providing these additional services are capable of being treated as costs to provide the regulated electricity lines service. Their opinion confirms that these costs are capable, from a legal perspective, of being treated in this way (see Appendix 3).
23. We note the recovery of the costs for these services could be differentiated across an ENB's customer groups to reflect the differentiation in costs between these groups that these services give rise to. We expect the way in which these costs are recovered would form part of an ENB's pricing methodology, in a similar manner to the way in which other costs are allocated across differing customer groups.
24. We also expect there will be a need to refine the information disclosure requirements to take account of these new set of assets and operating costs.
25. We recommend the ENA engages with the Commerce Commission to develop a way in which non-exempt EDBs are able to recover the costs of supplying these additional services under the Default Price-Quality Path (DPP) from April 2015 onward (i.e. from when the reset DPP is to take effect), and to refine the information disclosure requirements as required to take account of these new set of assets and operating costs.

Communications with stakeholders

26. A successful implementation of the Energia proposal will require good communication with a range of stakeholders. These stakeholders include policy makers and regulators (e.g. MBIE, the EA, and the Commerce Commission), electricity retailers, the EGCC, ENBs, and customers. We recommend the ENA prepares a communications plan either to inform stakeholders directly, or to inform them as to where they are able to find further information relevant to them (e.g. where customers are able to find information on the services available to them).

Summary of recommendations

27. In summary, we recommend the following:
1. That the ENA adopts the two-tiered service approach to address customer service line issues comprising:
 - a) an Inspect, Maintain and Replace service; and
 - b) an Inspect, Notify and Enforce service.Both services would be supplied at the discretion of the ENB as part of the electricity lines service (regardless of where the point of supply is located), with the costs to supply the service being recovered in electricity lines charges.
 2. That the ENA engages with the Ministry of Business, Innovation and Employment on the electrical safety issues and the recommended approach to address them, as outlined in this report, with a view to securing their support for this initiative.
 3. That the ENA has service definitions for each of the proposed two services developed that are designed to fit within the Model Use of System Agreements (MUoSAs), clarifies what obligations would arise for an ENB on the basis of those service definitions, and develops a transition period for the gradual introduction of these obligations in order to allow ENBs time to complete their initial inspection and upgrade of customer service lines.
 4. That the ENA develops a way to address the access issues required to provide the proposed services.
 5. That the ENA engages with the Electricity Authority as needed to achieve points 3 and 4.
 6. That the ENA engages with the Commerce Commission to develop a way in which non-exempt ENBs are able to recover the costs of supplying these additional proposed services under the DPP from April 2015 onward (i.e. from when the reset DPP is to take effect), and to refine the information disclosure requirements as required to take account of these new set of assets and operating costs.
 7. That the ENA develops a communications plan for stakeholders relevant to this initiative, including the Ministry of Business, Innovation and Enterprise, the Electricity Authority, the Commerce Commission, electricity retailers, the Electricity and Gas Complaints Commission, ENBs, and customers, either to inform them directly about the changes, or to inform them as to where they are able to find further information relevant to them (e.g. where customers are able to find information on the services available to them).

Appendix 1: Management of service lines; Investigation and solution: Part 1
Summary; Energia, 3 December 2012

Management of Service Lines: Investigation and Solution

PART 1: SUMMARY

03 December 2012

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1. Summary

The purpose of this report is to outline the problem with Service Lines and to propose a workable solution for the current and future issues.

The responsibility for the maintenance of Service Lines was (generally) transferred from Electricity Supply Authorities to customers following the passage of the Electricity Regulations 1984, and the Electricity Act 1992 (and the subsequent 2001 amendments). Hence today, customers are generally responsible for the maintenance of Service Lines.

It is clear from this review that Service Lines are not being systematically inspected, maintained and renewed, and if this issue is not addressed then Service Lines will present a material public safety risk. If existing arrangements continue, failure rates could increase tenfold from their current levels and any increase in failure rates would represent an untenable situation.

The problem with Service Lines is most apparent in respect of overhead Service Lines, where pole failure rates are estimated to be in the order of 10 times greater than what is considered reasonable (based on the data sample assessed). There are also inherent risks associated with underground Service Lines, with the most significant cause of failure being damage from cable strike during digging.

The size of the problem is large, with the cost to replace 'at risk' Service Lines over the next 12 years estimated at \$370 million, with maintenance estimated to be a further \$230 million.

While there has been some communication to customers, the lack of understanding of responsibilities, and the current condition of Service Lines, are the most significant factors behind the increasing public safety risk.

An improvement in Service Lines public safety risk management is necessary and this review recommends that the situation would be best managed by the industry through the adoption of a two-tier approach:

- For domestic customers, public safety would be most efficiently managed through Electricity Distribution Businesses ("EDBs") inspecting, maintaining and replacing Service Lines. The associated costs would be socialised through distribution prices.¹
- For commercial customers², EDBs are the most competent party to inspect Service Lines, to notify commercial customers of the need for maintenance or replacement, and to enforce safety standards should customers fail to rectify hazardous situations in a timely manner.³

The recommendation for domestic customers incorporates the inspection, maintenance and replacement of underground Service Lines, however, the decision in respect of these lines is very finely balanced.

Properly implemented, the solutions will maximise public safety outcomes and will be economically efficient. Implementing these solutions will result in an initial distribution price increase of approximately 2%, with very small annual increases thereafter. The solutions recommended require EDBs and customers to make a series of trade-offs, which need to be carefully considered.

¹ In Part 2: Analysis, this is referred to as Option #4 EDB Maintain and Replace.

² Commercial customers include industrial customers and farms.

³ In Part 2: Analysis, this is referred to as Option #2 EDB Inspect, Notify and Enforce.

2. Introduction

This Part 1: Summary report presents the review of the ownership and management of Service Lines. The Part 2: Analysis report presents the analysis in detail.

The purpose of this report is to outline the problem with Service Lines and to propose a workable solution for the current and future issues. It is intended that the ENA Board and its members consider the merit of the solutions recommended in this report.

The objective of the review was about ‘maximising public safety outcomes in respect of Service Lines’ having regard to:

- Property rights;
- Economic efficiency;
- Regulation (and cost recovery);
- Practicality and durability; and,
- Customer service.

The review was initiated due to the electricity industry’s concerns in respect of an increasing public safety risk in relation to Service Lines.

Refer to Part 2: Analysis for an explanation of the terms used in this report.

3. Ownership and maintenance of Service Lines – past and present

A brief history of ownership and responsibilities⁴

The ownership of Service Lines is a difficult and complex matter and determining definitive ownership needs to be addressed on a case-by-case basis.⁵ Determining ownership requires knowledge of: the date of installation, who paid for the construction, the prevailing legislation, and whether any specific agreement as to ownership was made between the company and the customer.

Prior to 1967, Electricity Supply Authorities (“ESAs”) were responsible for Service Lines that they owned. Service Lines were paid for (and hence owned) by the ESA if they were less than 60 feet long, and they would have typically been jointly owned if they were jointly paid for (for lengths greater than 60 feet). It is likely that ESAs also maintained the jointly owned Service Lines.

Between 1967 and 1984, ESAs were required to maintain, renew or reconstruct Service Lines (however, this could be charged directly to the customer in certain circumstances). These Service Lines may, or may not, have been owned by the customer, but this ownership did not alter the responsibility for maintenance (which resided with the ESA).

Under the Electricity Regulations 1984 the responsibility for Service Lines shifted from ESAs. However, where the ESA had previously been responsible for a Service Line, they were required to bring the Service Line up to a satisfactory standard of maintenance and repair and formally

⁴ For further details, refer to Part 2: Analysis, Section 2.2.

⁵ Except for some 11kV Service Lines which were not properly handed back to customers under the Electricity Regulations 1984.

hand it over to the customer. The handing back of the responsibility for Service Lines was often not in compliance with the regulations.

Where we are today⁶

The policy intent of the Electricity Act 1992 (and the preceding Electricity Regulations 1984) was to shift responsibility for Service Lines on private land to the customer (or land owner). The amendments made to the Electricity Act in 2001 sought to reinforce the demarcation between the network (or 'works') and the customer's electricity connection ('exclusive fittings') through the definition of a Point of Supply. The Point of Supply is defined, in general terms, in the Electricity Act and is agreed between the customer and the Electricity Distribution Business ("EDB"), or the energy retailer (on the EDB's behalf). In most cases this agreement is achieved by way of the Point of Supply definition in the EDB's use of system agreement and energy retailer's contracts with customers.⁷ Where the Point of Supply has changed, the transfer of responsibility is conditional on the EDB bringing the Service Line up to a reasonable standard of maintenance and repair.

Hence today, customers are generally responsible for the maintenance of Service Lines on their property (with exceptions being Service Lines on the Orion Network and 11kV Service Lines on a large number of other Networks).⁸

While there has been some communication to customers and landowners about their responsibilities, the lack of understanding of responsibilities, and the condition and safety of Service Lines, have been the most significant contributing factors to an increasing public safety risk associated with Service Lines.

The Electricity Act 1992 and the Electricity Regulation 1984 did not address ownership. It is important to note that the agreement of the Point of Supply does not address issues around ownership.

4. The problem with Service Lines

Deteriorating Service Line condition⁹

It is clear from the investigation undertaken that Service Lines are not being systematically maintained and renewed, and if this issue is not addressed then Service Lines will present a material public safety risk. If existing arrangements continue, failure rates could increase tenfold from their current levels. Any increase in failure rates represents an untenable situation.

The problem with Service Lines is most apparent in respect of overhead Service Lines where pole failure rates are estimated to already be in excess of 10 times greater than what is considered reasonable.¹⁰

With that said, there are inherent risks associated with underground Service Lines, with the most significant case of failure being damage caused by cable strike during digging.¹¹

⁶ For further details, refer to Part 2: Analysis, Section 2.2.

⁷ Noting that the term "Point of Connection" is used in the Electricity Authority, "Model Domestic Contract for Delivered Electricity (interposed)", last updated 24 October 2010.

⁸ This is on the assumption that Service Lines were 'handed back' under the Electricity Regulations 1984, or as a result of the implementation of the 'new' Point of Supply under the Electricity Act 1992.

⁹ For further details, refer to Part 2: Analysis, Section 2.5.

¹⁰ The current Service Line pole failure rate is estimated at 0.08% (8 failures per 10,000 poles). The target in Australia for unassisted failures is 0.25 per 10,000 (from Western Power's quarterly report date December 2009). It is appropriate to note that the NZ pole failure data may include some assisted pole failures.

Figure 1 illustrates the Service Line age profile in 2025 based on maintaining the “status quo” in terms of the maintenance and renewal of Service Lines.

As can be seen in Figure 1, there will be a significant ‘stock’ of Service Lines older than 45 years (from where the failure rate is forecast to increase significantly if no remedial action is undertaken). Based on the estimated 2025 age profile, the pole failure rate is forecast to increase to 60 failures per 10,000 poles.

The cost to replace the ‘at risk’ Service Lines over the next 12 years is estimated to be in the order of \$370 million, with maintenance and fault costs estimated to be a further \$230 million.¹²

The fault rate (excluding tree related faults) for Service Lines is also forecast to increase tenfold, which would have a material impact on fault and emergency management costs (where only some of these costs could be recovered from customers).

The key driver for the increase in failure rates is the increasing age of the ‘stock’ of Service Lines. Between now and 2025, the average age of underground Service Lines is forecast to increase from around 20 years to 32 years, and the average age of overhead Service Lines is forecast to increase from 27 years to 40 years.

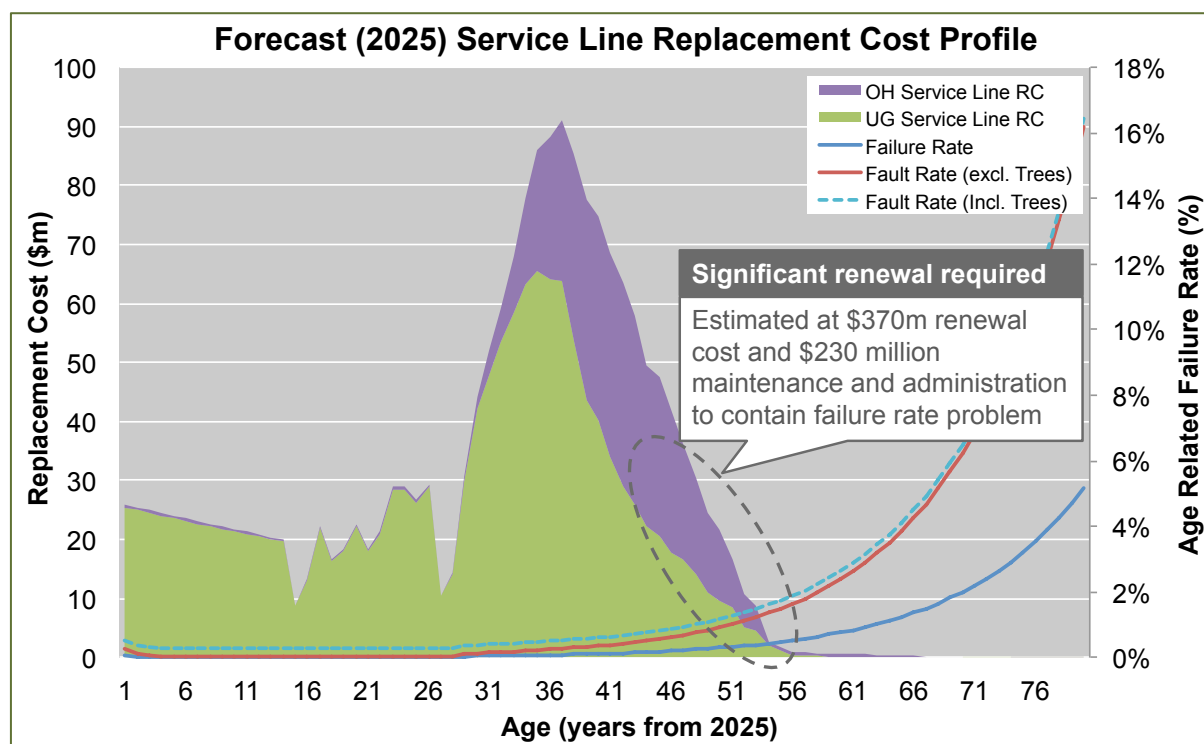


Figure 1: Forecast Service Line Replacement Cost Profile in 2025 (Status Quo)

Vegetation

Trees and electricity lines don’t mix. Over three quarters of all Service Line faults relate to trees. Tree related faults present a public safety hazard as tree damage can cause overhead line/cable and pole failures, and provide a path for electric current to earth.

¹¹ The current cable failure rate is estimated at 3 failures per 100km of underground Service Line. The majority of these failures were caused by cable strikes during digging.

¹² 2012\$.

Confusing ownership and maintenance responsibilities, and customer apathy¹³

The confusing and unclear definition of the point of supply, and the generally reliable nature of electricity supply in New Zealand contributes to the apathy in respect of the maintenance responsibilities for Service Lines.

Most domestic customers lack any form of asset management knowledge and as such adopt the attitude “if it’s not broke, don’t fix it”. Commercial customers generally have a higher level of understanding of risk and are more likely to make maintenance and replacement decisions based on the condition of their Service Line.

Increasing customer complaints

Service Lines are also a cause of complaints and the resolution of these complaints typically has a negative impact on the perception of EDBs.¹⁴ This impact is either driven by the customer’s unexpected liability for Service Line repairs (and the inconvenience and cost of those repairs) or by a dispute over ownership. Hence, resolving the on-going maintenance requirements of Service Lines presents an opportunity to improve customers’ perceptions of the industry. Both customer perception, and the reliability of distribution-supplied electricity, will become increasingly important should alternative energy sources become more competitive in the long-term.

In summary

Uncontrolled overhead line failures, underground cable strikes, and/or ineffective management of trees, all increase public safety risk around Service Lines.

Electricity is inherently dangerous and despite the implementation of electrical protection it does not always ‘fail safe’. The risk to the public will depend on the location of the Service Line and the frequency with which the public access the area near the Service Lines. By their very nature, Service Lines are located near dwellings and business premises, hence the public typically have frequent access in and around them.

The increasing age and worsening condition of Service Lines, driven by the lack of systematic maintenance and replacement, will result in worsening public safety outcomes.

While there has been some communication to customers about their responsibilities, the lack of understanding of responsibilities and the deteriorating condition of Service Lines are the most significant contributing factors to an expected increase in public safety risk associated with Service Lines.

5. Recommended solution¹⁵

An improvement in public safety outcomes in respect of Service Lines is best managed by the industry through the adoption of a two-tier solution:

¹³ Refer to Part 2: Analysis, Section 2.3.

¹⁴ A review of the EGCC case notes indicates that 25% of all EDB complaints that made it to the dispute resolution stage related to Service Lines.

¹⁵ A range of solution options were considered and are outlined in Part 2: Analysis, Section 4 and 5.

- For domestic customers, public safety outcomes will be most efficiently managed through EDBs inspecting, maintaining, and replacing Service Lines, and for the associated costs to be socialised through distribution prices.¹⁶
- For commercial customers¹⁷, EDBs are the most competent party to inspect Service Lines, notify commercial customers of the need for maintenance or replacement, and to enforce safety standards should hazardous situations be identified.¹⁸

It is recommended that these solutions be applied to both overhead and underground Service Lines. While the risks (and maintenance costs) associated with underground Service Lines are lower than with overhead Service Lines, there will be public safety benefits, and long term customer service benefits, if they are managed under the same regime as overhead Service Lines.^{19 20} It is recognised that the recommendation in respect of underground Service Lines is finely balanced, and their inclusion has been driven by the overarching objective of public safety and the secondary objectives of economic efficiency and customer service. It could be possible to provide satisfactory public safety outcomes through an inspection regime for underground Service Lines, however this is likely to lower economic efficiency and customer service outcomes.²¹ It is worth noting that underground Service Lines are maintained in US, UK and Canada (and also be Chorus in respect of phone and internet connections).^{22 23}

A range of solutions were considered, however, the solutions recommended in this report reflect the objective of 'maximising public safety outcomes in respect of Services Lines' having regard to Property rights; economic efficiency; regulation (and cost recovery); practicality and durability; and, customer service.

Note: The management of trees will be guided by the Electricity (Hazards from Trees) Regulations 2003. It is noted that further work is being undertaken in respect of the management of trees, and this report does not comment further in respect of trees.

Domestic customers represent 86% of all electricity customers. Placing the onus on EDBs to inspect, maintain and replace Service Lines would provide the vast majority of customers with a safe and reliable Service Line. This solution provides the best public safety outcome as well as being the most efficient.²⁴ It is recognised that there would be an implicit cross-subsidy between urban and rural (non-commercial) customers, however, it is not considered that this cross-subsidy would be material.²⁵ Importantly, this solution seeks to utilise EDBs' expertise in asset management and construction in maintaining Service Lines to the necessary safety and reliability standard and to 'socialise' the associated costs across the domestic customer base. This solution is consistent with arrangements in the United States, the United Kingdom and Canada.

¹⁶ In Part 2: Analysis, this is referred to as Option #4 EDB Maintain and Replace.

¹⁷ Commercial customers include industrial customers and farms.

¹⁸ In Part 2: Analysis, this is referred to as Option #2 EDB Inspect, Notify and Enforce.

¹⁹ Inspection (and replacement) of signage, the security of mains entry point, mechanical protection of cables (where they exit the ground) would assist in minimising the risk associated with underground Service Lines.

²⁰ In respect of underground Service Lines, the economic efficiency point is in favour of EDBs undertaking the maintenance and replacement, however, the customer service point is very finely balanced. However, should EDBs wish to: 'get closer to their customers', create opportunities to deliver good customer service, and ensure that customers remain grid connected (should alternatives become viable in the future), then it would be appropriate for EDBs to take responsibility for replacing underground Service Lines.

²¹ The inspection of safety signage and mechanical protection are considered necessary.

²² It is assumed that Chorus maintains phone/internet service lines for customer service reasons.

²³ For further details refer to Part 2: Analysis, Section 5.2.

²⁴ For further details on the efficiency comparison, refer to Part 2: Analysis, Section 4.6.

²⁵ It is expected that the number of non-commercial rural customers will be relatively low when compared to the urban domestic customer base. The inherent urban to rural cross-subsidy is considered to be a lower-order factor when compared to the issues of competency to undertake the work and customer service. Furthermore, it is considered that attempting to remove this cross-subsidy would undermine the objective of improving public safety outcomes as it would increase the cost threshold to maintain and replace Service Mains.

The expected cost of implementing the domestic solution over the next 12 years is \$450 million. The impact on customers would be a one-off increase in distribution prices of around 2% (and an annual price increase of 0.2%) for domestic customers²⁶.

The average unit cost of inspecting, maintaining and replacing commercial Service Lines will be many times larger than for the average domestic customer as commercial Service Lines are (on average), of higher capacity (i.e. larger) and are longer (in the case of farms), hence it is not considered appropriate to socialise higher commercial costs across the domestic customer base as this will create a material cross-subsidy.²⁷ A public policy driver would be needed to justify a cross-subsidy of this type. The recommended solution for commercial customers is not as economically efficient as for domestic customers.²⁸ However, it is considered that the cost disadvantage (which is applicable to approximately 14% of electricity customers) is less of a burden than the resulting domestic to commercial cross-subsidy. In addition, informing commercial customers about the condition (and risk) associated with their Service Line will allow these customers to make decisions on reliability risk vs. cost..

For the commercial customer solution, the cost impost on EDBs is expected to be \$12 million over the next 12 years, while the commercial customers' costs would be in the order of \$140 million for the same period. The one-off price increase to commercial customers would be around 0.2%.

Importantly, having Service Lines under EDB oversight will see these assets fall under the EDB's safety management system, which will ensure that Service Line public safety risks are appropriately governed and managed.

The solutions recommended provides the best trade-off between economic efficiency, protection of private property rights, and the need to improve public safety outcomes.

6. Implementation (next steps)

6.1 Specific implementation issues

Private property access arrangements

Access to private property is required to undertake inspection, and maintenance or replacement work.²⁹ Providing suitable notice is given, EDBs may already have contractual rights to enter private property to "inspect, test, install, operate, maintain, replace, or remove any equipment related to [the customers] electricity supply".^{30 31}

²⁶ These price increases assume the replacement Service Lines are capitalised by the EDB. The annual price increase relates to the increase in WACC x RAB and depreciation recoveries as the stock of EDB owned Service Lines increased each year. If the replacement Service Lines are expensed, a one-off P0 of 2.5% to 3.0% would be required (with no ongoing increase). EDBs are well placed to assert ownership of any new Service Line (provided the Point of Supply was refined) and could treat this expenditure as capex. However it is worth noting that the agreement as to the Point of Supply is customer specific and hence security for future access would be dependent on future customers continuing to agree to location of the Point of Supply. If EDBs were concerned with future impairment of Service Lines the replacement work could be expensed.

²⁷ In this situation a cross-subsidy would exist as the prices to the Commercial customer segment would be below the avoidable cost. That is, a form of cross subsidy exists when a company sets prices for a particular service, or to a particular customer group, so low that the revenues obtained are less than the money the company would save by not providing that service or serving that customer group. For this to be characterised as a cross subsidy, the low prices must be financed by revenues from the company's other customers.

²⁸ For further details on the efficiency comparison, refer to Part 2: Analysis, Section 4.3.

²⁹ Under the Electricity Act, Section 23, EDBs only have specific rights to enter onto private property to undertake inspection, maintenance or replacement of existing works.

³⁰ Electricity Authority, "Model Domestic Contract for Delivered Electricity (interposed)", last updated 24 October 2010, Clause 110.

If the right to access private property has not already been secured, it would need to be obtained via the customer's contract with their energy retailer (or EDBs in the case where customers contract directly). Access rights would first need to be negotiated in the Use of System Agreement ("UoSA") between EDBs and energy retailers.

Redefinition of the Point of Supply

The Point of Supply would need to be redefined as the point of entry to the house or building (noting that this point needs to be properly defined) to implement the domestic solution. The process for agreeing a Point of Supply requires a specific agreement with the customer.³² Current customer contracts only provide a 'loose' definition of the 'point of connection' and do not reference the Point of Supply as per the Electricity Act.³³

Implementing a change to the Point of Supply is achievable by way of a change to EDB's UoSA and energy retailers' standard terms and conditions with customers.³⁴ It is expected that consultation would be required (along with consultation on the change in price).

Consultation

Specific consultation with customers will be required in respect to the change in the Point of Supply (for domestic customers) and the change in prices. The results of this consultation would inform the decision as to whether to proceed with the solutions as proposed. The results of the customer consultation would also be an important input into the regulatory 'rate case'.

Accounting treatment of expenditure

EDBs are well placed to assert ownership of any new Service Line (provided the Point of Supply was redefined) and could treat this expenditure as capex.³⁵

Regulatory 'rate case'

It is recommended that the industry advise the Commission of the additional costs that need to be incorporated into the starting price adjustment for the 2015 DPP reset. Individual EDBs would include the forecast costs of the solution in their 2014 AMP.

Separable Implementation

While this report has been prepared on the basis of an industry-wide implementation, there is nothing preventing the solutions being implemented on an EDB-by-EDB basis.

6.2 Next steps

The implementation of this solution is proposed as follows:

³¹ For significant assets, easement protection would be appropriate.

³² Electricity Act 1992, Section 2, Subsection 3 (also refer to Part 2: Analysis, Appendix One).

³³ Electricity Authority, "Model Domestic Contract for Delivered Electricity (interposed)", last updated 24 October 2010, details contained in the Forward and Definitions.

³⁴ Electricity Act 1992, Section 2, Subsection 3 (also refer to Part 2: Analysis, Appendix One).

³⁵ However it is worth noting that the agreement as to the Point of Supply is customer (or landowner) specific and hence security for future access would be dependent on future customers continuing to agree to location of the Point of Supply. If EDBs were concerned with future impairment of Service Lines the replacement work could be expensed.

- Member consultation: The ENA Board and members should consider this report and endorse (or otherwise) the solutions proposed. The key aspects for ENA members to consider are noted below;
- Specific Legal Opinion: It would be appropriate to obtain a specific legal opinion in respect of: (a) obtaining the specific agreement for the change in the Point of Supply; and, (b) to verify access arrangements under the various energy retailers' terms and conditions;
- Customer consultation: The purpose of the consultation is to seek endorsement of the price increase and change in the Point of Supply associated with the improvement in public safety and reliability outcomes;
- Regulatory submission: Prepare a submission to the regulator on the cost impost on EDBs to implement the proposed solution.
- 2014 AMP update: Include the additional opex and capex in an 2014 AMP update.
- Retailer consultation: The usual price change consultation would need to be undertaken (as per the Electricity Authority requirements) and this consultation would need to also include consultation on the change in the Point of Supply.
- Preparation of Industry Guidelines: It would be appropriate to prepare a standard set of industry procedures to administer the EDB Inspect and Replace regime and the EDB Inspect, Notify and Enforce regime.³⁶

6.3 Key considerations by the ENA

In deciding whether to proceed with the solutions outlined in this report, the key factors for the ENA and its members to consider are:

- (a) Whether the higher safety, customer service, and economic efficiency outcomes associated with the domestic customer solution are of sufficient strategic importance to warrant the increase in administration, asset management, and associated responsibility;
- (b) In respect of (a), the inclusion of inspection, maintenance and replacement of underground Service Lines is very finely balanced and the public safety outcomes could potentially be managed by way of an inspection regime only (but which would likely lower customer service outcomes);
- (c) Whether the higher safety, customer service, and economic efficiency outcomes associated with the domestic customer solution are of sufficient value to warrant the price increase (noting this is a matter for consultation, but members may have views based on other customer interactions);
- (d) Whether a two-tier solution is appropriate;
- (e) Whether EDBs are in the best position, in terms of financial, process, and personnel, to manage Service Lines.

If these questions are answered in the affirmative, then the solutions should proceed as outlined.

³⁶ This review should encompass the cost sharing required for underground Service Line replacement, overhead to underground conversion and a review of the EEA Guide for Safety Checking of Private Overhead Lines.

Appendix 2: Issues arising out of proposal to adopt option 1 and 2 in respect of maintenance and replacement of customer service lines, Sally Fitzgerald, Ashleigh Cropp and Will Irving of Russell McVeagh, 11 October 2013

11 October 2013

PARTNERS

PATRICK BOWLER
DEREK NOLAN
JEFF MORRISON
GRAEME QUIGLEY
ALAN PATERSON
FREDERICK WARD
RICHARD McILRAITH
HAMISH McINTOSH
PIP GREENWOOD
JAMES EVERY-PALMER
DAVID CLARKE
BRENDAN BROWN
MALCOLM CROTTY
JOE WINDMEYER
GUY LETHBRIDGE
JOHN POWELL
ED CROOK
TIM CLARKE
BALHAZAR MATHESON
SARAH KEENE
SALLY FITZGERALD
ANDREW BUTLER
SARAH ARMSTRONG
ADRIAN OLNEY
DAVID HOARE
CHRISTOPHER BARGER
GEOFF BUSCH
SHAUN CONNOLLY
MATTHEW KERSEY
JAMES GARDNER-HOPKINS
DAVID BUTLER
CRAIG SHRIVE
JOHN-PAUL RICE
GRANT KEMBLE
DEEMPLE BUDHIA
MEI FERN JOHNSON
BRONWYN CARRUTHERS
NICK HEGAN
DAVID HOLDEN
DANIEL JONES
POLLY POPE

CONSULTANTS

GEOFFREY RICKETTS
ALAN A'COURT
PRUDENCE FLACKS
NICOLA PURVIS
DOUG BAILEY
PROF. PHILIP JOSEPH

Electricity Network Association Limited
PO Box 1017
WELLINGTON

By email

For: Alan Jenkins

ISSUES ARISING OUT OF PROPOSAL TO ADOPT OPTION 1 AND 2 IN RESPECT OF MAINTENANCE AND REPLACEMENT OF CUSTOMER SERVICE LINES

1. INTRODUCTION

1.1 Proposed options for resolving the issue of the maintenance and replacement of customer service lines are:

- (a) Option 1 - IMR with no changes to the UoSAs; and
- (b) Option 2 - Inspect, Notify & Enforce ("**INE**").

1.2 In our memorandum of 4 October 2013, we set out the reasons for our view that, where an electricity lines business ("**ENB**") adopts option 1 and option 2 (collectively, the "**proposal**"), the costs associated with servicing customer service lines are capable of being treated as regulated costs under the Act and / or under the input methodologies determination.

1.3 In light of that view, you have asked us to advise on a number of further issues in relation to the proposal to extend ENBs' inspection, maintenance and replacement obligations:

- (a) issues potentially arising under the Electricity (Safety) Regulations 2010 ("**Regulations**"), in particular in respect of:
 - (i) the meaning of "operates" for the purposes of regulation 15; and
 - (ii) any new obligations under the Regulations that would fall on an ENB if the proposal were adopted;
- (b) whether who is in "control" or in "charge" of customer service lines under the Electricity Act 1992 ("**Act**") would change if the proposal were adopted;
- (c) any implications of adopting the proposal under the Consumer Guarantees Act 1993 ("**CGA**") (and proposed amendments thereto); and
- (d) access issues.

2. SUMMARY OF ADVICE¹

2.1 In broad terms, and as would be expected from the fact that the proposal involves ENBs assuming responsibility for additional lines, poles etc, the *extent* of ENBs' existing obligations will change. However, under the Regulations, the Act and the CGA, the *nature* of those obligations remains essentially the same.

2.2 Focussing on the particular issues outlined above:

- (a) The meaning of "operates" in regulation 15 is unfortunately not clear, and there are competing arguments as to whether it would apply to an ENB in the event the proposal is adopted. However, we think the better view is that it would apply in the case of the IMR option, and while the arguments are less compelling in respect of the INE option, it cannot be ruled out. For these reasons, we think it would be prudent to assume that ENBs would be found to be "operating" customer service lines under the proposal.
- (b) A number of further obligations under the Regulations are likely to fall on ENBs were the proposal to be adopted. These are set out in the table at Appendix A to this letter. However, as will be seen from the type of obligations set out in Appendix A, the nature of those obligations are likely to be very similar to existing safety obligations on ENBs - they just now extend to a wider range of assets. In other words, the "additional" obligations are broadly commensurate with the greater responsibility that ENBs would adopt under the proposal. We should note, however, that a concluded view on each particular obligation that might apply will depend on the precise content and detail of the proposal (eg what particular contractual terms would be adopted to implement the proposal, the scope of potential work that could fall within the maintenance obligations taken on by the ENBs etc), which are not yet available.
- (c) The meaning of the terms "control" and "in charge" in the Act is dependent on the context of their particular use. "Control" of a thing likely has a higher threshold (involving some form of authority or ability to direct another person in relation to a thing), whereas being in "charge" connotes responsibility (ie rather than authority). We have set out at paragraph 4.14 below our view on whether an ENB would likely be "in control" or "in charge" of the customer service lines for the purpose of particular provisions in the Act that preliminary relate to safety. It should also be noted that these provisions of the Act are not particularly onerous², so do not expect there to be any particular issues arising if ENBs were "in control" or "in charge" in any event.
- (d) The CGA applies to all services provided under the proposal. Proposed reforms to the CGA would mean that the ENB would be liable to the retailer under an indemnity (rather than to the consumer) in respect of the provision of line function services (but

¹ For the purposes of this advice, we adopt the same factual assumptions as set out at paragraph 4 of our memorandum of 4 October 2013.

² For example, they deal with the Secretary's interaction with those "in control" of fittings for the purposes of giving notice of inspections etc.

only where the retailer has had a successful claim brought against it under the acceptable quality guarantee, and the retailer's failure has in turn been caused by the relevant ENB). The ENB would remain directly liable to the consumer in respect of any maintenance falling outside the provision of line function services. Like the position with the Regulations noted above, while the extent of obligations under the CGA may change, their nature does not.

- (e) Sufficient access rights required for the proposal are not currently provided in the relevant legislation or the Model UoSA ("**MuOSA**"), and it is unlikely full access rights could be achieved by contract. Full access would likely need to be addressed by legislative amendment, for example to section 23 of the Act. In the interim, additional maintenance obligations adopted by ENBs by contract could be expressly limited to circumstances where access is in fact granted by the relevant consumer (or landowner).
- (f) Finally, and as will be appreciated, how both the IMR and INE options are drafted will have a bearing on the nature and extent of additional obligations that an ENB will take on as a result. Accordingly, as the more detailed aspects of the proposal are being considered and drafted, we would be happy to advise further on any particular issues arising.

2.3 We address in the balance of this advice our more detailed reasoning for the above conclusions.

3. **ELECTRICITY (SAFETY) REGULATIONS**

3.1 There are unfortunately few background documents or legislative commentaries to aid the interpretation of the various terms introduced in the 2010 Regulations. On this basis, we have approached the issue on the basis of "first principles" statutory interpretation, in light of the empowering legislation, the purpose of the legislation and Regulations, and those background materials that are available at this time.

What is the meaning of 'operates' in the context of regulation 15?

3.2 Regulation 15 applies to anyone who "*owns or operates works, installations, fittings or appliances*". The upshot of the regulation is that those persons must not use, or allow any other person to use, the works, installations etc³ if they are electrically unsafe. The purpose of the regulation appears to be to place a positive obligation on those *responsible* for works, installations, fittings or appliances (and therefore their maintenance) to ensure electrical safety. The issue in the current case is whether the adoption of the proposal would result in ENBs "operating" customer service lines for the purposes of regulation 15.

3.3 It is relevant that regulation 13 specifically addresses "*doing work*" on customer service lines, and expressly provides that the term "work" includes maintaining and inspecting. That might indicate that the legislature intended "operating" and "doing work" (the latter expressly incorporating inspection and maintenance) to be different concepts. Further support for this view can be drawn from the fact that, in several provisions in the Act (being the empowering legislation for the Regulations), the separate words

³ Collectively referred to in this advice as "customer service lines".

"maintenance" and "operation", or "inspecting or operating", or "inspecting, maintaining or operating" are used.⁴ Further, given inspection and maintenance of customer service lines falls squarely within regulation 13, there is no basis or need for maintenance and inspection to also fall within regulation 15.

- 3.4 However, despite the initial attractiveness of the above argument, we do not think the position is so clear cut. For example, regulation 13 is only operative in the context of work actually *being done* on the lines. So, if work is not being carried out, regulation 13 is not triggered. In addition, the use of a word must be considered in its particular context, and therefore the same word is capable of bearing different meanings in different sections of a statute or regulations - if the context requires.
- 3.5 For these reasons, and as explained in the following paragraphs (3.6 to 3.23), we think there is a realistic prospect that the concept of "operates" in regulation 15 would capture entities that are responsible for the electrical safety of lines under the IMR option. On this basis, it would cover ENBs in a scenario where they have gone to their respective customer bases, and confirmed that they will take on that responsibility (and recover the costs of doing so). We also think the same position could apply under the INE option (though given maintenance is not actually carried out by the ENB, the arguments are not as strong). We address this scenario at paragraphs 3.24 to 3.25 below.

Ordinary meaning and use of the term "operate"

- 3.6 As noted above, regulation 15 applies to persons who "own" or "operate" a customer service line. "Operate" is therefore not dependent upon ownership. Further, while there will only ever be one owner of a particular line, it is possible that concurrent operation may occur by one or more operators.
- 3.7 The Regulations do not define the term "operate". In such circumstances, courts will very often start their analysis with the plain and ordinary meaning of the word in question, often gleaned from dictionary definitions.
- 3.8 The ordinary meaning of the word "operate" often refers to the *mechanical functioning* of an asset to fulfil its purpose. For example:
- (a) The Collins English Dictionary defines "operate" as "(1) to function or cause to function, (2) to control the functioning of, (3) to manage, direct, run or pursue (a business, system etc)" or (4) "to produce a desired or intended effect".⁵
 - (b) The Collins English Dictionary defines 'operator' as "a person who operates a machine, instrument etc[.]".⁶
 - (c) The Shorter English Dictionary relevantly defines 'operate' as to "... (5) cause or direct the functioning of; control the working of (a machine etc) (6) manage, direct the operation of (a business, enterprise, etc)".⁷

⁴ See the definition of "line function services"; and sections 23, 23B and 169A(2).

⁵ *Collins English Dictionary* (6th ed, HarperCollins, Great Britain, 2003) at 1144.

⁶ *ibid.*

⁷ *Shorter Oxford English Dictionary: on Historical Principles* (6th ed, Oxford University Press, Oxford, 2007) at 2009.

(d) The Chambers 20th Century Dictionary defines 'operate' as "to work; to exert strength; to produce any effect;... to be in activity, act, carry on business;... to effect, bring about, cause to occur, to work; to conduct, run, carry on."⁸

3.9 However, the word "operate" is used in a range of contexts in the Regulations, including in the context of entities that have a measure of control or visibility of the safety of the lines (see the various regulations summarised in Appendix B to this advice).⁹

Purposive approach

3.10 The Interpretation Act 1999 requires the meaning of an enactment to be "*ascertained from its text and in the light of its purpose*".¹⁰ Apparent meanings of the text or legislative term must be cross-checked against legislative purpose,¹¹ and (where this does not result in a strained interpretation of the text), this may widen the scope of an enactment. The explicit purposes of an enactment are considered both "*helpful [and] crucial*" in respect of determining the meaning or the whole or part of legislative language.¹²

3.11 Using a purposive approach, the Court of Appeal has previously held that the meaning of "operate" can be wider than the traditional concept of "mechanical operation". In that case, the word "operate" was being construed in the context of section 24 of the Civil Aviation Act 1964, which creates an offence for an aircraft to be operated in a manner as to cause unnecessary danger to other persons. The argument in that case was that "operate" related solely to the flying of the aircraft, and did not include matters such as pre-flight briefings.

3.12 The Court rejected this argument. It was held that 'operation' was not limited to the actual flying of the aircraft, but also extended to pre-flight briefings. The Court held that the "*common and ordinary meaning of manage or control seems to us both available and appropriate*".¹³ The Court also observed that "*the fact that he [ie the pilot] was not then directly in physical control of the machine would not in our view necessarily prevent him from being said to "operate it"*". Accordingly, the term was construed in the context of those who had responsibility for, managed, or control of the safety of the aircraft. We consider that a similar approach, on a purposive interpretation of the Act and Regulations, could apply in regulation 15.

3.13 In this context, electricity has long been considered a "special" hazard due to its wide distribution and ease of accessibility by people of all ages in a

⁸ Chambers 20th Century Dictionary (1983 ed., Richard Clay (The Chaucer Press) Ltd, Great Britain, 1983) at 886.

⁹ Note that the examples used are those where the context is to place responsibilities on a person or bodies corporate, rather than 'operate' or 'operating' in a mechanical or operational functioning sense.

¹⁰ Section 5 Interpretation Act 1999.

¹¹ *Commerce Commission v Fonterra Co-Operative Group Ltd* [2007] 3 NZLR 767 (SC) at 22 per Tipping J.

¹² *Northland Milk Vendors Association v Northern Milk Ltd* [1988] 1 NZLR 78 (CA) at 88 per Cooke P.

¹³ *R v Nicholson* CA397/90, 16 April 1991 at 12. This case was decided before the Civil Aviation Act 1990 came into force with its corresponding definition of "operate": "*to fly or use the aircraft, or to cause or permit the aircraft to fly, be used, or be in any place, whether or not the person is present with the aircraft; and operator has a corresponding meaning.*"

wide range of situations.¹⁴ The 2010 Regulations were enacted following amendments in 2006 to the Act, which re-emphasized the focus on consumer and property safety, and updated the Act to include two safety-related purpose statements:

- (a) to protect the health and safety of members of the public in connection with the supply and use of electricity in New Zealand; and
- (b) to promote the prevention of damage to property in connection with the supply and use of electricity in New Zealand.

3.14 Those amendments, in conjunction with other changes to the Act,¹⁵ required the Electricity Regulations 1997 to be amended; instead, these were revoked and the 2010 Regulations were enacted.

3.15 The Regulatory Impact Statement to the 2010 Regulations notes that the Regulations were intended provide for the safe delivery and use of electricity to industry and consumers, and to ensure the electricity industry had greater clarity in terms of its obligations in the electricity sector, while not constraining innovation.¹⁶

3.16 Given the strong and express safety purpose of the Regulations, it could be said to be consistent with this purpose that an ENB would be 'operating' the customer service line where it had fully assumed the obligations of inspection, maintenance and repair (and particularly so if that responsibility was to the exclusion of a consumer's obligation to do so). In other words, we think that it would be open to a court to define "operate" in a wider way than its ordinary usage,¹⁷ particularly where:

- (a) the control of the safety of the customer service line has been assumed by the ENB;
- (b) the ENB has effectively conveyed to its customers that they no longer need to concern themselves with such matters (at least insofar as carrying out regular inspection and maintenance); and
- (c) the ENB is recovering its costs for this service.

¹⁴ *Government Response to the Report of the Labour Committee on Inquiry into the Administration of Occupational Safety and Health Policy*, presented to the House of Representatives in accordance with Standing Order 251, p 47.

¹⁵ Including, through not exclusively, changes to the occupational licensing provisions for electrical workers to require registration and licensing classes and competency requirements to be defined by the Electrical Workers Registration Board, rather than in regulations; a new requirement for safety management systems to be in place for larger generation facilities and distribution networks; and new offence provisions and penalties.

¹⁶ Ministry of Economic Development "Regulatory Impact Statement" (4 March 2010)

[<http://www.med.govt.nz/about-us/publications/publications-by-topic/regulatory-impact-statements/mbie-regulatory-impact-statements/electricity-safety-regulations-2010-pdf>]. Note the policy objectives behind the 2010 Regulations were to provide for electricity to be delivered in a way that is safe for the public, safe for property, and safe for workers; be clear and understandable to aid industry compliance; provide for the availability of electrical appliances and fittings that are safe to use; provide guidance to the industry as to what is expected of the sector by Government; and provide flexibility so that innovation is not constrained while still achieving safe outcomes.

¹⁷ Although the purpose of statutory interpretation is never to strain Parliamentary language, strained meanings can in some cases be utilized where the words will legitimately bear them in light of the purpose: Ross Carter and Jason McHerron "Statutory Interpretation - a 2012 guide" (NZLS Seminar, October 2012), p 42.

- 3.17 Interpreting 'operate' in this way does not lead to a nonsensical or overly strained interpretation of regulation 15.
- 3.18 Construing the term "operate" in this way could also fill what might otherwise be a "gap" in the regulatory framework. This is because regulation 13 only applies when works are actually being carried out. If an ENB were not the owner of the customer service line (which will often be the case), then the entity that has proactively taken on responsibility for electrical safety of the lines will not be responsible for that electrical safety unless and until they are actually doing the work (and therefore fall within the scope of regulation 13).
- 3.19 In the context of the above interpretation, the *extent* of the obligation actually assumed by the ENB will also be a key consideration. For example, if the ENB assumed inspection and maintenance to the *exclusion* of the customer service line owner, there will be a stronger case to construe "operates" in a broader sense, and in a manner consistent with the safety purpose of the Regulations.
- 3.20 However, even where an ENB's assumption of responsibility operates in parallel to the customer service line owner's obligation, we still consider that there is a good argument that the ENB, having proactively taken on the role of inspecting and maintaining lines, could fall within regulation 15.
- 3.21 Our views in this regard are strengthened by the fact that a court would likely be cognisant of the very real difficulty of determining line ownership in many cases.
- 3.22 Finally, and putting aside the various legal arguments outlined above, it could be inherently unattractive for ENBs to take the position that, despite having proactively assumed full responsibility for maintenance (and thereby safety) of customer service lines (and recovering their costs of doing so), their legal responsibility was limited to when they were actually carrying out that work.
- 3.23 For all of these reasons, and while we recognise that the position is not clear cut, we think the better view is that the term "operate" in regulation 15 would be construed to include ENBs in the context of the IMR option.

Would the INE option result in an ENB operating the relevant customer service lines?

- 3.24 The INE option is less extensive than the IMR option. The proposed service extends only to inspecting and notifying/monitoring, to ensure that any defects in the customer service lines are rectified, but not necessarily carrying out the maintenance itself.
- 3.25 Because the ENB positively assumes inspection and notification obligations under the INE option, we consider that this assumption of responsibility still means that there is a prospect of an ENB "operating" the line for the purposes of regulation 15. The position is obviously not as strong as in the case of the IMR. However, similar policy reasons apply, in that by adopting the INE option, ENBs have conveyed to their customers that they need not concern themselves with electrical safety unless and until notified by the ENB that maintenance works are required. Again, if the ENB itself was not actually carrying out the maintenance, it would not be caught by regulation 13, and would also, on a narrower approach, fall outside regulation 15. Accordingly, while we think that the term "operates" in this context has a

more strained meaning than in the context of the IMR option, we do not think that possibility can be ruled out. For these reasons, we think it would be prudent for ENBs to assume that regulation 15 will also apply under the INE option.

How is the definition of "electrically unsafe" in regulation 5 likely to be interpreted?

- 3.26 The meaning of "electrically unsafe" under regulation 5 is relatively clear on its face, and its application will need to be determined on a case-by-case basis. Regulation 5 provides that:

electrically unsafe means, in relation to works, installations, fittings, appliances, and associated equipment, that there is a **significant risk** that a person may suffer **serious harm**, or that property may suffer **significant damage**, as a result of dangers arising[, directly or indirectly,] from the use of, or passage of electricity through, the works, installations, fittings, appliances, or associated equipment.

[Emphasis added]

- 3.27 Regulations 20 to 26 also specify works and installations that are *deemed* to be electrically safe or electrically unsafe.

- 3.28 The 1997 Regulations contained a definition of 'electrically safe', but not "electrically unsafe" in relation to the use of works, electrical installations, fittings, appliances and associated equipment.¹⁸ Regulation 69 was identified as a key provision for the electricity industry, and the movement of it to the beginning of the 2010 Regulations was intended to place it in a more prominent position and to improve the clarity of the 2010 Regulations as a whole.¹⁹ During consultation, the industry had indicated that the definition of "electrically safe" was well established, and did not require further clarification.²⁰

- 3.29 By way of reference, we note that the analogous provision in the Act, s 61A, has not been judicially considered. However, the Act defines "serious harm" as death, injury that consists of or includes loss of consciousness, injury that necessitates the person suffering the injury being admitted to hospital or receiving medical treatment from a health practitioner.²¹ "Significant damage" is not defined in the Act.

What "new" obligations or liabilities would emerge for an ENB under these safety regulations from the provisions of IMR or the INE services?

- 3.30 In Appendix A, we set out the potentially *new* obligations assumed by ENBs under the Regulations, if the proposal were implemented. As noted at the outset of this letter, they are broadly consistent with existing safety obligations, and commensurate with the additional responsibility that would be taken on by ENBs under the proposal.

- 3.31 Further, and importantly, a concluded view on this particular issue would need to take into account the more detailed content of the proposal, if it were to be implemented. Further technical information would also be

¹⁸ See regulation 69, 1997 Regulations.

¹⁹ Ministry of Economic Development, n 10 above.

²⁰ *ibid.*

²¹ Section 2 Electricity Act 1992.

required. (We have noted in the table at Appendix A some comments or queries in this regard.) As the actual content of the proposal firms up, we would be happy to revisit the potential application of any regulations that are of particular concern.

If an ENB provided the INE service, could these safety Regulations be relied upon for the enforcement element of that service?

- 3.32 This issue focuses on whether regulation 15 would be sufficient to act as an "enforcement provision" for an ENB under the INE option, given that (assuming it "operates" the line under that regulation), the ENB will have a positive obligation to ensure that neither it, nor any other person, uses an installation or works that is electrically unsafe. The enforcement mechanism would be disconnection.
- 3.33 As will be appreciated, to rely on regulation 15 in this way, the ENB must "operate" the relevant customer service line under the INE option. As we have set out above, that issue is not at all clear.
- 3.34 If the INE option were to be adopted, it would far preferable to have certainty around how the option would be enforced. Further, we think much more "rigour" and process would be expected around the circumstances for disconnection, given the potential effect on a consumer. This would include, for example, notification and a right of immediate disconnection in the case of very imminent harm. In this context, one might expect to see provisions along the lines of former regulations 60 and 61 from the 1984 Regulations, which contained a similar "INE" option. Those regulations addressed notification, time periods for notification, the duty on the consumer to repair and so on.
- 3.35 Accordingly, while we think that, *if* an ENB, under the INE option, were "operating" the line for the purposes of regulation 15, there is a reasonably good argument that it could disconnect in such circumstances (ie necessary to fulfil its own positive legal duty):
- (a) the position on "operate" under the INE option is far from certain (or at least not certain enough for it to be the sole basis for enforcement); and
 - (b) in the absence of clear process and notification requirements, any disconnection would likely be subject to considerable debate and concern (given by definition, the relevant consumer will not have agreed to the required maintenance being carried out or the resulting disconnection).
- 3.36 Accordingly, if the INE option were to be adopted, we think it would be in ENBs' interests to ensure that a proper and clear mechanism is adopted for enforcement, rather than seeking to do so, in effect, via a difficult interpretation of the term "operate" in regulation 15. Regulations 60 and 61 in the 1984 Regulations could be drawn on in this context. Absent a regulatory change, the matter could be addressed in the contractual terms with consumers.
- 3.37 Given the uncertainty over whether, under the INE option, an ENB would be "operating" a line for the purposes of regulation 15, a potential option for enforcement would also be to refer the matter to the Secretary as an urgent matter and an order made under regulation 110. Failure to comply by a person to whom such an order is directed triggers the highest penalties

under the Regulations. However, we expect that a direct enforcement mechanism would be far more preferable, as the regulation 110 route is a somewhat cumbersome process, which may not afford the speed required in urgent cases, and/or there may be debate between the ENB and the Secretary as to what ought to be done in any given case.

- 3.38 We have also considered whether, in a scenario such as that described above, the "enforcement mechanism" could extend to the ENB carrying out the electrical safety work itself, and then recovering the actual costs of doing so from the consumer. Given the ENB's obligation to prevent ongoing use of the line can be fulfilled by disconnection only, we do not think the existing regulation would permit cost recovery where the ENB carries out the remedial works itself.
- 3.39 For completeness, we note the statutory ability of the Fire Service in similar circumstances to recover costs incurred in connection with attendances at hazardous substance emergencies - ie where the Fire Service has had to remedy the matter to prevent harm (see section 47C of the Fire Service Act 1975, copied at Appendix C). Given the most efficient outcome in an electrically unsafe scenario, including under the INE option, might be for the ENB immediately to undertake the necessary works, consideration might be given to seeking a clear statutory or contractual right to recover the costs of doing so.

If an ENB wished to adopt the IMR option, would the option of having a maintenance management system be a viable option in terms of complying with Regulation 65?

- 3.40 CoCs are required where general or high-risk prescribed electrical works²² are carried out. They are optional in respect of low-risk prescribed electrical works. Where required, no prescribed electrical work is considered complete until a CoC is issued in respect of it.²³
- 3.41 However, CoCs are not required for general or high-risk prescribed electrical work carried out on an installation or part installation if:²⁴
- (a) the owner *or operator* of the installation has a maintenance management system in place *for the installation*; and
 - (b) the maintenance management system ensures that all the information required by regulation 67 to be on a certificate of compliance for the work is recorded in relation to all general and high-risk prescribed electrical work done *on the installation*.
- 3.42 As noted at paragraph 68 of the draft Sapere Report (of 21 August), to satisfy regulation 65(7), an ENB would first need to be considered an "operator" of the installation. As discussed above, while there are good arguments that, under the IMR option, the ENB would be an 'operator' of the installation for the purposes of regulation 15, this position is not absolutely clear, and ENBs would no doubt require more certainty on this before relying solely on a maintenance management system for compliance with regulation 65.

²² See the definition in regulation 6 and clause 1, Schedule 1 of the 2010 Regulations.

²³ See regulations 65(1)-(4).

²⁴ Regulation 65(7).

- 3.43 Regulation 65(7) also only applies to maintenance systems for prescribed works on "*installations or part-installations*" (installations being "*all fittings that are beyond the point of supply...*" on any given property). Accordingly, maintenance or replacement of "works", appliances or fittings still require a CoC under regulation 65 in the normal way. Further, determining the point of supply in any given case can be quite difficult. This is particularly so given that, in many cases, the definition of "point of supply" in the Act may not actually have come into force; see section 2(5) of the Act, which prescribes the two scenarios in which that definition will apply. If neither of those scenarios applies, then there is technically no "point of supply" definition in the Act, as the previous definition was expressly repealed by the 2001 Amendment Act. This is a most unsatisfactory, and probably unintentional, outcome.
- 3.44 A further point that would also need to be considered is that the Regulations do not define what a 'maintenance management systems' is.²⁵ The maintenance management system exception was inserted into the 2010 Regulations as part of the Electricity (Safety) Amendment Regulations 2012, effective from 1 July 2013. It has been described by the Ministry of Economic Development as:²⁶
- A maintenance management system that records the information required on a CoC as part of the normal operation or maintenance of the installation, for example an industrial plant, satisfies the requirements for certification.
- An electronic 'signature' or similar that uniquely identifies the person responsible for the work is acceptable.
- 3.45 Even putting aside the above issues, we note that each maintenance management system would need to address each installation (which, under the proposal, will be very significant in number), and contain all information required under regulation 67 that must be contained on a CoC. This is to ensure that the system accurately tracks asset maintenance practice, data collection and decision making, and properly encapsulate visibility of the health and maintenance requirements of assets. Details from CoC are also used for information records in Electricity and Gas High-Risk Database.²⁷

4. IN "CONTROL" AND IN "CHARGE" OF

²⁵ We note that Safety Management Systems ("**SMS**") are included in the 2010 Regulations under Part 4 for large generators (equal to or greater than 10 MW) and distributors (equal to or greater than 10 MVA). This requires the owner or operator to adopt and maintain a system that manages the risks of their operation to public safety and the potential for property damage. Although a SMS is intended to provide a systematic process for identifying and managing safety risks associated with electricity, we do not consider that a SMS and Maintenance Management Systems is the same system.

²⁶ Ministry of Economic Development "Certificate of Compliance" (28 June 2013) [<http://www.med.govt.nz/energysafety/installations-networks/gas-installations-and-networks/gas-installations/certification/coc>]

²⁷ From 1 July 2013 the Electricity and Gas High-Risk Database will be available. Electrical inspectors and certifying gasfitters will be required to enter key details of high-risk work into the database, based on information from the CoC. The public can freely search the database for basic information about high-risk work carried out at a particular location that has been entered. We do not consider this database is what was intended by Parliament to be covered by a maintenance management system, as the latter applies as an exemption for CoC's to be issued for both general and high-risk prescribed electrical works.

4.1 The words "control" and "in charge of" are used in a wide range of contexts in the Act. We expect that the primary sections of interest in relation to the proposal will be those most closely connected with safety related matters, such as sections 6 - 8, 16(4), 19 and 83(4).

4.2 Again, the meaning of these terms will depend very much on the context in which they are used, which may or may not alter the "ordinary" meaning.

Control - ordinary meaning

4.3 The natural and ordinary meaning of "in control" is defined as to "(1) to command, direct or rule, (2) to check, limit, curb, or regulate; restrain, (3) to regulate or operate (a machine)".²⁸ It is also defined as "(1) the act or power of directing or regulating; command, regulating influence; (2) the action of holding in check; restraint; self-restraint; prevention of the spread of something unwanted".²⁹

4.4 Spiller's Law Dictionary defines control as "to direct, regulate or command", and Black's Law Dictionary defines "control" as either:

(noun) The direct or indirect **power** to govern the management and policies of a person or entity, whether through ownership of voting securities, by contract, or otherwise; or the **power or authority** to manage, direct or oversee.

(verb) To exercise **power** or influence over; to regulate or govern; to have a controlling interest in.

4.5 The Court in *Smith v Police* stated that:³⁰

Control is a concept which is not susceptible of much elaboration. **You have control over something which is not in your actual custody if you have the ability to direct the custodian what is to be done with it. You may have that ability in conjunction with others.** If you do have that ability, in the sense that the custodian **will obey your direction**, you then have control.

[Emphasis added].

4.6 "Control" also has a quite specific legal meaning in the context of documents being in the "possession or control" of a party for the purposes of disclosure requirements in commercial litigation. It is clear that a document may be within the "control" of a party even though it does not possess it, if it has a *legal right* to call for its possession.

4.7 As will be evident from the concepts outlined above, a common theme of the ordinary usage of control is having a power, or authority, or legal right, or ability to direct a custodian of a thing who will obey that direction. We therefore think that, in its ordinary usage, "control" has a fairly high threshold, and is probably a more restricted concept than to "operate" a thing.

Charge - ordinary meaning

4.8 The natural and ordinary meaning of "charge" includes "a duty or responsibility; control" or "a command, injunction, or order",³¹ and "in

²⁸ *Collins English Dictionary* (6th ed, HarperCollins, Great Britain, 2003) at 366.

²⁹ *Shorter Oxford English Dictionary: on Historical Principles*, above n 4, at 510.

³⁰ *Smith v Police* (1994) 11 CRNZ 294 (HC) at 296.

charge" as "in command".³² "In charge of a" is defined as "having responsibility for".³³ Black's Law Dictionary defines "charge" as "to instruct or command", or "to entrust with responsibilities or duties".

- 4.9 Words and Phrases Legally Defined (Butterworths) notes that in New Zealand:³⁴

The word charge has a meaning perhaps distinct from control or custody. Charge, according to Webster's and to Latham's Johnson's Dictionaries, means the exercise of a "custody or care" over a person or thing. It is a responsibility.

- 4.10 The Shorter Oxford Dictionary defines charge as "a duty or responsibility of taking of (a person or thing); care, custody, control, superintendence",³⁵ and being "in charge" relates to being "(a) under the supervision or control of; (b) having supervision or control of".³⁶
- 4.11 We agree with the observations noted at paragraph 4.9 above, and consider that the meaning of "in charge of" something has a lower threshold than to "control" something. In other words, being "in charge" of something can be met by being responsible for it, whereas being in control of that thing might also require the ability to direct others in relation to that particular thing.

Analogous position under Health and Safety in Employment Act

- 4.12 Although safety regulation of workplaces were expressly excluded from the 2010 Regulations, the use of the words "in charge of" and "control" in the Health and Safety in Employment Act 1992 ("**HSE Act**") provide an interpretive aid to the same terms in the Act. Under the HSE Act, the interpretation of "a person *who controls* a place of work" has turned on both a person that has a possessory or ownership interest in premises or plant, as well as whether the occupation *excludes* others from use and the right to occupy and exercise control.³⁷ However, occupation per se is not enough to determine control; the length and nature of the occupation is relevant. In *River Valley Ventures v Maritime New Zealand*³⁸ the concept of control was considered in relation to occupation of a river rapid. It was held that while River Valley exercised some functions consistent with control (such as the removal of debris), this could not constitute control. Importantly, it could not give directions in relation to it or exercise any authority over it.³⁹ For this reason, under the HSE Act, brief use of a place or plant is unlikely to be sufficient to be "control" in the absence of a right to exclude others.⁴⁰ Even more so, the statutory interpretation required control over the place of work itself, not over one element of it.⁴¹

Application of the above to the Act

- 4.13 Even using the narrower interpretation of "in charge" referred to at 4.9 above, assuming responsibility of operational safety of a customer service

³¹ *Collins English Dictionary* (6th ed, HarperCollins, Great Britain, 2003) at 286.

³² *ibid.*

³³ *ibid.*

³⁴ Citing *Thompson v Grey* (1904) 24 NZLR 457 at 465 per Stout CJ.

³⁵ *Shorter Oxford English Dictionary: on Historical Principles*, above n 4, at 385.

³⁶ *ibid.*

³⁷ *Department of Labour v Nelson Dive Centre Ltd* (DC Nelson, 9/5/2013).

³⁸ (HC Palmerston North, CRI 2010-454-15, 17/12/2010).

³⁹ *ibid.*, [45]-[46].

⁴⁰ *ibid.*, [43]-[44]; *Department of Labour v Diveco Limited* (CA, CA98/04, 8/11/2004), at [28].

⁴¹ *ibid.* at [30].

line is precisely what an ENB will be doing under the IMR option. To a lesser extent, the INE option is also the acceptance of a responsibility, at least insofar as inspecting the safety of customer service lines, and notifying consumers of any work that needs to be done. Whether ENBs are "in control" of lines could turn on their particular legal rights in relation to the lines under each of the options.

4.14 However, as already outlined in connection with the word "operate", the words "control" or "in charge of" will depend to a very significant degree on the particular context in which they are used in the statute. For these reasons, and in relation to those provisions cited at paragraph 4.1 above:

- (a) "Control" as used in section 6(3) of the Act would likely apply to an ENB under the IMR option, and given the purpose of the section, probably under the INE also.
- (b) "In charge of" the fittings in section 6 would likely apply to the ENB under the IMR option (and also the IME option).
- (c) "In charge of the place" in sections 6(4)(b) and 7(b) is unlikely to apply to the ENB under the IMR or INE options (unless the particular access rights obtained under the proposal give the ENB certain rights in respect of both the place and the fittings, while the inspection and/or maintenance is being carried out).
- (d) "In control of the works" in section 7(b) would likely apply to the ENB under the IMR option (and, on a policy basis, to an ENB under the INE option also).
- (e) "Control of any works" in section 8(1) would likely apply to the ENB under the IMR option (and also the INE option).
- (f) "Control of the works" in section 16(4) is likely to apply to an ENB under the IMR option, and may also apply under the INE option.
- (g) "For the time being in charge of the place" in section 19 is unlikely to apply to the ENB under either the IMR or the INE option (unless, like above, the particular access rights obtained give the ENB certain rights in respect of both the place and the fittings, while the inspection and/or maintenance is being carried out).
- (h) "In charge of the premises" is unlikely to apply to the ENB under either the IMR or INE options for the purposes of section 83(4).⁴²

4.15 Who owns these lines is irrelevant to the concepts of "control" or "in charge" under the Act. It is quite clear that someone might control or be in charge of a thing without owning it. (The converse is not so - it is likely that the owner of a thing is also in charge of or in control of it.)

5. CONSUMER GUARANTEES ACT 1993

⁴² Other sections of the Act which use the words "control" and/or "in charge of", but which, given their context, are unlikely to be relevant to the proposal, include sections 123, 147, 159, 169A(2)(b).

Overview

- 5.1 Should the ENBs adopt the proposal, they would be liable under the CGA either to consumers or to retailers, for damage suffered as a result of a failure to perform maintenance with reasonable care and skill. However, the nature of those obligations is the same as those currently imposed by the CGA on ENBs in respect of any maintenance that is currently carried out in any event. Accordingly it is only the *extent* of the obligations (ie in respect of the additional lines and poles maintained) that will change, rather than the *nature* of those obligations.

CGA

- 5.2 The CGA contains guarantees as to reasonable care and skill, fitness for particular purpose and time of completion where services are supplied to a consumer.⁴³

- 5.3 Where a service supplied to a consumer fails to comply with one of those guarantees, the consumer may, amongst other things, obtain from the supplier damages for any loss or damage to the consumer resulting from the failure, which was reasonably foreseeable as liable to result from the failure to comply with the guarantee.⁴⁴

- 5.4 "Services" under the Act are expressly defined so as to include:⁴⁵

the rights, benefits, privileges, or facilities that are, or are to be provided, granted or conferred by a supplier **under ... a contract for, or in relation to**, the supply of electricity...

[Emphasis added]

- 5.5 The definition of services also includes:⁴⁶

any..., benefits, privileges or facilities that are, or are to be, provided, granted, or conferred by a supplier.

- 5.6 Accordingly, whether services provided under the proposal are provided under contract or not, they will be caught by the definition of "services".

- 5.7 A "supplier" under the Act means only:⁴⁷

...

(ii) in the case of a supply of **electricity line function services**, the distributor who owns or operates the line that is connected to the consumer's premises; and

(iii) in the case of **other services relating to electricity**, the person who provides that service to the consumer.

[Emphasis added]

- 5.8 As Miller J summarised in *Contact Energy Ltd v Jones*, the CGA:⁴⁸

⁴³ CGA, ss 28-30.

⁴⁴ CGA, ss 32(c).

⁴⁵ CGA, s 2, para (b) (vi) of the definition of "services".

⁴⁶ CGA, s 2, para (a) of the definition of "services".

⁴⁷ CGA, s 2.

⁴⁸ *Contact Energy Ltd v Jones* [2009] 2 NZLR 830 (HC) at 832.

... treats electricity distribution - which it calls electricity line function services - to consumers as a service, provided by the lines companies. It defines neither electricity nor electricity line function services.

5.9 As Miller J went on to recognise,⁴⁹ a definition of "line function services" is nonetheless found in the Act.⁵⁰

line function services means—

the provision and maintenance of **works** for the conveyance of electricity:

the operation of such **works**, including the control of voltage and assumption of responsibility for losses of electricity

5.10 [Emphasis added]Accordingly:

- (a) To the extent that ENBs provide "electricity line function services" under the proposal, paragraph (ii) of the definition of "supplier" under the CGA will apply. It is only "*the distributor who owns or operates the line that is connected to the consumer's premises*" who is the supplier for the purposes of the CGA. In some cases, the ENB will own the fittings being maintained. Even where it does not, we consider there are good arguments that an ENB "operates" the line, by virtue of having an inspection and maintenance obligation in respect of it (see the discussion above on the meaning of "operates").
- (b) To the extent that ENBs provide maintenance services that do not fall within the definition of "line function services" under the proposal, such services will nonetheless fall within the definition of "services" under the CGA, as they will be a benefit provided under a contract "in relation to" the supply of electricity.⁵¹ Under the definition of "supplier" the person who provides that service to the consumer (ie the ENB) is the supplier.

5.11 To the extent that ENBs currently maintain lines etc, the CGA applies. Accordingly, the *nature* of the ENB's CGA obligations will not change under the proposal. However, the proposal is to take on the maintenance obligation in respect of additional lines, being those on private land. Accordingly, the *extent* of ENB's obligations under the CGA will match the additional obligations assumed.

6. CONSUMER LAW REFORM BILL

6.1 Under the Consumer Law Reform Bill (as reported from the Commerce Commission at the date of this advice), various changes to the CGA regime in relation to the supply of maintenance services are proposed.

⁵¹ The CGA does not require the contract to be between the ENB and the consumer; eg it could cover a contract between the retailer and a consumer that provides for the maintenance of electrical installations, or even a contract between the retailer and the ENB, ie a UoSOA itself. Even if there were no contractual relationship, the service would be caught by paragraph (a) of the definition of services in the CGA.

6.2 The definition of "services" would be amended to relevantly include.⁵²

the rights, benefits, privileges, or facilities that are, or are to be provided, granted or conferred by a supplier under ... a contract relating to (but not for) the supply of ... electricity, **other than line function services.**

[Emphasis added]

6.3 "Line function services" would be explicitly defined by reference to the definition in the Act.⁵³ The specific definition of supplier would be repealed.⁵⁴

6.4 Clause 36 would insert new ss 7A and 7B into the CGA, which provide a guarantee that the supply of electricity by an electricity retailer is of an acceptable quality. Clause 41 would then provide an indemnity in s 46A in favour of a retailer against a responsible party or parties, in the event that a consumer obtained a remedy in respect of a failure of acceptable quality against the retailer. The indemnity applies where:⁵⁵

the failure of acceptable quality was wholly or partly the result of an event, circumstance or condition associated with ... electricity lines or other equipment that was, at the time of the failure, the responsibility of a person ... then supplying line function services.

6.5 Accordingly:

- (a) to the extent that the failure of acceptable quality is due to an ENB's failure to provide line function services, the indemnity regime would apply; but
- (b) to the extent that the failure of acceptable quality is *other than* due to an ENB's failure to provide line function services, the indemnity regime would *not* apply.

6.6 Moreover, as will be appreciated, the indemnity regime only applies where the "failure of acceptable quality" guarantee has been triggered - and not all issues with the maintenance of lines will necessarily trigger that guarantee.

6.7 Where the relevant failure was not related to the provision of line function services, the consumer may have a direct claim under the CGA against the ENB in accordance with sections 28 to 30. The amended definition of "services" incorporates contracts "relating to ... the supply of electricity". Accordingly, the normal provisions of the CGA would apply.

6.8 For completeness, we note that proposed new section 7B(4) would provide:

To avoid doubt, the guarantee provided by section 7A is the only guarantee provided under this Act that relates to the supply of gas or electricity by gas retailers and electricity retailers.

6.9 As the supply of line function services or the performance of other maintenance obligations by ENBs is neither "the supply of electricity" nor provided by "electricity retailers", that section would not affect the position set out above.

⁵² Consumer Law Reform Bill, cl 35(2).

⁵³ Consumer Law Reform Bill, cl 35(1A).

⁵⁴ Consumer Law Reform Bill, cl 35(4).

⁵⁵ Consumer Law Reform Bill, cl 41.

7. ACCESS

Overview

7.1 The Act and the MUoSA (Interposed) currently provide for limited access rights to ENBs for the maintenance of customer service lines that would be subject to the proposal. In some cases, because there is no contractual relationship between the retailer and the owner of the line (or the owner of land on which the fittings are installed)⁵⁶, it is not possible for *all* the additional access rights required for the proposal to be carried out to be acquired by ENBs through contract, either by a change to the UoSAs or the Code. Instead, a legislative or regulatory change is required for all such access to be granted. We have also suggested below (para 7.22) some options for a contractual "fix" pending any legislative change.

Legislative access rights

7.2 Section 23 of the Act provides:

Any person that **owns** any **existing works** may enter upon land for the purpose of gaining access to those works and may perform any act or operation necessary for the purpose of—

(a) inspecting, maintaining, or operating the works:

[Emphasis added]

7.3 Section 23 is a limited access right for ENBs to maintain fittings on private land. It only applies where:

- (a) the fittings are "works" (ie not electrical installations);
- (b) the ENB owns the works (and determining ownership in any given case is a complex exercise); and
- (c) the works are "existing", ie constructed before 1 January 1993.

7.4 Many of customer service lines that are the subject of the proposal will not meet these three criteria, because many of them will be:

- (a) electrical installations, being on the consumer side of the point of supply;
- (b) owned by the consumer receiving supply from the works or a third party (or ownership is simply not clear); and/or
- (c) not "existing" works, being constructed after 1 January 1993.

7.5 Accordingly, in terms of the proposal, the access right provided by section 23 of the Act is limited (though easements or other agreements between ENBs and consumers are more likely to exist in relation to post-1993 works, and may address access - that would need to be considered on a case by case basis).

7.6 We are not aware of any other legislative or regulatory provisions that would grant ENBs access rights to private property in the circumstances contemplated by the proposal.

⁵⁶ We understand that similar contractual matters are already an issue.

Existing access rights in MUoSA

7.7 Clause 13 of the current MUoSA (Interposed) provides:⁵⁷

13. ACCESS TO THE CONSUMER'S PREMISES

13.1 Rights of entry onto Consumer's Premises: The Retailer will, subject to clause 27.1, include in each of its Consumer Contracts a requirement that the Consumer provide the Distributor and its agents with safe and unobstructed access onto the Consumer's Premises for all of the following purposes:

(a) to inspect, maintain, operate or upgrade (provided that the upgrade does not have any material adverse effect on the relevant Consumer or Consumer's Premises) the Distributor's Equipment;

(b) to install, read, maintain or upgrade (provided that the upgrade does not have any material adverse effect on the relevant Consumer or Consumer's Premises) Metering Equipment;

(c) to disconnect and reconnect the Consumer in accordance with this agreement;

(d) to access the Retailer's Equipment to verify metering information, including, in the event of termination of this agreement, to determine any charges outstanding at the time of termination;

(e) for the safety of persons or property;

(f) to ensure that the Consumer fulfils its obligations in accordance with clause 14.7; and

(g) to enable the Distributor to gain access to and remove any of the Distributor's Equipment following the termination of the Consumer Contract for the period ending 6 months after the date that termination takes effect.

7.8 "Distributor's Equipment" is defined as:

"Distributor's Equipment" means the Fittings and Metering Equipment owned by the Distributor, the Distributor's agent, or any other third party with whom the Distributor has contracted with for the use by the Distributor of the party's Fittings or Metering Equipment that are from time to time installed in, over or on Consumer's Premises;

7.9 "Fitting" is defined as:

"Fitting" means everything used, designed or intended for use, in or in connection with the generation, conversion, transformation, conveyance or use of electricity;

7.10 Assuming that the Retailer procures such a clause in its agreements with Consumers, under clause 13.1(a), the Distributor is permitted to access the Consumer's Premises for the purpose of maintaining Fittings:

(a) owned by the Distributor itself;

⁵⁷ For the purposes of this advice, we have referred to the MUoSA dated September 2012, which is described as a "Final Draft".

- (b) owned by the Distributor's agent, in the respect of which the Distributor has a contract with the agent that provides the Distributor can use the works; or
 - (c) owned by a third party, in the respect of which the Distributor has a contract with the third party that provides the Distributor can use the works; or
- 7.11 The access right in the clause 13.1(a) is therefore broader than the access right under section 23 of the Electricity Act, in that it extends to:
- (a) Fittings that are both works and electrical installations;
 - (b) Fittings that were constructed both before and after 1 January 1993; and
 - (c) certain Fittings owned by certain people other than the Distributor.
- 7.12 However, clause 13.1(a) is tied to ownership. It does not provide for access to Fittings on a Consumer's Premises that are owned by the Consumer, or any other entity, or where ownership is simply unclear or in dispute. Moreover, we do not think that the consumer is a "third party" for the purpose of the definition of "Distributor's Equipment" (given the use of the separate term "Consumer" within that definition).
- 7.13 There may be an argument that, in certain cases at least, access to Fittings not provided by section 23 or clause 13.1(a) might be available under clause 13.1(e) of the MUoSA, on the basis that, if not maintained, the Fittings pose a safety risk to persons and/or property. However, we expect that, in many cases, ENBs would want to take a proactive, rather than reactive, approach to their maintenance responsibilities, by maintaining (and identifying for maintenance) Fittings *before* they posed an actual safety risk. It is not clear that clause 13.1(e) would apply in those circumstances, particularly where a specific (if more limited) access right is provided by clause 13.1(a). Accordingly, we do not recommend that ENBs rely only on clause 13.1(e) for gaining access to Fittings where such access is not provided by clause 13.1(a), except where the safety risk is immediate.

Method of achieving access

- 7.14 Accordingly, while certain access rights are provided for in the Act and the MUoSA, ENBs do not have access rights in respect of fittings owned by anyone other than the ENB, its agent or a third party with which it has a contract for access to the fittings.
- 7.15 It would be possible for the UoSAs to be amended (or a Code change to be implemented) to require Retailers to procure access onto the Consumer's Premises by the Distributor or its agent for the maintenance of all Fittings on a Consumer's Premises the Distributor is required to or has assumed responsibility to maintain. This would provide access whether those fittings were owned by the Consumer on whose land they are installed, or by a third party such as another land owner receiving supply from the fittings, or where ownership is simply not clear, and could take some time to determine on a case-by-case basis. Accordingly, this solution would define access rights not by reference to the ownership of the Fittings or the identity of the person on whose land they are installed, but by the Distributor's obligation to maintain them. We think this would be far preferable, particularly in light of the very vexed question of pole and line ownership.

7.16 There are a number of options for an amendment to clause 13.1(a):

13. ACCESS TO THE CONSUMER'S PREMISES

13.1 Rights of entry onto Consumer's Premises: The Retailer will, subject to clause 27.1, include in each of its Consumer Contracts a requirement that the Consumer provide the Distributor and its agents with safe and unobstructed access onto the Consumer's Premises for all of the following purposes:

(a) to inspect, maintain, operate or upgrade (provided that the upgrade does not have any material adverse effect on the relevant Consumer or Consumer's Premises) any Fittings;

...

7.17 This is the broadest access right, and follows similar language in the current section 23 of the Act. If it was not possible to achieve this (either because it is not possible to negotiate such a clause with Retailers, or a Code change along these lines is not acceptable to the Electricity Authority), an alternative that would achieve a similar result in practice would be:

13. ACCESS TO THE CONSUMER'S PREMISES

13.1 Rights of entry onto Consumer's Premises: The Retailer will, subject to clause 27.1, procure in its agreements with Consumers access onto the Consumer's Premises by the Distributor or its agent for the following purposes:

(a) to inspect, maintain, operate or upgrade (provided that the upgrade does not have any material adverse effect on the relevant Consumer or Consumer's Premises) any Fittings that the Distributor is required to or responsible for inspecting, maintaining, operating or upgrading; or

...

7.18 We expect that either solution would resolve the majority of access issues in respect of fittings under the proposal. However, similar to what we understand to be contracting issues that already exist, it would not allow the Distributor to obtain access to fittings where the owner of the fittings or the owner of the land on which they are installed does not have a contractual relationship with the Retailer. As Sapere notes in its report, an example of this is in some multi-tenanted buildings where the body corporate or the building owner owns the service line but the tenants (and not the body corporate or building owner) have a contractual relationship with the Retailer.

7.19 In such circumstances, there being no contractual relationship between the Retailer and the owner of the fittings, a contractual solution is not possible.

7.20 In order for access to be achieved in such circumstances, a legislative or regulatory change would be required. One possibility would be an amendment to section 23 of the Electricity Act 1992 along the following lines:

Any person that owns, or any electricity distributor that is permitted or required to inspect, maintain or operate, any fittings may enter upon land for the purpose of gaining access to those

fittings and may perform any act or operation necessary for the purpose of—

(a) inspecting, maintaining, or operating the fittings:

...

7.21 Consequential amendments would be required to the rest of section 23, and also to parts of clauses 23A to 23F.

7.22 Given that legislative amendment is not likely to be easy or quick to achieve, we suggest that, in the interim, any additional obligations contractually adopted by ENBs under the proposal are expressly circumscribed by the extent to which ENBs are in fact able to gain access to the fittings that they are required to maintain. In other words, if the consumer (or landowner) refuses to grant access, the contractual obligation to provide the service falls away.

8. CONCLUSION

8.1 We trust this advice is of assistance in the ongoing consideration of the proposal. As will be appreciated, as the proposal is progressed and developed in more detail, some of the conclusions reached in this advice may need to be re-visited, or will be able to be firmed up. We would be pleased to update or discuss our advice with you in such circumstances.

Yours faithfully

RUSSELL McVEAGH



Sally Fitzgerald | Ashleigh Cropp | Will Irving

Partner | Solicitor | Solicitor

Direct phone: +64 9 367 8087 | +64 9 367 8409 | +64 9 367 8252

Direct fax: +64 9 367 8591

Email: sally.fitzgerald@russellmcveagh.com

ashleigh.cropp@russellmcveagh.com

will.irving@russellmcveagh.com

APPENDIX A
OBLIGATIONS UNDER THE ELECTRICITY (SAFETY) REGULATIONS 2010

- As we noted in the main body of this letter, the nature of new obligations is unlikely to change significantly; rather the extent of the obligations will increase.
- Note that the presumption in the 2010 Regulations is that offences are strict liability offences, except those that specifically refer to a defendant's state of knowledge.⁵⁸

Regulation number	Additional obligation/liability	Comments
13(1)-(4)	<p>A person doing work on works, installations, fittings, and appliances, must ensure that the works, installation, fitting or appliance is electrically safe, and if the work is on only part of any works or installation, that the work has not adversely affected the electrical safety of the rest of the works or installation.</p> <p>A person who does work on any works, installations, fittings, or appliances must, while doing the work, take all practicable steps to ensure that people and property are protected from dangers arising from the work.</p> <p>Work includes doing, or supervising the doing of maintaining, testing, certifying, or inspecting.</p>	<p>Clearly when actually carrying out the IMR or INE options, ENB would fall within regulation 13.</p> <p>It is an offence to contravene this regulation, liable on summary conviction to a level 2 penalty.</p>
15(1) - (2)	<p>A person who owns or operates works, installations, fittings or appliances must not use, and must not allow any other person to use, the works if they are electrically unsafe. As well as this, a person who uses or supervises the use of associated equipment must ensure the equipment is not used in a manner that renders the associated equipment a danger to persons or property.</p>	<p>See our advice in the main body of this letter. There is a good argument that, on a purposive approach, the IMR option would trigger this regulation. It is less likely on the INE option, but its application cannot be ruled out.</p> <p>If a person owns or operates works or he or she uses, or allows another person to use, these works knowing that or being reckless as to whether or not they are electrically unsafe, they commit an offence and are liable on</p>

⁵⁸ Regulation 11. There are defences available: regulation 11(3).

Regulation number	Additional obligation/liability	Comments
		summary conviction to a level 2 penalty.
16(1)	A person who has control of works or installations must take all practicable steps to minimise the risk of injury to persons or damage to property from dangers arising from direct or indirect contact between any live exposed parts of the work and any person or animal or anything been worn or carried by a person or animal.	See our main advice. In the context of the particular regulation, we think that "control" would be interpreted in the context of physical control or responsibility, rather than in the sense of having a legal right, and is therefore likely apply under the proposal. A person who fails to comply is liable on summary conviction to a level 2 penalty.
17	A person who carries out any work on or near an electric line must maintain safe distances in accordance with ECP 34, or (in relation to any work on or near overhead rail lines) in accordance with ECP 34 or IEC 62128-1 and sections 5 and 9 of ECP 34. Note that there is an exclusion to the minimum distances required under regulation 17(2), including fibre optic cables near electricity conductors, and some works on electricity lines existing before 1 April 2010. Under regulation 17(4), it is an offence to place thermal insulating material around an electricity conductor in such a way that the safety of the installation is compromised.	See our comments regarding regulation 13 above. If safe distances are not maintained, each of the following persons commits an offence and is liable on summary conviction to a level 2 penalty: a person who carries out the work, who controls the work, or who owns or controls any line, works, fittings, building, structures, equipment or machinery that is a subject of, or involved in, the work described in regulation 17(1).
18A and 19	If a person is carrying out prescribed electrical work on an installation , the person must, if there is a reasonable risk associated with the work of injury to any person from electric shock, erect or affix a signed referred to in the Regulations at each access point to the area in which the work is carried out. Note there are specific requirements under regulation 19 as to notification of the Secretary of danger.	See cl 1 of schedule 1 of the 2010 Regulations for the definition of "prescribed electrical works". We assume, but would require confirmation, that the IMR option would involve the carrying out of "prescribed electrical work". Whether or not the customer service lines are "installations" will depend on the outcome of the argument noted at paragraphs 36-37 of our memorandum of 4 October 2013 (referred to in this table as " <i>our</i>

Regulation number	Additional obligation/liability	Comments
		<p><i>earlier works/installations advice").</i></p> <p>Failure to comply with regulations 18A or 19 is an offence and liable to summary conviction on a level 2 penalty.</p>
34(3)	<p>The owner or operator of works that contain fittings referred to in regulation 34(2) must ensure that the fittings are set to achieve the maximum practicable sensitivity and minimum practicable operating times within the limits necessary to achieve discrimination, in relation to the characteristics of the circuits or other fittings than those fittings protect. These fittings include anything that forms part of any works used to protect against over current, short circuiting, earth fault current, over voltage, under voltage, and no voltage.</p>	<p>See above re our advice on the term "operate". In the context of this particular regulation, we think there is a good argument that operator would include an ENB under the IMR option (if customer service lines are "works"; see our earlier works/installations advice), and an available argument that it applies in relation to the INE.</p> <p>Failure to comply constitutes an offence and the person is liable on summary conviction to a level 2 penalty. This person may be a person who either owns or operates works.</p>
38(1)(b)	<p>Before any works which have been subject to prescribed electrical work are connected to a power supply, the person who does the connection must be satisfied that tests have been carried out to ensure, in the case of any maintenance or alteration of, or addition to, works that the work done has not reduced the safety of the works and that any alterations or additions are electrically safe. Specific requirements of this check are contained within regulation 38(2). If a person who connects the works to a power supply has not done this testing personally, he or she must sight documentation signed by the person who did the testing that sets out what tests were carried out and what the results were.</p>	<p>This provision is limited to where "prescribed electrical works" have been carried out on "works". See our comments at 34(3) above.</p> <p>Under the definition of "line function services" in the Act, ENBs are already responsible for maintaining "works". However, it is possible to contract out of that (see section 22A(2) of the Act, at least in relation to "existing works"). However, under the INE option, ENBs will re-take responsibility for maintenance of any existing "works" that they had previously contracted out of.</p> <p>A person who connects works to a power supply commits an offence and is liable on summary conviction to a level 2 penalty if he</p>

Regulation number	Additional obligation/liability	Comments
		or she fails to comply with regulations 38(1), (2) or (3).
40(4)	A person who operates works commits an offence and is liable on summary conviction to a level 2 penalty if the works have not been checked as required by a system established by the owner of works, and the person knows that the works have not been checked, or is reckless as to whether the works have been checked.	Again, relates to "works" only. See above re 34(3) and 38(1)(b).
63/64	All prescribed electrical work done on low or extra low voltage installations or part installations must be tested for operational safety to ensure that this installation is not electrically unsafe, as required by regulations 59 or 60 or in accordance with verification or testing processes set out in the certified design. See also regulation 64 which contains similar provisions in respect of high voltage installations.	Relates to prescribed electrical works on certain "installations" only. (See our earlier works/installations advice.) Would require confirmation that this type of work would fall within the proposal. Failure to test under regulations 63 and 64 is an offence and a person who contravenes these is liable to a summary conviction and a level 2 penalty.
59/60/62	These regulations contain certain standards to be complied with if certain low-voltage installations are being installed, tested, inspected , and connected.	Both of the IMR and INE options require inspection, although it is unclear to what extent ENBs will be inspecting these particular types of installation. Further information required. (See our earlier works/installations advice.)
65	Certificates of compliance must be issued in accordance with these regulations for all general and high risk prescribed electrical work done on installations or part installations. No general prescribed electrical work may be treated as complete until a Certificate of Compliance is issued for it.	Applies to testing prescribed electrical work on installations. (See our earlier works/installations advice.) Failure to test as required is an offence and the wrongdoer is liable to summary conviction and a level 2 penalty. See regulations 66-68 for detail around the

Regulation number	Additional obligation/liability	Comments
		<p>content required in CoCs.</p> <p>A person commits an offence and is liable on summary conviction to a level 2 penalty if he or she falsely certifies any prescribed electrical work or purports to certify prescribed electrical work when the certificate of compliance does not comply with the requirements of regulation 66(1), or issues a certificate of compliance that contains incorrect information, or issues a certificate of compliance in relation to particular prescribed electrical work when not authorised to certify that work (regulation 69).</p>
70 - 72	<p>All high risk prescribed electrical work must be inspected as required by regulations 59 or 60. The Regulations specify who may carry out this inspection, and what the record of inspection must contain.</p>	<p>A person who fails to inspect prescribed electrical work sufficiently commits an offence and is liable on summary conviction to a level 2 penalty, or if a written record of inspection is made that is false in a material respect.</p>
73A	<p>Where prescribed electrical work has been done on low or extra low voltage installation or part installations, and this is being reconnected, the person doing the connection must be satisfied that the testing required by these regulations have been done. If a certificate of compliance is required either, the person must issue or sight a certificate of compliance, and if the work is required to be inspected, either inspect the work and complete a record of inspection, or sight a record of inspection that has been drafted no earlier than six months before the installation is connected. Before high voltage installation is connected, the person must comply with the requirements of regulation 38(2) as if references in that regulation to works were references to the installation or part installation.</p> <p>If a person who connects an installation has not completed testing required by the Regulations, that person must sight documentation signed by the person who did the tests that sets out that the tests were carried out, and what those results were.</p>	<p>Relates only to the connection of certain installations. (See our earlier works/installations advice.) Again, require confirmation that the proposal would cover such work.</p> <p>Failure to comply is an offence, and the wrongdoer is liable on summary conviction to a level 2 penalty (regulation 73B).</p>

Regulation number	Additional obligation/liability	Comments
74A - 74D	After prescribed electrical work on an installation or part installation is complete , the person who completed the work must issue an electrical safety certificate for the installation in accordance with the requirements in regulation 74A, within the time specified in regulation 74C.	Applies only in relation to installations. (See our earlier works/installations advice.) See above as to whether the proposal would cover such works. Exceptions apply where a maintenance management system is in place: regulation 74B. A person commits an offence and is liable on summary conviction to a level 2 penalty if he/she contravenes regulations 74A - 74C.
74E	The issuance of Certificates of Compliance requires certain record keeping requirements under regulation 74E-74H.	A person commits an offence and is liable on summary conviction to a level 2 penalty if he/she contravenes regulations 74E - 74G.
75(1)	Periodic assessments are required by owners and operators of certain installations including low-voltage installations in caravan parks, boat marinas, demolition and construction sites, carnivals at fairgrounds, any low-voltage installations in hazardous areas, and low-voltage and extra low-voltage installations intended for use with electrical medical devices situated in mobile medical facilities or in any other medical location. The requirement of who may undertake this inspection is prescribed in regulations 75(2) and (3).	Relates to specific installations only. (See our earlier works/installations advice.) The case for ENBs being an "operator" in the context of this specific regulation is more difficult. Further technical information required. A person who owns and retains in service and installation that is required by this regulation to be periodically inspected commits an offence if the installation is not inspected in accordance with regulation 75(1). A person who actually undertakes the inspection commits an offence and is liable on summary conviction to a level 2 penalty if that person is not authorised to inspect that installation, or if that person does not have the appropriate competencies, or if they fail to comply with the form and administrative requirements in regulation 75(4).

Regulation number	Additional obligation/liability	Comments
100	Safety responsibilities are prescribed under regulation 100 in respect of any person who carries out any prescribed electrical work or any work referred to in cl (2)(e)-(h) of Schedule 1 , and must take all practicable steps to check the order and condition of associated equipment before beginning work and personal protective equipment to follow procedures approved by their employer for the work to be carried out and to use the equipment and personal protective equipment provided in a competent manner. These responsibilities are in addition to those under the Health and Safety and Employment Act 1992.	Relates to any person who carries out any prescribed electrical work or work under clause 2(e) to (h) of Schedule 1. Again, would require confirmation that the proposal includes such works.
101	There are further provisions for responsibility of employers for the safety of employees, also in conjunction with, but not limiting, the Health and Safety and Employment Act 1992, in regulation 101 in respect of training and supervision.	Failure to comply is an offence, and the wrongdoer is liable on summary conviction to a level 2 penalty.
102	Work on live high voltage overhead electric lines must be carried out in accordance with ECP 46.	ENBs are likely to be the only persons already carrying out such work, and, where it may apply, we expect will be relatively infrequent in respect of customer service lines. Failure to comply is an offence, and the wrongdoer is liable on summary conviction to a level 2 penalty.
103	When a person is working on live conductors of low voltage overhead electric lines in installations that have exposed live metal, or there is a likelihood of accidental contact with any other conductor or bare earthed metal, the person may carry out the work only if he or she uses the associated equipment and personal protective equipment that is necessary to ensure his or her safety and the safety of other persons in the vicinity of the work.	Only relates to installations. (See our earlier works/installations advice.) Failure to comply is an offence, and the wrongdoer is liable on summary conviction to a level 2 penalty.
104	While a person is working on high-voltage fittings that are isolated from a supply of electricity, or disconnected from a supply of electricity, if there is a significant risk that the person may suffer serious harm from an electric shock in the event of the fittings becoming live other than by way of reconnection of the supply of	See our query above in regard to regulation 102. Failure to comply is an offence, and the

Regulation number	Additional obligation/liability	Comments
	<p>electricity, the person doing the work must ensure that the fittings are earthed before the work is commenced and that they remain earthed until the work is completed.</p> <p>The person doing the work need not comply with subclause (2) he/she person carries out the work using the procedures approved by the person's employer (if any), and the person uses appropriate associated equipment.</p> <p>The fittings must be sufficiently earthed to protect any person working on them from exposure to a significant risk of electric shock or other injury.</p>	<p>wrongdoer is liable on summary conviction to a level 2 penalty.</p>
105	<p>Where work is undertaken that consists of stringing additional conductors between poles or other supports where the poles or other supports already hold conductors, the person carrying out work must ensure that the existing conductors held by the poles or other supports are isolated and earthed before the work is completed, and that they remain isolated and earthed until the work is completed, or the additional conductors are earthed before the work is commenced, and they remain earthed until the work is completed, and the appropriate associated equipment referred to in regulation 101(2)(b) is used while carrying out the work.</p> <p>No person may be on any cross-arm, pole, or other support that carries conductors, other than a tower or similar structure, while additional conductors are being pulled up and tensioned.</p>	<p>It is unclear if this type of work would be carried out under the IMR. For example, stringing additional conductors may not be "maintenance" per se, but rather an upgrade. Will be factually dependant.</p> <p>Failure to comply is an offence, and the wrongdoer is liable on summary conviction to a level 2 penalty.</p>
106	<p>A person carrying out work on works or installations that are isolated from a power supply must, if there is a risk of unintentional enlivening of the works or installations, ensure that suitable notices warning against enlivening are fixed at a point where the power supply may be connected or restored.</p> <p>If works or installations have a locking facility for isolating them from the power supply, then any person isolating the works or installations must use that facility to lock the isolation.</p>	<p>Failure to comply is an offence, and the wrongdoer is liable on summary conviction to a level 2 penalty.</p>

APPENDIX B - "OPERATE" UNDER VARIOUS REGULATIONS

- (a) In regulation 34(3), "owners and operators" of works are required to ensure safety fittings to protect against over-current, short-circuiting, earth fault current, overvoltage, undervoltage and no voltage are set to achieve maximum practicable sensibility and minimum practicable operating times (though only the owner of the works must ensure that works have adequate electrical protection against earth faults and short circuits).
- (b) Either an "operator" or an "owner" of works needs to be consulted before works are moved or interfered with (regulation 35(1)).
- (c) A person who "operates" works must ensure those works are checked as required by the safety management system, though only owners of works must establish an implement safety checking systems (regulation 40(1) and (4)).
- (d) "Owners or operators" may choose to have a maintenance management system in place to satisfy Certificate of Compliance ("**CoC**") requirements (regulation 65(7)).
- (e) "Owners and operators" of certain installations are required to ensure they are periodically assessed to ensure compliance with the regulations (regulation 75).
- (f) A person who "owns or operates" a medical device and allows another person to use it, or uses it themselves, knowing it has not been inspected as required by the regulation commits an offence. However, only the owner of the electric medical device must ensure it is periodically inspected (regulation 91(1) and (5)).

APPENDIX C - FIRE SERVICE PROVISION**47C Power to charge for services other than attendance at fire calls**

The Commission, at its discretion, may charge for any service or function other than those provided for in section 17O(a) of this Act.

Notwithstanding subsection (1) of this section, the Commission, at its discretion, may charge for—

Attendance at a hazardous substance emergency, whether or not that hazardous substance emergency involves actual or suspected fire; and

Fire safety activities; and

Firefighting involving commercial forestry in Fire Districts or areas which, under section 38 of this Act, the Fire Service is under an obligation to protect.

Where, pursuant to subsection (2) of this section, a charge is made for attendance at a hazardous substance emergency, the amount of the charge made shall include all costs incurred (including costs incurred in securing contractual assistance or in obtaining supplies of materials required) in stabilising or rendering safe the hazardous substance emergency, together with those costs that can be reasonably attributed by the Commission to its function of providing an emergency response service for hazardous substance emergencies.

Notwithstanding anything in subsection (1) of this section, the Commission, at its discretion, may charge for attendance of any brigade, where the reason for that attendance was the receipt of a false alarm of fire, and, where that alarm came from persons or equipment in any premises, the owner of the premises shall be liable to meet the charge.

In any case where subsection (4) of this section applies and the false alarm of fire was not the fault of the owner of the premises, the owner may, by authority of this subsection, recover the costs incurred from the person who caused the false alarm to be made or whose equipment was responsible for the false alarm.

Appendix 3: Maintenance and replacement of customer service lines, Andrew
Butler and Catherine Marks of Russell McVeagh, 4 October 2013

TO: Electricity Network Association Limited (Alan Jenkins)
FROM: Russell McVeagh (Andrew Butler and Catherine Marks)
DATE: 4 October 2013
SUBJECT: Maintenance and replacement of customer service lines

Introduction

1. The Electricity Network Association ("**ENA**") has identified the maintenance and replacement of customer service lines as a significant industry-wide concern and is taking a leadership role in addressing this issue. ENA has commissioned a report from Energia which recommends options for resolving this issue at an industry-wide level.
2. The Energia options are further discussed in a draft report by Sapere Research Group and are described as:
 - (a) Option 1 - Inspect, Maintain & Replace with no changes to the location of the point of supply; and
 - (b) Option 2 - Inspect, Notify & Enforce.
3. ENA is seeking a legal view on whether the costs arising from assuming responsibility for customer service lines are capable of being treated as regulated costs under Part 4 of the Commerce Act 1986 ("**Act**"). ENA has identified a number of other issues for legal review, but the extent to which these issues are pursued may depend on the answer to this first question.
4. In providing this advice we assume the following:
 - (a) Customer service lines are the portion of electricity lines extending from the "point of supply" to a customer's premises.
 - (b) In some cases the point of supply is at the boundary of the customer's property, in others, at the point of entry into the premises.
 - (c) Ownership of the customer service lines varies: it can be the electricity customer, the owner of the premises or a body corporate that is not also the electricity customer, or the electricity lines business ("**EDB**"), depending on historic arrangements.
 - (d) Currently, the obligation to maintain and replace customer service lines varies across and within EDBs, depending on contractual or historic arrangements and individual EDBs' policies.
 - (e) Under the Sapere proposal, EDBs will be enabled to assume responsibility for customer service lines within its network area,¹ either directly (option 1) or by way of requiring customer action (option 2). This responsibility could be

¹ We understand that each EDB would define the customer service lines in its area that it is intending to assume responsibility for. We understand that separate small networks, such as those operated by some universities or Auckland airport are not the intended focus of the proposal.

assumed by the EDB irrespective of the ownership of the customer service lines or the position of the point of supply.

Summary

5. In our view, where an EDB adopts the Sapere proposed approach, the costs associated with servicing customer service lines² are capable of being treated as regulated costs under the Act and / or under the input methodologies ("IM") determination.³
6. The key question is whether the costs associated with servicing customer service lines could be allocated to an EDBs' regulated business in accordance with the cost allocation IM. This depends on whether:
 - (a) the customer service lines fall within the definition of electricity lines services ("ELS") under the Act (that is, a regulated service under the Act) because they are "associated with" the ELS, in which case the costs of servicing the lines would clearly be directly attributable to the regulated business under the cost allocation IM; or
 - (b) if the customer service lines do not fall within the definition of ELSs, the costs of servicing those lines are, nevertheless, operating costs that are attributable to the EDB's regulated business under the cost allocation IM because they are costs "relating to" the supply of the ELS.
7. Under Sapere's proposed approach, the costs associated with servicing customer service lines arguably become a key part of the overall regulated service, as the EDB assumes responsibility in order to ensure the overall safety and effective operation of the network, and to best ensure safe and efficient conveyance of electricity to the end user. Applying a purposive approach to the interpretation of the relevant provisions, the customer service lines are in these circumstances associated with the core ELSs and / or the costs are attributable to the regulated business under the cost allocation IM.
8. This view also applies to assets associated with servicing customer service lines (with some differences). That is, these asset values should be capable of being reported under the cost allocation IM as part of the regulated asset base.
9. A further question is whether the costs involved in servicing the customer service lines can or will be reflected in the next default price-quality path ("DPP") reset. While, in our view, the costs and asset values could be allocated to the EDB's regulated business under the cost allocation IM, the method for forecasting operating and capital expenditure for the purpose of the DPP is not the subject of an IM and will, accordingly, be determined by the Commission as part of the DPP reset consultation

Issue

10. The two options under consideration are:
 - (a) Option 1 - Inspect, Maintain & Replace

Here, the EDB adopts a policy that it will maintain and replace all customer service lines notwithstanding the position of the point of supply. The definition of point of supply in the UoSA would not be replaced. Under the status quo,

² Reference to the "servicing" of customer service lines in this advice is a reference to maintenance, replacement, inspection and / or enforcement activities.

³ Electricity Distribution Services Input Methodologies Determination 2012 ("**IM determination**").

the point of supply is either the boundary or the point of entry to the premises. ENA wishes to clarify whether the costs of serving customer service lines would or could be treated as regulated costs in these circumstances.

(b) Option 2 - Inspect, Notify & Enforce

This option is aimed at commercial customers and requires those customers to take action in accordance with contractual terms. As with option 1, ENA is wishing to clarify whether the costs of servicing the customer service lines in these circumstances would or could be treated as a regulated cost.

11. Sapere has identified option 1 as the option most likely to achieve the benefits of the ENA project in terms of addressing public safety issues and consumer perceptions. However, EDBs are unlikely to take up this option (or option 2) unless the costs of servicing customer service lines are capable of being treated as regulated costs. If not, the EDB could recover the costs directly from the customer, however, Sapere considers there is unlikely to be widespread uptake under this scenario.
12. Sapere is concerned that there is ambiguity as to whether the costs of servicing customer service lines would be regulated costs under either option 1 or option 2. This concern also applies to any capital expenditure associated with the customer service lines (although we note that operating costs will likely be the main issue in relation to servicing customer service lines).
13. The key issue is this: if the point of supply is at the boundary of a customer's property, can the costs of servicing (and replacing) the customer service lines be recovered by the EDB as a regulated cost where the EDB has adopted option 1 or option 2?

Regulatory framework

Overview

14. Electricity lines services ("**ELSS**") are regulated under Part 4 of the Act.⁴ All ELSSs are subject to information disclosure ("**ID**") regulation.⁵ Non-exempt ELSSs are subject to DPP / customised price-quality path ("**CPP**") regulation.⁶
15. Under the Act, the Commission must determine IMs for ID, DPP and CPP regulation, including the cost allocation methodology it will apply.⁷ A cost allocation IM sets out how costs (and asset values) are allocated between the different regulated services and unregulated services provided by an EDB.
16. In our view, the starting point for the question in issue is whether the costs (inclusive of any capital expenditure) associated with servicing customer service lines are capable of being allocated to an EDB's regulated business under the relevant cost allocation IM.

Cost allocation IMs

17. As required under the Act, the Commission has determined cost allocation IMs for ID, DPP and CPP regulation.

⁴ Section 54E of the Act.

⁵ Section 54F of the Act.

⁶ Section 54G of the Act.

⁷ Section 52T(1)(a)(iii) of the Act.

ID cost allocation IM

18. Under the ID cost allocation IM,⁸ operating costs and regulated service asset values that are "directly attributable" to a particular regulated service must be allocated to that type of regulated service, where, in the IM determination:⁹
- (a) "regulated service" is defined by referring back to the definition of ELSs in the Act;¹⁰
 - (b) "directly attributable" means, in relation to operating costs, wholly and solely incurred by the EDB in or in relation to its supply of one regulated service; and
 - (c) "operating costs" means a cost incurred by the EDB in question relating to the supply of regulated services alone, or regulated services and one or more unregulated service, excluding:
 - (i) a cost that is treated as a cost of an asset by GAAP;
 - (ii) amounts that are depreciation, tax, subvention payments, revaluations or an interest expense, in accordance with their meanings under GAAP;
 - (iii) pass-through costs; and
 - (iv) recoverable costs;
 - (d) "regulated service asset values" means the unallocated regulated asset base value (in a disclosure year) of an asset used by an EDB in the supply of one or more regulated services, or one or more regulated services and unregulated service.
19. Where operating costs or asset values are not directly attributable to a regulated service, they must be allocated in accordance with an accounting-based allocation approach (referred to as ABAA) or, in certain circumstances, the other allocation methodologies set out in the IM determination.¹¹

DPP cost allocation IM and CPP cost allocation IM

20. Under the DPP cost allocation IM,¹² an operating expenditure forecast for an EDB must be consistent with the ID cost allocation IM (referred to above). However, how operating expenditure is forecast is ultimately a matter to be determined by the Commission as part of the DPP reset process.¹³ We note that, for the last DPP reset, the Commission

⁸ Clause 2.1.1(1) of the IM determination.

⁹ Clause 1.1.4 of the IM determination.

¹⁰ In the IM determination, "regulated service" is defined as a type of service supplied by the EDB pursuant to the supply of a "regulated good or service". "Regulated good or service" is an "electricity distribution service". "Electricity distribution service" is defined as an ELS as defined under 54C of the Act (other than services provided by Transpower).

¹¹ The other methodologies are "the optional variation to accounting-based allocation approach (referred to as OVABAA) and the avoidable cost allocation methodology (referred to as ACAM). See clause 2.1.1(3) of the IM determination.

¹² Clause 4.1.1 of the IM determination.

¹³ "Operating expenditure" is defined in clause 1.1.4 of the IM determination as the operating costs forecast to be incurred by an EDB in a disclosure year, "as determined by the Commission".

used costs allocated in accordance with the ID cost allocation IM as a base year for the operating expenditure forecast.

21. Similarly, "capital expenditure" is defined as the "forecast aggregate value of commissioned assets".¹⁴ While this value must be allocated to the closing regulated asset base consistent with the ID cost allocation IM, the values are as determined by the Commission.
22. The Commission has also determined a cost allocation IM for CPPs, including a method for forecasting operating and capital expenditure. We do not consider this IM further for the purpose of this advice.

Electricity lines services

23. Section 54C of the Act defines ELSs as "the conveyance of electricity by line in New Zealand", unless the context otherwise requires. The ordinary meaning of convey is to "transport or carry to a place".¹⁵ In addition, under s 54C:
 - (a) "Lines" has the same meaning as in s 2(1) of the Electricity Act 1992, being "works that are used or intended to be used for the conveyance of electricity".
 - (b) "Works" are defined in s 2(1) of the Electricity Act as meaning "any fittings that are used, or designed or intended for use, in or in connection with the generation, conversion, transformation, or conveyance of electricity", but not including "any part of an electrical installation".
 - (c) "Fittings" means everything used, or designed or intended for use, in or in connection with the generation, conversion, transformation, conveyance, or use of electricity.¹⁶
24. "Electrical installation" is defined in the Electricity Act as:
 - (a) [meaning] -
 - (i) in relation to a property with a point of supply, all fittings beyond the point of supply that form part of a system that is used to convey electricity to a point of consumption, or used to generate or store electricity; and
 - (ii) in relation to a property without a point of supply, all fittings that form part of a system that is used to convey electricity to a point of consumption, or used to generate or store electricity; but
 - (b) [...] not [including] any of the following:
 - (i) an electrical appliance:
 - (ii) any fittings that are owned or operated by an electricity generator and that are used, designed, or intended for use in or in association with the generation of electricity, or used to convey electricity from a source of generation to distribution or transmission lines:

¹⁴ Clause 1.1.4 of the IM determination.

¹⁵ Oxford English Dictionary, 2009. The definition of "services" in the Act does not assist. The ordinary meaning of service, in this context, is "a system supplying a public need such as transport, communications, or utilities such as electricity and water": Oxford English Dictionary, 2009.

¹⁶ Electricity Act 1992, s 2(1).

- (iii) **any fittings that are used, designed, or intended for use in or in association with the conversion, transformation, or conveyance of electricity by distribution or transmission lines.**

[emphasis added]

25. Section 54C(2) sets out a number of specific exceptions to the definition of ELSs, including the conveyance of electricity "only by a line or lines that are mostly in competition with a line or lines operated by another supplier of ELSs that is not an associate of the person".

Advice

Overview

26. Customer service lines fall within the definition of electrical installation and, accordingly, the starting point is that these are excluded from the definition of ELSs. If not an ELS, the costs of servicing customer service lines are not automatically an operating cost of a regulated service.
27. For EDBs that do not assume responsibility for servicing customer service lines, the customer could engage an electrician to undertake the maintenance work. The EDB could also provide the service to the customer at a fee. In these circumstances the customer service lines are appropriately treated as not part of the regulated network and the cost of servicing customer service lines is appropriately an unregulated cost. That work is not an integral part of the electricity distribution business operated by the EDB.
28. However, we consider the cost is capable of being treated as a regulated cost where the EDB assumes responsibility under option 1 and / or option 2. In these circumstances, the service becomes an integral part of the overall regulated service and has the purpose of ensuring safe and efficient conveyance of electricity to the end consumer.
29. As explained below, we consider that the costs of servicing these customer service lines under options 1 or option 2 are capable of being treated as a regulated cost under the relevant cost allocation IM either because:
- (a) the customer service lines are used "in association with" the conveyance of electricity by distribution lines (in which case the customer service lines are excluded from the definition of an electricity installation and consequently fall within the definition of ELSs) and such costs would be directly attributable to the ELS under the cost allocation IM; or
 - (b) even if the customer service lines do not fall within the definition of ELSs, the costs are "related to the supply of the regulated service" and are "wholly or solely incurred by the EDB in or in relation to" its supply of a regulated service (in which case the costs are allocated to the EDBs' regulated business under the cost allocation IM).
30. A similar conclusion is reached in relation to capital expenditure associated with servicing customer service lines as explained below.

Applicable principles of statutory interpretation

31. The meaning of an enactment must be ascertained from its text and in light of its purpose.¹⁷ Further, a purposive approach to interpretation should be adopted (rather than a literal approach), where the interpretation should facilitate rather than frustrate the broad purposes of the Act.¹⁸ There should also be a focus on the practical and workable meaning of the relevant provision.¹⁹
32. The purpose of Part 4 of the Act is to promote the long-term benefit of consumers by promoting outcomes that are consistent with outcomes produced in competitive markets, such that the objectives set out in s 52A(1)(a) to (d) are promoted. Accordingly, provisions in the Act should be interpreted with the long-term interests of consumers, and the objectives in (a) to (d) in mind.
33. While the IMs themselves are not regulations, we consider that the same principles and approach to interpreting their meaning must sensibly apply.

Do customer service lines fall within the definition of ELSs where an EDB assumes responsibility for servicing those lines?

34. The definition of ELS is relatively broad and is intended to include works and services associated with the provision of the core conveyance service. What is or is not a regulated service is, accordingly, often a question of fact. Indeed, the Commission decided not to define regulated services more precisely in the IM determination, perhaps recognising that flexibility was required.
35. As set out above, a customer service line falls within the first part of the definition of "electrical installation". However, the customer service line is not an electrical installation (and therefore included in the definition of "works", and consequently "lines" and "ELs") if it is "used, designed, or intended for use in or in association with the conversion, transformation, or conveyance of electricity by distribution or transmission lines".
36. The words "in association with" is a broad phrase and, in our view, it is arguable that the customer service lines are "in association with the conveyance of electricity" where responsibility for these lines has become an integral part of the EDBs' electricity conveyance business. As noted above, by the EDB assuming this responsibility, the service becomes an integral part of providing a safe and efficient service to the end consumer.²⁰ There is no requirement in the definition of ELSs that the lines are owned by the EDB.

¹⁷ Section 5(1) Interpretation Act 1999. See *Commerce Commission v Fonterra Co-operative Group Ltd* [2007] NZSC 36, para 22, where Tipping J stated that: " Even if the meaning of the text may appear plain in isolation of purpose, that meaning should always be cross checked against purpose in order to observe the dual requirements of s 5 [of the Interpretation Act]".

¹⁸ *Tanui Maori Trust Board v Attorney General [Coal Case]* [1989] 2 NZLR 513 at 535.

¹⁹ *Northland Milk Vendors Association Inc v Northern Milk Ltd* [1988] 1 NZLR 530 (ca) at 537.

²⁰ The definition of "consumers" for the purposes of s 54C has the same meaning as in s 2(1) of the Electricity Act 1992, under which consumers are, in effect, defined as end-users. Specifically, consumers are defined as:

"(a) any person who is supplied, or who applies to be supplied, with electricity; but
 (b) does not include [any electricity generator] or any electricity distributor or electricity retailer, except where [the electricity generator] or, as the case may be, the electricity distributor or electricity retailer is supplied, or applies to be supplied, with electricity for its own consumption and not for the purposes of resupply to any other person."

37. It is also necessary to consider whether customer service lines fall within any of the exceptions to the definition of ELSs under s 54C(2) of the Act. In our view they would not. In particular:
- (a) We do not consider that lines from the boundary to the premises would usually fall within subsection (a), which refers to the conveyance of electricity "solely for the supplier's own consumption".²¹
 - (b) We do not consider that customer service lines are lines that are "mostly in competition with a line or lines operated by another supplier of ELSs that is not an associate of the person".

If customer service lines are not ELSs, are the servicing costs nevertheless attributable to the business of supplying the regulated service under the cost allocation IM?

38. If customer service lines are considered to not be part of ELSs, the costs of servicing the customer service lines could still be treated as an operating cost that can be allocated to the regulated business of an EDB under the cost allocation IM. As noted above, an operating cost is a cost incurred by the EDB "relating to" the supply of either regulated services alone, or regulated services and one or more unregulated service.
39. In our view, "relating to" is not a high threshold for a cost to qualify as an operating cost. The cost incurred only has to relate to, or have a connection with, the supply of regulated services or regulated services and one or more unregulated service. As set out above, if the EDB assumes responsibility for the customer service lines, this arguably becomes an extension of the overall regulated service for the purposes of Part 4 regulation, and the costs are related to the supply of the regulated service.
40. The operating costs also need to be "wholly and solely incurred by the EDB in or in relation to its supply of one regulated service". Whether the cost is wholly and solely incurred "in relation to" the supply of electricity distribution services is largely a factual enquiry. Again, where servicing of the customer service lines has become an integral part of the business of supplying the regulated service, the costs are wholly and solely incurred "in relation to" that business.

Interpretation most consistent with the Part 4 purpose statement

41. We consider the interpretation above is consistent with the plain text of the Act and of the IMs. Applying a purposive approach, it is also consistent with the Part 4 purpose, as this interpretation will best ensure EDBs provide consumers with a safe and reliable supply of electricity at a quality that reflects consumer demands (consistent with limb (b) of the purpose statement). The interpretation above also promotes the other limbs of the purpose statement, including that the EDB will be limited in its ability to earn excess profits (as the operating costs and asset values would be regulated and therefore subject to Commission oversight).
42. On the other hand, if such costs are not able to be allocated to the business of supplying the regulated service, EDBs are unlikely to be willing to adopt the Sapere proposed approach. This would likely result in the current ad hoc arrangements prevailing, which

²¹ This exception could apply, for example, to campus networks, such as networks owned and managed by Auckland Airport or universities (which arguably involve conveyance or supply for their own consumption). However, this exception does not in our view meaningfully apply to a line which simply runs from the boundary of a property to the premises. This is consistent with the definition of "supplier" in s 2 the Act and "supply" which includes "provide, grant or confer".

has an associated risk to public safety and would be inconsistent with the long-term interests of consumers.

If customer service lines are not ELSs, are the asset values associated with the customer service lines attributable to the business of supplying the regulated service under the cost allocation IM?

43. Servicing customer service lines is most likely to involve operating costs rather than additional commissioned assets. However, in some circumstances an EDB may need to incur capital expenditure to repair or replace these lines, giving rise to commissioned assets. Asset values arising from such commissioned assets could, in our view, also be allocated to the regulated business under the cost allocation IM. In particular:
- (a) If the customer service line is an ELS, then the asset values would, in our view, clearly be allocated to the business supplying the regulated service under the cost allocation IM. This is irrespective of ownership, as the test in the IM determination is whether the asset is "used" in the supply of the regulated service.
 - (b) Even if the customer service line is not an ELS, the asset value could be allocated to the regulated business on the basis that the customer service line is nevertheless used to supply the regulated service (where assuming responsibility for the maintenance and repair of the customer service line is in order to convey electricity safely and effectively to the end user).

Conclusion

44. For the reasons set out above, we consider the wording in the Act and IM determination is sufficiently broad to enable the costs of servicing customer service lines to be attributed to the business of supplying the regulated service under the cost allocation IM in circumstances where an EDB assumes responsibility for customer service lines. We consider that this interpretation is not only available on the plain text of the Act and the IM determination, but is also the interpretation that would best promote the Part 4 purpose.