

*Under:* the Resource Management Act 1991 (*RMA*)

*In the matter of:* Hearing of submissions and further submissions on Plan Change 92 to the Proposed Western Bay of Plenty District Plan (Ōmokoroa and Te Puke Enabling Housing Supply and Other Supporting Matters)

*and:* **Powerco Limited**  
*Submitter ID: 33*

Legal submissions on behalf of Powerco

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Dated: 7 September 2023

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## LEGAL SUBMISSIONS ON BEHALF POWERCO LIMITED

### INTRODUCTION

- 1 These legal submissions are provided on behalf of Powerco Limited (*Powerco*) in relation to Plan Change 92 (*PC92*) to the Western Bay of Plenty District Plan (*Plan, District Plan*). Powerco was a submitter on PC92.<sup>1</sup>
- 2 PC92 is a Council-led, albeit government-directed, plan change that introduces amendments to the District Plan required by the National Policy Statement for Urban Development 2020 (*NPSUD*) and the Resource Management (Enabling Housing Supply and Other Matters) Amendment Act 2021 (*Enabling Housing Act*). These amendments provide for housing intensification, specifically the incorporation of the Medium Density Residential Standards (*MDRS*) to every relevant residential zone.<sup>2</sup>

### Powerco

- 3 Powerco is a New Zealand energy company, which distributes both electricity and natural gas.
- 4 Powerco is a network utility operator,<sup>3</sup> and a requiring authority<sup>4</sup> under the Resource Management Act 1991 (*RMA*) and a lifeline utility under the Civil Defence Emergency Management Act 2002.
- 5 The scope of Powerco's operations, including within Te Puke and Ōmokoroa, is summarised in the evidence of Mr Gary Scholfield.<sup>5</sup>
- 6 As outlined in Mr Scholfield's evidence, Powerco's principal interest in PC92 is to ensure that higher density residential development is able to occur safely, without unreasonable and inappropriate risks to either the health and safety of the community or the electricity transmission network, which is critical to community wellbeing.

### SCOPE OF SUBMISSIONS

- 7 These submissions:
  - 7.1 provide a summary of Powerco's concern with the health and safety and network operation risks associated with PC92;

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<sup>1</sup> Submission #33 and further submission #75.

<sup>2</sup> Resource Management Act 1991 (*RMA*), section 77G(1) and Schedule 3A.

<sup>3</sup> RMA, section 166; Electricity Act 1992, section 2.

<sup>4</sup> Registration numbers / Gazette references, 2005-go8566 22 December 2005, 210/5367 2005-go8567 22 December 2005, and 35/940 2009-go2455 210/5367 19 March 2009.

<sup>5</sup> Statement of Evidence of Gary Alan Scholfield on Behalf of Powerco Limited, dated 25 August 2023.

- 7.2 provide a summary of the legal framework, including the Enabling Housing Act's requirements for qualifying matters and the grounds for Powerco's sought relief;
- 7.3 summarise and respond to the Officer's Report and Reply Evidence as these documents relate to Powerco's submission and sought relief; and
- 7.4 confirm Powerco's overall position and requested relief.

#### **SUMMARY OF POWERCO'S CONCERN WITH PC92**

- 8 Powerco supports the underlying policy and goals of PC92 and the Enabling Housing Act. However, Powerco sees that, unless appropriately qualified, the MDRS provisions are highly likely to result in increased safety risks, that can in extreme circumstances lead to serious injury and death, as well as adverse effects on the functioning and reliability of the electricity distribution network.
- 9 Housing activities enabled by PC92 need to be undertaken in a manner that is safe for developers and subcontractors, with full knowledge of the location and necessary setbacks from critical electricity distribution assets. Newly enabled activities permitted by PC92 will occur with limited Council oversight. This runs a very real risk of proliferation of developments undertaken without regard to the safety requirements necessary to avoid risks associated with both construction and ultimately residential activities in close proximity to electricity lines.
- 10 Powerco's submission and sought relief seeks to appropriately manage these risks by including a minor, easily understood and easily complied with qualifying matter. Powerco's proposed qualifying matter would include the identification of the location of Powerco's overhead electricity lines and include a requirement to comply with an existing safety standard – New Zealand Electrical Code of Practice for Electrical Safe Distances - NZECP 34:2001 (*ECP34*), which is discussed further below.
- 11 More specifically, to ensure safety requirements are addressed, Powerco's relief seeks:
  - 11.1 the identification of overhead electricity networks in the District Plan; and
  - 11.2 the inclusion of a new permitted activity standard that requires compliance with ECP34.
- 12 Mr Scholfield's evidence outlines the key areas of concern, and what can go wrong when separation distances are not respected.

### **Background to ECP34**

- 13 ECP34 is approved by the Minister of Energy and Resources under section 38 of the Electricity Act 1992. ECP34 sets minimum safe electrical distance requirements for overhead electric line installations and other works associated with the supply of electricity. Minimum safe distances are set primarily to protect persons, property, vehicles and mobile plant from harm or damage from electrical hazards.<sup>6</sup>
- 14 Maintaining safe distances in accordance with ECP34 is also a mandatory requirement on persons carrying out work near an electricity line under regulation 17 of the Electricity (Safety) Regulations 2010.<sup>7</sup> Failing to meet these requirements is an infringement offence, and enforcement is the responsibility of WorkSafe.<sup>8</sup>
- 15 The District Plan already requires compliance with ECP34 as an activity performance standard applying to infrastructure and network utilities.<sup>9</sup> Construction of a residential building next to Powerco's network could create a non-compliance with this standard, despite there being no failing by Powerco. Consequently, and as outlined in Mr Scholfield's evidence, Powerco considers it entirely reasonable that a corresponding obligation should also apply to new residential developments, particularly where their intensity increases the risk of unsafe developments and activities.
- 16 Powerco's existing experience is that awareness of the ECP34 requirements is not universal among developers and builders, and neither enforcement nor the penalties have been adequate to ensure universal compliance with ECP34. Further, once a building has been constructed in breach of ECP34, infringement proceedings and relatively modest fines do not assist in making the necessary changes to reinstate safe separation distances. Powerco's position is that it is appropriate and efficient to avoid these adverse effects before they occur through its proposed minor amendment to PC92.

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<sup>6</sup> New Zealand Electrical Code of Practice for Electrical Safe Distances, NZECP 34:2001 ISSN 0114-0663, Introduction, page 1.

<sup>7</sup> Section 169(2) of the Electricity Act 1992 allows regulations to require compliance with any electrical code.

<sup>8</sup> Electricity (Safety) Regulations 2010, regulation 12. Offences are punishable by a maximum penalty of \$1,000 for an individual or \$3,000 for a body corporate. Note also that the Registrar of the Electrical Workers Registration Board may issue infringement notices under section 165B of the Electricity Act 1992.

<sup>9</sup> Western Bay of Plenty Operative District Plan, section 10.4d New Zealand Electrical Code of Practice: "Activities to comply with the New Zealand Electrical Code of Practice 34:2001 (or other superseding standards)".

### **Powerco's proposed resolution**

- 17 The specific changes to PC92 that Powerco seeks are:
- 17.1 Identification of overhead electricity networks in the area covered by PC92 on planning maps;
  - 17.2 Inclusion of a new standard in Section 14A.4.2 (Other Standards) of the District Plan to ensure safe separation distances are maintained by requiring compliance with ECP34 (or other wording to similar effect):

*"Where a site contains or adjoins (e.g. on legal road) an overhead electricity line identified on the [non-statutory] planning maps, an assessment of the building(s) against the provisions of the New Zealand Electrical Code of Practice for Electrical Safe Distances - NZECP 34:2001 (ECP34) must be undertaken by a suitably qualified person with the report approved by the asset owner. If no report is provided, or a breach of ECP34 is identified, then resource consent is required for the development as a Restricted Discretionary Activity with the asset owner identified as an affected person."*
- 18 Compliance with Powerco's proposed qualifying matter will have little, if any, adverse impact on the ability to deliver housing intensification but will better ensure that:
- 18.1 the Plan provides for the wellbeing and health and safety of those persons working on and living in the housing that PC92 will deliver; and
  - 18.2 that the Plan is not, through neglect, missing an opportunity to ensure developers construct buildings that meet safety requirements.
- 19 As discussed by Mr Scholfield, the resource consent process is the most efficient, and often the principal or only formal process that ensures that developers engage with distribution network safety concerns and the only trigger for consideration of the need for compliant setbacks. Powerco considers that it is critical that this important safety supervisory role is not lost and that PC92 includes permitted activity development standards on residential land that give effect to the safe separation distances.
- 20 It is accepted that the change sought by Powerco would make the MDRS less enabling of development, albeit only slightly. Consequently, to incorporate ECP34 in PC92, it must meet the requirements to be a 'qualifying matter'. As set out below, there are clear grounds for ECP34 separation distances to be a qualifying matter.

- 21 It is also important to emphasise that what Powerco is seeking is not a 'new' restriction, but only that relevant District Plan provisions recognise and give effect to the important safety matters addressed in ECP34.

## **LEGAL FRAMEWORK**

### **Enabling Housing Act**

- 22 The primary purpose of Enabling Housing Act plan changes, such as PC92, is to require councils in New Zealand's largest urban areas to increase housing supply and allow a wider variety of homes to be built. A key outcome is to enable housing acceleration by "*removing restrictive planning rules*".<sup>10</sup> These restrictions are to be removed via mandatory requirements to incorporate the MDRS in every relevant residential zone<sup>11</sup> and give effect to Policy 3 of the NPSUD.<sup>12</sup> The force of these mandatory requirements is framed at the highest level, as a "duty" placed on specified territorial authorities.<sup>13</sup>
- 23 However, importantly, the Enabling Housing Act recognised the potential for unintended adverse outcomes in applying blanket provisions. Consequently, it expressly allowed councils to impose 'qualifying matters' as restrictions that are less enabling of development in limited circumstances.<sup>14</sup>

### **Qualifying matters**

- 24 Section 77G(6) of the RMA provides that a territorial authority can make the requirements in Schedule 3A of the RMA or under Policy 3 of the NPSUD less enabling of residential development or intensification in relation to an area within a residential zone, only to the extent necessary to accommodate a qualifying matter in section 77I of the RMA.
- 25 Powerco submits that the risks of health and safety impacts, network impacts and rectification cost inefficiencies resulting from inappropriate and inconsistent works in close proximity to its electricity distribution network should be managed to ensure that higher density residential development is not inappropriate. It further submits that compliance with ECP34 would enable higher density residential development to be undertaken in an appropriate manner. ECP34 provides for appropriate separation distances, manages significant safety concerns, and provides for appropriate engagement with the distribution network operator.

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<sup>10</sup> Cabinet Legislation Committee LEG-21-MIN-0154 (Cabinet Minute), at paragraph 4.

<sup>11</sup> RMA, section 77G(1).

<sup>12</sup> Sections 77G and 77N.

<sup>13</sup> Section 77G.

<sup>14</sup> Sections 77I-77L.

26 Inclusion of ECP34 as it relates to Powerco's distribution network is, in my submission, and for the reasons outlined below, an entirely appropriate and necessary qualifying matter, of the type anticipated by Parliament.

***Section 77I(j) any other matter that makes density inappropriate***

27 In my submission, distribution infrastructure is a qualifying matter under section 77I(j) of the RMA because higher density residential development that is undertaken in a manner that increases risks of health and safety and operational impacts, in breach of ECP34 would clearly make higher density development inappropriate.

28 Powerco's proposed qualifying matter is clear, and site-specific, insofar as it can be easily applied to only those limited areas within the relevant setback areas set out in ECP34.

29 The safety and operational implications of development that is not compliant with ECP34 are discussed in Mr Scholfield's evidence, but include:

29.1 risk of injury or death to contractors and potentially residents;

29.2 temporary service disruption to the network;

29.3 long-term service disruption by taking assets off-line and modifying the network, incurring both cost and time delays; and

29.4 time and cost delays in remedying non-compliance issues i.e. modification of the development (with those rectification costs principally being faced by residential developers and distribution network operators).

30 Powerco submits these are ample grounds to establish that residential development that presents health and safety and operational risks, and is inconsistent with ECP34, should not be enabled by PC92. It is clear that higher density development has greater potential to be conducted in breach of ECP34 next to electricity lines. This would be inappropriate. Consequently, a development standard requiring consistent compliance with ECP34 as a key safety standard is both justified and efficient.

31 Parliament clearly anticipated qualifying matters could apply to electricity infrastructure, with the select committee report stating that qualifying matters:<sup>15</sup>

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<sup>15</sup> See Report of the Environment Committee on the Resource Management (Enabling Housing Supply and Other Matters) Amendment Bill 83-1, page 15.

*...could include ensuring residential housing is safely set back from high voltage transmission lines, and other infrastructure such as airport noise areas, in order to avoid reverse sensitivity concerns.*

- 32 Without the changes Powerco seeks, the MDRS would enable intensification that would be incompatible with the safe and efficient operation of Powerco's distribution network.
- 33 To manage the significant consequences of permitting high density residential development with health and safety and operational risks in breach ECP34, 'less enabling' provisions are needed. Aligning rules in PC92 with the requirements of ECP34 is clearly the smallest limitation on MDRS that is necessary to accommodate safety and development issues. In so doing, Powerco's proposed change to PC92 meets the requirement in section 77I that the MDRS and the relevant building height or density requirements are only made to be less enabling to the extent necessary to accommodate a qualifying matter.
- 34 Section 77L of the RMA requires the section 32 analysis relating to any such qualifying matter under section 77I(j) to include a site-specific analysis. While the section 32 analysis is already complete on PC92, the site-specific analysis can and should now be incorporated by way of a further evaluation report under section 32AA or, (more likely) with sufficient information via the decision on PC92, under section 32AA(1)(d) RMA.
- 35 Throughout the PC92 process, Powerco has confirmed that it is very happy to work with Council on the evaluation or reporting process and happy to provide such further information as may be necessary in order to meet any necessary requirements of section 77L to undertake site-specific and characteristic-specific analysis to ensure the distribution network can be recognised as a qualifying matter.<sup>16</sup>

**Effect of Powerco's sought change**

- 36 To be clear, Powerco is not looking to disable residential development or intensification. Rather it is seeking to ensure that the mandatory ECP34 safety setbacks are adhered to when undertaking such works and that the planning system provides for consistent recognition of those requirements.

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<sup>16</sup> For completeness we note the recent Environment Court decision on qualifying matters in *Waikanae Land Company Limited v Heritage New Zealand Pouhere Taonga*, [2023] NZEnvC 056 is not relevant to the relief Powerco is seeking. The key issue determined in that decision was that it was ultra vires for an intensification planning instrument to go beyond making the MDRS less enabling, and disenable or remove permitted activity rights under the operative plan via a qualifying matter. In contrast, Powerco is not seeking to remove existing rights, as ECP34's protections and separation distances apply regardless of the District Plan provisions. Powerco is seeking the clarification of those existing requirements to prevent inappropriate intensification of residential development that would be in breach of ECP34.



- 37 The minor necessary change to PC92 is the addition of a new standard in Section 14A.4.2 (Other Standards) of the District Plan that requires compliance with ECP34.
- 38 This would trigger obligations to ensure compliance with ECP34 when undertaking works within close proximity of network distribution assets, or seek consent as a restricted discretionary activity.
- 39 Incorporating ECP34 separation distances as a permitted activity standard is not a burdensome constraint or limitation on high density development. The only substantive effect would be that activities that did not comply with the mandatory setback and notification requirements under ECP34 are identified at the planning stage, instead of further down the development pipeline such as at inspection stages or, in the worst-case scenario, where there is a health and safety incident.
- 40 Powerco considers that early identification and avoidance of ECP34 non-compliance would be likely to increase the efficiency and reduce the overall costs of higher density residential developments. Such avoidance would avoid stop work orders, requirements to redesign, the demolition/deconstruction of non-compliant parts of works, and/or the undergrounding of the existing overhead network. Moreover, Powerco considers that it would significantly reduce the risk of health and safety incidents and injuries.

#### **SECTION 42A / REPLY EVIDENCE**

- 41 The Officer's Report<sup>17</sup> and Reply Evidence<sup>18</sup> acknowledges the importance of compliance with ECP34 and supports the addition of non-statutory maps and advice notes to the District Plan but has rejected the insertion of a new performance standard as sought by Powerco, on the following grounds:
- 41.1 it is not Council's role to administer the ECP34, or take over responsibility from other parties who may be struggling to administer regulations;<sup>19</sup>
- 41.2 including the standard would bring extra costs and time delays to those seeking to proceed with a residential unit or building that would otherwise be a permitted activity;<sup>20</sup> and
- 41.3 it is not appropriate for the Council to require an assessment against the provisions of ECP34, and for the report to be

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<sup>17</sup> Section 42A Report - Section 14A - Omokoroa and Te Puke Part 2 (Definitions, Activity Lists, and Standards).

<sup>18</sup> Statement of Evidence in Reply of Tony Robert Clow on Behalf of Western Bay of Plenty District Council (Planning), 6 September 2023.

<sup>19</sup> Section 42A, at page 78 and Reply Evidence, at [82].

<sup>20</sup> Section 42A, at page 78.

approved by Powerco as part of a permitted activity standard.<sup>21</sup>

For the reasons set out below, Powerco does not consider these grounds provide any basis to reject the relief Powerco is seeking.

**Council role in administering ECP34**

- 42 In contrast to the Officer's assertion, Powerco is not seeking that the Council 'take over' administration of ECP34. Rather, it merely seeks to require developers who are undertaking works in areas where proximity to overhead lines presents health and safety risks to establish that ECP34 has been considered and complied with.
- 43 Moreover, Powerco notes that any concern with respect to Council's role in relation to ECP34 is one which Council has already established is both possible and acceptable. That is because compliance with ECP34 is already a performance standard in the District Plan that applies to infrastructure and network utilities.<sup>22</sup> Powerco understands that this existing performance standard has not raised any particular issues or concerns with respect to the Council's administrative roles in the past, and cannot see why its inclusion in PC92 would present such issues going forward were its relief to be accepted.
- 44 Furthermore, Powerco considers that the administration of health and safety matters is clearly a matter in which council has a role. Section 5 of the RMA obliges decision makers to consider safety matters. Safety is an explicit and key part of the definition of sustainable management and cannot simply be left to other legislative or regulatory schemes.
- 45 The fact that electrical separation distances are addressed by ECP34 does not mean that the District Plan can disregard electrical safety issues. It is common and proper for district plans to incorporate restrictions and requirements of other legal regimes, where there is good reason to do so. As noted below, case law establishes that a decision-maker must give careful consideration to safety and has an overarching responsibility to satisfy itself that safety is assured.
- 46 The observation of the Environment Court in *Re Auckland Regional Council* is that the scope of the RMA means it is not surprising that there is frequent overlap with other pieces of legislation, and approvals will often be required under other legislation for activities that also require resource consent.<sup>23</sup> The High Court decision of *Southern Alps Air* confirmed that there is nothing improper in relying on external rules and standards to manage safety effects, provided

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<sup>21</sup> Officer's Reply Evidence, at [87].

<sup>22</sup> Western Bay of Plenty Operative District Plan, section 10.4d New Zealand Electrical Code of Practice: "Activities to comply with the New Zealand Electrical Code of Practice 34:2001 (or other superseding standards)".

<sup>23</sup> *Re Auckland Regional Council* [2002] NZRMA 231, at [13].

the decision maker satisfies itself that the plan as a whole (including reliance on the external mechanisms) would achieve an appropriate level of safety.<sup>24</sup>

- 47 As should be clear, it is Powerco's view that reliance on ECP34 and associated enforcement under the Electricity Act, does not adequately ensure public safety, and that safety and operational outcomes would be improved through the incorporation of equivalent requirements in the District Plan.
- 48 The Courts have recognised and approved such approaches, with safety issues addressed by non-RMA regulations also needing to be addressed in RMA instruments. For example:
- 48.1 In *Dart River Safaris Ltd* the Court found that section 5 requires that safety issues must be met in deciding resource consents for jet boating operations, and this could not be done by leaving health and safety issues to the harbourmaster under Part 80 of the Maritime Rules.<sup>25</sup>
- 48.2 More recently in *Taranaki Energy Watch*, Judge Borthwick accepted that WorkSafe legislation did not provide a complete answer to health and safety issues, noting that those regulations did not require an assessment of risks carried out at the time of site selection. Instead, it was appropriate that decisions on relevant land use should be addressed by District Plan rules.<sup>26</sup>
- 49 The Western Bay of Plenty District Plan already recognises this, by applying rules that duplicate or apply legal requirements of legislation other than the RMA. For example:
- 49.1 as noted above, compliance with ECP34 is already a performance standard in 10.4d of the District Plan that applies to infrastructure and network utilities;<sup>27</sup>
- 49.2 new crossings onto Strategic Roads require the involvement of Waka Kotahi, and replicate the requirements of the Government Roadway Powers Act 1989;<sup>28</sup>
- 49.3 the rules in section 7 of the District Plan apply to Historic Heritage Features that are already the subject of existing

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<sup>24</sup> *Southern Alps Air v Queenstown Lakes District Council* CIV-2007-485-000134, 11 June 2007, at [63]

<sup>25</sup> *Dart River Safaris Ltd v Kemp* [2001] NZRMA 433, at [65].

<sup>26</sup> *Taranaki Energy Watch v South Taranaki District Council* [2018] NZEnvC 227 at [42-46].

<sup>27</sup> Western Bay of Plenty Operative District Plan, section 10.4d New Zealand Electrical Code of Practice: "Activities to comply with the New Zealand Electrical Code of Practice 34:2001 (or other superseding standards)".

<sup>28</sup> See District Plan, 4B.4.2.

legal protection requirements (and separate approval processes) under the Heritage New Zealand Pouhere Taonga Act 2014 (*HNZPTA*);<sup>29</sup>

- 49.4 signage requirements for hazardous facilities are required to, as a minimum requirement, comply with the provisions of the Hazardous Substances and New Organisms Act 1996; and<sup>30</sup>
- 49.5 new subdivisions are required to provide a compliant, reliable, safe and efficient supply of potable and wholesome water the Public Health Act 1956: Health (Drinking Water) Amendment Act 2007.<sup>31</sup>
- 50 ECP34 presents current best practice safety separation distances between buildings and electrical lines. Powerco's proposal that the District Plan require compliance with these distances is an appropriate method for the Council to meet its responsibility in ensuring community safety as required under the RMA. Powerco is certainly not seeking that the Council assume Worksafe's enforcement function of ECP34.
- 51 More specifically, the Council's objection to regulating separation distances from Powerco's distribution lines is inconsistent, given the Operative District Plan already includes the National Grid Electricity Transmission Buffer. This area applies 12m either side of lines and structures that make up Transpower's National Grid transmission lines within the District. Within this buffer area dwellings and other types of buildings/structures are non-complying activities.<sup>32</sup>
- 52 Although not directly referencing ECP34, this buffer area duplicates requirements of ECP34, by extending 12m out from support structures.<sup>33</sup> The relevance of ECP34 to the national grid buffer area is confirmed by the requirement in performance standards for all activities to comply with the New Zealand Electrical Code of Practice for Electrical Safe Distances and for Transpower to be 'considered an affected party to ensure compliance with NZECP34'.<sup>34</sup>
- 53 Powerco considers there are no principled reasons for the District Plan to take a different approach to safety around distribution electricity lines, to that adopted for transmission electricity lines. If the District Plan regulates activities that breach ECP34 in different ways, plan users are likely to misunderstand their obligations. For

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<sup>29</sup> District Plan, 7.6.2.

<sup>30</sup> District Plan, 9.5.1e. See also requirements related to the Building Code (F8), or the Code of Practice "Signage for Premises Storing Hazardous Substances and Dangerous Goods" of the New Zealand Chemical Industry Council (2004).

<sup>31</sup> District Plan, 12.4.7.2.

<sup>32</sup> For example in the Lifestyle zone 17.4.1 and Rural zone 18.4.1.

<sup>33</sup> As required by section 2.4.1 of the NZECP 34:2001.

<sup>34</sup> Lifestyle Subdivision Activity Performance Standards 17.4.2 and Rural Subdivision Activity Performance Standards 18.4.2.

example, the national grid is subject to plan rules, but the distribution network is proposed to be only addressed by an advice note. If this is the result, then requirements applying to the distribution network are likely to be perceived to be lesser requirements.

- 54 It may be that Council's objection is more to the requirement of an assessment against 'ECP34', and the direct reference and incorporation of this code. If that is the case, Powerco suggests that the proposed standard could instead set out the specific separation criteria or distances included in ECP34 instead, and would be happy to work with Council officers on the appropriate wording.
- 55 Powerco's key submission point remains that where the RMA touches on other regulatory frameworks, both RMA and other functions can be given effect to so long as this does not create conflict.
- 56 Powerco considers that, the incorporation of minimum setbacks into PC92 that either give effect to, or align with, ECP34 would not create conflict and there is no legal or principled reason the Council could not administer setbacks to ensure safety.
- Extra costs and time delays**
- 57 Council has concerns that the inclusion Powerco's development standard may lead to extra costs and time delays for those seeking to develop residential dwelling that would otherwise be a permitted activity.
- 58 Powerco's relief seeks that a report prepared by a suitably qualified person accompanies any relevant activity carried out on a site with the qualifying matter. It is only where a report is not provided, or a breach of the ECP34 is identified, that the activity would then become a Restricted Discretionary Activity (*RDA*).
- 59 While Powerco accepts that there would be a cost in procuring a report prepared by a suitably qualified person, Powerco notes that such reports are already prepared as a matter of course when preparing construction plans. Moreover, taking measures to ensure compliance with safe separation distances is a step that should be standard for developments beside electrical assets.
- 60 Assessment of safe separation distances is a routine measure for experienced and conscientious developers who are alert to safety risks, and aware of the benefits of constructing buildings right the first time. Unfortunately, Powerco's experience, as illustrated by Mr Scholfield's evidence, is that not all developers are informed or conscientious about safe electrical separation distances. It is those developers for whom the qualifying matter is prepared and in those cases the additional step to ensure safety is clearly justified.

- 61 A failure to allow safe distance between electrical infrastructure and buildings or construction, by landowners, developers or contractors can lead to development that risks human health and safety, and also compromises the safe and efficient operation of the network. Allowing such risks to develop is neither efficient nor effective, when the frequency of non-compliance could likely have been significantly reduced if the same requirements were included in the District Plan. This is particularly the case as the changes do not impose a substantive new constraint, but seek an integrated approach which uses planning rules to provide complementary support and management of an identified risk.
- 62 In this respect, Powerco notes the brief opposing further submission by Kāinga Ora, and Kāinga Ora's evidence supporting the Council's preferred approach of using advice notes.<sup>35</sup> Powerco respectfully suggests that Kāinga Ora is unlikely to be substantively affected by Powerco's relief, as Kāinga Ora developments would be expected to routinely assess and comply with safe separation distances.
- 63 It is Powerco's submission that there is a balance to be had between ensuring that development is carried out safely, versus the time and cost to remedy non-compliance at a later stage. Powerco's sought relief is a case of preferring the prevention rather than seeking a subsequent cure.
- 64 Powerco's 'prevention' measures have been deliberately prepared to not be onerous:
- 64.1 If a development is restricted discretionary activity (*RDA*) status only because of a lack of assessment against ECP34, then this will likely strongly motivate developers who might otherwise not otherwise be familiar with electrical safety to obtain an assessment, to secure permitted activity status.
- 64.2 If the proposed development is *RDA* status for other reasons, then the inclusion of ECP34 matters is unlikely to add substantive further costs or delay to consent processing, which must already consider non-compliance with other standards.
- 65 Finally, Powerco notes that only a relatively small number of sites would be affected in Ōmokoroa because most of its lines are underground, further limiting the potential administrative burden.
- 66 Contrary to the Council Officer's concerns, for the reasons above, Powerco considers that new administrative burden on the Council or developers will be minimal (if any). Further in the context of the

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<sup>35</sup> Statement of Primary Evidence of Susannah Vrena Tait on behalf of Kāinga Ora – Homes and Communities (Planning) 25 August 2023, at paragraph 13.3.

very real safety risks, any time and effort required by the proposed provisions should be considered proportionate and reasonable.

**Appropriateness of ECP34 assessment and reporting**

67 The Officer's Reply Evidence opposes Powerco's proposed wording for the standard on the basis that permitted activities should be measurable and it is not appropriate for the Council to require an assessment against the provisions of ECP34, nor for the report to be approved by Powerco as part of a permitted activity standard.<sup>36</sup>

68 Powerco considers the proposed wording of the standard is both reasonable and appropriate, as:

68.1 Assessment against ECP34 provides a simple and objective method to confirm safety by applying specific risk-based criteria for different components of electrical infrastructure. It is preferable, more responsive to risk and less restrictive than imposing a fixed setback distance from all electricity infrastructure.

68.2 Requiring the compliance report to be reviewed by Powerco:

(a) means a developer engages with Powerco at an early stage, which is likely to result in issues being identified and resolved without Council involvement; and

(b) supports an efficient process that recognises that Powerco has the in-house expertise to readily assess compliance with ECP34, meaning the Council is less likely to be put to any administrative cost in carrying out its own assessment.

69 However, as noted above, if the references to ECP34 and Powerco compliance review are not acceptable to the Council, Powerco is open to alternative wording. For example:

69.1 The standard could reflect a simpler, standardised 10m (for example) setback buffer from electricity infrastructure. Such a standard would be less nuanced and risk based than ECP34, but may simplify compliance requirements.

69.2 Instead of a report approved by Powerco, the standard could require evidence that an ECP34 compliance report had been 'provided for comment to' the asset owner, with confirmation from the applicant that no response indicating non-compliance had been received from the asset owner.

70 Powerco is happy to work with Council officers on alternative wording.

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<sup>36</sup> Officer's Reply Evidence, at [87].

### **Council's recommendation**

- 71 The Council's preferred option is that a new advice note is included in section 10.3 and 14A.4.1 of the District Plan.<sup>37</sup> For the reasons set out above, this is not the most appropriate way to address Powerco's concerns as:
- 71.1 An advice note is not binding; and
- 71.2 As noted by Mr Scholfield, an advice note may go unnoticed and be inadvertently (or intentionally) ignored.
- 72 While there is a lack of direct case law on the use of advice notes in district plans, decisions considering advice notes on resource consents emphasise that they should be used sparingly and for information purposes only.<sup>38</sup> Further, advice notes should not purport to create obligations or give directions.<sup>39</sup> The case law aligns with the common understanding of advice notes as providing non-binding guidance and information only.
- 73 Powerco expects that the advice notes proposed in the s42A Report will be understood in this light, as providing non-enforceable guidance, even if the words of the advice refer to 'mandatory compliance'. Mr Scholfield's evidence records the expense Powerco was put to when a building in Tauranga was constructed in contravention of ECP34, despite an advice note in the Tauranga City Plan.
- 74 As noted above, prudent developers will assess, and ensure, the compliance of structures with ECP34, regardless of the provisions of the District Plan. Less prudent developers are not likely to pay close attention to advice notes, but *will* assess whether a resource consent is required and be motivated to ensure compliance with ECP34 to avoid consent requirements. The inclusion of a new standard in Section 14A.4.2 (Other Standards) of the District Plan that requires compliance with ECP34 would provide a clear and binding development standard that would ensure public safety.

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<sup>37</sup> Section 42A Report - Section 14a - Ōmokoroa And Te Puke Medium Density Residential Part 2 - Definitions, Activity Lists & Activity Performance Standards – Topic 29, pages 77-79.

<sup>38</sup> *Te Maru o Ngati Rangiwewehi v Bay of Plenty RC* EnvC A017/09, at [13].

<sup>39</sup> *Te Runanga O Te Rarawa and Adams (Trustee) v Northland Regional Council* ENC Auckland A121/09, 17 November 2009, at [16].



## **CONCLUSION**

75 Accordingly, Powerco respectfully seeks that the Independent Hearing Panel accepts, and recommends, the proposals put forward by Gary Scholfield on behalf of Powerco.



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