

15 June 2018

James Blake-Palmer
Utilities Disputes Limited
PO Box 5875
WELLINGTON 6140

Sent via email: submissions@utilitiesdisputes.co.nz

Dear James

Recommendations from the 5-year review and other proposed changes

First Gas Limited welcomes the opportunity to make a submission to Utilities Disputes Limited (“Utilities Disputes”) on its consultation paper “*Independent 5-year review of Utilities Disputes Limited: Recommendations from the review and other proposed changes*”.

Support decision to review levies through a separate consultation process

We support the Utility Disputes Board’s decision to further analyse the current levy system and undertake modelling of alternate levy options.¹ We consider that it is important that the levy system remains fit for purpose, and allows Utilities Disputes to:

- Recover costs in a timely manner;
- Incentivise efficiencies; and
- Only charge providers their reasonable attributable share of those costs.

We look forward to considering the results of the modelling and engaging in the future consultation on this matter.

Do not support proposals to extend the jurisdiction of the Scheme

As noted in our prior submission,² First Gas does not support the proposals to remove several exclusions from the disputes scheme.³ We consider that these exclusions exist because

- The matters excluded from the Scheme are more appropriately considered in other forums, by those parties with the knowledge and experience to do so; and
- The exclusions reflect matters already covered by other entities or Acts. The exclusions therefore ensure there is no duplication by Utilities Disputes of work completed by other agencies.

To illustrate these points, we have provided further information on the alternative avenues consumers currently have to seek resolution of disputes. This information is included in **Attachment 1** of this submission, along with our response to the consultation questions.

¹ Page 9 of Utility Disputes’ consultation paper.

² *Proposed changes to the Energy Complaints Scheme*, First Gas submission to Utility Disputes Limited, 6 April 2018, <http://firstgas.co.nz/wp-content/uploads/First-Gas-Submission-UDL-5yr-review-1.pdf>

³ Formerly the Electricity and Gas Complaints Commissioner Scheme, EGCC and now Utility Disputes.

Contact person

If you have any questions regarding this submission, please contact me on 06 215 4046 or via email at lynette.taylor@firstgas.co.nz, or Karen Collins, Regulatory Manager, on 027 472 7798 or karen.collins@firstgas.co.nz.

Yours sincerely

A handwritten signature in black ink, appearing to read 'L. Taylor', with a long horizontal flourish extending to the right.

Lynette Taylor
Regulatory Advisor

Attachment 1: Response to consultation questions

Principle	#	Question	First Gas' response
Accountability	1	Do you have any further comment on the Board's approach to naming providers?	<p>We agree that if providers breach the scheme rules, then they should be named. However, we consider that is unnecessary to name providers who have breached any scheme guidelines. Parties should only be held accountable for breaches of the rules, not voluntary guidelines, and naming them twice for a single breach is an unnecessary duplication.</p> <p>For continuous improvement purposes, we think it would be useful for Utility Disputes to regularly update or establish new guidelines to reflect the learnings from the breaches occurring throughout the year.</p>
Natural justice	2	Do you have any further comment to the Board retaining the reference to natural justice in the scheme rules?	We support the Board's decision to retain the explicit reference to natural justice in the scheme rules.
Performance standards	3	Do you have any further comment to the Board removing the performance measures relating to cost per case and self-reporting of compliance?	<p>We support the removal of the current performance standards as all parties agree that they are not effective measures of performance.</p> <p>We encourage the development of performance standards that are more meaningful and contribute to the ongoing efficiency of Utilities Disputes. We would welcome the opportunity to engage on this matter further.</p>
Land complaint exclusions	4	Please add further thoughts on the land complaint exclusions here. Please provide references to specific changes where appropriate and ensure you provide any further information that may be of relevance to the Board's consideration of these changes.	<p>First Gas strongly recommends that the land complaint exclusions be retained in the scheme. We consider that these exclusions are necessary as:</p> <ul style="list-style-type: none"> • Consumers already have suitable avenues to resolve land complaints, and consideration of land disputes is already covered by existing Acts and regulatory bodies. Therefore, bringing land complaints into Utility Disputes' jurisdiction creates a duplication of process; and • Land complaints usually cover complex and difficult issues that are best dealt with by agencies with experience in such matters and understand the precedents set on land matters. <p>We expand on these points below.</p>

Principle	#	Question	First Gas' response
			<p>Existing avenues to resolve land disputes</p> <p>We understand that Utilities Disputes is concerned that retaining the exclusions will mean that the dispute resolution scheme is not meeting its purpose, being that:</p> <p><i>“any person (including consumers, potential consumers, and owners and occupiers of land, but excluding members of the scheme) who has a complaint about a member has access to a scheme for resolving the complaint.”⁴</i></p> <p>At present, land-related complaints can be considered under several Acts, regulatory agencies and courts of law. For gas related land complaints, these avenues include the Gas Act 1992, the Resource Management Act 1991 (the RMA), the Public Works Act 1981 (the PWA), the Environment Court, the Maori land court, and the National Code of Practice for Utilities Operators' Access to Transport Corridors.</p> <p>Given these existing avenues are available, we do not believe it is necessary for a consumer complaint to also be heard under the energy complaints scheme. This approach is supported by the scheme's general rule 18(a) that allows for Utilities Disputes to refuse to deal with a complaint if “there is a more appropriate place to deal with the complaint”. We do not consider that it is an efficient use of Utilities Disputes time and resources to duplicate the work of others.</p> <p>Complexity of land disputes</p> <p>From our perspective, land disputes often cover complex and difficult issues that should be dealt with by agencies who have knowledge and experience in these matters. Precedents will exist and be developed as complaints are heard over time, and it is important that any decision-making body take note of these precedents. Subsequently, we agree with the Review finding that alternative dispute resolutions schemes:</p>

⁴ Page 64, Independent Review of Utilities Disputes Limited 2017, Queen Margaret University Consumer Dispute Resolution Centre

Principle	#	Question	First Gas' response
			<p><i>“are not well place to settle legal controversies as they are not legal bodies and it is not the place of alternative dispute resolution scheme to make legal precedents. Legal precedents are properly made by courts.”⁵</i></p> <p>From our discussions, we understand that Utility Disputes currently does not have the suitable resources to deal with land complaints, therefore raising concerns about its capability to make decisions consistent with those made in the existing forums such as the Environment Court.</p> <p><u>Support for safe guard measures</u></p> <p>While we believe there is a strong case for retaining the land exclusions, should the Utilities Disputes Board remove the exclusions, we strongly support the inclusion of the five safeguards recommended by the Review.⁶</p> <p>One of the safeguards relates to a recommendation that a review team should review the schemes operation after a period of six months to determine if there should be any further changes to the scheme rules. We would endorse such a review but recommend that the review team be extended to include representatives from the Gas Industry Company (GIC), Ministry for Business, Innovation and Employment (MBIE), WorkSafe NZ, and the Commerce Commission. These other agencies have experience that would be relevant to this review and would provide useful insight as some of the exclusions fall within their ambit.</p>
		Exclusion 1.1	<p>We recommend that exclusion 1.1⁷ be retained, as First Gas considers that the enforcement of the Gas Act via the courts is a more suitable forum for these matters.</p> <p>First Gas proactively works with all land owners that host our gas assets, with the intention that there would never be a complaint to answer. However, a landowner can currently seek that a complaint be heard in a court of law. These courts are the suitable forum for breaches of the Gas</p>

⁵ Page 26, Independent Review of Utilities Disputes Limited 2017, Queen Margaret University Consumer Dispute Resolution Centre.

⁶ Pages 66 – 67, Independent Review of Utilities Disputes Limited 2017, Queen Margaret University Consumer Dispute Resolution Centre.

⁷ Whether lines equipment was lawfully fixed or lawfully installed in terms of section 22 of the Electricity Act 1992 in respect of Electricity Works and section 23 of the Gas Act in respect of gas pipelines.

Principle	#	Question	First Gas' response
			<p>Act and courts will make decisions that follow legal precedent. This view is consistent with the Review that states:</p> <p><i>'While alternative dispute resolution schemes may routinely use and refer to law in their decisions, they are not well placed to settle legal controversies as they are not legal bodies and it is not the place of alternative dispute resolution schemes to make legal precedents. Legal precedents are properly made by courts'.⁸</i></p>
		<p>Exclusion 1.2</p>	<p>As outlined in our response to exclusion 1.1, we recommend that this exclusion be retained as there is a more suitable forum for these matters to be considered.</p> <p>At present, First Gas holds easements for equipment fixed in, over, under or across land, and would consider any matter raised with us on a case by case basis. If we were unable to resolve the dispute, the landowners would have the following avenue of recourse:</p> <ul style="list-style-type: none"> • They may raise matters with the Environment Court; or • If the land is Maori land, the matter may be raised in the Maori land court. <p>We consider these courts to be the most suitable forum for any matter relating to rights for equipment to be held on land.</p>
		<p>Exclusion 1.3</p>	<p>We recommend retaining exclusion 1.3⁹ as we believe the court system remains the appropriate place for such matters to be heard.</p> <p>Ownership of our assets has far reaching consequence for our networks and we note that determining ownership of assets, particularly older assets, can be complex as absolute definitive evidence may not be available. Currently, any dispute over the ownership of lines equipment would be subject to a hearing before the courts (like other disputes over other forms of asset ownership), and decisions made would be binding and aligned with precedent.</p>

⁸ Page 26, *Independent Review of Utilities Disputes Limited 2017*, Queen Margaret University Consumer Dispute Resolution Centre.

⁹ Whether we own the lines equipment constructed before, or construction commenced before, 1 October 2006.

Principle	#	Question	First Gas' response
			<p>If Utility Disputes could hear disputes of this nature, it would not be bound to follow any legal precedent or rulings. This could provide conflicting decisions and would be a less robust process for both parties involved.</p> <p>Should this exclusion be removed, we strongly agree with the recommendation of the Review that the test-case clause be retained.</p>
		Exclusion 1.4	<p>We recommend that exclusion 1.4 be retained. These matters are covered with provisions in the National Code of Practice for Utilities Operators' Access to Transport Corridors. It does not seem an efficient or practical use of Utilities Disputes' resources to duplicate this work.</p>
		Exclusion 1.5	<p>We recommend this exclusion¹⁰ be retained as there is a more suitable forum for these matters to be considered.</p> <p>As an example, First Gas will occasionally seek to install equipment on private land. We will negotiate an easement or lease over the land following the requirements under the Land Transfer Act 1952. The easement supports our application to install and maintain lines equipment. This may occur under the Resource Management Act 1991 (the RMA) or the Public Works Act 1981 (the PWA).</p> <p>First Gas works closely with land owners to negotiate easements that are fair and reasonable. We are normally installing assets with a long life and are therefore investing in a substantive long-term relationship with land owners. Any land access agreement tends to have a reasonable value attached to it and land owners will usually seek their own legal and valuation advice.</p> <p>Whilst we have never had negotiations with land owners reach an impasse, if they were to do so, landowners can seek redress through the court system.</p> <p>Matters pertaining to the RMA and PWA are governed by provisions under those Acts and support by legal precedent. Disputes are heard by the Environment Court. Land owners may also request a hearing under the land valuation tribunal if the matter relates to the PWA.</p>

¹⁰ Matters relating to or arising from obtaining an easement.

Principle	#	Question	First Gas' response
			Any dispute is likely to be technical, complex and potentially affected by, or affecting legal precedent. We suggest the Environment Court remains the appropriate forum for these disputes.
		Exclusion 1.6	No comment.
		Exclusion 1.7	<p>We recommend that exclusion 1.7¹¹ be retained. It is more efficient for statutory bodies such as the Commerce Commission and the Gas Industry Company, with the knowledge and experience of the gas networks to determine the adequacy and reasonableness of maintenance requirements.</p> <p>First Gas maintains its gas networks is to ensure that they operate in a safe manner and can reliably serve our customers. We report our maintenance plans for the next 10 years annually in our asset management plan (AMP). The AMP is part of the suite of assets information required to be disclosed by the Commerce Commission under Part 4 of the Commerce Act 1986. The AMP explains our approach to the life-cycle management of our assets including maintenance. It is available on our website¹² or by contacting First Gas.</p> <p>Alongside our own maintenance plans, as a gas network operator we are governed by requirements under the GIC and various New Zealand safety standards. In particular, Standards NZS 5258 and AS/NZS 4645 Gas Distribution guide the operation, construction and commissioning of the distribution pipelines while Standard AS/NZS 2885 Pipelines – Gas and liquid petroleum guides the operation, construction and commissioning of the transmission pipelines. The GIC and standards specify the minimum requirements to ensure the equipment and processes are maintained to a safe and effective level. We suggest these mechanisms ensure maintenance occurs to a level that would be considered adequate or reasonable. Regular audits are completed by a third party to ensure First Gas is meeting the requirements.</p> <p>We consider any work undertaken on these matters by Utility Disputes would be a duplication of this work, with Utility Disputes unlikely to have</p>

¹¹ Whether the maintenance programme carried out by a Lines Company on Lines equipment is adequate or reasonable.

¹² <http://firstgas.co.nz/about-us/regulatory/>

Principle	#	Question	First Gas' response
			the skills needed to consider the matters as robustly as the existing government agencies and standards we operate under.
		Exclusion 1.8	No comment.
		Exclusion 1.9	<p>We recommend that exclusion 1.9¹³ be retained as there is a more suitable forum for these matters to be considered</p> <p>These matters are generally subject to commercial agreements and negotiated as part of the process when establishing an easement. Landowners generally seek separate legal advice and often their own valuations to aid in the negotiation process. The Gas Act 1992 establishes the process to follow in the default of agreement between parties.</p> <p>As with any contractual agreement, matters that are under dispute are best considered in the courts. It would create great uncertainty if Utilities Disputes could overturn commercial agreements.</p>
		Exclusion 1.10	<p>We recommend this exclusion¹⁴ is retained as these matters are already under the purview of other mechanisms and consumers already have several means of redress:</p> <ul style="list-style-type: none"> • Lines companies must provide an agreed level of service (quality standards) as set out by the Commerce Commission in their Default or Customised Price-Quality Paths (DPP/ CPP). The Commerce Commission acts in the best interests of consumers and considers the level of service consumers should receive for the price they pay; • The GIC monitor the quality of gas we supply, and this is based on an industry standard. It is also subject to commercial contracts. the reasonable quality of gas and service is not a simple consideration and Utilities Disputes risks setting precedents that disrupt the other regulatory mechanisms and application of other Acts;

¹³ Exclusion 1.9 refers to matters where changes to equipment carried out under the powers of the Gas Act 1992 have injuriously affected land in terms of section 51(1) of the same Act. This includes disputes about that amount of compensation that may be payable in relation to such injurious affection. Excepted from the exclusion are any disputes around matters of damage to land or property.

¹⁴ Exclusion 1.10 relates to matters concerning the quality of electricity or gas supplied by a lines company or any interruption in that supply, and the provision of lines services.

Principle	#	Question	First Gas' response
			<ul style="list-style-type: none"> Gas is an alternative fuel source and we are highly motivated to ensure we uphold our commercial agreements with our customers and our reputation with end consumers. Our commercial agreements specify the service provided; If consumers have an issue they consider we have not resolved adequately, they have several avenues of redress open to them including raising the issue with the Commerce Commission; and A further avenue open to consumers is to consider raising a matter under the Consumer Guarantees Act (CGA) managed by the Consumer Protection segment of MBIE. The CGA says that supply should be as safe and reliable as a reasonable consumer would expect it to be, and the quality of gas or electricity supplied must be such that it can be consistently used for the things that a reasonable consumer would expect to use gas or electricity for. There is precedent to what a 'reasonable consumer' would expect. <p>If this exclusion were to be removed, we would have some concern that Utilities Disputes may inadvertently make a ruling that undermines rulings from other agencies, legal precedent, or commercial contracts.</p>
		Exclusion 1.11	No comment.
		Exclusion 2.1	No comment.
		Exclusion 2.2	No comment
Mechanism to ensure Utilities Disputes can refer, and, where appropriate consider complaints about providers without delay	5	Do you agree with the Board's approach and wording to implementing a mechanism to ensure Utilities Disputes can refer, and, where appropriate, consider complaints about providers without delay?	No comment.