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Email: solrlevyteam@ofgem.gov.uk

20 October 2023

Dear Colleague

Termination of the True-up Agreement between ScottishPower Energy Retail Limited and Ofgem in relation to Orbit Energy Limited

On 7 October 2022, ScottishPower Energy Retail Limited ("ScottishPower") submitted a claim for a Last Resort Supply Payment (LRSP) for Ofgem's consent under Supply Licence Standard Licence Condition (SLC) 9. ScottishPower sought to recover additional costs incurred in complying with a Last Resort Supply Direction¹ to act as Supplier of Last Resort (SoLR) to customers of the former Orbit Energy Limited ("Orbit").

On 4 November 2022 Ofgem published a minded to position in relation to that claim for consultation.²

This claim was subsequently withdrawn by ScottishPower. This letter sets out our updated minded-to position to terminate the True-up Agreement between ScottishPower and Ofgem in relation to Orbit. We are minded-to determine that the termination of the True-up Agreement will take effect on the date of publication of our final decision.

Minded-to Position to Terminate the True-up Agreement

Our minded-to intention to terminate the True-up Agreement is a result of ScottishPower withdrawing its claim for an additional LRSP in relation to acting as SoLR for customers of the former Orbit Energy for costs relating to:

- Additional wholesale costs incurred as a result of commitments to supply energy to SoLR customers;
- Financing costs incurred on becoming a SOLR.

¹ [Direction to appoint ScottishPower Energy Retail Limited as Electricity Supplier of Last Resort](#) and [Direction to appoint ScottishPower Energy Retail Limited as Gas Supplier of Last Resort](#)

² https://www.ofgem.gov.uk/sites/default/files/2022-11/ScottishPower%20-%20SoLR%20levy%20true-up%20minded-to%20position%20-%20Orbit%20Energy_0.pdf

ScottishPower notified Ofgem of its intention to withdraw its claim for an additional LRSP and to voluntarily absorb the costs included in the claim submitted on 7 October 2022, and for which Ofgem had published its minded-to position for consultation on 4 November 2022.³ However, in accordance with the temporary multi-claim process introduced in 2021, we have assessed the claim in its entirety (including the initial claim) using the audited evidence provided to ensure that no overpayments have been made to ScottishPower.

In coming to our minded-to position to terminate the Agreement, we have assessed the entirety of the claim in accordance with our policy decision on the true-up process, published 21 September 2022⁴, and consistent with our published *Guidance on supplier of last resort and energy supply company administration orders*.⁵ In addition, in making this decision, we have had regard to Ofgem's principal objective of protecting the interests of current and future energy consumers⁶, the public sector equality duty⁷ relevant licence provisions, and the particular circumstances of the case.

As part of that faster multiple-claim levy process, each of the SoLRs entered into a True-up Agreement with Ofgem. Under the True-up Agreement between ScottishPower and Ofgem, Subsequent Levy Claims and a final True-up claim may be made following the Initial Levy Claim. Clause 5 of the True-up Agreements sets out what is required for a final True-up claim.

Clause 2.2 of the True-up Agreements sets out that the agreement will terminate on the earlier of the following:

- "(a) Where any Valid True-up Amount is an Excess, the date upon which the SoLR has repaid in full the total of any Excess resulting from the True-ups of all Last Resort Supply Directions covered by this Deed;*
- (b) Where any Valid True-up Amount is a Deficit, the date of the last of the Valid Final Levy Claim(s) covered by this Deed; and*
- (c) The date of termination specified in any notice of termination of this Deed issued by the Authority."*

Following our assessment of the evidence provided by ScottishPower, we are satisfied that no overpayments have been made in the initial claim. We are also satisfied that the information provided to us as part of ScottishPower's withdrawn October 2022 claim met the requirements of a final True-up claim set out in Clause 5 of the True-up Agreement and provided sufficient assurance of the costs incurred and claimed.

Due to the withdrawal of the claim for any further LRSP, and with no Excess to be repaid or Deficit to be recovered by ScottishPower, we are publishing this notice of termination under Clause 2.2(c) of the True-up Agreement to take effect from the date of its publication.

Nothing in this decision should be taken as setting a precedent for any future claims, which would be considered on their merits and on a case-by-case basis, taking into account all relevant circumstances.

³ https://www.ofgem.gov.uk/sites/default/files/2022-11/ScottishPower%20-%20SoLR%20levy%20true-up%20minded-to%20position%20-%20Orbit%20Energy_0.pdf

⁴ <https://www.ofgem.gov.uk/publications/decision-last-resort-levy-claims-true-process>

⁵ https://www.ofgem.gov.uk/system/files/docs/2016/10/solr_revised_guidance_final_21-10-2016.pdf

⁶ s4AA Gas Act 1986 and s3A Electricity Act 1989

⁷ Equality Act 2010 Part 11 Sections 149 to 157 [Equality Act 2010 \(legislation.gov.uk\)](https://www.legislation.gov.uk/ukpga/2010/154/part_11)

An overview of ScottishPower's LRSP claim together with the reasons for decision with respect to this claim are set out below.

Background

The SoLR process

Electricity and gas supply is a competitive activity in Great Britain. While competition has the potential to bring many benefits to consumers, in a competitive market, companies that are not operating efficiently may fail. This applies as much in relation to the gas and electricity supply markets as it does to other markets.

It is Ofgem's statutory duty to protect customers' interests when suppliers fail. When a supplier fails, our focus is to ensure continuity of supply for its customers and to minimise wider negative impacts on the market.

Ofgem can ensure continuity of supply to the failed supplier's customers and minimise these wider negative effects by appointing a SoLR, which is issued with a Last Resort Supply Direction requiring it to supply the failed supplier's customers at very short notice.⁸

Failed Supplier event

On 30 November 2021, we appointed ScottishPower as the SoLR for Orbit Energy gas⁹ and electricity¹⁰ customers, following its announcement that it had ceased trading. This followed an appointment process aimed at getting the best deal for consumers. We outlined the material factors behind our decision to appoint ScottishPower as the SoLR to those customers in our decision letter published on 18 March 2022¹¹.

Last Resort Supply Payment

Under SLC 9.1, SoLRs are entitled, with Ofgem's consent, to make a claim for a Last Resort Supply Payment ("LRSP") from each Relevant Gas Transporter and Electricity Distribution Operator ("network operators").

SLC 9.4 provides that the total amount of the LRSP must not exceed the amount by which the total costs (including interest on working capital) reasonably incurred by the SoLR in supplying customers under the Last Resort Supply Direction and a reasonable profit plus any sums paid or debts assumed by the SoLR to compensate customers in respect of any customer credit balances plus any additional (actual or anticipated) interest and finance costs associated with a financing arrangement approved under SLC 9.7C are greater than the total amounts recovered by the SoLR through charges for that supply.

⁸ The obligation for a supplier to comply with a LRSD derives from standard licence condition 8 of each supplier's gas and electricity supply licences and is intended to ensure a universal service for Great British energy consumers (for further information on this universal service, see Articles 3(3) of the EU Directives 2009/72/EC and 2009/73/EC).

⁹ [Direction to appoint ScottishPower Energy Retail Limited as Electricity Supplier of Last Resort](#)

¹⁰ [Direction to appoint ScottishPower Energy Retail Limited as Gas Supplier of Last Resort](#)

¹¹ <https://www.ofgem.gov.uk/publications/appointment-scottish-power-energy-retail-ltd-supplier-last-resort-orbit-energy-ltd>

SLC 9.6 makes clear that Ofgem may determine that an amount other than the one calculated by the SoLR is a more accurate calculation of the relevant amount and, in such cases, the amount specified by Ofgem must be treated as the relevant amount when the licensee submits its claim to each relevant electricity or gas network licensee in accordance with SLC 9.8.

LRSPs are paid for by the relevant network operators, who then recover the cost through charges to suppliers. SLC 38B of the Electricity Distribution Licence and Standard Special Condition A48 of the Gas Transportation Licence set out the details of this.

Multi-stage claims

During winter 2021/22 we introduced a number of changes to the process for making LRSP claims, which were designed to ensure that the SoLR process continues to protect consumers in the current market conditions. The changes included the temporary introduction of a faster, multiple-claims process whereby SoLRs are able to submit more than one claim in relation to each Last Resort Supply Direction.

This involves SoLRs submitting an 'initial claim' for costs faced in serving SoLR customers (typically wholesale commodity costs) in the period immediately after appointment. SoLRs may then follow this claim with a subsequent claim (or claims) for any additional and otherwise unrecoverable costs reasonably incurred under their SoLR Direction. We refer to these additional claims as 'true-up' claims for additional costs reasonably incurred during the relevant period. SoLRs entered into a 'True-up Agreement' with Ofgem to support the faster process. Initial claim consents, subsequent claims and true-up claims are conditional on SoLRs complying with the True-up Agreement. The true-up process is intended to reconcile suppliers' initial claims with actual costs incurred and determine any additional payments or repayments that should be made.

On 23 June 2022, we issued a consultation seeking views on our 'minded-to' positions on the fair approach to reflecting the costs suppliers faced in providing energy to customers after being appointed as a SoLR between September 2021 and December 2021. A decision document was published on the 21 September 2022¹² that set out our policy decisions on the approaches SoLRs should take with regards to these true-up claims. We applied these policies in order to reach our minded-to position on this claim, which we published for consultation on 4 November 2022.

Decision-making process

Under SLC 9.5, Ofgem must decide whether it is appropriate in all the circumstances of the case for the SoLR to make the claim notified to it in accordance with Standard Licence Condition 9.3. In making this decision Ofgem has considered evidence provided by ScottishPower, its own knowledge of the energy markets, and responses to consultation on the minded-to position on this claim.

¹² <https://www.ofgem.gov.uk/sites/default/files/2022-09/Decision%20on%20the%20last%20resort%20levy%20claims%20true-up%20process.pdf>

In exercising this decision-making function Ofgem has had regard to the interests of current and future consumers of gas and electricity, and has considered the public sector equality duty.

Ofgem published a minded-to position on this claim and invited consultation responses. ScottishPower was offered the opportunity to meet with us to clarify aspects of the minded-to position during the consultation period. In reaching its decision Ofgem has taken into consideration any additional evidence provided by ScottishPower during the consultation period and any consultation responses received in relation to the published minded-to position.

In reaching its minded-to position Ofgem carried out:

- a. A quantitative check of ScottishPower's methodology for each cost item claimed. This included determining how each total cost item was calculated based on data sent to us by ScottishPower and ensuring these costs were in line with commitments ScottishPower made at the time of its SoLR appointment;
 - b. A true-up and cross check of any evidence that may result in a change to the initial claim made by the SoLR;
 - c. Undertaking validation of some assumptions with other data sources, where appropriate;
 - d. Review and audit of the calculations made in the published minded-to position; and
 - e. A qualitative and quantitative assessment of the claim for costs related to wholesale costs in accordance with our criteria and methodology, set out below.
- **Additional:** whether the costs claimed are additional to the costs to the SoLR of existing customers. In addition, we consider whether these costs would have been expected at the time of the SoLR's bid and whether any commitments were given in relation to these costs in their competitive SoLR bid.
 - **Directly incurred as part of the SoLR role:** whether the costs were incurred as a result of taking on customers in an emergency situation as opposed to normal customer acquisition routes.
 - **Otherwise unrecoverable:** whether the SoLR could have recovered the costs through other means. It would not be appropriate for us to allow the SoLR to claim for costs it could have recovered – or reasonably be expected to recover – through the administration process or customer charges, for example.
 - **Economic:** whether the SoLR had made all reasonable efforts to avoid the cost in the first instance or absorb the cost.

Overview of ScottishPower's claims

ScottishPower indicated at the time of our SoLR appointment process that it would not waive its right to make a claim for a LRSP. However, ScottishPower had made Ofgem aware that there was an escrow agreement in place with the administrator under which

ScottishPower has a right to claim the value of credit balances. At the time of the claim submission, ScottishPower had no access to these funds and notified Ofgem that, in the circumstances where it does gain access to the escrow funds, it would withdraw its claim for an additional LRSP and voluntarily absorb the additional wholesale and working capital costs.

In November 2022, ScottishPower notified Ofgem that these conditions had been met and it was now seeking to withdraw its additional LRSP claim, agreeing to voluntarily absorb these costs.

Had ScottishPower not withdrawn the claim for an additional LRSP, access to the escrow funds for the cost of honouring credit balances would not have impacted Ofgem's decision as ScottishPower had not sought to recover the cost of credit balances through the SoLR levy.

The initial claim(s) were consented to on 17 December 2021.¹³ Consistent with the terms of that consent and the True-up Agreement between ScottishPower and Ofgem, we have taken that claim and its supporting evidence into consideration in reaching our decision on this claim to ensure that there was no overpayment within the initial claim.

Summary of Claim Assessment

In line with the True-up Agreement between Ofgem and ScottishPower, as well as Ofgem's principal objective to protect current and future consumers, we have assessed the evidence provided by ScottishPower prior to the withdrawal of its October 2022 claim to satisfy the condition that ScottishPower had not been overcompensated in its initial claim.

The reasons for the decision are set out below. This decision should not be taken as setting a precedent for any future claims, which would also be considered on their merits and on a case-by-case basis, taking into account all relevant circumstances.

Table 1: Summary table of initial claim, true-up and minded-to position on final claim amounts.

Item	Cost	Initial Claim	Withdrawn claim	Minded-to deductions	Decision on this claim
1	Wholesale	£41,322,896.59	£2,641,017.48	£1,842,211.34	N/A
2	Working capital	-	£698,949.34	-	N/A
Total:		£41,322,896.59	£3,339,966.82	£1,842,211.34	N/A

Reasons for decision

General

Ofgem's general preference is for a SoLR not the make a claim for a LRSP for costs it has incurred carrying out its role. However, we do recognise that circumstances may exist which would justify a departure from this general rule. In our assessment of the claims,

¹³ <https://www.ofgem.gov.uk/publications/faster-solr-levy-process-consents-last-resort-supply-payments>

consideration has been given to the interests of current and future consumers, particularly those in more vulnerable circumstances.

Cost category: Wholesale

In our published policy decision on the true-up process¹⁴ we explained that all SoLRs appointed in the period from September – December 2021 would be able to make claims to recover additional and otherwise unrecoverable wholesale costs reasonably incurred relating to energy delivered up until 31 March 2022 or until the end of their 6-month Last Resort Supply Direction, whichever is later. This was primarily necessary as a result of a period of extreme wholesale energy price volatility and record high prices, resulting in wholesale direct fuel costs often far exceeding those assumed in the default tariff price cap over the period. The bulk of these costs were considered in the December 2021 initial claim, by which time most initial wholesale energy purchases had taken place.

In this assessment we have analysed the information provided by suppliers, to:

- Assess whether costs being claimed for are consistent with the criteria set out earlier in this letter and our September 2022 Decision on the True-up process;
- Assess the reasonableness of assumptions made and decisions taken, including for example demand forecasting and hedging strategies, against the criteria we consider in assessing claims;
- Assess the specifics of the reported wholesale market trades, including trade date, contract type, price, and volume. Specifically, we have considered whether trade prices are consistent with market benchmarks and price assessments;
- Assess cost per MWh and cost per customer to facilitate comparisons between claims; and,
- Assess the amounts deemed to have been recovered from customer charges, including the applicability of various price cap allowances, and hence offset against the wholesale costs incurred.

Decision

On 17 December 2021, we consented to ScottishPower claiming £41,322,896.59 in relation to Orbit, the full amount of which related to wholesale costs¹⁵. On 7 October 2022 ScottishPower submitted a True-up claim of £2,641,017.48 for wholesale costs, which was subsequently withdrawn with ScottishPower voluntarily absorbing these costs.

As part of our assessment of this claim, and in line with our True-up process, we reviewed the full amount claimed for wholesale costs; this included the amount claimed and consented to in December 2021.

We consider that the amount already consented to in December 2021 is consistent with our criteria. Following the True-up assessment, we are assured that there was no overpayment in December 2021; as set out in our minded-to position¹⁶, we would have

¹⁴ <https://www.ofgem.gov.uk/sites/default/files/2022-09/Decision%20on%20the%20last%20resort%20levy%20claims%20true-up%20process.pdf>

¹⁵ [Faster SoLR levy process: consents to Last Resort Supply Payments | Ofgem](#)

¹⁶ [Last resort levy true-up claim minded-to position | Ofgem](#)

consented to ScottishPower recovering an additional £798,806.14 if it had not withdrawn its claim. This amount was revised to £799,688.07 following the minded to consultation, before ScottishPower withdrew its claim.

Table 2: Summary of claims and decision for wholesale costs

Item	Cost	Initial Claim	True-up claim	Minded-to deductions	Final deduction following assessment	Decision on True-up claim
1	Wholesale costs	£41,322,896.59	£2,641,017.48	£1,842,211.34	£1,841,329.31	N/A

Final decision on wholesale costs

Our assessment resulted in a proposed total wholesale deduction for ScottishPower of £1,841,329.31, which is £881.93 lower than the proposed deduction of £1,842,211.34 in the minded-to decision. This would have resulted in a net wholesale True-up claim of £799,688.07, as opposed to £798,806.14 as set out in the minded-to decision. As ScottishPower subsequently withdrew its claim for Orbit, we are satisfied that even with the proposed deductions made to the True-up claim submitted on 7 October 2022 of £2,641,017.48, there would have been a net positive amount consented to be paid to ScottishPower had it not withdrawn the True-up claim.

Therefore, we are satisfied that there has been no overpayment in the initial amount consented to in December 2021. Given the withdrawal of the True-up claim, the total wholesale costs approved are £41,322,896.59, as consented to in the December 2021 decision, with no further claim for additional costs.

Minded-to Position to Terminate of True-up Agreement

As a result of ScottishPower withdrawing its claim, and Ofgem's assessment of the evidence provided for both the initial and withdrawn true-up claim, we are satisfied that there is no Excess due to be repaid or Deficit due to be recovered by ScottishPower.

We are content that the information provided to us as part of ScottishPower's withdrawn October 2022 claim had met all the requirements under the True-up Agreement for a final True-up claim, and that the internal audit and declaration submitted as part of its October 2022 True-up claim provides sufficient assurance of the accuracy of the information provided to us to support ScottishPower's claim.

Under Clause 2.2(c) of the True-up Agreement entered into between ScottishPower and Ofgem, we are minded-to to publish our notification that the True-up Agreement in relation Orbit Energy is terminated effective on the date of publication of our final decision.

Next Steps

The purpose of this letter is to provide the SoLR and interested parties with an opportunity to make any representations to us, ahead of us making our final decision on

the termination of the True-up Agreement. We invite any representations by 17 November 2023. Responses should be emailed¹⁷ to solrlevyteam@ofgem.gov.uk.

We normally publish all responses on our website. However, if you do not wish your response to be made public then please clearly mark it as not for publication. We prefer to receive responses in an electronic form so that they can be placed easily on our website.

We will take into account all relevant information, including any representations we receive, and the results of our internal assurance of our assessment process in reaching our final decision on this claim. We expect to make our final decision in mid-December 2023.

Yours faithfully,

Rohan Churm
Director of Financial Resilience and Controls

¹⁷ Although we prefer responses in electronic format, responses can be posted to the address below.