

Gas and Electricity Suppliers,  
Electricity Distribution Network  
Operators,  
Gas Transporters and all other  
interested parties

Email: [solrlevyteam@ofgem.gov.uk](mailto:solrlevyteam@ofgem.gov.uk)

20 October 2023

Dear Colleague

### **Last Resort Supply Payment Claim from Octopus Energy**

On 7 September 2023, Octopus Energy Limited ("Octopus Energy") gave notice to Ofgem of its claim for a Last Resort Supply Payment (LRSP) in relation to acting as Supplier of Last Resort (SoLR) to customers of the former Avro Energy ("Avro").

Under Standard Licence Condition (SLC) 9.1 of the Supply Licence, SoLRs are entitled, provided Ofgem consents, to make a claim for a LRSP from each Relevant Gas Transporter and Electricity Distribution Operator. The claim from Octopus Energy included its calculation of the claim amount and information to support the calculation (outlined in Table 1).

This letter sets out the reasons why we are minded-to not grant consent to Octopus Energy's claim for a LRSP.

We are minded-to consent to Octopus Energy making a claim for costs incurred in complying with a Last Resort Supply Direction<sup>1</sup> relating to:

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

During winter 2021/22 we introduced a number of temporary changes to the LRSP claim process, which were designed to ensure that the SoLR process continues to protect consumers in volatile market conditions. This included the temporary introduction of a faster, multiple-claim levy process, which was intended to reduce the time taken for suppliers to submit claims and for us to make decisions on those claims. Our policy on assessing further claims under this temporary multiple-claim process was published on 21 September 2022<sup>2</sup>. On 25 May 2023 we published a further consultation on whether to end or continue the temporary multiple-claim process. In the consultation decision, published on 24 August 2023, we set out our decision to maintain the temporary process until at least

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<sup>1</sup> <https://www.ofgem.gov.uk/publications/ofgem-appoints-Octopus-Energy-energy-take-customers-avro-energy>

<sup>2</sup> <https://www.ofgem.gov.uk/sites/default/files/2022-09/Decision%20on%20the%20last%20resort%20levy%20claims%20true-up%20process.pdf>

after winter 2023/24, at which point we would again review market conditions and consult on whether the temporary process should be ended.<sup>3</sup>

As part of that faster multiple-claim levy process, each of the SoLRs entered into a true-up deed with us. Under this True-up Agreement between Octopus Energy and Ofgem, Subsequent Levy Claims may be made following the Initial Levy Claim and before a final True-up claim. We are minded-to consider this claim to be a Subsequent Levy Claim for the purposes of the True-up Agreement. This would mean that the final True-up claim would happen next year, or in the years after. This will enable Octopus Energy to submit additional LRSP claims with supporting evidence for costs that have not yet been approved by Ofgem. As a result of this, under the terms of the True-up Agreement, we will require a final True-up claim to be submitted in the future. In the meantime, we note that obligations under the True-up Agreement continue to apply and will remain in place until a final True-up claim has been finalised.

The purpose of this consultation letter is to provide interested parties with an opportunity to make any representations to us, ahead of us making our final decision. We will take such representations into account in reaching our final decision and may make changes to our minded-to position in response to such representations, if we consider it appropriate to do so.

In addition, before we make our final decision we will conduct an additional assurance process in respect of the calculations contained in our minded-to position, the results of which may also be reflected in our final decision.

We expect to make our final decision in mid-December 2023.

## **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<sup>4</sup>.

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<sup>3</sup> [Decision on ending the temporary Last Resort Supply Payment claim process | Ofgem](#)

<sup>4</sup> 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).

### Failed Supplier event

On 26 September 2021, we appointed Octopus Energy as the SoLR for Avro<sup>5</sup> gas<sup>6</sup> and electricity<sup>7</sup> 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 Octopus Energy as the SoLR to those customers in our decision letter published on 23 June 2022<sup>8</sup>.

### **Claim for Last Resort Supply Payment**

Under SLC 9.1 of the Supply Licence, SoLRs are entitled, with Ofgem's consent, to make a claim for a LRSP from each Relevant Gas Transporter and Electricity Distribution Operator.

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.

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 gas and electricity 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.

### **Our true-up decision process and methodology**

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.

The multiple-claims process involves SoLRs submitting an 'initial claim' for costs faced in serving SoLR customers (typically wholesale commodity costs) in the period immediately

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<sup>5</sup> [Ofgem appoints Octopus Energy to take on customers of Avro Energy | Ofgem](#)

<sup>6</sup> [Direction to appoint Octopus Energy Limited as Gas Supplier of Last Resort for customers of Avro Energy Limited | Ofgem](#)

<sup>7</sup> [Direction to appoint Octopus Energy Limited as Electricity Supplier of Last Resort for customers of Avro Energy Limited | Ofgem](#)

<sup>8</sup> [Appointment of Octopus Energy Limited as Supplier of Last Resort \(ofgem.gov.uk\)](#)

after appointment. Each SoLR entered a True-up Agreement with Ofgem to support this process. The True-up Agreements provide for the initial claims to be followed by an additional claim (or claims) in accordance with SLC 9. We refer to these additional claims as either a Subsequent claim or a final True-up claim. The true-up process is intended to reconcile suppliers' initial and subsequent claims with actual costs incurred and determine any additional payments or repayments that should be made at the end of the multiple-claim process.

Following consultation, on 21 September 2022<sup>9</sup> we published our policy on assessing these true-up claims and it has been applied to subsequent and true-up claims under the True-up Agreements.

In December 2022, Ofgem consented to SoLRs making Subsequent levy claims totalling £405m on the condition that these claims be treated as Subsequent levy claims under the True-up Agreements, and that the Agreements remain in place until a valid final True-up claim is made. As a result, SoLRs that submitted claims in 2022 under their True-up Agreements were still required to submit to Ofgem a final True-up claim for each Last Resort Supply Direction in respect of which they have a True-up Agreement.

In May 2023, we set out in an open letter our expectations for SoLRs' final True-up claims following the LRSP claims that were approved in December 2022 under the temporary multiple claim process.<sup>10</sup>

Under Supplier 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 SLC 9.3.

Our process to reach our minded-to position included:

- a. A quantitative check of Octopus Energy methodology for each cost item claimed. This included determining how each total cost item was calculated based on data sent to us by Octopus Energy and ensuring these costs were in line with commitments Octopus Energy 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 or subsequent claim made by the SoLR;
  - c. Undertaking validation of some assumptions with other data sources, where appropriate; and
  - d. A qualitative and quantitative assessment of the claim for costs related to wholesale and other costs in accordance with the relevant licence conditions and/or 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.

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<sup>9</sup> <https://www.ofgem.gov.uk/sites/default/files/2022-09/Decision%20on%20the%20last%20resort%20levy%20claims%20true-up%20process.pdf>

<sup>10</sup> [Update on the last resort claim process for 2023 | Ofgem](#)

- **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.

### Octopus Energy claim

Octopus Energy indicated at the time of our SoLR appointment process that it would not waive its right to make a claim for LRSP, but that it would claim for the cost of wholesale, credit balances, financing costs and certain other costs.

The initial claim(s) were consented to on 17 December 2021<sup>11</sup> and a subsequent claim was consented to on 20 December 2022.<sup>12</sup> Consistent with the terms of that consent and the True-up Agreement between the SoLR and Ofgem, we have taken those claims into consideration in reaching our minded-to position on this claim.

### **Summary of our minded-to decision**

Based on the information available and consideration of the circumstances in which the claims for LSRPs by Octopus Energy were consented to, and in accordance with the True-up Agreement in relation to customers of the former Avro, Ofgem is minded-to not consent to Octopus Energy claiming a LRSP.

Under the Supplier SLCs we are required to consider on a case-by-case basis whether in the circumstances it is appropriate for a SoLR to make a claim for a LRSP. We have set out below our reasons for our minded-to position for this case. This 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 of the particular case.

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

Item	Cost	Initial Claim Approved	Subsequent Claim Approved in 2022	This Claim as Submitted	Minded-to position on This Claim
1	Other Costs	£1,116,077.62	£18,797,414.68	£8,883,988.47	£0
	Total			£8,883,988.47	£0

<sup>11</sup> Our Notice of Reasons for granting consent to the initial claim was published on 23 June 2022: [Faster SoLR levy process: Notice of Reasons for Last Resort Supply Payment \(LRSP\) claims | Ofgem](#)

<sup>12</sup> [Decision on last resort levy true-up claims | Ofgem](#)

## Reasons for our minded-to decision

### Cost category: "Other costs"

We understand that other costs may have been incurred when undertaking activities as part of becoming a SOLR (for example, legal fees). We have used the criteria set out in our published decision on the last resort levy claims true-up process<sup>13</sup> to assess whether it is appropriate for these costs to be recovered through a LRSP. The other costs that Octopus Energy has claimed are detailed below alongside our minded-to position.

#### Minded-to decision:

Octopus Energy's claim includes £8,883,988.47 for other costs incurred when acting as SoLR for former customers of Avro. We consider that the claimed amount has not been demonstrated to be consistent with our criteria and we are minded-to not grant consent to the claim.

Table 2: Summary of claim for other costs

Item	Cost	Initial Claim Approved	Subsequent Claim Approved in 2022	This Claim as Submitted	Minded-to position on claim
	Administrator withheld funds	£1,116,077.62	£18,797,414.68	£8,883,988.47	£0

#### Rationale for decision:

##### Administrator withheld funds

Octopus Energy is requesting our permission to claim £8,883,988.47 for administrator withheld funds. The administrator withheld funds represent direct debits collected from Avro customers by a third-party debit provider after Avro failed (that is, after Octopus Energy was appointed). In previous SoLR events, such payments have been held by the debit provider and, once final billing was completed, funds collected pre-SoLR would go to the administrator and funds collected post-SoLR to the appointed SoLR. In this case, at the request of the administrator of Avro, all the funds collected pre- and post-SoLR appointment were released to the administrator. Octopus Energy has taken action to recover the funds collected in respect of energy supplied after it was appointed as SoLR.

Octopus Energy made an LRSP claim for the administrator withheld funds and legal costs in October 2022 but we did not consent to Octopus Energy claiming them at that time because of the possibility that they may have been recovered, through legal action, from the administrator for Avro.

Octopus Energy has not supplied evidence to support this claim. As we informed Octopus Energy prior to and during our assessment period, in order to duly assess the claim, we

<sup>13</sup> <https://www.ofgem.gov.uk/sites/default/files/2022-09/Decision%20on%20the%20last%20resort%20levy%20claims%20true-up%20process.pdf>

require Octopus Energy to submit supporting evidence for the costs and an explanation as to why the costs meet our criteria.

In principle, the type of cost claimed by Octopus Energy can be recovered through an LRSP claim as a result of Octopus Energy acting as the SoLR for former customers of Avro. However, without supporting evidence from Octopus Energy, we cannot make a reasoned decision on the claim. As a result, we are unable to determine whether the claim for these costs is consistent with our criteria and, in the circumstances of this particular case, we are minded to not grant consent to this portion of the claim.

### **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 this LRSP claim. We invite any representations by 17 November 2023. Responses should be emailed<sup>14</sup> to [solrlevyteam@ofgem.gov.uk](mailto: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 Octopus Energy's claim. We expect to make our final decision in mid-December 2023.

Yours faithfully,

**Rohan Churm**  
**Director, Financial Resilience and Controls**

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<sup>14</sup> Although we prefer responses in electronic format, responses can be posted to the address below.