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14 December 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).

On 20 October 2023 Ofgem published a minded-to position in relation to that claim.<sup>1</sup> Summaries of the responses to the minded-to position consultation, including any relevant general representations made in response to the consultations on other SoLR claims, can be found within this document.

In addition, we undertook further internal assurance of our minded-to position.

### **Decision to consent**

After taking into consideration the consultation responses and the results of our internal assurance process, on 14 December 2023 Ofgem consented to Octopus Energy making a LRSP claim of up to **£8,883,988.47**.

This letter is the notice of reasons for Ofgem's decision to consent to Octopus Energy making a LRSP claim from relevant network operators. Our decision will allow Octopus Energy to claim for:

- other costs reasonably incurred as a result of becoming a SoLR.

We have assessed this LRSP claim in accordance with our policy published 21 September 2022,<sup>2</sup> and consistent with our published *Guidance on supplier of last resort and energy*

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<sup>1</sup> [Last Resort Supply Payment claims minded-to positions 2023 | Ofgem](#)

<sup>2</sup> <https://www.ofgem.gov.uk/publications/decision-last-resort-levy-claims-true-process>

*supply company administration orders.*<sup>3</sup> In addition, in making this decision, we have had regard to Ofgem's principal objective of protecting the interests of current and future energy consumers<sup>4</sup>, the public sector equality duty<sup>5</sup> relevant licence provisions, and the particular circumstances of the case.

As part of the temporary multiple-claim levy process introduced in December 2021, Octopus Energy entered into a True-up Agreement with Ofgem. Under the 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 set out in the consultation in relation to this claim that we were minded to consider this claim to be a Subsequent Levy Claim under the True-up Agreement. Following this consultation, we consider that this remains a reasonable approach. Accordingly, Ofgem has made its consent to this LRSP claim conditional on confirmation by Octopus Energy that this claim is a Subsequent Levy Claim for the purposes of the True-up Agreement, and that the terms of the True-up Agreement continue to apply. 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 decision, the final True-up Claim required under the True-up Agreement will be made next year or later.

Nothing in this decision should 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.

An overview of Octopus Energy'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.<sup>6</sup>

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<sup>3</sup> [https://www.ofgem.gov.uk/system/files/docs/2016/10/solr\\_revised\\_guidance\\_final\\_21-10-2016.pdf](https://www.ofgem.gov.uk/system/files/docs/2016/10/solr_revised_guidance_final_21-10-2016.pdf)

<sup>4</sup> s4AA Gas Act 1986 and s3A Electricity Act 1989

<sup>5</sup> *Equality Act 2010* Part 11 Sections 149 to 157 [Equality Act 2010 \(legislation.gov.uk\)](https://www.legislation.gov.uk/ukpga/2010/15/part_11)

<sup>6</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>7</sup> gas<sup>8</sup> and electricity<sup>9</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>10</sup>.

### 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.

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 incurred in serving SoLR customers (typically wholesale commodity costs) in the period immediately after appointment. SoLRs may then follow this claim with 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. SoLRs entered into a 'True-up Agreement' with Ofgem to support the faster process. The Initial, Subsequent and True-up claim consents are

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<sup>7</sup> [Ofgem appoints Octopus Energy to take on customers of Avro Energy | Ofgem](#)

<sup>8</sup> [Direction to appoint Octopus Energy Limited as Gas Supplier of Last Resort for customers of Avro Energy Limited | Ofgem](#)

<sup>9</sup> [Direction to appoint Octopus Energy Limited as Electricity Supplier of Last Resort for customers of Avro Energy Limited | Ofgem](#)

<sup>10</sup> [Appointment of Octopus Energy Limited as Supplier of Last Resort \(ofgem.gov.uk\)](#)

conditional on SoLRs meeting the requirements of the True-up Agreement. 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.

Following consultation, on 21 September 2022<sup>11</sup> we published our policy on our approach to these claims. In December 2022, Ofgem consented to SoLRs making LRSP 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.

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>12</sup>

### 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 Octopus Energy, its own knowledge of the energy markets, and responses to consultation on the minded-to position on this claim.

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. Octopus Energy 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 Octopus Energy during the consultation period and any consultation responses received in relation to the published minded-to position.

In reaching its decision Ofgem carried out:

- 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;
- 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 and other costs in accordance with our criteria and methodology, set out below.

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<sup>11</sup> <https://www.ofgem.gov.uk/sites/default/files/2022-09/Decision%20on%20the%20last%20resort%20levy%20claims%20true-up%20process.pdf>

<sup>12</sup> [Update on the last resort claim process for 2023 | Ofgem](#)

- **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.

### 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 was consented to on 17 December 2021.<sup>13</sup> A Subsequent claim was consented to on 20 December 2022.<sup>14</sup> Consistent with the terms of the LRSP consents and the True-up Agreement between the SoLR and Ofgem, we have taken those claims into consideration in reaching our decision on this claim.

### **Summary of decision**

Ofgem has consented to Octopus Energy claiming a LRSP of up to **£8,883,988.47**.

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.

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<sup>13</sup> [Faster SoLR levy process: consents to Last Resort Supply Payments | Ofgem](#)

<sup>14</sup> <https://www.ofgem.gov.uk/publications/decision-last-resort-levy-true-claims>

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

Item	Cost	Initial Claim Approved	Subsequent Claim Approved	This claim	Minded-to position	Decision on this claim
1	Other costs - Administrator Withheld Funds	£0	£0	£8,883,988.47	£0	£8,883,988.47
Total:						£8,883,988.47

## General points raised in consultation

We received two responses to our minded-to consultation, one from a supplier and one confidential response that was not specifically related to our minded-to positions.

The supplier supported the minded-to positions on its claims and flagged that updated data had been submitted as requested in our minded-to positions. The supplier also queried how we will treat claims for customer credit balances refunded to customers by cheques that remain unpresented - for example, cheques that have not been cashed after five years from issue.

In response to this query, we note that further LRSP claims (subsequent claims and true-up claims) can continue to be made by a SoLR as long as the True-up Agreement remains open, which may be beyond the default five-year limitation period in SLC 9.3. Where customer credit balance cheques remain uncashed, we encourage SoLRs to be proactive in following up with customers where appropriate.

## Reasons for decision

### General

Ofgem's general preference is for a SoLR not to 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. We recognise that the costs of this claim will ultimately be paid by consumers. In our assessment of the claim, consideration has been given to the interests of current and future consumers, particularly those in more vulnerable circumstances.

In the particular circumstances of this claim, and in line with the relevant licence conditions, we consider it appropriate to allow for the additional and otherwise unrecoverable costs summarised in Table 1 to be recovered via a LRSP. We consider it to be in the interest of current and future consumers to allow this claim to ensure that the safety net provided by the SoLR process remains viable into the future, and the stability of the retail energy market is not further undermined to the detriment of all consumers.

### **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 to assess whether it is appropriate for these costs to be recovered through a LRSP. The other costs Octopus Energy has claimed are detailed below.

### Decision

Octopus Energy's claim includes £8,883,988.47 for other costs incurred when acting as SoLR for former customers of Avro. The cost claimed is for administrator withheld funds, which are direct debits for which payment by customers has been withheld by the administrator for Avro. We consider that the claimed amount is consistent with our assessment criteria and we consent to the claim. We have set out our rationale for this below.

*Table 2: Summary of claim for other costs*

Item	Cost	Initial Claim	Subsequent Claim	This claim	Minded-to position	Decision on this claim
1	Other Costs – Administrator withheld funds	£n/a	£0	£8,883,988.47	£0	£8,883,988.47

### **Administrator withheld funds**

#### Summary of minded-to position

Octopus Energy requested our consent 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 have been paid to the administrator and funds collected post-SoLR have been paid to the appointed SoLR. In this case, at the request of the administrator of Avro, some funds collected through customer direct debit payments post-SoLR appointment were released to the administrator. Octopus Energy acted to recover the funds collected in respect of energy supplied after it was appointed as SoLR.

In our minded to position, we noted that Octopus Energy had not supplied evidence to support its claim and therefore we were not able to make a reasoned decision on the claim. As a result, we were minded-to not consent to this portion of the claim. However, we noted that, in principle, this type of cost can be recovered through an LRSP claim as a result of Octopus Energy acting as the SoLR for former customers of Avro.

#### Summary of consultation responses

Octopus Energy did not submit a formal written response to the consultation on the minded-to position, and no other respondents commented on this aspect of our consultation. During the consultation period, Octopus Energy engaged in bilateral meetings with Ofgem and subsequently submitted evidence in support its claim. The

additional evidence included emails showing attempts to recover the money from the administrator and supporting narrative to explain fully why these costs fit our assessment criteria. Octopus Energy also confirmed that these funds are separate to claims for honouring customer credit balances that existed at the time it was appointed to act as SoLR for Avro.

### Rationale for decision

We have considered the evidence supplied by Octopus Energy and whether the costs Octopus Energy is seeking to claim are unrecoverable including whether Octopus Energy is able to recover some of the customer payments collected after it was appointed through the ongoing administration process for Avro. Octopus Energy has confirmed it has submitted a creditor claim to the administrators of Avro but at present has been given no indication of what it might expect to receive from the administration process or the expected timescales.

Having considered the additional evidence submitted by Octopus Energy, we are now satisfied that the administrator withheld funds costs have been incurred as a result of acting as the SoLR for former customers of Avro, are additional to those that it would have incurred in the course of its normal retail operations and have not been recoverable in any other way. Therefore, based on the information submitted as part of the claim, the additional information submitted by Octopus Energy during the consultation period, and within the particular circumstances of this case, we consider it reasonable to allow Octopus Energy to recover these costs and we have approved the full amount claimed. However, consent is conditional on repayment of any amount recovered from the administration of Avro.

In future LRSP claims we expect SoLRs to submit evidence in support of their claims at the time of submission to prevent unnecessary delays within the LRSP claims assessment process. If a supplier is unable to do so for some reason, we would expect in the future that SoLRs set out in advance the reason for this. SoLRs should fully consider what supporting evidence they will need to support any future claims and compile it accordingly ahead of submission.

### **Recovery of LRSP claim**

Octopus will be paid the amounts specified in the Ofgem's consent documents, published alongside this letter, by the relevant licensed gas and electricity network operators. This will be recovered by the network operators in proportion to the total number of nationwide gas and electricity supply points.

Yours faithfully,

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