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5 April 2024

Dear David

SoLR Levy Offset Policy Consultation

EDF is the UK's largest producer of low carbon electricity. EDF operates low carbon nuclear power stations and is building the first of a new generation of nuclear plants. EDF also has a large and growing portfolio of renewables, including onshore and offshore wind and solar generation, as well as energy storage. With over five and a half million electricity and gas customer accounts, including residential and business users, EDF aims to help Britain achieve net zero by building a smarter energy future that will support delivery of net zero carbon emissions, including through digital innovations and new customer offerings that encourage the transition to low carbon electric transport and heating.

We welcome Ofgem's commitment to strengthen the financial resilience of retail energy companies and to build a stronger, more resilient market in the interest of consumers. Customers should be protected from paying the significant costs that can be incurred as the result of a Supplier of Last Resort (SoLR) and therefore we fully support Ofgem's concept for a SoLR Levy Offset to enable a greater recovery of these costs from failed supplier assets than has been achieved to date.

EDF also agrees that where there is a Last Resort Supplier Payment (LRSP) that networks are best placed to recover LRSP costs from the failed suppliers administrator. However, in order to avoid multiple complex claims for the same LRSP, this should include Customer Credit Balances (CCBs), where these are contained within the LRSP claim.

The current design of the SoLR Levy Offset must also be much more ambitious if it is to maximise benefits to consumers as set-out below:

- **A failed supplier should be contractually liable for the costs incurred as a result of their failure whether or not there is a LRSP.** If there is not a LRSP the winning SoLR supplier should have the right to claim for reasonable and efficient costs incurred from the SoLR (including CCBs). In order to provide the equivalent legal certainty as will be afforded to networks, a multi-party deed should be agreed between suppliers, as well as between networks and suppliers.

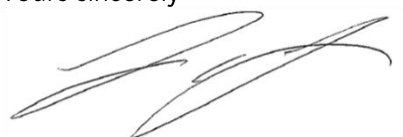
- **Creditor ranking should maximise the probability of returns.** The ranking 'unsecured creditor' in the insolvency waterfall may not maximise returns for consumers. Ofgem is best placed to analyse options but should progress the approach which most optimally balances securing the best return for consumers, against ensuring there is not a disproportionate impact on the business models of suppliers. Ofgem should provide clear evidence that the option progressed will meet this principle.
- **Customers should benefit from any costs recovered from the failed supplier's assets.** In the case of Networks, for any costs recovered, the reduction of networks costs to suppliers, will result in a reduction in customer bills. In the case of suppliers, any costs recovered from the administrator surplus to levy claimed, should also be partially or fully returned to customers. This could be achieved through a payment to Ofgem with funds redistributed via the Energy Saving Trust.

The SoLR Levy Offset will create additional administrative burdens across both suppliers and the networks, the benefit of which will only be realised if for any future failed supplier, there is a successful claim to recover costs from the failed supplier's administrator. Ofgem must therefore ensure that the design of the SoLR levy offset is robust and maximises the likelihood of cost recovery, as this will be essential if customers are to benefit as intended.

Our detailed responses are set out in the attachment to this letter. Should you wish to discuss any of the issues raised in our response or have any queries, please contact Nicola Pope, or myself.

I confirm that this letter and its attachment may be published on Ofgem's website.

Yours sincerely

A handwritten signature in black ink, appearing to read 'John Mason', written over a light blue horizontal line.

John Mason
Senior Manager - Senior Manager (Price Regulation and Market Dynamics)

Attachment
SoLR Levy Offset Policy Consultation
EDF's response to your questions

Q1. Do you agree with our problem statement?

EDF agrees that it is unfair that a failed supplier carries limited responsibility for the cost of transferring its customers to the winning SoLR supplier (and ultimately customers where there is a LRSP claim). Customers should be protected from paying the significant costs that can be incurred as the result of a SoLR and therefore we fully support Ofgem's concept for a SoLR Levy Offset that will enable a greater recovery of these costs from the failed supplier assets than has been achieved to date.

Q2. What are your overall views on whether the proposal would deliver on the aims of the SoLR levy Offset?

Partially. When designing the offset Ofgem must ensure that benefits to consumers are maximised. We agree that Ofgem's concept of a SoLR levy offset as currently envisaged could potentially protect consumers from paying some of the significant costs that can be incurred as the result of a SoLR. However the current proposal is not sufficiently ambitious as it only aims to reduce costs to consumers where a supplier makes a LRSP claim. A failed supplier should be contractually liable for the costs incurred as a result of their failure irrespective of *whether or not* there is a LRSP.

There are three scenarios to be considered:

No Levy Claim

If there is not a LRSP the winning SoLR supplier should have the right to claim for reasonable and efficient costs incurred from the SoLR (including CCBs). In order to provide the equivalent legal certainty as will be afforded to networks, a multi-party deed to reimburse SoLR costs should be agreed between suppliers, as well as between networks and suppliers.

Ofgem claim that agreements between each individual supplier are too complex, particularly as the agreements will have to be updated as suppliers enter and exit the market. However, precedent for such agreements already exist particularly within industry codes (for example, DCUSA, REC, BSC). When a party is expelled from a code their right and obligations under that code would usually cease at that point - however any rights or obligations they accrued when they were a party to the code would still exist - so, for example they would still be liable for any outstanding charges.

This approach could also help deliver on Ofgem's underlying aims of reducing consumers costs, as any SoLR sums recovered by the winning SoLR supplier from the administrator surplus to costs, could be partially or fully returned to consumers. This could be achieved through a payment to Ofgem with funds redistributed via the Energy Saving Trust.

Levy claim

We agree that where there is a LRSP that a deed between licenced suppliers and networks, and Ofgem's consent to the value (£) of the levy claim could act as a 'proof of debt' in the insolvency process, enabling networks to potentially recover some of the costs of the LRSP. These costs could then be reimbursed to customers via a reduction in networks charges on their bills. However the proposal will only deliver on this aim if the networks have a reasonable chance of recovering the LRSP costs.

As the insolvency process and SoLR process will remain distinct from one another, Ofgem must work to ensure that the LRSP process is as quick as possible, not just in terms of the winning SoLR submitting the LRSP claim in the first place, but also in terms of Ofgem turning the claim around as quickly as possible and confirming the 'debt' value. Without both parties commitment, it may be too late for networks to make a claim under the insolvency process. Ofgem should therefore set out a clear timeline that they will follow as part of their consultation decision document.

Ofgem must ensure that the network creditor ranking maximises the probability of returns. The ranking 'unsecured creditor' in the insolvency waterfall may not maximise returns for consumers. Ofgem is best placed to analyse options but should progress the approach which most optimally balances securing the best return for consumers, against ensuring there is not a disproportionate impact on the business models of suppliers. Ofgem should provide clear evidence that the option progressed will meet this principle.

For simplicity and in order to avoid multiple complex claims for the same LRSP, the Network claim should include CCBs, where these are contained within the LRSP claim.

Partial Levy claim

If a supplier makes a partial LRSP claim, recovery for SoLR costs could be sought from the administrator using a combination of both the above approaches.

Q3. What are your views on the proposed option of network companies being creditor, as opposed to other alternatives?

We agree that where there is a LRSP claim that networks are best placed to act as the creditor. For simplicity and in order to avoid multiple complex claims for the same LRSP, the network claim should include CCBs, where these are contained within the LRSP claim.

Equivalently, where there is not a LRSP the winning SoLR supplier will be the creditor (including for CCBs). In order to provide a comparable legal certainty of recovering costs, a multi-party deed that creates a contractual liability to reimburse SoLR costs, should be agreed between suppliers, as well as between networks and suppliers.

If a supplier makes a partial LRSP claim, recovery for SoLR costs could be sought from the administrator using a combination of both approaches i.e. with networks acting a creditor for LRSP and the winning SoLR supplier acting as creditor for any other reasonable and efficiently incurred SoLR costs.

Q4. What are your views on the creditors ranking in the insolvency waterfall as unsecured creditors and do you think another classification would be more appropriate?

Ofgem must ensure that the creditor ranking maximises the probability of returns. The ranking 'unsecured creditor' in the insolvency waterfall may not maximise returns for consumers. Ofgem is best placed to analyse options but should progress the approach which most optimally balances securing the best return for consumers, against ensuring there is not a disproportionate impact on the business models of suppliers. Ofgem should provide clear evidence that the option progressed will meet this principle.

Q5. What are your views on the creditor claim being contingent on a valid claim being made by a SoLR for a LRSP? Do you think that the creditor claim could be formulated or calculated in another way?

EDF agrees that where the network is the creditor the proposed approach that the claim is contingent on a valid claim being made by the winning SoLR for a LRSP is sensible.

However, in addition where there is no LRSP (or a partial LRSP) the winning SoLR supplier could also make a valid claim via a multi-party supplier deed, for the fair and efficient costs they have accrued from taking on the failed suppliers customers. A failed supplier should be contractually liable for the costs incurred as a result of their failure irrespective *whether or not* there is a LRSP.

To provide equivalent legal certainty of 'proof of debt' to the winning SoLR supplier if there is no LRSP, Ofgem should explore how they can support such claims being made and substantiated to maximise the potential for a successful administrator claim. One option would be for Ofgem to also assess and to consent the value (£) of supplier costs reasonably incurred even where there is not a LRSP claim, and whether this could similarly act as proof of debt in the insolvency process.

Q6. What are your views on the deed as it is currently drafted?

EDF has no comments on the wording of the deed between networks and suppliers as is currently drafted. However the 'Last Resort Supply Payment Liability' should include rather than exclude the cost incurred by the SoLR in honouring CCBs if this is included in a LRSP claim. This will help avoid multiple complex claims for the same LRSP.

In addition to the deed of undertaking to the networks, a new multi-party deed that creates a contractual liability to reimburse SoLR costs, should be agreed between suppliers, as well as between networks and suppliers. This will provide an equivalent legal certainty to the winning SoLR to claim for costs from the failed suppliers administrator, where they do not make a LRSP claim or only make a partial claim. Ofgem must ensure the multi-party deed between suppliers is legally binding and as such will continue to have legal bearing after a supplier's license is revoked.

Q7. What are your views on the proposed license changes for suppliers and networks? Please identify any factors relating to the drafting of license changes that we should consider at this stage.

The Supply Licence obligation to enter into a legally binding deed to reimburse SoLR costs, should include a multi-party deed between suppliers, as well as with networks. This will help provide equivalent legal certainty to the winning SoLR supplier to claim for costs where there is no LRSP claim (or a partial claim). Ofgem must ensure the multi-party deed between suppliers is legally binding and as such will continue to have legal bearing after a supplier's license is revoked. As well as being entered into by all existing suppliers once this new licence condition becomes effective, all new suppliers must also sign this as part of the process for gaining a Supply Licence.

We agree that the Network Licence conditions should include an obligation to take reasonable steps to recover the sums owing to them under the deed. Clarity should also be provided within the licence on what 'reasonable steps' means in this instance – for example submitting the claim to the Insolvency Practitioner within the requisite timeframe and pursuing the claim correctly in accordance with the insolvency regulations.

EDF also supports the LRSP multi-claim process becoming permanent under Supply Licence obligations.

Q8. Have we identified the key impacts, risks, and benefits of the SoLR Levy Offset, and are there any impacts we should give further consideration to? Do you think that overall this would be of benefit to consumers?

Yes broadly. The SoLR Levy Offset will only provide benefits to consumers if for any future failed supplier, there is a successful claim to recover costs from the failed supplier's administrator. Ofgem must therefore mitigate potential risks to ensure that the final policy is robust and as full proofed as possible. These include:

Risk the SoLR and Insolvency timelines will not align.

As the insolvency process and SoLR process will remain distinct from one another, Ofgem must work to ensure that the LRSP process is as quick as possible, not just in terms of suppliers submitting the LRSP claim in the first place, but also in terms of Ofgem turning the claim around as quickly as possible and confirming the 'debt' value to be recovered. Without

both the winning SoLR and Ofgem's commitment, it may be too late for networks to make a claim under the Insolvency process. Ofgem should set out a clear timeline that they will follow as part of their consultation decision document to mitigate this risk.

Risk the status of 'unsecured creditor' will not result in returns for consumers.

Ofgem must also provide evidence that there is a reasonable prospect of costs being recovered from the failed supplier if the networks (and potentially suppliers) have an unsecured creditor status. Ofgem state¹ that *'Based on information available from insolvency office holders' reports, we anticipate that unsecured creditors have, or will, receive a distribution in the majority of insolvency processes relating to suppliers that failed since Autumn 2021.'* However Ofgem do not provide any detail to corroborate this claim. To provide confidence that the proposal will be successful, Ofgem should provide evidence to support their assertions.

Consumer benefits should be maximised.

To maximise consumer benefits, as well as introducing a process for networks to make a claim for the LRSP from the failed suppliers administrator, a process should also be introduced to enable the winning SoLR to make a claim for reasonable costs incurred where there is no LRSP (or a partial claim). In order to provide the equivalent legal certainty as will be afforded to networks, a multi-party deed should be agreed between suppliers, as well as between networks and suppliers.

In the case of suppliers, any costs recovered from the administrator surplus to levy claimed, should also be partially or fully returned to customers. This could be achieved through a payment to Ofgem with funds redistributed via the Energy Saving Trust.

EDF
April 2024

¹ Ofgem Consultation SoLR Levy Offset page 33.