Foxglove Energy Supply Ltd

Notice of reasons under Section 49A of the Electricity Act 1989 and Section 38A of the Gas Act 1986 for the decision to make a Provisional Order under Section 25(2) of the Electricity Act 1989

1. This Notice sets out the reasons why, on 5 July 2022, the Gas and Electricity Markets Authority ("the Authority") made a Provisional Order in respect of contraventions and likely contraventions by Foxglove Energy Supply Ltd ("Foxglove"), (company number 09689035) having its registered office at 16 North Mills, Frog Island, Leicester, Leicestershire, England, LE3 5DL.

2. Foxglove is the holder of gas and electricity supply licences granted by the Gas and Electricity Markets Authority ("the Authority") and is subject to the usual conditions thereunder, which are "relevant conditions" for the purposes of the Electricity Act 1989 ("EA89") and the Gas Act 1986 ("GA86") (together, "the Acts");

3. The Provisional Order was made as it appeared to the Authority that Foxglove was contravening and likely to continue to contravene relevant conditions and requirements by virtue of the following:

   a. Foxglove does not currently hold sufficient cash to meet its Renewables Obligation ("RO") liability[1], while, procuring a sufficient hedged position (see paragraph 3b below). It has provided information[2] to the Authority forecasting increased cashflow that would, on the face of it, enable it to meet its RO liability by 31 October 2022. However, the forecast cashflow is not in line with cashflow forecasts previously provided to the Authority[3]. Further, the current level of cash held by Foxglove is substantially lower than the level previously forecast by Foxglove[4]. Even where the divergence can be explained to a degree by changing circumstances, the differences are large, and information obtained by the Authority shows that Foxglove's approach to financial forecasting is not fit for purpose[5]. The Authority does not therefore consider that Foxglove's current forecast is accurate. In addition, as above, even where Foxglove is able to secure sufficient cash to meet its RO liability, it is highly unlikely that it would be able to do so while also procuring a sufficient hedged position. If Foxglove fails to meet its RO liability, that cost will be Mutualised[6] across other market participants

[1] The Renewables Obligation is a government support scheme for large-scale renewable generation which places an obligation on suppliers to obtain a certain number of Renewables Obligation Certificates (ROCs) in proportion to the amount of electricity they supply to customers. As an alternative, suppliers can make a payment in lieu of ROCs.

[2] Provided to the Authority on 30 June 2022, in response to a letter issued by the Authority dated 22 June 2022.

[3] Foxglove forecast substantially lower cashflow in response to a Stress Testing Request for Information ("RFI") issued by the Authority on 25 February 2022.

[4] In response to Ofgem's Stress Testing RFI.

[5] Outcomes from a recent project taking a closer look at Foxglove's (and other suppliers) financial processes identified fundamental concerns with Foxglove's financial forecasting approach, which remain unresolved.

[6] Has the meaning given to it as SLC 1 of the gas and electricity supply licences: "*means one or more market participants other than the licensee bearing costs incurred by the licensee, which may include Customer Credit*

and ultimately passed on to consumers through higher bills. In failing to make adequate arrangements to meet its RO liability, Foxglove is contravening, and is likely to continue to contravene, SLC 4B. It is also not responsibly manging costs that could be Mutualised nor taking appropriate action to minimise such costs, all in contravention of SLC 4B.

b. Foxglove has not procured a sufficient hedged position[7] in the wholesale market. Foxglove therefore currently purchases the majority of its gas and electricity on the open market exposing it to volatile prices and putting it at risk of insolvency should prices increase further before it can improve its hedged position. Given the current market and geopolitical circumstances, this constitutes a significant risk to Foxglove, which should be mitigated appropriately. Failure to procure a sufficient hedged position, and the correspondent risk of insolvency, amount to a failure to manage responsibly costs that could be Mutualised because, upon insolvency, Foxglove's costs including its outstanding RO liability (described in paragraph 3a above) and any liability it has in respect of other industry schemes will be Mutualised and therefore borne by other market participants and, therefore, ultimately, by consumers. Also, where the Authority requires to appoint a Supplier of Last Resort ("SOLR") in respect of Foxglove's customers, the SOLR would honour any outstanding Customer Credit Balances[8]. The SOLR is then able to make a SOLR levy claim[9] in respect of these, the cost of which would be Mutualised. In failing to procure a sufficient hedged position, Foxglove is therefore contravening SLC 4B.

c. Foxglove has provided the Authority with information[10] that it intends to use its increased cashflow to improve its hedged position by the start of the winter in 2022. However, for the reasons set out at paragraph 3a above, the Authority does not consider Foxglove's forecast cashflow to be accurate and does not consider that it will be in a position to sufficiently improve its hedged position, while also meeting its RO liability. By continuing to be insufficiently hedged, it appears to the Authority that Foxglove will continue to contravene SLC 4B for the reasons set out at paragraph 3b above.

4. The Authority considers that it is essential to uphold compliance with SLC 4B (known as the Financial Responsibility Principle). Failure to do so risks significant consumer harm in the event of a supplier entering insolvency or defaulting on payments due. This is because insolvency and / or payment default would result in costs being Mutualised across other market participants who will ultimately pass those costs to consumers through increased bills, as explained at paragraph 3 above. Given the current market circumstances and cost to consumers of gas and

---

Balances and costs incurred by the licensee under government environmental and social schemes, by virtue of regulatory mechanisms;".

[7] A hedged position enables a supplier to purchase energy on the wholesale market for a price that is fixed over time, protecting it from price volatility.

[8] Has the meaning given to it as SLC 1 of the gas and electricity supply licences: "*means the amount by which any payment made by the Customer to the licensee under or in accordance with the relevant Domestic Supply Contract and/or Non-Domestic Supply Contract which exceeds the total amount of Charge which is due and payable by the Customer to the licensee under that Domestic Supply Contracts and/or Non Domestic Supply Contracts minus any amount refunded to the Customer"*.

[9] This is a mechanism through which SOLRs can claim certain costs incurred as a result of acting as a SOLR.

[10] Information provided on 30 June 2022, in response to a letter issued by the Authority on 22 June 2022.

electricity, further increase could be highly detrimental to consumers, particularly to those in a Vulnerable Situation[11].

5. The Authority considers it requisite to issue a Provisional Order (rather than consulting on a final order) because the information obtained by the Authority indicates that Foxglove must urgently improve its financial position to realistically avoid insolvency and / or defaulting on payments due. If the Authority does not require Foxglove to make improvements immediately, by virtue of this Provisional Order and instead consults on a final order, it is more likely that Foxglove will fail and / or default on payments triggering cost mutualisation and resultant harm to consumers.

6. The Provisional Order also prohibits Foxglove from engaging in sales, marketing and customer acquisition activity until it provides a report to the Authority confirming its compliance with paragraphs 1 and 2 of the Provisional Order. The Authority has considered this provision (commonly referred to as a 'sales ban') very carefully, mindful of its likely impact on Foxglove's business. The Authority considers it requisite on this occasion to prohibit Foxglove from acquiring new customers until it can satisfy the Authority that it is in compliance with SLC 4B. Where Foxglove acquires new customers, its RO liability, Customer Credit Balances and hedging requirements increase. This in turn increases the amount of costs at risk of being Mutualised. The Authority therefore considers the 'sales ban' to be reasonable and proportionate in the circumstances to limit loss to consumers should Foxglove enter insolvency or default on payments due and trigger cost mutualisation. The Authority also notes that the 'sales ban' will only apply until Foxglove can provide a satisfactory report evidencing that it is meeting the requirements of the Provisional Order and is therefore in compliance with SLC 4B.

7. The Provisional Order also prohibits Foxglove from making any payment, providing any loan or transferring any asset to any third party unless that payment, loan or transfer is essential to Foxglove's supply operation (i.e. a 'ban on non-essential payments'). The Authority has also carefully considered this provision, again mindful of its potential impact on Foxglove's business. If Foxglove makes non-essential payments this will prevent it improving its finances such that it has a realistic chance of avoiding insolvency. Also, making non-essential payments is likely to decrease the sums available to meet its RO liability, liability under other industry schemes and the sums available to refund Customer Credit Balances – therefore increasing the costs at risk of being Mutualised. The Authority therefore considers that this requirement is reasonable and proportionate in the circumstances, again noting that that it will apply for a short period of time, as set out at paragraph 6 above.

8. The Authority has had regard to the matters in sections 25(3), (4A), (4B), (5), (5A) and 26 EA89 and the equivalent provisions in GA86[12]. In particular:

    a. It does not consider that it would be more appropriate to proceed under the Competition Act 1998 (that Act has no application to the present circumstances);

[11] Has the meaning given to at SLC 0.9 of the gas and electricity supply licences.
[12] Sections 28 (3), 28 (4A), 28 (4B), 28 (5), 28 (5A) and 29 GA86

b. It is satisfied that the duties imposed on the Authority by sections 3A to 3C of EA89 and 4AA to 4A GA86 do not preclude Authority from making the Provisional Order (on the contrary, it considers that its duties require it to make the Provisional Order);

c. It does not consider that the contraventions are trivial.

9. For the above reasons, the Authority decided to make the Provisional Order requiring Foxglove to do the following:

   a. Not to act in contravention of SLC 4B;
   b. By 2 August 2022, improve its financial position such that it can demonstrate that it can operate effectively under all financial stress test scenarios provided by the Authority[13] to Foxglove alongside the Provisional Order, and in doing so ensure that it will be able to meet its Renewables Obligation liability when this falls due[14];
   c. By no later than 5pm on 5 August 2022 provide a report to the Authority confirming Foxglove's compliance with paragraphs a and b above;
   d. Until the provision of the report referred to in paragraph c above:
      i. Refrain from all sales, marketing and customer acquisition activity, including the acquisition of any new domestic customer or upgrading of all existing domestic customer to dual fuel;
      ii. Refrain from making any payment, providing any loan or transferring any asset to any third party unless that payment, loan or transfer is essential to Foxglove's operation as a supplier of gas and electricity to consumers.

10. The Provisional Order is available at [Foxglove Energy Supply Ltd: Provisional Order July 2022 | Ofgem]

11. The Authority will in due course consider whether to consult on confirming the Provisional Order (with or without modifications). Unless earlier confirmed or revoked by the Authority, the Provisional Order will lapse on 5 October 2022.

Dated: 8 July 2022

Signed

Charles Hargreaves
Deputy Director, Enforcement
Duly Authorised on behalf of the Gas & Electricity Markets Authority.

---

[13] The stress test scenarios require Foxglove to provide forecasts in respect of certain financial metrics in three key price scenarios (central, low and high). The Authority has provided detail of the financial metrics and pricing scenarios annexed to its letter to Foxglove dated 5 July 2022, served alongside this Order.
[14] As provided for under the Renewables Obligation Order 2015 (including any amendments to the order).