

Foxglove Energy Supply Ltd

Notice of reasons under Section 49A(1)(f) of the Electricity Act 1989 and Section 38A(1)(f) of the Gas Act 1986 for the decision to confirm a Provisional Order (with modifications) under Section 25(4) of the Electricity Act 1989 and Section 28(4) of the Gas Act 1986

1. This Notice sets out the reasons why, on 3 October 2022, the Gas and Electricity Markets Authority (“the Authority”) confirmed a Provisional Order dated 5 July 2022 (with modifications) in respect of contraventions or 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. Pursuant to section 25(2) EA89 and section 28(2) GA86, the Authority made and served a Provisional Order dated 5 July 2022 (“the Provisional Order”). The Provisional Order required Foxglove:
 - 1) Not to act in contravention of SLC 4B;
 - 2) 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 to Foxglove alongside the Provisional Order, and in so doing ensure it will be able to meet its Renewables Obligation (“RO”) liability when this falls due;
 - 3) By no later than 5pm on 5 August 2022 provide the Authority with a report confirming Foxglove’s compliance with paragraphs 1 and 2 above;
 - 4) Until the provision of the report referred to in paragraph 3 above:
 - a. Refrain from all sales, marketing and customer acquisition activity, including the acquisition of any new domestic customers or upgrading of all existing domestic customer to dual fuel;
 - b. 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.
4. The Provisional Order was made as it appeared to the Authority that Foxglove was contravening or was likely to contravene relevant conditions and requirements by virtue of the following:

- a. Foxglove did not hold sufficient cash to meet its RO liability¹, while simultaneously procuring a sufficient hedged position (see paragraph 4b. below). It had provided information² 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, on multiple occasions Foxglove’s reported cash was substantially lower than its forecasted cash position in its responses to the Stress Testing Request for Information (“RFI”) issued by the Authority on 25 February 2022. Even where the divergence could be explained to a degree by changing circumstances, the differences were large, and information obtained by the Authority showed that Foxglove’s approach to financial forecasting was not fit for purpose³. The Authority did not therefore consider that Foxglove’s forecast was accurate. In addition, as above, even where Foxglove was able to secure sufficient cash to meet its RO liability, it was highly unlikely that it would be able to do so while also procuring a sufficient hedged position. If Foxglove fails to meet its full RO liability or meets it at the cost of failing to meet other payments due, that cost will be Mutualised⁴ across other market participants and ultimately passed on to consumers through higher bills. In failing to make adequate arrangements to meet its RO liability, the Authority considered that Foxglove was contravening, or was likely to contravene, SLC 4B. The Authority also considered that it was not at all times responsibly managing costs that could be Mutualised nor taking appropriate action to minimise such costs, all in contravention of SLC 4B.
- b. Foxglove had not procured a sufficient hedged position⁵ in the wholesale market. Foxglove therefore currently purchases a significant amount 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 is likely. 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 4a. 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 Balances⁶.

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 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.

⁴ 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 Balances and costs incurred by the licensee under government environmental and social schemes, by virtue of regulatory mechanisms;*”.

⁵ 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.

⁶ 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*

The SOLR is then able to make a SOLR levy claim⁷ in respect of these, the cost of which would be Mutualised. In failing to procure a sufficient hedged position, the Authority considered that Foxglove was therefore contravening or likely to contravene SLC 4B.

- c. Foxglove has provided the Authority with information⁸ 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 4a above, the Authority did not consider Foxglove's forecast cashflow to be accurate and did 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 appeared to the Authority that Foxglove was contravening or was likely to contravene SLC 4B for the reasons set out at paragraph 4b. above.
5. The Provisional Order was made for the reasons set out above. 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 4 above. Given the current market circumstances and cost to consumers of gas and electricity, further increase could be highly detrimental to consumers, particularly to those in a Vulnerable Situation⁹.
 6. Following the receipt of the report referred to in paragraph 3 above ("the Report"), the Authority took the decision to consult on the confirmation of the Provisional Order (with modifications) as it was of the opinion that Foxglove was contravening or was likely to contravene SLC 4B for the following reasons:
 - a. The Authority noted that Foxglove had paid 50% of its RO liability. The Authority further noted that the Report indicated that it would be in a position to operate effectively under the high price stress test scenario if it relied on support from its parent company. Foxglove provided information to the Authority confirming that its parent company provided financial support to Foxglove between 2017 and 2021, with this sum having now been repaid by Foxglove to its parent. Foxglove believes this "track record" of parent company support is evidence that it will be able to remain in the market even where wholesale gas prices are high, and is therefore responsibly managing the risk of insolvency and the corresponding risk of cost mutualisation. It considers that it is therefore in compliance with SLC 4B (to note that it has however indicated to the Authority that such support could

Customer to the licensee under that Domestic Supply Contracts and/or Non Domestic Supply Contracts minus any amount refunded to the Customer".

⁷ This is a mechanism through which SOLRs can claim certain costs incurred as a result of acting as a SOLR.

⁸ Information provided on 30 June 2022, in response to a letter issued by the Authority on 22 June 2022.

⁹ Has the meaning given to at SLC 0.9 of the gas and electricity supply licences.

be withdrawn in a very high price scenario (wholesale gas price of £10/therm and/or a base-load of £850 and peak-load of £1,100 over a continued period)). In further support of this, the Report also pointed to:

- i. Foxglove remaining in the market when there was an opportunity to exit, potentially to the advantage of shareholders, when another 30 suppliers did so;
- ii. Foxglove's strong track record of making obligation payments for RO /Feed In Tariffs (FIT);
- iii. Foxglove's recent investment (since March 2022) in developing its own end-to-end customer platform, which is designed to improve the customer experience and drive cost savings via a reduced reliance on third party contractors.

- b. Foxglove also reported to the Authority that it intends to be 75% hedged by the start of each delivery month.

7. However, from the information obtained from Foxglove, the Authority noted:

- i. Foxglove estimated that it would have a sum available in cash in September 2022. This sum would quickly need to be used to meet (a) its RO liability and / or (b) to purchase wholesale gas where prices are at the level of the high price scenario (which the Authority considered was likely).
- ii. Significant concerns as to the viability of Foxglove's approach to financial forecasts and that, even if this forecasting is accurate, Foxglove would be reliant on financial support from its parent company (or other investors) to remain solvent in the likely high price scenario. If that support is withdrawn or not provided Foxglove is likely to fail (causing cost mutualisation). The Authority sought evidence that adequate parental support is in place but did not receive it.

8. For the reasons set out at paragraph 7 above, the Authority took the decision to consult on confirming the Provisional Order with modifications on 9 September 2022 as it was of the opinion that Foxglove was contravening or was likely to contravene SLC 4B.

9. The Authority received a representation from Foxglove on 12 September 2022. The representation clarified the use to which the proceeds of the hedging arrangements that Foxglove had liquidated during the winter of 2021/22 had been put. The Authority received further representations from Foxglove on 30 September 2022 (which also repeated the representations made on 12 September). The representations provided additional background information. Foxglove did state it had approached a third-party consultant to further improve its financial management processes, including production of an integrated cash flow, Profit & Loss and balance sheet. While the Authority recognises that this is a positive step, it notes that the action is not yet complete. The Authority would have expected a supplier to have already taken this action at this stage. Ultimately therefore, the representations did not contain sufficient information to cause the Authority to change its view of the company's current and future financial

position. In its representations Foxglove failed to provide forward looking reassurance on its financial position such as updated cashflows or evidence of the availability of parent company or other financial support. It also failed to respond to Ofgem's September request for financial information. Foxglove has therefore not fully addressed to concerns which the Authority set out in its Notice of Proposal to confirm the Provisional Order.

10. The Authority notes that Foxglove has now paid 80% of its RO. The Authority's view is that the Report and other information provided do not demonstrate that Foxglove is able to both pay its RO and manage the risk of insolvency and associated risk of cost Mutualisation.
11. The Authority is therefore satisfied that Foxglove:
 - a. Is not at all times managing responsibly costs that could be Mutualised as required by SLC 4B.1;
 - b. Is not taking appropriate action to minimise such costs as required by SLC 4B.1; and
 - c. Does not at all times have adequate financial arrangements in place to meet its costs at risk of being Mutualised as required by SLC 4B.2.
12. For the reasons set out in this document, and having considered the information provided by Foxglove and the representations and objections made, the Authority is satisfied that Foxglove is contravening or is likely to contravene the requirements of SLC 4B.
13. Also, the Authority is satisfied that failure to comply with SLC 4B risks significant consumer harm in the event of Foxglove entering insolvency or defaulting on payments due because this would result in costs being Mutualised across other market participants and ultimately being passed to consumers through increased bills. The Provisional Order, with modifications, 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 ("sales ban"). 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 Provisional Order, with modifications, further prohibits Foxglove from making any payment, providing any loan or transferring any asset to any third party unless that payment, loan or transfer is one that Foxglove:
 - i) is required to make by virtue of a legal requirement;
 - ii) is essential to Foxglove's operation as a supplier of gas and electricity to consumers;
 - or iii) is otherwise approved in writing by the Authority ("non-essential payments").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, liabilities 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 remains reasonable and proportionate in the circumstances.

14. Further, the Authority¹⁰:

- a. Is satisfied that Foxglove has not agreed to take and is not taking all such steps as it appears to the Authority for the time being appropriate for Foxglove to take for the purpose of securing or facilitating compliance with SLC 4B;
- b. Notes that the acts or omissions which the Authority is satisfied constitute a contravention or likely contravention of SLC 4B, and other factors which in the Authority's opinion justify the confirming of a Provisional Order with modifications are those set out above; and
- c. Considers that the provision made by the Provisional Order (with modifications) is requisite to secure compliance with SLC 4B.

15. For the above reasons, the Authority has decided to confirm the Provisional Order with modifications requiring Foxglove:

- a. Not to act in contravention of SLC 4B;
- b. Improve its financial position such that it can meet the requirements of all financial stress test scenarios provided by the Authority to Foxglove alongside the Provisional Order, and in so doing ensure it will be able to meet its RO liability when this falls due;
- c. Provide the Authority with a report confirming Foxglove's compliance with paragraphs 15a. and 15b. above;
- d. Until the Authority has confirmed in writing to Foxglove that it has provided a report in satisfaction of paragraph 15c. above:
 - i. Refrain from all sales, marketing and customer acquisition activity, including the acquisition of any new domestic customers 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 one that Foxglove: i) is required to make by virtue of a legal requirement; ii) is essential to Foxglove's operation as a supplier of gas and electricity to consumers; or iii) is otherwise approved in writing by the Authority.

16. The Authority has had regard to the matters in sections 25 (4A), (4B), (5), (5A) and has complied with the procedural requirements at section 26 EA89 (and the equivalent provisions in GA86)¹¹. In particular:

¹⁰ In line with s.25(4) and s.25(5A) EA89 and s.28(4) and s.28(5A) GA86

¹¹ Sections 28 (4A), 28 (4B), 28 (5), 28 (5A) and 29 GA86

- 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);
- 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 ;
- c. It does not consider that the contraventions are trivial.

17. The confirmed Provisional Order is available at:

<https://www.ofgem.gov.uk/publications/foxglove-energy-supply-ltd-provisional-order-july-2022>

Dated: 11 October 2022

Megan Forbes (Chair)

Peter Hinchliffe

Ulrike Hotopp

Enforcement Decision Panel Duly authorised on behalf of the Gas and Electricity Markets Authority