

## **Foxglove Energy Supply Ltd**

### **Notice of Proposal to make a Final Order**

of the Gas and Electricity Markets Authority ("the Authority")  
made under section 29(1) Gas Act 1986 and section 26(1) of the Electricity Act 1989.

#### **1. Notice**

- 1.1 The Gas & Electricity Markets Authority ("Authority") gives notice that it proposes to make a Final Order ("FO") in relation to Foxglove Energy Supply Ltd ("Foxglove"), with company number 09689035 and with its registered office at 16 North Mills, Frog Island, Leicester, Leicestershire, England, LE3 5DL holder of an electricity supply licence granted or treated as granted under section 6(1)(d) of the Electricity Act 1989 ("the Electricity Act") and holder of a gas supply licence granted or treated as granted under section 7A(1) of the Gas Act 1986 ("the Gas Act").
- 1.2 The Authority proposes to make the Final Order to require Foxglove to comply with Standard Licence Condition ("SLC") 4A (Operational Responsibility Principle) by requiring it to:
  - i Improve its operational capability such that it can respond accurately and on time to any Requests for Information from the Authority in relation to its financial position and arrangements or otherwise.
  - ii Provide the Authority with evidence and explanations to support the results reported in the next quarterly stress test.
  - iii Within 28 days of the issuing of this order, provide the Authority with a report setting out the steps taken to meet the requirements in (i) and (ii) above.

- iv Until Foxglove meets the requirements in (i) and (ii) above:
  - a. 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 ("non-essential payments ban").

1.3 The Authority has reached the preliminary view that Foxglove is contravening and is likely to contravene SLC 4A.

## 2. Condition 4A. Operational Responsibility Principle

2.1. SLC 4A of the gas and electricity supply licences relevantly requires a licensee to "*ensure that it has and maintains robust internal capability, systems and processes to enable the licensee to: .... Comply with relevant legislative and regulatory obligations*".

2.2. The Authority has formed the preliminary view that Foxglove is contravening and is likely to continue to contravene SLC 4A. Foxglove has consistently failed to respond accurately or on time to the Authority's Requests for Information issued under SLC 5 of the gas and electricity supply licences. The Authority's comments and concerns regarding the response, or lack of response, to particular Requests for Information are set out in the table at Annex 1 of this Notice. SLC 5 requires licensees, after receiving a request from the Authority, to provide Information<sup>1</sup> to it when and in the form requested. Responding to an SLC 5 Request for Information is a regulatory obligation. The Authority also has a statutory power to issue Requests for Information under sections 28 and 47A of the Electricity Act 1989 and sections 38 and 34A of the Gas Act 1986. Foxglove's inability to respond to SLC 5 Requests for Information indicates that it would be similarly unable to respond to any statutory Requests for Information. While the concerns set out in the table at Annex 1 are not in respect of requests for which a response remains outstanding, they show that, over the last number of months, Foxglove has been unable to respond accurately and / or on time to Requests for Information. In addition, the Authority had imposed and subsequently confirmed a Provisional Order (PO)<sup>2</sup> requiring Foxglove to come

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<sup>1</sup> Information is defined at SLC 1 of the gas and electricity supply licences as "*information (other than information subject to legal privilege) in any form or medium and of any description specified by the Authority and includes any documents, accounts, estimates, returns, records or reports and data of any kind, whether or not prepared specifically at the request of the Authority*"

<sup>2</sup> See [Foxglove Energy Supply Ltd: Provisional Order July 2022 | Ofgem](#)

back into compliance with SLC 4B (the Financial Responsibility Principal). The Authority considers that Foxglove has sufficient funds to meet its obligations under SLC 4B due to an improved financial position and, as a result, the Authority is now consulting on revoking the PO. However, Foxglove has consistently failed to respond accurately and on time to Requests for Information about its finances, and so the Authority remains concerned about its future financial management and considers that Foxglove is contravening and is likely to continue to contravene SLC 4A. The Authority's preliminary view is therefore that Foxglove's consistent failure to respond accurately and on time to these requests demonstrates that it does not have and is not maintaining robust internal capability, systems and processes to enable it to comply with its relevant legislative and regulatory obligations.

### **3. Prohibition on "non-essential payments"**

- 3.1. The proposed Final Order would prohibit 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 "non-essential payments ban"). The Authority considers that this prohibition is requisite to secure compliance with SLC 4A because it will ensure that Foxglove retains sufficient funds within the business whilst it improves its internal capability, systems and processes to bring them into compliance with SLC 4A and being unable to make non-essential payments will also incentivise Foxglove to prioritise improving its operational capability.

### **4. The Authority's Preliminary View**

- 4.1. The Authority has given careful consideration to the question of what remedial action is requisite for the purpose of securing compliance with SLC 4A.
- 4.2. The Authority proposes (subject to consideration of any representations or objections) to make a Final Order with the requirements and prohibition set at paragraph 1.2 of this Notice. The Authority considers it requisite (subject to any representations or objections) to make the Final Order in the form set out in Annex 2 to this Notice to secure compliance with SLC 4A.

- 4.3. In reaching its conclusion that it should propose to make the Final Order in the form in the Annex to this Notice, the Authority has had regard to the matters set out in sections 25(4A), (4B), (5) and (5A) of the Electricity Act and sections 28(4A), (4B), (5) and (5A) of the Gas Act. Sections 25(4A) and (4B) of the Electricity Act and sections 28(4A) and (4B) of the Gas Act relate to the question as to whether this matter should be investigated on the basis of a possible breach of the Competition Act 1998. The Authority does not consider that this case falls into that category. Section 25(5) of the Electricity Act and section 28(5) of the Gas Act refer to the Authority's principal objective and other general duties as set out in sections 3A to 3C of the Electricity Act and sections 4AA, 4AB or 4A of the Gas Act. The Authority does not consider that these duties preclude the making of a Final Order in this case, but it will make a final decision on these matters in due course. Having regard to its duties in section 25(5A) of the Electricity Act and section 28(5A) of the Gas Act, the Authority does not consider that Foxglove has proposed a satisfactory remedial plan and/or reassessment to secure or facilitate compliance with SLC 4A to date, nor does it consider the contravention to be trivial. Again, the Authority will make its final decisions on these matters in due course.
- 4.4. The Authority has given particular consideration to the likely impact of the proposed Final Order on Foxglove's business. It considers that the proposed requirements and prohibition included in the proposed Final Order are requisite to secure compliance. It is presently of the view that the Final Order is requisite for the purpose of securing Foxglove's compliance with SLC 4A. The Authority will give careful consideration to any representations it may receive prior to finalising its decision on whether or not to make the Final Order.
- 4.5. In accordance with section 26(1) of the Act, the Authority gives notice that:
- a) It proposes to make a Final Order;
  - b) The acts or omissions which, in the Authority's opinion, constitute or would constitute contraventions of those requirements, and other factors which in the Authority's opinion justify the making of a Final Order are those set out above;
  - c) It is, in the Authority's preliminary view, requisite to make a Final Order in (or substantially similar to) the form set out in the Annex 2 to this Notice;

- d) Any representations or objections with respect to the proposed Final Order may be made to the Authority by 5pm, 4 July 2023 to Marcus Clubb at [Marcus.Clubb@ofgem.gov.uk](mailto:Marcus.Clubb@ofgem.gov.uk) or via post to OFGEM, 10 South Colonnade, Canary Wharf London, E14 4PU1.

4.6. The Authority proposes to make a Final Order requiring Foxlove to:

- i. Improve its operational capability such that it can respond accurately and on time to any Requests for Information from the Authority in relation to its financial position and arrangements or otherwise.
- ii. Provide the Authority with evidence and explanations to support the results reported in the next quarterly stress test.
- iii. Within 28 days of the issuing of this order, provide the Authority with a report setting out the steps taken to meet the requirements in (i) and (ii) above.
- iv. Until Foxglove meets the requirements in (i) and (ii) above:
  - a. 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 ("non-essential payments ban").

## **5. Representation or Objections**

5.1. The Authority invites representations or objections in relation to its proposal to make the Final Order in the form set out in the Annex 2 to this Notice.

5.2. Any representations or objections with respect to this Notice must be made in writing on or before 5pm, 4 July 2023 to Marcus Clubb at [Marcus.Clubb@ofgem.gov.uk](mailto:Marcus.Clubb@ofgem.gov.uk) or via post to OFGEM, 10 South Colonnade, Canary Wharf London, E14 4PU1. Should you have any questions about this Notice you can contact [Marcus.Clubb@ofgem.gov.uk](mailto:Marcus.Clubb@ofgem.gov.uk).

5.3. If a respondent does not wish its response or part of its response to be published, it should clearly mark its response or the relevant parts "not for publication" and give reasons. The Authority will consider such requests on case-by-case basis.

5.4. Any representations or objections which are made within the timeframe specified above and not withdrawn will be duly considered by the Authority.

Date: 09/06/2023

Name: Frank Hemmes, Head of Enforcement, Policy & Prevention

Signed for and on behalf of:

MEGAN FORBES (Chair)

PETER HINCHLIFFE

ULRIKE HOTOPP

**Enforcement Decision Panel**

**Duly authorised on behalf of the Gas and Electricity Markets Authority**

### Annex 1

<b>Request For Information (RFI)</b>	<b>Authority's Concerns and Comments</b>
<p>Vulnerability (Market-wide RFI to assess supplier compliance with their obligations toward Domestic Customers in a Vulnerable Situation)</p>	<p>The MCR RFI was due for submission on 18 July 2022. The submission was submitted on time but was lacking in evidence/materials. It did not contain a sufficient explanation or understanding of the areas required. The lack of provision of a comprehensive narrative explanation made it very difficult to assess Foxglove's strengths and weaknesses in this area. In particular, there was inadequate supporting materials in respect of Foxglove's Governance in this area, it did not provide evidence of having any policies in place, its assessment of risk was unclear and ambiguous, it provided limited evidence of processes, controls, management, training and assurance. The Authority has had to devote additional time and resources to work toward obtaining sufficient information and evidence to enable it to assess Foxglove's compliance with relevant obligations in this area, which remains under assessment.</p>
<p>Fit and Proper (Market-wide RFI to assess supplier compliance with SLC 4C and SLC 19AA)</p>	<p>There were gaps and errors in the narrative response and Foxglove did not provide any supporting material. Its response was late – the submission was due on 12 September 2022 and the Authority did not receive Foxglove's initial response until 10 November 2022. The Authority had to engage extensively with Foxglove to obtain sufficient information and evidence to make its assessment. It did not ultimately receive this until 3 March 2023.</p>
<p>Customer Service and Complaint Handling Market Compliance Review (Market-wide RFI to assess supplier compliance with</p>	<p>Foxglove's 31 August 2022 submission was insufficiently detailed. The Authority requested further detail in November 2022 but did not receive a response to that request. In January 2023, Foxglove also failed to meet two further separate RFI deadlines to provide its remedial action plan and customer service data. This delay therefore delayed the Authority's conclusions as to Foxglove's performance in this area. It was not until 31 March 2023 that</p>

<p>customer service and complaints handling obligations).</p>	<p>Foxglove provided a response to all concerns raised by the review.</p>
<p>Customers in Payment Difficulty (Market-wide RFI to assess supplier compliance with obligations relating to customers who are having difficulty paying their bills)</p>	<p>Foxglove did not provide any rationale to support all areas of its self-assessment of compliance in this area. The Authority required to follow up and did ultimately receive this on 1 July 2022 (the RFI response was due on 20 June – the Authority’s follow-up request was sent on 30 June). The original response was limited in detail which adversely impacted the Authority’s ability to confidently assess Foxglove’s compliance. The Authority issued various follow-up requests connected to this RFI for further information and actions plans – Foxglove failed to respond to a number of these and the Authority had to expend time and resources chasing responses. For example, one request was sent on 7 December 2022 and Foxglove did not fully respond to it until 10 March 2023.</p>
<p>Tariff Offering (request for information regarding what tariffs Foxglove offer customers)</p>	<p>A response was due on 22 September 2022 and Foxglove did not provide one until 2 November 2022. Foxglove commented that this RFI was “lost among everything else going on”. This indicates that it does not have robust processes and systems in place to meet its regulatory obligations.</p>
<p>Asset Control (request for information to determine whether Foxglove holds sufficient control over the assets on which it relies to run its supply business)</p>	<p>The response to this RFI was due on 6 January 2023, Foxglove did not respond until 17 March 2023. This delayed the Authority’s ability to assess Foxglove’s compliance. Foxglove did not respond to our most recent SLC RFI (due 19 May), which remains outstanding.</p>



<p>Engagement with BDO and Foxglove</p>	<p>Ofgem contracted an external auditor, BDO, to engage with Foxglove to understand their financial position in more detail. A site visit was conducted on 28 and 29 March. Through ongoing engagement in April and May 2022, numerous errors were identified by BDO in financial information provided by Foxglove. This indicates that Foxglove did not have adequate processes, systems and capabilities in place to meet regulatory obligations.</p>
<p>Forecasts provided by Foxglove to Ofgem in response to compliance engagement</p>	<p>On 29 June 2022, Foxglove provided cash flow information to Ofgem which indicated that their cash position was materially lower than amounts disclosed in other requests for information. The Authority was therefore concerned at the time that financial forecasts were ambitious and not reflective of their financial position.</p>
<p>Financial stress test RFIs</p>	<p>RFIs were up to one month late in April and August 2022 and January 2023 (no other supplier has been as consistently or repeatedly late).</p> <p>The quality of submissions was also poor with Ofgem asking Foxglove to rework forecasts.</p> <p>Repeated issues indicate Foxglove did not have adequate processes, systems and capabilities in place to meet regulatory obligations.</p>
<p>Monthly Financial Responsibility Principle RFIs</p>	<p>Late submissions August and September 2022. For the months of August to October 2022, Foxglove did not submit any returns. Returns were eventually provided for those months in October/November 2022 but they contained errors.</p> <p>More broadly, submissions contained inaccuracies around areas such as net assets and hedging, e.g. Foxglove did not update their net asset number in each submission for August and September 2022, and hedging information often reported how</p>

	<p>much Foxglove <u>aspired</u> to hedge rather than how much they had <u>actually</u> hedged.</p> <p>Repeated issues indicate Foxglove did not have adequate processes, systems and capabilities in place to meet regulatory obligations.</p>
<p>Ofgem site visit March 2023</p>	<p>Due to repeated instances of late and inaccurate financial RFI submissions in 2022 (see above narrative on financial stress test and monthly financial responsibility principle RFIs), an Ofgem team visited Foxglove’s offices on 14 March 2023 to discuss their financial forecasts, performance and understand their accounting processes.</p> <p>Foxglove’s staff and their external auditors attended the meeting. Although sufficient notice had been given to Foxglove for this meeting, financial forecasts presented by Foxglove at the meeting had several material errors.</p> <p>It was apparent that Foxglove was unusually reliant on external auditors for their financial reporting and information quality remained an issue.</p>

## Annex 2

Electricity Act 1989 and Gas Act 1986 Final Order of the Gas and Electricity Markets Authority (“the Authority”) made under section 25(1) of the Electricity Act 1989 (“EA89”) and 28(1) of the Gas Act 1986 (“GA86”).

To: Foxglove Energy Supply Ltd (“Foxglove”), with company number 09689035 and with its registered office at 16 North Mills, Frog Island, Leicester, Leicestershire, England, LE3 5DL holder of an electricity supply licence granted or treated as granted under section 6(1)(d) of the Electricity Act 1989 (“the Electricity Act”) and holder of a gas supply licence granted or treated as granted under section 7A(1) of the Gas Act 1986 (“the Gas Act”).

### WHEREAS:

A. Foxglove is a licensed supplier of electricity and gas to Domestic Premises in Great Britain and is subject to the requirement under standard licence condition (“SLC”) 4A of the electricity and gas supply licences to ensure that it has and maintains robust internal capability, systems and processes to enable the licensee to: .... Comply with relevant legislative and regulatory obligations.

B. Foxglove is subject to a regulatory obligation, under SLC 5 of the gas and electricity supply licences to, after receiving a request from the Authority, to provide Information<sup>3</sup> to it when and in the form requested and is also subject to the legislative obligation, under sections 47A and 28 of the Electricity Act and sections 34A and 38 of the Gas Act to provide information requested by the Authority.

C. From July 2022 to date the Authority issued several Requests for Information under SLC 5 to which Foxglove has consistently failed to respond accurately and / in time thus

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<sup>3</sup> Information is defined at SLC 1 of the gas and electricity supply licences as “*information (other than information subject to legal privilege) in any form or medium and of any description specified by the Authority and includes any documents, accounts, estimates, returns, records or reports and data of any kind, whether or not prepared specifically at the request of the Authority*”

demonstrating that it does not have, and does not maintain robust internal capability, systems and processes to enable it to comply with its regulatory obligation to provide information under SLC 5 not to, if any such request were issued, would it have the capability systems and processes to comply with its legislative obligations to provide information.

D. The Authority is satisfied that a) Foxglove is contravening and is likely to continue to contravene SLC 4A by not having, and not maintaining, robust internal capability, systems and processes to enable it to comply with its regulatory and legislative obligations and b) the inclusion of the obligations set out below upon Foxglove within a Final Order, made under section 25(1) of the EA89 and section 28(1) of the GA86, are requisite for the purpose of securing Foxglove's compliance with SLC 4A.

NOW THEREFORE: The Authority, pursuant to section 25(1) of the EA89 and section 28(1) of the GA86 makes a Final Order requiring Foxglove:

- i Improve its operational capability such that it can respond accurately and on time to any Requests for Information from the Authority in relation to its financial position and arrangements or otherwise.
- ii Provide the Authority with evidence and explanations to support the results reported in the next quarterly stress test.
- iii Within 28 days of the issuing of this order, provide the Authority with a report setting out the steps taken to meet the requirements in (i) and (ii) above.
- iv Until Foxglove meets the requirements in (i) and (ii) above:
  - a. 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 ("non-essential payments ban").

The Enforcement Decision Panel agreed to make this final order in the form set out above on [ ].

Signature: [ ] Name: [EDP secretariat staff member]

Job Title: [EDP secretariat staff member]

Signed for and on behalf of  
[names of EDP Panel]