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Gas and Electricity Suppliers,
Electricity Distribution Network
Operators,
Gas Transporters and all other
interested parties

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Dear Colleague

Last Resort Supply Payment Claim from E.ON Next – revised decision following Court judgment

On 7 October 2022, E.ON Next submitted a claim for Ofgem’s consent to a Last Resort Supply Payment (LRSP) under Supply Licence Standard Licence Condition (SLC) 9. E.ON Next has sought to recover additional costs incurred in complying with a Last Resort Supply Direction to act as Supplier of Last Resort (SoLR) to customers of the former energy supplier, Igloo Energy Supply Limited (Igloo).

On 22 December 2022, Ofgem published its decision in relation to that claim. That decision was the subject of judicial review proceedings, which concluded on 17 November 2023, Mr Justice Bright finding that Ofgem had erred in law in treating E.ON Next’s conditional offer of £15 million as a commitment under SLC 8.3. It was on the basis that E.ON Next had made a commitment to contribute £15 million towards the wholesale costs associated with acting as SoLR for the former customers of Igloo (along with two other failed energy suppliers, namely, Enstroga Ltd (“Enstroga”) and Symbio Energy Ltd (“Symbio”) that Ofgem had decided to deduct £15m from the amount which E.ON Next had claimed as a LRSP.

In light of the Administrative Court’s conclusion and its declaration that Ofgem had erred in law in making its original decision on E.ON Next’s LRSP claim in respect of Igloo, Ofgem revisited that decision. On 14 December 2023, taking into consideration the Court’s declaration, Ofgem made a revised decision reversing its decision to deduct £15,000,000 from its original claim and consequently allowing E.ON Next a further LRSP of up to **£15,000,000** from Relevant Gas Transporters and Relevant Distributors.

This letter is the notice of reasons for Ofgem’s decision.

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.¹

Failed Supplier event

On 1 October 2021, we appointed E.ON Next as the SoLR² for Igloo gas³ and electricity⁴ 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 E.ON Next as the SoLR to those customers in our decision letter published on 18 March 2022⁵.

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

¹ 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).

² [Appointment of E.ON Next Energy Limited as Supplier of Last Resort for Igloo Energy Supply Limited \(ofgem.gov.uk\)](https://www.ofgem.gov.uk/appointment-of-e.on-next-energy-limited-as-supplier-of-last-resort-for-igloo-energy-supply-limited)

³ [Direction to appoint E.ON Next Energy Limited as Gas Supplier of Last Resort for customers of Igloo Energy Supply Limited | Ofgem](https://www.ofgem.gov.uk/direction-to-appoint-e.on-next-energy-limited-as-gas-supplier-of-last-resort-for-customers-of-igloo-energy-supply-limited)

⁴ [Direction to appoint E.ON Next Energy Limited as Electricity Supplier of Last Resort for customers of Igloo Energy Supply Limited | Ofgem](https://www.ofgem.gov.uk/direction-to-appoint-e.on-next-energy-limited-as-electricity-supplier-of-last-resort-for-customers-of-igloo-energy-supply-limited)

⁵ [Appointment of E.ON Next Energy Limited as Supplier of Last Resort for Igloo Energy Supply Limited \(ofgem.gov.uk\)](https://www.ofgem.gov.uk/appointment-of-e.on-next-energy-limited-as-supplier-of-last-resort-for-igloo-energy-supply-limited)

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 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 2022⁶ 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.

E.ON Next claim

E.ON Next 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 2021.⁷ A Subsequent claim was consented to on 20 December 2022.⁸

2022 Levy claim

In the decision of 20 December 2022, Ofgem deducted a sum of £15 million from the amount that would otherwise have been claimable by E.ON Next in respect of its wholesale costs. This was for the purpose of giving effect to what Ofgem had considered

⁶ [Decision \(ofgem.gov.uk\)](#)

⁷ [Faster SoLR levy process: consents to Last Resort Supply Payments | Ofgem](#)

⁸ [Decision on last resort levy true-up claims 2022 | Ofgem](#)

was a commitment by E.ON Next to make a contribution towards its SoLR costs of £15 million.

Explaining the reasoning behind this, Ofgem stated in the December 2022 decision that:

“Finally, we note that a commitment to contribute £15m towards the cost of Igloo was made by E.ON Next when we made the decision to appoint it to act as SoLR for Igloo customers. No condition about fair treatment of LRSP claims by E.ON Next could meaningfully modify that commitment as Ofgem has a statutory duty to act fairly and reasonably in exercising its discretion to consent to any LRSP claim. In reaching our final position on the E.ON Next claim for a LRSP in respect of its SoLR role for Igloo, Ofgem has taken into account the statutory framework, all the relevant circumstances and no irrelevant factors, as required in reaching a fair and reasonable decision. Under the supply licence Standard Licence Condition (SLC) 8.3 a supplier is required to take all reasonable steps to honour any commitment made to Ofgem before being appointed to act as SoLR.

In the letter provided to Ofgem on 12 December, E.ON Next made representations to Ofgem regarding why we should not deduct the £15million from the E.ON Next claim. Nothing raised in that letter addresses new issues, and restates E.ON Next’s position with respect to the treatment of wholesale costs in particular through the True Up process.

Ofgem has decided to reduce by £15 million the amount we consent to E.ON Next claiming as LRSP. The reason for this is that we consider that E.ON made a commitment when responding to our RFI to absorb £15 million of the additional wholesale costs incurred in acting as SoLR.”

On 17 March 2023, E.ON Next filed a claim for judicial review in respect of the decision of 20 December 2022.

One of E.ON Next’s grounds of claim was that Ofgem had erred in law in that the contribution was either (i) not a “commitment” within the meaning of the relevant licence conditions, it was a conditional offer, alternatively (ii) if it is a commitment within the meaning of the licence conditions, it is in the terms set out and agreed with Ofgem” (Ground 4 of E.ON Next’s judicial review claim).

In alternative grounds of claim, E.ON Next challenged Ofgem’s decision in respect of the costs it claimed in respect of its three SoLR appointments (for Igloo, Enstroga and Symbio) for shaping and imbalance costs. E.ON Next claimed that Ofgem had breached a legitimate expectation in respect of the treatment of its shaping and imbalance costs, that it had breached E.ON Next’s substantive legitimate expectation under the Human Rights Act 1998 and Article 1 of the First Protocol to the European Convention on Human Rights, and that Ofgem had made an irrational decision on its shaping and imbalance costs (Grounds 1 to 3 of E.ON Next’s judicial review claim).

E.ON Next’s claim for judicial review was heard on 17 and 18 October 2023 by Mr Justice Bright. Judgment was handed down on 17 November 2023. The Court dismissed Grounds 1 to 3 of E.ON Next’s claim, but allowed Ground 4 of E.ON’s claim.

The Court granted a declaration that Ofgem had “erred in law in treating E.ON Next’s conditional offer of £15 million as a commitment under SLC 8.3.”

Further to the Court's declaration that Ofgem had erred in law in reaching its decision of 20 December 2022 to deduct £15 million from E.ON Next's claim, Ofgem reconsidered its decision. Ofgem therefore makes this revised decision in accordance with the declaration of the Court of 17 November 2023.

Reconsideration of the deduction of £15 million from E.ON Next's LRSP claim and revised decision

In taking its revised decision Ofgem acts pursuant to its discretionary power in SLC 9.5.

Ofgem considers that the decision of the Administrative Court, which was reached on the basis of its examination of the particular circumstances of the case, including the exchanges between Ofgem and E.ON Next that preceded E.ON Next's appointment as SoLR, that Ofgem had erred in law in concluding that £15 million should be deducted from E.ON Next's LRSP claim because E.ON had made a 'commitment' under SLC 8.3 to contribute this amount, weighs heavily in favour of Ofgem now exercising its discretion to consent to E.ON Next now being allowed this sum by way of LRSP.

For the avoidance of doubt, the remainder of the reasons given in the decision of 20 December 2022 for the amount of LRSP that was allowed, remain valid and unchanged. This revised element of that earlier decision should be read alongside the full text of the earlier decision, save insofar as expressly revised in this letter following the reasoning in the Judgment and Order of the Administrative Court.

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. This accords with the Administrative Court's finding (in the reasoned Order of 17 November 2023) that the matters addressed in the Court's Judgment (including the decision in respect of Ofgem's erroneous understanding that E.ON Next had made a commitment) are "*fact-specific and concern[...] limited issues arising from the particular language used by E.ON when bidding to be appointed as SoLR in this necessarily unique situation.*"

Recovery of LRSP claim

E.ON Next will be paid the amounts specified in 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