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Non-confidential

Octopus Energy's response to the Smart Secure Electricity Systems Programme: Implementing the load control licensing regime consultation

Thank you for the opportunity to respond to this consultation. We have significant interest in the proposed new licence given the Octopus Energy Group position as:

- The UK's largest domestic electricity supplier and a global leader in innovative smart tariffs and products that harness and reward consumer demand flexibility. With over half a million customers on smart tariffs and exponential growth, we are pioneering the future of energy.
- The creator of Kraken, now operating as an independent platform, and as one of its largest super-users. Kraken connects all parts of the energy system - from customer billing to the flexible management of renewable generation, energy storage, and consumer devices such as EVs, home batteries, and heat pumps.
- Octopus Energy Group also produces multiple smart electricity systems as part of a comprehensive decarbonisation and electrification strategy. These include air source heat pumps, heat pump control systems, electrified hot water systems, and EV chargers.

Summary

- Consumer-led flexibility will play an increasingly important role in delivering a secure, affordable and low-carbon energy system. We strongly support government and Ofgem in their aim to put in place robust consumer protections and system safeguards, while enabling the rapid growth and innovation needed to unlock the full value of consumer-led flexibility. Ensuring consumer trust will be vital for market growth.
- Effectively implementing this licensing regime means Ofgem ensuring its regulation is fit for purpose across all the different types of companies active in the retail markets. This includes recognition that there is competition between the different actors (e.g. load controllers, heat networks, suppliers, third party intermediaries) and that many companies are active in more than one of these spaces. **Regulation therefore should be consistent where possible, not distortive of competition, and give customers similar protections across similar markets.** Doing this effectively must mean integration of the load control regime with the broader programmes of work on improving retail regulation through the consumer outcomes work and e.g. the new compliance operating principles.
- We welcome much of Ofgem's initial thinking on how to manage unnecessary duplication, including for example in creating a streamlined licence application process and integrating load

control into its broader work on retail. **However, we do not believe that the current proposals adequately manage the risks of regulatory duplication. We are therefore concerned that the licensing regime will impose unnecessary regulatory burden and risk on licensed suppliers, without any benefit to consumers.**

- We urge Ofgem and DESNZ to look at more fundamental solutions. In our view, a much simpler approach would be to create a targeted exemption to overlapping licence conditions, where licensed electricity suppliers offer load control functionality as an intrinsic part of a regulated supply tariff.
- We have also encouraged DESNZ to consider whether creating a new load control licence is indeed the most efficient way to deal with the potential harms it has identified with cybersecurity, grid stability and consumer protection. Cybersecurity risks could largely be dealt with via the NIS regulations, and grid stability risks through application of industry codes like the BSC. Consumer protections may still need the FSP licence, but equally given our concerns around duplicative regulation, could instead be addressed through amendment of the electricity supply licence to apply certain conditions to load control activities, rather than through the creation of a new licence.
- Finally, we encourage Ofgem to be open and collaborative in its approach to licence applications, and its monitoring and compliance of the new licence. Where parties are subject to new rules, it will be more important than ever for Ofgem to support firms to comply with the new regime and for Ofgem to take into consideration feedback from licensees, especially if they raise concerns that Ofgem is creating more administrative burden than intended. We look forward to working with you as the work progresses.

Consultation questions

1. Do you agree that the Licence Policy Principles, as well as Ofgem's Growth Duty, are the correct principles to guide the development of Ofgem's implementation proposals? Please provide reasons for your answer.

We agree that the licensing principles are broadly sensible to guide Ofgem's implementation. However, Principle 4 (*enable effective regulation*) as drafted is not so much a principle in itself but is about the basic functioning of any regulatory regime (i.e. the ability to monitor and enforce the conditions) and should be a core underpinning of Principles 1-3.

In our view, both Principle 3 'enable vibrant markets' and Principle 4 'effective regulation' should include more explicit recognition of Ofgem's role as a regulator across all the different types of companies it regulates in the retail markets (e.g. load controllers, heat networks, suppliers, third party intermediaries). This includes recognition that there is competition between the different actors and that many companies are active in more than one of these spaces. Fair competition between these actors is key to achieving Principle 3, while Principle 4 should also aim to create consistency where possible. Together, Ofgem should be aiming to implement regulation in a way which is not distortive of competition, and gives customers similar protections across similar markets. Doing this effectively must mean integration with the broader programmes of work on improving retail regulation through the consumer outcomes work and e.g. the new compliance operating principles.

2. Are there other measures Ofgem and DESNZ should consider in order to ensure the regime is proportionate and our approach minimises unnecessary burden? Please provide reasons for your answer.

Yes. It is positive that both Ofgem and DESNZ have recognised that load control and electricity supply are often delivered as a single product. This is the case for our managed EV Tariff, Intelligent Octopus Go, as well as multiple products offered by other suppliers in the market. The DESNZ consultation on load control recognises that this could create "unnecessary duplicative regulatory burden" where load control licence conditions overlap with those in the supply licence. We agree. Managing this duplication and creating a streamlined approach to regulation must be a priority for DESNZ in setting the licence and regulations, and for Ofgem in its implementation. Regulating products concurrently under two regimes which largely overlap is unnecessary and will increase regulatory burden without providing consumers greater protection.

In our view, the most effective way to address this would be by introducing a targeted exemption, written into the load control licence, for retail tariffs which include an element of load control - clarifying that these are covered by the supply licence. Such an exemption should apply where there is clear overlap with existing supply licence obligations, or where the supply licence provides greater protections than the load control licence. We consider this applies to the FSP-specific licence conditions, as well as the overarching conditions in Part A. The exemption could look something like:

"When a product being offered by a licensed electricity supplier is primarily a domestic or small business energy supply tariff, any integrated load control functionality marketed and available only as an intrinsic feature of a tariff shall be regulated solely by the electricity supply licence in place at the time, thereby exempting it from licence conditions X,Y,Z of the load control licence."

Alternatively, Ofgem and DESNZ could revisit the rationale for introducing a standalone new licence from first principles. The cyber and grid stability risks identified can be largely addressed through existing frameworks, including the NIS Regulations, industry codes such as the BSC, and the electricity supply licence. The consumer protections and overarching conditions in Part A of the licence could be extended to FSPs by amending the supply licence and applying the relevant conditions, rather than creating two parallel and duplicative regimes. We understand such a decision would not rest with Ofgem solely, but we urge it to work with DESNZ to find solutions for the issue, even if they differ substantially from the current position.

We understand Ofgem and DESNZ have set out that regulatory duplication could be managed via licence derogations. This would be an improvement to the draft licence but we do not consider it to be an effective or proportionate way of addressing the overlap. It would not provide additional protection over an exemption and would create an unnecessary bureaucratic process for both licensed suppliers and Ofgem. We are also concerned that the Ofgem proposal to grant a derogation where the supplier is 'demonstrably meeting supply licence conditions' would substantially increase the regulatory burden associated with applying for any derogation. The point is that suppliers are already subject to supply licence conditions, and if these are being breached then Ofgem can already deal with those through its existing compliance procedures. The derogation process should not become a compliance exercise in its own right.

3. Do you agree with the proposed application form evidence requirements for each area? Please provide reasons for your answer, including any concerns with providing the requisite information and why.

We limit our comments in this section to the licence application process for licensed suppliers. We agree with Ofgem that the application process should be lighter touch for suppliers, given the significant overlap with the supply licence. We would prefer a targeted exemption regime, as outlined above, which could then be taken into consideration in the application process, but nonetheless provide comments on the proposals as outlined in the consultation.

Broadly, the process seems reasonable but we would like further clarity over the proposed 'initial internal checks' to determine pre-existing compliance issues. In most cases we would expect that these could be resolved internally within Ofgem without needing to request further information from the supplier. Given that load control activity is already ongoing at prospective licensees, Ofgem should be particularly mindful that withholding a licence is the same as withdrawing consent for an ongoing activity, similar to revoking a licence. Therefore there should be a very high bar for any compliance issues to affect the application - and likely only those which are already within the enforcement process.

We also query whether requiring financial and operational controls information at an individual licensee level is necessary. We would at least encourage Ofgem to simplify the process so that this information can be submitted in a single document for multiple licence applications coming from a single corporate group. This could mirror the process for Annual Adequacy Self-Assessments where a single submission can be used for all supply licensees.

4. Do you agree with the proposal for a 12-month transition period? Please provide reasons for your answer.

While 12 months may be sufficient, we are highly concerned that Ofgem has not built in adequate flexibility into the licence application period to deal with any potential delays to the process. In particular,

Ofgem's statement in paragraph 4.26 of the consultation - that a company will not be able to continue to operate legally - is something the process should be built to avoid as only a very extreme outcome and ideally one that does not take place at all. We are concerned that, as set out currently, unforeseen delays to processing of applications could leave companies unlicensed and operating illegally, or otherwise withdrawing existing products and creating substantial consumer harm. The risks to customer harm of this hugely outweigh the potential benefits.

Providing tacit authorisation for firms who have made their applications in good time, pending final authorisation, would allow Ofgem to keep to a 12-month transition, while minimising the risks of unintended market disruption and consumer harm.

5. Do you agree with our proposed application process for certain licensed suppliers? Please provide reasons for your answer. Note, please refer to the DESNZ Licensing Consultation for a specific question on licence condition derogations.

See our response to question 3

6. Do you agree that the proposed application process for certain licensed suppliers should apply to licensed domestic suppliers, and not licensed suppliers who supply non-domestic customers only?

No, we think the proposed process for domestic suppliers could also be replicated for non-domestic suppliers.

7. Do you agree with our proposed application process for non-licensed suppliers? Please provide reasons for your answer.

No comment

8. Do you agree that the proposed application process for different types of applicants is proportionate and reflects the SSES purpose and Licence Policy Principles? Please provide reasons for your answer.

Yes broadly.

9. Do you agree that our proposed timelines for licence application processing are reasonable? Please provide reasons for your answer.

The timelines are reasonable but we have concerns over whether Ofgem can meet them given the volume of applications it is likely to receive. Contingency arrangements must be put in place in the event of delays, as otherwise the proposed framework risks creating substantial consumer harm. Please see further detail in our response to question 4 above.

10. Do you agree with our proposal that tacit authorisation should not apply to the load control licence? Please provide reasons for your answer.

As per our response to question 4, we think there is a case for tacit authorisation at least for the period during which Ofgem is still assessing active licence applications. This would ensure the consequences of delay would not be too severe.

11. Should Ofgem reconsider the question of tacit authorisation in future? Please provide reasons for your answer.

Not without good reason.

12. Do you agree with the proposed approach to compliance-related monitoring? Please provide reasons for your answer.

Generally, the proposed approach to compliance-related monitoring appears proportionate. However, where licensees are already operating as energy suppliers, Ofgem should seek to streamline processes and avoid requesting data already submitted under existing supply licence obligations.

For example, clear guidance will be needed on complaints recording, including to ensure all licensees are reporting on a similar basis. Ofgem should also be flexible around how information is provided so that suppliers who are also licensed load controllers can include things in current processes. For example, this may include allowing information on financial controls to be submitted in suppliers' Annual Adequacy Self-Assessments.

13. Do you agree with the proposed approach to market insights-focused monitoring, and are there any additional market indicators we should consider tracking? Please provide reasons for your answer.

In general, the approach appears to be reasonable. However, Ofgem should ensure that information requested through these RFIs does not duplicate data already being collected through supplier RFIs or through its compliance-related monitoring. For instance, Ofgem proposes tracking the products being provided by FSPs and Load Controllers. This could overlap with information Ofgem is proposing to collect on exit fees under compliance monitoring. Being clear on the purpose of RFIs and allowing comments in advance will be important.

14. Are the proposed RFIs proportionate and manageable? Please provide reasons for your answer.

Mostly the RFIs should be manageable, although it is difficult to comment fully without seeing the requests themselves.

Reporting on switching may be difficult given the lack of standardised industry processes in the load control market. It is very clear when someone has switched to or from a tariff but this is not the case for self-contained load control. More generally, a lack of standardisation may make it difficult for Ofgem to collect and compare information on a consistent basis from FSPs and load controllers. Ofgem will need to take a proportionate approach and consider what information can be meaningfully compared across providers.

We also ask that Ofgem is clear about the purpose of its data requests ahead of time, and that it shares relevant insights with licensees. This happens to some extent in the domestic supply market, but too often we provide data with limited reasoning, limited understanding of what Ofgem is doing with the data, and limited sight of the outcomes of that data. Aggregated trends are useful for the industry as well as the regulator - hence why suppliers have already begun to collate their own data.¹

¹ <https://www.lcp.com/en/insights/publications/beyond-tariffs-gb-household-flexibility-market-monitor>

15. Please estimate the costs for your organisation for responding to the proposed RFIs. In the impact assessment accompanying the DESNZ Licensing Consultation government estimated indicative costs of approximately £7,000 to £24,000 per annum. Is this estimate appropriate? Please provide reasons for your answer.

We estimate that the costs of responding to the proposed RFIs will be close to the upper-end of Ofgem's estimate of £24,000. These costs could fall over time as processes become standardised, although of course could also rise if Ofgem requests more information than currently set out.

16. Do you agree with our proposed risk-based and proportionate approach to compliance under the load control licensing regime? Please provide reasons for your answer.

We are supportive of using existing account management relationships for supply licensees. However, this will require some upskilling within the relevant Ofgem teams, given they will be engaging with licensees on a different basis and looking at different activities. This will help to keep the relationship as productive as possible.

We are also very supportive of Ofgem using its retail compliance operating principles with the load control licence, and in bringing this up-to-date with the work on consumer outcomes. It would be helpful if Ofgem could make this intention explicit when it next publishes an update of its workstream on consumer outcomes.

As per our response to Q17 below, we also support Ofgem taking a risk-based approach to compliance, and with Ofgem's intention to focus on 'supporting licensees in complying with the requirements of the licence.' Particularly when the licence is new, it will be vital for Ofgem to take a collaborative approach to helping licensees identify and fix issues. We agree priority should be given to those failing where risk of consumer harm is highest as well as risk of reputational damage to the sector. Ofgem should also consider this in its approach to publishing outcomes from its compliance actions - ensuring consumer trust in this sector will be vital in Ofgem and Government achieving their aims under the Consumer-led Flexibility Roadmap and in delivering Clean Power 2030. Publication should generally come as a last resort and individual firms not named at compliance stage.

17. Are there additional factors we should consider when determining the level of compliance engagement for different types of licensees (eg. new entrants vs licensed suppliers)? Please provide reasons for your answer.

Action and engagement should be risk-based, which might include an assessment of the number of customers affected, but solely the size of licensee should not be the determining factor in setting the approach. Risk of harm and its potential effect on confidence in the market should come first. In general, for all licensees, Ofgem should be first endeavouring to engage constructively with licensees and to assist with bringing those licensees into compliance.

18. Do you support the proposal to use informal account management relationships to support licensees into compliance in the early years? Please provide reasons for your answer.

Informal engagement will be useful for all licensees, including those who are already operating as suppliers. Much of the licence and the accompanying guidance will still be new for those who are used to engaging with Ofgem as existing licensees.

19. Do you agree with the proposed priority areas for compliance engagement? Please provide reasons for your answer.

The priority areas Ofgem has set out cover most of the licensing requirements and therefore seem fairly poorly specified. However, do not suggest that Ofgem puts further work into setting out its priority areas in advance, given the intention to operate a risk-based approach. The biggest risks to consumer harm are not yet known, and should develop with Ofgem's understanding of the market. Initially, the focus should be on assisting applicants with becoming licensed and in helping licensees to find and fix issues early, as per Ofgem's retail compliance operating principles.

20. Do you agree with our proposal to align enforcement under the load control licensing regime with Ofgem's existing enforcement approach, outlined in the Enforcement guidelines? Please provide reasons for your answer.

Yes, in general we support alignment of the enforcement approach under the load control licensing regime with that in Ofgem's existing enforcement guidelines. We do, however, reiterate the need for Ofgem to consider its approach to compliance and enforcement across the retail markets (including supply and load control) and reflect this in its plans for outcomes-based regulation, which should also drive prioritisation of compliance and enforcement work.

21. Do you agree with our proposed enforcement approach for multiple licence holders?

We do not agree that regulating a single product, like a managed EV charging tariff, under both the supply and load control licences is entirely analogous to a supplier holding both gas and electricity supply licences. There is already divergence between the supply and load control licences, including through Ofgem's draft guidance on treating customers fairly, and there is no established convention to ensure the frameworks remain aligned over time.

Despite Ofgem's assurances in the consultation, we consider this still creates a risk of 'double jeopardy' for any issues which arise with tariffs being regulated concurrently under two regimes, and therefore an increase in regulatory risk from being double licensed, which could manifest in less innovation from suppliers. This is why we believe targeted exemption from areas of overlap is important (see our response to Q2 above).

22. Are the regulatory requirements for different types of Load Controller sufficiently clear? Please provide reasons for your answer.

No. There is significant complexity being introduced through the proposed approach to cybersecurity. We are particularly concerned around Ofgem's implementation of the licence cutting across government policymaking. For example, we do not see why licence applications should include firms demonstrating how they will comply with the Tier 1 CAF profile under NIS when this will not be a requirement of the licence, nor why a licence should be revoked on the basis of non-compliance with something which is not a requirement of the licence. We urge Ofgem, DESNZ and DSIT to work together to find a more streamlined and practical means forward.

23. Do you agree with the proposed approach to cyber security assessments for load control licence applications? Please provide reasons for your answer.

Our initial view is that the licence application process risks cutting across the government policymaking process. Requiring a statement of intent from CEO and Board members to comply with something that may not yet (or ever) be a requirement of the licence and could still be under consultation is overburdensome. It is also unclear how this requirement interacts with the DESNZ consultation's proposal to allow 18 months from the licence being in place for licensees to comply. We urge Ofgem, DESNZ and DSIT to work together to find a more streamlined and practical means forward.

24. Do you agree with the proposed approach to cyber security monitoring and compliance? Please provide reasons for your answer.

We suggest Ofgem sets out its approach in more detail once the Tier 1 and 2 CAF profiles are available and the CSRB has gone through the parliamentary process.

25. What would you suggest is a reasonable equivalent of a CRA Audit? Please provide reasons for your answer.

No comment.

26. Do you agree with the inspection process outlined for the cyber security of below 300MW Load Controllers? Please provide reasons for your answer.

No comment.

27. Do you agree with our proposed approach to licence modifications? Please provide reasons for your answer

We are pleased to see Ofgem's intention to keep alignment with the supply licences as each licence is modified. However, this commitment is fairly vague, and it would be helpful to have more clarity on what 'internal frameworks' Ofgem envisages using to manage ongoing alignment.

We remain concerned that divergence between the two licences over time could exacerbate regulatory complexity and uncertainty. We believe the most effective way to address this is by using an exemption framework (see our response to Q2). This could first be introduced on a temporary basis to allow Ofgem to monitor whether load control elements within supply tariffs are adequately covered.

An exemption may not be the only solution to this issue. Amending the supply licence to cover load control activities could also be an alternative option. In any case Ofgem should be looking to avoid subjecting a single product to overlapping but slightly divergent licensing regimes where equivalent consumer protections can be achieved through a simpler structure (see our response to Q2).

We are very supportive of Ofgem bringing load control explicitly into its Consumer Outcomes programme of work.

28. Do you agree with our proposed process for the transfer of a load control licence? Please provide reasons for your answer.

We suggest Ofgem learns lessons from its existing process for transfer or closure of supply licences. Where we have gone through these processes in the past, there has been substantial complexity in closing down a supply licence after customers from one licence to another. These may be factors

limited to the supply market but where possible Ofgem should endeavour that they are not replicated e.g. data clean up with industry systems and external parties can take a very long time and prevent a licence from being closed down.

29. Do you agree with our proposed approach to extending/restricting a licence? Please provide reasons for your answer.

No comment

30. Do you agree with our proposed approach to revocation of the load control licence, including our proposal to include a revocation item on the basis of failure to comply with the NIS regulations? Please provide reasons for your answer.

We do not agree that it's necessary for Ofgem to create new penalties (licence revocation) for non-compliance with NIS. This cuts across a policymaking process which sits within government and increases regulatory uncertainty. There is already substantial regulatory complexity with how different government departments, Ofgem, the NCSC and the Security Governance Group interact to set cyber security policy. For simplicity's sake, we ask that Ofgem allows government to set out the penalties for non-compliance with NIS, rather than creating its own via a consultation on licence implementation. We suggest Ofgem only proceeds with this if directed by government.

See also comments in response Q28 on Ofgem learning from its existing processes.

31. Do you agree with our proposed approach to cost recovery for the load control licensing regime? Please provide reasons for your answer.

We are not convinced that the correct approach to cost recovery for this regime is to ultimately collect it from all energy customers via network charges. This is a notable divergence for example from the proposed approach that will be taken with heat networks and which is currently under consultation.² While the simplicity of the recovery via network charge may be appropriate in the first instance while the regime is new, we suggest that longer term Ofgem explores mechanisms for administration costs to be borne by the licensees themselves, which happens in most other regulatory regimes.

² <https://www.ofgem.gov.uk/consultation/heat-networks-regulation-recovering-ofgems-costs>