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### **Ofgem Statutory Consultation – Supplier Licensing Review: Ongoing requirements and exit arrangements**

EDF is the UK's largest producer of low carbon electricity. We operate low carbon nuclear power stations and are building the first of a new generation of nuclear plants. We also have a large and growing portfolio of renewable generation, including onshore and offshore wind, as well as coal and gas stations and energy storage. We have around five million electricity and gas customer accounts, including residential and business users. EDF is committed to building a smarter energy future that will support delivery of net zero carbon emissions, including through digital innovations and new customer offerings that encourage the transition to low carbon electric transport and heating.

EDF continues to fully support Ofgem's Supplier Licensing Review (SLR), including the four overarching themes that have informed its licensing policy development. We agree that strengthening ongoing supplier requirements in a targeted and proportionate manner should ensure consumers are better protected and risks are minimised for existing suppliers. All market participants must provide customers with an appropriate level of customer service and support, and their business models should not be able to put undue risks on the wider market and other participants. Market participants who create risks should bear the associated costs, and the regulatory framework should seek to minimise the risk of market exits that leave large customer credit balances and policy costs owing.

We welcome the opportunity to comment on Ofgem's final proposals for ongoing requirements and exit arrangements and we set out our views on the specific proposals below.

#### **1. Cost mutualisation protections**

Market exits are a natural feature of competitive markets. However, when a supplier fails and exits the energy supply market it is disruptive to their current (and in some cases also previous) customers, can lead to additional mutualised costs, and undermine trust in the sector. We are therefore fully supportive of Ofgem looking to introduce licensing changes that aim to improve its ongoing financial oversight of suppliers and promote higher financial and risk management standards in the energy market in order to minimise the costs and detriment that result from such failures for both customers and suppliers.

Ofgem has previously consulted on possible prescriptive measures that sought to put in place protections to minimise the costs that would otherwise be mutualised in the event of failure. EDF continues to be supportive of further consideration of such measures.

We note that Ofgem is now proposing to introduce a financial responsibility principle in to the licence as an over-arching obligation with the aim of ensuring suppliers act in a more financially responsible manner and take steps to bear an appropriate share of their risk.

While we are supportive of the policy intent behind the proposal and the inclusion of the principle within the supply licence, it will be important for Ofgem to closely monitor the impact of the new obligation in order to assess the extent to which it successfully achieves its aims and promotes the supplier action that Ofgem envisage. For instance, we note that Ofgem has stated within its recent effective competition report<sup>1</sup> that it believes that its SLR reforms will help provide confidence that pricing strategies are sustainable. Specifically, that the introduction of this proposal will require suppliers at a minimum to have “*plans in place to meet their financial obligations, effective processes for setting direct debit levels, sustainable pricing strategies and arrangements that would reduce the need for costs to be mutualised*”.

We agree with Ofgem’s view that for financially responsible suppliers the principle should introduce little or no additional burden. However, it is not certain that the new principle will in itself be sufficient to lead to better outcomes for consumers. We would therefore like to see Ofgem make timely progress on consulting on further additional prescriptive measures covering explicit cost mutualisation protection, and thereby reduce the risks of consumer detriment through mutualisation.

## **2. Operational capacity and capability**

EDF does not have any specific concerns with the policy intent behind the proposed operational capability principle, such that all suppliers should have the capability, systems and processes in place to enable them to effectively serve their customers and operate in accordance with their regulatory obligations. We would, though, question the extent to which this new principle provides Ofgem with additional powers over and above that which is already provided to it under existing licence conditions.

We fully agree that Ofgem should undertake operational capability checks at the point a supplier seeks to enter the market and we supported the introduction of such requirements as part of the revised new entry requirements Ofgem introduced in 2019. However, Ofgem should provide a clearer rationale for the introduction of a regulatory intervention of this nature on existing suppliers who are already subject to a number of similar regulatory provisions enforceable by Ofgem, including the Standards of Conduct requirements.

## **3. Milestone assessments and dynamic assessments**

We are supportive of Ofgem introducing milestone assessments and believe that they are an important element of the package of SLR reforms that Ofgem is seeking to introduce in order to gain a greater and more effective monitoring role. Ofgem’s original impact assessment highlighted that the risks to consumers are much higher from those suppliers with high growth rates across a short period of time, in terms of quality of service and risk of failure. As such the proposed milestone assessments should provide ongoing assurance that suppliers are fit for purpose and, for example, have credible plans in place when certain regulatory obligations start to apply.

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<sup>1</sup> Outcome of review into whether conditions are in place for effective competition in domestic supply contracts - pages 19/20; Ofgem 7 August 2020

However, we note that Ofgem has made a change to the thresholds compared to that originally proposed, both in level and number of thresholds. We retain the view that Ofgem should further consider the need for an additional higher threshold which would allow an assessment of a suppliers' capability of dealing with a much larger customer base than the current 200K customer threshold. The automated systems and processes required to grow sustainably, whilst continuing to meet all licence obligations, can be very different for a medium sized supplier compared to a small supplier with less than 250K customers.

We agree that suppliers should be required to provide timely notice to Ofgem when it is both approaching, and at the point it has reached, a milestone threshold. It is also fair, reasonable and proportionate to amend Ofgem's original proposals and allow suppliers to continue to acquire customers through the period of assessment.

As well as specific milestone assessments, we are also supportive of Ofgem undertaking dynamic assessments in response to specific early signs about a supplier's financial sustainability or ability to serve their customers. We agree that Ofgem should adopt a flexible and proportionate approach to undertaking such assessments and should be free to act in a risk based manner on a case by case basis rather than be constrained by specific assessment criteria. In terms of action that Ofgem could undertake, we agree that using the enforcement tools that will be used under the milestone assessments is the right approach.

Ofgem has to be ready to take prompt action where it determines that a supplier has failed any assessment and where the risk of existing or imminent customer detriment is high. For instance, as part of any milestone or dynamic assessments there should be a requirement on suppliers to adequately demonstrate their financial solvency. Should Ofgem, following these assessments have significant concerns as to the sustainability of businesses then they should act swiftly in order to minimise the potential for consumer detriment. This should include Ofgem making greater use of customer acquisition bans until any significant compliance deficiencies have been resolved.

#### **4. Ongoing fit and proper tests**

We are supportive of an ongoing 'fit and proper' requirement. Such a test is already part of the new entrant process checks and it would be appropriate to apply the same standards as an ongoing requirement.

The definition of a person with 'significant management responsibility or influence' is open to interpretation and without additional guidance as to which individuals Ofgem would expect to fall within the scope of the requirement there may be an inconsistent implementation approach across different suppliers.

It also remains unclear whether the requirement is expected to apply retrospectively and involve undertaking tests of existing supplier employees who fall within scope; and what actions Ofgem expect suppliers to undertake as a result of such tests. Our expectation is that suppliers will be able to take a risk based approach to the tests across the range of items that they are required to have regard to under the proposed licence condition. It is then for suppliers to determine if, and what, mitigating actions may need to be taken in order to address any risks to consumer harm. Further clarity on how Ofgem will approach compliance on this matter would be welcome.

## **5. Principle to be open and cooperative with the regulator**

We continue to believe that this principle is overly broad and subjective and it remains unclear how it will be applied by Ofgem. There already exists regulatory measures that actively encourage suppliers to engage openly and constructively on matters with Ofgem that have or are likely to involve material detriment to consumers (e.g. through Ofgem's Enforcement Guidelines). It is therefore unnecessary for Ofgem to apply a broad principle to all suppliers, rather than addressing directly any poor performing suppliers through their existing regulatory powers. Furthermore, in terms of the proposed licence condition wording we note that in effect this will lead to suppliers having to make a judgment on what the Authority would reasonably expect.

## **6. Customer supply continuity plan**

We fully support the objective of ensuring more transparency over a supplier's systems and other relevant information which would be helpful for Ofgem, and a winning SoLR supplier, in the event of supplier failure.

We doubt that a continuity plan is the best method of achieving the policy intent. Significant improvements could be made to the SoLR process itself, including in the information held by Ofgem and provided to prospective SoLRs, which would better meet the objectives behind this proposal. EDF has already separately provided to Ofgem views on the data required for a smooth transition of customers during a SoLR event. This includes the types of data that will be required and how this may differ dependent on the exiting supplier's customer portfolio i.e. domestic only, non-domestic only or both.

Improvements could be more readily achieved by requiring all suppliers to provide such information at regular intervals to Ofgem. An initial basis for this would be the operational aspects of the current SoLR Request for Information (RFI) and the data that Ofgem requires from failed suppliers currently. Having an ongoing requirement to evidence that this is retained, in an appropriate format that can be easily accessed by Ofgem, would avoid the need for the more prescriptive continuity plans proposed.

Furthermore, in terms of meeting the objective of supporting suppliers exiting the market in an orderly way, we remain unconvinced that this proposal will achieve the stated purpose. Failing suppliers are unlikely to keep a continuity plan updated, as the consequences of non-compliance are unlikely to be felt by the exiting supplier.

## **7. Independent Audits**

We agree with the implementation of a new requirement for suppliers to undertake an independent audit, if instructed to do so, on the basis that this will be used in a proportionate way and in circumstances where Ofgem has serious concerns around financial solvency and customer service arrangements.

## **8. Reporting requirements**

We have no specific concerns around the new reporting requirements. We would welcome more information on how this reporting will work from an operational perspective; for example, will Ofgem prescribe notification formats and Ofgem contacts points?

## 9. Exit arrangements

### *Interactions with administrators:*

We remain supportive of Ofgem's intent behind many of the proposals and in particular the desire for insolvency practitioners to deal with energy customers in a fair and reasonable way and to follow the same standards that would apply to licensed suppliers in terms of pursuing debt etc.

However, as Ofgem itself has acknowledged, it has limited powers or rights over the administration process and in particular the extent to which insolvency practitioners follow the terms or conditions of the failed supplier. It is uncertain therefore as to the extent to which these proposals will have the desired effect of improving customer experience and minimising disruption associated with supplier exits. We welcome Ofgem further exploring, with other regulatory bodies, opportunities to work together to ensure energy customers are treated in a fair and reasonable way. In addition, Ofgem should further consider the extent to which use of the special administration regime process would avoid many of the issues and risks around supplier exits and be a more effective tool to resolve the lack of power or legal rights Ofgem has over the administration process.

In terms of the specific requirement for suppliers to include references in their contract terms and conditions that activities relating to debt recovery will be executed as outlined in relevant licence conditions, we are specifically concerned with the proposed drafting of SLC 27.8A, which states:

*(ii) charges may not be demanded or recovered unless and until it can be established that such steps to ascertain a domestic customer's ability to pay have been taken and instalments set accordingly.*

As drafted, the requirement goes further than the rest of SLC 27. Suppliers are not currently required to ascertain ability to pay before demanding payment and this may prove complicated prior to the provision of a bill. For example, a supplier could be non-compliant with both SLC 27.8A and its own terms and conditions if it writes to a customer stating: " *You currently owe us £50. Please pay by x or y method or get in touch if you are facing payment difficulties*". We encourage Ofgem to review the specific wording of this condition to ensure it appropriately aligns with its policy intention.

### *Customer Book Sales:*

We have no specific concerns with the proposals in this area. However, we would welcome clarity as to what point in a trade sale or purchase transaction Ofgem expects to be informed by both suppliers. For instance, the point at which both parties have signed contracts, or alternatively at the point a non-disclosure agreement has been entered into but due diligence and commercial negotiations are still ongoing?

### *SoLR Selection Process:*

In principle, we are supportive of suppliers being obliged to honour the commitments they make through a SoLR selection process. However, in terms of any commitments in respect of honouring credit balances, such an obligation should relate only to the level of information that was provided to bidding suppliers at the time any commitment was made. To do otherwise would expose suppliers to potentially significant commercial risks where the level of credit

balances materially changed post SoLR appointment from the information that was originally made available by Ofgem through the selection process.

Should you wish to discuss any of the issues raised in our response or have any queries, please contact Steven Eyre or myself. I can confirm this letter is not confidential and may be published.

Yours sincerely

A handwritten signature in black ink that reads 'R. Beresford'.

**Rebecca Beresford**  
**Head of Customers Policy and Regulation**