

Notice of reasons pursuant to Section 49A(1)(f) of the Electricity Act for the decision of the Authority to make a provisional order under Section 25(2) of the Electricity Act 1989

1. This Notice sets out the reasons why, on 11 February 2020, the Authority made a Provisional Order ("PO") in respect of likely contraventions by Foxglove Energy Supply Limited (company number 09689035) of 16 North Mills, Frog Island, Leicester, Leicestershire, England, LE3 5DL ("Foxglove"). Foxglove is the holder of an Electricity Supply Licence and as such is bound by Standard Licence Conditions ("SLCs") for electricity supply activities.
2. The Feed-in Tariffs ("FIT") scheme is a government programme designed to promote the uptake of small-scale renewable and low-carbon electricity generation technologies. This scheme is now in its 10th year.
3. SLC 33 stipulates that (among other things) all licensed electricity suppliers that have supplied electricity in Great Britain, within the relevant FIT year or quarter are obligated to participate in the FIT levelisation process. They have to declare the amount of electricity they have supplied and make a financial contribution towards the scheme in proportion to this. A licensed supplier is not obligated to make a Levelisation submission if it has not supplied electricity within the relevant levelisation period, unless that licenced supplier is also a FIT licensee and has associated payment data.
4. Levelisation is the mechanism by which the total cost of the FIT Scheme is apportioned across licensed electricity suppliers. The cost is allocated between suppliers in proportion to their share of the electricity supply market of Great Britain, whilst taking into account any FIT contribution they have already made. Payments are made quarterly and annually.
5. Foxglove is a Voluntary Feed In Tariff ("FIT") Licensee and is required to comply with the conditions of SLC 33. SLC 33.3 provides that licensees shall comply with Part 3 of Schedule A (FIT obligations applicable to all licensees) with effect on and after 1st April 2010 . Condition 3.1 of Part 3 of Schedule A to SLC 33 provides that licensees shall participate in the Levelisation Process as set out in Part 6 of the Feed-In Tariffs Order

2012, in accordance with the Authority's instructions. Condition 3.1.2 of Part 3 of Schedule A, further provides that licensees will make FIT Levelisation Payments in accordance with the Authority's instructions. SLC 33.5 states that Section C and Schedule A to Standard Condition 33 are "relevant conditions" for the purposes of section 25(8) of the Act and a non-complying licensee shall be subject to the enforcement powers of the Gas and Electricity Markets Authority ("the Authority") under the Act.

6. The SLCs and the Feed-In Tariff Order 2012 are enforceable as relevant requirements for the purposes of section 25 of the Electricity Act 1989. They require each FIT licensee to make Levelisation Payments to the Authority at specified times of the year. The deadlines for when these payments are due are laid out in Feed-In Tariff Levelisation process Schedule 2019/2020¹, the current year being FIT Year 10. Suppliers which fail to make the requisite payments by the deadlines, as instructed by the Authority, are in breach of SLC 33.3, conditions 3.1 and 3.1.2 of Schedule A, Part 3 of SLC 33 and the Feed-In Tariff Order 2012.
7. Foxglove failed to make the necessary payments on time for two periods in FIT Year 9 which ran in 2018/2019. The periods were FIT Year 9 Quarter 2 and Quarter 4. In Quarter 2, the Authority took alternative action to secure payment from Foxglove. Payment was made late and no further formal action was taken. Foxglove also submitted a late payment for FIT Year 9 Quarter 4². In early 2020 the Authority requested assurances from Foxglove that it would be able to pay its Year 10, Quarter 3 Levelisation Payment. In those discussions Foxglove informed the Authority that it would be unable to submit its FIT Year 10 Quarter 3 payment on time. This covers the period 1 October 2019 to 31 December 2019 and is the sum of £602,930.63. The deadline for this payment is 12 February 2020.
8. In Year 9, the Authority noted a continuation in the trend of suppliers submitting late or inaccurate data and late payments in respect of FIT levelisation. Year 9 also saw the greatest number of licensees participating in the scheme so far. However, the number

¹ https://www.ofgem.gov.uk/system/files/docs/2019/02/levelisation_schedule_yr_10.pdf

² https://www.ofgem.gov.uk/system/files/docs/2019/12/feed-in_tariff_annual_report_2018-19.pdf

of outstanding late Levelisation Payments also increased. Additionally every quarterly levelisation round experienced a shortfall in the fund³.

9. In Year 9, the first mutualisation process was triggered. Mutualisation is the process whereby large shortfalls in the fund are recovered from Licensed Electricity Suppliers. Compliant participants address the shortfall by making additional payments. These payments are then redistributed to those licensees whose payments were reduced as a result of the shortfall in the levelisation fund.
10. The Authority is concerned with Foxglove's poor record of compliance in making its FIT Levelisation Payment on time. Foxglove has historically failed to pay by the stipulated deadlines and was the subject of previous alternative action for a late payment. Despite this, Foxglove informed the Authority that it could not meet the upcoming deadline for its FIT Year 10 Quarter 3 payments. The Authority therefore considers it necessary and proportionate to impose a Provisional Order on Foxglove to secure the FIT Year 10 Quarter 3 payment.
11. The Authority took the view that a provisional order (rather than a final order with the associated delay) was requisite on this occasion. The Authority views this as the most timely means of securing payment from Foxglove, reducing the risk of triggering the mutualisation process and protecting the interests of consumers. The Authority does not consider it acceptable for Foxglove to fail to meet its financial and regulatory obligations when other licensees make adequate provision for compliance.
12. The Authority has had regard to the matters in sections 25(3), (4A), (4B), (5) and (5A), and section 26 of the EA89. In particular:
 - 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. is satisfied that the duties imposed on the Authority by sections 3A to 3C of the EA89 do not preclude the Authority from making the PO (on the contrary, it considers that its duties require it to make the order).

³ https://www.ofgem.gov.uk/system/files/docs/2019/12/feed-in_tariff_annual_report_2018-19.pdf

- c. 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 to be appropriate for Foxglove to take for the purpose of securing or facilitating compliance with the Relevant Condition; and
- d. is satisfied that the contravention is not of a trivial nature.

13. For the above reasons, the Authority decided to make the provisional order requiring the outstanding payment of £602,930.63 to be made by 12 February 2020.

14. The provisional order is available at:

<https://www.ofgem.gov.uk/investigations/provisional-orders-and-final-orders>

Charles Hargreaves

Deputy Director, Enforcement

Duly Authorised on behalf of the Gas & Electricity Markets Authority

11 February 2020