Department of Energy & Climate Change

# Government Response to the consultation on Energy Supply Company Administration Rules and the Consultation on Energy Supply Company Administration (Scotland) Rules

URN 13D/087

April 2013

# General Information

**Purpose of this Document**

This document sets out the Government response to the consultation on the draft Energy Supply Company Administration Rules and the consultation on the draft Energy Supply Administration (Scotland) Rules.

The draft consultation on Energy Supply Company Administration Rules was issued on19 June 2012 and closed on 7 September 2012.

The draft consultation on the Energy Supply Company Administration (Scotland) Rules was issued 1 October 2012 and ended on 26 November 2012.

**Consultation reference**: 12D/246

# Contents

# 1. Introduction

1.1 In June 2012 the Government consulted on draft Energy Supply Company Administration Rules for England and Wales to implement provisions in the Energy Act 2011 for a special administration regime for energy supply companies – Energy Supply Company Administration. In October 2012 the Government consulted on draft Energy Supply Company Administration Rules for Scotland.

1.2 The purpose of energy supply company administration is to ensure that if a large gas or electricity supply company is in financial difficulty, arrangements are in place to allow the company to continue operating until it is either rescued, sold, or its customers transferred to other suppliers. This will reduce the risk of financial failure spreading across the energy market, maintain market stability and therefore protect consumers.

1.3 Energy supply company administration is intended as a backstop to the Supplier of Last Resort arrangments, which allow Ofgem to revoke a supplier's licence if it becomes insolvent and appoint another supplier to take over its customer accounts. The purpose of energy supply company administration is to protect the market from the sudden impact of the failed supplier's debt, which under the market trading arrangements could be smeared across other market participants, increasing the risk of financial failure spreading across the market.

1.4 Energy supply company administration is essentially a contingency measure to deal with a low probability, but high impact event. It will allow the company to continue trading normally, potentially with financial assistance from the Government, if the company is unable to secure funding from commercial sources, until it is either rescued, sold or its customers transferred to other suppliers.

1.5 The Government received 8 responses to the consultations – 7 in response to the consultation on the rules for England and Wales and 1 in response to the consultation on the rules for Scotland. Respondents welcomed the introduction of Energy Supply Company Administration and agree that it will protect the gas and electricity markets from the risk of financial failure spreading in the event of a large supplier becoming insolvent. A full list of respondents can be found at Annex 1.

1.6 The consultations were intended to give interested parties an opportunity to comment on the detailed technical rules of procedure. However, some respondents raised questions and suggestions around the policy design.

1.7 In the following pages we set out our response to these suggestions as well as our response to some of the more detailed comments on the draft rules.

# 2. Government Response

## 2.1 Scope of energy supply company administration

2.1.1 Three respondents suggested that it was unfair that the Government envisaged applying for an energy supply company administration order only if a large supplier were in financial distress. They argued that all supply companies encountering financial difficulties should be given the opportunity of being rescued prior to Ofgem implementing its Supplier of Last Resort process. Under this process Ofgem may revoke the supplier's licence (once the company has been declared insolvent by the court), and appoint another supplier to take over the insolvent supplier's customers. The failed supplier receives no payment for the customer accounts which are transferred.

2.1.2 Small firms still have the potential to be rescued under ordinary administration. The primary objective under ordinary administration is to restructure and rescue the company. Ofgem does not automatically seek to appoint a Supplier of Last Resort. If an energy supply company enters into ordinary administration Ofgem will discuss with the administrator whether the company is in a position to continue to pay balancing and settlement charges (which could be smeared across other market participants if the supplier defaults). If the administrator agrees to continue to pay the charges, the company may continue to trade. If the company is not in a position to pay the charges, Ofgem will revoke its licence and appoint another supplier to take over its customers.

2.1.3 A key difference between ordinary administration and energy supply company administration is that under energy supply company administration the administrator's actions are constrained by the duty to continue to supply customers until the company is either rescued, sold or its customers transferred to other suppliers. This is likely to result in less favourable outcomes for creditors and shareholders than under ordinary administration. The Government believes that the restrictions placed on creditors' and shareholders' rights can only be justified in order to ensure the continued operation of essential services. We therefore restate our intention to apply for an energy supply company administration order only if it is not possible to appoint a Supplier of Last Resort.

## 2.2 Conduct of energy supply company administration

2.2.1 One respondent suggested that the rules should contain provision to prohibit a company in energy supply company administration from taking on new customers. They expressed concern that the energy administrator may seek to grow the company, which would increase its financial exposure.

2.2.2 The energy administrator is under a duty to ensure that energy continues to be supplied at the lowest cost which it is reasonably practicable to incur and to conclude energy supply company administration as quickly and as efficiently as is reasonably practicable. Seeking to grow the company is unlikely to be compatible with achieving these objectives.

2.2.3 The energy administrator must first seek to rescue the company, and only if that is not possible can the energy administrator seek to sell the company as a going concern, and only if this is not possible can the energy administrator transfer the assets to more than one company.

2.2.4 Consumers are free to choose their energy supplier and in the normal course of events consumers will switch suppliers in order to get a better deal on their energy bills. We believe that any restriction placed on the energy administrator in relation to taking on new customers could hamper efforts to rescue the company. There are no such restrictions under ordinary administration or in any other special administration regimes.

2.2.5 The Government agrees that it would not be appropriate for the energy administrator to seek to grow the company, but we do not agree that there should be a prohibition on taking on new customers.

2.2.6 One respondent pointed out that it would be important to ensure that implementation of the energy supply company administration rules does not undermine the effectiveness of the Government's Electricity Market Reform by introducing uncertainty in generators' ability to recover difference payments from a supplier facing insolvency. The Government agrees and we would expect that generators will continue to receive FIT CFD payments if a supply company were to enter into energy supply company administration.

2.2.7 One supplier argued that energy supply company administration should be widened to consider costs such as FiT levelisation and RO mutualisation. The Government can confirm that under energy supply company administration the energy administrator would be obliged to continue to meet all statutory and licence obligations and that therefore we expect that FiTs payments and obligations under the RO would be met.

## 2.3 Legal drafting points

2.3.1 We received few substantive comments on the legal drafting of the rules. One respondent queried the need for separate sets of rules and suggested that the Energy Administration Rules 2006 that govern the special administration regime for network and distribution companies could be amended to encompass energy supply company administration. We did consider this approach initially but came to the view that, due to the different legal framework to the regimes, covering both in one set of regulations would be complex and potentially confusing.

2.3.2 Two respondents suggested that rule 55 in the draft rules for England and Wales, which deals with establishing the rate of exchange in relation to foreign currency debts, should be amended to allow the Energy Administrator the flexibility to come to agreement with the creditor. We agree and propose to amend rule 55 to allow this flexibility. In the event that the Energy Administrator is unable to reach agreement with the creditor then the Energy Administrator will apply to the court to determine the rate of exchange.

2.3.3 In relation to the draft Scotland Rules (rule 46 (2)(b)) one respondent queried whether the "official" rate of interest at 15% was anomalous, given the official rate in the England and Wales draft rules is 8%. The corporate official rate of interest is applied at 15% in Scotland and this is in line with the Insolvency (Scotland) Rules 1986. We do not propose to amend the Scotland Rules to change the official rate of interest to that set in England and Wales as this would be anomalous in the context of the Insolvency (Scotland) Rules.

# Annex 1

# List of organisations that responded to the consultation

E. ON UK

Association of Business Recovery Professionals

Ecotricity

EDF Energy

Haven Power

Insolvency Lawyers' Association

First Utility

Association of Business Recovery Professionals Scottish Technical Committee

Department of Energy & Climate Change
London SW1A 2AW
**www.decc.gov.uk**

**URN 13D/087**