Annex 1 - Penalty Notice

Notice of intention to impose a financial penalty pursuant to section 30A(3) of the Gas Act 1986 and section 27A(3) of the Electricity Act 1989

Proposal of the Gas and Electricity Markets Authority (the "Authority") to impose a financial penalty following an investigation into compliance by Spark Energy Limited ("Spark") with the following Standard Licence Conditions ("SLCs") 14, 21B, 22, 23 and 27 of its Gas and Electricity Supply Licences[1] and with the Gas and Electricity (Consumer Complaints Handling Standards) Regulations 2008 (the "CHRs").

16 February 2015

1. Summary

1.1. The Authority proposes to impose a financial penalty on Spark following an investigation by Ofgem into Spark's compliance with a number of relevant conditions and requirements set out in the SLCs and the CHRs[2]. The SLCs set out the rules on how licensees can operate within the terms of their gas and electricity supply licences. The CHRs prescribe the minimum standards regulated providers are required to meet in the handling of consumer complaints.

1.2. The Authority finds that Spark has breached the following relevant conditions and requirements:

- SLCs 14.4, 14.7 and 14.8 – Domestic Customer transfer blocking. These provisions govern when a licensee may block a Domestic Customer's request to transfer to another supplier, and were breached for the period June 2010 to February 2014.

- SLC 21B – Billing based on meter readings. These provisions place requirements on licensees where a Domestic Customer provides a meter reading, and was breached for the period June 2010 to May 2013.

- SLC 22.3 – Licensee's obligations. This provision requires a licensee to supply gas or electricity in accordance with the terms of a Domestic Supply Contract accepted by it, and was breached for the period August 2011 to May 2013.

- SLC 23.3 – Notification of increase in Charges and other unilateral variations. This provision requires a licensee to give Notice where it unilaterally varies any

[1] The SLCs considered within this notice have similar wording in the Gas and Electricity Supply Licences and are interpreted by the Authority in a consistent manner. In this document, a reference to a SLC by number refers to the identical condition in both licences. All terms used in this notice are deemed to have the same definitions as those in the Electricity and Gas Supply Licences or the CHRs, unless indicated otherwise.

[2] The investigation of Spark's activities included consideration of SLC 25C (Customer Objective and Standards of Conduct for supply activities), but has not found sufficient evidence to seek a finding of breach in relation to this licence condition.

term of a Domestic Supply Contract in a way that is to the disadvantage of a Domestic Customer, and was breached for the period August 2011 to May 2013.

- SLC 27.15 – Direct debits. This provision requires the licensee to take all reasonable steps to ensure that the fixed amount of a regular direct debit payment is based on the best and most current information available, and was breached for the period June 2010 to June 2013.

- SLC 27.16 – Customer credit. This provision includes requirements on licensees to refund Credit to Domestic Customers in a timely manner, and was breached for the period June 2010 to October 2013.

- SLC 27.17 - Provision of final Bill. This provision requires a licensee to send a final Bill or statement of account within 6 weeks of a supplier transfer or a Domestic Supply Contract being terminated, and was breached for the period June 2010 to February 2014.

- Regulations 4(1), 5, 6 and 7 of the CHRs. These regulations place requirements on regulated providers in relation to handling consumer complaints, and were breached for the period June 2010 to March 2013.

- Regulation 10(3) of the CHRs. This regulation requires a regulated provider to inform all of its domestic consumers of the existence of its complaints handling procedure, and was breached for the period June 2010 to November 2013.

1.3. Spark has admitted that it breached the relevant conditions and requirements set out above and has co-operated with the Authority's investigation. It has acknowledged that its practices fell short of requirements in relation to objections, transfers of customers, refunds, billing and complaints handling. Spark has made significant improvements in these areas during the investigation and has improved its performance as a consequence.

1.4. Further, Spark has offered to pay £250,000 to an appropriate consumer organisation by way of settlement.

1.5. Having considered all the circumstances of the case, the Authority considers this redress payment will be of greater benefit to consumers than if a significant financial penalty were to be imposed.

1.6. In the circumstances, and in recognition of the redress payments to be made for the benefit of certain consumers, the Authority hereby gives notice under section 27A(3) of the Electricity Act 1986 ("the Electricity Act") and section 30A(3) of the Gas Act 1986 ("the Gas Act") of its proposal to impose a penalty of £1 on Spark in respect of the contraventions set out above provided that, pursuant to the direction of the Authority, and in any event by no later than the date of any final penalty notice issued by the Authority pursuant to section 30A(5) of the Gas Act and section 27A(5)

of the Electricity Act, Spark has paid £250,000 (less £1) by way of consumer redress as set out below.

1.7. The payment of consumer redress is to be made to Citizens Advice Scotland and to Citizens Advice (the latter covering England and Wales) to provide advice and support to energy consumers. This redress of £250,000 (less £1) will be split equally between these two charities.

1.8. The Authority considers the level of the penalty to be reasonable in all the circumstances of the case. If Spark had not agreed to settle this investigation by making these redress payments, the Authority would have considered it appropriate to impose a much larger penalty in view of the seriousness of the contraventions.

1.9. Any written representation or objection with respect to the proposed penalty must be received by Martin Campbell at Ofgem (martin.campbell@ofgem.gov.uk) or Ofgem, 3rd Floor, Cornerstone, 107 West Regent Street, Glasgow, G2 2BA by 5.00pm on 16 March 2015.

1.10. Any representations or objections received may be published on the Ofgem website. Should you wish for your response or part of your response to remain confidential, please indicate this clearly and give reasons for this request. Any such requests will be considered by Ofgem on a case by case basis.

2. Background

2.1. Spark is a licensed domestic energy supplier based in Selkirk, Scotland. A major part of its business model is to work with letting agents to supply energy to landlords' properties so that they are the default energy supplier to these properties when new tenants move in. It has experienced significant growth in customer numbers in recent years.

2.2. Ofgem opened its investigation on 28 June 2013 following receipt and consideration of information received from a number of sources. These included a reference in May 2013 from Consumer Focus (now Consumer Futures) detailing concerns in relation to Spark's objections to transfer requests, obtaining refunds of credit owed to customers, the calculation and submission of bills, and the handling of customer complaints. Spark's issues attracted media comment, raised public concern and resulted in an increase in complaints received by Ofgem.

2.3. In December 2013, Ofgem became aware of allegations that Spark had been transferring customers to other suppliers without the express permission of those customers (a process Spark termed 'Consequential Transfers'). On 24 March 2014, Ofgem expanded the scope of the investigation to cover these allegations.

2.4. Further details of the relevant SLCs and CHR requirements are set out below.

Transfer blocking – SLC 14.4, 14.7 and 14.8

2.5. Under SLC 14.4, a licensee may make a request to prevent a proposed supplier transfer in certain specified circumstances. The main reason a supplier can object to a transfer is where there is an outstanding debt on the customer's account.

2.6. SLC 14.7 prohibits suppliers from blocking customer transfer requests in circumstances where they know, or have reason to believe, that a customer's relevant Outstanding Charges (a potentially legitimate reason for blocking) are made up in their entirety of a Disputed Amount and/or a Supplier Error Amount, and the operational functioning or the management of its business is such that it is unreasonably practicable for it not to make the request in these circumstances.

2.7. SLC 14.8 requires that suppliers must take such steps as are necessary and within its reasonable control to facilitate a customer transfer in circumstances where, subsequent to blocking the transfer, it becomes aware that the Outstanding Charges are made up in their entirety of a Disputed Amount and/or a Supplier Error Amount.

2.8. The objective of these SLCs is to ensure that suppliers are limited in the circumstances in which they can prevent a customer switching to an alternative supplier, thus encouraging consumers to choose suppliers, engage in the market and drive competition.

Billing based on meter readings – SLC 21B.1 and 21B.2

2.9. SLC 21B.1 requires that if a customer provides a meter reading that the licensee considers reasonably accurate, or if the electricity or gas meter is read by the licensee, the licensee must take all reasonable steps to reflect the meter reading in the next bill or statement of account sent to the customer.

2.10. SLC 21B.2 requires that if the licensee considers that a meter reading provided by a customer is not reasonably accurate, the licensee must take all reasonable steps to contact the customer to obtain a new meter reading.

Duty to Supply – SLC 22.3

2.11. SLC 22 details the obligations placed on suppliers to supply customers under Domestic Supply Contracts. Specifically, SLC 22.3 provides that where a customer accepts the terms of a supplier's Domestic Supply Contract for supply, the supplier must supply electricity in accordance with that contract. Possible exceptions to this requirement are provided at SLC 22.7 (electricity) and 22.6 (gas). In particular SLC 22.7(b) or 22.6(c) (respectively) allow a licensee not to comply with SLC 22.3 where it is not reasonable in all the circumstances to supply electricity or gas to premises, provided that it has given 7 days' notice of its intention to stop supply.

2.12. The objective of SLC 22.3 is to ensure that a supplier is obligated to supply a domestic customer under the terms of the contract they have entered in to. This

provides protection for consumers by ensuring that suppliers adhere to the terms of their contracts with customers, which themselves should be compliant with the SLCs as a whole.

Unilateral Variations – SLC 23.3

2.13. SLC 23.3 provides that if, in accordance with the terms of a Domestic Supply Contract with a Domestic Customer the supplier (a) increases the Charges for the Supply; or (b) unilaterally varies any other terms of the contract in any other way that is to the disadvantage of the Domestic Customer ("Disadvantageous Unilateral Variation") the supplier must give the Domestic Customer Notice of that increase in the Charges for the supply (or Disadvantageous Unilateral Variation) in accordance with Paragraph 23.4.

2.14. The Notice must be given at least 30 days in advance of the date on which the increase in the charges or the disadvantageous Unilateral Variation has effect and must comply with other requirements set out in the licence condition, such as the giving of notice of the ability to object and seek independent advice.

Provision of Information/Final bills

Direct debit – SLC 27.15 and 27.16

2.15. SLC 27.15[3] requires energy suppliers to take all reasonable steps to ensure that they base the fixed amount of the regular direct debit payment on the best and most current information available (or which reasonably ought to be available).

2.16. SLC 27.16 requires suppliers to refund, in a timely manner, any Credit amount that has accumulated when a Domestic Customer requests such a refund. This does not apply where it is fair and reasonable in all the circumstances not to provide such a refund. Where the supplier considers that it is fair and reasonable in all the circumstances for it not to refund the Credit amount, it must inform the Domestic Customer of its view and of the reasons for holding that view.

Final bills – SLC 27.17

2.17. SLC 27.17 requires that where the responsibility for the supply of electricity to a Domestic Customer transfers from the licensee to another Electricity Supplier or otherwise terminates, the licensee must take all reasonable steps to send a final Bill or statement of account to the Domestic Customer within 6 weeks of the supplier transfer or termination of the Domestic Supply Contract.

2.18. SLCs 27.15 – 27.17 are extremely important to safeguard the interests of consumers. When these provisions are breached, consumers risk being misled as to the actual cost of energy; large deficits or credits can accrue on customers' accounts; customers face uncertainty regarding the level of payment to be paid on a

[3] Save where an express contract term provides otherwise (which is not the case in this matter).

regular basis and as such cannot take informed decisions regarding their financial situation. As a result they are at risk of being financially disadvantaged and more likely to become disengaged from participating in the market. This has knock-on effects on the effectiveness of competition within the market as a whole.

CHRs

2.19. The CHRs came into force on 1 October 2008. They introduced requirements on suppliers to establish robust in-house systems, processes and procedures to receive and record all complaints from customers and provide appropriate signposting of relevant complaints handling procedures.

2.20. Regulation 4(1) requires regulated providers to record in a written electronic format the details of every complaint received, irrespective of whether such complaint is immediately resolved or not. Under the CHRs, a "complaint" means any "expression of dissatisfaction made to an organisation, related to any one or more of its products, its services or the manner in which it has dealt with any such expression of dissatisfaction…" The details that are required to be recorded under this provision are:

a) date of receipt of complaint;

b) whether that complaint was made orally or in writing;

c) the identity and contact details of the consumer making the complaint or on whose behalf the complaint is being made;

d) the account details of the consumer making the complaint;

e) a summary of the complaint;

f) a summary of any advice given or action taken or agreed in relation to the consumer complaint;

g) whether the consumer complaint has become a resolved complaint and if so upon what basis the regulated provider (i.e. the licensee) considers it a resolved complaint; and

h) the method of future communication (if any) agreed with the complainant.

2.21. Regulation 5(1) requires that each regulated provider must, for each customer complaint, keep a written electronic record of various aspects of the complaint where it has not been resolved at the end of 1 working day following receipt. The matters which must be recorded are set out in Regulation 5(2) and include:

a) the steps the regulated provider has taken in response to each consumer complaint (including any steps taken to resolve that complaint);

b) the date (if any) upon which such complaint became a resolved complaint;

c) the date (if any) upon which the specified time period (before a complainant can refer the complaint to a redress scheme) expired; and

d) the date (if any) upon which the consumer who made the complaint was informed of their right to refer that complaint to a qualifying redress scheme.

2.22. In accordance with Regulation 6(1), regulated providers must send certain domestic and micro business customers a written notice informing that consumer of their right to a qualifying redress scheme and certain other matters relevant to consumer redress. Regulation 6(3) stipulates when the notice must be sent.

2.23. Regulation 7(1) requires that each supplier must (a) receive, handle and process consumer complaints in an efficient and timely manner, and (b) allocate and maintain such level of resources as may be reasonably be required to enable that regulated provider to receive, handle and process consumer complaints in an efficient and timely manner, and in accordance with the requirements of the CHRs.

2.24. Regulation 10(3) requires that each supplier must, at least once in every 12 month period, inform all its domestic consumers (or arrange for all of its domestic consumers to be informed) of the existence of its complaints handling procedure and how a relevant consumer may obtain a copy.

2.25. The Authority takes compliance with the CHRs very seriously. These provisions are extremely important to safeguard the interests of consumers. They are designed to ensure licensees have appropriate complaints handling systems in place to deal with consumer complaints in an efficient, ordered and timely manner. They also enable licensees to identify systemic issues and therefore improve the service delivered to consumers. Effective complaints handling allows consumers to make informed decisions about the level of service they receive and to gain effective redress when licensees do something wrong.

3. The Authority's decision on contraventions

3.1. The Authority has considered the evidence gathered during the course of the investigation in the making of this decision. Details of the contraventions and their duration are set out below, grouped together as follows:

- Breaches 1 – 2 relate to domestic customer transfer blocking;
- Breaches 3 – 4 relate to transferring customers to other suppliers without their permission;
- Breach 5 relates to withholding of credit balances;
- Breach 6 relates to billing practices and performance;

- Breaches 7 and 8 relate to billings based on meter readings;
- Breach 9 relates to regular direct debit payments; and
- Breaches 10 – 14 relate to complaints handling.

3.2. The ordering of the breaches reflects the profile of each of the issues, based on the nature and extent of the intelligence received during the investigation, with the highest profile matters addressed first.

Customer transfers - Domestic customer transfer blocking

Breach 1: SLC 14.4

3.3. The Authority finds that between June 2010 and February 2014 Spark failed to comply with SLC 14.4. During this period, Spark blocked transfer requests from its customers to transfer to other suppliers on grounds not permitted by SLC14.4.

3.4. Between June 2010 and May 2013 Spark objected to all transfer requests that it received from customers. In most instances, the stated reason for objection was because of an outstanding debt on the customer's account, which is an allowable reason for blocking under SLC14.4(a). However, there are certain requirements that must be fulfilled in order for a debt to be regarded as outstanding, and Spark did not check whether these conditions existed before issuing an objection. Rather, it merely objected to all transfers. As a consequence of the systems in place, Spark objected to transfer requests on grounds which were non-compliant with SLC 14.4, in particular 14.4(a).

3.5. Spark corrected this policy of blanket objection in June 2013. However, Spark still objected to some transfer requests thereafter in order to avoid erroneous transfers. This is not a valid reason to object to a transfer request. Following agreement with Ofgem in February 2014, it ended this practice.

3.6. The relevant period of infringement for this breach was June 2010 to February 2014. During this period, Spark prevented a significant number of its customers from leaving and engaging in the market. For example, between June 2010 and July 2013 Spark objected to 29,381 transfer requests it received with 18,573 rejected on debt grounds and 9,457 rejected on the basis an account had not been set up on the system.[4] Until the grounds for objection had been resolved, these customers would have been unable to choose another supplier that may have been able to offer a more attractive deal or that could provide higher standards of customer service. Furthermore, as a consequence of Spark's poor customer service and complaints handling during this period, customers were prevented from leaving whilst not being

[4] The remainder were Erroneous Transfers.

able to gain an understanding of, or to rectify, the situation. The Authority believes this would have contributed to poor customer satisfaction during the period.

Breach 2: SLC 14.7 and 14.8

3.7. The Authority concludes that the above evidence of Spark's policy of objecting to all transfer requests in relation to Breach 1 is also evidence that Spark did not carry out the required checks before issuing an objection.

3.8. The Authority finds that between June 2010 and May 2013, during the period when Spark objected to all transfer requests, it failed to comply with SLC 14.7 and 14.8. Spark did not run adequate checks on customers' accounts prior to issuing the objection to assess whether there were grounds to legitimately reject the transfer request, or whether any outstanding bill was disputed by a customer or if the outstanding bill was the result of an error by Spark. Such checks are required to ensure objections are issued legitimately. It did not use or have appropriate procedures to make such checks in order to satisfy itself as required by SLC14.7 and 14.8.

3.9. In addition, Spark acknowledged that during this period it received a high volume of complaints in connection with its billing system. It acknowledged the system was not reliable and could not be relied upon to generate accurate bills.

3.10. Given its knowledge of the widespread instances of complaints relating to the level of bills, errors in administration and the blanket objection policy, Spark would not have known or had a reason to believe that all customers, who requested to transfer, had bills that did not comprise Outstanding Charges made up in their entirety of a Disputed Amount and/or a Supplier Error Amount.

3.11. The Authority also considers that the breaches of SLCs 14.7 and 14.8 continued after Spark corrected its policy of blanket objection in June 2013, until February 2014. The Authority concludes that between June 2010 and February 2014, Spark failed to run adequate checks on customers' to assess whether there were grounds to reject a transfer request on legitimate grounds under SLC 14.7 and 14.8.

Customer transfers - Transferring customers without permission

3.12. In August 2011 Spark devised and introduced the Consequential Transfer policy (CT). The effect of CT was that if Spark could not contact a customer to arrange payment or set up a direct debit after multiple attempts, it would transfer them to another supplier. Spark relied upon clause 19.1 of its standard terms and conditions of supply in force during that period, which purported to allow a transfer to another supplier where a requirement for a Payment Method (e.g. a direct debit mandate) had not been met or satisfied by a customer. Spark's terms and conditions set out details of the process. Spark stated that customers would be informed again of the process by letter. However, customers would not know the transfer had been completed or the identity of the new supplier until they received a welcome letter or

email from the new supplier. Spark's explanation for the use of CT was that the process was invoked as a last resort in the context of significant levels of bad debt. During the period CT was in effect between August 2011 and May 2013, Spark transferred 705 customers to alternative suppliers without express consent.

Breach 3: SLC 22.3

3.13. The Authority finds that between August 2011 and May 2013 Spark transferred 705 customers to other suppliers, via switching websites, without the express permission of those customers.

3.14. Spark unilaterally stopped supplying customers in circumstances which did not engage the statutory exceptions to the duty to supply contained under SLC22.7(a) to (d). The Authority considered, in particular, whether the possibly relevant exception SLC22.7(b) would have applied to Spark. This exception allows a licensee to stop supplying electricity if it is reasonable in all the circumstances of the case and it has given seven days' notice of the intention to stop supply. The Authority concludes that it would be unreasonable for Spark to rely on the exception in SLC 22.7(b).

3.15. It is the Authority's firm view that the purported exercise in this case of a unilaterally imposed and exercised, non-negotiated standard contract provision such as clause 19.1 is not within the scope of the exception to the duty to supply.

3.16. Transferring customers in this way, and ceasing their supply without their consent is a serious breach. Even if the amount of detriment suffered by customers is low, it has the potential to lower consumer confidence in the industry and may make a consumer less likely to engage again with the market.

Breach 4: SLC 23.3

3.17. The Authority finds that between August 2011 and May 2013 Spark failed to comply with SLC 23.3. It finds that during this period Spark unilaterally varied the terms of customers' contracts by transferring them to other suppliers via the CT process. Spark failed to issue those customers with the required Notice set out in SLC 23.4. Whilst Spark says it sent all of the affected customers a series of letters before the transfer took place these did not meet the specified requirements of the Notice as set out in that provision, such as 30 days' notice, and notice of the ability to object and seek independent advice. Accordingly, Spark failed to give any affected customer the required Notice of Disadvantageous Unilateral Variation in accordance with SLC 23.4.

3.18. Whilst the Authority acknowledges that Spark's standard tariff was the most expensive in the market during the period of breach, it still considers these transfers amount to a variation of contract disadvantageous to the customers. While Spark stated it tried to ensure that a transferred customer would not lose out financially by transferring the customer to a cheaper tariff (and waiving outstanding debt and debt collection costs), it could not have been certain that this would be the case after the transfer completed. Nor could Spark ensure that any other features of the contract

would not result in higher charges to the customer (e.g. the application of a standing charge compared with a two tier tariff or that other entitlements, for example services provided under a new supplier's contract, would not be inferior). For these reasons, the Authority considers the transfer to be a disadvantageous unilateral variation.

Withholding of credit balances

Breach 5: SLC 27.16

3.19. The Authority finds that between June 2010 and October 2013 Spark failed to comply with SLC 27.16. Spark failed to return all credit balances in a timely manner following customer requests as required by the SLC.

3.20. Spark's own internal procedures included an SLA target to return refunds in 28 days. However, Spark's own internal compliance reports show it operated a policy whereby it would 're-set' the clock on the payment process if a customer contacted it to follow-up on an initial request to return a credit balance. This would stop the refund and return the request to the beginning of the 28 day period, further extending the time taken to process and ultimately for the customer to receive the refund. Data shows that during the period of breach Spark paid 90% of refund requests outside of 28 days.

3.21. The Authority concludes that failure to meet the company's own SLA target further demonstrated that refunds were not being made in a timely manner. Furthermore, the policy of re-setting the clock on an automatic basis does not constitute a "fair and reasonable" justification for withholding customer credit. The Authority is unable to identify evidence of any fair and reasonable justification for withholding customers' credit. Nor did Spark provide evidence that it notified customers of any justification for withholding payments in such a way.

3.22. Spark has subsequently introduced a new refund policy. This removed the clock reset policy and targeted all refunds to be paid within 28 days. Evidence gathered during the investigation showed that following the introduction of the new policy on 1 October 2013, refund times significantly improved to such an extent that the Authority considers Spark became compliant at that time.

Billing and direct debits

Breach 6: SLC 27.17

3.23. SLC 27.17 requires licensees to take all reasonable steps to provide a final bill within 6 weeks (42 days) of supplier transfer or termination of the supply contract. The evidence shows that Spark consistently issued a high proportion of final bills outside of the 6 week limit between June 2010 and September 2013.

3.24. Further, Spark's internal policies and procedures referred to a 60 day maximum turnaround period from supplier transfer/termination of supply contract. It also advised customers that it would take up to 60 days to receive their final bill. These arrangements were in place until February 2014. The Authority considers that by not ensuring it had policies and procedures that reflected and emphasised the six week requirement in the SLC, together with the issue of a high proportion of final bills after six weeks, Spark failed to take all reasonable steps to provide a final bill within that time.

3.25. The Authority finds that Spark was in breach of SLC 27.17 between June 2010 and February 2014.

Breaches 7 and 8: SLC 21B.1 and 21B.2

3.26. The Authority finds that Spark was in breach of SLC 21B.1 and 21B.2 between June 2010 and May 2013. During the period Spark did not have a billing and customer handling system in place that was fit for purpose. In considering evidence in relation to Breach 2 above, it was clear that during the period concerned, Spark's billing system was not reliable and generated inaccurate bills. The evidence, including evidence submitted by Consumer Futures, shows that customers experienced difficulties in submitting meter readings to Spark, and experienced associated problems with receiving estimated bills.

Breach 9: SLC 27.15

3.27. The Authority finds that between June 2010 and June 2013 Spark did not use the best and most current information available to set direct debit payments. As a result of the problems with its billing system, a lack of customer engagement and problems with its meter reading contractor, Spark was not able to collect and apply meter readings consistently to customers' accounts, and so was not able to produce accurate direct debit calculations.

3.28. Spark therefore relied heavily on estimated meter readings. Problems with its customer services systems and procedures meant that its customers were not able to submit meter readings using either the online system or by phone. Relying too much on estimates and poor billing systems caused significant fluctuations in the level of customer bills and consequently the level of direct debit subsequently set by Spark.

Spark's handling of customer complaints

3.29. The evidence shows that between June 2010 and approximately mid 2013 Spark failed to deal with customer complaints in line with its obligations under the CHRs. The issue was largely one of resourcing. Spark acknowledged at an early stage in the investigation that it did not allocate sufficient resources to deal with the complaints that it received. This had knock on effects. Spark did not consistently record receipt and handling of complaints, nor did it consistently signpost to sources of consumer

redress such as the Ombudsman. Such deficiencies led to consumer frustration when their complaint was not dealt with, or if they were not able to access the Ombudsman.

Breach 10: CHR 7(1)

3.30. The level of resource a supplier allocates to complaints handling must be adequate to enable it to meet regulatory requirements under the CHRs and maintained at such a level as may be reasonably required.

3.31. The Authority finds that between June 2010 to March 2013 Spark was in breach of CHR 7(1)(a) and 7(1)(b) as it failed to deal with complaints in an efficient and timely manner because of its failure to allocate and maintain appropriate resources to receive, handle and process consumer complaints.

3.32. Spark acknowledged at an early stage in the investigation that, from the inception of the business, prior to the beginning of 2013, it did not allocate enough resources to complaints handling as it was dealing with other issues. The evidence shows that the failure to receive, handle and process consumer complaints in an efficient and timely manner was principally due to a lack of resources.

3.33. Spark performed poorly on complaints resolution before Q2 2013. However, since then First Day complaints resolution performance improved markedly between Q2 2013 and Q4 2013. This directly corresponds to the period during which Spark allocated significant additional resources to this area of its business. In this regard, Spark provided evidence during the investigation showing it was compliant from April 2013.

Breach 11: CHR 4(1)

3.34. The Authority finds that between June 2010 and March 2013 Spark was in breach of CHR 4(1). During this period, Spark failed to record expressions of customer dissatisfaction as complaints in accordance with CHR 4(1).

3.35. Spark acknowledged this specific breach during the course of our investigation. It had no reliable systems in place to ensure that it recorded all customers' expressions of dissatisfaction as complaints.

3.36. Spark recognised this failure and, as part of the additional resources allocated, put in place measures, completed in March 2013, to ensure that it recorded all cases of customer dissatisfaction in accordance with the Regulations to ensure compliance with CHR4(1).

Breach 12: CHR 5(1)

3.37. Between June 2010 and March 2013 Spark failed to keep a written electronic record of various aspects of all the expressions of customer dissatisfaction it received. By

virtue of this failure, the Authority finds that Spark also failed to comply with the further requirements on recording the handling of complaints set out in Regulation 5 of the CHRs. Accordingly, the Authority finds that during the period Spark were in breach of CHR 5(1), having secured compliance by April 2013.

3.38. The evidence cited in respect of Breach 11 above is applicable in its entirety to Breach 12.

Breach 13: CHR 6(1)

3.39. The Authority finds that between June 2010 and March 2013 Spark failed to send relevant consumers a written notice informing them of the matters set out in Regulation 6(2) of the CHRs, including their right to refer a complaint to a qualifying redress scheme in accordance with deadlines stipulated in the CHRs. Spark provided evidence during the investigation showing it was compliant with CHR 6(1) from April 2013.

Breach 14: CHR 10(3)

3.40. In response to specific concerns regarding its complaints handling procedure, Spark confirmed that until November 2013 it did not proactively provide details of its complaints handling procedure to its customers.

3.41. The Authority finds that between June 2010 and November 2013 Spark did not, in accordance with CHR 10(3), inform its customers of the existence of its complaints handling procedure nor where it could be accessed. Consequently, the Authority finds that during the period Spark was in breach of CHR 10(3). Spark was compliant with CHR 10(3) from November 2013.

4. The Authority's decision on whether to impose a financial penalty

General background to the Authority's decision to impose a financial penalty

4.1. The Authority has considered whether a financial penalty is appropriate in accordance with the requirements of 27A(1) of the Electricity Act and section 30A(1) of the Gas Act and its published Statement of Policy with respect to Financial Penalties (October 2003) ("the Policy"[5]). The Authority may impose a penalty on Spark of such an amount as is "reasonable in all the circumstances of the case".

4.2. The Authority is required to carry out all its functions, including the taking of any decision as to penalty, in the manner which it considers is best calculated to further its principal objective[6], having regard to its other duties.

[5] https://www.ofgem.gov.uk/ofgem-publications/74207/utilities-act-statement-policy-respect-financial-penalties.pdf

[6] The Electricity Act (section 3A) and the Gas Act (section 4AA) set out details of the Authority's principal objective as being the protection of the interests of existing and future consumers, wherever

4.3. In deciding whether it would be appropriate to impose a penalty, the Authority has considered and taken into full account the particular facts and circumstances of the contravention under consideration, including the extent to which the circumstances from which the contravention or failure arose may have been outside the control of Spark. It has also taken full account of the representations made to it by Spark.

Factors tending to make the imposition of a financial penalty more likely than not

Whether the contravention or the failure has damaged the interests of consumers or other market participants

4.4. The Authority finds that the contraventions taken as a whole, given their nature and extent, are of a serious nature. The Authority considers that Breaches relating to transfer objections, delayed refunds and transferring customers without their express permission were particularly serious and had the greatest potential to damage the interests of consumers.

4.5. In addition, the Authority considers that Spark's failure to adequately record and address customer complaints would have exacerbated the negative effect the contraventions had on its customers, as well as causing consumer harm in their own right.

4.6. Other market participants may have had their interests damaged due to Spark's breaches, when customer switches were objected to by Spark.

Whether imposing a financial penalty is likely to create an incentive to compliance and deter future breaches

4.7. The Authority considers that it is appropriate to impose a financial penalty in order to deter Spark or any other licensees from engaging in the same or similar conduct.

Factors tending to make the imposition of a financial penalty less likely than not

If the contravention is trivial in nature

4.8. The Authority does not consider that Spark's failure to meet its obligations in respect of the SLCs and CHRs is trivial.

That the principal objective and duties of the Authority preclude the imposition of a penalty

4.9. There is nothing in the Authority's principal objective and duties that precludes the imposition of a penalty in this case.

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appropriate by promoting competition, and including their interests in the reduction of greenhouse gas emissions and the ensuring of the security of energy supply.

That the breach or possibility of a breach would not have been apparent to a diligent Licensee

4.10. The Authority considers that the breaches should have been apparent to a diligent licensee. In relation to the breaches that Spark may not have been aware of, as outlined above, this was because it did not always have in place the appropriate systems and processes to identify these breaches or to prevent them from occurring.

4.11. In relation to the breaches found in relation to the CHRs, the Authority considers that Spark knew of the deficiencies in its complaints handling systems and procedures. However, Spark's senior management chose, in order to ensure the company remained viable, to focus on other areas of the business rather than allocate sufficient resource to complaints handling.

4.12. The Authority would stress that compliance with the obligations of the SLCs and CHRs is not optional, irrespective of the relative size of supplier.

5. Criteria relevant to the level of financial penalty

5.1. In accordance with section 27A(8) of the Electricity Act and section 30A(1) of the Gas Act, the Authority may impose a financial penalty of up to 10 per cent of the annual turnover of the relevant licence holder.

5.2. In deciding the appropriate level of financial penalty, the Authority has considered all the circumstances of the case, including the following specific matters set out in the Policy[7].

Factors which are first considered when determining the level of penalty

The seriousness of the contravention and failure

5.3. The Authority considers that the contraventions are wide ranging and serious, both individually and when one considers the effects on consumers of all the breaches as a whole. In particular, the Authority considers that breaches in relation to transfer blocking, transferring customers without their express consent and delaying refunds were of a particularly serious nature and took this into account. The fact that Spark is a small supplier and was in a phase of establishing itself in the market does not excuse its actions – all suppliers, irrespective of size, have to comply with their obligations.

The degree of harm or increased cost incurred by customers or other market participants after taking into account any compensation paid

5.4. The Authority considers that affected customers and other market participants were likely to be harmed by the contraventions. Whilst the Authority acknowledges that

[7] https://www.ofgem.gov.uk/ofgem-publications/74207/utilities-act-statement-policy-respect-financial-penalties.pdf

Spark had already identified and began resolving a number of the issues prior to June 2013, harm would have continued until Spark fully complied with its obligations set out in this Penalty Notice, in February 2014.

5.5. From June 2010 to May 2013, Spark blanket objected to consumers switching their supply contract to another provider. As a result, consumers were unable to choose the supplier best suited to their requirements. This would have hampered their ability to choose a cheaper supplier (which would have been possible for pay monthly customers as Spark was the most expensive supplier during the period) and drive effective competition in the market. In turn, other market participants were denied the revenue associated with their taking on these customers who were attempting to switch away from Spark.

5.6. Given the timescale during which the policy of blanket objection to transfer requests was effective, together with the significant issues Spark experienced with billing and complaints handling during that time, the Authority considers that a significant number of customers were likely to have been affected by this contravention alone.

5.7. The effects of these breaches meant that Spark's customers received very poor levels of customer service and the effects of some breaches could have been compounded due to other breaches. For example, customers who wished to transfer away from Spark, but were prevented from doing so, would have had to contact Spark to try to resolve the issue. However, due to Spark's lack of investment in its billing systems and complaints handling, coupled with its admission that it did not record complaints properly, the complainant could then have suffered financial harm through wasted time, call costs, postage etc, in addition to any financial detriment they suffered by having to stay on Spark's tariffs. It is clear from the complaints evidence that some customers found their experience with Spark at the time extremely frustrating.

<u>The duration of the contravention or failure</u>

5.8. The duration of the infringements was significant. At a broad level all breaches, barring Breaches 3 and 4, occurred over a period of several years from June 2010 to at least the first quarter of 2013.

5.9. Furthermore, Breaches 1 and 2 continued until February 2014, despite Ofgem raising concerns at the outset of the investigation about the seriousness of the policy of objecting to all transfer requests.

5.10. In relation to Breaches 3 and 4 (transfer of customers without their express consent), this occurred from August 2011 to May 2013, a period of almost 2 years.

<u>The gain (financial or otherwise) made by the licensee</u>

5.11. The Authority acknowledges that Spark incurred significant losses during the period, including high levels of bad debt. However, the Authority considers that Spark could

potentially have gained (and reduced its losses) through operating three policies: 1) objections 2) transfer of bad debt customers, and 3) delaying refunds.

5.12. The Authority considers it reasonable to assume that Spark's objections policy, during the time which it was in operation, enabled it to retain a significant number of customers.

5.13. The transfer of 'bad debt' customers without their express permission effectively meant that Spark reduced its exposure to risk. Although it could not recoup these debts, it also meant that no further debt was built up. And Spark was passing these customers onto other suppliers who would then have to deal with customers that could not/would not pay their energy bills, potentially causing harm to these suppliers.

5.14. The failure to return credit balances in a timely manner gave Spark access to a source of cash over a longer period of time. Evidence from Spark's internal board reports show that lack of cashflow was a reason why it sought to 're-set the clock' on receipt of further customer contact regarding a refund. Whilst Spark says it eventually made the appropriate refunds and did not have this money indefinitely, retaining additional customer funds for even a short period of time would have helped stabilise its financial position.

Factors tending to increase the level of penalty

Repeated contravention or failure

5.15. This is the first investigation into Spark. The Authority considers that Spark has co-operated throughout the period of the investigation and notes that they have amended certain practices as they have been highlighted during this investigation and in some cases, prior to the investigation.

Continuation of failure after being aware of the contravention or failure or becoming aware of the start of Ofgem's investigation

5.16. The Authority considers in relation to its objections policy (Breach 1), Spark continued to object on certain non-debt grounds. However it recognises that Spark faced particular difficulties in identifying un-notified occupants of let premises.

The involvement of senior management in any contravention or failure

5.17. The Authority considers that Spark's senior management implemented policies that were not compliant with the SLCs. Firstly, its stated policy was to object to all transfer requests and its computer systems allowed it to do this. Secondly, its board knew that refunds were only being paid once a customer had formally complained about a delay in receiving it. Thirdly, regarding CT, Spark used clause 19.1 of its standard terms and conditions to facilitate transfers and each transfer could only be signed off at Director level.

5.18. In addition, Spark's senior management were responsible for planning, resourcing, and implementing appropriate systems and processes to ensure compliance.

5.19. In relation to complaints handling, Spark's management did not allocate enough resources to deal with the complaints that it was receiving.

5.20. All these factors show that Spark's non-compliance in relation to the most serious breaches began at senior levels of the company. Accordingly, the Authority considers the direct involvement of senior management in the processes and policies which led to the breaches was a serious aggravating factor in setting the level of penalty. As referred in in paragraph 5.24 below, the Authority acknowledges that Spark's senior management team has since made significant improvements.

Absence of any evidence of internal mechanisms or procedures intended to prevent contravention or failure

5.21. The Authority considers that although Spark had systems in place during the relevant periods, they were not adequate. Spark failed to implement and maintain adequate procedures in relation to customer transfers, refunds and customer complaints handling.

The extent of any attempt to conceal the contravention or failure from Ofgem

5.22. The Authority considers that there is no evidence that Spark attempted to conceal the contraventions.

Factors tending to decrease the level of penalty

The extent to which the licensee had taken steps to secure compliance either specifically or by maintaining an appropriate compliance policy, with suitable management supervision.

5.23. The Authority considers that Spark failed to maintain adequate compliance policies and procedures in respect of the breaches of the SLCs and CHRs. In addition, Spark did not have in place adequate management oversight and supervision in order to identify and monitor compliance issues across the business.

Appropriate action by the licensee to remedy the contravention or failure

5.24. The Authority acknowledges that Spark is now more focussed on securing compliance. It has made significant improvements to its processes and procedures to remedy the contraventions and the Authority has taken these into account. These improvements have included:

- significant investment in customer experience/service and complaints handling, including establishing a Compliance and Regulatory Affairs team during 2013;

- securing £13m in external investment in order to improve its systems, training and regulatory functions across the business;
- amendments to its objections and refunds policies and procedures;
- a new refund procedure which went live on 1st October 2013;
- new billing systems and back office functions;
- making a number of senior management appointments with a regulatory and compliance focus; and
- complaints handling performance that has increased markedly.

Evidence that the contravention or failure was genuinely accidental or inadvertent

5.25. The Authority recognises the challenges that small suppliers face when entering the market. However, the contraventions cannot be regarded as accidental or inadvertent as it was within Spark's control to allocate resources effectively and manage systems and processes to ensure compliance with its licence obligations.

5.26. Spark acknowledged during the investigation that it focused on stabilising the business and securing sufficient growth to survive as a going concern which resulted in insufficient resources being directed to complaints handling and customer care. The Authority considers Spark's senior management was therefore aware that, as a consequence, the systems and processes they had in place were deficient.

5.27. The Authority finds that senior management devised and implemented the transfer objection policy, CT and the policy of delaying payment of refunds. Spark was slow to recognise that it had introduced policies and practices that were not compliant with the SLCs. The Authority considers that senior management, during the period these policies operated, were focused on securing the continued operation of the business to the detriment of compliance with its obligations. The Authority recognises that there can be significant challenges to overcome in establishing a new supplier in the market. However, the Authority considers that no licensee, at whatever stage of its development, can ignore or act contrary to its obligations, which are there to protect the best interests of consumers. The Authority does not accept that Spark or any other supplier could only develop and establish itself in the market by committing numerous serious breaches of its obligations as a licensee.

Reporting the contravention or failure to Ofgem

5.28. Spark did not report any contraventions or failures to Ofgem prior to the opening of the original investigation in June 2013.

Co-operation with Ofgem's investigation

5.29. Spark has cooperated with the investigation by accepting the breaches and agreed to settle the case at the earliest opportunity. This has achieved a speedier resolution and avoided additional spending of resource by Ofgem.

6. The Authority's decision

6.1. The Authority considers that the seriousness of the contraventions, the duration of the contraventions, the adverse impacts on its customers and the potential financial gain made by Spark warrant a financial penalty.

6.2. Nonetheless, the Authority considers that the redress payment of £250,000 (less £1) that Spark will make, in equal shares, to Citizens Advice Scotland and to Citizens Advice as a result of settling this investigation will be of greater benefit to consumers than if a significant financial penalty was imposed.

6.3. In reaching its decision, the Authority is mindful of its principal objective in carrying out its enforcement functions under the Electricity Act and Gas Act to protect the interests of existing and future gas and electricity consumers. In addition, of particular significance is Spark's admission of the breaches together with the company's stated commitment to improving its processes and systems to secure compliance throughout the course of the investigation.

6.4. The case involves a number of aggravating factors which apply partially or fully as set out at paragraphs 5.16 to 5.21 including:

- continuation of failure after being aware of the investigation;
- the involvement of senior management in any contravention or failure; and
- absence of any evidence of internal mechanisms or procedures intended to prevent contravention or failure.

6.5. The case involves two mitigating factors as set out at paragraphs 5.24 and 5.29 comprising:

- appropriate action by the licensee to remedy the contravention or failure; and
- co-operation with Ofgem's investigation.

6.6. Taking all these factors into account, the Authority considers it appropriate in the circumstances of this investigation to impose a penalty of £1 on Spark which it considers to be reasonable in all the circumstances of the case.

6.7. The penalty would have been significantly higher if Spark:

- had not agreed to pay £250,000 (less £1) in consumer redress to Citizens Advice Scotland and to Citizens Advice as provided for in paragraph 1.7 to settle this investigation;

- had not admitted the breaches of the SLCs and Regulations of the CHRs listed at paragraph 1.2; and

- had not demonstrated its serious intent to secure compliance.

6.8. Any written representations or objections with respect to the proposed penalty must be received by Martin Campbell, martin.campbell@ofgem.gov.uk or Ofgem, 3rd Floor, Cornerstone, 107 West Regent Street, Glasgow, G2 2BA by **5pm on 16 March 2015**.

6.9. Any representations or objections received may be published on the Ofgem website. Should you wish your response or part of your response to remain confidential, please indicate this clearly and give reasons for this request. Any such requests will be considered by Ofgem on a case by case basis.

Gas and Electricity Markets Authority

16 February 2015