

**NOTICE OF DECISION TO IMPOSE A FINANCIAL
PENALTY PURSUANT TO SECTION 27A(5) OF THE
ELECTRICITY ACT 1989**

Date: 28 March 2023

Decision of the Gas and Electricity Markets Authority to impose a financial penalty on Delta Gas and Power Limited in relation to its non-compliance with obligations under the Renewables Obligation Order 2015.

1. Summary

1.1. The Gas and Electricity Markets Authority ("**the Authority**"¹) has made a determination to impose a financial penalty on Delta Gas and Power Limited ("**Delta**"), company number **09933244**, **registered address** 344-354 Gray's Inn Road, London, England, WC1X 8BP, regarding Delta's non-compliance with its 2021-2022 obligations under the Renewables Obligation ("**RO**") scheme.

1.2. The Authority is satisfied that Delta has contravened the following provision which is enforceable by the Authority as a "relevant requirement"²:

- Article 68(7) of the Renewables Obligation Order 2015 ("**ROO**") by failing to make payments to discharge its Renewables Obligation by the date required;

¹ References to 'the Authority' throughout this document should be read as references to the Enforcement Decision Panel acting on behalf of the Authority.

² The ROO was made by the Secretary of State (and the ROS by the Scottish Ministers), inter alia, in exercise of the powers conferred by sections 32 to 32K, 32LA and 32M of the Act, which, pursuant to section 25 of and Schedule 6A to the Act, are provisions imposing obligations enforceable as "relevant requirements" by the Authority. In this context, the requirement to discharge the RO and ROS is enforceable as a relevant requirement.

- 1.3. In its Notice of Proposal to Impose a Financial Penalty dated 25 January 2023 (“Proposal Notice”) the Authority indicated that it was minded to impose a penalty of £100,000, reduced to £70,000 if Delta accepted the imposition of the proposed financial penalty and agreed to forgo the opportunity to make further representations or objections.
- 1.4. No representations or objections were received by the Authority in regard to the Notice of intention to Impose a Financial Penalty. The Authority has considered all the relevant facts and circumstances of the contravention and hereby confirms its original proposal to impose a penalty of £70,000 on Delta for the reasons set out below.
- 1.5. The Authority is of the view that failure to make timely payments in respect of these obligations imposes a significant resource drain on Ofgem as the regulator, causing resources to be directed to activity which would have been avoidable had Delta appropriately planned to meet their obligation. Such behaviour has an adverse effect on other suppliers who have met their obligations (and potentially their customers), offers an unfair advantage to the late payer, and undermines the integrity of the environmental schemes. The Authority is of the view that the breaches of the ROO are serious. The effective operation and administration of the RO scheme, alongside other environmental schemes, is very important. The schemes were introduced by the Government to promote the uptake of renewable and low-carbon energy generation technologies and support renewable electricity generation projects in the UK.
- 1.6. The background to Delta’s contravention is as follows:
- Delta was required to present Renewables Obligation Certificates (ROCs) or make payment in lieu by 1 September 2022. By 1 September, Delta had not presented any ROCs or made any payment in lieu. On 1 September, Delta owed £530,809.20 in respect of its RO.
 - Delta failed to provide sufficient assurances when asked, in order to satisfy Ofgem that it could/would discharge its owed amount by the late payment deadline of 31 October 2022. As a result, on 28 September 2022 Ofgem published a Notice of Proposal to make a Final Order because the Authority was satisfied that (a) Delta was likely to contravene the requirement to pay the outstanding sum of £530,809.20, plus accrued interest, by 31 October 2022; and (b) a Final Order was requisite for the purpose of securing compliance with that requirement.

- Ofgem made a Final Order on 27 October 2022 requiring Delta to pay the outstanding sum of £530,809.20, plus accrued interest, by 31 October 2022. Delta failed to pay the sum due by 31 October 2022.
- On 1 November 2022, Ofgem issued Delta with a Statutory Demand for the outstanding amount. On 17 and 18 November 2022, Delta paid £400,000 towards its RO. On 25 November 2022, Delta paid the remaining balance of £136,797.16 (this amount includes the interest owed).
- The Authority notes that Delta has admitted the contravention set out above. It has admitted the facts associated with the contravention as set out above. The Authority is satisfied that Delta has contravened the RO as set out above and thereby imposes a penalty for early settlement as proposed in the Notice of Intention to Impose a Financial Penalty of £70,0000.

1.7. In accordance with section 27A(2) of the 1989 Act, the Authority is satisfied that it would not be more appropriate to proceed under the Competition Act 1998.

2. The Authority's view on the contravention

2.1. It is clear Delta has breached the requirement set out above by failing to make payment in full by the date required. Delta has offered various explanations for its failure to make the payment on time, which are considered in greater depth below. Delta has now made the payments to the required level, however they were late.

3. The Authority's view on whether to impose a financial penalty

3.1. In deciding whether it is appropriate to impose a financial penalty, and the amount of any penalty, the Authority is to have regard to its current Statement of Policy with respect to Financial Penalties and Consumer Redress published in March 2022 ("**the Penalty Statement**")³.

3.2. The Authority is required to carry out its functions under Part 1 of the 1989 Act, including the taking of any decision as to the imposition of a penalty, in the manner that it

³ Section 27B of the 1989 Act. A copy of the Penalty Statement can be found at:

<https://www.ofgem.gov.uk/publications/statement-policy-respect-financial-penalties-and-consumer-redress>

considers is best calculated to further its principal objective set out in section 3A of the 1989 Act, having regard to its other duties⁴. In formulating its view whether it is appropriate to impose a financial penalty, the Authority has considered all the circumstances of the case including, but not limited to, Delta's representations to the Statement of Case (STOC) and the specific matters set out in the Penalty Statement.

Penalty Statement - General Criteria in relation to imposing a financial penalty and/or consumer redress order

Seriousness of the contravention or failure

- Where suppliers only comply with their obligations late, it places an additional and substantial burden on Ofgem's time and resources.
- Ofgem considers that the contravention is serious and has damaged the interests of other market participants and indirectly the interests of consumers. The RO scheme relies on suppliers making payments in full and on time.
- The failure to make payments under the RO scheme on time has outcomes which are not in the interests of consumers or other market participants. Suppliers that fail to discharge their obligations unfairly accrue financial gain and create additional financial burdens for compliant companies, which are likely to be passed on to customers, as well as creating an administrative burden on Ofgem.
- Ofgem considers that Delta's contravention was deliberate in that Delta knowingly failed to meet its obligations on time. The RO payment is an annual payment. Ofgem made it clear that we take these obligations seriously and suppliers must comply with their scheme payment obligations. This message was reiterated in letters sent to suppliers on 28 July and 7 September 2022.
- Ofgem acknowledges that Delta (and other suppliers) may have suffered financial difficulties due to the impact of the global energy crisis. However for the reasons set out within this notice, it has taken the view that RO payments need to be made in full and on time.

⁴ Section 3A(1B) of the 1989 Act.

- Ofgem considers that the breach would have been, and was, apparent to Delta. Ofgem engaged extensively with Delta (and other suppliers) in reminding it of its obligations in summer 2022 and then in pursuing payment during the autumn. In particular:
 - i. 27 April 2022: Supplier Compliance wrote to all suppliers to set out the deadlines and actions required for the obligation period
 - ii. 28 July 2022: Deputy Director of Enforcement wrote to all suppliers reminding them of the RO deadline and noting that Ofgem will take non-compliance seriously and follow up with robust action, including enforcement action.
 - iii. 4 August 2022: Supplier Compliance wrote to all suppliers to set out their RO obligations for the 2021-22 period.
 - iv. 29 August 2022: Supplier Compliance sent an email to all suppliers to remind them of the deadline for meeting the 2021-22 Obligation.
 - v. 7 September 2022: Requested assurance from Delta regarding ability to discharge RO by 31 October 2022 deadline.
 - vi. 13 September 2022: Reminder sent to Delta regarding request for assurance.
 - vii. 14 September 2022: Assurance documentation provided by Delta.
 - viii. 22 September 2022: Request for Delta to confirm date outstanding payment would be made.
 - ix. 26 September 2022: Reminder for Delta to confirm date outstanding payment would be made.
 - x. 26 September 2022: Call with Delta to inform them of service of Notice of Proposal to Make a Final Order.
 - xi. 27 September 2022: Confirmation to Delta of balances outstanding.
 - xii. 28 September 2022: Delta made representations in respect of Notice of Proposal to Make a Final Order.
 - xiii. 17 October – 18 October: Various email exchanges regarding part payment of outstanding obligation.
 - xiv. 1 November 2022: Statutory Demand served.

- xv. 17 - 25 November 2022: Various email exchanges regarding payment of Statutory Demand.

Impact of licencees' behaviours, including the extent to which the contravention or failure has damaged, or could have damaged, the interests of consumers and or other market participants

- Ofgem considers that non-compliance with regulatory obligations carries a risk of undermining consumer and industry confidence in the relevant schemes and the market. Indeed, Ofgem is aware that a number of industry participants have expressed concern about the unfairness of some suppliers failing to meet their obligations, including suppliers and industry bodies.
- Ofgem acknowledges Delta's financial difficulties, and in particular the impact of the global energy crisis. However, it is ultimately the responsibility of every supplier to be aware of its upcoming liabilities and to ensure it is in a position to meet them.
- Ofgem has expended significant amounts of time and resource reminding Delta of its obligations, encouraging Delta to comply with its obligations, and ultimately in pursuing those undischarged obligations through formal action, in particular by way of a Final Order and a Statutory Demand. This activity is resource intensive, much of which would not have been required had Delta complied with its obligation. It diverts Ofgem resource away from other priority activities aimed at protecting consumers, particularly during this period of rising energy prices. Current market conditions underline the importance of Ofgem's work to protect consumers, especially those in vulnerable situations. Delta's behaviour therefore, causes an unnecessary distraction from this vital work.
- Delta's failure to comply with its obligation has contributed towards the mutualisation process being triggered in respect of the 2021/22 year. Under this process, other suppliers must make up the shortfall in scheme funds through making additional payments on a quarterly process, over the course of a year. As such, there is not just a benefit to Delta in failing to pay on time, but also a cost to wider industry.

Deterrence, including whether a financial penalty and/or a restitution payment is necessary to deter future contraventions or failures by all market participants and encourage compliance

- Ofgem considers that general and specific deterrence are both relevant to this matter.

- In relation to Delta specifically, it has a poor compliance history and a poor attitude to compliance. It failed to meet its obligations in relation to the ROO last year. Ofgem is of the view that a financial penalty is necessary to concentrate the minds of Delta's senior management on the need to comply with its regulatory obligations.
- In relation to the wider market, in recent years a number of suppliers have made RO payments (in particular) late or failed to make payments at all. While Ofgem has taken appropriate compliance and enforcement action in each case (leading to either belated payment or the supplier in question exiting the market via an insolvency process), this has not averted the problem recurring. The Authority is not in the business of providing commercial credit to suppliers and will not do so. Ofgem is of the view that it is necessary to impose a financial penalty in this case to send a strong message to the market that late payment of these obligations will have consequences.
- The smooth administration of the environmental schemes by Ofgem, worth many billions of pounds, is dependent on the companies making their payments by the legislative deadlines. Failure to do so leads to Ofgem's resources being diverted from other activities and undermines our ability more broadly to protect the interests of consumers. The resource that Delta has drawn from Ofgem in respect of its failure to pay is considerable. The fact that Delta failed to discharge its obligation in full until Ofgem took formal enforcement action is unacceptable. The resource expended on these formal processes could be better directed towards protecting consumers, particularly given the difficult market conditions in which we are currently operating.
- Ofgem notes that Delta has since paid all of the outstanding amounts, albeit late and only after extensive compliance engagement and formal enforcement action by Ofgem. It is not acceptable for suppliers to delay meeting their obligations until compliance and enforcement action is taken by Ofgem (which is a resource and time intensive activity for Ofgem). It is the supplier's responsibility to be aware of and meet its obligations itself.
- This is the second time that Delta has been the subject of enforcement action in respect of its compliance with the RO scheme. Last year we issued a Provisional Order in respect of Delta's compliance with the scheme due to similar behaviour whereby Delta failed to pay £381,030.65 plus interest in respect of its 2020/21 RO. In that case Delta did not pay in full until 18 February 2022. The proposed penalty relates to a contravention by Delta, which resulted in the imposition of a Final Order and

Statutory Demand before the payment was made. Delta's poor compliance history has informed Ofgem's decision to pursue a penalty on this occasion.

4. Determining the amount of the financial penalty

4.1. In accordance with section 270 of the 1989 Act, the Authority may impose a financial penalty of up to ten per cent of the turnover of the relevant licence holder. Turnover is defined in an Order made by the Secretary of State. The Authority is satisfied that the proposed penalty does not exceed ten per cent of Delta's turnover.

4.2. As noted above, the Authority must have regard to the matters set out in its Penalty Statement when determining the amount of any penalty. The Penalty Statement requires that a six step process is followed in order to determine the level of financial penalty:

1. Calculate the detriment and gain;
2. Assess seriousness;
3. Consider aggravating or mitigating factors;
4. Consider an adjustment for deterrence;
5. Apply a discount in settled cases; and
6. Establish the total financial liability.

Step 1 – Calculate the detriment and gain

4.3. The gain to Delta relates to the financial benefit of deferring payment. The Authority is not able to quantify with any accuracy the undue advantage obtained by Delta by not paying the sums due on time. This may include the costs that would have been incurred to pay the sums on time (e.g. by loan) or the financial windfall obtained by Delta in retaining the credit for an extended period. Accordingly, the Authority proposes to consider the seriousness of the contravention to determine the appropriate penalty, in accordance with the Penalty Statement.

Step 2 - Seriousness

4.4. The Authority considers that the breaches are of a moderate degree of seriousness. In particular:

- Delta only made its outstanding RO payment once enforcement had been commenced. These processes have been time and resource intensive due to Ofgem

engaging repeatedly with Delta by way of obligation reminders, requests for assurance, and ultimately in pursuing undischarged obligations through formal action, in particular by way of Final Order and a Statutory Demand. This activity is resource intensive, much of which would not have been required had Delta complied with its obligation.

- Delta failed to make its RO payment on time last year, showing a pattern of poor compliance in regard to its environmental scheme payment obligations.
- Senior management was at all material times aware of the contravention.
- Delta's contravention was deliberate in that it knowingly failed to meet its obligations on time.

4.5. The Authority considers the appropriate penal element to be £100,000. We have taken into account that this is approximately 18.6% of the amount that Delta paid late. The Authority considers this to be a reasonable penalty in this case.

Step 3 – Aggravating and Mitigating Factors

4.6. The Authority is of the view that some aggravating and mitigating factors apply.

4.7. The Authority is of the view that the following **aggravating** factors are applicable:

- Compliance history: This is the second time Delta has been subject to enforcement action in respect of RO. Last year we issued a Provisional Order (PO) for RO non-compliances, indicating poor attitude towards compliance with other environmental scheme obligations. Although the fact there are multiple contraventions and that Delta has a poor compliance history has informed the Authority's view that a penalty is appropriate, the Authority is not minded to uplift the penalty further on this ground alone.
- Actions, or lack thereof, taken after becoming aware of the contravention or failure prior to Ofgem's investigation: Delta was at all material times aware of the potential contravention and the contravention at the point it crystallised and failed to take action to address it until the first late payments on the 17th and 18th November and further late payment on 25th November were made. Delta was also aware of the Authority's efforts to pursue payment and secure compliance. Delta is a relatively small supplier, and its senior management were, as might be expected, heavily involved in the day to day management of the business. Ofgem has not formally opened an investigation against Delta during the RO process.

- Actions, or lack thereof, taken after becoming aware of the contravention or failure during Ofgem's investigation: The Authority considers that the same points set out at the above bullet point apply to this factor.

4.8. The Authority is of the view that the following **mitigating** factor applies:

Delta made payments after the late payment deadline on the 17th and 18th November of £400,000 and a further late payment on 25th November of £136,797.16. Delta has therefore paid the amounts due, albeit late and only after substantial compliance engagement and enforcement action by the Authority.

4.9. The Authority has considered the aggravating and mitigating factors when determining an appropriate penalty figure, mindful that some of them have informed the Authority's view of the seriousness of the contravention and its decision to impose a penalty. The Authority does not propose an uplift or reduction of penal element in these circumstances.

Step 4 – Adjustment for Deterrence

As mentioned in respect of Step 2 – Seriousness, the Authority considers the appropriate penal element to be £100,000. We have taken into account that this is approximately 18.6% of the amount that Delta paid late. The Authority considers this amount to be reasonable in all the circumstances of the case. The Authority expects previous similar actions taken against other suppliers to be noted and Delta to take compliance with their obligations seriously. The Authority has previously proposed a financial penalty on a different supplier for a similar breach on the RO in respect of a previous year. The penalty level imposed in that case was set at 8.7% of the total amount paid late. Clearly that level was not high enough to deter Delta from failing to comply with the RO for two years running. As such, an increased penalty level is justified in order to provide deterrence from similar non-compliance in future years.

Step 5 – Settlement Discount

The settlement process set out in section 6 of the Enforcement Guidelines does not apply, due to the statutory time restrictions where a Provisional or Final Order has been made: see paragraph 6.10 of the Enforcement Guidelines. However, the Authority is prepared to reduce the penal element of the overall financial liability by 30% on an equivalent basis as set out below.

Step 6 – Total Liability

Having considered all of the above matters, the Authority hereby confirms its proposal and has decided to impose a penalty of £70,000, noting Delta’s agreement to early settlement. The Authority considers this penalty to be reasonable in all the circumstances of the case.

5. The Authority’s Decision

The Authority received no representations or objections in response to the Notice of Intention to Impose a Financial Penalty issued pursuant to 27A(3) of the Electricity Act 1989 and is hereby confirming its decision to impose a financial penalty on Delta.

The Authority has found that Delta contravened the following relevant requirement:

- Article 68(7) of the Renewables Obligation Order 2015 (“ROO”) by failing to make payments to discharge its Renewables Obligation by the date required.

Having considered all of the relevant facts and circumstances in its possession, the Authority has decided to impose a financial penalty of £70,000 on Delta.

The penalty must be paid to the Authority by 5:00pm on 11 May 2023.

Signature:

Name:

Job title:

Signed for and on behalf of

Megan Forbes (Chair)

Penalty notice

ofgem

Making a positive difference
for energy consumers

Peter Hinchliffe

Philip Marsden

Enforcement Decision Panel

Gas and Electricity Markets Authority

Date: 28 March 2023