

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

Proposal of the Gas and Electricity Markets Authority to impose a financial penalty following an investigation into compliance by EDF Energy Customers plc (“EDF Energy”) with the obligations under conditions 23 (“SLC 23”), 25 (“SLC 25”) and 27 (“SLC 27”) of the Standard Conditions of the Electricity and Gas Supply Licences

Date 9 March 2012

1. Summary

- 1.1 The Gas and Electricity Markets Authority (“the Authority”) proposes to impose a financial penalty on EDF Energy following an investigation into its compliance with the obligations under SLC 23 (Notification of Domestic Supply Contract Terms), SLC 25 (Marketing Gas/Electricity to Domestic Customers) and SLC 27 (Provision of information to customers who pay for electricity/gas by way of regular direct debit payments of a fixed amount) of its electricity and gas licences¹.
- 1.2 The Authority considers it appropriate to impose a penalty on EDF Energy for these contraventions. However, EDF Energy has agreed to make payments amounting to £4.5 million which benefit consumers. The Authority considers that the payments offered by EDF Energy will benefit electricity and gas consumers more than would be the case if a significant penalty were to be imposed, so it proposes to impose a reduced penalty of £1. In addition, from an early stage of the investigation, EDF Energy took proactive steps to put corrective measures in place.
- 1.3 The breaches in this case are not as serious as breaches of sales and marketing licence conditions investigated in 2008 and 2002. However, in considering the appropriate size of payment, the Authority has taken into account the fact that it has felt it necessary to make several regulatory interventions in relation to marketing over the last 10 years by way of enforcement action against a number of suppliers, amending licence conditions and introducing standards of conduct. These repeated regulatory interventions have caused an escalation in the size of the appropriate penalty.
- 1.4 Ofgem’s investigation concerned EDF Energy’s Marketing and Telesales Activities post 21 October 2009. The Authority finds that for varying periods from October 2009 EDF Energy breached the relevant licence conditions in its face-to-face and telephone sales. EDF Energy failed:
 - to ensure consistent provision of complete and accurate information on aspects of sale, including information on Principal Terms;

¹ Standard Licence Conditions 23,25 and 27 of the gas supply licence are identical to the same licence conditions in the electricity supply licence. These licence conditions are interpreted by the Authority in a consistent manner in relation to both gas and electricity supply. In this document, a reference to an SLC by number refers to the identical condition in both licences. The relevant SLCs of the gas supply licences can be found here: http://epr.ofgem.gov.uk/document_fetch.php?documentid=16003
The relevant SLCs of the electricity supply licences can be found here: http://epr.ofgem.gov.uk/document_fetch.php?documentid=15997

- sufficiently to ensure and control the provision of accurate estimates, comparisons and monthly direct debit (“MDD”) payments; and
- to have regard to all relevant information when arriving at a “best estimate” of a prospective customer’s annual consumption.

The Authority notes that EDF Energy did have controls in place to address these issues. However to meet the high standards of the licence conditions they were not sufficient. EDF Energy has promptly taken steps to address each of the concerns raised by the Authority.

- 1.5 Detailed descriptions of the nature of these contraventions are provided in section 3.
- 1.6 In deciding the level of penalty, the Authority has taken into account the prompt action taken by EDF Energy to remedy these breaches, by putting in place new systems that are better designed for compliance with the relevant aspects of the licence conditions. Detailed descriptions of these measures are provided in section 5. The Authority does not therefore propose to issue an Enforcement Order.
- 1.7 In the circumstances, the Authority hereby gives notice under section 30A of the Gas Act 1986 and section 27A of the Electricity Act 1989 of its proposal to impose a penalty of £1 on EDF Energy in respect of contraventions of SLC 23.1, SLC 25 and SLC 27.
- 1.8 All representations received from EDF Energy in writing and orally have been taken into account when making the decision to find breach and impose a penalty
- 1.9 As with all such cases, this case will close after the Authority has considered any representations received. Any written representations on this notice must be sent to Michal Lurka (michal.lurka@ofgem.gov.uk) by 30 March 2012.
- 1.10 The Authority would prefer it if, as far as possible, responses were provided in a form that can be placed on the Ofgem website. Should you wish your response or part of your response to remain confidential please indicate this clearly.

2. Background

History of concern about marketing of gas and electricity to domestic customers

- 2.1. The marketing of gas and electricity to domestic consumers has been a source of concern for Ofgem since the retail market was opened up to competition in 2000. Ofgem has taken repeated enforcement action in this area against a number of suppliers, but any subsequent improvements appear to have been short-lived or have had limited impact on the behaviour of other suppliers. This, and the findings of the Probe, led Ofgem significantly to strengthen licence obligations, including SLC 25.
- 2.2. The current investigation is the second into EDF Energy or its predecessors.
- 2.3. Other suppliers have also been investigated for their approaches to marketing of energy products to domestic customers.
- 2.4. In addition to taking enforcement action, Ofgem held detailed discussions with suppliers about its proposed Probe remedies during which the aims of the Ofgem marketing licence

obligations were made clear. The draft licence condition was the subject of a formal statutory consultation in August 2009.

- 2.5. Both the Consultation Document and the 2009 Probe Decision Document made clear the policy concerns behind the proposed changes to the marketing licence condition. Ofgem's research had confirmed doubts that the information provided to consumers about tariffs and the savings they could make by switching supplier was actually correct. Ofgem wanted to take steps to help ensure that consumers were always provided with accurate information so they could then make properly informed decisions.
- 2.6. The Authority made clear that the proposed changes were to meet aims which included –
- improving consumers' ability to make well-informed decisions in response to direct sales approaches from suppliers – and so reduce instances of consumers switching inadvertently to less appropriate deals; and thereby to increase competitive pressure on suppliers;
 - improving the regulatory framework in order to allow more effective enforcement of the rules governing sales and marketing activity; and
 - building consumer confidence in the competitive market, given that for many consumers doorstep selling is their only engagement in the market.
- 2.7. Following the consultation Ofgem significantly strengthened a number of licence obligations, including SLC 25 as part of its Probe Remedies. Given this history of repeated problems relating to the sales and marketing conditions, the Authority considers that it is appropriate to increase significantly the level of penalty to be imposed for breaches of these licence conditions which are crucial to ensure that the customer is adequately informed.

The importance of compliance

- 2.8. Compliance with the licence obligations is important for a number of reasons:
- i) Consumer confidence in switching, and customers' ability to make the right choice for their needs, is crucial to healthy domestic energy markets that allow consumers to receive choice and value. These obligations are designed to ensure more competitive markets.
 - ii) Sales approaches that are inappropriate, misleading, unfair, non-transparent and/or unprofessional can result in unhappy consumers, wasted time and financial loss.
 - iii) Sales activity takes place on a very large scale: running into hundreds of thousands, if not over a million approaches per month, per supplier. For example, EDF Energy reported several million face-to-face activities and several million telesales activities in 2010. Marketing Activity has the potential therefore to affect significant numbers of consumers. If done in breach of the SLCs, it may have an adverse impact on competition by reducing consumer confidence and engagement and their willingness to switch suppliers. Consumer inactivity reduces the effectiveness of competition in the retail market.
 - iv) High standards are appropriate in this industry sector as energy is an essential and complex product. In both marketing and telesales activities the interaction with the

consumer is short. There are limited possibilities to transfer essential information. The quality of the information which is transferred is therefore critical.

EDF Energy's sales activities

- 2.9. Prior to EDF Energy's announcement of its suspension of un-solicited door-to-door selling of residential energy in September 2011, EDF Energy conducted the full range of sales activities that were covered by the marketing licence condition.
- 2.10. Until September 2011, EDF Energy sold Domestic Supply Contracts on the doorstep and in "public places" as referred to in SLC 25.17. In 2010, a significant proportion of EDF Energy's Marketing Activities were conducted face-to-face (i.e. approaches were made in person with the intention to sell Domestic Supply Contracts). These Marketing Activities resulted in nearly [excised] new contracts and were conducted by both in-house and agency staff.
- 2.11. EDF Energy also sells Domestic Supply Contracts over the telephone. In 2010, EDF Energy conducted over several million Telesales Activities (i.e. customer connections with the intention to sell Domestic Supply Contracts) resulting in nearly [excised] contracts. These were conducted by both in-house and agency staff.

3. The Authority's decision – EDF Energy in breach of SLC 25, 23.1 and 27

- 3.1. After considering the relevant information in the case, the Authority finds that EDF Energy breached SLC 25, SLC 23.1 and SLC 27.
- 3.2. Details of these contraventions are set out below.

Marketing Activities

- 3.3. Between January and October 2010, EDF Energy failed to ensure that its (face-to-face) sales representatives routinely provided customers with a clear explanation of how the proposed monthly direct debit (MDD) payments were calculated and how MDD payments related to the estimated annual spend with EDF Energy. EDF Energy also failed to ensure that MDDs were routinely correctly calculated by its Representatives. During this time there were examples of MDD amounts that fell both above and below the estimated annual spend recorded for the customer in question. The reason for this was not recorded in any of the samples. Whilst the reasons for the differences might have been justifiable, and whilst EDF Energy had some controls in place to check when very low monthly direct debits were set up, it did not collect the information that would have allowed it to know the reasons for MDDs being set differently, and hence assure itself, and Ofgem, that its sales representatives were not in breach of SLC 25 and/or SLC 27. The Authority therefore considers that EDF Energy's controls, and its management and compliance arrangements, were insufficient and that EDF Energy was in breach of SLC 25.1, 25.2, 25.7(c), 25.16, and 27.13 – 15. However, in October 2010, EDF Energy remedied this breach with the introduction of specific control arrangements to verify and, where necessary, rectify instances of MDD levels not reflecting the estimated annual spend.
- 3.4. Between January and October 2010, EDF Energy failed to ensure that its sales representatives always showed the basis upon which they had estimated the customer's annual consumption. There were failures to record the basis for the estimate (that is, whether it was based on actual consumption; reasonably ascertained based on the available

billing information; or a best estimate based on the relevant characteristics of the customer's property). Such instances of incomplete documentation were not systematically identified, and remedied, by EDF Energy. Between January and December 2010 EDF Energy also failed to inform prospective customers of the estimated annual consumption in kWhs used for the estimate of annual spend. Provision of this information is important if customers are to be able to properly assess the appropriateness of the product being sold and make a well informed decision. The Authority therefore concludes that, between January and December 2010, EDF Energy was in breach of the requirements of SLC 25.1, 25.2, 25.7(b), 25.10 and 25.16. However, the automated system introduced by EDF Energy in December 2010 remedied this breach.

3.5. Since January 2010, EDF Energy has failed to clearly itemise and explain other relevant differences, including discounts and/or differences in charges associated with different payment methods, between prospective customers' existing energy supply contract(s), and those proposed by EDF Energy. The Authority considers that in order for customers to be provided with complete information, the following differences are to be itemised as a minimum:

- the amount and type of any discounts, for example for the use of different payment methods; and/or
- the amount of any standing charges; and/or
- the amount of any cancellation charges; and/or
- the amount of unit rates and the tier(s) at which these apply.

The Authority considers that EDF Energy has been in breach of the specific requirements of SLC25(8)(b), and the wider requirements of SLC 25.1, 25.2 and 25.16. However, EDF Energy has informed Ofgem that it has planned changes to its systems to enable it to provide comparisons on an itemised basis and that it expects these changes to take effect in the first half of 2012.

3.6. Between January 2010 and October 2011, EDF Energy failed to ensure that customers acquired as a result of face-to-face marketing activities were reminded to check that the product they had signed up to was appropriate for them, including details of where to find impartial advice and information. For a shorter period, between January 2010 and October 2010, EDF Energy also failed to provide information to its newly acquired customers on how to contact Consumer Direct². These failures constituted a breach of the specific requirements of SLC 25.12(c) and (e), and the more general requirements of SLC 25.1, 25.2 and 25.16. However, they were remedied by EDF Energy in October 2011 and October 2010, respectively, through amendments to its Welcome Booklet.

² Consumer Direct is the government funded telephone and online service offering information and advice on consumer issues. Consumer Direct is funded by the Office of Fair Trading and delivered in partnership with Local Authority Trading Standards Services.

- 3.7. Between February and December 2010, EDF Energy arrived at its best estimate of a prospective customer's annual consumption through the use of a model which took into account only two factors, namely the number of bedrooms and the number of occupants. The Authority does not consider this approach to be sufficient as it failed to take into account all relevant information available at the time. Although the Authority notes and welcomes that EDF Energy had evidence to show it had tested this model, in the Authority's view, estimating customers' annual consumption while failing to take into account all relevant information available at the time falls short of meeting the standard required by SLC 25.7(a). The Authority acknowledges that a range of approaches is taken by suppliers in arriving at "best estimate". However, suppliers' approach should be guided by using all available relevant information and enabling the customer to understand and assess the reliability of the estimate provided.
- 3.8. Between January 2010 and October 2010, EDF Energy's overarching management and compliance arrangements were insufficient to demonstrate the accuracy of all estimates and comparisons provided by its representatives. This is because the supplier failed to ensure that (a) all the necessary information required for the purpose of calculating estimates and comparisons was recorded by its representatives and (b) the recorded values of estimates and comparisons³ were correct. As a result of this failure, EDF Energy could not demonstrate that mistakes made by its sales Representatives in the provision of estimates and comparisons would have been proactively monitored, identified and, where necessary, rectified by the supplier. EDF Energy remedied this breach with introduction of additional control arrangements in this area.

Telesales Activities

- 3.9. Between October 2009 and October 2010, EDF Energy failed, in its training materials, to take all reasonable steps to bring the requirements of the objective of SLC 25 to the attention of its telesales representatives. Whilst all of its staff are trained on the requirements of its internal Code of Conduct which conveys some of the requirements of the revised SLC 25, its training of telesales representatives relied on training material which corresponded to the old versions of the licence condition. EDF Energy has provided evidence to show that as from October 2010, its telesales representatives receive the appropriate training and guidance.
- 3.10. Between October 2009 and December 2011, EDF Energy failed to take all reasonable steps to ensure, and control through its monitoring arrangements, that saving claims being made by its telesales representatives, as part of an opening call introduction, were being applied appropriately. This is because in the training and instructions provided to its Representatives, EDF Energy did not sufficiently explain how these claims should be applied (including the context in which these are being made); it failed sufficiently to control the way in which these claims were then used by its Representatives; and it subsequently failed to adequately monitor for the correct use of these claims. As a result of these shortcomings, some customers contacted by EDF Energy were at risk of being provided, in the opening part of the call, with information which was generic without the customer realising that it might not be specific to their circumstances. The Authority considers that the requirement to provide accurate information applies to each part of every Telesales Activity. Whilst EDF Energy targeted customers in order to maximise the likelihood that it would be able to offer a lower price, opening a telesales call with a generic and unqualified savings claim could lead

³ Either transposed from EDR Energy's Price Comparison Tables or manually calculated by the sales representatives

to incorrect expectations at the start of the call, and the Authority does not consider this to be acceptable. EDF Energy remedied this breach in January 2012, by introducing a formalised approach requiring for the Opening Benefit Statements to be approved and signed-off prior to their use.

- 3.11. From October 2009 to December 2011, EDF Energy failed to take all reasonable steps to ensure, and control through its monitoring arrangements, that its telesales representatives always sought and took into account all the information required for the purpose of calculating accurate estimates and comparisons. In the training and instructions provided to its telesales representatives, EDF Energy did not explicitly require its staff to obtain information on the customer's current tariff as part of the process of providing saving quotes. As a result this information was not always sought. Whilst EDF Energy targeted customers it believed had a high probability of being on a standard tariff, it is not a safe or permissible approach when conducting a price comparison not to try and establish the customer's existing tariff. EDF Energy remedied this breach in December 2011 by altering its system to include prompts requiring agents to ask for the customer's current tariff.
- 3.12. From October 2009 to September 2011, EDF Energy operated a telesales process that did not comply with SLC 23 and SLC 25, in that it did not provide a summary of the terms of its contract (the Principal Terms) before entering into at the contract with the customer, as required under SLC 23.1. Instead, it instructed its telesales representatives to send customers written details of the full terms of the supply contract after the verbal contract had been entered into, and provided a lengthened cooling-off period. EDF Energy believed that doing this was beneficial for customers in terms of giving them much more time to read the Principal Terms properly and the Authority recognises this. However, the obligation to provide the Principal Terms and the time in which this is done is clearly spelt out in SLC 23 as being before the contract is entered into. The Authority therefore found that EDF Energy was in breach of SLC 23 and SLC 25 as it failed to ensure consistent provision of Principal Terms prior to customers entering into a contract. EDF Energy remedied the position in September 2011, by requiring its telesales agents to use scripts for their calls that include all necessary information. It has retained the additional cooling off period. In addition, in telesales calls customers might have been quoted unit rates either inclusive or exclusive of VAT without the reasons for doing so being sufficiently explained. Sales representatives were given no clear instructions whether to quote prices inclusive or exclusive of VAT when the customer did not have information to hand to make an immediate comparison with their own tariff. EDF Energy has since rectified this.

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

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

- 4.1 The Authority has considered whether a financial penalty is appropriate in this case, taking into account the requirements of the Act and its published Statement of Policy with respect to Financial Penalties (October 2003) ("the Policy").
- 4.2 The Authority is required to carry out all of its functions, including the taking of any decision as to financial penalty, in the manner which it considers is best calculated to further its principal objective and having regard to its other duties.

- 4.3 The Authority considers that a significant penalty is necessary in order to create an incentive to ensure compliance and to deter future breaches by the licensee and all other licensees.
- 4.4 The Authority's reasons for proposing that a penalty should be imposed in this case, and the factors and circumstances it has taken into account, are set out below in summary. These reasons are accepted by EDF Energy.
- 4.5 EDF Energy was responsible for ensuring that it had in place systems and processes to ensure that both EDF Energy and its sales representatives complied with the relevant licence obligations.
- 4.6 The extent to which EDF Energy was able to provide support and fund those systems and processes was entirely within its control. The Authority considers this to be the case in relation to contracted agency staff as well as in relation to EDF Energy's own staff. EDF Energy failed to provide, support and fund those systems and processes to the high standard required by the updated licence conditions.
- 4.7 The Authority does not consider that EDF Energy has allowed or condoned mis-selling but has concerns that the interests of consumers were not properly protected as a result of the above breaches. The Authority considers that the scale of EDF Energy's marketing activities and the manner in which they were carried out will have contributed to the interests of consumers being damaged resulting in two main impacts–
- a) customers' ability to make fully informed decisions about energy offers in response to telephone and face-to-face sales may have been impeded;
 - b) customers may have been placed on a more expensive tariff or missed out on the full extent of expected savings.
- 4.8 Section 2 of this Notice sets out the history of the marketing obligation and previous investigations. It highlights the difficulties experienced over many years by consumers when trying to switch supplier on the basis of poor or partial information from suppliers, meaning consumers do not achieve the savings they had hoped for. The Authority cannot overstate the importance of SLCs 25, 23.1 and 27.15 as tools that aim to ensure that accurate and adequate information is provided to customers and go to the heart of the Authority's principal objective to protect the interests of consumers.
- 4.9 All licensees would have been fully aware of and familiar with the licence obligations, due to both previous investigations and licensees' input to proposed amendments to the marketing licence condition when these were consulted on as part of the Probe in 2009.
- 4.10 The Authority considers that the breaches should have been apparent to EDF Energy. The Authority found in its investigations that EDF Energy did not have sufficient systems or processes to make these breaches apparent or to prevent them occurring.
- 4.11 In these circumstances, the Authority considers that the contraventions of SLC 23, 25 or SLC 27 described above are serious.
- 4.12 There is nothing in the Authority's principal objective and duties that precludes the imposition of a penalty in this case.

5. Criteria relevant to the level of financial penalty

- 5.1 In accordance with section 28A(8) of the Electricity Act 1989 and section 30A(8) of the Gas Act 1986, 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 proposing the level of financial penalty, the Authority has considered all the circumstances of the case, including the following specific matters set out in the Policy.

The seriousness of the contravention and failure

- 5.3 The Authority considers that EDF Energy's failure to comply with SLCs 23, 25 and 27 is serious, even though it relates to breaches which are not as serious as previous breaches of sales and marketing licence conditions investigated. These are very important obligations with which the Authority expects all licensees to comply. The scale of marketing and telesales activity means that a significant number of customers did not receive information to the high standard that is now expected, and, as a result, may have been exposed to inaccurate information about EDF Energy's products and offerings. As set out in paragraph 2.7, given the history of repeated problems relating to the sales and marketing conditions across the industry, the Authority considers that it is appropriate to increase significantly the levels of penalty that would be imposed for breaches of SLC 23, SLC 25 and SLC 27.

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

- 5.4 The Authority considers that customers and other market participants may have been harmed by the breaches.
- 5.5 The non-exhaustive list of harms that may have been suffered by customers and other market participants as a result of EDF Energy failing to comply with the licence obligations that govern face-to-face and telesales marketing are summarised at paragraph 4.7.
- 5.6 Estimating consumer detriment is inherently a case-specific exercise. Any financial detriment will vary depending on the extent of the promised savings, tariffs in question, variations in consumption and any corrective actions taken by the affected customers. We have not here attempted to quantify the harm, given the time and resource which would be needed to achieve this.
- 5.7 With regards to other market participants, the breaches may have led to a reduction in the intensity of competition and may have acted as a barrier to entry or created an uneven playing field for competitors that complied fully with their marketing obligations.

The duration of the contravention or failure

- 5.8 The proposed penalty relates to marketing and telesales breaches the majority of which occurred between 18 January 2010 (when the specific changes to SLC 25 came into force) and 13 December 2010 (when EDF Energy fully implemented its new sales system for face-to-face sales).

The gain (financial or otherwise) made by the licensee

- 5.9 Energy suppliers engage in marketing activities in order to maintain their existing customer base and to win new customers from their competitors. The breaches identified above mean that EDF Energy may have won some customers that might otherwise have stayed with their

existing supplier or switched elsewhere had customers always been given the information as required by the licence condition. In that case, the revenue stream earned from any Customers who may have been acquired in such a manner would have been the financial gain made by EDF Energy.

- 5.10 In addition, the company may have gained financially by not devoting sufficient company resources to compliance procedures, for example:
- a) providing or procuring sufficient training for sales agents;
 - b) providing or procuring, in a timely manner, sales systems and procedures to ensure for compliance with the specific obligations of the licence condition for face-to-face sales; and
 - c) establishing adequate monitoring procedures to identify the failings and taking remedial action.
- 5.11 The Authority considers that before applying the relevant mitigating and aggravating factors, the appropriate level of penalty for these breaches would be much higher than the value of the package offered by EDF Energy.

Repeated contravention or failure or continuation of a contravention or failure after either becoming aware of the contravention or failure or becoming aware of the start of Ofgem's investigation

- 5.12 As set out in section 2, this is the second time a company within EDF Energy Group has been investigated for compliance with the marketing licence condition, although the nature of the breaches in this case is less serious.
- 5.13 Further, EDF Energy was fully aware of the history of problems with direct marketing by energy suppliers and the efforts made by Ofgem to promote improvements for customers. In particular, the 2009 Energy Supply Probe (see paragraphs 2.4-2.6) highlighted the problems caused to customers through the provision of inaccurate information. To help ensure well-informed decision making, suppliers were consulted about changes to the marketing licence condition in 2009.
- 5.14 In addition, to complement the new licence condition, Ofgem introduced a set of overarching standards of conduct that it expected suppliers to take all reasonable steps to adhere to in the domestic and small business retail markets.
- 5.15 Ofgem indicated in October 2009 that it expected these high standards to drive improved performance by suppliers and stated that it had already started to have regard to these standards when considering consumer detriment in the context of investigations.
- 5.16 Changes to the licence condition were introduced in October 2009 with the more detailed requirements taking effect in January 2010. The date on which the most recent changes took effect was delayed in order to give suppliers further time to prepare.
- 5.17 EDF Energy failed to comply with a number of the licence obligations from when they were first introduced.

The involvement of senior management in any contravention or failure

- 5.18 The Authority considers that planning and resourcing for licence compliance and the implementation of appropriate systems and processes to ensure compliance are the responsibility of senior managers at EDF Energy. The Authority expects that senior management will put in place systems that secure and incentivise compliance.
- 5.19 The Authority considers that although EDF Energy had systems in place during the relevant periods, they were not adequate. However, the Authority is pleased to note that senior managers reacted swiftly to put in place new systems and processes to deal with many of the breaches as they were identified, with the aim of securing compliance for future Marketing and Telesales Activities. The Authority has seen no evidence that senior management at EDF Energy were involved in any deliberate actions in relation to the contraventions described above.

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

- 5.20 While some systems and procedures were in place in order to prevent contravention or failure, the Authority has found these systems and processes were not always adequate. The changes to the systems and processes that have been and are being made by EDF Energy to ensure compliance, identified in paragraphs 3.3 to 3.12, indicate where those systems and processes were inadequate.

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

- 5.21 The Authority found no evidence that there was any attempt to conceal the contraventions. Indeed EDF Energy's admission of the breaches is a significant factor in its favour.

Factors tending to decrease the level of financial 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 and action taken by the licensee in recognition of the contravention or failure

- 5.22 The Authority acknowledges that EDF Energy has taken or agreed to take steps to secure future compliance with the licence obligations.
- 5.23 During the course of the investigation, EDF Energy was made aware of several of Ofgem's concerns in relation to the activities of its representatives and its policies and procedures.
- 5.24 EDF Energy has informed Ofgem of some additional changes it considered to improve its processes and the Authority has taken this into account. These include:
- piloting and considering of a voice recording of some of its Marketing Activities; and
 - piloting an extension of the written quotation process for Telesales Activities.

It appears to the Authority that EDF Energy has already taken action (as described in paragraphs 3.3 to 3.12) to secure or facilitate compliance with the obligations under SLC 23.1, SLC 25 and SLC 27 as those obligations.

5.25 EDF Energy has agreed to make payments to the sum of £4.5 million to acknowledge the breaches which have taken place. The Authority has taken these payments into account and considers them to provide additional value because they benefit customers that most need assistance as an acknowledgement that EDF Energy did not reach the high standards expected of it under the licence.

Evidence that the contravention or failure was genuinely accidental or inadvertent

5.26 The Authority considers that the contravention cannot be regarded as completely accidental or inadvertent as it was ultimately within EDF Energy's control to allocate resources effectively and manage appropriate systems and processes to ensure compliance with its licence obligations. However, there is no evidence that the contraventions were deliberate or wilful.

Reporting the contravention or failure to Ofgem

5.27 EDF Energy did not report the contravention or failure to Ofgem.

Co-operation with Ofgem's investigation

5.28 The Authority notes EDF Energy's willingness to admit these breaches, to put in place remedial measures and to agree to make payments which benefit consumers. EDF Energy's responses to Ofgem's requests for information were prompt and informative and EDF Energy fully cooperated with the investigation. EDF Energy initiated settlement negotiations long before Ofgem had prepared a Statement of Case, thereby saving Ofgem significant expenditure in the way it concluded its investigation. During the investigation EDF Energy further acknowledged, and acted upon, the need for improvements to many of its systems and processes, introduced new checks and procedures to help ensure compliance and was willing to settle the investigation on the basis of this Notice.

5.29 These factors allowed the investigation to be progressed in a timely manner and they weigh in EDF Energy's favour.

The balance of factors tending to increase or decrease the level of penalty

5.30 On balance the Authority considers that the mitigating factors outweigh the aggravating factors in this case.

6. The Authority's proposed decision on penalty

6.1 With particular regard to the payments to be made by EDF Energy which total £4.5 million and which benefit consumers that most need assistance, the Authority hereby proposes to impose a financial penalty on EDF Energy of £1, which it considers is reasonable in all the circumstances of the case.

6.2 The penalty would have been much higher if EDF Energy:

- had not made an early offer to reach a settlement and then to admit the breaches;
- had not taken steps to improve its systems and processes and to introduce new checks and procedures to improve compliance and remedy the breaches identified above; and

- had not agreed to make payments of £4.5 million to benefit consumers as an acknowledgment that it did not reach the required standards.

6.3 Any written representations on the proposed penalty must be received by Michal Lurka at Ofgem (michal.lurka@ofgem.gov.uk) by 5.00pm on 30 March 2012.

6.4 Any representations received that are not marked as confidential may be published on the Ofgem website. Should you wish your response or part of your response to remain confidential, please indicate this clearly.

Gas and Electricity Markets Authority

9 March 2012