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23 June 2014

### **Consultation on financial penalties and consumer redress policy statement**

EDF Energy is one of the UK's largest energy companies with activities throughout the energy chain. Our interests include nuclear, coal and gas-fired electricity generation, renewables, and energy supply to end users. We have over five million electricity and gas customer accounts in the UK, including residential and business users.

EDF Energy welcomes the opportunity to comment on Ofgem's proposed new policy statement on financial penalties and consumer redress orders. We share a common goal with Ofgem to rebuild consumer trust, confidence and engagement, and together with safety this is a top priority for EDF Energy. Consistent with this goal, we believe there is a clear need for a robust, transparent, consistent and fair enforcement regime to promote best practice, protect consumers' interests and competition.

Our detailed responses are set out in the attachment to this letter. Should you wish to discuss any of the issues raised in our response or have any queries, please contact Ian George on 01452 654 498, or me.

I confirm that this letter and its attachment may be published on Ofgem's website.

Yours sincerely,

A handwritten signature in blue ink, reading "Paul Delamare".

**Paul Delamare**  
**Head of Downstream Policy and Regulation**

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## **Attachment**

### **Consultation on financial penalties and consumer redress policy statement**

#### **EDF Energy's response**

#### **Objectives and duties in relation to penalties and redress**

##### **Q.1. Are these objectives appropriate?**

We share Ofgem's vision that suppliers should operate in a culture in which customers are at the heart of everything they do. This is wholly consistent with our Customer Commitments and Trust Test, and our ambition to be the best and most trusted energy supplier.

To have trust, customers need confidence that they are being treated fairly by suppliers and that suppliers are running their businesses properly and compliantly. In that context, we agree with Ofgem that its financial penalty and consumer redress powers are powerful tools in deterring non-compliance and in providing visible and meaningful consequences when breaches occur. We therefore support Ofgem's position that companies should not benefit from non-compliance. This is particularly important in cases where Ofgem is assessing suppliers generally against a relevant requirement where compliance is 'black and white', and finds that not all suppliers have met the relevant requirement. In these circumstances it would be unacceptable if, as part of any enforcement proceedings, a non-compliant party gained a commercial advantage over a compliant party through the award of a financial penalty that was below the costs avoided or other gain made through the non-compliance, or which did not reflect the detriment caused to customers.

With regard to Ofgem's consumer redress powers, we believe the policy statement should reflect the Government's intention that these should only be used as a last resort to secure redress<sup>1</sup>. Therefore, the policy statement should make clear that where consumer detriment is identified, a redress order will only be issued if a negotiated agreement to provide redress cannot be reached.

#### **Determining the amounts payable under penalties and redress orders**

##### **Q.2. Is the proposed process for determining the amount of penalties and/or redress appropriate?**

Regulated persons and other interested parties need confidence that when Ofgem is using its penalty/redress powers, the award of a penalty/redress, including its amount, is an appropriate and proportionate response to the facts of the case. Therefore, Ofgem must ensure that the determination of a penalty/redress order is as transparent as possible so that interested parties not only understand how the penalty/redress has been calculated, but also have confidence that it has been robustly arrived at, is reasonable and proportionate. This will be particularly true with regard to any adjustment for deterrence, recognising the greater emphasis Ofgem will place on deterrence when imposing financial penalties from 1 June, when the first penalties from that date are likely to be regarded as a 'benchmark' for future enforcement action.

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<sup>1</sup> Page 4 of the Government response to the consultation on a proposed new power for Ofgem to compel regulated energy businesses to provide redress to consumers, 29 November 2012

Transparency will also be important when calculating the loss or damage suffered by customers under a redress order, where the calculation of detriment might require Ofgem to place a value on nebulous impacts (e.g. when placing a value on inconvenience), and in the context of settlement discounts if their application is to become a meaningful and real aspect of the new policy.

**Q.3. Do you agree with the proposed factors that may aggravate or mitigate the amount of a penalty or redress payment?**

Steps taken to secure compliance

The steps taken by a regulated person to secure compliance should be an important factor in the calculation of the penal element. More fundamentally, this consideration is likely to be critical in determining whether or not a breach has occurred in the first place. In either case, any assessment of the steps taken to secure compliance must be undertaken by reviewing the facts of the case and the actions taken by the regulated person *at the time* (as opposed to an assessment of compliance informed with the benefit of hindsight), particularly for those requirements framed in terms of “best endeavours” or the reasonableness of the steps taken.

Equally, where Ofgem has satisfied itself that a breach has occurred, due consideration needs to be given to the extent to which factors were outside the reasonable control of the regulated person.

Self reporting of breaches

We note the inclusion of self reporting of breaches as a mitigating factor. Given Ofgem’s new tone on deterrence and the substantial increase in future penalties this has signalled, Ofgem will need to ensure it gives sufficient weight as a mitigating factor to a person who self reports, otherwise any benefit to self reporting (including to Ofgem) will not be realised.

**Settlement discounts**

**Q.4. Do you agree with the proposed settlement percentage discounts in cases under the Gas Act or Electricity Act?**

We support in principle the introduction of settlement discounts. However, for the settlement arrangements to work, it is critical that settlement discounts are “real”. As noted in our response to Ofgem’s recent consultation on its draft enforcement guidelines, we do not believe a party can sensibly commit to settlement until the full facts of the case, and the nature and extent of any breaches have been established. This means that only fully worked up cases should be presented to the Settlement Committee so that pre and post discount packages can be assessed at the same time and in relation to the same facts.

**Requirements that may be set out in a consumer redress order**

**Q.5 Do you agree with the proposed policy on determining who receives payments where consumer redress powers are used?**

We agree that wherever possible compensation under a consumer redress order should be made to consumers directly affected by the non-compliance. However, it is important

that Ofgem recognise that the costs involved in making payments to individual consumers could be substantial (see our response to Q8).

**Q.6. Are there any other potential consumer redress requirements that we should specifically refer to in section 7 of the policy statement?**

No comment.

**Treatment of consumer detriment**

**Q.7. Do you agree with the proposed approach to the treatment of detriment?**

Subject to our comments under Q 1 on Ofgem's mandate in respect of its consumer redress powers, we note that a consumer redress order will take account of any compensation already paid by a regulated person to affected consumers (paragraph 8.2 of the draft policy statement). In addition, and to the extent they are relevant to the case involved, the Authority should also have regard to any compensation awarded by the Ombudsman Services (Energy) when determining the amount of compensation payable under a redress order.

As indicated under Q2 above, Ofgem must ensure that the calculation of redress under a consumer redress order is fully transparent, recognising that the assessment of detriment/consumer harm might require Ofgem to quantify nebulous impacts (e.g. inconvenience).

**Administering consumer redress orders and bearing administrative costs**

**Q.8. Should administrative costs be borne by the company in addition to any compensation or other payments that may be required?**

We agree in principle that the administrative costs associated with redress orders should be borne by the regulated person(s). However, it is possible that the costs involved in making redress payments could be substantial, particularly where this involves making payments to individual consumers (who may no longer be a customer of the supplier under investigation or reside at their last known address and where the costs of tracing such persons could be considerable). We understood that the introduction of redress orders would not increase the overall quantum of liability for non-compliance, and taking administrative costs into account when determining a regulated person's overall financial liability for non-compliance would be one way of achieving this outcome.

**EDF Energy**  
**June 2014**