

**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 to impose a financial penalty, following an investigation into compliance by SSE plc and related entities with Article 14 of the Electricity and Gas (Community Energy Saving Programme) Order 2009**

**12 December 2014**

**1 Summary**

1.1 The Gas and Electricity Markets Authority (“the Authority”) proposes to impose a financial penalty of £1 on each of the following SSE companies (collectively, “SSE”) provided that, by the time of any final Penalty Notice issued pursuant to section 27A(5) Electricity Act 1989 and section 30A(5) Gas Act 1986 (“Final Penalty Notice”) and at a date to be agreed with the Authority, any or all of these companies shall pay in aggregate £1.75 million in consumer redress (less the £1 financial penalties):

- (a) SSE Energy Supply Limited;
- (b) Southern Electric Gas Ltd;
- (c) SSEPG (Operations) Ltd;
- (d) Medway Power Ltd;
- (e) Keadby Generation Ltd;
- (f) Greater Gabbard Offshore Windfarm Ltd;
- (g) Uskmouth Power Company Ltd;
- (h) Clyde Wind Farm (Scotland) Ltd; and
- (i) Griffin Wind Farm Ltd.

The payment of consumer redress shall be to charities which pursue any or all of the following objectives: promotion of carbon emissions reduction in domestic homes; promotion of energy efficiency in domestic homes; and fuel poverty. The payment of consumer redress shall be used for the objectives described above and shall consist of: £849,997 to the Foundations Independent Living Trust; £749,997 to Energy Action Scotland; and £149,997 to the Citizen’s Advice Bureau for use in Wales.

(together, “Penalties in Light of Redress”)

1.2 This follows an investigation by Ofgem into SSE’s failure to meet its obligations under the Electricity and Gas (Carbon Emissions and Community Energy Saving) Order 2009 (“CESP Order”). Under Article 14(1) of the CESP Order, generators and suppliers had to achieve their carbon emissions reduction obligation by promoting qualifying actions to domestic energy users in low income areas.

- 1.3 The investigation arose following the submission of the final CESP report to the Secretary of State on 30 April 2013<sup>1</sup>, which provided details of the obligated parties' ("OP") achievements of the targets and obligations under the CESP programme, whose time for compliance expired on 31 December 2012.<sup>2</sup> The report sets out that SSE did not comply with the targets set out in its CESP obligation resulting in a shortfall of 252,168 tonnes ("tCO<sub>2</sub>"), or 9.1% of its obligation. SSE accepts that it breached Article 14(1) of the CESP Order.
- 1.4 The Authority notes that SSE undertook mitigation action equivalent to the volume of its shortfall associated with not achieving the carbon reduction target and has had regard to this in setting the level of penalty.
- 1.5 The Authority finds that SSE breached Article 14(1) of the CESP Order having failed to achieve its carbon emissions reduction obligations by promoting qualifying actions to domestic energy users by 31 December 2012.
- 1.6 The Authority considers it appropriate to propose a financial penalty on SSE for the contravention of Article 14(1) of the CESP Order, which occurred on 31 December 2012.
- 1.7 In the circumstances, the Authority hereby gives notice under section 27A(3) of the Electricity Act 1989 and section 30A(3) of the Gas Act 1986 of its proposal to impose £1 Penalties in Light of Redress. This is in respect of SSE's failure to comply with Article 14(1) of the CESP Order. In reaching this decision, which the Authority considers reasonable in all circumstances, it has taken into account the following:
- (a) SSE's failure to achieve the CESP target was a serious contravention of a major environmental programme;
  - (b) the extent of the initial shortfall in delivery of carbon reduction measures by SSE was 252,168 tCO<sub>2</sub> or 9.1% of its obligation;
  - (c) SSE has made a financial gain from the breach;
  - (d) SSE undertook mitigation action equivalent to the volume of the shortfall associated with its breach;
  - (e) the level of consumer detriment is low;
  - (f) SSE has one aggravating factor (see paragraphs 5.13-5.19);
  - (g) SSE has several mitigating factors that apply or partially apply (see paragraphs 5.24-5.25 and 5.28-5.36); and
  - (h) SSE has agreed to settle this investigation;
  - (i) SSE has agreed to pay an aggregate of £1.75 million in consumer redress (less the £1 financial penalties) as set out in paragraph 1.1.

The aggregate of the proposed penalties and consumer redress is a lower figure than would have been the case if SSE had not taken the steps as

<sup>1</sup> <https://www.ofgem.gov.uk/ofgem-publications/58763/cesp-final-report-2013final-300413.pdf>

<sup>2</sup> Article 10(3) of the CESP Order provided that the obligation period for suppliers ended on 31 December 2012.

set out in paragraphs (d), (h) and (i) above. The aggregate of the proposed penalties and consumer redress is larger than the detriment suffered by consumers and the gain made by SSE.

- 1.8 Any written representations on this proposed Penalty Notice must be received by Maudlyn Darkwa at Ofgem ([Maudlyn.Darkwa@ofgem.gov.uk](mailto:Maudlyn.Darkwa@ofgem.gov.uk)) by 5.00pm on **19 January 2015**.
- 1.9 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.

## 2 Background

### *The Community Energy Saving Programme*

- 2.1 The Community Energy Saving Programme (“CESP”) was a policy, set down in legislation, designed to improve domestic energy efficiency standards in the most deprived geographical areas across Great Britain. The relevant legislation was the Electricity and Gas (Community Energy Saving Programme) Order 2009 (“CESP Order”).
- 2.2 CESP was structured to incentivise the energy companies to install particular measures which had hitherto not been the focus of energy efficiency schemes, and to undertake as much activity as possible in each house treated and in each area targeted, via a number of incentives. These incentives included individual measure uplifts to incentivise particular measures such as Solid Wall Insulation; whole house bonuses where more than one energy efficiency measure was installed in a property; and area bonuses when at least 25% of all dwellings in a low income area were treated by the same obligated party (“OP”).
- 2.3 Article 14(1) of the CESP Order required that certain gas and electricity suppliers and certain electricity generators must achieve their carbon emissions reduction obligations by promoting qualifying actions to domestic energy users in areas of low income in Great Britain.
- 2.4 The CESP obligation ran from 1 October 2009 to 31 December 2012 (referred to here as the ‘compliance period’). Obligations under the CESP Order (including Article 14(1) referred to above) are relevant requirements for the purposes of the powers of the Authority to impose a financial penalty for any failure to comply with such, under sections 27A Electricity Act 1989 and section 30A Gas Act 1986.<sup>3</sup>
- 2.5 The Department of Energy and Climate Change (“DECC”) was responsible for drafting and implementing the legislation governing the scheme. This included setting the overall CESP target. Ofgem was responsible for administering the CESP programme, on behalf of the Authority.

### *SSE’s Obligation under CESP*

- 2.6 SSE had an obligation of 2,769,125 tCO<sub>2</sub>. Each of the individual licensees, SSE Energy Supply Limited, Southern Electric Gas Ltd, SSEPG (Operations) Ltd, Medway Power Ltd, Keadby Generation Ltd, Greater Gabbard Offshore Windfarm Ltd, Uskmouth Power Company Ltd, Clyde Wind Farm (Scotland) Ltd and Griffin Wind Farm Ltd failed to meet their individual obligations. By 31 December 2012, SSE as a whole had achieved only 2,516,957 tCO<sub>2</sub> of its obligation and was left with a shortfall of 252,168 tCO<sub>2</sub>.

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<sup>3</sup> Please see section 41A(7A)(a) Electricity Act 1989, section 33BC(7A)(a) Gas Act 1986 and Article 27(1) of the CESP Order.

## *Investigation*

- 2.7 Ofgem takes compliance with all obligations seriously. When it became clear to Ofgem that there was a risk of non-compliance with CESP by several parties, Ofgem published an open letter dated 21 September 2012<sup>4</sup>, setting out its approach to enforcement in relation to CESP. This letter set out the way Ofgem and the Authority would approach actions taken by the OPs under CESP after the scheme's end date of 31 December 2012. The letter stated that Ofgem would take mitigation action into account in its enforcement procedures.<sup>5</sup>
- 2.8 Following the submission of the final CESP report to the Secretary of State on 30 April 2013 (see paragraph 1.3 above), Ofgem launched an investigation into SSE. In particular, Ofgem investigated whether SSE had met its carbon emissions reduction target set out under the CESP Order.

### **3 The Authority's decision on breach**

- 3.1 Following an investigation by Ofgem into SSE's compliance with the CESP Order, the Authority is satisfied that SSE breached Article 14(1) of the CESP Order.
- 3.2 Article 14(1) CESP Order is a relevant requirement for the purposes of section 27A of the Electricity Act 1989 and section 30A Gas Act 1986 (the Authority's power to impose a financial penalty)<sup>6</sup>. Article 14(1) mandated that SSE achieve its carbon emissions reduction obligations by promoting qualifying actions to domestic energy users in low income areas.
- 3.3 SSE failed to achieve, by 31 December 2012, its carbon emissions reduction obligation mandated under Article 14(1) of the CESP Order. It delivered 90.9% of its obligation and had a shortfall of 252,168 tCO<sub>2</sub>. SSE's shortfall as a percentage of its obligation (9.1%) was smaller than any other OP under CESP.
- 3.4 This failure is evidenced by the Authority's report to the Secretary of State in April 2013 in which the Authority set out the levels of carbon emissions

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<sup>4</sup> <https://www.ofgem.gov.uk/ofgem-publications/58765/open-letter-cert-cesp-210912.pdf>

<sup>5</sup> Ofgem also published three other open letters:

- (i) on [20 December 2012](#), setting out the administrative arrangements that Ofgem would use to process the mitigation actions delivered by OPs under CESP;
- (ii) on [31 January 2013](#), setting out the way the Authority and Ofgem would approach the assessment and timing of mitigation actions taken by OPs under CESP; and
- (iii) on [29 May 2013](#), setting out the administrative arrangements that Ofgem would use to process the mitigation actions delivered beyond 30 April 2013.

<sup>6</sup> See footnote 3

reductions achieved by OPs and whether they had met their obligations. SSE does not dispute that the breach occurred.

- 3.5 In light of the finding of breach, the Authority considered whether to impose a financial penalty, under section 27A of the Electricity Act 1989 and section 30A of the Gas Act 1986.

#### **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 the Electricity Act 1989 and/or the Gas Act 1986 and having regard to its published Statement of Policy with respect to Financial Penalties (October 2003) ("the Policy")<sup>7</sup>.
- 4.2 The Authority is required to take a decision on penalty in the manner which it considers is best calculated to further its principal objective<sup>8</sup>, and having regard to its other duties.
- 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 were outside the control of SSE. It has also taken full account of the representations made to it by SSE.

##### ***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 considers that SSE's breach of Article 14(1) of the CESP Order damaged the interests of consumers in that energy efficiency measures were not installed in people's homes by the end of the CESP compliance period. Whilst SSE was installing energy efficiency measures

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

<sup>8</sup> The Electricity Act 1989 (section 3A) and the Gas Act 1986 (section 4AA) sets out details of the Authority's principal objective as being the protection of the interests of existing and future consumers, wherever appropriate by promoting competition, and including their interests in the reduction of greenhouse gas emissions and the ensuring of the security of energy supply

as mitigation action from January 2013, it took until May<sup>9</sup> 2013 (in contrast to the 31 December 2012 deadline for compliance) to deliver all of the expected energy efficiency measures, meaning energy savings for some consumers were delayed.

- 4.5 This delay had a material impact on consumers, who experienced a particularly cold winter during the months of January to March 2013, with average temperatures below the long-term average from 1981 to 2010.<sup>10</sup>
- 4.6 During that cold winter, domestic consumers used more gas than during either of the previous two winters.<sup>11</sup>
- 4.7 Had SSE met its target by 31 December 2012, it estimated around 2,100<sup>12</sup> extra households would have benefited from energy efficiency measures under CESP on time. These households were more likely to have been living on a low income than the average household in Great Britain, because CESP was targeted at low income areas.
- 4.8 The Authority has considered the extent to which harm caused to consumers will have been offset by over-delivery of mitigation activities. We consider this further in paragraphs 5.34 – 5.36 below.
- 4.9 Further, the Authority has also considered whether non-compliance has damaged the interest of other market participants who complied with CESP. The Authority considers the evidence to be inconclusive but notes that the case does not turn on this point.

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

- 4.10 The Authority considers that imposing a financial penalty is likely to create an incentive to compliance and deter future breaches:
  - (a) both generally, as the Authority considers compliance with mandatory deadlines to be very important and not imposing a penalty in this case would not create the right incentives around the need for regulated parties to comply with deadlines; and
  - (b) specifically, in relation to environmental programmes, to incentivise companies to comply in full and on time with future

<sup>9</sup> A small number of works were completed after 30 April before SSE had completed mitigation action equivalent to the volume of the shortfall associated with its breach.

<sup>10</sup> <http://www.metoffice.gov.uk/climate/uk/summaries/anomalygraphs>. The Met Office publishes data on 30-year averaging periods, for 1961-1990, 1971-2000 and 1981-2010. Thus, 1981-2010 is the most recent data-set.

<sup>11</sup> [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/266718/et4\\_1.xls](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/266718/et4_1.xls)

<sup>12</sup> This figure is based on the number of properties treated by SSE after 31 December 2012.

mandatory energy efficiency obligations such as the Energy Companies Obligations (“ECO”).

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

If the contravention is trivial in nature

4.11 The Authority does not consider that SSE’s failure to meet its CESP obligation is trivial. The Authority notes that SSE’s shortfall as at 31 December 2012 was 252,168 tCO<sub>2</sub>, which was equivalent to installing energy efficiency measures in around 2,100 households. Furthermore, SSE’s shortfall was larger than the entire CESP obligation placed on one of the OP’s.

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

4.12 The Authority does not consider that its principal objective and duties, as set out in section 3A Electricity Act 1989 and section 4AA Gas Act 1986, preclude the imposition of a penalty in this case.

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

4.13 The Authority considers that the breach or possibility of a breach would have been apparent to a diligent licensee. Companies were given over three years to deliver their full obligation and were aware that a breach of this obligation would occur if they did not meet their full obligation by 31 December 2012.

Conclusion

4.14 Having taken into account the factors set out in the Policy and the representations made by the company, the Authority considers that the imposition of a penalty is appropriate in this case.

**5 Criteria relevant to the level of financial penalty**

5.1 In accordance with Section 270 of the Electricity Act 1989 and Section 300 (1) of the Gas Act 1986, the Authority may impose a financial penalty of up to 10% of the annual turnover of the relevant license holder. The



Authority is satisfied that its proposed penalty falls within the maximum statutory limit.

- 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.

***Factors which are first considered when determining the general level of penalty***

The seriousness of the contravention and failure

- 5.3 The Authority considers that SSE's breach of CESP is serious. Companies had over three years to comply with the CESP obligation. Four of the ten parties with obligations under CESP complied. The Authority expects regulated parties to meet mandatory obligations, in full and on time.
- 5.4 SSE incurred a shortfall of 252,168 tCO<sub>2</sub> (see paragraph 2.6 above). Unmitigated, that shortfall would have been detrimental to the social policy objectives underlying the CESP obligation, which were to ensure consumers in low income areas in Great Britain benefit from multiple measures to make their homes more energy efficient, reducing their energy bills and increasing thermal comfort. The Authority also notes that unmitigated shortfalls would have been detrimental to the UK's commitment under the Climate Change Act 2008 to reduce carbon emissions by 80% by 2050 compared to 1990 levels.

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

- 5.5 The degree of consumer harm has been set out above (see paragraphs 4.4 to 4.9). Once SSE had completed its CESP mitigation activities in May 2013, the period of consumer harm ceased.

The duration of the contravention or failure

- 5.6 The breach of the obligation was "one off" and occurred at 31 December 2012, although the effects of the breach contravention persisted for approximately five months after that date until SSE's mitigation activities were complete.

The gain (financial or otherwise) made by the licensee

- 5.7 The Authority has considered whether or not SSE may have made a financial gain through not meeting its CESP obligation by the statutory deadline.

- 5.8 The Authority notes that SSE's mitigation carbon costs were lower than the average cost per tCO<sub>2</sub> secured in the final year of CESP by all OPs. As a consequence, the Authority considers that SSE is likely to have made a gain by delivering its CESP obligation during the mitigation period (discussed at paragraphs 5.15 to 5.16 below).
- 5.9 The Authority also considers that SSE has gained by delaying a significant proportion of its CESP expenditure into the mitigation period. By not investing in CESP delivery in a manner that would achieve compliance, SSE would have made a gain, on a time value of money basis, by being able to put deferred expenditure to alternative use.
- 5.10 The Authority notes that SSE spent additional money through its over-delivery of CESP measures which is discussed at paragraph 5.34 below.

### ***Factors tending to increase the level of penalty***

#### Repeated contravention or failure

- 5.11 SSE has not previously failed to meet an energy efficiency obligation. The Authority does not consider that this aggravating factor applies.

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

- 5.12 The breach of the obligation was "one off" and occurred at 31 December 2012 although the effects of the breach continued for five months. The Authority does not consider that this aggravating factor applies.

#### Involvement of senior management in any contravention or failure

- 5.13 From a review of the evidence, it appears that SSE's senior management became aware of the real risks to compliance during the first quarter of 2011. Further evidence suggests that senior management, rather than positively being involved in the contravention in the sense of having actively determined, instructed or encouraged it, contributed by failing to recommend appropriate steps. An example of this can be highlighted in the board reports produced by SSE in response to Ofgem's first information request.
- 5.14 Extracts from this report clearly highlight senior management's failure to recommend an increase in the budget allocation to CESP following a loss of one of SSE's schemes to another OP. Additionally, this failure occurred after the inadequate price of carbon offered for that particular scheme had been brought to senior management's attention.

- 5.15 Evidence shows that in late 2011, SSE senior management were aware that full delivery and installation of the contracted measures required to meet SSE's obligation would not be complete until June 2013, and failed to take steps to address this.
- 5.16 SSE has submitted its justification of this action as a way of exercising prudent control of costs whilst endeavouring to meet its obligation. The Authority agrees that companies should seek to manage their costs effectively. At the same time, the Authority considers that sufficient priority must be given to complying with legal obligations.
- 5.17 The evidence shows that SSE later increased its budget gradually in response to the increases in market rates for CESP schemes. However, due to the piecemeal nature of its subsequent budget increases, and a willingness to allow delivery to be delayed into 2013, SSE failed ultimately to ensure that delivery of its CESP obligation occurred on time.
- 5.18 Given the oversight of CESP provided by SSE's senior management (see paragraph 5.20), and given the factors listed above, the Authority considers that senior management had knowledge of and/or provided input into some of the decisions which led to SSE's non-compliance.
- 5.19 Accordingly, the Authority considers that this aggravating factor applies.

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

- 5.20 The Authority considers there is evidence that SSE had some internal mechanisms or procedures in place intended to prevent contravention, including:
- (a) A record of risk registers to monitor risks to compliance. SSE did not produce a full set of risk registers to capture the entire compliance period; however, the process of mitigating such risks was captured through the management of SSE's CESP Plan which was updated throughout the compliance period.
  - (b) A CESP Panel set up initially to approve schemes and later a process of monthly reporting to the Management Board on CESP progress.
- 5.21 Taking the above into account, the Authority does not consider that there is an absence of any evidence of internal mechanisms or procedures intended to prevent contravention or failure.

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

5.22 The investigation found no evidence of any attempt to conceal the contravention from Ofgem. The Authority does not consider that this aggravating factor applies.

***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 there is some evidence that SSE took steps to secure compliance (for example, by increasing its budget for CESP and maintaining suitable management supervision) and that this factor partially applies.

Appropriate action by the licensee to remedy the contravention or failure

5.24 As noted in Ofgem's Open Letter of September 2012, mitigation action is not a substitute for compliance with the carbon emission reduction obligations and OP should not be able to benefit from non-compliance. However in considering mitigation actions, Ofgem said that "*we will give most weight to CERT/CESP measures that are delivered shortly after 31 December 2012*". Ofgem later stated in its January 2013 Open Letter that 30 April 2013 would be a key date for assessing the mitigation actions taken by the parties.

5.25 The Authority notes that SSE undertook mitigation action equivalent to the volume of its shortfall associated with not achieving the carbon reduction target. The vast majority of this mitigation was completed by the "key date" of 30 April. The Authority also notes that SSE delivered more than its shortfall as mitigation (see paragraphs 5.34 – 5.36 below). In light of this, the Authority considers that SSE did take appropriate action to remedy the breach and that this mitigating factor applies in this case.

Evidence that the contravention or failure was genuinely accidental or inadvertent

5.26 SSE has made representations as to the non-foreseeability of the cost of CESP compliance due to the low estimations set out in DECC's Impact Assessment. The Authority notes that OPs had over three years to secure compliance with the CESP scheme and has seen no evidence to suggest that SSE's contravention was genuinely accidental or inadvertent. Accordingly, the Authority does not consider that this mitigating factor applies in this case.

### Reporting the contravention or failure to Ofgem

5.27 The arrangements under the CESP Order were that the Authority was required to report in April 2013, to the Secretary of State for Energy and Climate Change, its determination as to whether OPs had achieved their carbon emissions reduction targets. This report was duly presented and the OPs were notified of its conclusions. The Authority therefore considers that this factor does not apply.

### Co-operation with Ofgem's investigation

5.28 SSE has responded to Ofgem's Information Requests on time and complied with Ofgem's investigation process. However, the Authority considers that this mitigating factor should only apply to such co-operation where that co-operation has gone beyond what would be expected of any licensee facing enforcement action.<sup>13</sup>

5.29 In this case, SSE has additionally, in response to the Settlement Mandate put forward, accepted its breach and agreed to settle the case at the earliest opportunity. This has achieved a speedier resolution and avoided additional spending of resource by the regulator. Accordingly, the Authority considers that this mitigating factor applies and the Authority has imposed a lower penalty than it would otherwise have imposed.

### Other factors

5.30 It is the view of the Authority that the following additional factors tending to reduce the level of any penalty are relevant in this matter.

### ***Design and administration of the CESP scheme and the ability of SSE to deliver it***

5.31 The Authority has considered the extent to which the design and administration of CESP may have adversely affected SSE's ability to deliver CESP by 31 December 2012. The Authority has considered the evidence including a report commissioned by the Department of Energy & Climate Change, "Evaluation of the Carbon Emissions Reduction Target and Community Energy Saving Programme"<sup>14</sup>.

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<sup>13</sup> See the Notice of decision to impose a financial penalty upon SSE for non-compliance with its obligations under conditions 23 and 25 of the Standard Conditions of the Electricity and Gas Supply Licences - <https://www.ofgem.gov.uk/sites/default/files/sse-penalty-notice.pdf>

<sup>14</sup> <https://www.gov.uk/government/publications/evaluation-of-the-carbon-emissions-reduction-target-and-community-energy-saving-programme>

- 5.32 The Authority considers that CESP was a complex programme. The complexity stemmed from the design of the CESP which promoted new approaches and innovation. These factors led to technical and management challenges for all OPs, and for Ofgem, in administering CESP. Further the Authority notes there were a number of issues which impacted on scheme approval times. These include: the scheme's promotion of new approaches and innovation leading to many technical issues which had to be resolved during the scheme, the complexity of the programme and legislative requirements, initial predictions (which determined resourcing) regarding scheme numbers proving inaccurate, and a slow start to CESP by OPs resulting in back-loading of activity later into the programme.
- 5.33 The Authority considers that these factors were not insurmountable as other OPs secured compliance. Further, in the case of SSE the Authority does not consider that these factors prevented the company from complying with its obligations. Nonetheless, the Authority considers it reasonable in all of the circumstances that a mitigating factor should be applied to reflect these challenges.

### ***Over-delivery of CESP mitigation measures***

- 5.34 SSE delivered mitigation actions in excess of the level required to address the harm associated with its breach. The Authority recognises that this additional delivery by SSE provides enduring benefits for those consumers who have received these measures.
- 5.35 At the same time the Authority is aware that in relation to CERT and CESP, compliant suppliers were able to carry forward part of any over-delivery of compliance actions into the ECO scheme, albeit not necessarily on a pound for pound basis.
- 5.36 The Authority has balanced both of these points and considers that a mitigating factor should apply.

## **6 The Authority's proposed decision as to the level of penalty**

- 6.1 Taking all of the above into account, the Authority proposes to impose £1 Penalties in Light of Redress on SSE. The Authority considers this penalty to be reasonable in all the circumstances of the case. In reaching this decision the Authority has taken into account the following:
- (a) SSE's failure to achieve the CESP target was a serious contravention of a major environmental programme;
  - (b) the extent of the initial shortfall in delivery of carbon reduction measures by SSE;

- (c) SSE has made a financial gain from the breach;
- (d) SSE undertook mitigation action equivalent to the volume of the shortfall associated with its breach;
- (e) the level of consumer detriment was low;
- (f) SSE has one aggravating factor (see paragraphs 5.13-5.19);
- (g) SSE has several mitigating factors that apply or partially apply (see paragraphs 5.24–5.25 and 5.28–5.36); and
- (h) SSE has agreed to settle this investigation;
- (i) SSE has agreed to pay an aggregate of £1.75 million in consumer redress (less the £1 financial penalties) as set out in paragraph 1.1.

The aggregate of the proposed penalties and consumer redress is a lower figure than would have been the case if SSE had not taken the steps as set out in paragraphs (d), (h) and (i) above.

6.2 Any written representations on this proposed Penalty Notice must be received by Maudlyn Darkwa at Ofgem [Maudlyn.Darkwa@ofgem.gov.uk](mailto:Maudlyn.Darkwa@ofgem.gov.uk) by **5.00pm** on **19 January 2015**.

6.3 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**

**12 December 2014**