

Notice of decision to impose a financial penalty pursuant to section 30A(5) of the Gas Act 1986 and section 27A(5) of the Electricity Act 1989

Decision of the Gas and Electricity Markets Authority (the Authority) to impose a financial penalty, following an investigation into Utilita Energy Limited's compliance with Standard Licence Condition (SLC) 14 of its Gas and Electricity Supply Licences.

12 November 2015

1. Summary

- 1.1. The Authority has decided to impose a financial penalty on Utilita Energy Limited (Utilita) following an investigation into its compliance with a number of relevant conditions set out in SLC 14. The SLCs set out the rules on how licensees can operate within the terms of their gas and electricity supply licences.
- 1.2 The Authority found that Utilita breached several of the conditions of SLC 14. The provisions of SLC 14 govern when a licensee may block a domestic customer's request to transfer to another supplier. Utilita breached the following conditions:
- SLC 14.1 – General prohibition stating that licensees must not prevent Proposed Supplier Transfers (PSTs) except in accordance with the conditions set out in SLC 14. Breaches of SLC 14.1 occurred between June 2010 – May 2015.
 - SLC 14.4 (c) – This provision sets out one of the circumstances in which licensees can legitimately prevent a PST taking place, namely where a customer has not entered into a contract with a proposed new supplier and asks the licensee to prevent the PST from taking place. The breach occurred between June 2010 – May 2015.
 - SLC 14.6 – At the time of the investigation¹ this provision stated that licensees shall ensure that Outstanding Charges of amounts equal to or less than £200 are capable of being assigned to Proposed Suppliers in accordance with the Debt Assignment Protocol. The breach occurred between June 2010 - May 2014.
 - SLC 14.9 - This provision requires, amongst other things, that licensees, when preventing PSTs, must send notices to help customers make informed decisions about who to contact to resolve any issues they might have during the switching process. The breach occurred between June 2010 - June 2015.
 - SLC 14.10 – If sub-paragraph 14.4(c) applies, and the licensee can legitimately prevent a PST at the customer's request, the licensee must keep evidence of that request and inform the proposed new supplier that an objection has been raised and the reason given by the customer for making the request. This breach occurred between June 2010 – May 2015.

¹ In July 2015 the amount involved increased from £200 to £500.

- 1.3 Utilita admitted that it breached the relevant conditions set out above and co-operated with the Authority's investigation. It acknowledged that its practices fell short of requirements in relation to objections, PSTs and the provision of notices to customers and other suppliers. Utilita made significant improvements in these areas to the point where we are satisfied that it now complies with SLC 14.
- 1.4 The Authority considered that consumers' ability to exercise choice over who supplies their gas and electricity is crucial to an efficiently functioning market that consumers can engage with. By blocking PST requests and breaching various provisions of SLC 14 over a protracted period, Utilita harmed the market, prevented consumers from exercising choice and retained customers it would otherwise have lost.
- 1.5 Some Utilita customers suffered financial detriment. Financial detriment suffered by vulnerable consumers is likely to have a greater impact on them than it would on the average consumer. Vulnerable consumers are more likely to have pre-payment meters (PPMs). Utilita's business model focusses on the PPM market and as such some vulnerable consumers are likely to have suffered financial detriment or other harms.
- 1.6 On 14 October 2015 the Authority gave notice under section 27A(3) of the Electricity Act 1989 (the Electricity Act) and section 30A(3) of the Gas Act 1986 (the Gas Act) of its proposal to impose a penalty of £1 on Utilita in respect of the contraventions set out above. No representations or objections were received in response to the Authority's proposal.
- 1.7 The £1 penalty figure recognised that Utilita will make the following payments:
- i) £110,000 within 3 months from the publication of this Notice of Decision to impose a financial penalty as compensation to identifiable and traceable customers who suffered financial detriment as a result of having their PST requests blocked illegitimately, with any residual sums (Residual Sums) to be paid to the charity StepChange; and
 - ii) £450,000 (less £1) to the charity StepChange.
- 1.8 Having considered all the circumstances of the case, the Authority considered that these redress payments would be of greater benefit to consumers than if a significant financial penalty were to be imposed.
- 1.9 The redress payments will be used to fund various projects to improve advice and services available for often vulnerable consumers who are experiencing energy-related debt and other debt problems.
- 1.10 The Authority has decided to confirm the penalty of £1 on Utilita. In the circumstances, and in recognition of the redress payments to be made for the benefit of certain consumers, the Authority hereby gives notice under section 27A(5) of the Electricity Act and section 30A(5) of the Gas Act of its decision to impose a penalty of £1 on Utilita in respect of the contraventions set out above. The penalty must be paid by 29 December 2015.

- 1.11 The Authority considers the level of the penalty to be reasonable in all the circumstances of the case.

2. The Authority's decision on contraventions

- 2.1. Eight breaches (Breaches 1-8) of SLC 14 occurred at various times between June 2010 and July 2015.

Breaches 1-5 related to non-compliant reasons used by Utilita to object to PST requests. All were breaches of SLC 14.1. Breach 5 was also a breach of SLC 14.4 (c). Breach 1 involved Utilita preventing PSTs for customers who were in a fixed term contract. Breach 2 involved Utilita objecting (automatically) to further PST requests when those requests were made within 45 days of an initial one being blocked. Utilita's supply contract included the installation of an advanced meter. Breach 3 occurred when a PST request was received before the meter had been installed; that PST request would be blocked. Breach 4 occurred when Utilita blocked a significant proportion of PST requests from customers who had a Change of Tenancy (CoT)² flag on their account. Breach 5 occurred when PST requests were received and no reason to object could be identified. In such circumstances Utilita would contact customers with the aim of retaining them. If successful, Utilita would raise an objection preventing the transfer. Raising an objection when a customer has entered into a contract with another supplier is not permitted under the provisions of SLC 14.

- 2.2. Breach 6 related to the communications a licensee must send, under SLC 14.10, to a proposed new supplier when an objection to a PST has been raised in circumstances where customers have not entered into a contract with the proposed new supplier and have asked the licensee to prevent the transfer.
- 2.3. Breach 7 related to the requirement in SLC 14.6 to ensure that Outstanding Charges of £200 or less were capable of being assigned in accordance with the Debt Assignment Protocol.
- 2.4. Breach 8 related to the notices that must be sent, under SLC 14.9, to customers to explain the reason for raising an objection to a PST request and how to resolve any issues they might face during the switching process.
- 2.5. All of the breaches, except Breach 2, began in June 2010. Breach 2 began in May 2014. Breaches 3 and 7 ceased in May 2014 while breach 1 remained ongoing until December 2014. Breaches 4, 5 and 6 ceased in May 2015, as did breach 2. Breach 8 ceased in June 2015. Table 1 below shows the breach periods in graphical format.

Table 1: Utilita SLC 14 Breach Periods

² The COT flag is an item used during the registration process on the data flows to communicate information between industry participants. The COT flag indicates to the proposed new supplier that the customer is a new owner or occupier of the premises and the licensee should have no valid grounds to object to the transfer of the customer to another supplier

Utilita SLC14 Breach periods	2010	2011	2012	2013	2014	2015
Breach 1 – 12 month fixed term contracts	Jun-10				Dec-14	
Breach 2 – 45 day window					May-14	May-15
Breach 3 – meter installation	Jun-10				May-14	
Breach 4 – Change of Tenancy (CoT)	Jun-10					May-15
Breach 5 – Customers requesting to remain with Utilita	Jun-10					May-15
Breach 6 – Failure to communicate with new suppliers	Jun-10					May-15
Breach 7 – Failure to facilitate Debt Assignment Protocol	Jun-10				May-14	
Breach 8 – Failure to notify customers	Jun-10					Jun-15

3. The Authority’s decision on whether to impose a financial penalty

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

- 3.1. In deciding whether to impose a penalty, and in determining the amount of any penalty, the Authority has regard to its statement of policy most recently published at the time when the contravention or failure occurred. The 2003 Penalty Statement was introduced in October 2003 (“the 2003 Penalty Statement”). In November 2014, the Authority introduced a new policy (“the 2014 Penalty Statement”) which the Authority must have regard to when deciding whether to impose a financial penalty, and determining the amount of any such penalty, in respect of any contravention which occurred on or after 6 November 2014. In such cases, the 2014 Penalty Statement applies instead of the 2003 Penalty Statement.
- 3.2. In this case the contraventions occurred during the time periods set out in Table 1. Each of those breaches commenced within the timescale that the 2003 Penalty Statement applies to. The majority of the contraventions or failures also occurred during the time period that the 2003 Penalty Statement applies to. The Authority recognised that instances of the breaches would also have occurred after November 2014 and could therefore fall within the scope of the 2014 Penalty Statement. However, the Authority considered that the gravamen of the misconduct occasioned by each of the breaches took place during the period that the 2003 Penalty Statement applied to and therefore decided to determine the penalty by reference to the 2003 Penalty Statement.

- 3.3. The Authority is required to carry out all its functions, including the taking of any decision as to penalty, in the manner which it considers is best calculated to further its principal objective, having regard to its other duties.
- 3.4. In deciding whether it would be appropriate to impose a financial penalty, the Authority considered all the circumstances of the case including, but not limited to, the specific matters set out in the 2003 Penalty Statement and representations made by Utilita. These matters are examined in detail below.

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

- 3.5. The Authority considered that Utilita's actions damaged the interests of consumers by illegitimately blocking PST requests. Some Utilita customers suffered financial detriment.
- 3.6. We analysed and found no reason to disagree with Utilita's calculation that showed the total financial detriment suffered by Utilita customers was in the region of £110,000.
- 3.7. Those customers and many others were likely to suffer other harms such as wasted time, frustration and confusion.
- 3.8. Consumers have a fundamental right to switch suppliers when they want and to whom they want. Customers who had a poor switching experience may have disengaged from the market. Transfer blocking breaches such as the ones described in this document are likely to have a wider market impact. Consumer confidence in switching and trust in suppliers are vital for a healthy domestic energy market. Consumer inactivity that might result from frustrating switching experiences can lead to a sub-optimal functioning of the market.
- 3.9. Other market participants were likely to have had their interests damaged by Utilita's actions: they were likely to have suffered a loss of revenue due to the switches Utilita prevented illegitimately. By not allowing customers to switch, Utilita gained a competitive advantage. Utilita was not subject to the same competitive pressures as other suppliers who were complying with SLC 14.

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

- 3.10. The Authority considered that the imposition of a penalty was likely to act as a deterrent to Utilita and to other licensees from engaging in similar conduct. A penalty sends a clear signal to all suppliers, particularly smaller ones, that breaches of the SLCs relating to customer transfer blocking, in light of the importance of switching to the successful functioning of the market, will be taken seriously.

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

If the contravention is trivial in nature

3.11. The Authority considered that illegitimate transfer blocking was serious in nature. In our view the right to switch is fundamental to a successfully functioning supply market. There are many reasons why customers might wish to switch and to deny them that option was likely to result in harms as described in paragraphs 3.5-3.9 above. Accordingly the Authority found that the breaches were not trivial.

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

3.12. There is nothing in the Authority's principal objective and duties that precluded 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

3.13. The Authority considered that the breaches should have been apparent to a diligent licensee. While Utilita might have been a relative newcomer to the market and focussing on other areas of its business, it should have known about the importance of switching to the market and the applicable standard licence conditions, which set out clearly the ways in which PST requests can be blocked legitimately. If Utilita believed that its licence obligations affected its ability to provide good customer service, it should have engaged with the Authority to raise its concerns rather than instituting non-compliant business practices. All licensees are encouraged to engage with the Authority when they believe their licence obligations can affect their ability to operate effectively in the market. Utilita should have had processes in place to check whether its practices around transfer blocking were compliant with the rules. By instituting and persisting with non-compliant business practices, Utilita did not act as diligently as it should have. Furthermore, Utilita did not act diligently when non-compliant practices were brought to its attention.

4. Criteria relevant to the level of financial penalty

4.1. In accordance with section 270(1) of the Electricity Act and section 300(1) of the Gas Act, the Authority may impose a financial penalty of up to 10 percent of the annual turnover of the relevant licence holder. Annual turnover is defined in an Order issued by the Secretary of State for Energy and Climate Change³ as the applicable turnover for the business year preceding the date of this notice. Utilita last filed its accounts with Companies House in July 2014; that statement covered the 2013-2014 financial year. The statement reported turnover of £75.8 million. Therefore the Authority may impose a financial penalty of up to £7.58 million.

4.2. In deciding the appropriate level of financial penalty, the Authority considered all the circumstances of the case, including the following specific matters set out in the 2003 Penalty Statement.

Factors which are first considered when determining the level of penalty

³ The Electricity and Gas (Determination of Turnover for Penalties) Order 2002.

The seriousness of the contravention and failure

- 4.3. The Authority considered that the breaches of SLC 14 were serious when considered in the round. Together, the non-compliant reasons Utilita used to block PST requests amounted to a business policy of widespread transfer blocking.
- 4.4. The Authority considered that switching was important for the effective functioning of the market for the reasons set out in paragraph 3.8. The Authority considered that to have a business policy that prevented switching for illegitimate reasons constituted a serious breach of the rules. Persisting with some of the policies after the non-compliance was brought to Utilita's attention compounded the seriousness of the breaches.
- 4.5. Financial detriment suffered by vulnerable customers is likely to have a greater impact on them than it does on the average consumer. Vulnerable customers are more likely to have PPMs. Utilita's business model focusses on the PPM market and as such some vulnerable consumers were likely to have suffered financial detriment or other harms.

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

- 4.6. The Authority considered that many Utilita customers and other market participants were likely to have been harmed by the contraventions. While the Authority acknowledged that most customers who had their PST requests blocked saved money by remaining with Utilita, many suffered financial detriment.
- 4.7. Even customers who did not suffer financial detriment would have suffered non-financial harms such as the infringement of their right to switch, the denial of the benefits, as they saw them, of switching, frustration, the opportunity cost of wasted time and financial cost from time spent on the phone.
- 4.8. Affected customers might also have lost confidence in the market.
- 4.9. Other market participants were denied the revenue associated with acquiring Utilita customers and Utilita gained as a result of keeping them.

The duration of the contravention or failure

- 4.10. The Authority considered that the duration of the breaches was significant. Table 1 (see page 4 above) shows that all breaches apart from Breach 2 lasted for around four years or longer. Breach 2 lasted for one year.

The gain (financial or otherwise) made by the licensee

- 4.11. The Authority considered that Utilita gained from its illegitimate transfer blocking policies. By retaining customers who would otherwise have switched Utilita increased its revenues and reduced its losses.

Factors tending to increase the level of penaltyRepeated contravention or failure

4.12. This was Ofgem's first investigation into Utilita; we noted the amendments Utilita made to its practices during the investigation to bring them into compliance with SLC 14.

4.13. The Authority considered that this factor did not apply.

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

4.14. The Authority wrote to Utilita in April 2014 and again in July 2014 to outline concerns about its non-compliant practices. In October 2014 an independent consultancy firm told Utilita that its retention strategy was not compliant with SLC 14.1 and SLC 14.4(c). However, breaches continued throughout 2014 and for the first part of 2015.

4.15. The Authority considered that this factor applied.

The involvement of senior management in any contravention or failure

4.16. Senior management was not sufficiently focussed on compliance; rather, it placed too much emphasis on customer retention. In that sense the Authority considered that senior management was involved in the contraventions because it oversaw a business practice that involved widespread transfer blocking for non-compliant reasons.

4.17. The Authority considered that this factor applied.

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

4.18. The Authority considered that Utilita lacked internal mechanisms to prevent contraventions of SLC 14. During the investigation Utilita failed to provide details of policies and procedures to suggest compliance with SLC 14 was considered seriously and systematically. Instead, Utilita provided details of a number of non-compliant practices as reported in section 2 above.

4.19. The Authority considered that this factor applied.

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

4.20. The Authority considered that there was no evidence to suggest that Utilita sought to avoid detection; Utilita reported non-compliant practices when responding to our information requests and questions asked during a site visit, and admitted to breaches of SLC 14. Utilita did not withhold important information or submit it in a manner that hindered the investigation's progress. Utilita co-operated fully throughout the investigation.

4.21. The Authority considered that this factor did not apply.

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

- 4.22. Utilita took only limited steps to improve compliance before the investigation began. Utilita maintained its non-compliant business practices despite them being brought to its attention by the Authority in advance of the investigation. Utilita was also advised by an independent consultancy firm of some areas of non-compliance with SLC 14 but took only limited action to remedy them.
- 4.23. The Authority considered that this factor applied to a limited extent only.

Appropriate action taken by the licensee in recognition of the contravention or failure

- 4.24. Whilst Utilita initially maintained some of its non-compliant practices as explained in paragraph 4.14 above, the Authority acknowledged the compliance action taken by Utilita in recognition of the contraventions. Utilita put new resource in place, including the recruitment of a Head of Regulatory Affairs, who now oversees a compliance team, which is sufficiently separated from the sales arm to provide critical oversight. There are new compliance processes, reporting mechanisms and a compliance manual.
- 4.25. The Authority considered that this factor applied.

Evidence that the contravention or failure was genuinely accidental or inadvertent

- 4.26. The Authority considered that there was no evidence to suggest the failure was accidental or inadvertent. Utilita did not demonstrate a sufficient degree of business diligence and it appeared that Utilita had not allocated sufficient resources to important compliance work. Further, Utilita was operating what amounted to a business policy of illegitimate transfer blocking with the involvement of senior management.
- 4.27. The Authority considered that this factor did not apply.

Reporting the contravention or failure to Ofgem

- 4.28. Utilita did not report the contraventions to Ofgem in advance of the correspondence referred to in para 4.14 above. Neither did it report potential non-compliance to us on receiving advice to that effect from an independent firm of consultants it had employed. In advance of the correspondence Utilita might not have been aware of the non-compliance with SLC 14 because of its inexperience and lack of effective compliance controls.
- 4.29. The Authority considered that this factor did not apply.

Co-operation with Ofgem's investigation

- 4.30. The Authority considered that Utilita co-operated fully throughout the formal investigation; once Utilita was notified of the breaches via the formal investigative process, it responded rapidly to adapt its practices and move into compliance. It also notified us of its intention to settle the case.
- 4.31. Utilita's co-operation helped to achieve a speedier resolution and avoided additional spending on resources by the regulator. Accordingly, the Authority considered that this mitigating factor applied and the Authority decided to impose a lower penalty than it would otherwise have done.

4.32. The Authority considered that this factor applied.

5. The Authority's decision

- 5.1. On 14 October 2015, the Authority gave notice, pursuant to section 30A(3) of the Gas Act and section 27A(3) of the Electricity Act, of its proposed financial penalty of £1 on Utilita in respect of the contraventions set out above. No representations or objections with respect to the proposed penalty were received in response to the Authority's notice.
- 5.2. The Authority considered that the seriousness of the contraventions, the duration of the contraventions, the adverse impacts on customers and on the market and the potential financial gain by Utilita warranted a financial penalty.
- 5.3. The Authority has decided to confirm the penalty of £1. The £1 penalty figure recognises that Utilita will make the following payments:
- i) £110,000 within 3 months from the publication of this Notice of Decision to impose a financial penalty as compensation to identifiable and traceable customers who suffered financial detriment as a result of having their PST requests blocked illegitimately, with any residual sums (Residual Sums) to be paid to the charity StepChange; and
 - ii) £450,000 (less £1) to the charity StepChange.
- 5.4. In reaching its decision the Authority was mindful of its principal objective in carrying out its enforcement functions under the Electricity Act and Gas Act to protect the interests of existing and future gas and electricity consumers. In addition, of particular significance was Utilita's admission of the breaches and the steps it took to bring itself into compliance with SLC 14 – the objectives of this case have been achieved.
- 5.5. The penalty must be paid by 29 December 2015.

Gas and Electricity Markets Authority

12 November 2015