

Notice of Decision to impose a financial penalty pursuant to s30A(5) of the Gas Act 1986 and s27A(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 Economy Energy Trading Limited's ("EE") compliance with its obligations under Standard Licence Conditions ("SLCs") 23 and 25 of its Gas and Electricity Supply Licences

17 December 2015

1. Summary

- 1.1 The Authority has decided to impose a financial penalty on Economy Energy Trading Limited ("EE") following an investigation into EE's compliance with SLCs¹ 23 and 25 which requires EE to ensure compliance with all the relevant requirements relating to contractual terms, the notification of price increases and the marketing of energy to domestic customers.
- 1.2 EE admitted that it breached SLCs 23 and 25 and has paid a consumer redress package of £250,000 (less the £1 financial penalty) in respect of the contraventions set out below to Citizens Advice Energy Best Deal extra Prepayment Meter Project (the "Project"). The aim of the Project is to provide advice and information to vulnerable consumers with prepayment meters who live in Housing Association or social housing accommodation to enable them to manage and understand how to use their prepayment meters.

If EE had not made these contributions, the Authority would have considered it appropriate to impose a much larger penalty on EE.

- 1.3 The Authority found breaches in respect of:

Breach 1: SLC 23.1; notification of principal terms

Breach 2: SLCs 25.1 and 25.2; marketing energy to domestic customers

Breach 3: SLCs 23.3 and 23.4; notification of increase in charges for the supply of energy

Breach 4: SLCs 25.6, 25.7, 25.8; pre-contract obligations

Breach 5: SLCs 25.5; selection and training of staff

Breach 6: SLC 25.16; management arrangements.

¹ The SLCs referred to in this notice have similar wording in the Gas and Electricity Supply Licences and are interpreted by the Authority in a consistent manner. In this notice, a reference to a SLC by number refers to the identical condition in both licences. All defined terms used in this notice are deemed to have the same meaning as in the SLCs, unless indicated otherwise.

1.4 The Authority found that:

1.5 EE failed to comply with SLC 23.1 as it did not take all reasonable steps to communicate to its customers, before they entered into a contract, the principal terms of the contract and ensure that the principal terms were communicated (or where they are provided in writing, drafted) in plain and intelligible language.

1.6 EE failed to comply with SLC 25.2 in that it failed to take all reasonable steps to secure the achievement of the Objective in SLC 25.1 as set out below. These provisions concerned EE's face to face marketing activities.

1.6.1 *EE's guarantee claim:* EE's guarantee claim breached SLC 25.2 as it was not written in clear and easily understood language and was misleading.

1.6.2 *EE's comparative savings claims:* EE failed to comply with SLC 25.2 as its comparative savings claims, which it provided to customers at the point of sale, were not complete and accurate and were therefore misleading.

1.6.3 *Misleading information from sales agents:* EE failed to comply with SLC 25.2 as some of its sales agents did not behave in a fair, transparent, appropriate and professional manner and as a result some customers were mis-sold contracts.

1.7 EE failed to comply with SLCs 23.3 and 23.4 in that it did not give 30 days advance notice to its electricity customers of two price increases which occurred on 4 April 2013 and 6 November 2013.

1.8 EE failed to comply with SLC 25.6 (a) as, at the time of the offer or before the contract began, it did not provide all customers, either in writing or by means of electronic display, with an estimate of the total annual charges for the supply of energy which would be payable to EE under the offered contract.

1.9 EE failed to comply with SLC 25.6 (b) as, at the time of the offer or before the contract began, it did not provide, either in writing or by means of electronic display, all customers with prepayment meters, or those customers for whom it indicated EE's prices would be cheaper than their current supplier, a comparison of the charges that would be payable with EE against those of the customer's current supplier based on a best estimate.

1.10 EE failed to comply with SLC 25.7(a) as some estimates it provided in accordance with SLC 25.6 (a) did not take account of annual consumption figures. EE failed to comply with SLC 25.7 (b) in that it failed to provide, either in writing or by electronic display, the basis for the estimated annual consumption when it provided an estimate of the total annual charges to a Domestic Customer.

- 1.11 EE failed to comply with SLC 25.8 (b) as some comparisons of charges it provided in accordance with SLC 25.6 (b) did not itemise clearly nor explain any relevant differences between the contracts. As a result, EE's estimates did not take into account seasonal variations in spend.
- 1.12 EE failed to comply with SLC 25.5(a) in that the appropriate procedures and training were not put in place for the selection and training of sales staff.
- 1.13 EE failed to comply with SLC 25.5(b) by not providing or procuring appropriate training for sales staff.
- 1.14 EE failed to comply with SLC 25.5(c) (i) as it did not take all reasonable steps to ensure that the customer could readily identify the sales agents as an EE sales agent.
- 1.15 EE failed to comply with SLC 25.5(c) (ii) in that some sales agents did not take all reasonable steps to ensure that customers understood that they were signing a contract to switch to EE.
- 1.16 EE failed to comply with SLC 25.16 by not taking all reasonable steps to establish management arrangements to facilitate compliance with its obligations in relation to marketing energy to domestic customers.
- 1.17 The relevant period of breach was from when EE started trading (October 2012) until December 2013, when EE suspended sales and marketing activity. This applied to all breaches save for those of SLCs 23.3 and 23.4 which occurred on 4 April 2013 and 6 November 2013.
- 1.18 EE took action to improve its compliance with SLCs 23 and 25. EE commissioned external consultants Cornwall Energy to undertake an audit of its compliance with supply licence conditions. The consultants' report was shared with Ofgem, informing the investigation and EE acted upon key recommendations by implementing new processes and procedures and appointing new experienced personnel to improve compliance.
- 1.19 The Authority took into account that EE admitted the breaches, offered to settle the investigation and made a payment of £250,000 (less £1) in consumer redress. The payment was made to the Citizen's Advice Energy Best Deal extra Prepayment Meter project (the "Project") on 9 December 2015. The aim of the project is to provide advice and information to vulnerable consumers with prepayment meters who live in Housing Association or social housing accommodation to enable them to manage and understand how to use their prepayment meters.

The Authority's decision:

- 1.20 On 5 November 2015, the Authority gave notice under section 27A (3) of the Electricity Act and section 30A (3) of the Gas Act 1986 of its proposal to impose a penalty on EE in respect of the contraventions set out above.

The Authority considered the penalty to be reasonable in all the circumstances of the case.

- 1.21 The Authority did not receive any representations or objections to the proposed penalty. Therefore, in the circumstances and in recognition of the redress payment made for the benefit of vulnerable customers, the Authority has decided to confirm the penalty of £1 on EE. The penalty must be paid by 4 February 2016.

2. Background

- 2.1 EE is a licensed domestic energy supplier which began trading in October 2012. By February 2014 it had approximately 70,000 customers. Its customers are predominantly prepayment (PPM) customers. EE stated in a letter dated 16 May 2014, in response to Ofgem's concerns, that it had been experiencing problems and that it had been caught out by the rapid growth of its business. EE acquired over 50% of its customers in the last three months of 2013.
- 2.2 In October 2013, Consumer Futures raised concerns that it was receiving a disproportionately high number of consumer complaints about EE.
- 2.3 Ofgem issued a Provisional Order ("PO") on 14 February 2014, which was confirmed on 13 May 2014 with modifications, to address areas of priority concern quickly. These were transfer blocking, customers being off supply and EE's complaint handling procedures. Areas of priority concern were dealt with quickly under the PO².
- 2.4 Other areas of concern were identified and dealt with under this investigation which was opened on 26 September 2014.

The relevant Licence Conditions:

- 2.5 The licence conditions relevant in this investigation are SLCs 23 and 25.
- 2.6 The relevant provisions are summarised below:
- 2.7 The conditions of SLC 23.1 require that the licensee must take all reasonable steps to communicate the principal terms of the domestic supply contract to domestic consumers, before they enter into the contract, and ensure the principal terms are communicated (or where they are provided in writing, drafted) in plain and intelligible language³.

² Pursuant to our powers under section 25 Electricity Act 1989 and section 28 Gas Act 1986

³ The wording of the condition was amended as a result of the Retail Market Review. The first tranche of reforms took effect from 23 October 2013. The wording of the previous condition was: "Before it enters into a Domestic Supply Contract with a Domestic Customer, the licensee must take all reasonable steps to bring the Principal Terms of that contract to the attention of that customer."

- 2.8 The conditions of SLC 25.2 requires that licensees shall take all reasonable steps to secure the objective described at SLC 25.1 is achieved. The objective is, firstly, to ensure that all information provided to Domestic Customers in the course of the licensee's Marketing Activities is capable of being easily understood by domestic customers and does not mislead them, and is otherwise fair both in terms of its content and in terms of how it is presented. Secondly, the objective is to ensure that all contact with domestic customers in the course of a licensee's marketing activities should be conducted in a fair, transparent, appropriate and professional manner.
- 2.9 The conditions of SLCs 23.3 and 23.4 applicable at the time of the two price increases requires that suppliers must give notice of increases in any charges for the supply of electricity or disadvantageous unilateral variation to the domestic consumers and that such notice must be given at least 30 days in advance of the date on which the price increase takes effect⁴. This means that where a customer gave notice to terminate their contract after notification of a price increase as set out above, the supplier must not require a customer to pay a termination fee.
- 2.10 The conditions of SLC 25.6 (a) requires that where licensees offer to enter into a domestic supply contract in the course of their marketing activities, licensees must provide at the time of making the offer and before entering into the contract an estimate of the total annual charges for the supply of energy payable under the offered contract. The estimate must be provided in writing or by means of electronic display.
- 2.11 Further, under SLC 25.6 (b) (i), if the customer is being supplied through a prepayment meter or, under SLC 25.6 (b) (ii), the licensee has indicated that its prices would be lower than the customer's current energy supplier's prices then the licensee must provide a comparison of the charges for the supply of energy that would be payable under the offered contract with the charges payable with the customer's current energy supplier. SLC 25.6 (b) also provides that, where the customer has a prepayment meter and is unable or unwilling to provide details of its current charges, then the licensee should base any comparison on its best estimate of those charges, having regard to any relevant information that is available to the licensee at the time the comparison is prepared.
- 2.12 The conditions of SLC 25.7 requires that any estimate given as required by SLC 25.6 (a) must take account of the customer's annual consumption or, where that is not known or could reasonably be ascertained, be based on the licensee's best estimate of annual consumption. The basis of any

⁴ The wording of SLC 23.3 and 23.4 was amended as a result of the reforms brought about by the Retail Market Review and took effect on 23 October 2013 and consequently applies to the November 2013 breach. However, the amended provision also required the licensee to give 30 days' notice before an increase in Charges for the supply of gas and/or electricity or a Disadvantageous Unilateral Variation; that is a unilateral variation to any other term of the contract which is to the disadvantage of the domestic customer. In the case of EE, the breach related to the failure to notify domestic customers of an increase in the Charges for the supply of gas and/or electricity only.

estimated annual consumption should be clearly set out in writing or by electronic display.

2.13 The conditions of SLC 25.8 requires that any comparison of charges as required by SLC 25.6 (b), where the customer is being supplied through a prepayment meter or the licensee has indicated that its prices would be lower, should be undertaken on a like for like basis; that is, based on the same time period (usually one year) and the same consumption level (either actual or estimated) and itemise clearly and explain any other relevant differences between the contracts.

2.14 The conditions of SLC 25.5 provide in summary the following:

- SLC 25.5 (a) -The licensee shall put in place and follow procedures which are appropriate for the selection of staff or other representatives who are employed or engaged in roles which involve, might involve or will involve communication with domestic customers for the purpose of its marketing activities.
- SLC 25.5 (b) - The licensee shall provide or procure appropriate training for all staff or other representatives who communicate with domestic customers for the purpose of the licensee's marketing activities. This training should include, but not be limited to, training about the licensee's obligations insofar as they affect domestic customers, including its obligations under SLC 25.5.
- SLC 25.5 (c) (i) – The licensee shall take all reasonable steps to ensure that a domestic customer may readily identify the licensee whenever that domestic customer is contacted by the licensee or a representative.
- SLC 25.5 (c) (ii) – The licensee shall take all reasonable steps to ensure that if a domestic customer enters into a domestic supply contract with the licensee, that customer will readily understand that they have done so.

2.15 The conditions of SLC 25.16 provide in summary, that suppliers must take all reasonable steps to establish management arrangements that facilitate the licensee's compliance with its obligations, which include steps to ensure that any agents and subcontractors establish equivalent arrangements.

2.16 Ofgem issued one formal Information Request to EE on 16 January 2015. EE provided its responses on 5 and 13 February 2015. Cornwall Energy's December 2013 Compliance Review was also reviewed as evidence.

3 The Authority's decision on contraventions

3.1 After considering all relevant information relating to the investigation, The Authority was satisfied that EE had breached SLCs 23 and 25. These breaches have been admitted by EE.

3.2 The Authority made specific findings in relation to:

- SLC 23.1: in relation to EE's notification of principal terms
- SLC 25.1 and 25.1: in relation to EE's marketing energy to domestic customers
- SLC 23.3 and 23.4: in relation to EE's notification of increase in charges for the supply of energy
- SLC 25.6, 25.7 and 25.8: in relation to EE's pre-contract obligations
- SLC 25.5: in relation to EE's selection and training of staff
- SLC 25.16: in relation to EE's management arrangements

Breach 1. *Breach of SLC 23.1 in relation to EE's notification of principal terms:*

3.3 The Authority found that EE failed to take all reasonable steps to communicate to its customers before they entered into a contract, the principal terms of the contract, in particular the contract duration fixed at 12 months and the application of a termination fee for each fuel type. The welcome letter which customers were required to sign at the point of sale did not mention the principal terms at all. The contract did not mention the termination fees at all but stated in small print in the declaration. The Authority found that the contract did not communicate the principal terms. The general terms and conditions, which customers were given at the point of sale, were very text heavy and there were only two references to a "12 month rolling" tracker or contract and one reference to the termination fees. These references were in very small print [font size 7] and were not prominent.

Breach 2. *Breach of SLC 25.2 in relation to EE's marketing activities:*

EE's guarantee claim:

3.4 The Authority found that the documentation EE gave to new consumers at the point of sale made reference to the guarantee claim but these references were unclear and misleading. The Authority understood the intended claim to be that EE guaranteed to be cheaper than the average standard tariff of the 'Big 6' when comparing average annual consumption figures. However, the Authority found the guarantee claim, as worded in the various documents, was ambiguous and did not make the intention clear.

EE's comparative savings claims:

3.5 The Authority found that EE's comparative savings claims provided to customers on the contracts at the point of sale, and which showed the savings to be made between EE and the customer's relevant 'big 6' current

supplier were misleading. The Authority found that differences between the suppliers' charges were not always made clear and that a best estimate was not always provided.

- 3.6 EE sent 50 samples of contracts signed by its customers over its operating period. These compared the customer's weekly, monthly or annual actual spend (as provided by the customer) with their existing supplier to EE's estimated equivalent spend broken down for gas, electricity and total spend. EE did not have a standing charge whereas the 'big 6' suppliers did. EE explained that it took the weekly spend and multiplied it by 52 to give an estimated annual spend and used its comparison charts to provide a comparable EE weekly, monthly or annual spend. The Authority considered comparisons of weekly and monthly spend to be inaccurate as they do not take account of seasonal variations in spend.
- 3.7 The Authority found that EE was unable to provide copies of its comparison charts to demonstrate how EE fulfilled its intended guarantee claim or comparative savings claim over the operating period. EE explained that it updated the data on the comparison charts on a monthly basis overwriting the previous version. EE stated that it used figures from a comparison website and these took account of dual fuel discounts but without copies of the charts we cannot confirm this or whether the data being used to calculate the savings was accurate.

Misleading information from sales agents:

- 3.8 The Authority found that EE failed in the course of its face to face marketing activities to provide complete and accurate information to Domestic Customers which was fair both in terms of its content and how it was presented. EE identified 756 customers whom it considered may have been mis-sold contracts. EE accept that some customers may have been mis-sold contracts. The Authority considered that the number of customers affected was likely to be significantly higher because EE's complaint handling procedures were inadequate and may not have documented all complaints regarding mis-selling. Also, customers may not have realised they had been mis-sold contracts as the evidence demonstrates that some sales agents were not honest about their intentions.

Breach 3. Breach of SLCs 23.3 and 23.4 in relation to EE's notification of price increases:

- 3.9 Prices on EE's electricity tariff were increased on 4 April 2013 and again on 6 November 2013. The Authority found that none of EE's electricity tariff customers received advance notification in respect of either price increase. On 4 April 2013 EE had 13,701 electricity customers and on 6 November 2013 EE had 56,253 electricity customers, and the Authority found that all of these customers were affected. Customers were therefore not given the opportunity to switch before the price increases took effect. In relation to the 13,701 electricity customers affected by the 4 April 2013 price increase, the Authority found that EE had neglected to include VAT and therefore these customers had been signed up on a cheaper tariff than they should otherwise have been. The Authority noted that these

customers would have been receiving cheaper energy than they should have done for the period up until the 4 April 2013 price increase and that the reason for this was EE's failure to calculate its tariff correctly.

- 3.10 The Authority found, in respect of the 6 November 2013 price increase, that 14,035 customers were moved onto the higher tariff prior to them being notified and were disadvantaged as a result.
- 3.11 The Authority found EE's calculation of the number of customers (13,459) that were owed nothing to be correct as these customers had signed up after 6 November 2013 on the new rate. The increase was implemented on the 6 November 2013 and EE acquired over 50% of its customers in October, November and December 2013.
- 3.12 Further to the above, the Authority also found that 23,043 customers were owed nothing as a result of the 6 November 2013 price increase as they were either on the correct tariff or had been undercharged; 21,168 customers were undercharged a total of £423,473.01. EE took the decision not to seek to recover these costs from these customers as the underpayment was EE's fault.

Breach 4. *Breach of SLC 25.6, 25.7 and 25.8: in relation to EE's pre-contract obligations*

- 3.13 The Authority found that EE failed to comply with:
- SLC 25.6 (a) as, at the time of the offer or before the contract began, it did not provide all customers, either in writing or by means of electronic display, with an estimate of the total annual charges for the supply of energy which would be payable to EE under the offered contract, instead providing some customers with either weekly or monthly spend calculations only.
 - SLC 25.6 (b) as, at the time of the offer or before the contract began, it did not provide, either in writing or by means of electronic display, all customers with prepayment meters, or those customers for whom it indicated EE's prices would be cheaper than their current supplier, a comparison of the charges that would be payable with EE against those of the customer's current supplier based on a best estimate.
 - SLC 25.7 (a) as some estimates it provided in accordance with SLC 25.6 (a) did not take account of annual comparison for the customer to retain for their records.
 - SLC 25.8 EE failed to provide any comparison of charges which must be on a like for like basis, that is, based on the same time period (usually one year) and the same consumption level (either actual or estimated) and itemise clearly and explain any other relevant differences.

- 3.14 EE sent a sample of 50 contracts across its operating period as evidence. The Authority found that 20 of these contracts (40%) were based on weekly or monthly spend and did not provide customers with an estimate of the annual charges. These contracts were dated August 2013, October 2013 and November 2013 and were used in the period when EE doubled its customer base (the last three months of 2013).

Breach 5. Breach of SLC 25.5: in relation to EE's selection and training of staff

- 3.15 The Authority found that the appropriate procedures and training were not put in place for the selection and training of sales staff. Furthermore, EE did not take all reasonable steps to ensure that the customer could readily identify the sales agents as an EE sales agent and ensure that customers understood they were signing a contract with EE.
- 3.16 EE was unable to provide copies of its sales or training materials from 2013 and believed that none existed as training was conducted face to face and involved shadowing existing sales advisors. EE was unable to provide evidence to substantiate how the sales, training, monitoring or compliance was carried out and the Authority therefore found a breach due to a lack of evidence to demonstrate compliance with SLC 25.5.
- 3.17 The Authority also found that some sales agents did not take all reasonable steps to ensure that customers understood that they were signing a contract to switch to EE as some customers wrongly understood they were signing for other reasons such as to receive information from EE or to complete a survey or, in a few cases, to switch to other suppliers.
- 3.18 The Authority drew on further data provided by Citizens Advice, the Extra Help Unit and Consumer Futures. Their data can be summarised as follows:
- 3.18.1 **Citizens Advice:** The data reported 154 complaints related to EE for the period 1 December 2013 to 26 January 2014. Although one company reported higher complaints than EE it had a higher customer base and therefore the proportion of complaints as a percentage of its customer base was the highest for Economy Energy. It should be noted that the complaints were not all related to mis-sales and some related to customers being off-supply or those being transfer blocked or unable to get through to EE.
- 3.18.2 **Extra Help Unit data:** The data reported 107 complaints related to EE for the period 1 December 2013 to 26 January 2014. EE reported the highest complaints and as a percentage of customer base it was also the highest. Again, it should be noted that the complaints were not all related to mis-sales and some related to customers being off-supply or those being transfer blocked or unable to get through to EE.
- 3.18.3 **Consumer Futures complaints data:** Consumer Futures provided complaints data for EE for the period 5 October 2012 to 13 February 2014 which showed an average of three to four complaints a month relating to mis-selling except for the following months: August 2013 (13), September 2013 (9), October 2013 (7) and November 2013 (13). A total of 76 complaints (38%) from 196 logged in the period October 2012 to 13 February 2014 related to mis-selling. There were 3 reports of forged signatures. The majority of customers

admitted signing a contract but 31 customers said it was not clear what they were signing for.

Breach 6. Breach of SLC 25.16: in relation to EE's management arrangements

- 3.19 The Authority found that EE did not have proper controls in place to ensure sales agents were acting in a responsible manner. EE also admitted that during the period of breach, it did not have regular Board meetings or to having an appropriate structure and controls in place. Furthermore, EE was unable to provide evidence to substantiate how its sales, training, monitoring or compliance was carried out. The Authority found that management arrangements in respect of these functions were inadequate. EE accepted that its commission only remuneration system ran the risk of incentivising its sales agents to make sales with less regard to fairness and information to the customers than should have been the case.
- 3.20 The period of breach was from when EE started trading (October 2012) until December 2013, when EE suspended sales and marketing activity. EE has since strengthened its board and enhanced corporate governance with the appointment of a number of new directors, and replacing some individuals who had senior managerial responsibilities during the relevant period of breach.

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 considered whether a financial penalty was appropriate in accordance with the requirements of the Electricity Act and the Gas Act and with its published Statement of Policy with respect to Financial Penalties (October 2003) ("the Policy"⁵). Under s27A (1) of the Electricity Act and s30A (1) of the Gas Act, the Authority may impose a penalty on EE of such an amount as is reasonable in all the circumstances of the case. On 27 March 2014 the Chairman published an open letter ("The Chairman's Letter") which explained the Authority's position on future financial penalties. The Open letter stated that the Authority had decided to place greater emphasis on deterrence thereby resulting in higher penalties in respect to breaches which came to the Authority's attention on or after 1 June 2014. In this case, the breaches occurred and came to the Authority's attention before the application of the Chairman's Letter and so consequently the considerations set out in the Chairman's Letter do not apply.
- 4.2 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

⁵ <https://www.ofgem.gov.uk/ofgem-publications/74207/utilities-act-statement-policy-respect-financial-penalties.pdf>

calculated to further its principal objective⁶, having regard to its other duties. The Authority is not, under the Policy limited to considering the matters specifically mentioned in the Policy, but will consider all the circumstances of the case.

- 4.3 In deciding whether it would be appropriate to impose a penalty, the Authority considered and took into account the particular facts and circumstances of the contraventions under consideration, including the extent to which the circumstances from which the contraventions or failures arose may have been outside the control of EE. It also took full account of the representations made to it by EE.
- 4.4 The matters giving rise to considerations under the Policy are detailed 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

- 4.5 The Authority considered the breaches by EE to be serious failures, both individually and when one considers the effect on consumers of all the breaches as a whole. Particular reference was made to the breaches relating to mis-selling and the lack of management procedures and controls over EE's sales agents to ensure sales agents were acting in a fair, transparent, appropriate and professional manner. EE damaged the interests of consumers and caused wider harm to consumers and the industry through its mis-selling practices. Consumers become less engaged in the energy market and the reputation of the energy industry as a whole is damaged when mis-selling practices occur. Such behaviour causes consumers to lose trust in the energy industry and it makes it more difficult for small suppliers to succeed in the market and gain consumers' confidence. If consumers become disengaged and are put off from switching then consumer inactivity reduces the effectiveness of competition in the retail market. This is detrimental to the efficient functioning of the market.
- 4.6 The fact that EE did not have appropriate management arrangements in place to facilitate its compliance with its obligations was also serious. The Authority accepted that Economy Energy was a relatively new supplier at the time of the contraventions but considered that all suppliers should be aware of their licence obligations and take them seriously.

⁶ The Electricity Act (section 3A) and the Gas Act (section 4AA) set out the Authority's principal objective for energy regulation, thereby defining the purpose of Ofgem's activities as to protect the interests of existing and future consumers, wherever appropriate by promoting competition. The Energy Act 2010 amended the principal objective to clarify that the interests of consumers should be taken as a whole, including their interests in the reduction of greenhouse gas emissions and ensuring security of supply.

- 4.7 The Authority also considered that the interests of EE's own consumers, who are predominantly pre-payment customers, were damaged by the contraventions set out in each of breaches.
- 4.8 The Authority acknowledged that compensation payments have been made to some customers directly affected by the breaches in this case (see below) and that those consumers should not have suffered any ongoing financial loss.

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

- 4.9 The Authority considered that imposition of a financial penalty on EE is likely to incentivise compliance and help deter future breaches.
- 4.10 The Authority also considered that the imposition of a financial penalty is likely to send a message to the company, its shareholders and the industry at large that such breaches are taken seriously. It is incumbent on suppliers, irrespective of their size, to take compliance with licence conditions seriously and they should take steps to do so proactively through putting appropriate sales, training and compliance processes and procedures in place and checking that these processes and procedures are effective. In the Authority's view, imposing a financial penalty would help to incentivise implementation of robust processes, procedures and controls to prevent future breaches.
- 4.11 Whilst the Authority acknowledged that EE took steps to secure compliance with SLCs 23 and 25, the Authority considered that the imposition of a financial penalty in relation to the breaches was warranted to reflect strong deterrence against future non-compliance by EE and other companies. The Authority also considered that the imposition of a financial penalty would create an incentive to ensure the underlying issues were fully and effectively addressed.

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

If the contravention is trivial in nature

- 4.12 The Authority considered that the contraventions were not trivial in nature and considered that the general interests of consumers and the market have been damaged by the contraventions (see 4.5 - 4.8).

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

- 4.13 The Authority did not consider that its principal objective and duties 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

- 4.14 The Authority considered that the breach or possibility of a breach would have been apparent to a diligent licensee. The Authority accepted that Economy Energy was a relatively new supplier at the time of the contraventions but considered that the breaches outlined within this notice would have been apparent to a diligent licensee and all suppliers should be aware of their obligations under the Standard Licence Conditions. In addition the Authority has published a number of decisions with regards to SLC 25 which the Authority would expect a diligent licensee to be aware of.

5 Factors relevant to the level of financial penalty

- 5.1 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 per cent of the annual turnover of the regulated person. The Authority was satisfied that its proposed penalty fell within the maximum statutory limit.
- 5.2 In deciding the appropriate level of financial penalty for the breaches cited above, the Authority considered all the circumstances of the case. It has also had regard to the following factors in accordance with the Policy.

Factors which are first considered when determining the level of penalty

The seriousness of the contravention and failure

- 5.3 As set out at section 4.5, The Authority considered the contraventions described above were serious: consumer confidence is underpinned by suppliers complying with their legal obligations. The Authority considered the breaches by EE to be serious failures. Particular reference was made to the breaches relating to mis-selling and the lack of management procedures and controls over EE's sales agents to ensure sales agents were acting in a fair, transparent, appropriate and professional manner. EE damaged the interests of consumers and caused wider harm to consumers and the industry through its mis-selling practices.
- 5.4 In addition to the detriment suffered by directly affected customers in this particular case, the Authority considered compliance with SLCs 23 and 25 to be particularly important in protecting consumers during the marketing process, most of whom in this case were pre-payment customers. Prepayment customers in particular are more likely to be vulnerable consumers as prepayment meters are used more often by households on low incomes.

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

- 5.5 The Authority considered that breaches such as those occurring in this case can cause serious harm to the general interests of consumers and the energy market. As a result of EE's marketing activities, some of its customers may have lost out on securing better energy deals. The Authority considered that some customers may have benefited from cheaper energy had they stayed with their current supplier or switched to a different supplier.
- 5.6 In determining the level of penalty, the Authority took into account that EE made compensation payments to those customers affected or potentially affected by the breaches. In relation to customers that were not notified of a price increase, 14,035 customers were identified as being owed a refund as they were moved onto a higher tariff without having been notified. EE has traced 2,254 (16%) of these paying £44,493.60 in compensation but 11,732 (84%) customers did not claim a total of £98,863.08 owed. EE agreed to undertake further steps to trace and refund affected customers at the request of Ofgem. The Authority noted that EE had not gained from these monies as it paid this to charity as part of a £100,000 payment to the National Children's Bureau, although these customers have lost out. The Authority considered this in the level of penalty.
- 5.7 In relation to 756 customers deemed to have been mis-sold contracts, EE paid compensation totalling £23,339.67 to 492 of those 756 customers. A total of £6,600 compensation was still owed to the remaining 264 customers. EE agreed to donate £6,600 to a nominated charity and that this would be part of the penalty in this investigation but would be in addition to any future compensation claimed and paid to those customers owed. EE agreed to undertake further steps to trace and refund affected customers at the request of Ofgem. The Authority took this into account in setting the level of penalty.

The duration of the contravention or failure

- 5.8 The period of breach in respect to the contraventions of SLCs 23.1, 25.1, 25.5, 25.2, 25.6, 25.7, 25.8, and 25.16 was from when EE commenced trading in October 2012 to the start of December 2013 when EE suspended sales activity. The period of breach in respect to Breach 3, occurred when EE failed to give advance notice of the prices rises which took effect on 4 April 2013 and 6 November 2013.

The gain (financial or otherwise) made by the licensee

- 5.9 The Authority noted that some consumers have been compensated for their direct financial losses as a result of these breaches. However, having taken all of the circumstances of the investigation into consideration, the Authority considered EE will have gained through avoided compliance costs by not having appropriate compliance processes, procedures and staff in place to deal with compliance. The Authority considered that there would

be further avoided costs through not having appropriate sales and training processes and procedures in place. Further costs were avoided through a lack of management oversight and EE not having appropriate procedures and controls in place at senior level.

- 5.10 EE profited through mis-selling in that at least 756 customers were switched to EE via misleading sales practices. However, the Authority noted that EE had paid compensation totalling £23,339.67 to 492 of those 756 customers deemed to have been mis-sold contracts and committed to donating £6,600 to a nominated charity in addition to undertaking further steps to trace and refund affected customers.
- 5.11 The Authority noted that EE stated that it lost £423,473.01 in underpayments in respect of 21,168 customers who were undercharged as a result of being put onto an industry standard tariff by EE that was significantly cheaper than the intended tariff. These customers may also have benefited by switching albeit by accident.
- 5.12 Under the erroneous transfer process EE was required to return all income received from the customer to the original supplier, whilst incurring the costs of supply. EE returned £80,603 back to original suppliers and the cost to service these customers equated to approximately £73,000.

Factors tending to increase the level of penalty

Repeated contravention or failure

- 5.13 These are not repeated contraventions by EE. The Authority noted that EE has not previously contravened SLCs 23 or 25, for this reason, the Authority considered this not to be an aggravating factor.

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

- 5.14 On the basis that EE suspended sales and marketing activity in December 2013 ahead of Ofgem launching a formal investigation, the Authority considered that this aggravating factor did not apply.

The involvement of senior management in any contravention or failure

- 5.15 The Authority found that at the time of the contravention EE's senior management were directly involved in the various failures. There was no evidence that sales or training materials existed. The Director who oversaw training, and who has since left EE, conducted training which was face to face or via work shadowing of existing sales advisors rather than through robust sales and training processes and procedures. Instead of putting

robust compliance processes, procedures and compliance staff in place, the senior management team placed four regional sales managers in charge of monitoring and checking of sales compliance.

- 5.16 EE was unable to demonstrate how any of these sales, training, monitoring or compliance processes and procedures were carried out which demonstrated that senior management did not have the appropriate controls in place to secure compliance with the SLCs. These lack of controls led to misleading sales practices from EE's sales advisors; some deliberate and some through lack of awareness of the obligations. Senior management did not do enough to ensure that the 'point of sale' documents were not misleading and to meet its obligations in relation to price increases. The Authority considered this to be a significant aggravating factor.
- 5.17 The Authority noted that EE has since strengthened its board and enhanced corporate governance with the appointment of a number of new directors, replacing some individuals who had senior managerial responsibilities during the relevant period of breach.

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

- 5.18 EE did not provide evidence to show that it had internal procedures/mechanisms in place to prevent contraventions or failures.
- 5.19 In particular, EE was unable to provide any evidence to demonstrate that it had internal mechanisms or procedures in place intended to prevent the following breaches: Breach 3, notification of a price increase, Breach 5, the selection and training of staff and Breach 6, management arrangements in place. The Authority considered this to be a significant aggravating factor.

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

- 5.20 EE did not conceal the contraventions from Ofgem, and the Authority acknowledged that EE commissioned external consultants Cornwall Energy to audit its compliance with supply licence conditions, providing Ofgem with a copy of the final report.

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

- 5.21 The Authority found that EE did not take certain appropriate steps towards achieving compliance. There was a lack of robust compliance processes,

procedures and compliance staff. EE did not have appropriate systems and controls in place to secure compliance with the SLCs.

- 5.22 For this reason the Authority considered that this mitigating factor did not apply.

Appropriate action by the licensee to remedy the contravention or failure

- 5.23 The Authority acknowledged the following steps that EE took to try to remedy these failures. The Authority considered this mitigating factor applied to a limited extent.
- EE introduced regular Board meetings as well as daily meetings where senior managers share important information among the leadership team.
 - EE amended its sales process at the point of sale to explain the principal terms of the contract to consumers.
 - EE no longer use the guarantee claim and the Authority considered this action remedied the contravention for future customers.
 - EE stated that any changes to tariffs will be firstly notified to customers 30 days in advance. EE also sought to compensate those customers affected and identified 14,035 customers who required a refund. EE paid £44,493.60 in total to 2,254 customers who claimed compensation. A further 11,732 customers did not claim compensation totalling £98,863.08 and EE paid that to charity as part of a £100,000 payment to National Children's Bureau. EE contacted the customers twice by letter and those owed more than £50 also received a phone call. The letter invited customers to claim the monies within 28 days or it would be paid to charity. The Authority considered that EE could have done more to reunite its customers with the monies owed to them. EE has since agreed to undertake further steps to trace and refund affected customers.
 - EE appointed an experienced compliance manager in June 2014. EE now use the verification process to ensure compliance and document any instances of non-compliance. Any potential mis-selling is investigated by the Complaints team and fed back to the Head of Sales and Regional Sales Managers.
- 5.24 However, the Authority remained concerned about EE's lack of communication at senior management level. In June 2014 EE advised Ofgem in a teleconference that it did not intend to carry out direct sales in the foreseeable future and instead it was looking at comparison websites which it considered would reduce the likelihood of SLC 25 issues arising. It said it was signing contracts with one comparison site and then would look to extend to others. EE sent a copy of its Sales Strategy 2014/15 which

stated that EE has ceased direct sales but should they be minded to resume direct sales they would give Ofgem eight weeks' notice. However, in December 2014, after the confirmed Order against EE was lifted, EE commenced direct sales without giving Ofgem eight weeks' notice. It appeared that the relevant senior managers had not been informed of this commitment. EE disagreed with Ofgem over the validity of this point, stating that the commitment was in the form of a draft document that was never intended to be binding and as such it was not considered necessary to show it to senior managers.

Having taken account of the points set out above, the Authority considered that the steps EE took to compensate customers who suffered loss as a result of Breaches 3 and 4 was a mitigating factor but only to a limited extent. In respect to the remaining breaches, the Authority acknowledged the steps EE took to come into compliance but were not persuaded that the steps taken to date warranted any decrease in the level of penalty and for this reason considered that the mitigating factor did not apply.

Evidence that the contravention or failure was genuinely accidental or inadvertent

- 5.25 The Authority recognised that the contraventions were not deliberate or calculated. However, the Authority considered that the breaches could not be considered genuinely accidental or inadvertent and would have been apparent to a diligent licensee. Breach 1 and 3: it should have been apparent to EE that it needed to make the principal terms of the contract clear to customers and give notification of a price increase. Breach 2: EE accepted its guarantee claim to be unclear and potentially misleading and this would have been apparent to a diligent licensee from the outset. Breach 4: the Authority considered that a diligent licensee would have understood its pre-contract obligations. Breach 5 and 6: the Authority considered that the failures in relation to the selection and training of staff and to have management arrangements in place were unacceptable and could easily have been prevented with appropriate management oversight. The Authority considered this mitigating factor did not apply.

Reporting the contravention or failure to Ofgem

- 5.26 EE did not draw the contravention or failures to Ofgem's attention. The Authority therefore considered that this mitigating factor did not apply.

Co-operation with Ofgem's investigation

- 5.27 The Authority expects companies to cooperate fully with Ofgem's investigations and considers that this mitigating factor should apply only where such cooperation has gone well beyond what would be expected of any regulated person facing enforcement action. EE accepted the breaches and agreed to settle the case at the earliest opportunity and this has achieved a speedier resolution and avoided additional spending of resource

by the regulator. EE considered that in co-operating with Ofgem it had gone above and beyond the typical conduct of a licensee. EE cited the Cornwall Energy audit and report (its disclosure to Ofgem in particular), self-reporting and its invitation to Ofgem to attend its offices as examples. Ofgem rejected this argument on the basis that EE's actions did not constitute self-reporting relevant to this investigation and the other actions referred to fell within Ofgem's reasonable expectations of a company such as EE with serious compliance problems at the relevant time.

- 5.28 The Authority therefore considered that this mitigating factor did not apply.
- 5.29 Notwithstanding the above, EE has, in response to the mandate put forward, accepted its breaches 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 considered that this mitigating factor applied and the Authority has imposed a lower penalty than it would otherwise have imposed.

6 The Authority's decision

- 6.1 The Authority considered all of the circumstances of the investigation. It considered that the seriousness of the contraventions and the level of involvement of senior management in failing to take sufficient steps to prevent the breaches warrant a financial penalty.
- 6.2 The penalty proposed for the Breaches set out at section 3 is £1.
- 6.3 Taking all the above into account, the Authority considered the penalty to be reasonable in all the circumstances of the case. In reaching this decision the Authority considered in particular the following:
- (a) EE's failures were serious contraventions of the Standard Licence Conditions;
 - (b) EE made a gain from the breach;
 - (c) There was considerable consumer detriment although EE took some appropriate action to compensate consumers affected;
 - (d) The case had two mitigating factors; (which applied to a limited extent) relating to appropriate action by the licensee to remedy the contravention or failure and for agreeing to settle the case at the earliest opportunity;
 - (e) The case had aggravating factors including the absence of internal mechanisms or procedures intended to prevent contravention and senior management involvement, which were not conducive to achieving compliance; and

- (f) EE accepted the breaches and agreed to settle this investigation, including making a payment of £250,00 (less £1) in consumer redress.

6.4 The Authority has therefore decided to confirm the penalty of £1 on EE. The penalty must be paid by 4 February 2016.

Gas and Electricity Markets Authority

17 December 2015