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

Decision of the Gas and Electricity Markets Authority to impose a financial penalty following enforcement proceedings brought against SSE Energy Supply Limited and Southern Electric Gas Limited ("SSE") for alleged non-compliance with its obligations under conditions 23 ("SLC 23") and 25 ("SLC 25") of the Standard Conditions of the Electricity and Gas Supply Licences

3rd May 2013

I. SUMMARY

1. The Gas and Electricity Markets Authority ("the Authority") hereby gives notice of its decision to impose a penalty of **£10.5 million** on SSE. This follows an investigation by Ofgem into SSE's compliance with its licence conditions in relation to the marketing of gas and electricity to domestic customers.

2. Ofgem's investigation related to various aspects of SSE's Marketing and Telesales Activities following the introduction of the new supply licence condition, SLC 25, in October 2009, and the further detailed amendments to the licence conditions in January 2010. The Marketing Activities in question covered both sales made on the doorstep ("doorstep sales") and sales made by agents within the stores of a major high street retailer under a joint branding arrangement between SSE and that retailer ("venue sales"). The Telesales Activities included both those of an external agent, Universal, and of SSE's in-house telesales agents.

3. Having considered all the written and oral submissions of both Ofgem and SSE, the Authority has concluded that, for varying periods between October 2009 and September 2012[1], SSE committed various contraventions of SLC 23 (Notification of

[1] In one case, a breach (breach 17 below) was ongoing at the time of the oral hearing, although SSE has subsequently altered its procedures to reflect the Authority's findings. Ofgem has accepted SSE's undertaking to

Domestic Supply Contract Terms) and SLC 25 (Marketing Gas/Electricity to Domestic Customers).

4. The contraventions which have been found include:

- The use of misleading scripts by both external telesales agents and doorstep sales agents;
- Failure adequately to monitor and audit the sales activities of external and in-house telesales agents, doorstep sales agents, and venue sales agents; and
- Failure sufficiently to ensure and control the provision of accurate estimates and comparisons to customers, and to have regard to all relevant information when arriving at a "best estimate" of a customers' annual consumption.

5. A detailed description of the nature of SSE's contraventions is provided in section 3 below.

II. BACKGROUND

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

6. The marketing of gas and electricity to domestic customers has been a source of concern to Ofgem for a number of years. There have been several regulatory interventions in relation to marketing over the last 10 years by way of enforcement action against suppliers, amending licence conditions and introducing standards of conduct. It is noted that in May 2011 SSE was found guilty of misleading commercial practice in relation to certain doorstep selling activities during 2008 and 2009.

7. The current investigation is the second formal investigation into SSE's compliance with standard licence conditions for the supply of energy to domestic customers, albeit that the previous formal investigation, initiated in April 2004, was closed

cease the behaviour in question and for that reason the Authority has not considered it necessary to make any order in respect of the breach.

following changes that were made to SSE's procedures, including its termination of the use of Universal for doorstep sales.

8. In addition to taking enforcement action, Ofgem held detailed discussions with suppliers about its proposed Retail Market Probe remedies, during which the aims of the Ofgem marketing licence obligations were made clear. The draft licence condition was the subject of a formal statutory consultation in August 2009.

9. Both the Consultation Document and the 2009 Probe Decision Document made clear the policy concerns behind the proposed changes to the marketing licence condition. Ofgem's research confirmed that the information provided to some consumers about tariffs and the savings they could make by switching supplier was incorrect. Ofgem wanted to take steps to help ensure that consumers were always provided with accurate information so they could then make properly informed decisions.

10. The Authority made clear that the proposed changes were to meet aims which included:

- improving consumers' ability to make well-informed decisions in response to direct sales approaches from suppliers – so reducing instances of consumers switching inadvertently to less appropriate deals, and thereby increasing competitive pressure on suppliers;
- improving the regulatory framework in order to allow more effective enforcement of the rules governing sales and marketing activity; and
- building consumer confidence in the competitive market.

11. Following the consultation Ofgem significantly strengthened a number of licence obligations, including SLC 25, as part of its Probe Remedies.

12. Compliance with the licence obligations is important for a number of reasons:

- Consumers' ability to make the right choice for their needs, and to have confidence in switching, is crucial to healthy domestic energy markets that allow consumers to receive choice and value.

- Sales approaches that are inappropriate, misleading, unfair, non-transparent and/or unprofessional can result in financial loss to consumers, distress and wasted time.

- Sales activities take place on a very large scale and therefore have the potential to affect significant numbers of consumers. If these activities are carried out in a manner which breaches the relevant SLCs, this may have an adverse impact on competition by reducing consumers' confidence, engagement and willingness to switch suppliers. Consumer inactivity may reduce the effectiveness of competition in the retail market.

- High standards are appropriate in this industry sector as energy is an essential product. In both marketing and telesales activities the interaction with the consumer is short. There are limited possibilities to transfer essential information. The quality of the information which is transferred is therefore critical.

SSE's sales activities

13. Prior to SSE's suspension of un-solicited door-to-door selling of gas and electricity to domestic customers in July 2011, SSE conducted the full range of sales activities that are covered by the marketing licence condition, namely telesales (both in-house and, until December 2010, via an external agent, Universal), doorstep sales (until July 2011) and venue sales.

14. In total, SSE carried out between 20 and 30 million sales activities during the period from October 2009 to November 2012. A significant number of those sales activities resulted in domestic supply contracts for gas and electricity during that period.

III. DECISION ON CONTRAVENTION – SSE IN BREACH OF SLC 23 AND 25

15. The Authority has considered the extensive written materials (both evidence and submissions) provided by Ofgem and SSE in relation to each of the 21 allegations of breach made by Ofgem. It finds that, in respect of certain of these allegations, SSE

contravened SLC 23.1 and/or SLC 25. The basis and scope of each of the Authority's findings is outlined below in relation to each allegation of breach.

16. As a preliminary and general matter, the Authority notes that SLC 25.2 is a condition which imposes an obligation to achieve the Objective specified in SLC 25.1. Accordingly the Authority does not consider that these provisions can give rise to two separate breaches i.e. of SLC 25.1 and 25.2. It is only the obligation in SLC 25.2 of which there can be a breach albeit that the content of the SLC25.2 obligation is defined by reference to SLC 25.1.

Breach 1

17. This alleged breach concerned the Telesales Activity of SSE's agent, Universal, and in particular the script used by Universal for its sales calls. Ofgem alleged that during the period October 2009 to December 2010 (when SSE ceased to use Universal as its agent), SSE was in breach of SLC 23.1 and of the Objective in SLC 25.1 and the obligation to achieve it in SLC 25.2.

18. Having at one stage in the proceedings put forward a different view, SSE properly conceded during the course of written submissions that contracts with customers were, in fact, concluded during sales calls. Accordingly, SSE admitted the breach in respect of SLC 23.1 for the entire period of the alleged breach, on the basis that its practice was to send the Principal Terms by post to customers after contracts had been made during sales calls. The obligation in SLC 23.1 must, on the clear wording of that licence condition, be met "*before [the licensee] enters into a Domestic Supply Contract with a Domestic Customer*". The Authority accordingly finds that SSE was in breach of SLC 23.1 for the entire period alleged.

19. In relation to Ofgem's case on SLC 25.1/25.2 which concerned the use of sales scripts by Universal salespeople which were alleged to be in breach of SLC 25, SSE admitted this aspect of Breach 1, but only for the period August 2010 – December 2010. However, the Authority is satisfied that evidence of sales calls involving Universal agents in March 2010 was sufficiently similar in content to the script dated August 2010 to demonstrate that the same contraventions were occurring at that earlier

stage. Moreover, it was noted that the filename for August sales script referred to its being a "revised" script implying the existence of an earlier script and that there was no evidence to suggest that such earlier script may have been compliant.

20. The Authority is therefore satisfied on the basis of the material that it has seen that non-compliant scripts were used by Universal prior to August 2010 and that the breach lasted from March 2010 to December 2010.

Breach 2

21. Ofgem alleged that during the period January 2010 – December 2010, SSE failed to have in place adequate monitoring and auditing procedures or audit systems to ensure that the information provided by Universal met the obligation in SLC 25.2. SSE admitted that during this period it did not have a contract in place with Universal and that it did not sufficiently monitor the scripts which were used. Accordingly SSE admits, and the Authority finds, that it was in breach of SLC 25.2, in relation to its monitoring and auditing of Universal telesales, for the entire period alleged.

Breach 3

22. Ofgem alleged that in relation to its in-house Telesales Activities during the period October 2009 – 4 September 2012, SSE failed to provide customers with the Principal Terms of energy supply contracts, in breach of SLC 23.1. It also alleged that between October 2009 and December 2011, SSE was in breach of its obligations in respect of the Objective in SLC 25.1 and SLC25.2.

23. In respect of SLC23.1, SSE accepted the breach, but only until October 2011 when it introduced a revised script which required its in-house sales staff to provide certain principal terms as a matter of course during sales calls. However, the Authority finds that termination fees, unit rates and standing charges for energy supply are "Principal Terms", as that phrase is used in SLC 23.1, of any contract for the supply of gas or electricity. Termination fees were not provided by SSE during sales calls until April 2012. Unit rates and standing charges were disclosed on request after

December 2011, as indicated by training documents to which the Authority was referred from that period, but they were not provided as a matter of course in all cases, as the condition requires, until 4 September 2012. Therefore, the Authority finds that the breach of SLC 23.1 continued until 4 September 2012.

24. Although, by virtue of SLC 25.3, the express requirement under SLC 25.6(b)(ii) for comparisons to be provided when savings claims are made is only applicable to "Marketing Activities" (as defined in SLC 25.17), Ofgem maintained that such comparisons were also required in respect of Telesales Activities, since this constituted a reasonable step required to comply with the Objective in SLC 25.1 and 25.2.

25. The Authority notes the evidence provided as to exchanges with Ofgem when the condition was introduced, as well as the structure of the licence conditions. This suggests a clear distinction between the two types of sales activity. Accordingly, as a matter of construction of the SLCs, there is no specific obligation under SLC 25.6(b)(ii) to give a comparison in all cases where a savings claim is made during a Telesales call.

26. This does not, however, absolve the licensee from its obligations under SLC 25.2. Where a specific savings claim is made in relation to a particular individual, it must be "*complete and accurate ....and otherwise fair*". The Authority is satisfied from looking at a sample of calls that reasonable steps were not being taken to ensure complete accurate and fair statements were being made. Whilst the Authority cannot ascertain precisely what led to these failings, the nature and extent of them in the sample reviewed means that the Authority consider SSE was not taking reasonable steps in this regard. To that extent, the Authority finds that there was a breach of the obligation in SLC 25.2. However, as accepted by Ofgem, the introduction of new training materials by SSE in December 2011, which (for example) referred to the need for agents not to be misleading and gave examples of particular misleading statements, corrected this omission.

27. In summary, the Authority finds a breach of SLC 23.1 from October 2009 – 4 September 2012, and of SLC 25.2 from October 2009 – December 2011.

Breach 4

28. Ofgem alleged that, in relation to SLC 23.1, SSE failed to take reasonable steps in its training and auditing of its in-house Telesales Activities to ensure compliance with its obligation in the period October 2009 – 4 September 2012. Ofgem also alleged that in the period October 2009-December 2011 the training materials in respect of in-house telesales calls, and between October 2009 and February 2012 the auditing arrangements (both their frequency and the criteria used and the length of time for which call recordings were retained) in respect of such calls, were inadequate to meet SSE's obligation in SLC 25.2 to take all reasonable steps to meet the Objective in SLC 25.1.

29. SSE accepts the breach in relation to SLC 23.1 to the extent it admitted Breach 3, since it admits that the relevant Principal Terms were not provided during sales calls and that SSE's training did not require this to occur until revised training was introduced in September 2012.

30. For the same reasons as set out above in relation to Breach 3, the Authority finds that there was a breach in relation to training in respect of SLC 23.1 from October 2009 until September 2012, since it was only from September 2012 that the relevant Principal Terms, including termination fees, unit rates and standing charges, were provided. It is accepted that salespersons were trained, from this point, to provide those terms during all sales calls.

31. The Authority finds that, on the basis of the evidence provided to it, the frequency of auditing by SSE was adequate to meet its obligations during the period of the alleged breach.

32. In relation to the audit criteria used by SSE during the relevant period, the Authority finds that these were inadequate until November 2011. Until that time, the audit criteria did not contain any instruction to ascertain whether principal terms had been given during sales calls or whether calls were otherwise complete and accurate. However, after that period the audit criteria used were adequate.

33. The Authority does not consider that retention of the recordings of sales calls for 35 days was inadequate during the period under consideration, in particular, in the light of the auditing arrangements in place and the company's policy in relation to dealing with complaints received when the recordings were no longer available to check a customer's complaint. In particular, SSE's assurance that, in cases where sales calls had been deleted, the customer was given the "benefit of the doubt" assisted in satisfying the Authority that its approach to retention of calls was adequate having regard to its obligation under SLC 25.2.

34. It should not, however, be presumed that 35 day retention would be appropriate in future cases and the Authority's finding is limited to a finding that Ofgem did not make out any breach of SLC 25.2 in relation to SSE's retention of calls on the evidence put before the Authority in this case. The Authority notes that SSE's current approach, whereby recordings are now retained for 120 days, is better than the previous system of 35 day retention.

Breach 5

35. Ofgem alleged that in breach of SLC 25.2, 25.5(b) and 25.16, SSE failed to have appropriate training and monitoring arrangements in respect of its Marketing Activities.

36. In respect of doorstep sales the period of breach alleged in relation to SLC 25.2 and 25.5(b) was October 2009 until July 2011, when doorstop sales were suspended and subsequently terminated. The period of breach alleged in respect of SLC 25.16 was January 2010 until July 2011.

37. In respect of venue sales the period of breach alleged was October 2009 until: 17 September 2012 in relation to the provision of information, training and management arrangements; July 2011 in relation to the monitoring and auditing of sales activities; and October 2011 in relation to the monitoring and auditing of complaints.

38. Ofgem's main case on the provision of information and training was that the information provided to sales staff, both doorstep and venue, did not contain sufficient, if any, instruction as to specific misleading statements which sales agents should not make. However, on the basis of the evidence put before it, the Authority finds that SSE in fact did provide examples of unacceptable statements when training its sales agents during the period in question and therefore the training actually provided by SSE was a reasonable method of dealing with misleading statements and compliant with its obligations under SLC 25.2 and with the specific training obligation in 25.5(b). The Authority notes, in addition, that providing examples of misleading behaviour is plainly good practice when training sales agents and does not accept SSE's argument that the Objective does not require any such training to take place. However, given the Authority's finding that SSE did train its agents adequately in this respect, no finding of breach is made.

39. However, the auditing of both venue and doorstep Marketing Activities over the relevant period (i.e. from October 2009 to July 2011) was inadequate: in relation to doorstep sales, the main auditing was carried out by local managers who received commission on sales and therefore had a financial interest in not reporting misbehaviour and so were not sufficiently independent; and in relation to venue sales the "mystery shopper" system did not address the adequacy of the sales activity by reference to the relevant SLCs but rather focused mainly on compliance with dress-code and other elements of working in the high street stores at which the venue sales took place.

40. In relation to the auditing of specific complaints and the methods used to categorise complaints, the Authority does not consider that SSE's processes were inadequate. While the categories used could have been different and were subsequently developed, it would always be likely that there would be a risk as to how to allocate particular complaints unambiguously. Thus, in relation to both the alleged inadequacy and ambiguity of the complaint categories, the Authority finds that Ofgem has not established that SSE was in breach of its licence obligations.

41. In relation to SLC 25.16, SSE admits, and the Authority finds, that SSE's auditing procedures for both doorstep and venue sales were inadequate from January 2010 to

July 2011, i.e. to the extent admitted in respect of Breach 14 below. The Authority further finds that given that no substantive breaches were made out under this head in relation to venue sales beyond July 2011, there was no breach of the management arrangements obligations in SLC 25.16 after July 2011 in relation to venue sales.

42. In its Statement of Case, Ofgem also made allegations under this breach in relation to the scripts used by SSE for its face-to-face sales. The Authority proposes to deal with such matters under breach 6.

Breach 6

43. This allegation of breach related to doorstep sales activities only. Ofgem alleged that, in relation to doorstep sales, SSE was in breach of SLC 25.2 by virtue of its use of inappropriate and inadequate sales scripts for the period October 2009 to May 2011, and in respect of other training materials provided to its sales staff for the period October 2009 to July 2011. Ofgem also alleged a breach of SLC 25.16 in respect of SSE's management arrangements in the period January 2010 - July 2011.

44. In relation to the scripts used by doorstep sales agents, the Authority notes the reference in many of these scripts to customers being named on a printout of energy customers in a particular postcode who may not be receiving their full deregulated rates or taking advantage of competition between suppliers or words to similar effect. Taken in context, such statements are misleading in that they imply that the sales agent has some special prior knowledge about the particular customer and that, irrespective of that customer's particular existing energy contracts, switching to SSE may be beneficial to that customer. The Authority considers that such a statement is misleading since the print out process did not provide salespeople with any indication that a particular named customer would make savings. As such it was apt to create confusion in the minds of customers, and the Authority finds a breach of the obligation in SLC 25.2 to achieve the Objective in SLC 25.1, from October 2009 until 13 May 2011 when a new, compliant script was introduced for doorstep sales.

45. However, the Authority did not consider that the additional training materials (such as the document entitled "The Art of Closing") relied on by Ofgem constituted a

breach of SLC 25.2. Sales methods such as the use of the "assumptive close" are not misleading or otherwise in breach of the Objective in themselves. Provided they are used in a way which is not misleading or otherwise unfair, such sales methods are not incompatible with an approach to energy sales which complies with the Objective.

46. The Authority finds that the use of misleading scripts also entailed a breach of SSE's management arrangements obligations in SLC 25.16 from October 2009 to 13 May 2011 when the compliant scripts were introduced.

Breach 7

47. Ofgem alleged that, in respect of venue sales, SSE was in breach of SLC 25.5(c)(i) in failing to take all reasonable steps to ensure that a Domestic Customer could readily identify the licensee whenever contacted by the licensee or its representative. The period of the breach alleged was January 2010 to November 2011, when venue sales agents were expressly instructed (as evidenced by a training DVD) to explain, at the kiosk, that the high street retailer (in whose stores they were operating) had entered into a joint branding arrangement with Southern Electric to form a partnership which bore the name of the high street retailer in question.

48. SLC 25.5(c)(i) refers to the licensee being "readily" identifiable, "whenever" contact is made with the customer. The Authority interprets this licence condition as requiring that it be obvious to customers, from early in the sales process, that it would be SSE who would actually be providing them with gas and electricity. In light of the evidence of SSE's own sales process in relation to venue sales, the Authority considers that this licence condition required venue sales agents to refer to the partnership with SSE, at the latest, at the time that any potential customer had reached the kiosk or before any further substantial steps had been taken to secure a sale (following any initial contact or introduction). The fact that later elements of the sales process (e.g. the sales brochures used in relation to venue sales) allowed customers to identify SSE is insufficient in the absence of a clear statement, sufficiently early in the sales process, that SSE would be the supplier under the offered domestic supply contract..

49. Accordingly, until the revised script was introduced in November 2011, it would not have been sufficiently obvious to a customer that it would be contracting with SSE rather than the high street retailer in question until later in the process than is required by the condition. The Authority therefore finds that SSE was in breach of SLC 25.5(c)(i) in respect of its venue sales for the entire period alleged.

Breach 8

50. Ofgem alleged that in respect of its doorstep Marketing Activities SSE failed to take all reasonable steps to ensure that customers readily understood that they were entering into domestic supply contracts, in breach of SLC25.5(c)(ii). The period of breach alleged under this head was 10 January 2010 – 11 July 2011.

51. Ofgem argued that the scripts used by sales staff and the fact that domestic customers signed a form entitled "Application for contract" entailed that domestic customers would not "readily understand" that they have entered into contracts. It was further noted that SSE had only accepted that a contract between it and the customer was entered into at the time when the "Application for contract" form was completed in its Response to Ofgem's Statement of Case.

52. The Authority notes that the Application for Contract form is a somewhat confusing document which variously describes itself as "an agreement" and "a legally binding offer". However, once a customer has signed the Application for Contract form, SSE's sales procedure then requires the customer to speak by phone to an On-Line Order Entry ("OLOE") operator. The scripts used by OLOE operators require those operators to ascertain whether customers have "signed the contract(s)". If the customer does not give this assurance, the OLOE operator is instructed to cancel the application for contract.

53. The Authority notes that, unlike the obligation in SLC 25.5(c)(i), the obligation to ensure that customers readily understand that they are entering into a contract in SLC 25.5(c)(ii) does not arise "whenever" that customer is contacted by a sales agent. Rather, SLC 25.5(c)(ii) is an obligation to take reasonable steps to ensure that a

customer readily understands that he or she has entered into a contract, if he or she has done so. The Authority is therefore satisfied that, taken as a whole, and notwithstanding the deficiencies in the Application for Contract form, SSE's sales process (and particularly the conversation with the OLOE operator) is sufficient to ensure that customers will readily understand that they are entering into contracts, and so meets the obligation in SLC 25.5(c)(ii). Accordingly the Authority does not uphold Ofgem's allegations under Breach 8.

Breach 9

54. Ofgem alleged that in respect of its doorstep Marketing Activities, SSE did not take account of annual consumption based on actual bills or annual statements wherever possible for the purpose of providing estimates of annual charges, in breach of SLC25.6(a) and 25.7(a) and 25.16 in the period January 2010- July 2011.

55. SLC 25.6(a) provides that whenever the licensee or its representative offers to enter into a contract with a customer, it must provide a written/electronic estimate of the total annual charges which would be payable under the offered contract.

56. SLC 25.7(a) provides that any such estimate must take account of the customer's annual consumption. Where this is not known and cannot be reasonably ascertained by the licensee or its representative, the estimate must "*be based on the licensee's or the Representative's best estimate of the relevant Domestic Customer's annual consumption, having regard to any relevant information that is available to the licensee or Representative at the time the estimate is prepared*".

57. Ofgem considered that SSE failed clearly and unambiguously to instruct its agents to ask for a bill or an annual statement in the first instance, which would have allowed it to ascertain the customer's total annual consumption or a best estimate thereof and thereby meet the requirements of the licence conditions.

58. The Authority finds that, on the evidence put before it, SSE did adequately instruct its staff to obtain customers' bills wherever possible as a first step during the period alleged. However, it did not instruct its staff additionally or in the alternative to seek

annual statements. The Authority notes that Ofgem issued guidance on 27 April 2010 which specifically provided that sales agents should ask for customers' bills "and/or annual statements" in order to estimate total annual consumption. The Authority considers that SSE's scripts should have been amended, at the latest in light of this Guidance, to instruct agents, where necessary, to seek out an annual statement as an alternative to a bill. Although SSE itself may have elected to print annual statements on its energy bills so that a request for an SSE bill would have constituted a request for an annual statement as well, some other suppliers published annual statements separately. The absence of any reference to annual statements in its scripts, despite Ofgem's guidance, means that SSE failed to ensure that estimates provided by its doorstep sales agents took account of domestic customers' total annual consumption or a best estimate thereof, taking into account any relevant information available. There was therefore a breach of SLC 25.6(a) and SLC 25.7(a) from 27 April 2010 until July 2011.

59. It follows that SSE also failed to have in place management arrangements to ensure compliance with its obligations under SLC 25, again from 27 April 2010 until July 2011.

Breach 10

60. This allegation of breach related to those situations in which customers were not able to provide details of their actual annual consumption (e.g. by providing a bill or annual statement) and where sales agents were therefore required, under SLC 25.7(a), to use a "best estimate" thereof in order to provide the estimate of the total annual charges required under SLC 25.6(a).

61. Ofgem alleged that in respect of SSE's Marketing Activities both on the doorstep and in relation to venue sales, the "matrix" used by SSE agents to estimate consumption failed to ensure that "*any relevant information...available to the licensee or Representative at the time the estimate is prepared*" was taken into account. This, it was alleged, amounted to a breach of SLC 25.6(a), 25.7 (a) and 25.16. The relevant periods of breach were: for doorstep sales, January 2010 – July 2011, and for venue sales,

January 2010 - April 2010 (at which point a different "matrix" was introduced for venue sales, which is the subject of Breach 11).

62. The matrix at issue in Breach 10 was entitled a "Guide to Annual Average Energy Consumption by Property Type" and sales agents were instructed to use it in situations where no evidence of a customer's actual annual energy consumption, such as a bill or bank statement, was available. The Authority finds that the matrix was too crude and simplistic to meet the obligation in SLC 25.7(a) that an estimate of total annual consumption must be based on "any relevant information". In particular, the document only gave five options (2-bed flat, 2-bed end terrace, 3-bed semi-detached, 3-bed detached, and 4-bed detached") with estimated figures for average annual energy consumption listed for each. This was plainly insufficient to meet the requirements of SLC 25.7(a) since it did not take into account relevant factors such as (for example) the number of occupants, the type of appliances, and whether the customer was a low, medium or high-usage customer. A number of additional, relevant factors were included in the matrix which was used in venue sales from August 2010 onwards, and which Ofgem did regard as compliant (see Breach 11).

63. It is also noteworthy that, immediately following the issue by Ofgem of its guidance in April 2010, the matrix used in relation to venue sales was improved and took into account additional factors (although whether that matrix was itself compliant is the subject of Breach 11 below). However, the matrix which is the subject matter of this breach was not amended at the same time and continued to be used in doorstep sales, although SSE offered no good explanation as to why this was the case. The Authority is satisfied that additional relevant factors could have been taken into account in formulating estimates under SLC 25.7(a) in relation to doorstep sales, and therefore finds that the breach of SLC 25.6(a) and 25.7(a) is made out for the entire period alleged.

64. The Authority also finds that the failure to put in place an adequate matrix initially, and then to amend the matrix used in doorstep sales in April 2010 in response to Ofgem guidance, constituted a failure to establish management arrangements to ensure compliance with its licence obligations, in breach of SLC25.16.

Breach 11

65. This breach covers the amendments made in April 2010 to the matrix for use in venue sales, and whether this matrix ("the venue sales matrix"), in use until August 2010, was compliant with SSE's licence obligations.

66. Ofgem alleged that the venue sales matrix, although it was more refined than the matrix considered under Breach 10, still did not include all relevant information for the purpose of providing an estimate of total annual consumption, in breach of SLC 25.6(a) and 25.7(a) and 25.16.

67. The Authority agrees that the venue sales matrix in use during the period alleged was still not sufficient to satisfy the requirements of SLC 25.6(a) and 25.7(a). In particular, although the venue sales matrix referred to the number of occupants as well as the number of rooms in a property, it still did not take into account whether the customer in question should be considered a low, medium or high-usage customer. As can be seen from the matrix introduced in August 2010, the placement of a particular customer in one of these "bands" could have a very significant impact on the estimate of total annual consumption produced under SLC 25.7(a) and, in turn, on the estimate of total annual charges under SLC 25.6(a). Accordingly, the Authority finds that the venue sales matrix did not comply with SLC 25.6(a) and 25.7(a), as it did not provide for an important item of relevant information, namely the level of usage, to be taken into account when providing estimates. The Authority considers that this breach started in April 2010 and continued until the introduction of a more refined, and compliant, matrix for venue sales in August 2010.

68. The Authority also, accordingly, finds that the management arrangements in place from April 2010 to August 2010 in respect of ensuring compliance with the obligations in SLC 25.6(a) and SLC 25.7(a), were in breach of SLC 25.16. However, this aspect of the breach also ended in August 2010.

Breach 12

69. Ofgem alleged that SSE breached SLCs 25.6(a), 25.6(b), 25.7(a), 25.8(a) and 25.16 through the use by its sales agents of "competitor comparison tables" when providing estimates and comparisons to customers. These tables, Ofgem alleged, did not take account of actual consumption, and/or were not based on a best estimate thereof having regard to any available information. Moreover, the comparisons which were based on Competitor Comparison Tables and provided to customers were not made on a like-for-like basis.

70. In relation to doorstep sales the period of breach alleged was January 2010 to July 2011. In respect of venue sales, the alleged breach began in January 2010 and is ongoing.

71. An essential element of this breach is whether, in principle, SSE's Competitor Comparison Tables, which use "rounded" figures to produce estimates and comparisons of total annual consumption, were compliant with the relevant SLCs.

72. In relation to estimates, the obligation in SLC 25.7(a) is that an estimate of annual charges payable under an offered contract must "take account" of a customers' annual consumption or a best estimate thereof, having regard to any relevant information.

73. The Authority does not accept that this requires that only actual consumption figures may be used. It is sufficient if the licensee relies on a best estimate thereof and, moreover, the obligation to "take account" of annual consumption does not prohibit the use of rounded figures as the basis of an estimate. Accordingly, the Competitor Comparison Tables were, in principle, compliant with SLC 25.6(a) and SLC 25.7(a).

74. In relation to comparisons, SLC 25.6(b) provides that where a customer is on a prepayment meter or where a claim is made that the customer will make a saving by switching to the licensee, the licensee must provide the customer, in writing or by means of an electronic display, with a comparison of the charges that would be payable under the offered contract as compared with those payable under the existing contract. SLC 25.8(a) provides that any such comparison must be undertaken and explained on a "like for like basis" which means that it is "*based on the same time*

period...and the same consumption level" (whether based on actual consumption or a best estimate thereof).

75. Again, the Authority does not accept Ofgem's view that only actual consumption figures may be used when preparing a comparison. Such a comparison, under SLC 25.8(a), need only be "based on" actual annual consumption figures or a best estimate thereof. Rounding was plainly an acceptable and practical method for creating the comparisons required under the licence conditions. No systematic skew, as Ofgem put it, is caused by using rounded figures.

76. As to the requirement that any such comparisons must be made on a like for like basis, the Authority finds that Ofgem has not made out its case that the way the Competitor Comparison Tables were implemented by SSE permitted sales agents to compare the customer's actual spend, before rounding, with the charge that SSE would levy for a level of supply equivalent to the rounded figure. Plainly such a comparison would not be like for like; however, in the round, the evidence put forward by Ofgem was insufficient to establish that there was any inherent flaw in SSE's system and the instructions it gave to its agents. Accordingly there is no breach of SLC 25.6(b) and 25.8(a).

77. However, it is clear from the evidence considered by the Authority that in a material number of cases the use of the Competitor Comparison Tables, although acceptable as a method, was undertaken incorrectly by sales agents in practice. Although Ofgem has not made out its case that this reflects a flaw in the instructions given to those agents, the Authority does find that the extent of errors entails that there was a failure of management arrangements to pick up and remedy instances of misuse of the tables over the period of the breach. Accordingly, the Authority finds that SSE was in breach of SLC 25.16 until July 2012. The Authority notes that this finding is limited to venue sales: the Authority is not satisfied that there was a similar failure of management arrangements in relation to doorstep sales and accordingly does not find any parallel breach of SLC 25.16 for doorstep sales. However, the Authority notes that SSE admitted, under this head, that there was a failure of its auditing arrangements, and so a breach of SLC 25.16, to the same extent as admitted under Breach 14, i.e. until September 2010.

78. The Authority notes the point raised by SSE in its skeleton argument at paragraph 5.136 that the wording of the estimate box in the application for contract forms used in venue sales may have contributed to individual errors made by sales agents. This did not form part of Ofgem's pleaded case and it is creditable that SSE raised it themselves. The Authority notes SSE's indication that it is intending to reword the relevant section in the appropriate forms.

Breach 13

79. Ofgem alleged that SSE failed to provide comparisons of charges to customers who were being supplied via prepayment meters whenever an offer to supply energy was made, in breach of SLC 25.6(b)(i) and 25.16. The period of breach alleged was January 2010 – July 2011.

80. The Authority was satisfied, on the evidence before it, that both where a sale was actually concluded and where an offer was made which was not ultimately accepted, SSE's processes, taken as a whole, trained its agents in the requirement to provide a comparison of charges to PPM customers in every case (and not just where savings claims were made). Accordingly Ofgem has not established that there was any breach of SLC 25.6(b)(i).

81. Where a sale was concluded, the relevant comparison would be included in the box entitled "Pricing Estimate" on the application for contract document and management arrangements could therefore sufficiently assess and remedy any failure to provide comparisons in these cases. However, it was not suggested to us that there was a similar document which sales agents were required to complete and return to the office to evidence any comparison which was given in cases where no contract was concluded. There was therefore no evidence on the basis of which SSE could assess that its policy of providing comparisons to customers on prepayment meters in all cases where a contract was offered was being carried out. The Authority therefore finds that, although there is no breach of SLC 25.6(b)(i), SSE failed to put in place management arrangements to ensure it could be satisfied that its procedures

were being followed in all cases where contracts were offered to prepayment customers. This constitutes a breach of SLC 25.16 over the period alleged.

Breach 14

82. Ofgem originally alleged that SSE failed to monitor/audit sales agents in Marketing Activities (both doorstep and venue sales) in respect of failures to provide compliant estimates and comparisons to customers on standard tariffs, and that this amounted to a breach of SLCs 25.6(a), 25.6(b), 25.7(a), 25.8(a) and 25.16 in the period January 2010 – September 2010.

83. At the oral hearing, however, Ofgem stated that it did not wish to pursue its allegations of substantive breach of SLCs 25.6(a), 25.6(b), 25.7(a) and 25.8(a) in relation to Breach 14. It took the view that the heart of this breach was, in the words of its counsel, "really about failure to audit". In the circumstances, it is not necessary for the Authority to make any finding on the question of whether individual failings by sales agents can each amount to breaches of these substantive conditions.

84. Accordingly, the only remaining aspect of Breach 14 is the allegation that the failure to adequately monitor and audit sales agents in respect of estimates and comparisons for standard-tariff customers amounted to a breach of the obligation relating to management arrangements in SLC 25.16. SSE admitted that allegation over the entire period alleged and the Authority therefore finds that it was in breach of SLC 25.16 from January 2010 – September 2010.

Breach 15

85. Ofgem originally alleged that SSE failed to provide estimates and comparisons to customers on non-standard tariffs and to audit/monitor compliance with these obligations in the period January 2010 - February 2011, in breach of SLCs 25.6(a), 25.6(b), 25.7(a), 25.8(a) and 25.16. In respect of such sales, the SSE procedure required agents to contact the Tariff Assistance Bureau ("TAB") for advice when dealing with a non-standard customer in order to prepare estimates and comparisons. SSE recognised that it had inadequate systems in place to ensure that the information

given to and received from the TAB was properly recorded, whether by the TAB operator or by the sales agent, and there was evidence to suggest that there had been material mis-recording of this information to the potential detriment of customers in particular cases, although the extent of any such detriment is a matter for consideration of penalty only (as to which see below). Accordingly, SSE admitted a breach of SLC 25.16 for the entire period alleged and the Authority finds it to be in breach of SLC 25.16 during that period.

86. However, as for Breach 14, at the oral hearing Ofgem stated that it was not pursuing its allegations of breach of the substantive licence conditions in SLCs 25.6(a), 25.6(b), 25.7(a) and 25.8(a). Accordingly the Authority does not need to, and does not, make any finding in respect of those licence conditions under this breach.

Breach 16

87. Ofgem alleged that SSE, in the course of its Marketing Activities, failed to explain how Direct Debit payments have been calculated in breach of SLCs 25.7(c) and 25.16. The period of breach alleged was January 2010 – July 2011 for doorstep sales and January 2010 – 17th September 2012 for venue sales.

88. SLC 25.7(c) provides that in the case of any estimate provided in accordance with SLC 25.6(a), where the licensee or a Representative makes any representation concerning the amount of any regular direct debit payment to be made under the offered contract, the estimate must include a "*clear explanation of how the proposed regular direct debit payments have been calculated and how these amounts relate to the [estimate of] total annual charges*".

89. The Authority does not consider that SLC 25.7(c) should be construed as requiring the calculation of direct debit to be recorded in writing in all cases. In particular, where a direct debit is simply 1/12th of the estimated total annual charge under the offered contract, there is no requirement for this to be recorded in writing although it must be explained to the customer, as must any method of calculating direct debit payments under SLC 25.7(c). However, some customers may wish to retain their existing direct debit amounts, even if the expected total annual charge under the

offered contract is different. The Authority considers that while SLC 25.7(c) itself does not require that the explanation for the calculation of direct debit payments should always be in writing, the management arrangements obligation in SLC 25.16 does require that any deviation from a simple direct debit amount of 1/12th of the estimated annual charge must be recorded by sales agents in a manner which enables SSE to be satisfied that its staff were complying with the obligations under SLC 25.7(c) to provide a "clear explanation" of how proposed direct debit payments have been calculated. Without any such provision for recording deviations from standard "1/12th" direct debit payments, it was not possible for SSE to ascertain, at a management level, whether deviations were the result of a decision by the customer or inappropriate manipulation by a sales agent.

90. Accordingly, although on the Authority's interpretation there was no breach of SLC 25.7(c), the Authority does find that SSE was in breach of SLC 2.16 from January 2010 – July 2011 in respect of doorstep sales, and from January 2010 until 17th September 2012 in respect of venue sales (at which point new training instructing agents to explain any variance from "1/12th" direct debit payments in a new "notes" section on the application for contract forms was introduced).

Breach 17

91. Ofgem alleged that SSE in its Marketing Activities failed to provide estimates of annual consumption in kWh, in breach of SLC 25.6(a), 25.7(b) and 25.16 during the period January 2010 – July 2011 for doorstep sales. In relation to venue sales, the period of alleged breach began in January 2010 and is ongoing.

92. Under SLC 25.7(b), where an estimate of total annual charges under SLC 25.6(a) is based on estimated annual consumption, that estimate must "*clearly set out, in writing or by means of an electronic display, the basis for any such estimated annual consumption*".

93. By its own admission, SSE instructed its agents to provide estimates of consumption by reference to annual spend (i.e. a monetary value) rather than units of energy in kWh. The Authority considers that the wording of SLC 25.7(b) entails that an estimate of annual consumption must be explained and set out by reference to kWh.

The obligation is to provide, in writing or by means of an electronic display, the "basis" for an estimate of annual "consumption", which must refer – on the natural meaning of the word "consumption" (and as the Authority understands its meaning in the industry) – to units of energy rather than a monetary figure. This is important because it may assist customers to make proper comparisons between the price of energy, per unit, under the offered contract and the price per unit under their existing contracts.

94. In support of this conclusion, the Authority is fortified by the fact that SLC 25.7(c) makes an express reference to explaining how proposed direct debit payments have been calculated. The licence conditions thus draw a distinction between the basis of estimates of consumption in SLC 25.7(b), and the method by which direct debit payments have been calculated in SLC 25.7(c).

95. At the oral hearing, SSE made the argument that there was an illogicality in Ofgem's case, in that Ofgem stated that the obligation to provide an estimate of consumption in kWh only arose where an estimate of total consumption was made using the matrices referred to above (as opposed to using an existing bill to ascertain total annual consumption). The Authority agrees with Ofgem that SLC 25.7(b) is effectively intended, so far as possible, to put a customer who does not have access to information concerning his current annual consumption in the same position as one who does, and enable a customer in the former category to make proper comparisons between suppliers based on their unit rates. Customers who have possession of bills will, of course, already have the information on unit rates which is necessary in order to make such comparisons.

96. The Authority accordingly finds that SSE was in breach of SLC 25.6(a) taken together with SLC 25.7(b) for the entire period alleged.

97. It follows that SSE also failed to have in place adequate management arrangements to facilitate compliance with its obligations under SLC 25.6(a) and 25.7(b), and the Authority therefore finds that SSE was in breach of SLC 25.16, again for the entire period alleged.

98. While doorstep sales were terminated in July 2011, the Authority found that this breach was continuing in respect of venue sales at the time of the oral hearing. However, as referred to above, SSE has subsequently altered its procedures for venue sales to reflect the Authority's findings in respect of this allegation of breach. Ofgem has accepted SSE's undertaking to cease the behaviour in question and for that reason the Authority does not consider it necessary to make any order in respect of the breach.

Breach 18

99. Ofgem alleged that SSE failed to ensure that when giving comparisons between SSE's charges and those payable by customers under their existing contracts, its sales agents itemised and clearly explained any other relevant differences between the offered and the existing contracts. This was alleged to be a breach of SLCs 25.6(b), 25.8(b) and 25.16. The period of breach alleged was January 2010 - July 2011 for doorstep sales and January 2010 – 17 September 2012 in respect of venue sales.

100. As set out above, SLC 25.6(b) requires comparisons to be given: (i) for prepayment meter customers, whenever an offer of a contract is made; and (ii) in any event, whenever a savings claim is made. SLC 25.8(b) provides that such comparisons should "*itemise clearly and explain any other relevant differences*" between the offered and the existing contract, "*including any discounts and/or differences in charges associated with different payment methods*".

101. The comparison tables provided by SSE to its staff did take into account discounts offered by other suppliers including those relating to different payment methods. These matters are specifically referred to as "relevant differences" in SLC 25.8(b). However the wording of that licence condition makes it clear that these are just examples of "relevant differences". The SSE comparison tables did not take into account any difference in termination fees, which the Authority considers clearly constitute relevant differences within the meaning of SLC 25.8(b).

102. The Authority also notes that vouchers or other benefits in kind may also be relevant to consumers' decisions to switch to particular energy suppliers, albeit that they may

not always be applied to reduce the charges for energy. However, the Authority does not make any finding that SSE was in breach of its licence conditions in relation to such matters.

103. It follows from the failure to take into account termination fees that SSE did not have in place adequate management arrangements to ensure that the relevant licence conditions were being complied with, in breach of SLC 25.16, again for the entire period alleged.

104. For completeness, the Authority notes that the breach was remedied in respect of venue sales by the introduction in September 2012 of new training instructing agents to explain relevant differences and to mark these in the "notes" section of the application for contract form.

Breach 19

105. Breach 19 was withdrawn by Ofgem prior to the oral hearing and the Authority makes no finding in respect of the matters that were originally alleged.

Breach 20

106. Ofgem alleged that SSE failed to provide details as to where a customer could obtain impartial advice and information when the customer enters into the contract or as soon as reasonably practicable thereafter, in breach of SLC 25.11 and 25.12. The period of breach alleged was January 2010 – July 2011 in respect of doorstep sales and January 2010 – September 2012 in respect of venue sales.

107. SLC 25.11 contains the basic obligation on the licensee to provide, at the time of entry into the contract or as soon as reasonably practicable thereafter, all the information which it "reasonably considers" the customer would need having regard to the Objective. SLC 25.12 then sets out a (non-exhaustive) list of information which must be provided under SLC 25.11, which includes, at SLC 25.12(c), "*a reminder to that*

Domestic Customer to check that the product they have signed up to is appropriate for them, including details of where to find impartial advice and information."

108. As the evidence considered by the Authority showed, in the case of both doorstep and venue sales during the periods of breach alleged, the materials which SSE provided to customers who had entered into contracts included a written statement that they could contact a customer services number and also a number for Consumer Direct. However, while this may have fulfilled the requirement in SLC 25.12(e) to provide the information as to what a customer could do if he or she had concerns, including details of how Consumer Direct can be contacted, it did not, in itself, meet the obligation in SLC 25.12(c) to provide a reminder to the customer to check that the product was appropriate for his needs and details of where to find impartial advice and information.

109. The use of the word "reminder" in the licence condition requires more than a written statement of where to seek impartial advice at the time of entry into the contract; some further step must be taken to draw the customer's attention to this information. In relation to venue sales, in September 2012 SSE introduced a new consolidated script for sales agents and new training materials, which instructed agents to specifically refer to the written provision of details of how to access "independent energy advice" from Consumer Direct. It also amended its OLOE script so that it referred to contacting Consumer Direct, rather than merely a freephone SSE customer services number. This is an example of good practice and meets the obligation in SLC 25.12(c) to "remind" the customer of where to seek impartial energy advice. However, there was no such "reminder", within the meaning of SLC 25.12(c), before this point.

110. Accordingly, the Authority finds that SSE was in breach of SLC 25.12(c) from January 2010 until July 2011 in respect of doorstep sales, and from January 2010 until September 2012 in respect of venue sales (at which point the new, compliant process was introduced).

111. It follows that SSE was also in breach of SLC 25.16 from January 2010 to July 2011 in respect of doorstep sales, and from January 2010 until September 2012 in respect of

venue sales, on the basis that no management arrangements were in place to ensure compliance with SSE's obligations under SLC 25.11 and 25.12(c).

Breach 21

112. Ofgem alleged that in relation to its Marketing Activity, SSE failed adequately to seek confirmation that customers who had entered into contracts had received the estimates/comparisons required by SLC 25.6 and that they were content with the information provided by the licensee and otherwise content with the way in which the Marketing Activities of the licensee were conducted. Ofgem alleged that this constituted a breach of SLCs 25.13, 25.14 and 25.16. The period of breach alleged was from January 2010 until July 2011 in respect of doorstep sales, and from January 2010 until September 2012 in respect of venue sales.

113. So far as is relevant, SLC 25.13 imposes an obligation on the licensee to comply with the requirements of SLC 25.14 where a domestic supply contract has been entered into by a domestic customer in the course of a visit to the customer's premises or a conversation between a customer and a Representative in a place to which the public has access. SLC 25.14 requires that in those circumstances the licensee must, within 14 days, take all reasonable steps to contact the customer, through a representative who was not engaged in direct sales, by telephone or in writing to seek confirmation of various matters. Under SLC 25.14(d) and (e) these matters include confirmation that the customer has received the estimate, and where appropriate, the comparison required by SLC 25.6, and that the customer is content with the information provided and otherwise content with "*the way in which the Marketing Activities of the licensee were conducted*".

114. In relation to SLC 25.14(d), the Authority notes SSE's argument that the OLOE script included a question designed to check whether the customer had received the estimate required by SLC 25.6 and that, under SSE's processes, this would inevitably involve a confirmation that a comparison had been provided, since estimates and comparisons went "hand in hand" in SSE's sales process. However, this argument is based on the presumption that SSE's sales process worked as it should have done. Without a specific question by the OLOE operator about whether a comparison had

been provided in cases where SLC 25.6 demands that one must be given, the OLOE operator cannot have been satisfied that an individual sales agent had provided the necessary comparison. SLC 25.14(d) requires that confirmation must specifically be sought as to whether a comparison has been provided, and the obligation cannot merely be met by asking whether an estimate has been provided.

115. In relation to SLC 25.14(e), the Authority observes that the OLOE script which was stated by SSE to meet the obligations contained in these licence conditions referred to whether the customer was "*happy with the information you've received and the arrangements we're making for you*". The Authority finds that customers would be likely to interpret this question as referring to the nature of the contract itself and the decision to switch to SSE, rather than the way in which the sales process was carried out. The Authority finds that this was insufficient to discharge the obligation to confirm that the customer was content with the conduct of the Marketing Activity itself, which is a "backward-looking" obligation, relating to the process leading up to the contract being entered into. This is an important obligation, since it is aimed at ensuring that the domestic customer did not feel that he was pressured into signing or otherwise misled by the sales agent.

116. The Authority therefore finds that SSE was in breach of SLC 25.13, taken together with SLC 25.14(d) and (e), for the entire period alleged. In the case of venue sales, the breach lasted until September 2012 when a revised OLOE script was introduced. The revised script included specific questions about the conduct of Marketing Activities and, in particular, whether comparisons had been provided.

117. It follows that SSE was also in breach of SLC 25.16 for the periods alleged, on the basis that no management arrangements were in place to ensure compliance with SSE's obligations under SLC 25.13, taken together with SLC 25.14(d) and (e).

IV. DECISION ON PENALTY – PENALTY OF £10.5 MILLION REASONABLE IN ALL THE CIRCUMSTANCES OF THE CASE

(a) Statutory background

118. Under section 27A(1) of the Electricity Act 1989 and section 30A(1) of the Gas Act 1986, where the Authority is satisfied that a licence holder has contravened or is contravening any relevant condition or requirement, then it may impose a penalty of such an amount as is "*reasonable in all the circumstances of the case*".

119. The maximum level of penalty which the Authority may impose is 10% of the turnover of the legal entity holding the relevant licence.[2] In the present case,. SSE's overall turnover for the financial year ending 31st March was over £30 billion and Ofgem estimated its turnover with respect to the domestic supply of gas and electricity to be approximately £4 billion. These figures were not disputed by SSE.

120. In considering whether it would be appropriate to impose a penalty and, if so, what level of penalty, the Authority has had regard to the *Statement of Policy with respect to financial penalties*[3] ("the Penalties Statement").

(b) The Authority's decision to impose a penalty

121. In deciding whether to propose the imposition of a penalty for a contravention of the licence conditions (and the quantum of any penalty), the Authority must have regard to its statement of policy most recently published at the time when the contravention occurred[4], i.e. the Penalties Statement.

122. In reaching the conclusion that it would be appropriate to impose a penalty, the Authority has taken full account of the particular facts and circumstances of the contravention under consideration.[5]

123. The Authority considers that this case meets the criteria which, under the Penalties Statement, tend to make the imposition of a financial penalty *"more likely than not"*[6]; in particular, SSE's contraventions have plainly damaged the interests of consumers.

[2] Electricity Act 1989, section 27A(8); Gas Act 1986, section 30A(8).
[3] October 2003
[4] Electricity Act 1989, section 27B(2); Gas Act 1986, section 30B(2)
[5] Penalties Statement, para. 4.2
[6] Penalties Statement, para. 4.3

124. The Authority also considers that the imposition of a financial penalty is appropriate because it is likely to create an incentive to comply with licence obligations and is likely to deter future breaches, whether by SSE or by other licensees.

125. Having regard to the factors which the Penalties Statement lists as tending to make the imposition of a financial penalty "*less likely than not*"[7], the Authority does not consider that any of these are met in the present case:

- The contraventions in question were not trivial, but rather of a serious nature, as set out further in section IV(c) below; and

- Nothing in the Authority's principal objective of protecting consumers of electricity and gas, or any of its other statutory duties, precludes the imposition of a penalty in this case.

126. The Authority considers that the breaches in question should have been apparent to SSE. Inadequate monitoring and auditing of sales activities formed a significant part of the Authority's findings of breach. The Authority considers that having adequate systems in place to ensure that licence conditions were complied with was a matter that was entirely within SSE's control.[8]

127. Accordingly, in all the circumstances, the Authority considers that it is appropriate to impose a financial penalty on SSE. The Authority notes that SSE has accepted that, given the findings of contravention which the Authority has made, a financial penalty is appropriate.

(c) Criteria for fixing the quantum of penalty

128. The starting point is that the quantum of any penalty must be reasonable in all the circumstances. In making this assessment there is a danger of trying to identify the

[7] Penalties Statement, para. 4.4
[8] Penalties Statement, para. 4.2

appropriate level of penalty using a spurious degree of precision. The extensive submissions of both parties, whilst in places recognising the limitations of certain proposed methods of assessment, in substantial part sought to attach numbers to considerations which are not easily susceptible to quantification. In both cases assertions were made which depended upon data which was limited and/or assumptions or extrapolations which seemed difficult to justify. The Authority found the submissions in those respects to be of limited assistance.

129. In determining a reasonable sum to impose by way of penalty, the Authority considered in particular the following factors identified in the Penalties Statement.

The seriousness of the contravention

130. The Authority considers that the contraventions by SSE of its licence conditions were of a serious nature and has taken this into account in deciding on the level of penalty to impose. Findings of breach have been made in relation to a range of sales channels – telesales, doorstep sales and venue sales – and a range of different points during the sales process. While certain of the findings of breach which the Authority has made are of a more limited or technical nature, a number of other breaches, in particular those involving the use of misleading scripts and SSE's failure adequately to monitor and audit the behaviour of its sales agents, clearly amount to serious breaches of the relevant licence conditions. However, rather than considering separately the seriousness of individual breaches or, indeed, groups of breaches on related matters, the Authority has considered the breaches in the round. In doing so it considers that it is likely to understate rather than overstate the cumulative seriousness of the breaches and the consequential penalties.

131. Considering seriousness in the round, given the scale of SSE's sales activities during the relevant period, the potential impact of the breaches which occurred was clearly significant.

132. The absence of adequate monitoring and auditing of sales activities is a matter of particular concern to the Authority. A large number of the findings of particular breach made by the Authority involved a failure of management arrangements and

although, in some cases, these findings were simply a logical corollary of a finding of substantive breaches of the licence conditions, in others the essence of the contravention was SSE's failure adequately to police the behaviour of its sales agents. SSE admitted that its monitoring and auditing procedures were not adequate and that this allowed instances of mis-selling to pass unnoticed.

133. The Authority does not consider that SSE's senior management engaged in any wilful or intentional non-compliance with the licence conditions or that they turned a "Nelsonian" blind eye to mis-selling. However, the Authority does consider that its findings of breach show that insufficient attention was paid to compliance at board level, and that compliance with the licence conditions by SSE was not a sufficiently high priority for SSE's senior management. Given the history of concern over mis-selling in the industry (including in relation to SSE itself), the lack of consistent and proper consideration of compliance issues at board level is an important aspect of the Authority's conclusion that the contraventions were serious, and this is reflected in the quantum of penalty which the Authority has decided to impose.

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

134. SSE's contraventions of its licence conditions have undoubtedly caused harm. The Authority recognises the difficulty of quantifying the precise level of harm and cost suffered. However, the Authority considers that harm has been suffered under the following heads:

(a) **Financial detriment suffered by customers who have moved to more expensive contracts as a result of mis-selling**. A number of the breaches involved inflated savings claims being made by sales agents which resulted in consumers switching to more expensive tariffs. These consumers suffered a direct financial detriment. The Authority has not attempted to calculate a precise figure for the detriment suffered under this head. It notes however that Ofgem provided a sample which indicated that the total financial detriment to doorstep and venue sales customers as a result of

switching to more expensive contracts due to mis-selling was £1.6m, or £1.1m if energy credit vouchers were taken into account. SSE, while disputing Ofgem's methodology more broadly, appeared to accept this general interpretation of financial detriment. Thus the minimum likely detriment is substantial and may be a great deal higher.

In any event, the Authority considers that a significant number of consumers suffered direct financial detriment by being placed on more expensive tariffs as a result of SSE's breaches, and consider it should reflect this in its decision on the quantum of penalty.

In addition, the Authority has also taken account of the detriment suffered by consumers who expend time and money in seeking redress for mis-selling (e.g. by telephoning a complaints line), albeit that, again, it has not sought to quantify this detriment (nor did either party attempt to do so).

(b) **Harm suffered by customers to whom inflated savings claims have been made, even where those customers still make some savings which are not fully realised**. The Authority does not accept Ofgem's arguments that harm under this head can be straightforwardly quantified as the difference between the promised saving and the actual saving made. However, consumers who have been subject to exaggerated savings claims, even if they still make some saving by switching to SSE, have undoubtedly suffered some harm (for example, disappointment or frustration) and it is appropriate that the Authority should recognise this is in its decision on the quantum of penalty. To take the view that these customers have suffered no detriment would appear implicitly to accept that, provided customers make a saving by switching, then the manner in which they have been encouraged to switch, including by mis-selling, is irrelevant. This would run counter to the very purpose of the licence conditions

which are at issue in this case. While quantifying the harm suffered by consumers under this head is very difficult, it is evident that many thousands of customers were misled as a result of savings claims by SSE agents. Even if the detriment were relatively small in each case, the numbers involved suggest that a further substantial detriment arises under this head.

(c) **Harm suffered as a result of loss of confidence in the gas and electricity markets**. As referred to above, mis-selling creates a real risk of undermining consumers' confidence in the energy market, and, ultimately, consumers become less willing to consider switching between suppliers. Such consumer disengagement is likely, in turn, to decrease the competitiveness of energy markets. Ofgem did not attempt to quantify the harm caused by SSE's contraventions under this head although they considered this to be *"almost certainly"* the most serious consequence of SSE's non-compliance with its licence conditions. SSE, for its part, accepted that harm of this form did occur as a result of its behaviour. The Authority considers that it is difficult and impractical to attempt to quantify the scale of harm suffered as a result of mis-selling in terms of loss of confidence in the market. However, the Authority considers that this is certainly an important element of the harm caused by SSE's mis-selling and accordingly has taken it into account in deciding on the appropriate level of penalty in this case.[9]

[9] The Authority does not accept SSE's argument that imposing a penalty on it in respect of harm to the "structure" of the market is inappropriate and should be dealt with, if at all, by way of "structural" remedies under the Competition Act 1998. The Authority considers that SSE has plainly been responsible for significant mis-selling, as set out above; again, while precise quantification is not possible, it is clear that many thousands of customers were affected by SSE's mis-selling. The existence of other legislation under which structural remedies can be imposed does not detract from the Authority's statutory powers to impose a penalty which it considers to be "*reasonable in all the circumstances*", provided that it is satisfied – as in this case – that a contravention of the licence conditions has occurred. This is not a case in which the Authority considers that the "*most appropriate*" way of proceeding is under the Competition Act 1998: see Electricity Act 1989, section 27A(2), and Gas Act 1986, section 30A(2).

(d) **Harm to other market participants**. In deciding on a reasonable level of penalty to impose, the Authority has also taken account of (although it has not attempted to quantify) the potential harm suffered by other market participants, in particular where SSE's mis-selling has resulted in consumers switching to SSE instead of its competitors. This is a particular problem where an SSE customer moves to SSE on the basis of a savings claim but, in fact, ends up on a more expensive contract than would be the case with a competitor. Whilst quantification of this harm is, again, difficult, it is not a matter which the Authority considers it should ignore.

135. Whilst it is not possible accurately to ascertain the levels of detriment under the various heads it is clearly substantial and could realistically run into many millions of pounds.

136. In considering the extent of harm suffered by consumers, the Authority has also considered, as required by the Penalties Statement, compensation paid by SSE in this case under the "Sales Guarantee" scheme. The Authority welcomes the fact that SSE has acted to provide some redress for consumers who have been harmed by mis-selling. However, the Authority notes that while SSE has reserved £5 million to the scheme, actual take-up has been relatively low so far, with only around £400,000 paid out. Given that the breaches which have been established are now largely historic, the Authority is uncertain whether and to what extent any further sums will be paid out. The Authority also notes that given the serious contraventions that have occurred, the payment of compensation of this kind is no more than it would expect of any conscientious licensee. Accordingly, the Authority has taken into account the sums paid out and also the fact that further sums have been reserved. It does not, however, carry out a simple, pound for pound, reduction in a headline penalty sum by reference to the sums reserved (or those paid out) but, consistent with the overall approach adopted, considers these to be relevant factors taken into account in the round in the assessment of the overall penalty. The Authority does encourage all consumers who think that they may have been exposed to mis-selling by SSE agents to consider applying under the Sales Guarantee for redress.

137. In conclusion, and taking into account the sums paid under the Sales Guarantee, there can be no doubt that SSE's contraventions have resulted in significant harm to consumers (as well as to the market and other market participants).

The duration of the contravention or failure

138. The Authority notes that, taken together, SSE's contraventions extended over a significant period of time. Certain of the breaches began in October 2009 and a number of them did not conclude until September 2012. A number of specific contraventions extended beyond 1 year, some beyond 2 years, and one breach had persisted for some 3 years at the time of the Authority's decision, although the Authority has now accepted an undertaking from SSE to end this breach.

139. The Authority notes that certain serious breaches were terminated significantly earlier (e.g. through the cessation of doorstep sales activity in July 2011, and the decision to terminate the use of Universal telesales agents in December 2010) than other breaches. However, almost all of the contraventions admitted by SSE or found by the Authority above lasted for at least 1 year, many were longer, and the overall period in which SSE was in breach of the licence conditions stretched to over 3 years (until SSE's undertaking in respect of the provision of estimates of consumption in kWh brought breach 17 to an end in respect of venue sales). The Authority notes that the Penalties Statement does not suggest a methodology by which duration should be taken into account in penalty assessment. There is not, for example, any mechanism under that Statement for a simple multiplier to be applied to a starting level of penalty. In the circumstances, the Authority does not seek to apply such an approach. Instead, the Authority considers that it is appropriate for the overall level of penalty to be significantly higher by reason of the duration of the breaches extending as they did in the most part for well over a year.

140. The Authority emphasises that it has considered the duration of the breaches as a separate factor from the question of seriousness considered earlier, in accordance with the approach set out in the Penalties Statement.

Any gain (financial or otherwise) made by the licensee

141. On the question of whether SSE gained financially by wrongfully acquiring customers as a result of mis-selling, and the extent of any such gain, the parties provided two competing methodologies for quantifying the percentage of customers who were wrongly acquired by SSE over the relevant period, and the total gain thereby made by SSE as a result of its contraventions. The Authority has serious doubts about the validity of both approaches. However, it is undoubtedly the case that SSE has gained from its mis-selling activities, at least where these resulted in the acquisition of customers which it would not otherwise have acquired.

142. On SSE's own calculations, and taking account of only those customers who moved to a more expensive contract as a result of SSE's mis-selling (i.e. consumers who, it can reasonably be assumed, would not have switched but for the mis-selling), SSE wrongly acquired 20,606 customers on the doorstep and 2,558 through venue sales. Taking account of the uncertainties in the assessment and having regard to Ofgem's submissions on the issue, the Authority considers that in assessing the level of gain in relation to those customers who moved to a more expensive contract it is reasonable to have particular regard to the benefits which would accrue to SSE should they retain such customers on average for 4 years (at an average annual profit agreed to be £25.99 per electricity account and £20.86 per gas account). On that basis, SSE's estimated gain would be approximately £4 million.[10] The actual figure may well be higher, in particular given that it does not include contracts acquired by telesales, although the Parties did not attempt to quantify gain in relation to telesales.

143. The Authority also notes that a number of the breaches in question involved a failure of auditing and monitoring arrangements. Whilst the point was not emphasised by Ofgem, it would seem very likely that SSE will also have gained from the fact that it has not spent more time and money on ensuring compliance, including at board level. That is a further reason why the Authority would have good reason to raise the penalty; however, in the light of the fact that this was not a matter pursued by Ofgem, it is not a matter to which the Authority had regard in setting the penalty.

[10] The Authority accepts that an average retention period of 4 years per customer is a reasonable basis and does not accept SSE's argument that it should use a period of 2.5 years because this was the period used in the EDF case.

144. In conclusion, and while the Authority does not accept Ofgem's approach to quantifying gain, having regard to certain of the figures provided by the parties, it is satisfied that the likely gain to SSE as a result of its breaches was at least £4 million. However the actual level of gain may have been substantially higher. The Authority has reflected this in the quantum of penalty which it has decided to impose. The Authority also notes that SSE may have gained financially by not devoting adequate company resources to compliance matters.

Mitigating and aggravating factors

145. The Authority has also considered whether there are any aggravating or mitigating factors on the basis of which it should adjust the quantum of penalty which it would award based on the considerations above, as set out in the Penalties Statement at paragraphs 5.3 and 5.4.

Aggravating factors

Repeated contravention or failure

146. The Authority notes that SSE has not previously been the subject of a finding of breach of its supply licence conditions. While SSE was responsible for multiple contraventions of its licence conditions in the present case, the Authority has already taken this into account in its consideration of the seriousness of the breaches and has not treated it as an aggravating factor which would justify a further uplift in penalty at this stage.

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

147. The extent to which SSE's contraventions involved a failure to monitor and remedy mis-selling behaviour has already been considered in relation to the question of seriousness above. However, the Authority notes that SSE introduced an improved (albeit still non-compliant) "matrix" for use in venue sales in April 2010 but continued to use a plainly non-compliant matrix for doorstep sales until July 2011, and was unable adequately to explain this anomaly. For that reason, the Authority

considers that SSE continued with a contravention of which it was aware and has taken this example into account in fixing the quantum of penalty.

Involvement of senior management in any contravention or failure

148. The Authority has already emphasised that it regards the failure of SSE's monitoring and auditing and its management arrangements, including the lack of attention to compliance at board level, as a particularly serious aspect of this case. However, it has considered this issue in relation to the seriousness of the breaches and accordingly does not treat it as a further aggravating factor at this stage. The Authority reiterates that it does not consider that SSE's senior management engaged in wilful non-compliance with the company's licence conditions. The Authority's concern has been with the non-involvement of senior management in compliance and oversight of sales activities, rather than any positive involvement of senior management in the breaches themselves.

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

149. Again, as set out above, a particularly serious aspect of this case is the absence of appropriate monitoring and auditing arrangements in relation to sales activities. A significant number of SSE's breaches involved failures of supervision, and the extent of these failures aggravated the seriousness of the breaches. However, this was considered in relation to the question of seriousness and no further uplift is applied at this stage.

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

150. No evidence was put before the Authority to suggest that SSE made any attempt to conceal its contraventions from Ofgem.

Mitigating factors

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

151. The Authority considers that SSE's suspension of doorstep sales constituted an important and, at the time, unprecedented step to securing compliance with its licence conditions. The Authority would emphasise that it does not take the view that engagement in doorstep sales activity necessarily involves breaches of the licence conditions; however, in the circumstances it considers that SSE's decisions in this respect were creditable attempts to improve its record of compliance. The Authority treats this as a mitigating factor which it has reflected in the level of penalty which it has decided to impose.

Appropriate action by the licensee to remedy the contravention or failure

152. The Authority notes that SSE's Sales Guarantee and the amounts of money already claimed under it have been considered in relation to harm to consumers, and the quantum of penalty reflects this. The Authority also notes that SSE has taken steps to improve its sales activities at various points in the procedure. However, aside from the matters set out above in relation to the cessation of doorstep sales, the improvements which have been made are no more than the Authority would expect of any licensee and are not so significant as to warrant any particular reduction in penalty.

Evidence that the contravention or failure was genuinely accidental or inadvertent

153. The Authority does not consider that the breaches in this case were accidental or inadvertent: in particular, establishing appropriate systems to monitor and remedy mis-selling was a matter which was entirely within SSE's control and its failure to do so constituted a significant aspect of its breaches of its licence conditions. Accordingly, no reduction in penalty has been applied on this basis. The Authority does, however, repeat that it does not consider that the contraventions in question were – at a management level – deliberate.

Reporting the contravention or failure to Ofgem

154. SSE did not report its contraventions to Ofgem, and accordingly no reduction in penalty has been applied on this basis.

Co-operation with Ofgem's investigation

155. The Authority does not consider that SSE's cooperation with Ofgem's investigation went beyond what would be expected of any licensee facing enforcement action in relation to alleged non-compliance with licence conditions. It therefore does not apply any reduction to the penalty imposed on this basis.

Other factors considered by the Authority

156. As part of its consideration of all the circumstances of the matter under consideration[11], the Authority has considered the size of SSE, in terms of its overall turnover, its turnover in relation to the domestic supply of gas and electricity, and its market share, as well as the scale of its sales activities. The Authority considers that in relation to serious breaches of licence conditions, it is important that the scale of any financial penalty has a material impact upon the infringing enterprise. It also notes the maximum cap on penalty, which is 10% of the turnover of the legal entity holding the relevant licence.

157. The parties have emphasised the previous settlement following the investigation of EDF Energy. The Authority is concerned properly to apply the Penalties Statement and its judgment to the particular facts and circumstances of the present case and considers, therefore, that the level of penalty imposed on EDF is of limited assistance to it in reaching its judgment on penalty. The circumstances of each case are different. In particular, it is noted that in the EDF case the matter was settled without an extensive, contested hearing. The nature and extent of the breaches were different (and more limited). It should be noted that a number of particularly serious breaches committed by SSE (in particular in relation to the extent of its failure to adequately monitor external sales agents and the use of misleading scripts) were not a feature of the Authority's findings against EDF. The scale of the marketing activities engaged in by EDF Energy over a period during which the Authority found it to have been in contravention of its licence conditions[12] was significantly lower than SSE's in the present case and the financial value of relevant EDF Energy activities is substantially lower. In addition, it should be noted that the average duration of breach in the SSE

[11] See Penalties Statement, para. 5.5
[12] See Ofgem's Final EDF Energy Penalty Notice of 28 May 2012.

case was longer than in the EDF case. In all the circumstances, the Authority considers that SSE's contraventions warrant a substantially higher level penalty than that upon which settlement was reached in the EDF case.

Conclusion on quantum of penalty

158. Having considered all the circumstances, the Authority has decided to impose a penalty of £10.5 million in the present case. As set out above, this reflects the seriousness of the breaches, their duration, the likely substantial harm that they have caused and the likely substantial gain to SSE. The Authority has, however, taken into account, in particular, both the Sales Guarantee and the steps taken by SSE to terminate doorstep sales.

159. It considers that in its assessment of the level of quantum it is has adopted a relatively conservative approach and that further infringements of the same sort might be expected to attract more severe penalties.

160. The Authority has considered whether, in the light of the scale of SSE's business and turnover and the extent of its activities on the retail markets, the penalty it has set will provide a sufficiently strong signal to SSE (and others) that conduct which undermines the operation of the market and harms consumers is a matter which the Authority takes extremely seriously. It has decided, however, that the level of penalty will provide a sufficient signal.

161. The Authority has received and carefully considered a number of representations, although not all were relevant to its proposed penalty. The Authority has decided to confirm the penalty of £10.5million on SSE.

162. The Penalty must be paid by **17 July 2013**. The penalty will be paid to the Treasury. It is anticipated that in the future, the Authority will be granted power to order that redress payments are made to consumers.

The Gas and Electricity Markets Authority

3rd May 2013