

**NOTICE OF INTENTION TO IMPOSE A FINANCIAL
PENALTY PURSUANT TO SECTION 30A(3) OF THE GAS
ACT 1986 AND 27A(3) OF THE ELECTRICITY ACT 1989**

Date: 27 January 2021

The Gas and Electricity Markets Authority proposes to impose a financial penalty on Symbio Energy Limited in relation to its non-compliance with obligations under the Renewables Obligation Order 2015, the Renewables Obligation (Scotland) Order 2009, and Standard Licence Condition 33 of the Electricity Supply Licence.

1. Summary

1.1. The Gas and Electricity Markets Authority ("**the Authority**¹") proposes to impose a financial penalty on Symbio Energy Limited ("**Symbio**"), company number **07999360**, **registered address** Room 103, Mansion House Bucknalls Lane, Watford, Hertfordshire, England, WD25 9XX, regarding Symbio's non-compliance with obligations under the Renewables Obligation ("**RO**") and Feed-In Tariff ("**FIT**") schemes.

1.2. The Authority is satisfied that Symbio has contravened the following relevant conditions and requirements:

- Article 68 of the Renewables Obligation Order 2015 ("**ROO**") by failing to make payments to discharge its Renewables Obligation by the date required;
- Article 74 of the ROO and article 49 of the Renewables Obligation (Scotland) Order 2009 ("**ROS**") by failing to make mutualisation payments by the date required; and,
- Standard Licence Condition 33 of the Electricity Supply Licence, by failing to make FIT levelisation payments by the date required.

¹ References to 'the Authority' throughout this document should be read as references to the Enforcement Decision Panel acting on behalf of the Authority.

1.3. The Authority has taken account of the relevant facts and circumstances of the contraventions, the representations made by Symbio and the financial pressures caused by Covid 19, and is minded to impose a financial penalty of £100,000. The Authority is of the view that failure to make timely payments in respect of these obligations has an adverse effect on other suppliers who have met their obligations (and potentially their customers), offers an unfair advantage to the late payer, is a resource drain on the regulator and undermines the integrity of the environmental schemes. It takes the view that these breaches of the ROO, ROS and Standard Licence Condition 33 are serious. The effective operation and administration of the Renewables Obligation and Feed-in-Tariff schemes, alongside other environmental schemes, is very important. The schemes were introduced by the Government to promote the uptake of renewable and low-carbon energy generation technologies, and support renewable electricity generation projects in the UK.

1.4. A summary of the contraventions is as follows:

1.4.1. Symbio was required to make its FIT, Year 11, Quarter 1 Levelisation payment of £300,883.80 by 11 August 2020. Symbio failed to pay the sum due by this date. It made the payment on 10 September 2020, when it was informed that the issuance of a Notice of Proposal of Final Order was imminent.

1.4.2. Symbio was required to make its FIT, Year 11, Quarter 2 Levelisation payment of £345,087.64 by 10 November 2020. Symbio failed to pay the sum due by this date. Ofgem issued a statutory demand for this sum on 18 November 2020. Symbio made the payment on 10 December 2020, following a partial payment of £171,000 on 17 November 2020.

1.4.3. Symbio was required to present Renewable Obligation Certificates or make a payment in lieu by 1 September 2020. By 1 September, Symbio paid its ROS in full and partial payment towards its RO. On 1 September 2020, Symbio owed a total of £1,200,000. On 2 October 2020, Ofgem published a Notice of Proposal of Final Order because the EDP was satisfied that (a) Symbio was likely to contravene the requirement to pay the outstanding sum of £927,870.57, plus accrued interest, by 31 October 2020; and (b) an Order was required for the purpose of securing compliance with that requirement. The Authority made a Final Order on 28 October 2020 requiring Symbio to pay the outstanding sum of £506,308.40, plus accrued

interest, by 31 October 2020. Symbio failed to pay the sum due by 31 October 2020. On 10 November, Symbio paid its RO in full and the Final Order was revoked on 14 December 2020.

1.4.4. Symbio was required to pay £55.80 in RO and ROS mutualisation payments by 31 August 2020. Symbio failed to pay the sum due by this date. It made the payment on 19 October 2020.

1.5. The Authority made a Final Order in respect of the contravention detailed at paragraph 1.4.3 on 28 October 2020. The Authority may not impose a penalty in respect of this contravention unless this Notice is served within three months of the making of the Final Order². The Authority notes that Symbio has admitted the contraventions at paragraphs 1.4.1, 1.4.2 and 1.4.3. It has admitted the pertinent facts associated with the contravention at paragraph 1.4.4. Symbio now has a further opportunity to make representations on the financial penalty the Authority is minded to impose as provided for at paragraph 1.7 below.

1.6. As explained further below, the Authority is minded to impose a financial penalty on Symbio of either:-

1.6.1. £100,000, or

1.6.2. by way of settlement discount, a reduced financial penalty of £85,000 if Symbio accepts the imposition of the proposed financial penalty and agrees to forgo the opportunity to make further representations.

1.7. Any written representations or objections to the proposed penalty must be received by the Enforcement Decision Panel Secretariat at Secretariat@ofgem.gov.uk³ by 5pm on 25 February 2021 pursuant to section 27A(3) of the Electricity Act 1989. (**the 1989**

² S.27C(2)(a) the Electricity Act 1989

³ During the Covid-19 pandemic, Ofgem's offices are operating with very limited staff on site and arrangements for the handling of postal mail are similarly limited. Representations should be made by email if at all possible – if you need to make a representation by post, please ensure you allow sufficient time for it to reach us.

Act). Any representations received by this date will be considered by the Authority before it makes a final decision. A copy of the Authority's [Enforcement Guidelines](#) dated 10 October 2017 ("**the Enforcement Guidelines**") can be found on the Ofgem website.

1.8. In accordance with section 27A(3) of the 1989 Act, the Authority will consider any representations made before making a final decision to impose a penalty. If as a result of representations the Authority proposes to vary the penalty, it will consult again in accordance with section 27A(4) of the 1989 Act.

1.9. In accordance with section 27A(2) of the 1989 Act, the Authority is satisfied that it would not be more appropriate to proceed under the Competition act 1998.

2. The Authority's view on contraventions

2.1. Symbio has breached the requirements and conditions set out above by failing to make payments by the date required. Symbio has offered various explanations for its failure to make these payments on time, primarily⁴ relating to the impact of the Covid-19 pandemic on its business, which are considered further in sections 3 and 4 below. It has now made all of the relevant payments (albeit late).

3. The Authority's view on whether to impose a financial penalty

3.1. In deciding whether it is appropriate to impose a financial penalty, and the amount of any penalty, the Authority is to have regard to its current Statement of Policy with respect to Financial Penalties and Consumer Redress published in 2014 ("**the Penalty Statement**").

3.2. The Authority is required to carry out all its functions, including the taking of any decision as to the imposition of a penalty, in the manner that it considers is best calculated to further its principal objective set out in section 3A of the 1989 Act, having regard to its other duties. In formulating its preliminary view whether it is appropriate to impose a

⁴ It also expressed disagreement with the amount of one of the FIT levelisation payments.

financial penalty, the Authority has considered all the circumstances of the case presently known to it including, but not limited to, Symbio's representations and the specific matters set out in the Penalty Statement.

Penalty Statement - General Criteria in relation to imposing a financial penalty and/or consumer redress order

Factors tending to make (a) the imposition of a financial penalty and/or (b) the making of a consumer redress order more likely

Whether the contravention or failure has damaged, or could have damaged, the interests of consumers or other market participants

- 3.3. The Authority considers that the contravention has damaged the interests of other market participants and indirectly the interests of consumers. The RO and FIT schemes rely on suppliers making payments in full and on time.
- 3.4. The failure to make payments under the RO and FIT schemes on time has outcomes which are not in the interests of consumers or other market participants. Suppliers that fail to discharge their obligations unfairly accrue financial gain and create additional financial burdens for compliant companies, which are likely to be passed on to customers, as well as creating an administrative burden on the Authority. The Authority further notes that Symbio's business appears to have grown over the period of the contravention and notes that growth of the business cannot be at the expense of complying with regulatory obligations.
- 3.5. The Authority has considered Symbio's representations and, in particular, whether other suppliers who have made late payments have been treated in an appropriately similar and even-handed manner and the Authority is satisfied in this regard.
- 3.6. The Authority notes that it does not receive any benefit from the imposition of a penalty because all penalties are required by legislation to be paid to HM Treasury (via Ofgem).

Whether the contravention or failure has damaged, or could have damaged, the confidence that consumers and/or other market participants have in the market

3.7. The Authority considers that non-compliance with regulatory obligations carries a risk of undermining consumer and industry confidence in the relevant schemes and the market. Indeed, the Authority is aware that a number of industry participants have expressed concern about the unfairness of some suppliers failing to meet their obligations, including suppliers and industry bodies.

A penalty and/or a consumer redress order is necessary to deter future contraventions or failures and to encourage compliance

3.8. The Authority considers that general and specific deterrence are both relevant to this matter.

3.9. Symbio has failed to meet its obligations in relation to environmental scheme payments on four separate occasions in the past five months. The Authority is of the view that a financial penalty is necessary to ensure Symbio's senior management recognise the importance of complying with its regulatory obligations on time.

3.10. In relation to the wider market, in recent years a number of suppliers have made RO payments (in particular) late, or failed to make payments at all. While the Authority has taken appropriate compliance and enforcement action in each case (leading to either belated payment or the supplier in question exiting the market via an insolvency process), this has not averted the problem recurring. The Authority is of the view that it is necessary to impose a financial penalty in this case to send a strong message to the market that late payment of its obligations has consequences and will cost more.

3.11. The smooth administration of the environmental schemes by Ofgem, worth many billions of pounds, is dependent on the companies making their payments by the legislative deadlines. Failure to do so is detrimental to suppliers who do comply with their obligations and leads to the Authority's resources being diverted from other activities which undermines our ability more broadly to protect the interests of consumers.

Whether the contravention or failure was deliberate or reckless

- 3.12. Notwithstanding the difficult circumstances created by the Covid-19 pandemic, the Authority considers that Symbio's contraventions were deliberate in that Symbio knowingly failed to meet its obligations on time. The RO payment is an annual payment, and Levelisation payments are made on an annual and quarterly basis. During the Covid-19 pandemic, Jonathan Brearley, CEO, Ofgem made clear in his open letter of 16 June 2020 that suppliers must comply with their scheme payments. This message was reiterated in further letters sent to suppliers on 06 May, 17 July and 28 August 2020.
- 3.13. The Authority acknowledges that Symbio (and other suppliers) may have suffered financial difficulties due to the impact of the Covid-19 pandemic. The Authority accepts that the Government agreed measures with domestic energy suppliers to support customers who are financially impacted as a direct or indirect result of Covid-19 and that this could include reassessing, reducing or pausing debt repayment and bill payments for domestic customers in financial distress⁵. The Authority has endeavoured to assist suppliers so far as possible. In addition to the well-publicised schemes for businesses announced by the Government, the Authority has arranged relief for energy suppliers in the form of a deferral scheme for certain network charges (not including payments under the FIT and RO schemes) incurred by suppliers.
- 3.14. However, it has taken the view that RO and FIT payments need to be made in full and on time for the following reasons (a) the legislation does not confer any discretion on the Authority to waive or defer payments due under the schemes; and (b) if the Authority were able to waive or defer payments due from a supplier, the cost would be imposed on other suppliers (see §3.3 above). The Authority made clear on a number of occasions that RO and FIT payment would need to be made in full and on time (see 3.16-3.20 for detail), and has taken the view that it is the responsibility of every supplier to be aware of its upcoming liabilities and ensure it is in a position to meet them. The Authority also notes that the majority of other suppliers have been able to put financial

⁵ Agree between the Department for Business, Energy & Industrial Strategy and domestic energy suppliers dated 19 March 2020

arrangements in place to make their RO and FIT payments on time, despite the impact of the Covid-19 pandemic.

3.15. The Authority also notes that Symbio initially disputed the FIT Year 11 Quarter 1 payment amount before paying it in full late.

Whether the circumstances from which the contravention or failure arose were or should have been within the control of the regulated person under investigation

3.16. The Authority acknowledges Symbio's financial difficulties, and in particular the impact of the Covid-19 pandemic. However, it is ultimately the responsibility of every supplier to be aware of its upcoming liabilities and to ensure it is in a position to meet them. As detailed at paragraph 3.4 above, Symbio appears, notwithstanding the Covid-19 pandemic, to have experienced a period of growth in 2020.

Whether the contravention or failure (or possibility of it) would have been apparent to a regulated person acting diligently

3.17. The Authority considers that the breaches would have been, and were, apparent to Symbio. Symbio engaged extensively with the Authority over its intentions to pay, and in turn the Authority engaged extensively with Symbio (and other suppliers) in reminding it of its obligations in summer 2020 and then in pursuing payment during the autumn. In particular:

3.18. 06 May 2020: Ofgem sent a letter to suppliers outlining the key deadlines and actions required for the Renewables Obligation 2019-20 Obligation Period

3.19. 16 June 2020: Jonathan Brearley, CEO, Ofgem made clear in his open letter of 16 June 2020 that suppliers must comply with their scheme payments.

3.20. 17 July 2020: Ofgem's Director of Conduct and Enforcement sent a letter to suppliers reiterating Jonathan Brearley's message of 16 June letter and that suppliers must comply with their scheme obligations and payments and noting that Ofgem will take non compliance seriously and follow up with robust action, including enforcement action.

3.21. 28 August 2020: Ofgem's Deputy Director, Enforcement wrote to all suppliers reminding them of the RO deadline and noting that Ofgem will take non compliance seriously and follow up with robust action, including enforcement action.

Whether there was a lack of effective remedial action after the contravention or failure became apparent to the regulated person

3.22. The Authority notes that Symbio has since paid all of the outstanding amounts, albeit late and only after extensive compliance engagement and/or formal enforcement action by the Authority. It is not acceptable for suppliers to delay meeting their obligations until compliance and enforcement action is taken by the Authority (which is a resource and time intensive activity for the Authority). It is the supplier's responsibility to be aware of and meet its obligations itself.

Whether the regulated person has a record of previous contraventions or failures, similar or otherwise

3.23. This is the first time that Symbio has been the subject of an enforcement case that proposed a financial penalty. The proposed penalty relates to four separate contraventions by Symbio, which resulted in the imposition of a Final Order and statutory demand before the payment was made (see paragraph 1.4 above). The Authority also notes that Symbio was the subject of a Final Order in relation to a breach of smart metering communication requirements in March 2020. Symbio's poor compliance history has informed Ofgem's decision to pursue a penalty on this occasion.

3.24. Having considered all of the above matters, the Authority is of the view that a financial penalty is warranted in these circumstances.

4. Determining the amount of the financial penalty

4.1. In accordance with section 270 of the 1989 Act, the Authority may impose a financial penalty of up to ten per cent of the turnover of the relevant licence holder. Turnover is defined in an Order made by the Secretary of State. The Authority is satisfied that the proposed penalty does not exceed ten per cent of Symbio's turnover.

4.2. As noted above, the Authority must have regard to the matters set out in its Penalty Statement when determining the amount of any penalty. The Penalty Statement

requires that a six step process is followed in order to determine the level of financial penalty:

1. Calculate the detriment to consumers and calculate the gain to the regulated person. Consider whether a consumer redress order is appropriate to remedy the consequences of the contravention identified or to prevent a contravention of the same or a similar kind from being repeated.
2. Consider the seriousness of the contravention or failure to determine the appropriate penal element.
3. Consider any aggravating and mitigating factors that may increase or decrease the penal element.
4. Consider the need for a deterrence uplift to the penal element, having regard to the principle that non-compliance should be more costly than compliance and that enforcement should deliver strong deterrence against future noncompliance.
5. Where a case is settled, apply a discount to the penal element.
6. Establish the total financial liability

Step 1 – Gain & Detriment

- 4.3. The gain to Symbio relates to the financial benefit of deferring payment. The Authority is not able to quantify with any accuracy the undue advantage obtained by Symbio by not paying the sums due on time. This may include the costs that would have been incurred to pay the sums on time (e.g. by loan) or the financial windfall obtained by Symbio in retaining the credit for an extended period. Accordingly, it proposes to consider the seriousness of the contravention to determine the appropriate penalty, in accordance with the Penalty Statement at §§5.8, 5.10.

Step 2 - Seriousness

- 4.4. The Authority considers that the breaches are of a moderate degree of seriousness. In particular:

- Symbio has failed to meet its obligations in relation to environmental scheme payments on four separate occasions in a four month period (although one late payment was small).
- Symbio has complied with its obligations late and after enforcement action has been threatened or commenced. These processes have been time and resource intensive.
- In some instances Symbio's senior management have said that payments have been made when they have not. The contraventions have revealed serious weaknesses in Symbio's management or compliance procedures
- Senior management were at all material times aware of the contraventions.
- Symbio's contraventions were deliberate in that Symbio knowingly failed to meet its obligations on time.

4.5. The Authority considers the appropriate penal element to be £100,000. This is approximately 8.7% of the sums that Symbio paid late.

4.6. The Authority also considered Symbio's operating profit over the course of the last 12 months and its turnover and considers the penal element to amount to a fair and reasonable proportion of both.

4.7. The Authority therefore considers the proposed sanction to be reasonable and proportionate.

Step 3 – Aggravating and Mitigating Factors

4.8. In the interests of brevity, the full list of potential factors in the Penalty Statement is not listed here. However, the Authority is of the view that some aggravating and mitigating factors apply.

4.9. The Authority is of the view that the following aggravating factors are applicable:

- Repeated contravention or failure: although there are multiple contraventions and that Symbio has a poor compliance history has informed the Authority's view that a penalty is appropriate, the Authority is not minded to uplift the penalty further on this ground alone.
- Continuation of the contravention: Symbio was aware of the contraventions and of the Authority's efforts to pursue payment and secure compliance.

- Involvement of senior management: as is common for suppliers of Symbio's size, Symbio's senior management are involved in the day to day running of the company, and were directly involved in the contraventions.
- Absence of any evidence of internal mechanisms or procedures intended to prevent contravention or failure and absence of any evidence that such internal mechanisms have been properly applied and kept under appropriate review by senior management: Ofgem has seen instances of Symbio's senior management claiming to have made payments that have not in fact been made. Assuming no deliberate falsehoods, this indicates poor compliance processes and poor management of outgoing payments.

4.10. The Authority is of the view that the following mitigating factors are applicable:

- Appropriate action to remedy the contravention: Symbio has paid the amounts due, albeit late and only after substantial compliance engagement and/or enforcement action by the Authority.
- The Authority has also taken into account the impact of the Covid-19 pandemic and its disruption to Symbio's business model (and indeed many other businesses) (see §§3.11-3.14 above). It is the responsibility of all suppliers to ensure they can meet their obligations, and other suppliers struggling with similar financial pressures have done so. The Authority repeatedly reminded suppliers of these upcoming obligations during the summer of 2020, the Authority nevertheless recognises Symbio's financial difficulties and the pandemic's contribution to them.

4.11. The Authority has considered the aggravating and mitigating factors when suggesting an appropriate penalty figure, mindful that some of them have informed the Authority's view of the seriousness of the contravention and its decision to impose a penalty. The Authority does not propose an uplift or reduction of penal element in these circumstances.

Step 4 – Adjustment for Deterrence

4.12. The Authority does not propose a further adjustment for deterrence.

Step 5 – Settlement Discount

4.13. Due to the strict legislative time restrictions where a provisional or final order has been made, the settlement process set out in section 5 of the Enforcement Guidelines does not apply⁶.

4.14. However, the Authority notes that Symbio has accepted the breaches set out at paragraphs 1.4.1, 1.4.2 and 1.4.3 of this Notice and has accepted the pertinent facts of the breach at paragraph 1.4.4. The Authority is therefore minded (as permitted by the flexibility it can apply in accordance with paragraph 1.13 of the Enforcement Guidelines) to apply a settlement discount of 15% to the penalty if Symbio does not make representations in response to this Notice and accepts the imposition of the proposed penalty on it.

Step 6 – Total Liability

4.15. Having considered all of the above matters, the Authority is minded to impose a penalty of £100,000, reduced to £85,000 if Symbio accepts the imposition of the proposed penalty and agrees to forgo the opportunity to make further representations. If it is persuaded by representations to impose a penalty of a different amount, it will re-consult on the proposed variation.

5. Notice of the proposed penalty

5.1. Having considered all of the relevant facts and circumstances in its possession, the Authority gives notice under section 27A(3) of the 1989 Act that it proposes to impose either:-

5.1.1. a financial penalty of £100,000; or

⁶ Paragraph 1.13 of the Enforcement Guidelines permits a flexible approach where justified by the circumstances of the case.

5.1.2. a reduced financial penalty of £85,000 if Symbio accepts the imposition of the proposed penalty and agrees to forgo the opportunity to make further representations.

5.2. Any written representations on the proposed penalty must be sent to Secretariat@ofgem.gov.uk by marked for the attention of the Enforcement Decision Panel and must be received by 25 February 2021.

5.3. Any representations received may be published on the Ofgem website. Should you wish your response or part of your response to remain confidential, please indicate this clearly. Any such requests will be considered by the Enforcement Decision Panel on a case by case basis and may or may not be approved.

Gas and Electricity Markets Authority

Date: 27 January 2021