

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

Proposal of the Gas and Electricity Markets Authority (the "Authority") to impose a financial penalty, following an investigation into BES Commercial Electricity Ltd and Business Energy Solutions Ltd and their compliance with obligations under the gas and electricity supply licences¹ (Standard Licence Conditions 7A, 7B, 7, 14 and 21B²) and with the Gas and Electricity (Consumer Complaints Handling Standards) Regulations 2008.

25 November 2015

1. Summary

- 1.1. The Authority proposes to impose a financial penalty on BES Commercial Electricity Ltd and Business Energy Solutions Ltd (together referred to as "BES") following an investigation by Ofgem into BES' compliance with a number of relevant conditions and requirements set out in the Standard Licence Conditions ("SLCs") of BES' gas and electricity supply licences and the Gas and Electricity (Consumer Complaints Handling Standards) Regulations 2008 ("CHSRs"). The SLCs set out the rules on how licensees must operate within the terms of their gas and electricity supply licences. The CHSRs prescribe the minimum standards regulated providers are required to meet in the handling of consumer complaints.
- 1.2. The Authority finds that BES has breached the following relevant conditions and requirements:
- SLC 7A.4(b) - Supply to Micro Business Consumers – these provisions require that, before a licensee enters into a Micro Business Consumer Contract, it must take all reasonable steps to bring the Principal Terms of the proposed contract to the attention of the consumer and ensure that the information is communicated in plain and intelligible language. These conditions were breached for the period 8 June 2010 to 12 July 2015 (Breaches 1 and 2).
 - SLC 7B - Customer Objective and Standards of Conduct for non-domestic supply activities – These provisions require that the licensee takes all reasonable steps to achieve the Standards of Conduct and apply the Standards of Conduct in a manner consistent with the Customer Objective of ensuring that each Micro Business Consumer is treated fairly³. This condition was breached for the periods 26 August 2013 to 12 July 2015 (Breach 3) and 26 August 2013 to 14 August 2014 (Breach 4). The Standards of Conduct include that:

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

² The investigation of BES' activities included consideration of SLC 21B (Billing based on meter readings), but Ofgem has not found sufficient evidence to seek a finding of breach in relation to this licence condition.

³ SLC 7B.5

- the licensee behaves and carries out any actions in a Fair, honest, transparent, appropriate and professional manner (SLC 7B.4(a));
 - the licensee provides information (whether in writing or orally) to each Micro Business Consumer which is complete, accurate and not misleading (in terms of the information provided or omitted) and which is otherwise Fair both in terms of its content and in terms of how it is presented (with more important information being given appropriate prominence) (SLCs 7B.(i) and (iv)).
- SLC 7.6A(c) – Terms of Contracts and Deemed Contracts– These provisions state that a deemed contract must not require a customer to give any form of notice before they are able to change supplier, and were breached for the period 23 October 2013 to 9 June 2014 (Breach 5).
 - SLC 14 – Non-Domestic Customer Transfer Blocking – These provisions state that a licensee must not prevent a Proposed Supplier Transfer except in accordance with certain specific provisions, one of which being that the licensee’s Contract with that customer allows the licensee to prevent the transfer. Contract is a defined term within SLC 1 and the definition states that a Contract does not include a Deemed Contract. This SLC was breached for the period 14 November 2012 to 9 June 2014 (Breach 6).
 - Regulations 4 and 5 of the CHSRs. These regulations place requirements on regulated providers in relation to handling consumer complaints, and were breached for the period 1 January 2013 to 31 October 2014 (Breach 7).
- 1.3. BES has admitted that it breached the relevant conditions and requirements set out above and has co-operated with the Authority’s investigation. It has acknowledged that its practices fell short of requirements in relation to communicating principal terms, complying with the Standards of Conduct, dealing with requests from customers on deemed contracts to switch supplier, objecting to customer transfers of those on deemed contracts and complaints handling. BES has made improvements in those areas which are the subject of this investigation.
- 1.4. BES has offered to pay £980,000 in total by way of settlement of this case. Of this amount it has undertaken to pay compensation totalling £311,000 to consumers affected by the breaches who can be identified in accordance with the arrangements set out at paragraph 5.12 of this notice. The remainder, £669,000 (plus any amounts which cannot be returned to affected consumers), less a penalty sum of £2 will be paid to an appropriate consumer charity identified by BES and approved by the Authority.
- 1.5. The payment of consumer redress (the initial sum, plus any amounts which cannot be returned to affected consumers) is to be made to the charity The Money Advice Trust / Business Debtline. The redress payments will be used to fund a specific project in which Business Debtline will provide debt advice services to business customers who are experiencing difficulties in paying their energy bills.
- 1.6. Having considered all the circumstances of the case, the Authority considers this compensation and redress package will be of greater benefit to consumers overall than if a significant financial penalty were to be imposed.

- 1.7. In the circumstances, and in recognition of the compensation and redress payments to be made for the benefit of consumers, the Authority hereby gives notice under section 27A(3) of the Electricity Act 1986 ("**the Electricity Act**") and section 30A(3) of the Gas Act 1986 ("**the Gas Act**") of its proposal to impose a penalty of £2 on BES⁴ in respect of the contraventions set out above provided that, pursuant to the direction of the Authority, and in any event by no later than the date of any final penalty notice issued by the Authority pursuant to section 30A(5) of the Gas Act and section 27A(5) of the Electricity Act, BES has paid compensation and consumer redress as set out above and has complied with the associated arrangements set out at paragraph 5.12 below.
- 1.8. Any written representation or objection with respect to the proposed penalty must be received by Pat Ogan at Ofgem (patrick.ogan@ofgem.gov.uk) or Ofgem, 3rd Floor, 9 Millbank, London, SW1P 3GE, by 5.00pm on 16 December 2015.
- 1.9. Any representations or objections received may be published on the Ofgem website. Should you wish for your response or part of your response to remain confidential, please indicate this clearly and give reasons for this request. Any such requests will be considered by Ofgem on a case by case basis.

2. Background

- 2.1. BES is a licensed non-domestic energy supplier based in Fleetwood, Lancashire. It has no in-house sales team; energy contracts are sold on its behalf by third party intermediaries, energy brokers, conducting telesales calls. BES is a relatively small, independent supplier with approximately 40,000 electricity and gas customers, mostly small businesses. Most of BES' customers are Micro Business Consumers⁵ and BES, as a matter of policy, treats all of its customers as Micro Business Consumers.
- 2.2. Ofgem opened its investigation on 30 October 2014 following receipt and consideration of information from a number of sources. These included a formal referral from Citizens Advice to Ofgem on 21 May 2014 and a high number of complaints about BES from consumers and from Members of Parliament on behalf of their constituents. In July 2015, Ofgem became aware of additional potential breaches of the CHSRs, and the scope of the investigation was widened to include these matters on 15 July 2015⁶.

⁴ £1 each on BES Commercial Electricity Ltd and Business Energy Solutions Ltd.

⁵ Micro Business Consumers are defined separately within the SLCs and the CHSRs. For the purposes of SLCs 7A and B, a Micro Business Consumer means a Non-Domestic Consumer: (a) which is a "relevant consumer" (in respect of premises other than domestic premises) for the purposes of article 2(1) of the Gas and Electricity Regulated Providers (Redress Scheme) Order 2008; or (b) which has an annual consumption of not more than 100,000kWh. For the purposes of the CHSRs, "micro business consumer" means any person, other than a domestic consumer, who a regulated provider knows or, acting reasonably, considers falls within the description of consumers who are covered by the above Order.

⁶ <https://www.ofgem.gov.uk/publications-and-updates/investigation-bes-and-its-compliance-its-obligations-under-gas-and-electricity-supply-licences-standard-licence-conditions-7a-7b-7-14-and-21b-and-consumer-complaints-handling-standards-regulations-chsr-2008>

3. The Authority's decision on contraventions

- 3.1. The Authority has considered the evidence gathered during the course of the investigation in the making of this decision. Details of the contraventions and their duration are set out below, grouped together as follows:
- Breaches 1 and 2 relate to a failure to take all reasonable steps to bring the principal terms of contracts (terms relating to the price and termination fees) to the attention of micro business consumers, and to ensure that such information is communicated in plain and intelligible language prior to that contract being entered into;
 - Breach 3 arises from the same actions and behaviour described in breaches 1 and 2 and relates to a breach of the Standards of Conduct licence conditions.
 - Breach 4 is also a breach of the Standards of Conduct licence conditions and relates to the statement of renewal letter sent by BES to its customers when nearing the end of their energy contract with the company.
 - Breach 5 relates to terms of standard contracts which wrongly required notice from customers on deemed contracts seeking to transfer to another energy supplier.
 - Breach 6 relates to transfer blocking by BES of those non-domestic customers in deemed contracts seeking to transfer to another supplier.
 - Breach 7 relates to complaints handling.

Communicating principal terms (price)

Breach 1: SLC 7A.4(b)

- 3.2. SLC 7A.4(b) requires that, before the licensee enters into a contract with a micro business consumer, it must take all reasonable steps to bring to the attention of the consumer the Principal Terms of a proposed contract and ensure that such information is communicated in plain and intelligible language. "Principal Terms" are defined in SLC 1 and include "Charges" and therefore details of price.
- 3.3. The Authority finds that between 8 June 2010 and 12 July 2015, BES has failed, via its contract validation scripts provided to and used by brokers, to communicate, prior to the contract being entered into, principal terms relating to price in electricity and gas contracts sold to micro business consumers. BES has not asserted or evidenced any other method of communication to customers of the principal terms prior to the conclusion of contracts. As such, the Authority considers that it has failed to take all reasonable steps to communicate the price as required by the licence requirements summarised above and has thereby breached SLC 7A.4(b). During the period of breach BES acquired over 30,000 customers.
- 3.4. The scripts failed to explain important details relating to price: while the initial price was specified, and it was made clear that prices would be reviewed and might vary, the detail as to how prices might fluctuate during the life of a

contract was not made sufficiently clear; when reviews of prices would take place was not made clear; and whilst consumers were asked to confirm they anticipated a minimum level of consumption (£250 per annum in the case of gas and £40 per month for electricity), BES failed to communicate the result of not reaching that level of consumption and its effect on prices charged in the form of standing charges.

- 3.5. All of BES' acquisitions are achieved through telesales by brokers. A binding contract is made during the sales call and there is no cooling off period. It is therefore important that principal terms, including price and the way prices can change during the length of the contract are properly explained. BES' contracts are typically longer than the average in the market and around 80% of BES customers were on 4 or 5 year contracts during the breach period.
- 3.6. Customers agreed to enter these contracts without any certainty as to price, how the tariffs operated in terms of timing of price reviews and how prices had behaved in similar contracts in previous years. Customers faced the risk of financial detriment, and the risk of harm to consumer confidence in the market was also present. The Authority notes that during the period of breach price reviews have resulted in increases in BES' prices; prices have remained unchanged and there has also been a decrease in prices.
- 3.7. In relation to one particular failing – the failure to explain the charges applied to a customer not reaching the minimum usage level – over 7,000 customers were affected and collectively paid to BES a total of £212,000 in additional charges.
- 3.8. BES has now taken steps to ensure that the contract validation scripts issued by the company to brokers communicate these details clearly prior to a contract being agreed. These amended scripts were introduced on 13 July 2015.

Communicating principal terms (Termination Fees)

Breach 2: SLC 7A.4(b)

- 3.9. The requirements of SLC 7A.4(b) are summarised at paragraph 1.2 above. "Principal Terms" as defined in SLC 1 include "the rights to end the Contract" (including any obligation to pay a Termination Fee)".
- 3.10. The Authority finds that between 8 June 2010 and 12 July 2015, BES failed, via its contract validation scripts provided to and used by brokers, to communicate, prior to the contract being entered into, Principal Terms relating to termination fees in electricity and gas contracts sold to micro business consumers. As set out above, BES has not asserted or evidenced any other method of communication to customers of the principal terms prior to the conclusion of contracts. As such, the Authority considers that it has failed to take all reasonable steps to communicate Termination Fees as required by SLC 7A.4(b).
- 3.11. Up until 6 August 2014 the scripts did not mention termination fees at all prior to the contract being agreed and when they were mentioned it was only in one specific circumstance (relating to the registration period and not the general position). Following Ofgem's intervention the scripts were amended to mention termination fees prior to the contract being agreed, but the amended scripts did not include an explanation of how the termination fees were calculated. Ofgem considered this essential, because the method of calculation used by BES (until

March 2015 when the calculation was changed) was to take 1/3 of a customer's average monthly bill and multiply that sum by the remaining number of months on the contract. The fact that the vast majority of BES customers are signed to contracts of 4 or 5 years means that an explanation of the method of calculation is particularly important.

- 3.12. Customers agreed to enter contracts without understanding when and how a termination fee was payable and without knowing how that termination fee was calculated. Customers faced the risk of financial detriment in the event they wished to terminate the contract earlier than the agreed term, and had their ability to or likelihood of switching inhibited. The risk of harm to consumer confidence in the market was also present.
- 3.13. The investigation has found that in practice the termination fee has not been imposed on a large number of occasions. 141 customers have paid a total of circa £80,000 in termination fees to BES.
- 3.14. This issue has been the focus of customer complaints seen by Ofgem. It has not been possible to establish how many customers considered or enquired about leaving but chose not to when they were advised of the termination fee and its method of calculation. Any customers who have contacted BES in relation to any of breaches 1-3 during the period of breach, will be able to terminate their contracts, should they wish, without incurring any charge.
- 3.15. BES has now taken steps to ensure that the contract validation scripts issued by the company to brokers communicate these details clearly prior to a contract being agreed. These amended scripts were introduced on 13 July 2015.

Standards of Conduct (Communication of Principal Terms – Price and Termination Fees)

Breach 3: SLC 7B.5

- 3.16. SLC 7B.5 requires the licensee to take all reasonable steps to achieve the Standards of Conduct and ensure that it interprets and applies the Standards of Conduct in a manner consistent with the Customer Objective. The Customer Objective is for the licensee to ensure that each Micro Business Consumer is treated fairly⁷.
- 3.17. SLC 7B was introduced on 26 August 2013. These licence conditions apply to all Designated Activities⁸ in respect of Micro Business Consumers.
- 3.18. The Authority uses a bespoke approach to enforcement of the Standards of Conduct as set out in its Enforcement Guidelines. When assessing the seriousness of a potential breach, it will consider whether a reasonable person, intent on complying with the Standards of Conduct, would have acted the way the supplier did in its interactions with consumers. Further, the Authority will also have regard to the supplier's actions and considerations (including at senior level)

⁷ SLC 7B.2.

⁸ Designated Activities are defined in SLC 7B. They include any matters which fall within the scope of SLC 7A which sets out certain requirements for the protection of Micro Business Consumers.

in (among other things) developing new policies and processes and taking remedial actions where any adverse consequences for consumers come to light⁹.

- 3.19. The facts and evidence for this breach are similar to those set out above in relation to Breaches 1 and 2; although the breach period is shorter (SLC 7B came into force on 26 August 2013) and so the number of customers affected is fewer than that estimated in relation to Breaches 1 and 2.
- 3.20. The Authority finds that between 26 August 2013 and 12 July 2015 BES has failed, via its contract validation scripts provided to brokers, who in turn used such scripts to arrange contracts with new customers on behalf of BES, to take all reasonable steps to bring to the attention of Micro Business Consumers, prior to the contract being entered into, principal terms relating to price and termination fees in electricity and gas contracts sold to micro business consumers. The Authority considers that this amounts to a breach of the Standards of Conduct.
- 3.21. The Standards of Conduct for non-domestic supply activities include that the licensee behaves and carries out any actions in a Fair, honest, transparent, appropriate and professional manner¹⁰; that the licensee provides information (whether in writing or orally) to each Micro Business Consumer which is complete, accurate and not misleading (in terms of the information provided or omitted)¹¹ and which is otherwise fair both in terms of its content and in terms of how it is presented (with more important information being given appropriate prominence)¹².
- 3.22. The Authority finds that BES' contract validation scripts failed to satisfy these requirements in relation to communicating principal terms relating to price and termination fees. The Authority therefore finds that BES has failed to take all reasonable steps to achieve the Standards of Conduct.
- 3.23. The Authority finds that BES has failed to interpret and apply the Standards of Conduct in a manner consistent with the Customer Objective of treating micro business consumers fairly. It notes that the actions and behaviour set out above at Breaches 1 and 2 have significantly favoured the interests of BES. They enabled the company to gain customers who might not have signed up to the supplier had they been aware of the relevant contractual obligations prior to entering into the agreement.
- 3.24. Further, the Authority finds that the actions and behaviour set out at Breach 1 have given rise to a likelihood of detriment to the Micro Business Consumers in question. Customers agreed to enter these contracts without certainty as to price, how the tariffs operated in terms of timing of price reviews and how prices had behaved in similar contracts in previous years; customers were also not made aware that a failure to reach a minimum usage level of energy would result in the introduction of or increased levels of standing charges. Customers faced

⁹ Further details are set out in Ofgem's Enforcement Guidelines (September 2014) available at: <https://www.ofgem.gov.uk/ofgem-publications/92045/enforcementguidelines12september2014publishedversion-pdf>

¹⁰ SLC 7B.4(a)

¹¹ SLC 7B.4(b)(i).

¹² SLC 7B.4(b)(iv)

the risk of financial detriment, and the risk of harm to consumer confidence in the market was also present.

- 3.25. The Authority finds that the actions and behaviour set out above at Breach 2 have significantly favoured the interests of BES. They enabled the company to gain customers, many agreeing to 4 and 5 year contracts, who might not have signed up to the supplier had they been aware of the relevant contractual obligations prior to agreement being entered into.
- 3.26. Further, the Authority finds that these actions and behaviour have given rise to a likelihood of detriment to the Micro Business Consumers in question. Customers agreed to enter contracts without understanding when and how a termination fee was payable and without knowing how that termination fee was calculated, in the event they wished to terminate the agreed contract early. Customers faced the risk of financial detriment and had their ability to or likelihood of switching inhibited. The risk of harm to consumer confidence in the market was also present.
- 3.27. In view of the above, the Authority finds that BES failed to take all reasonable steps to achieve the Standards of Conduct and to ensure that it interpreted and applied the Standards of Conduct in a manner consistent with the Customer Objective as required by SLC 7B.5, and has thereby breached this licence condition. The Authority considers that these were widespread and systemic breaches affecting BES' customer base and which were not adequately addressed by BES' management until amended contract validation scripts were introduced in July 2015. As such, the Authority considers that BES' actions were not consistent with those of a reasonable person intent on complying with the Standards of Conduct and that this is therefore a serious breach of the Standards of Conduct.
- 3.28. BES has now taken steps to ensure that the contract validation scripts issued by the company to brokers communicate these details clearly prior to a contract being agreed. These amended scripts were introduced on 13 July 2015. Whilst the Authority has found that the Standards of Conduct have been breached, it notes that this breach arises from the same conduct as breaches 1 and 2. In considering this matter the Authority has considered the contravening conduct as a whole.

Standards of Conduct (Provision of information in Statement of Renewal letters)

Breach 4: SLC 7B.5

- 3.29. The requirements of the Standards of Conduct licence condition (SLC 7B.5) are set out at paragraph 3.16 above. The Authority's approach to enforcement of this licence condition is also summarised at paragraph 3.18 above.
- 3.30. The Authority finds that between 26 August 2013 and 14 August 2014 BES failed to provide information, via the Statement of Renewal, which was fair in terms of its content and how it was presented.
- 3.31. SLC 7A.8 requires that on or about 30 days before the Relevant Date, unless the licensee has already agreed a new Micro Business Consumer Contract with the

Micro Business Consumer, the licensee must provide the Micro Business Consumer with the Statement of Renewal Terms.

- 3.32. The Standards of Conduct for non-domestic supply activities include that the licensee provides information which is Fair both in terms of its content and in terms of how it is presented (with more important information being given appropriate prominence).
- 3.33. The Authority finds that BES' Statement of Renewal letter failed to satisfy these requirements and, as such that it failed to take all reasonable steps to achieve this Standard of Conduct.
- 3.34. The Authority considers that the Statement of Renewal, sent by BES when the customer was coming towards the end of their contract, was unhelpful in that the information relating to the purpose of the letter (i.e. the purported statutory notice as to a customer's rights required under SLC 7A.8 to enable a customer to make a judgment as to whether to renew a supply contract) was given on page 2 and was not given a proper heading (in bold) as all other headings in the letter were.
- 3.35. The Authority considers that page 1 of the letter might well have caused the recipient to believe it to be marketing literature and thus not read the letter fully or at all. The Authority also finds that BES has failed to interpret and apply the Standards of Conduct in a manner consistent with the Customers Objective of treating micro business consumers fairly. The Authority considers that BES' actions and behaviour have significantly favoured the interests of BES who would be likely to benefit from customers not considering their energy provision, and whether to switch. In turn, this would have given rise to a likelihood of detriment to the Micro Business Consumers in question, who if they missed the opportunity to avoid renewal would likely not consider their energy provision and whether to switch and potentially take advantage of a better deal with another supplier or negotiate better terms with BES. The Authority also notes that BES does not apply higher "off-contract" rates when a customer is rolled over onto a new contract with them.
- 3.36. In view of the above, the Authority finds that BES failed to take all reasonable steps to achieve the Standards of Conduct and to ensure that it interpreted and applied the Standards of Conduct in a manner consistent with the Customer Objective as required by SLC 7B.5 and has thereby breached this licence condition. The Authority considers that a reasonable person intent on complying with the Standards of Conduct would have taken steps to ensure important customer information was prominent and clear in written communications with its consumers. As such, it considers this to be a breach of the Standards of Conduct.
- 3.37. In August 2014 BES redesigned the Renewal Notices it uses to give due prominence to provisions relating to the consumer's opportunity to give notice to avoid a renewal of the contract.

Terms of standard contracts which wrongly required notice from customers on deemed contracts seeking to transfer to another energy supplier.

Breach 5: SLC 7.6A(c)

- 3.38. SLC 7.6A(c) provides that a deemed contract must not require a customer to give any form of notice before they are able to change supplier.
- 3.39. The Authority finds that between 23 October 2013 and 9 June 2014 BES' terms and conditions documents required, wrongly, that a customer on a deemed contract must give notice before they were able to change supplier. Accordingly, the Authority finds that BES breached this licence condition.
- 3.40. BES has acknowledged that its terms and conditions documents were wrong in respect of this provision in its deemed contract terms and in June 2014 amended its terms and conditions.

Transfer blocking by BES of those on deemed contracts seeking to transfer to another supplier

Breach 6: SLC 14

- 3.41. SLC 14.1 provides that a licensee must not prevent a Proposed Supplier Transfer except in accordance with certain specific provisions. These include where the licensee's Contract with that customer allows the licensee to prevent the transfer (SLC 14.2(a)). However, Contract is a defined term within SLC 1 and the definition states that a Contract does not include a Deemed Contract. As such, this exemption does not apply in respect of customers on Deemed Contracts.
- 3.42. The Authority finds that between 14 November 2012 and 9 June 2014 BES' terms and conditions documents stated incorrectly that BES had the right to object to the transfer of supply in certain circumstances.
- 3.43. The Authority also finds that, irrespective of the content of the terms and conditions documents at particular points in time, BES has objected, wrongly, to the proposed supplier transfers of those on deemed contracts.
- 3.44. The Authority notes that this breach was pointed out to BES by Citizen's Advice on 11 April 2013. BES said that a new version of the terms and conditions document was not promulgated internally and sent to customers as it should have been at that time, due to an oversight.
- 3.45. 108 customers on deemed contracts were wrongly blocked from transferring and BES therefore kept customers and has gained revenue that it should not have done. Those customers would have suffered detriment by being prevented from switching and therefore missing the opportunity to be supplied energy by the supplier of their choice, perhaps missing out on a better deal and in any event paying a higher deemed contract rate.
- 3.46. BES has acknowledged that its terms and conditions documents were wrong in respect of this provision in its deemed contract terms and in June 2014 amended its terms and conditions.

- 3.47. In view of the above, the Authority finds that BES has breached the provisions of this licence condition.

Handling of customer complaints

Breach 7: Regulations 4(1) and 5(1) of the CHSRs

- 3.48. Regulation 4 of the CHSRs provides that a regulated provider (including one licensed under the Electricity Act and/or Gas Act) must record in a written, electronic format various details relating to complaints received and the handling of such complaints, including how complaints were resolved. These include the date the complaint was received; whether the complaint was made orally or in writing; the identity and contact details of the complainant; a summary of the consumer complaint; a summary of any advice given or action taken or agreed in relation to the consumer complaint; whether the consumer complaint has become a resolved complaint and, if so, the basis upon which the regulated provider considers that the consumer complaint is a resolved complaint.
- 3.49. Regulation 5 of the CHSRs provides that a regulated provider must, where a complaint has not been resolved by the end of the working day after the day of receipt, keep a written, electronic record of certain additional information, including steps taken to resolve the complaint and the date of resolution; or where resolution was not achieved, the date upon which the specified time period expired and the date the complainant was advised of their right to go to the Ombudsman.
- 3.50. The Authority finds that between 1 January 2013 and 31 October 2014 BES failed to record details of complaints, and failed to handle the complaints it has received as required by the CHSRs.
- 3.51. The Authority finds that during the breach period BES failed to record the necessary detail in relation to a significant number of complaints received¹³. Accordingly, the Authority finds that BES breached Regulations 4 and 5 of the CHSRs. These are relevant requirements for the purposes of Part I of the Electricity Act¹⁴ and the Gas Act.¹⁵

¹³ These related to complaints received on three specific areas of potential breach for the period 1 January 2013 to 31 October 2014: 1. Complaints re failure to explain price properly prior to the contract being agreed; 2) Complaints re failure to explain termination fees properly prior to the contract being agreed; and 3) Complaints from Gas Budget Payment Plan customers that monthly direct debit payments were too high and not reflective of consumption.

In relation to all 3 aspects, the information provided has been significantly incomplete and it is not possible to glean when the complaint was made (breach of regulation 4(1)(a)) and when and how it was resolved. (breaches of respectively Regulation 5(2)(b) and 4(1)(g)). In relation to 1, BES advised that they had received 341 complaints. BES was only able to provide detail/ documentation in relation to 114 complaints; in relation to 2, BES advised that they received 30 complaints. BES was only able to provide detail/documentation in relation to 11 complaints; in relation to 3, BES advised that they received 940 complaints. BES was only able to provide detail/documentation in relation to 131 complaints.

¹⁴ Schedule 6A

¹⁵ Schedule 4B

- 3.52. BES has acknowledged its failings in this regard and has taken action to remedy the issues by making significant investment in staff and IT, enhancing its in-house staff training and improving its complaints handling processes.

4. The Authority's decision on whether to impose a financial penalty

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

- 4.1. The Authority is required to carry out all its functions, including the taking of any decision as to penalty, in the manner which it considers is best calculated to further its principal objective, having regard to its other duties¹⁶.
- 4.2. The Authority has considered whether a financial penalty is appropriate in accordance with the requirements of section 27A(1) of the Electricity Act and section 30A(1) of the Gas Act and its published Statement of Policy with respect to Financial Penalties (October 2003) ("**the 2003 Policy**"¹⁷). The Authority may impose a penalty on BES of such an amount as is "reasonable in all the circumstances of the case.
- 4.3. In deciding whether to impose a penalty, and in determining the amount of any penalty, the Authority is to have regard to its statement of policy most recently published at the time when the contravention or failure occurred. On 6 November 2014, the Authority (following consultation) adopted a new Statement of Policy with respect to Financial Penalties and Consumer Redress ("**the 2014 Policy**"), which the Authority must have regard to when deciding whether to impose a financial penalty, and determining the amount of any such penalty, in respect of any contravention which occurred on or after 6 November 2014.
- 4.4. The Authority notes that although certain of the breaches (breaches 1 to 3) extended beyond the commencement of the 2014 Policy, it notes that the investigation and each of the breaches commenced during the period of the 2003 Policy. Further, the Authority considers that the underlying actions and behaviours of the business which are the subject of the investigation, as well as the gravamen of the misconduct occasioned by the majority of the breaches, commenced and took place during the period in which the 2003 Policy applied. It has therefore decided to determine the penalty by reference to the 2003 Policy.
- 4.5. On 27 March 2014, the Authority published an open letter to its stakeholders setting out the Authority's position on future financial penalties (the "**Chairman's Letter**"). In line with its strategic objectives for enforcement, the Authority stated that it considered that enforcement should deliver strong deterrence against non-compliance and also ensure regulatory compliance is given sufficient focus within businesses. As such, the Authority stated that it had decided to place greater emphasis on deterrence when imposing penalties and indicated that its decision would be likely to mean a substantial increase in the levels of penalty in

¹⁶ The Electricity Act (section 3A) and the Gas Act (section 4AA) set out details of the Authority's principal objective as being the protection of the interests of existing and future consumers, wherever appropriate by promoting competition, and including their interests in the reduction of greenhouse gas emissions and the ensuring of the security of energy supply.

¹⁷ <https://www.ofgem.gov.uk/ofgem-publications/74207/utilities-act-statement-policy-respect-financial-penalties.pdf>

cases where the behaviour in question came to the Authority's attention on or after 1 June 2014.

- 4.6. Breach 7 (relating to complaints handling) came to the attention of the Authority after 1 June 2014. Accordingly the Authority considers the principles outlined in the Chairman's Letter to be applicable to this breach.
- 4.7. In deciding whether it is appropriate to impose a financial penalty, the Authority has considered all the circumstances of the case including, but not limited to, the specific matters set out in the 2003 Policy and the Chairman's Letter. It has also taken full account of the representations made to it by BES.

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

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

- 4.8. The Authority considers that the contraventions taken as a whole, given their nature and extent, are serious. In particular, it notes that contractual safeguards for micro business consumers have not been adhered to and that in August 2013 the Standards of Conduct were implemented to ensure that suppliers treat Micro Business Consumers fairly, by providing greater protection and transparency to businesses in respect of contractual information, switching supplier, deemed contracts and billing. By failing to communicate the principal terms of contracts to its customers (and noting that over 30,000 customers were acquired in the breach periods for breaches 1 and 2), the Authority considers that BES has acted in a manner that damaged the interests of its customers.
- 4.9. In addition, the Authority considers that BES' failure to adequately record and address customer complaints, during the period January 2013 to October 2014, would have exacerbated the negative effect the contraventions had on its customers.
- 4.10. Other market participants may have had their interests damaged due to BES' breaches when customers were acquired by BES, or when BES wrongly blocked customers from switching, contrary to SLC 14.

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

- 4.11. The Authority considers that it is appropriate to impose a financial penalty in order to deter BES or other licensees from engaging in the same or similar conduct.
- 4.12. Noting the position set out in the Chairman's Letter, the Authority considers that the imposition of a financial penalty in relation to Breach 7 is warranted to reflect strong deterrence against future non-compliance by BES and other companies. The Authority also considers that imposing a financial penalty will create an incentive to ensure the underlying issues are fully and effectively addressed.

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

If the contravention is trivial in nature

4.13. The Authority does not consider that BES' failure to meet its obligations in respect of the SLCs and CHSRs is trivial. The Authority notes that multiple breaches have occurred over significant time periods, and that these have affected a large proportion of BES' customer base.

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

4.14. There is nothing in the Authority's principal objective and duties that precludes the imposition of a penalty in this case.

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

4.15. The Authority considers that the breaches should have been apparent to a diligent licensee.

4.16. BES has consistently throughout the breach period been the subject of a disproportionately high level of complaints (disproportionate in comparison to other suppliers in the non-domestic market) and has received complaints that, if properly recorded and reviewed, should have alerted BES to the fact that breaches were occurring.

4.17. The Authority would stress that compliance with the obligations of the SLCs and CHSRs is not optional, irrespective of the size of supplier.

4.18. Having taken into account the factors set out in the 2003 Policy, the Authority considers that the imposition of a penalty is appropriate in this case.

5. Criteria relevant to the level of financial penalty

5.1. In accordance with section 270 of the Electricity Act and section 300 of the Gas Act, the Authority may impose a financial penalty of up to 10 per cent of the annual turnover of the relevant licence holder. The Authority is satisfied that the proposed penalty is within the maximum statutory limit.

5.2. In deciding the appropriate level of financial penalty, the Authority has considered all the circumstances of the case, including the following specific matters set out in the 2003 Policy.

5.3. In determining the amount of the penalty in respect of Breach 7, the Authority has also taken account of the position set out in the Chairman's Letter regarding deterrence as set out at paragraph 4.5 of this notice.

Factors which are first considered when determining the level of penalty

The seriousness of the contraventions and failures

- 5.4. The Authority considers that the majority of the contraventions are serious, wide ranging and have been committed over a protracted period. BES has failed to respond appropriately to the high levels of dissatisfaction shown by a significant number of its customers.
- 5.5. In relation to Breaches 1 and 2, the Authority considers the contraventions to be serious. Non-domestic customers must be fully aware of the principal terms of their contracts in relation to price and termination fees, so that they can make informed decisions regarding their energy supply. BES had a responsibility to ensure that its customers were in possession of all of the relevant facts. In view of this, the Authority considers these breaches to be serious.
- 5.6. The Authority considers BES' breaches of the Standards of Conduct also to be serious. The Standards of Conduct apply in respect of any written or oral communications to Micro Business Consumers, and transparency and fairness are especially important when interacting with customers at the stage of entering into and renewing contracts. BES had a responsibility to ensure that its customers were in possession of all of the relevant information regarding their contracts.
- 5.7. In respect of BES blocking transfers of customers on deemed contracts (breach 6), the Authority considers that this is a serious breach. The ability of consumers to switch suppliers with the minimum of problems is vital for the effective working of the non-domestic market. BES' customers on deemed contracts were entitled to switch suppliers freely, and should not have been prevented from doing so.
- 5.8. The Authority also considers that BES' failures in relation to complaints handling (breach 7) represent serious breaches of the CHSRs. Complaints are a key method by which customers can communicate to suppliers their dissatisfaction and gain access to potential remedies, including their rights to seek review through the Energy Ombudsman.

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

- 5.9. The Authority considers that affected customers and other market participants were likely to be harmed by the contraventions.
- 5.10. Micro-Business Consumers have agreed to enter into often lengthy energy contracts with BES and principal terms of those contracts - important information about price, potential changes in price and termination fees - have not been communicated clearly or at all. The way termination fees were calculated is likely to have inhibited switching, especially in contracts lasting for more than one year, though this is mitigated to some extent by the fact that BES did not always seek to recover such charges. Some customers who have found themselves on deemed contracts (during the period of breach), including the 108 customers identified as having been blocked from switching, have found it difficult to extricate themselves and switch to another supplier.

- 5.11. The effects of breaches 1 to 6 have been compounded by the effects of breach 7 (during the period January 2013 to October 2014). Dissatisfied customers making complaints in relation to confusion about the principal terms of their contract, or in relation to blocked transfers, would have been further harmed by BES's failure to handle their expression of dissatisfaction appropriately.
- 5.12. The sum of £212,000 has been identified as consumer detriment arising from breach 1, where minimum usage was not properly explained. The sum of £80,000 has been identified as detriment arising from customers who paid termination fees to BES, arising from breach 2. The sum of £19,000 has been identified as consumer detriment arising from breach 6 in respect of customers paying higher deemed contract rates subsequent to a requested transfer being blocked. Therefore, in total a sum of £311,000 of consumer detriment has been identified. The Authority acknowledges that BES has offered to compensate all those customers affected. The Authority notes also that BES has agreed to do the following:
- a) to contact all those customers who have contacted them previously in relation to any matters relevant to breaches 1 to 3 to explain its failings and to offer all those customers the opportunity to terminate their contract, should they wish to, without a termination fee being imposed.
 - b) In relation to those customers affected by breach 1 and the minimum usage clause not being properly explained, in addition to BES agreeing to offer to return these monies, as set out at paragraph 5.12, BES has agreed to have any monies invoiced but not yet received written off.
 - c) In relation to those customers affected by breach 6, in addition to offering to return these monies, as set out at paragraph 5.12, BES has agreed to amend invoices and reduce amounts owing where customers have been charged higher deemed rates. BES will be attempting to contact all affected customers to explain the failing; to offer contract rates where the customer is still on higher deemed rates; and to offer all affected customers, should they so choose, the opportunity to terminate their contracts with BES without incurring a termination fee.
 - d) BES has also agreed to commission and pay for an audit by an appropriately qualified external firm, agreed with Ofgem, to ensure that the exercise set out at sub-paragraph a) above is carried out effectively.
- 5.13. BES has also worked with Ofgem during the investigation to make the necessary changes to contract validation scripts; to amend the Statement of Renewal letter; to ensure that deemed customers are not wrongly blocked for transferring to another supplier; and BES has made significant efforts to improve their performance and achieve compliance in relation to complaints handling. However, BES has not up to now made contact with affected customers to make compensatory payments where appropriate.

The duration of the contravention or failure

- 5.14. The duration of the contraventions is significant, particularly breaches 1 and 2 (communication of principal terms) which have a breach period of over 5 years.

The gain (financial or otherwise) made by the licensee

- 5.15. The Authority finds that for a period of five years BES has failed to communicate, prior to the contract being agreed, principal terms relating to price and termination fees in electricity and gas contracts sold to micro business consumers. During the period of breaches 1 and 2 BES acquired over 30,000 customers. The Authority considers that BES would not have made all these acquisitions had the principal terms been communicated appropriately and therefore has made a significant financial gain and it is likely that there is present an element of ongoing gain. As set out above at paragraph 5.12 sub-paragraph (a), BES has agreed to write to all customers who entered into contracts with the company during the breach period and who have previously contacted them to express dissatisfaction about any matter relevant to breaches 1 to 3. These customers will be offered the opportunity to cancel their contracts with BES and no termination fee will be imposed, should they choose to do so and this will be audited (by an independent firm agreed with Ofgem and at BES' expense) to ensure full compliance.
- 5.16. In respect of the failure to explain the principal term relating to minimum usage, the Authority notes that BES has received £212,000 from over 7,000 customers. These customers were not made aware of the possibility of the minimum usage charges at the time they agreed the contract.
- 5.17. In respect of the failure to explain the principal terms relating to termination fees, the Authority notes that BES has received over £80,000 from customers who were not informed at the time they agreed the contract about the existence of or calculation of the termination fee. Other BES customers, who would have discovered the termination fee and its method of calculation only after they entered into their contracts, would likely have been inhibited from switching to another energy supplier.
- 5.18. In respect of the transfer blocking of those on deemed contracts, BES has received over £250,000 in revenue that it would not have received, had the company allowed the customers to switch to their preferred supplier. The Authority notes that BES has made a financial gain from these contracts.
- 5.19. In respect of complaints handling, BES has gained in terms of costs avoided in providing an appropriate level of customer service and handling expressions of dissatisfaction received in an appropriate and compliant way during the period January 2013 to October 2014. Recent actions taken by BES have seen significant investment in new staff, IT, training and new processes. The Authority considers that BES has gained financially by avoiding investing in these resources in the past.

The Authority's position concerning deterrence of future breaches (Breach 7 only)

- 5.20. In setting the level of penalty for Breach 7, the Authority has also taken into consideration its stated position on deterrence of future breaches as set out in the Chairman's Letter.
- 5.21. As set out at paragraph 4.5, the Authority considers that enforcement should deliver strong deterrence against non-compliance and ensure regulatory compliance is given sufficient focus within businesses. The Authority's decision to place greater emphasis on deterrence in its enforcement work will be reflected in the level of financial penalties it imposes in appropriate cases.
- 5.22. The Authority has carefully considered the circumstances of Breach 7, including BES's actions with regard to regulatory compliance. In view of this, the Authority considers that the penalty it imposes to the extent it reflects Breach 7 must act to deter future breaches and reinforce the need for senior management to ensure regulatory compliance going forward.

Factors tending to increase the level of penalty

Repeated contravention or failure

- 5.23. This is the first Ofgem investigation into BES and BES took steps to remedy certain practices as they have been highlighted during this investigation and in some cases, prior to the investigation. The Authority does not consider that this factor applies.

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

- 5.24. In respect of breaches 1-3, there has been a continuation of the contravention subsequent to the breaches being brought to the attention of BES by Ofgem (in July 2014 and at various points subsequently), but the Authority notes that BES has engaged positively in correspondence in an effort to improve contract validation scripts so that principal terms are now communicated appropriately prior to the contract being concluded.
- 5.25. In respect of breach 6, the contravention was pointed out to BES' senior management by Citizens Advice in April 2013 and the contravention continued until June 2014.
- 5.26. The Authority considers, therefore, that this factor applies.

The involvement of senior management in any contravention or failure

- 5.27. The Authority considers that BES' senior management implemented policies that were not compliant with the SLCs.
- 5.28. BES' senior management was responsible for planning, resourcing, and implementing appropriate systems and processes to ensure compliance.

- 5.29. Senior management was involved in the drafting and approval of contract validation scripts and the presentation of information provided and omitted would have been apparent to senior management.
- 5.30. In relation to breach 6 and the blocking of customer transfers of those on deemed contracts, the Authority notes that a member of the senior management team dealt with the correspondence with Citizens Advice that was not acted upon appropriately until over a year later.
- 5.31. In relation to complaints handling, the Authority considers that BES' senior management did not allocate enough resources to record and deal appropriately with the complaints it was receiving and to monitor and audit that process.
- 5.32. For the reasons given above, the Authority considers that this factor applies.

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

- 5.33. The Authority considers that BES' failure to respond to complaints from its customers, relevant to the breaches asserted in this document, provides evidence of an absence of appropriate internal mechanisms to record complaints, handle them appropriately and to take suitable remedial actions. The Authority considers that this factor applies.

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

- 5.34. The Authority considers that there is no evidence that BES attempted to conceal the contraventions, and therefore does not consider that this factor applies.

Factors tending to decrease the level of penalty

The extent to which the licensee had taken steps to secure compliance either specifically or by maintaining an appropriate compliance policy, with suitable management supervision

- 5.35. There is no evidence to suggest the licensee had taken steps to secure compliance, prior to Ofgem's intervention in these matters and therefore the Authority does not consider that this factor applies.

Appropriate action taken by the licensee to remedy the contravention or failure

- 5.36. Since engaging with Ofgem BES has made improvements to its contract validation scripts, Statement of Renewal letters, processes around deemed contracts, and complaints handling procedures. Although some of these improvements have taken time to deliver, the Authority notes that BES has made significant efforts to remedy its breaches. The Authority also acknowledges the arrangements to pay compensation to customers affected by breaches 1 to 3 and 6 set out at paragraph 5.12 above which BES has agreed to deliver. Therefore, the Authority considers that this factor applies.

Evidence that the contravention or failure was genuinely accidental or inadvertent

- 5.37. The Authority notes that there has been contact between BES and Ofgem in relation to compliance with SLC 7A in 2010 and 2011, prior to the present investigation. This followed the introduction of the (then) new licence conditions placing obligations on suppliers with regard to their micro business consumers, including the requirements to communicate principal terms of contracts.
- 5.38. At that time Ofgem had sight of certain of BES' documents and processes which are the subject of the current investigation. BES has asserted that this previous contact with Ofgem shows that the contraventions were not deliberate and should be taken into account in relation to the level of any penalty.
- 5.39. The Authority considers that responsibility for regulatory compliance rests with the boards of directors of the companies that it regulates. Whilst it welcomes communication from regulated parties on a range of matters, it considers that responsibility for compliance remains with the relevant business.
- 5.40. The Authority has considered the representations made by BES, including the correspondence referred to. It considers that the context in which this correspondence took place and the content of the correspondence made clear that Ofgem's purpose was not to approve licensees' processes and documentation and stated that compliance with licence conditions and other relevant requirements are the responsibility of the supplier.
- 5.41. Whilst noting the previous contacts and BES' views in relation to those contacts, the Authority considers that BES, faced with very significant levels of dissatisfaction from its own customers, should have taken steps to improve or adapt its process to ensure compliance with its licence obligations.
- 5.42. For these reasons the Authority does not consider that this factor applies.

Reporting the contravention or failure to Ofgem

- 5.43. Ofgem opened the investigation into BES following a formal referral from Citizens Advice and a significant number of complaints about the licensee from consumers and Members of Parliament representing their constituents. There was no element of self-reporting from BES. Therefore, the Authority does not consider that this factor applies.

Co-operation with Ofgem's investigation

- 5.44. BES has responded to all requests for information on time and has complied with Ofgem's investigation process. However, the Authority considers that this mitigating factor should only apply where cooperation has gone beyond what would be expected of any licensee facing enforcement action. In this case, BES has additionally accepted its breaches and agreed to settle the case at the earliest opportunity. This has achieved a speedier resolution and avoided additional spending of resource by the regulator. Accordingly, the Authority considers that a discount can be applied and the aggregate of the financial

penalty and any amount of consumer redress is a lower figure than would have been the case if BES had not agreed to settle.

6. The Authority's decision

- 6.1. Taking into account all of the above, the Authority considers it appropriate to impose a financial penalty on BES. In reaching this decision the Authority has considered in particular the following:
- a) BES' breaches of SLCs 7A, 7B, 7 and 14, and of Regulations 4 and 5 of the CHSRs are serious;
 - b) the duration of these breaches in some cases exceeds five years;
 - c) BES has made a significant financial gain from some of the breaches;
 - d) three factors tending to increase the level of penalty apply (see paragraphs 5.26, 5.32 and 5.33);
 - e) two factors tending to decrease the level of penalty apply (see paragraphs 5.36 and 5.44); and
 - f) any penalty to the extent it relates to Breach 7 is required to deter future breaches and help ensure that regulatory compliance is given sufficient focus within the business in the future in accordance with the position set out in the Chairman's Letter.
- 6.2. However, the Authority has also taken into account that BES has offered to pay £980,000 in total by way of settlement of this case. Of this amount it has undertaken to pay compensation totalling £311,000 to consumers affected by breaches 1 to 3 and 6 as set out at paragraph 5.12 of this notice. It has offered to pay the remainder (including any amounts which cannot be returned to affected consumers) to an appropriate consumer charity identified by BES and approved by the Authority. It has also made the commitments set out at 5.12(a).
- 6.3. The payment of consumer redress is to be made to the charity The Money Advice Trust / Business Debtline. The redress payments (the initial sum, plus any amounts which cannot be returned to affected consumers) will be used to fund a specific project in which Business Debtline will provide debt advice services to business customers who are experiencing difficulties in paying their energy bills.
- 6.4. Having considered all the circumstances of the case, the Authority considers this compensation and redress package will be of greater benefit to consumers overall than if a significant financial penalty were to be imposed.
- 6.5. In the circumstances, and in recognition of the compensation and redress payments to be made for the benefit of consumers, the Authority hereby gives notice under section 27A(3) of the Electricity Act and section 30A(3) of the Gas

Act of its proposal to impose a penalty of £2 on BES¹⁸ in respect of the contraventions set out above provided that, pursuant to the direction of the Authority, and in any event by no later than the date of any final penalty notice issued by the Authority pursuant to section 30A(5) of the Gas Act and section 27A(5) of the Electricity Act, BES has paid compensation and consumer redress as set out at paragraph 6.2 above and has complied with the associated arrangements set out at paragraph 5.12 above.

- 6.6. Any written representations with respect to the proposed penalty must be received by Pat Ogan, patrick.ogan@ofgem.gov.uk or Ofgem, 9 Millbank, London, SW1P 3GE) by **5pm on 16 December 2015**.
- 6.7. Any representations or objections 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 and give reasons for this request. Any such requests will be considered by Ofgem on a case by case basis.

Gas and Electricity Markets Authority

25 November 2015

¹⁸ £1 each on BES Commercial Electricity Ltd and Business Energy Solutions Ltd.