

**NOTICE OF DECISION TO IMPOSE A FINANCIAL  
PENALTY PURSUANT TO SECTION 27A(5) OF THE  
ELECTRICITY ACT 1989**

**Date: 5 May 2021**

Decision of the Gas and Electricity Markets Authority 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**") has made a determination to impose a financial penalty on Symbio Energy Limited ("**Symbio**"), company number **07999360, registered address**, Integer Millennium House Bre Innovation Campus, 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.

1.3. The Authority has taken account of the relevant facts and circumstances of the contraventions, in particular the unprecedented challenges presented by the Covid 19 pandemic. It has taken into account all of the representations received which include the written representations made by Symbio dated 24 February 2021, its further comments in correspondence dated 25 February 2021, written submissions dated 14 March 2021 and its oral representations made to the Authority on 22 March 2021 and

additional financial information provided after the oral hearing (“**Symbio’s Representations**”). The Authority has also considered representations made by Centrica Plc dated 8 and 11 March 2021 (“**Centrica Representation**”) and the representations received from a member of the public dated 28 January 2021 and 3 November 2020. The Authority has also sought and obtained further representations from the Ofgem case team. The Authority’s response to the representations received are set out at Annex 1.

1.4. The Authority hereby confirms its original proposal to impose a penalty of £100,000 on Symbio for the reasons set out below.

1.5. The Authority appreciates the efforts that energy suppliers have gone to which have been critical to keeping essential energy supplies flowing to customers. This has required suppliers to make difficult judgments in a fluid situation as the Covid 19 pandemic has made business and payment conditions very challenging for all participants in the energy market from consumers, from suppliers to network operators. These circumstances have made it particularly difficult to make the necessary payments under the Government’s environmental schemes this year. Notwithstanding these challenges, 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.

1.6. A summary of the contraventions is as follows:

1.6.1. 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.

1.6.2. 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 the outstanding sum of £174,087.64 on 18 November 2020. Symbio made the payment on 10 December 2020, following a partial payment of £171,000 on 17 November 2020.

1.6.3. Symbio was required to present Renewable Obligation Certificates by 1 September 2020 or make a payment in lieu by 31 August 2020. Regulated persons who fail to discharge their obligations by 1 September 2020 had until 31 October 2020 to make late payment(s). During the late payment period only, late payments are subject to statutory daily interest on top of the amount owed. This is calculated on a daily basis at a rate of 5% plus the Bank of England base rate per annum. By 1 September, Symbio paid its ROS in full, but made only 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 Authority was satisfied that (a) Symbio was likely to contravene the requirement to pay the then 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 then outstanding sum of £506,308.40, plus accrued interest, by 31 October 2020<sup>1</sup>. 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.

1.6.4. 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.

1.7. The Authority notes that Symbio has admitted the contraventions at paragraphs 1.6.1, 1.6.2 and 1.6.3. It has admitted the pertinent facts associated with the contravention at paragraph 1.6.4. The Authority is satisfied that Symbio has contravened the RO and SLC 33 as set out at paragraphs 1.6.1 to 1.6.4 above.

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<sup>1</sup> Regulated persons who failed to discharge their RO obligations by 1 September 2020 had until 31 October 2020 to make a late payment.

- 1.8. In its notice of [proposal to impose a financial penalty dated 27 January 2021](#) ("Proposal Notice") the Authority indicated that it was minded to impose a reduced financial penalty of £85,000 if Symbio accepted the imposition of the proposed financial penalty and agreed to forgo the opportunity to make further representations. After the publication of the Proposal Notice, Symbio notified the Authority that it did not accept the imposition of the financial penalty as proposed. Given Symbio's choice not to accept the penalty as proposed and the conclusion of the Authority that it is appropriate to impose the penalty as proposed after having carefully considered the content of Symbio's further representations (and the representations of others), the Authority has not reduced the penalty to £85,000.
- 1.9. In accordance with section 27A (2) of the Electricity Act 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 accepted that it did not make these payments on time. Symbio has offered various explanations for its failure to make these payments on time, primarily relating to the impact of the Covid-19 pandemic on its business, which are considered further in sections 3 and 4 below. It 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 view whether it is appropriate to impose a financial penalty, the Authority has considered all the circumstances of the case including the representations listed above 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 could have 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. Late payment causes costs to be imposed on other market participants as it delays their receipt of funds via the FIT levelisation<sup>2</sup> and the Renewables Obligation mutualisation<sup>3</sup> processes. Late payment by Symbio contributed to payments to other suppliers being delayed. Late payments can result in an unfair competitive advantage for the late payer in relation to rival market participants who pay on time.

3.4. Late payment creates administrative cost for the Authority because of the additional steps it needs to take to pursue payment, and steps taken outside the normal mutualisation processes in order to redistribute sums to other suppliers in an equitable way.

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<sup>2</sup> The levelisation process is the mechanism by which the cost of the FIT scheme is apportioned across Licensed Electricity Suppliers. The cost is apportioned based on each supplier's share of the Great Britain electricity market, whilst taking into account any FIT contribution they have already made.

<sup>3</sup> Mutualisation is the mechanism whereby a shortfall in the RO Scotland and/or RO England & Wales buy-out funds which meets a certain threshold ("relevant shortfall") requires all compliant and partially compliant suppliers who have an obligation under the RO (Scotland) or RO (England & Wales) to make additional payments to make up the shortfall. A "relevant shortfall" is £15.4m in England & Wales and £1.54m in Scotland. Mutualisation does not apply to the RO (Northern Ireland).

- 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. From the evidence provided, other suppliers who paid late either paid by the late payment date under the RO or the ROS, or they ceased trading and had their licence revoked, or they are facing enforcement action. The Authority considers that Symbio was treated in an appropriately similar way to other suppliers.
- 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. While the Authority recognises the challenges faced by small and new suppliers during the Covid-19 pandemic, particularly as regards access to credit, it considers that due to the legislative requirements imposed on the Authority, it is not in a position to extend credit or offer deferred payment plans to those suppliers without adversely affecting other suppliers who are also likely to be facing financial challenges.

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 failed to meet its obligations in relation to environmental scheme payments on four separate occasions during the period between 1 August 2020 and 31 December 2020. While those five months coincided with the severe financial impact of the Covid pandemic, the Authority has taken account of that as a mitigating factor as explained below. The Authority considered Symbio's Representations in this regard. However, the Authority considers that the likely damage to the interests of consumers and market participants caused by Symbio's failure to meet its obligations on these occasions is such that the imposition of a penalty is necessary to deter future contraventions on the part of Symbio or others and to encourage compliance.

3.10. 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 and the impact late payment has on other market participants and the potential impact on consumers.

3.11. 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. In response, Ofgem issued very clear warnings about the potential for enforcement action and has pointed suppliers to the enforcement action which has been taken. In the majority of cases, these warnings have resulted in prompt payment. 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 sums due under financial obligations has consequences and will cost more.

3.12. 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 its ability more broadly to protect the interests of consumers.

Whether the contravention or failure was deliberate or reckless

- 3.13. Although the Authority accepts that Symbio's failure to make the payment described at paragraph 1.6.4 appears to have been due to oversight, it has considered the contraventions collectively and in the round rather than on an individual basis. The Authority accepts that Symbio did not set out to fail to make the payments on time, but it was certainly cognizant of the requirements to pay the sums due. The Authority considers that Ofgem had done all that it reasonably could to alert Symbio to the consequences of late or non-payment as there had been extensive engagement, warnings about enforcement action and commencement of enforcement action.
- 3.14. 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 other letters sent to suppliers on 06 May, 17 July and 28 August 2020.
- 3.15. The Authority acknowledges that Symbio (and other suppliers) have suffered financial difficulties due to the impact of the Covid-19 pandemic. The Authority appreciates that the Government asked 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 distress<sup>4</sup>. On 16<sup>th</sup> June 2020 Ofgem's CEO wrote to all energy supply companies to set out the regulatory expectations of them. The letter stated "we expect suppliers to continue to provide strong support for those customers struggling to manage their energy costs, including continuing to honour the voluntary agreement with BEIS." In relation to customer debt management the letter went on to say "we recognise that suppliers cannot extend unlimited credit to customers – nor is this in customers' interests overall – and we anticipate suppliers will begin to restart debt management activities that may have been paused during the immediate crisis." In relation to payments which are relevant to this case, the same letter stated "We have

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<sup>4</sup> Voluntary agreement between the Department for Business, Energy & Industrial Strategy and domestic energy suppliers dated 19 March 2020



been clear that suppliers must comply with their scheme payments, eg Feed-in-tariff (FIT), Renewables Obligation (RO) and Warm Homes Discount (WHD) for the current financial year. As always, we will take appropriate enforcement action where suppliers do not comply.”

- 3.16. In a separate letter to industry dated 2 June 2020 the Authority set out arrangements designed to assist suppliers so far as possible. In addition to the well-publicised schemes for businesses announced by the Government, the Authority arranged relief for energy suppliers in the form of a deferral scheme for certain network charges incurred by suppliers.
- 3.17. Despite the Covid pressures, the Authority has made it clear 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 also notes that the majority of other suppliers have been able to put financial arrangements in place to make their RO and FIT payments on time, despite the impact of the Covid-19 pandemic.
- 3.18. The Authority notes, that the late payment of £55.80 in relation to the RO and ROS mutualisation appears to have been an oversight. The Authority notes that Symbio sought and was refused credit from its bank in late September 2020. It also notes that Symbio disputed the FIT Year 11 Quarter 1 payment amount after the date on which it was due in August 2020 before paying it in full late in September 2020. For this latter payment, the Authority also notes from the correspondence referred to in Symbio’s Representations that Symbio did not cite cash flow difficulties at the time as a reason for late payment.
- 3.19. The Authority notes that Symbio’s business model, with no share capital or available credit facilities in place, exposed it to suffering cashflow difficulties in circumstances when customers pay late. The circumstances presented by the Covid-19 pandemic are unprecedented and very difficult. Had Symbio taken action sooner to rise to these challenges, it may have been possible to pay on time as is demonstrated by the fact that it did end up finding the funds to pay. Ofgem was vigorous in its attempts to underline to Symbio the need for it to take action to enable it to pay the sums it owed. Before taking the steps it took to improve cashflow, and in the absence of Ofgem having

powers to offer deferment, Symbio resorted to paying late. In this sense, Symbio's inaction, in failing to secure a means of making timely payment, resulted in it breaching its obligations. Symbio was aware that this inaction would result in it breaching its obligations. Therefore, while the Authority recognises that Symbio's actions may not have been deliberate in the sense that it did not set out with an intention to contravene its obligations, its conscious decision making in very difficult circumstances, made with a clear understanding of the nature of its obligations, led directly to the breaches occurring.

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

3.20. The Authority acknowledges Symbio's financial difficulties, and in particular the impact of the Covid-19 pandemic. It has taken account of this as a mitigating factor as set out below. 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. Symbio took steps to recover customer debt and to acquire new customers in order to be able to pay its obligations late. It was within Symbio's control to have taken those steps sooner.

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

3.21. The Authority considers that the breaches were apparent to Symbio. The Authority engaged with suppliers generally with regard to their payment obligations. In particular:

- 3.21.1. 06 May 2020: Ofgem sent a letter to suppliers outlining the key deadlines and actions required for the Renewables Obligation 2019-20 Obligation Period.
- 3.21.2. 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.
- 3.21.3. 17 July 2020: Ofgem's Director of Conduct and Enforcement sent a letter to suppliers reiterating Jonathan Brearley's message in his 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.

3.21.4. 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.

3.22. The Authority also engaged extensively with Symbio directly with regard to its payment obligations and Symbio responded albeit that the content of Symbio's engagement often contained a lack of clarity over its ability to pay on time. In particular, the Authority reminded Symbio of its payment obligations as follows:

3.22.1. 28 May 2020: email from Ofgem noting that it had not received a response from Symbio to its letter of 6 May 2020 confirming how Symbio expected to meet its RO Payment for 2019 – 2020.

3.22.2. 28 July 2020: email from Ofgem reminding Symbio that its the FIT Year 11 Quarter 1 levelisation payment was due.

3.22.3. 5 August 2020: Email and letter from Ofgem reminding Symbio of its RO obligations.

3.22.4. 12 August 2020: letter from Ofgem noting that Symbio had not made the the FIT Year 11 Quarter 1 levelisation payment.

3.23. 13 August 2020: email from Ofgem answering a query from Symbio with regard to the amount of the FIT Year 11 Quarter 1 levelisation payment and confirming that the matter of late payment had been referred for enforcement action.

3.24. 26 August 2020: email from Ofgem reminding Symbio of its RO obligations.

3.25. 8 September 2020: email from Ofgem asking Symbio for robust assurance that it would make its RO and its FIT, Year 11, Quarter 2 Levelisation payment on time.

3.26. 9 September 2020: email from Ofgem reminding Symbio that it was due to make payment of its RO payment by 31 October 2020 and that its failure to do so could trigger enforcement action following by an email later that from Ofgem confirming that the Authority intends to use a Notice of Proposal to make a Final Order by Friday of that week.

- 3.27. 11 September 2020: email from Ofgem asking for clarification of what Symbio will pay and when.
- 3.28. 21 September 2020: email from Ofgem asking for assurance that that Symbio will make its RO payment on time – Ofgem asked for confirmation by close of business the following day, failing which Symbio would face enforcement action.
- 3.29. Ofgem also reminded Symbio of its obligations on a number of calls between 11 June 2020 and 23 October 2020.

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

- 3.30. The Authority notes that Symbio did pay all of the outstanding amounts, albeit late. This happened after extensive compliance engagement and/or formal enforcement action by the Authority. It was apparent to Symbio, given the extensive correspondence set out at Annex 2, that it was required to take action to ensure that it was in a position to meet its obligations in accordance with the statutory deadlines for doing so. A letter to all energy suppliers and network operators (amongst others) from Ofgem’s CEO of 2 June 2020 outlined the support available to energy suppliers facing cash flow issues. It highlights some of the options which Symbio needed to consider which included commercial lending, government support schemes for business and pointing customers to government support schemes<sup>5</sup>. In a letter to all suppliers from Ofgem’s CEO of 16 June 2020<sup>6</sup> it was stated that it was anticipated that suppliers will begin to start their

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<sup>5</sup> “As a consequence of the impacts on the energy supply chain, suppliers (and in turn shippers) may find themselves experiencing cash flow issues, which could have negative impacts on consumers. We would expect suppliers and shippers with cash flow issues to seek to access commercial or the government’s and Bank of England financial support facilities.”

<sup>6</sup> “However, we recognise that suppliers cannot extend unlimited credit to customers nor is this in customers’ interests overall and we anticipate suppliers will begin to restart debt management activities that may have been paused during the immediate crisis.”

debt management activities. The Authority concludes that Symbio had not organised itself and its financial affairs so as to make payments on time.

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

3.31. This is the first time that Symbio has been the subject of an enforcement case which has resulted in the imposition of a financial penalty. The penalty relates to four separate contraventions by Symbio over a five month period. During that period, a final order was issued in relation to late payment of the Renewables Obligation and a statutory demand for payment was issued in relation to late payment of the FIT year 11 Q2 levelisation payment. The Authority also advised Symbio that the issuance of a Notice of Proposal of Final Order was imminent in respect of the FIT, Year 11, Q1 levelisation payment. Therefore, enforcement action was taken or threatened in respect of three of the four contraventions. 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. This compliance history has informed Ofgem's decision to pursue a penalty on this occasion.

3.32. 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 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 Authority considers that there is likely to have been a gain to Symbio and detriment caused to other market participants, and that there is potential detriment to consumers.. This is because:

- 4.3.1. Late payment causes administrative cost to the Authority as described at paragraph 3.4 above.;
- 4.3.2. Late payment of the RO triggers mutualisation<sup>7</sup> and late payment under the FIT scheme triggers levelisation<sup>8</sup>. This results in additional costs being levied on compliant licensees and delayed receipt of payments. Therefore, this cost is borne by market participants and that cost may be passed to consumers. Symbio's late payment contributed to both mutualisation and levelisation.

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<sup>7</sup> See footnote 6 above.

<sup>8</sup>See footnote 5 above.

4.3.3. Symbio may have gained an unfair financial advantage by avoiding the cost of commercial credit and the cost of levelisation borne by compliant suppliers.

4.4. The Authority is not however able to quantify with any accuracy the amounts of the potential gain or detriment. Accordingly, the Authority has considered the seriousness of the contravention to determine the appropriate penalty, in accordance with the Penalty Statement at §§5.8, 5.10.

## Step 2 - Seriousness

4.5. The Authority considers that the breaches are of a moderate degree of seriousness when considered collectively, though it notes that the breach of £55.80 would not be regarded as moderate in isolation. In particular:

- The amount of the late payment was £1,152,335.64 in total, which is a significant sum.
- The degree of delay in payment was, in each instance, sufficient to contribute to the triggering of the mutualisation mechanisms which means that detriment is likely to have been caused to other market participants in the form of delayed receipt of payments, and that detriment may have been passed on to consumers. This delay is considered to be more significant in the circumstances of the Covid-19 pandemic when other suppliers may also be facing financial difficulties.
- Although it is the responsibility of each supplier to arrange to meet its regulatory responsibilities without prompting, the Authority has been vigorous in its efforts to alert suppliers to their obligations, to encourage early action to ensure that suppliers can meet them, and to avert contravention.

4.6. The Authority considers the appropriate penal element to be £100,000. This is approximately 8.7% of the sums that Symbio paid late. As is set out in the Penalty Statement, it considers that non-compliance should cost significantly more than compliance and that financial penalties should act as a significant deterrent to future non-compliance.

4.7. The Authority has taken account of Symbio's operating profit and turnover, as disclosed in its accounts dated 1 January 2019 to 31 March 2020, and of its draft profit and loss accounts for April 2020 to March 2021, noting that the company has grown rapidly

between these two periods. The Authority has also taken into consideration that no interest is charged on late payments in relation to RO payments made after 31 October.

4.8. The Authority considers the sanction to be fair, reasonable and proportionate.

### Step 3 – Aggravating and Mitigating Factors

4.9. 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.

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

- There have been repeated contraventions or failures over a five month period despite clear explanations of the Authority's expectations and warnings from the Authority.
- Symbio has made payments after enforcement action has been threatened or commenced. These processes have been time and resource intensive.
- Enforcement action has previously been taken against Symbio on a separate matter.
- Symbio's communications over whether it would be in a position to pay on time were repeatedly unclear and inconsistent. Symbio's senior management said that a payment of £152,000 was made toward the FIT year 11 Q1 payment when it was not. Although the Authority notes that this was likely due to oversight on Symbio's part due to a change in banking arrangements, these exchanges revealed serious weaknesses in Symbio's financial management or compliance procedures.

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

- A significant mitigating factor is that the Covid-19 pandemic has presented suppliers with unprecedented and unexpected cash flow challenges. Symbio has sought to honour the voluntary agreement with BEIS to provide strong support to customers who were struggling to manage their energy costs. This forbearance has resulted in an increasing burden of customer debt which has contributed to Symbio's failing to make the required payments on time. These circumstances meant that Symbio needed to consider and balance reassessing payments for customers in financial distress, its difficulty in accessing credit facilities, deferring payments with creditors and meeting its regulatory obligations in order to take timely corrective action. The Authority recognises that as a



relatively new supplier it was difficult for Symbio to gain access to credit facilities. It also notes that the agreement with BEIS was voluntary and that the letter from Ofgem's CEO of 16 June 2020 was clear that suppliers must meet their scheme payments notwithstanding the terms of that voluntary agreement. Whilst the Authority recognises that the above set of circumstances and considerations would have been very challenging to address and balance, it is the responsibility of suppliers of any size or newness to meet their regulatory responsibilities. Nonetheless, the Authority recognises this as a significant mitigating factor.

- A minor mitigating factor is that in response to this enforcement action Symbio accepted three of the breaches and the pertinent facts relating to the fourth breach.

4.12. The Authority considers that the above-noted mitigating and aggravating factors balance each other so that they do not merit any adjustment to the level of penalty from £100,000.

#### Step 4 – Adjustment for Deterrence

4.13. The Authority has not applied a further adjustment for deterrence.

#### Step 5 – Settlement Discount

4.14. No settlement discount has been applied. Due to the strict legislative time restrictions where a provisional or final order has been made, the settlement process as set out in section 5 of the Enforcement Guidelines does not apply<sup>9</sup>. As an alternative to that process, the Authority's proposal to issue a penalty notice included a reduced penalty of £85,000 if Symbio accepted the imposition of the proposed penalty and agreed to

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<sup>9</sup> Paragraph 1.13 of the Enforcement Guidelines permits a flexible approach where justified by the circumstances of the case.

forgo the opportunity to make further representations. Symbio did not take up that proposal.

## Step 6 – Total Liability

4.15. Having considered all of the above matters, the Authority hereby confirms its proposal and has decided to impose a penalty of £100,000.

## **5. The Authority's Decision**

5.1. The Authority has found that Symbio contravened the following relevant conditions and requirements:

- Article 68 of the **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 **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.

5.2. Having considered all of the relevant facts and circumstances in its possession, including the representations listed at paragraph 1.3, the Authority has decided to impose a financial penalty of £100,000 on Symbio.

5.3. The Authority has set out in more detail the facts, circumstances and representations it considered in reaching this decision in the Response to Representations at Annex 1 to this Notice.

5.4. The penalty must be paid to the Authority by 5 pm on Wednesday 23 June 2021.

*The Enforcement Decision Panel agreed to impose the financial penalty as set out in this notice on 28 April 2021.*

*Signature:*

# Penalty notice

**ofgem**

Making a positive difference  
for energy consumers

*Name: Jennifer Todd*

*Job Title: Senior Governance and Secretariat Manager*

*Signed for and on behalf of*

***Megan Forbes (Chair)***

***Andrew Long***

***Amelia Fletcher***

***Enforcement Decision Panel***

***duly authorised on behalf of the Authority***