

**The Energy (Northern Ireland) Order 2003 and the Water and
Sewerage Services (Northern Ireland) Order 2006**

Statement of Policy with respect to Financial Penalties

STATEMENT OF POLICY WITH RESPECT TO FINANCIAL PENALTIES

PURSUANT TO ARTICLE 46 OF THE ENERGY (NORTHERN IRELAND) ORDER 2003 AND ARTICLE 36 OF THE WATER & SEWERAGE SERVICES (NI) ORDER 2006

BACKGROUND

- 1.1 The Energy (Northern Ireland) Order 2003, as amended (“the Energy Order”) provides that in certain circumstances the Northern Ireland Authority for Utility Regulation (“the Utility Regulator”) may impose a financial penalty on any electricity or gas licence holder. The Water & Sewerage Services (Northern Ireland) Order 2006 (“the Water Order”) provides that in certain circumstances the Utility Regulator may impose a financial penalty on any relevant undertaker (i.e. a company appointed as a licence holder for the provision of water or sewerage services).
- 1.2 Both the Energy Order and Water Order (together “the Orders”) further provide that the amount of such a penalty must be reasonable in all the circumstances of the case, and that it must not exceed ten percent of the turnover of the licensee.¹
- 1.3 The Orders require the Utility Regulator to prepare and publish a statement of policy with respect to the imposition of a penalty, and to the determination of its amount. This statement has been prepared to revise the original statement which applied only to the imposition of penalties under the Energy Order. This statement now therefore adopts a cross-utility approach to make provision for the Utility Regulator’s role and responsibilities in respect of the imposition of financial penalties and the determination of their amount as regards any holder of a licence for water or sewerage services in Northern Ireland.
- 1.4 The Utility Regulator may not impose a penalty on a licence holder under the Orders where it is satisfied that the most appropriate way of proceeding is under the Competition Act 1998. The Utility Regulator has powers to investigate and fine companies under the Competition Act 1998. If the investigation proves to be one that should be investigated under Competition Act powers then that route will be chosen. The Utility Regulator will take this into account throughout its procedures and deliberations.
- 1.5 The Orders lay out procedures for notifying and consulting affected parties. In imposing any penalty, the Utility Regulator will follow the procedural requirements set out in the Orders. In addition, and in recognition of the fact that it retains an

¹ Meaning 10% of *applicable* turnover in the preceding business year - as supplemented and determined in accordance with the Electricity and Gas (Determination of Turnover for Penalties) Order (Northern Ireland) 2005 in the case of electricity and gas licence holders and the Water Industry (Determination of Turnover for Penalties) Order (Northern Ireland) 2007 in the case of penalties imposed on a water or sewerage services licence holder.

appreciable degree of discretion when considering the imposition of a financial penalty, the Utility Regulator shall set out its own procedural guidelines in this document for the purposes of transparency and in keeping with the Better Regulation Executive's principles of best regulatory practice.

Financial Penalties – General Principles

- 2.1 The primary purpose of the financial penalty system is to give companies an incentive to comply with statutory and regulatory requirements now and in the future. Penalties must be reasonable in the circumstances of the case and should also be such as to provide an adequate incentive both to the company in question and to other companies in the sectors we regulate, to comply.
- 2.2 Dependent upon whether a proposed financial penalty is intended to be imposed upon a gas, electricity, water or sewerage services licence holder, the Utility Regulator will need to consider the relevant legislative provisions as set out in either the Energy Order or Water Order as the case may be. Recognising that the relevant provisions within the Orders are similar but essentially different, there are nevertheless three common questions which the Utility Regulator is required to address, prior to imposing a financial penalty on each type of licence holder which it regulates. These are:
 - Is the Utility Regulator satisfied that the licence holder has contravened or is contravening any relevant condition or requirement, or has failed to achieve any standard of performance set in accordance with the relevant provisions of the Orders?
 - If so is it appropriate to impose a financial penalty?
 - If so, what amount is reasonable in all the circumstances of the case?
- 2.3 The Utility Regulator adheres to the principles of best regulatory practice as set out by the Better Regulation Executive -: namely those principles which state that regulatory action should be transparent, consistent, accountable, targeted, and proportionate. We believe that the following procedural guidance adheres to such principles.

PROCEDURAL GUIDANCE & CRITERIA FOR THE IMPOSITION OF A PENALTY

Stage 1: Substantiating a Breach

- 3.1 Before deciding to impose a financial penalty under the Energy Order, the Utility Regulator must be satisfied that the licence holder has contravened or is contravening any relevant condition of its licence or other requirement, or has failed to achieve any standard of performance set in accordance with specified provisions of the Energy Order. In deciding firstly whether a condition or requirement is a relevant condition or requirement, secondly whether there has been a contravention of that condition or requirement, and thirdly whether there has been a failure to achieve a standard of performance, the Utility Regulator will seek to obtain all relevant evidence to substantiate the breach in question and will fully explain the basis for final decisions made on a case by case basis. The

Utility Regulator reserves the right to rely on assumptions, estimates and opinions in the absence of correct or sufficiently precise data being provided by the licence holder in question.

- 3.2 Before deciding to impose a financial penalty under the Water Order, the Utility Regulator must be satisfied that the licence holder has contravened or is contravening any condition of its licence (its instrument of appointment) or that it has failed or is failing to achieve any standard of performance set in accordance with specified provisions of the Water Order (and prescribed in separate regulations) or has contravened any other enforceable requirement under the Order. The Utility Regulator will seek to obtain all relevant evidence to substantiate the breach in question and will fully explain the basis for final decisions made on a case by case basis. The Utility Regulator reserves the right to rely on assumptions, estimates and opinions in the absence of correct or sufficiently precise data being provided by the licence holder in question.

General Criteria

Stage Two – Whether to Impose a Penalty or Not

- 4.1 Once satisfied that a contravention or failure of service (or a contravention of any relevant requirement or any provision of the Community Regulation in the case of the Energy Order only) has occurred or is occurring, the Utility Regulator will have to decide whether a financial penalty should be imposed and at what level.
- 4.2 The Utility Regulator will take full account of the particular facts and circumstances of the contravention, failure, or general breach under consideration. It will also take full account of any representations or objections made to it by interested parties by seeking either written or oral evidences as necessary in the case. Any contravention or failure that may arise from circumstances or events outside the control of the licensee will not incur any penalty, provided the Utility Regulator is of the opinion that the licensee is not, in any way, to blame or contributed in any way to any such contravention or failure.
- 4.3 When considering whether to impose a penalty, a penalty is more likely where:
- the contravention or failure has damaged the interests of customers or other market participants or damaged the environment; or
 - its imposition would be likely to create an incentive to comply and deter future contraventions or failures.
 - the circumstances from which the contravention or failure arose were substantially within the control of the licensee
- 4.4 A financial penalty may be less likely to be imposed where:
- the contravention or failure was or is of a trivial nature; or
 - the contravention or possibility of a contravention would not have been apparent to a diligent licence holder;
 - the principal objective and duties of the Utility Regulator would weigh against the imposition of a penalty;
 - the Utility Regulator is satisfied that in lieu of a financial penalty the licence holder in question agrees in writing that any indicative value of a proposed financial penalty should be applied exclusively and verifiably to

the benefit customers (through requiring higher investment without higher prices to consumers)

- the circumstances from which the contravention or failure arose were outside the control of the licensee
- the same contravention has already been the subject of a fine by a concurrent enforcement authority.

Stage 3 – Fixing the Broad Banding of a Penalty

5.1 Once it has been decided that a financial penalty should be imposed, the Utility Regulator must consider the appropriate level. Any penalty must be reasonable in the circumstances of the case. Factors relevant to decisions on the broad level of a penalty will likely include (but not be limited to):

- the seriousness of any contravention or failure;
- the degree of nuisance, harm or increased cost incurred by consumers or other market participants or the environment;
- precedents set by other regulators for other utilities or public services;
- any gain (financial or otherwise) made by the licensee.

5.2 When determining the appropriate level of a financial penalty, the Utility Regulator reserves the right to rely on assumptions, estimates and opinions in the absence of correct or sufficiently precise data being provided by the licence holder in question.

Stage 4A – Fixing the Specific Banding of a Penalty: Aggravating Factors

6.1 Having considered the broad banding into which a proposed penalty may fall, other factors may be taken into consideration in order to set a more specific banding for the financial penalty under consideration. Aggravating factors tending to lead to an increase in the level of any penalty may include (but not be limited to):

- repeated or continued contravention or failure after either becoming aware of the contravention or failure or becoming aware of the Utility Regulator's investigation;
- the involvement of senior management in any contravention or failure;
- failure to compensate or otherwise provide a remedy to those affected persons who have suffered a clear detriment as a result of the contravention or failure;
- knowingly or recklessly submitting false information to the Utility Regulator;
- unduly delaying the submission of information to the Utility Regulator;
- the absence of any evidence of internal mechanisms or procedures intended to prevent contravention or failure; and
- the extent of any attempt to conceal the contravention or failure from the Utility Regulator.

Stage 4B – Fixing the Specific Banding of a Penalty: Mitigating Factors

7.1 Mitigating factors tending to decrease the level of any penalty would include (but not be limited to):

- the extent to which the licence holder in question had taken steps to avoid contraventions or failures, either specifically or by maintaining an appropriate compliance policy, with suitable management supervision;
 - appropriate action to remedy the contravention or failure;
 - evidence that the contravention or failure was genuinely accidental or inadvertent or outside management control;
 - the extent to which the licence holder in question had compensated those affected;
 - proactive reporting of the contravention or failure to the Utility Regulator; and
 - co-operation with any investigation.
- 7.2 Having considered, to the extent appropriate, the factors listed above and all of the circumstances of the matter under consideration, the Utility Regulator will determine an appropriate amount for a financial penalty. It will ensure that the amount it determines is not more than 10 per cent of the turnover (as determined in accordance with established rules and accounting practice set down in the relevant secondary legislation) of the licence holder in question.
- 7.3 We envisage that the maximum penalty would be applied only in the most severe cases.

REVISION OF THE STATEMENT OF POLICY

- 8.1 The Utility Regulator may, from time to time, revise this Statement, in accordance with the Orders as the case may be. Any revised Statement will be published.