

**Notice of decision to impose a financial penalty pursuant to Article 45(6) of the Energy  
(Northern Ireland) Order 2003 (the "Energy Order")**

**Decision of the Northern Ireland Authority for Utility Regulation (the "Authority") to impose a financial penalty, following an investigation into Project Plug Limited and its compliance with its obligation under Article 41 of the Renewables Obligation (Northern Ireland) Order 2009 (the "2009 Order") for the obligation period 1 April 2017 to 31 March 2018**

**19 December 2019**

**1. Summary**

- 1.1. The Authority has decided to impose a financial penalty on Project Plug Limited following an investigation into its failure to comply with Article 41 of the 2009 Order.
- 1.2. The Authority is satisfied and finds that Project Plug Limited has breached the requirement set out in Article 41 of the 2009 Order for the obligation period 1 April 2017 to 31 March 2018 (the '**relevant period**').
- 1.3. Having not submitted the required number of Renewable Obligation Certificates to Ofgem (the Authority's agent for this purpose) for the relevant period, Project Plug Limited failed to make the payment required under Article 41 of the 2009 Order by 31 October 2018. The requirement to make the payment by the date specified is, in accordance with Article 41A(4)(e) of the Energy Order, a relevant requirement.
- 1.4. Project Plug Limited has admitted that it breached the relevant requirement for the relevant period.
- 1.5. The Authority has taken into account that Project Plug Limited has admitted the breach and has offered to settle the investigation with regard to the imposition of a financial penalty.
- 1.6. The Authority's decision:
- 1.7. On 19 November 2019 the Authority gave notice under Article 45(4) of the Energy Order of its proposal to impose a financial penalty (in the amount of £228,541) on Project Plug Limited in respect of the said breach of relevant requirement for the relevant period.
- 1.8. The Authority considered the penalty to be reasonable (and proportionate) in all the circumstances of the case.
- 1.9. The Authority did not receive any representations or objections to the proposed penalty. Therefore, in the circumstances and mindful of its principal objective and general duties<sup>1</sup>, the Authority has decided to confirm the penalty of £228,541 on Project Plug Limited. The penalty must be paid within 90 days of the date of service of this notice on Project Plug Limited.
- 1.10. The Authority takes the breach of the relevant requirement seriously. In determining the amount of the financial penalty, the Authority has had regard to the factors set out at section 4.2 of this

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<sup>1</sup> As set out in Article 12 of the Energy Order.

notice. The Authority considers the penalty to be reasonable (and proportionate) in all the circumstances of this case.

## **2. Background**

- 2.1. Project Plug Limited is the holder of an electricity supply licence granted under Article 10(1)(c) of the Electricity (Northern Ireland) Order 1992.
- 2.2. Project Plug Limited failed to submit the requisite number of Renewables Obligation Certificates in accordance with the requirements of Article 5 of the 2009 Order or to make a payment to the Authority before 1 September 2018 in accordance with the requirements of Article 40 of the 2009 Order, for the obligation period the relevant period.
- 2.3. On 29 October 2018 the Authority (in accordance with Article 41 of the 2009 Order), notified Project Plug Limited of the extent of its default in respect of its failure to discharge its renewables obligation for the relevant period.
- 2.4. Project Plug Limited failed to make payment to the Authority under Article 41 of the 2009 Order, the amount referred to in the Authority's notification of 29 October 2018 and all interest required to be paid on that amount under paragraph (3) of Article 41 of the 2009 Order by 31 October 2018.
- 2.5. On 2 July 2019, the Authority made a provisional order in exercise of its powers in Article 42(2) of the Energy Order requiring Project Plug Limited to make the required payment by no later than 9 July 2019.
- 2.6. Project Plug Limited made a part payment of the amount it was required to pay in accordance with the Provisional Order on 8 July 2019 (being a part payment amount of £206,000).
- 2.7. Project Plug Limited made a further part payment of £206,000 on 16 August 2019 and £206,000 on 20 September 2019 and £206,550.61 on 25 October 2019.
- 2.8. On 2 September 2019, the Authority, having given notice of its proposal to confirm and consider representations made to its proposal and having had regard to the matters set out in Article 42 of the Energy Order, confirmed the provisional order.

## **3. Authority decision on breach and 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 required to have regard to its statement of policy (in respect of the imposition and amount of any Financial Penalty) most recently published when the contravention(s) in question occurred. For these purposes, the Authority's Financial Penalties Policy published in June 2018 applies.
- 3.2. The Authority is required to carry out all of 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, having regard to its other general duties.<sup>2</sup>

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<sup>2</sup> As set out in Article 12 of the Energy Order. The UR also adheres to the principles of best regulatory practice.

- 3.3. The Authority has considered all the circumstances of the case including, but not limited to, the specific matters set out in the 2018 Financial Penalties Policy and representations made by Project Plug Limited.<sup>3</sup>
- 3.4. The Authority is satisfied, and Project Plug has admitted, that there has been a contravention of the relevant requirement.
- 3.5. The Authority has considered the factors which tend to make the imposition of a financial penalty more likely and is of the view that most of the indicators are present in this case, while none of the indicators which make it less likely apply.
- 3.6. Accordingly the Authority is satisfied that it would be appropriate to impose a financial penalty in the circumstances of this case.

#### **4. Determining the amount of the applicable financial penalty**

- 4.1. In accordance with Article 45(9) of the Energy Order, the Authority may impose a financial penalty of up to ten percent (10%) of Project Plug Limited's turnover<sup>4</sup>. The Authority is satisfied that the penalty does not exceed ten percent of the turnover of Project Plug Limited.
- 4.2. The Authority has followed the process for determining the level of the financial penalty (as set out in the 2018 Financial Penalties Policy). The Policy requires that the Authority determine a non-penal amount and a penal amount in respect of the financial penalty. In this case the Authority has determined that the non-penal amount is made up of the gain that Project Plug has made by virtue of its contravention of the relevant requirement, and is in the amount of £39,541.<sup>5</sup>
- 4.3. As to the penal amount, the Authority had regard to the following factors<sup>6</sup>:
  - 4.3.1. Project Plug did not make the required payments to discharge its renewables obligations for the period 1 April 2017 to 31 March 2018 when due;
  - 4.3.2. the financial interests of other suppliers (those that submitted NIROs) have been directly impacted and/or damaged as they have received a lesser amount from the NIRO buy-out fund in respect of the period (and suppliers may choose to recover these losses through their supply charges);
  - 4.3.3. failure to comply with the relevant requirement damages the confidence in the Authority to regulate its statutory duties;

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<sup>3</sup> The Authority is satisfied that it would not be more appropriate to proceed under the Competition Act 1998 (see: Article 45(3) and Article 45(3A) of the Energy Order).

<sup>4</sup> As defined in the Electricity and Gas (Determination of Turnover for Penalties) Order (Northern Ireland) 2005.

<sup>5</sup> This amount has been calculated using the interest that the company would (or could) have earned on the amount that it should have but did not pay. This is calculated, taking into account the timings and amounts that have subsequently been paid by Project Plug Limited following the Authority making and confirming a provisional order, from 1 November 2018 to the date of this notice (as applicable). The interest rate used was the Bank of England base rate plus the interest taken from The Renewables Obligation Order (Northern Ireland) 2009 in respect of late payments - Article 41: (4) That interest shall be calculated on a daily basis at 5 percentage points above the base rate charged by the Bank of England on the first day of the late payment period.

<sup>6</sup> Which represent reasons for the assessment of the penal element of the financial penalty to include aggravating features.

4.3.4.the circumstances from which the contravention arose were substantially within the control of Project Plug Limited, which suggests poor governance with respect to procedures designed to ensure compliance with regulatory obligations; and

4.3.5.the contravention is a repeated contravention and shows a consistent pattern of behaviour,<sup>7</sup> furthermore, the decision not to comply with the relevant requirement was an active and conscious decision taken by Project Plug Limited and it is thereby considered to have understood and accepted the risk of enforcement action for non-compliance.

4.4. The Authority considers that there is some mitigation to be found in the fact that Project Plug has made payments in respect of the relevant requirement. However, the Authority considers that little weight may be attached to this mitigating factor on the grounds that:

4.4.1.The payments did not commence until July 2019, with the last payment not being made until 25 October 2019, and

4.4.2.The payments were only made following the making of the relevant provisional order (noting that the provisional order called for full payment of the outstanding amount by 9 July 2019).

4.5. The Authority does not find any mitigation in the representations of Project Plug Limited as to the difficulties it faced in making payments (e.g. due to fluctuations in wholesale prices) for non-compliance with the relevant requirement.

4.6. In arriving at its decision as to the appropriate penalty the Authority made an adjustment to the penal component to take account of the need for the overall financial penalty to act as an incentive for Project Plug Limited to comply with the relevant requirement going forward, and as a deterrent to Project Plug Limited (and other suppliers) in respect of relevant future non-compliance.<sup>8</sup>

4.7. In reaching its decision, the Authority does not consider that either the principal objective or the general duties (to include the duty as to financing in Article 12(2)(b) of the Energy Order) present as an impediment to the decision to propose the overall financial penalty as determined.

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

5.1. The Authority finds that Project Plug Limited breached the relevant requirement for the relevant period.

5.2. In all circumstances the Authority proposed a financial penalty on Project Plug Limited in the sum of £228,541. In reaching its decision the Authority has taken the relevant factors under the Financial Penalties Policy 2018 into account.

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<sup>7</sup> Given that a financial penalty was previously imposed on Project Plug in respect of a similar type default in failing to make a NIRO related payment on time: this decision may be found here: [<https://www.uregni.gov.uk/publications/utility-regulator-imposes-financial-penalty-click-energy>]

<sup>8</sup> In this regard the Authority takes into account that Project Plug has already been the subject of an enforcement action in respect of a previous failure to comply with a similar NIRO obligation to make requisite payments within a stipulated period.

- 5.3. The Authority set out its proposed financial penalty in a published notice on 19 November 2019. Under Article 45(4) of the Energy Order. No representations or objections were received in respect of the proposed financial penalty.
- 5.4. The Authority considers the financial penalty reasonable and proportionate in all the circumstances.<sup>9</sup> The Authority has had due regard to the fact that Project Plug Limited has admitted that it breached the relevant requirement for the relevant period and agreed to settle this matter with the imposition of the financial penalty.
- 5.5. The Authority has therefore decided to confirm the financial penalty of £228,541 on Project Plug Limited.
- 5.6. Project Plug Limited shall pay the financial penalty 90 days from the date of service of this notice of decision.

**Northern Ireland Authority for Utility Regulation**

**19 December 2019**

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<sup>9</sup> To include Project Plug's agreement to settle this matter.