

NORTHERN IRELAND AUTHORITY FOR UTILITY REGULATION

PROJECT PLUG LIMITED TRADING AS CLICK ENERGY: FAILURE TO COMPLY WITH A RELEVANT REQUIREMENT

Determination

Dated: 23rd May 2018

1. Introduction

- 1.1 Project Plug Limited, trading as Click Energy (and herein after know as Click Energy) hold an electricity licence granted by the Northern Ireland Authority for Utility Regulation (referred to hereafter as the Utility Regulator) on 13th January 2015 (A1)
- 1.2 The Utility Regulator was notified by email (B1A) on 1st November 2017 by Richard Bellingham, Head of Renewable Compliance at the Office of Gas and Electricity Markets ("Ofgem") that Click Energy had failed to discharge its Renewable Obligation as per Article 5 of the Renewables Obligation Order (Northern Ireland) 2009 ("the 2009 Order")
- 1.3 Click Energy did not submit the required number of Renewable Obligation Certificates nor did it make payment of the equivalent buyout fee before 1st September 2017 or a subsequent late payment fee by 31st October 2017.
- 1.4 Following discussions between Damian Wilson, Managing Director, of Click Energy and the Utility Regulator (Kevin Shiels and Barbara Cantley) on 10th November 2017, it was agreed that Click Energy would make a payment on 29th November 2017. However, Click Energy failed to make a second payment, as agreed, (by way of a written undertaking) by 31st December 2017. Damian Wilson of Click Energy subsequently advised by way of a letter to Richard Bellingham of Ofgem that this second and final payment would be made by 31st March 2018 (B13.)

- 1.5 Click Energy failed to make the payment on the proposed date of 31st March 2018. The Utility Regulator was informed of this failure to pay by way of email from Richard Bellingham of Ofgem to Sarah Brady (Utility Regulator) on 3rd April 2018 (B21.)
- 1.6 Based on the information before the Utility Regulator, it was considered that further investigation in relation to this matter was not required (B17) and this matter proceeded to the Enforcement Committee (“the Committee”) for preliminary determination.
- 1.7 Jenny Pyper (CEO) and John Mills (Network Asset Manager) were appointed to this Enforcement Committee on 22nd March 2018.
- 1.8 The Utility Regulator’s Enforcement Procedure which came into effect in March 2016 (A2) provides at paragraph 3.1 that **a formal investigation process is not necessary in every case.**
- 1.9 The Utility Regulator has considered this matter in accordance with the Utility Regulator’s Enforcement Procedure dated March 2016 (A2.) The statutory policy on financial penalties are also applicable to this case.

2. The Company Investigated

- 2.1 Project Plug Limited, trading as Click Energy was granted an electricity supply licence by the Utility Regulator on 13th January 2015 in accordance with Article 10(1) of the Electricity (NI) Order 1992.

3. Timetable as to Payment Dates

Payment to discharge Renewables obligation	Date Due	Met by Click Energy Y/N
Renewables Obligation Due	On or before 1 st September	No
Late Payment for Renewable Obligation	On or before 31 st October	No

1 st Payment due (as undertaken by Click Energy)	On or before end November	Yes
2 nd (final) payment due as undertaken by Click Energy	On or before end December	No
2 nd (final) payment due as proposed by Click Energy	On or before end March	No
2 nd (final) payment due as proposed by Click Energy	30th June 2018	

4. Summary of the Issues

- 4.1 Click Energy did not submit the required number of Renewable Obligation Certificates nor did it make payment of the equivalent buyout fee on or before 1st September 2017 or the subsequent late payment fee of 31st October 2017, as set out under the 2009 Order.
- 4.2 The Utility Regulator (Sarah Brady and Frankie Dodds) were advised by Richard Bellingham, Head of Renewable Compliance, Ofgem by way of email dated 1st November 2017 (B1A) that Click Energy had failed to discharge its renewable obligation for the relevant obligation period. That is, it had not submitted the required number of NIROCs or made payment (via Ofgem) by the statutory deadline of 1st September 2017.
- 4.3 Ofgem advised Click Energy on 26th October 2017 (B2) that if they did not make the late payment in full by the legislative deadline of 31st October they would not have complied with their statutory obligations.
- 4.4 Click Energy advised the Utility Regulator on 31st October 2017 by way of letter (B4) that they would be unable to meet their obligations under the Renewables Obligation Order within the late payment deadline.

- 4.5 They failed to meet the late payment (totalling £324,946.28 including interest accrued in the late payment period) deadline of 31st October 2017.
- 4.6 The Utility Regulator wrote to Click Energy on 16th November 2017 setting out alternative resolution arrangements. (B6)
- 4.7 Ofgem also wrote to Click Energy on 16th November 2017 (B7) setting out the next steps.
- 4.8 Utility Regulator Officials, Kevin Shiels, Director of Retail and Barbara Cantley, Retail Manager, met with Click Energy 10th November 2017 and Click Energy gave an undertaking to make payments totalling £324,946.28 in two parts. They agreed to make the first payment by 30th November 2017 and the second by 31st December 2017. They confirmed this arrangement by way of a signed undertaking dated 20th November 2017. (B8)
- 4.9 A payment of £162,473 was made by Click Energy on 29th November 2017 (B9) but no further payment has been made to date.
- 4.10 Click Energy wrote to Ofgem on 29th December 2017 (B11) to advise that the further NIRO payment due by end December would not be made.
- 4.11 Click Energy met again with Kevin Shiels and Barbara Cantley on 9th January 2018. Click Energy agreed that they would make the remaining payment by 31st March 2018. They wrote to Ofgem on 29th January 2018 (B13) setting out the plans they would put in place to make payment by 31st March 2018 and to explain why they had deprioritized the payment of a legal obligation.
- 4.12 The Utility Regulator was advised, by way of email to Sarah Brady from Richard Bellingham of Ofgem, dated 4th April 2018, that Click Energy did not make the payment on 31st March 2018 (B21).
- 4.13 Click Energy received a copy of the draft Statement of Case (B19) on 28th March 2018. Carson McDowell Solicitors acting on behalf of Click Energy provided submissions on 11th April 2018 (B20)
- 4.14 Within their submissions, Click Energy stated that they:
“...expect to be in a position to discharge the amount owing to Ofgem by the end of June (exact date to be confirmed in due course.)”

4.15 Further correspondence was received from Carson McDowell Solicitors, on behalf of Click Energy dated 26th April 2018. In this correspondence they submitted that they would make the final outstanding payment on or before 30th June 2018. (B22)

5. Breach of a relevant requirement

5.1 Under Article 42 (1) of the Energy (Northern Ireland) Order 2003 (“the Energy Order”) (A4) the duty to enforce applies in respect of relevant conditions and relevant requirements.

5.2 A relevant requirement covers statutory requirements as listed in Article 41A of the Energy Order. The Renewables Obligation Order is included as a relevant requirement under this list.

5.3 Therefore, failure to comply with the Renewables Obligation Order is subject to the Utility Regulator’s duty to enforce at Article 42 of the Energy Order and subject to the Utility Regulator’s power to impose penalties at Article 45.

6. Legal Framework

6.1 Click Energy holds an electricity supply licence granted by the Utility Regulator on 13th January 2015 in accordance with Article 10(1) of the Electricity (NI) Order 1992.

6.2 Click Energy has a statutory requirement to comply with the Renewables Obligation Order. In failing to comply with this statutory requirement Click Energy have failed to comply with a relevant requirement under Article 42 of the Energy Order.

6.3 Article 42(1) of the Energy Order states that where the Utility Regulator is satisfied that a company is contravening or is likely to contravene any relevant condition or requirement, it shall by a final order make such provision as is requisite for the purpose of securing compliance.

6.4 Article 42(2) states that where it appears to the Utility Regulator that a company is contravening, or likely to contravene, a relevant condition or requirement, and it is requisite that a provisional order be made instead of

making a final order, the Utility Regulator shall by provisional order make such provision as appears to it requisite for the purpose of securing compliance.

6.5 A provisional order shall be confirmed (with or without modifications) if the Utility Regulator is satisfied that the company is contravening, or is likely to contravene, any relevant condition or requirement and the provision made by the order is requisite for the purpose of securing compliance.

6.6 If a provisional order is made and not confirmed, it will cease to have effect at the end of such period (not exceeding three months) as it determined by or under the order.

6.7 There are certain expectations to these duties, where the Utility Regulator is not required to make a final or provisional order. These include the following:

- where the company agreed to take and is taking all such steps as it appears to the Utility Regulator to be appropriate for the company to take to secure or facilitate compliance;
- where the contraventions were of a trivial nature.

Financial Penalties

6.8 Article 45(1) of the Energy Order states that where the Utility Regulator is satisfied that a company has contravened or is contravening any relevant condition or requirement, or any provision of a Community Regulation, it may impose on the company a penalty of such amount as is reasonable in all the circumstances of the case.

6.9 There is a limited time following a contravention or failure within which a penalty can be imposed. Generally, where no provisional or final order has been made in relation to a contravention or failure, the Utility Regulator may not impose a penalty more than 12 months from the time of the contravention or failure unless during that period it has done one of the following :

- Served a penalty notice relating to the contravention or failure on the company;

- Served an information notice on the company requesting further information in relation to the contravention of failure.
- 6.10 Where a final enforcement order has been made in relation to the contravention or failure the penalty notice relating to the contravention or failure must generally be served on the company within 3 months from the making of the order.
- 6.11 Where a provisional enforcement order has been made in relation to the contravention or failure, the penalty notice relating to the contravention or failure must generally be served on the company within 3 months from the confirmation of the provisional order by the Utility Regulator or, if the provisional order is not confirmed, within 6 months from the making of the provisional order.

7. Click Energy's Submissions in response to the Utility Regulator's Draft Statement of Case dated 11th April 2018

- 7.1 Carson McDowell Solicitors, acting on behalf of Click Energy, responded to the Utility Regulator's draft Statement of Case on 11th April 2018 (B20.)
- 7.2 Carson McDowell, on behalf of Click Energy, made the following submissions:
- their client was unable to make the initial payment due to a "*fundraising exercise with WhiteRock Capital/Danske Bank*" in 2017 which was delayed;
 - that their client did take into account their obligations to Ofgem. However, the System Marginal Price (SMP) was above what was forecast for every month except January 2018, resulting in additional non recoverable costs to their client. This was alongside their client's requirement to make payment to the Single Electricity Market Operator, therefore making them unable to make the required payment to Ofgem under the Renewables Obligation Order (NI) 2009;

- the agreed final payment of 31st March 2018 was not made because the SMP was again unseasonably high.
- that their client; “*remains committed to ensuring that its renewable obligations are met*”;
- their client is involved in ongoing discussions with “*the bank and other funders*” and expects to recoup some of its losses due to the tariff increase in December 2017 and the trend of the SMP falling.
- that their client will expect to discharge the amount owing to Ofgem by the end of June 2018.

7.3 Carson McDowell wrote to the Utility Regulator on 26th April 2018 outlining their client’s instructions that they would make the required payment to Ofgem on or before 30th June 2018. (B22)

8. Click Energy’s submissions dated 15th May 2018 in response to the Preliminary Determination dated 8th May 2018.

- 8.1 A copy of the Committees preliminary determination was sent to Carson McDowell and Click Energy on 8th May 2018 (B23.) The Committee asked for submissions within seven days.
- 8.2 Carson McDowell, acting on behalf of Click Energy, responded to the preliminary determination on 15th May (B24.)
- 8.3 They stated that the increase in System Marginal Price (SMP) had a significant impact on the business and they asked that the Committee give this further consideration.
- 8.4 They submitted that the proposed financial penalty was excessive and would put unnecessary strain on the business.
- 8.5 They noted previous decisions of the Committee when financial penalties have been imposed on energy companies when customers have been financially affected or misled. They submitted that their client did not act dishonestly but has delayed in making a payment. They contend that this delay in payment has not posed any risk to customers.

The Enforcement Committee's Response to the above submissions:

8.6 This Committee has considered the submissions received on behalf of Click Energy and respond as follows:

1. We have considered the increase in relation to the SMP and we do not consider it to be a mitigating factor in Click Energy's ability to pay their relevant requirement under the Renewable Obligation.
2. We do not consider that the financial penalty is excessive. It is below the permitted 10% maximum. It has been calculated to reflect the time in which Click Energy failed to make payment, as demonstrated at paragraph 11 of this document.

We note Click Energy's submissions that they did not act dishonestly, however, they have persistently failed to make this payment, despite reassurances and undertakings to the Utility Regulator that payment would be made. A failure to make this payment will ultimately have a negative impact on consumers because it has reduced or delayed payment to other suppliers from the buyout fund, and we do not accept that this poses no risk to Northern Ireland consumers.

9. The Committee's Determination

- 9.1 We issued our preliminary determination on 8th May 2018 (B23.)
- 9.2 This document was shared with Click Energy and they made their submissions to us on 15th May 2018 (B24) by way of written correspondence.
- 9.3 We met on 1st May 2018 and again on 22nd May 2018.
- 9.4 We have considered all of the relevant factors and the evidence put before us, including all submissions received from Click Energy and their legal advisers.
- 9.5 We are satisfied that Click Energy have breached a relevant requirement, namely their requirement under Article 5 of the Renewables Obligation

Order (Northern Ireland) 2009, and they are continuing to breach this requirement. Click Energy breached their undertaking to the Utility Regulator to make payment by 31st December 2017. They failed to fulfil further written assurances that they would pay the outstanding money by 31st March 2018. By continuing to breach this relevant requirement, there is an ultimate detriment to consumers, and therefore we cannot accept Click Energy's submissions that this failure to pay has no risk to consumers.

9.6 We have considered the most recent correspondence received from Carson McDowell Solicitors of 15th May 2018 in response to our preliminary determination. We are of the view that this correspondence does not present any new or additional evidence to this Committee. In fact, the submissions received contain no reiteration of Click Energy's prior commitment to make payment to Ofgem by 30th June 2018, nor do their submissions contain an offer of mitigation in relation to the financial penalty proposed.

9.7 We have considered the System Marginal Price (SMP) for the relevant months as referred to by Carson McDowell in their submissions of 11th April 2016 and again of 15th May 2018. Whilst we acknowledge an increase in the SMP from 2016, we do not consider this to be a mitigating factor in Click Energy's failure to pay their renewables obligation.

9.8 In considering whether there is a need to take enforcement action, we have satisfied ourselves of the following:

1. the Enforcement Committee is not precluded from taking action under its general duties;
2. Click Energy has failed to take steps to facilitate compliance with the relevant requirement to date - the breach is continuing, and;
3. the breach is not of a trivial nature, given the potential detriment to Northern Ireland electricity consumers.

9.9 Therefore, we have concluded that it is appropriate that this Committee take enforcement action in this instance.

9.10 We are satisfied that Click Energy is contravening a relevant requirement and hereby make a Final Order under Article 42 (1) of the Energy (Northern Ireland) Order 2003. Under the terms of this Order, Click Energy are required to make payment to Ofgem of the amount outstanding, namely **£162,473.14 (including interest accrued during the late payment period) on or before 27th June 2018**. The terms of this Order will be satisfied upon written confirmation from Ofgem to the Utility Regulator that this payment has been received, and **cleared into their account on or before 29th June 2018**.

9.11 Furthermore, this Committee is of the view that a financial penalty is reasonable in the circumstances of this case. We therefore intend to impose a penalty on Click Energy under Article 45 of the Energy (Northern Ireland) Order 2003. We have determined that a financial penalty should reflect the length of time which their renewable obligation has remained unpaid. We have taken into account the fact that Click Energy entered into an undertaking, and had co-operated with both Ofgem and the Utility Regulator up to the date of the missed second payment (31st December 2017.) Therefore the penalty will be calculated as of 1st January 2018. This Committee have concluded that the amount of **£24,682** is a fair and reasonable penalty in the circumstances of this case.

9.12 This figure of £24,682 has been calculated as follows:

To reflect the time value of money	4,372
Late payment penalty based on 1/48 th of the principal per month or part there of from 1 January 2018	20,310
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Financial penalty	24,682
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10. Conclusions and Comment

- 10.1 Accordingly, we the Committee have taken into consideration the evidence before us in this case and are of the view that a Final Order is an appropriate course of action to ensure payment is made to Ofgem prior to 29th June 2018 (this being the last banking day of the month.)
- 10.2 Furthermore, we are of the view that a financial penalty, as outlined above, is reasonable in the circumstances of this case. The proposed amount of the financial penalty is below the permitted 10% maximum.
- 10.3 This determination will be published on the Utility Regulator's website.
- 10.4 The relevant statutory notices will be published shortly in order to give effect to our determination.



Jenny Pyper

John Mills

23rd May 2018

Authorised on behalf of the Utility Regulator

Time Line of correspondence

Date	
1 st September 2017	Renewables Obligation Due
26 th October 2017	Letter from Click Energy to Ofgem advising that they may not make the late payment deadline of 31 October
26 th October 2017	Letter from Ofgem to Click Energy setting out late payment deadline
31 st October 2017	Late Payment deadline under Renewables Obligation Order
31 st October 2017	Click Energy advised Ofgem and Utility Regulator that they would not be in a position to meet the late payment deadline
10 th November 2017	Meeting between Utility Regulator and Click Energy. Payment plan agreed.
20 th November 2017	Signed undertaking received by Utility Regulator from Click Energy agreeing to make the payment due in two parts, the first by end November; second by end December
29 th November 2017	Payment of £162,473.14 made by Click Energy.
29 th December 2017	Click Energy advised Ofgem and Utility Regulator that they would not make the second agreed payment by end December
9 th January 2018	Meeting with Utility Regulator and Click Energy. Click Energy agreed to make final payment by end March 2018
29 th January 2018	Letter from Click Energy to Ofgem advising that the final payment would be made by 31 March 2018
12 th February 2018	Letter from Utility Regulator to Click Energy advising that this matter has been referred to the Enforcement Committee.
28 th March 2018	Draft Statement of Case sent to Click Energy for comment
11 th April 2018	Submissions on draft Statement of Case received from Carson McDowell Solicitors on behalf of Click Energy
18 th April 2018	Statement of Case sent to Enforcement Committee and Click Energy
26 th April 2018	Correspondence received from Carson McDowell for attention of Enforcement Committee

1 st May 2018	First meeting of the Enforcement Committee
8 th May 2018	Preliminary Determination issued to Carson McDowell/Click Energy
15 th May 2018	Submissions received from Carson McDowell/Click Energy
22 nd May 2018	Second meeting of the Enforcement Committee
23 rd May 2018	Determination of Enforcement Committee issued to Carson McDowell/Click Energy