

**Statement by the Gas and Electricity Markets Authority ('the Authority'), following an investigation into compliance by TXU UK Ltd (In Administration) (TXU) with the Renewables Obligation and Renewables Obligation Scotland under The Renewables Obligation Order 2002 (No. 914) and The Renewables Obligation (Scotland) Order 2002 (No. 163) ('the Orders')**

**09 March 2004**

1. Ofgem has conducted an investigation into TXU's compliance with the Orders, in respect of the first Renewables Obligation period (1 April 2002 to 31 March 2003).
2. Article 3 in the respective Orders requires each licensed electricity supplier to provide evidence in the form of certificates (Renewables Obligation Certificates ('ROCs')) that, during a period designated in the Orders, it has supplied to customers in Great Britain a specified percentage of electricity generated from renewable sources – or that another supplier has done so, or that they have done so jointly. The obligation is to provide the evidence before the 'specified day', which is the 1 October immediately following any obligation period.
3. The Electricity Act 1989 ('the 1989 Act') provides for an alternative to complying with the Orders by submission of ROCs<sup>1</sup>. This is the 'buy-out' mechanism set out in article 7 of the respective Orders. Instead of producing ROCs, a supplier may make a payment to the Authority before the specified day relating to the relevant obligation period. During the first obligation period, the 'buy-out price' was £30 for each MWh of the obligation in respect of which the supplier did not produce ROCs. The 'buy-out' fund is subsequently redistributed, pro rata, amongst suppliers who have presented ROCs.
4. The Orders do not provide for suppliers to discharge their Renewables Obligation after the specified day. Both the production of ROCs and the payment of any buy-out monies have to be made before the specified day for any obligation period.
5. TXU, a licensed electricity supplier, went into administration in November 2002. On 25 September 2003, the Authority served a provisional enforcement order on TXU, under section 25 of the 1989 Act. The order required them, before 1 October 2003, to comply with the Renewables Obligation.
6. TXU failed to produce to the Authority, before 1 October 2003, evidence in the form of ROCs showing that, during the first Renewables Obligation period, it had supplied customers in Great Britain with electricity generated from renewable sources. TXU made no payment under the 'buy-out' mechanism, as an alternative method of complying with the Renewables Obligation.

---

<sup>1</sup> EA 89, s. 32C

7. TXU's obligation under the first Renewables Obligation period in respect of England and Wales was 759,277 MW, representing 759,277 ROCs or a buy-out liability of £22,778,310 at £30 per ROC.
8. TXU's obligation under the first Renewables Obligation period in respect of Scotland was 10,932 MW, representing 10,932 ROCs or a buy-out liability of £327,960 at £30 per ROC.
9. The Authority is satisfied, and TXU's Joint Administrators have accepted, that TXU was in breach of its obligations in respect of the first period of the Renewables Obligation and Renewables Obligation (Scotland).
10. Section 27A(1) of the 1989 Act provides that, where the Authority is satisfied that a licence holder has contravened or is contravening a relevant condition or requirement, the Authority may impose a financial penalty on the licence holder. Compliance with the Renewables Obligation is a 'relevant requirement', within the meaning of section 27A(1) of the 1989 Act<sup>2</sup>.
11. In considering the circumstances surrounding the breach, the Authority noted discussions that had taken place between the Joint Administrators and Ofgem officials, prior to the service of the provisional order. During these discussions, attempts had been made to find a way of complying with the obligation within the framework created by the Orders and commensurate with the Joint Administrators' obligations to the Court and to TXU's creditors. Although it had not proved possible to find such a solution, the Authority noted the active co-operation of the Joint Administrators in seeking a resolution.
12. TXU's Joint Administrators told the Authority that, in their submission, compliance with the Renewables Obligation had proved to be incompatible with their statutory duties. They had, however, obtained approval from the Court for arrangements allowing TXU to make payments to electricity suppliers with a valid claim who had sustained direct loss in consequence of the breach. The Authority noted that arrangements were being made to agree such payments with affected third party suppliers, and anticipated that these arrangements should at least partially offset the negative effects of TXU's breach.
13. The Authority, having taken full account of the particular facts and circumstances of the contravention outlined above, concluded that it is not justified to impose a penalty in this case. The Joint Administrators had been constrained by their obligations to the Court and to TXU's creditors. Finally the Authority noted that any penalty would reduce the funds available to those adversely affected by the breach. However, the Authority has made it clear that, in any future instance of breach of the Renewables Obligation, and in the absence of similar circumstances, significant financial penalties would be likely.

---

<sup>2</sup> EA89, s.25(8) and s.64(1).