

Delta Gas and Power Limited

Notice of reasons under Section 49A of the Electricity Act for the decision of the Authority to make a Provisional Order under Section 25(2) of the Electricity Act 1989

1. This Notice sets out the reasons why, on 28 October 2021, the Authority made a Provisional Order in respect of likely contraventions by Delta Gas and Power Limited (formerly known as Lily Energy Supply Limited) ("Delta"), (company number 09933244) of 344-354 Gray's Inn Road, London, England, WC1X 8BP.
2. Delta is the holder of an electricity supply licence issued by the Authority under section 6(1)(d) of the Electricity Act 1989 ("the Act").
3. The Provisional Order was made as the Authority was satisfied that Delta was likely to contravene the Renewables Obligation ("RO") under article 7 of the Renewables Obligation Order 2015 ("ROO") and article 5 of the Renewables Obligation (Scotland) Order 2009 ("ROS") which provides the statutory basis for the RO.
4. The ROO and ROS are enforceable as relevant requirements for the purposes of section 25 of the Act. The ROO and ROS requires each licenced electricity supplier to produce to the Authority a prescribed number of Renewables Obligation Certificates ("ROCs") and/or make payments to discharge its RO by 1 September and 31 August respectively each year. Suppliers who fail (in whole or part) to discharge their RO by production of ROCs by 1 September or by payments by 31 August, are able to make late payments (with accrued interest as prescribed under the ROO and ROS) up until 31 October in each year.
5. Under article 68(6) of the ROO and article 44(6) of the ROS, where a supplier has paid to the Authority the necessary payments together with accrued interest, it will be treated as having discharged its RO for the relevant period.
6. Under article 68(7) of the ROO and Article 44(7) of the ROS, if, by 31 October in each year, a supplier has not paid to the Authority the necessary payments, together with accrued interest, the supplier will not have discharged its RO for the relevant period.

7. Given that a number of suppliers failed to make the necessary payments on time for the obligation period ended 31 March 2020, in the summer of 2021, the Authority was concerned by the significant non-compliance with the RO. Accordingly, the Authority engaged with the industry and made clear that it expected payments to be made in full and on time and would be taking a robust approach to compliance and enforcement.
8. Despite this engagement, a number of suppliers failed to make payments (or present ROCs) before the 31 August 2021 and 1 September 2021 deadlines. The Authority engaged with these suppliers individually, seeking (in particular) robustly evidenced assurances that they would be in a position to make the necessary payments by 31 October 2021. Where satisfactory assurances (or payments) were not forthcoming, the Authority published proposals to issue final orders requiring payment by the statutory deadline of 31 October.¹
9. Delta provided satisfactory assurances in September 2021 that it would make the necessary payments by 31 October 2021. However, on 25 October 2021 Delta admitted to the Authority that it was unable to make the necessary payments in full together with accrued interest in order to meet its RO by 31 October 2021 and hence was likely to contravene the RO. This is wholly unacceptable. The ROO and the ROS provides a two month window for late payments to be made and (beyond this) makes no provision for flexible or extended payment arrangements.
10. The ROO and the ROS requires the Authority to determine whether there has been a shortfall in the fund and whether mutualisation has been triggered as soon as reasonably practicable after 31 October in the relevant year. The Authority is also required to distribute the buyout and late payment funds (once administration costs are withdrawn) to suppliers who have presented ROCs. For the Authority to perform those functions in an efficient, effective and timely manner, it requires certainty and finality as to the payments into the fund or the absence thereof. Indeed, this was the reason that the Authority sought suitably evidenced assurances from suppliers who had missed the initial due date for payment and proposed final orders requiring payment by the 31 October 2021 against those suppliers who refused or failed to provide such assurances. For this

¹ <https://www.ofgem.gov.uk/publications/ofgem-consults-issuing-final-orders-five-suppliers-over-ps7-million-late-renewables-obligations-payments>

reason, the Authority took the view that a Provisional Order (rather than a final order with the associated delay) was requisite on this occasion.

11. The Authority also did not consider it appropriate for suppliers who provided assurances (in order to avoid enforcement action at an earlier stage) but then failed to make the necessary payments, to gain a procedural advantage over suppliers who were more realistic in their discussions with the Authority at an earlier stage (and who therefore were the subject of proposals for final orders).

12. The Authority has had regard to the matters in sections 25(3), (4A), (4B), (5), and (5A) of the Act. In particular:

- a. It does not consider that it would be more appropriate to proceed under the Competition Act 1998 (that Act has no application to the present circumstances);
- b. It is satisfied that the duties imposed on the Authority by sections 3A to 3C of the Act do not preclude Authority from making the Provisional Order (on the contrary, it considers that its duties require it to make the Provisional Order);
- c. It does not consider that the contravention is trivial.

13. The Authority notes that:

- a. The ROO was made by the Secretary of State (and the ROS by the Scottish Ministers), inter alia, in exercise of the powers conferred by sections 32 to 32K, 32LA and 32M of the Act, which, pursuant to section 25 of and Schedule 6A to Act, are provisions imposing obligations enforceable as “relevant requirements” by the Authority. In this context, the requirement to discharge the RO is enforceable as a relevant requirement;
- b. The acts or omissions which, in the Authority’s opinion, constitute or would constitute contraventions of those requirements, and other factors which in the Authority’s opinion justify the making of a Provisional Order are those set out above; and

- c. The Authority considers it requisite to make the Provisional Order to secure compliance with the RO.

14. For the above reasons, the Authority decided to make the Provisional Order requiring payment from Delta in full settlement of the RO together with accrued interest to be made no later than 31 October 2021.

15. The Provisional Order is available at: <https://www.ofgem.gov.uk/publications/delta-gas-and-power-limited-provisional-order>

Dated: 28 October 2021

Signed:

Charles Hargreaves
Deputy Director, Enforcement
Duly Authorised on behalf of the Gas & Electricity Markets Authority