



**In the High Court of Justice
Queen's Bench Division
Administrative Court**

CO/895 /2022

In the matter of an application for judicial review

THE QUEEN

on the application of

ALASKA ENERGY LIMITED

Claimant

-and-

GAS AND ELECTRIC MARKETS AUTHORITY

Defendant

Notification of the Judge's decision on the application for permission to apply for judicial review (CPR 54.11, 54.12)

Following consideration of the documents lodged by the Claimant and by the Defendant.

ORDER by the Honourable Mrs Justice Cutts DBE

1. The application for an extension of time is refused.
2. The application for permission to apply for judicial review is refused.
2. The costs of preparing the Acknowledgement of Service are to be paid by the Claimant to the Defendant, summarily assessed in the sum of [REDACTED]
3. Paragraph 2 above is a final costs order unless within 14 days of the date of this Order the Claimant files with the Court and serves on the Defendant a notice of objection setting out the reasons why he should not be required to pay costs (either as required by the costs order, or at all). If the Claimant files and serves notice of objection, the Defendant may, within 14 days of the date it is served, file and serve submissions in response. The Claimant may, within 7 days of the date on which the Defendant's response is served, file and serve submissions in reply.
4. The directions at paragraph 3 apply whether or not the Claimant seeks reconsideration of the decision to refuse permission to apply for judicial review.
 - (a) If an application for reconsideration is made, the Judge who hears that application will consider the written representations filed pursuant to paragraph 3 above together with such further oral submissions as may be permitted, and decide what costs order if any, should be made.

(b) If no application for reconsideration is made or if an application is made but withdrawn, the written representations filed pursuant to paragraph 3 above will be referred to a Judge and what order for costs if any, should be made will be decided without further hearing.

Reasons

1. The challenge brought against the first decision of Ofgem is out of time. The relevant time for the purposes of judicial review runs from 29th October 2021 when Ofgem decided to pause assessments for an indeterminate period and remove tacit authorisation. Proceedings were not issued until more than four and a half months later on 14th March 2022. I consider there to be no relevant or cogent reason for the delay.
2. It is arguable that there was a separate decision made on 15th December 2021 to further extend the time period for assessment. However, although the application for permission to bring judicial review proceedings is just within time, I consider the Claimant failed to act promptly as it knew sufficient to bring the claim by 15th December 2021. I have nonetheless considered the merits of the application.

Ground 1 – The extension of time decisions of 29 October and 15 December 2021 were *ultra vires*.

3. It is unarguable that the Defendant has no power to extend time when deciding whether to grant a licence. Pursuant to s.7A(2) of the Gas Act 1986 and s.6(1) of the Electricity Act 1989, the Defendant has a discretionary power to grant supply licences. Nothing prohibits it from pausing the assessment of applications for such licenses provided its decision to do so and the manner in which it does so is in accordance with the principal objective and is rational. It is unarguable that the Defendant's decision to pause its assessment of licence applications for the purpose of reviewing the entire regulatory framework under which suppliers operate (and against which licence applications would be considered) was unreasonable or in breach of its statutory obligations. Rather, the Defendant is obliged to exercise its functions, including its power to grant licences, in accordance with its principal objective to "*protect the interests of existing and future consumers in relation to electricity conveyed by distribution systems or transmission systems.*"
4. In circumstances where the Defendant considered that to grant licences under the existing regulatory framework was against the interests of current and future consumers and as such contrary to the principal objective, the Defendant could not continue to grant licences under the existing regulatory framework. In those circumstances a proper exercise of its powers required it to review the regulatory framework under which suppliers operate and against which licence applications are assessed. It is unarguable that a pause of licence applications was unnecessary for that purpose.
5. It is unarguable that Regulation 19 of PSR 2009 renders the decisions *ultra vires*. Regulation 19(5) makes specific provision for

different arrangements to be in place. Regulation 19(6) states that these must be justified for overriding reasons relating to the public interest, including the legitimate interest of third parties. I consider it unarguable that the Defendant was unjustified in pausing the licensing process while a review was conducted as to the regulatory framework in the circumstances of this case.

Ground 2 – failure to give reasons for pausing consideration of applications and withdrawing tacit consent.

6. The Defendant's reasons were fully set out in its letters of 29 October 2021 and 15 December 2021 and further letters sent to the Claimant. These included the explanation that it was reassessing the regulatory framework applicable to all suppliers, current and prospective.
7. It is for the Defendant to decide on which approach to adopt having regard to the principal objective. It was reasonable for it to determine that it would neither be reasonable nor responsible to allow new suppliers to enter the market under conditions that could put consumers at risk or to allow new suppliers to enter the market during a process of review only then to find that they did not meet the new requirements of any new regulatory framework.
8. The Defendant allowed for the possibility that there may be exceptional circumstances in which it would determine a licence application whilst carrying out its review of the regulatory framework. In doing so it was open to the possibility that this might occur and therefore not closing its mind to the exercise of its discretion. It was not required to specify what those might be.

Ground 3 – Breach of legitimate expectation

9. As set out in the AoS [28 and 29], the Claimant was consulted on changes to the Guidance.
10. The Defendant was carrying out a review of the entire regulatory framework in order to determine how best to protect the interests of consumers in light of market instability. This included consultation. In the circumstances at the time of the decision to pause the assessment of licence applications the Defendant was entitled to consider the matter urgent. The Defendant's Guidance does not arguably constitute a promise to consult prior to a decision to extend time for consideration of applications. There was no arguable legitimate expectation to be breached.

Ground 4 - unreasonableness

11. As set out at [3] above, it is for the Defendant to determine how it should exercise its discretionary powers. It is unarguable that the decision to pause its assessment of applications and remove default authorisation was unreasonable against the background of a possible reform of the regulatory framework to reflect the risks that the unexpected rise in gas and electricity prices (which had put the energy markets under real strain) had revealed.

Signed: *Mrs Justice Catts DBE*

The date of service of this order is calculated from the date in the section below

For completion by the Administrative Court Office

Sent / Handed to

either the Claimant, and the Defendant [and the Interested Party]
or the Claimant's, and the Defendant's [and the Interested Party's] solicitors

Date: 26/04/2022

Solicitors: HARRISON CLERK RICKERBYS SOLS
Ref No.

Notes for the Claimant

If you request the decision to be reconsidered at a hearing in open court under CPR 54.12, you must complete and serve the enclosed Form 86B within 7 days of the service of this order.

A fee is payable on submission of Form 86B. **For details of the current fee please refer to the Administrative Court fees table at <https://www.gov.uk/court-fees-what-they-are>.**

Failure to pay the fee or submit a certified application for fee remission may result in the claim being struck out.

The form to make an application for remission of a court fee can be obtained from the gov.uk website at <https://www.gov.uk/get-help-with-court-fees>