

Notice of Proposal to make a Final Order

Date: 1 10 2019

**DRAFT NOTICE UNDER Section 26(1) Electricity Act 1989
RE PROPOSED FINAL ORDER – Confidential and Commercially Sensitive
The Electricity Act 1989
Notice of Proposal to make a Final Order**

**Proposal of the Gas and Electricity Markets Authority (“the Authority”) to make a
Final Order (FO) pursuant to section 26(1) and 26 (2) of the Electricity Act 1989
(“EA89”)**

1. BACKGROUND

- 1.1. TOTO Energy Limited (company number 09256482) of 1st Floor Locksview East Lockside, Brighton Marina Village, Brighton, East Sussex, England, BN2 5HA, is a holder of an Electricity Supply Licence issued by the Authority under section 6(1)(d) of the EA89.
- 1.2. TOTO Energy Limited is a designated electricity supplier (“supplier”) subject to the requirement to discharge its Renewables Obligation (“RO”) under the arrangements set out in the Renewables Obligation Order 2015 (“the ROO”) and the Renewables Obligation Order (Scotland) 2009 (“the ROS”).
- 1.3. In order to discharge the RO, article 7 of the ROO requires each supplier to produce to the Authority the number of Renewables Obligation Certificates (ROCs) it has acquired, in respect of each megawatt hour of relevant electricity that it supplies in England & Wales during an obligation period. Such a period is defined in article 2 of the ROO as the period starting on 1st April 2016 and ending on 31st March 2017 - or any subsequent period of 12 months - ending with the period of 12 months ending on 31st March 2037. This requirement to produce ROCs is subject to articles 67 and 68 of the ROO whereby payments can be made to the Authority as an alternative to production

of ROCs. Articles 5, 43 and 44 of the ROS impose materially identical obligations to discharge the RO in relation to electricity supplied in Scotland by producing ROCs to the Authority or making payments in lieu thereof.

- 1.4. Under these arrangements, suppliers were required to discharge their RO for the obligation period of 1 April 2018 to 31 March 2019 in full, via the presentation to the Authority of valid ROCs and/or via making a payment (or balancing payment, taking into account the value of any ROCs produced) to the Authority.
- 1.5. TOTO Energy Limited failed to present sufficient ROCs and/or make payments to discharge its RO, for the 2018-2019 obligation period, by 1 September 2019 as required by article 7 and as provided for in article 67 of the ROO and the equivalent provisions of the ROS.
- 1.6. TOTO Energy Limited owes a total amount of £4,555,880.04 in relation to its RO, plus late payment interest accruing on this amount at 5% above the Bank of England rate.
- 1.7. The Authority has engaged with TOTO Energy Limited and invited it to explain the reason(s) for its non-payment, and to provide robust assurances to the Authority that it will be in a position to make the necessary payment by the late payment deadline of 31 October 2019. TOTO Energy Limited has failed to provide the Authority with such assurances and accordingly the Authority is satisfied that TOTO Energy Limited is likely to contravene the requirements of the ROO and/or the ROS.
- 1.8. The Authority considers it important to protect the integrity of the RO scheme, which is a government scheme designed to incentivise the uptake of renewable electricity within the UK. A key aim of the scheme is to encourage UK electricity suppliers to obtain an increasing proportion of the electricity they supply from renewable sources.
- 1.9. If a supplier fails to discharge its obligation on time this leaves a shortfall in the scheme funds. The amount by which the supplier has defaulted is either absorbed into the scheme funds (meaning that less money is recycled back to suppliers) or the amount is mutualised, whereby compliant and partially compliant suppliers are required to make further payments to make up the shortfall.

- 1.10. Mutualised funds are then redistributed amongst suppliers who presented ROCs. Where there is a shortfall, this affects suppliers who have presented ROCs as they receive less money back through the scheme's recycling mechanism. This means that compliant and partially compliant suppliers are penalised due to other suppliers' failure to comply with their obligations.
- 1.11. The Authority proposes to make a Final Order requiring payment of the outstanding amount, plus applicable interest, by no later than the prescribed late payment date of 31 October 2019. The Authority considers it requisite (subject to any representations) to make the FO in the form set out in the Annex to this notice to secure compliance with the RO.
- 1.12. If Toto Energy Limited fails to comply with the FO by making the required payment the Authority may initiate the process of revocation of the licence.
- 1.13. In reaching its conclusion that it should propose to make the FO in the form at Annex to this notice, the Authority has had regard to the matters set out in section 25(4A), (4B), (5) and (5A) and section 26 of the EA89. Sections 25(4A) and (4B) relate to the question as to whether this matter should be investigated on the basis of a possible breach of the Competition Act 1998. The Authority does not consider that this case falls into that category. Section 25(5) of the EA89 refers to the Authority's principal objective as set out in section 3A of the EA89.
- 1.14. In accordance with section 26(1) of the EA89, the Authority gives notice 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 EA89, which, pursuant to section 25 of and Schedule 6A to EA89, 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 an FO are those set out at paragraph 2 below.

- c) Any representations or objections with respect to the proposed confirmation may be made to the Authority by 4pm, 22nd October 2019 (see paragraph 3 below).

2. REASONS FOR THE AUTHORITY'S DECISION TO PROPOSE TO MAKE A FINAL ORDER

- 2.1. TOTO Energy Limited has failed to present sufficient ROCs and/or make payments to discharge its RO, for the 2018-2019 obligation period, by 1 September 2019 as required by article 7 and as provided for in article 67 of the ROO and the equivalent provisions of the ROS.
- 2.2. TOTO Energy Limited owes a total amount of £4,555,880.04 (plus interest accruing on a daily basis) in relation to its RO, which remains unpaid to date.
- 2.3. The Authority considers it important to protect the integrity of the RO scheme which is a government scheme designed to incentivise uptake of renewable electricity within the UK. A key part of the scheme requires UK electricity suppliers to source an increasing proportion of the electricity they supply from renewable sources.
- 2.4. Suppliers can comply with their obligations through presenting ROCs to Ofgem or making payments in lieu of presenting ROCs. ROCs and payments must be presented to Ofgem within timescales set out in the RO Orders. If a supplier fails to discharge its obligation on time (or at all), it is non-compliant under the scheme and this leaves a shortfall in scheme funds. The amount by which the supplier has defaulted is either absorbed in to the scheme funds (meaning that less money is recycled back to suppliers) or the amount is mutualised, whereby suppliers that have discharged the whole or part of their RO for the relevant period are required to make further payments to make up the shortfall.
- 2.5. Mutualised funds are then redistributed amongst suppliers who presented ROCs. Where there is a shortfall, this affects suppliers who have presented ROCs as they receive less money back through the scheme's recycling mechanism. This undermines the integrity of the scheme and is entirely unacceptable to the Authority. Suppliers who fail to

comply with the scheme gain an unfair competitive advantage over suppliers that do comply with their obligations, which distorts the wider market and is likewise unacceptable to the Authority.

- 2.6. The RO scheme has been in place since 2002 and there is no excuse for suppliers not to be aware of their obligations and ensure they are in a position to meet them, whether by holding sufficient ROCs or having sufficient funds available to make the necessary payments.
- 2.7. The Authority has engaged with TOTO Energy Limited requesting a robust assurance to demonstrate that it could meet its RO for the 2018/19 scheme year by 31st October 2019. In order to demonstrate that funds would be available, TOTO Energy Limited was asked to provide supporting documentary evidence such as bank letters/statements, letters from parent companies or investors or alternative documentary evidence. In its response, TOTO was unable to provide sufficient assurance that it could meet its RO by 31 October 2019.
- 2.8. The Authority is satisfied that TOTO Energy Limited is likely to contravene its obligations under the ROO and/or the ROS and that the imposition of a Final Order compelling payment of the monies outstanding for the 2018-2019 obligation period is requisite for the purposes of securing compliance with the ROO and/or the ROS.
- 2.9. For these reasons the Authority proposes to make the FO in the form set out in the Annex to this notice.

3. REPRESENTATION OR OBJECTIONS

- 3.1. The Authority invites representations or objections in relation to its proposal to make the FO in the form at the Annex to this notice.
- 3.2. Any representations or objections with respect to this proposed notice to make the FO must be made in writing on or before 4pm, 22nd October 2019 and sent to Bruno Sheldon and Silvia Mariani OFGEM, Floor 4, 10 South Colonnade, Canary Wharf, London, E14 4PU or by email to Silvia.Mariani@ofgem.gov.uk and Bruno.Sheldon@ofgem.gov.uk.

- 3.3. If a respondent does not wish its response or part of its response to be published, it should clearly mark its response or the relevant parts “not for publication” and give reasons. The Authority will consider such requests on a case by case basis.
- 3.4. Any representations or objections which are made within the timeframe specified above and not withdrawn will be duly considered by the Authority.

Dated: 1st October 2019

Megan Forbes – Chair

Dr Ulrike Hotopp

Dr Philip Marsden

Enforcement Decision Panel

Duly authorised on behalf of the Gas and Electricity Markets Authority

Annex

Electricity Act 1989 Final Order of the Gas and Electricity Markets Authority ("the Authority") Made under section 25(1) of the Electricity Act 1989 ("EA89")

To:

TOTO Energy Limited (company number 09256482) of 1st Floor Locksview East Lockside, Brighton Marina Village, Brighton, East Sussex, England, BN2 5HA, holder of an Electricity Supply Licence issued by the Authority under section 6(1)(d) of the EA89

WHEREAS:

A. TOTO Energy Limited is a designated electricity supplier ("supplier") subject to the requirement to discharge its Renewables Obligation ("RO") under the arrangements set out in the Renewables Obligation Order 2015 ("the ROO") and the Renewables Obligation (Scotland) Order 2009 ("the ROS");

B. Specifically, to meet the RO, article 7 of the ROO and article 5 of the ROS requires each supplier to produce to the Authority the number of Renewables Obligation Certificates (ROCs) determined in accordance with the ROO and ROS as applicable, in respect of each megawatt hour of relevant electricity that it supplies during an obligation period, before 1 September after the obligation period in question. An obligation period is defined in article 2 of the ROO and the ROS respectively as a period starting on 1st April 2016 and ending on 31st March 2017, or any subsequent period of 12 months, ending with the period of 12 months ending on 31st March 2037. Article 7 is subject to articles 67 and 68 of the ROO, and article 5 of the ROS is subject to articles 43 and 44 of the ROS, whereby payments can be made to the Authority as an alternative to production of ROCs;

C. Under article 67 of the ROO and article 43 of the ROS, payments by a supplier, as an alternative to production of ROCs, are required to be made before 1 September after the obligation period in question;

D. Under article 68 of the ROO and article 44 of the ROS, where a supplier has failed (in whole or part) to discharge its RO, by production of ROCs or by payments, before 1 September after the obligation period in question there is a further period, ("the late payment period"). This lasts from 1 September to 31 October after that obligation period, and suppliers are able to use it to pay the outstanding sums which correspond to the UK ROCs due under their RO, together with interest on a daily basis at 5% above the Bank of England Base rate;

E. Under article 68(6) of the ROO and article 44(6) of the ROS, where a supplier has paid to the Authority the outstanding sums due, together with interest, it will be treated as having discharged its RO for the relevant period;

F. Under article 68(7) of the ROO and article 44(7) of the ROS, if, by the end of the late payment period, a supplier has not paid to the Authority the outstanding sums due, together with interest, the supplier will not have discharged its RO for the relevant period;

G. Under these arrangements, a supplier was required to discharge its RO for the obligation period of 1st April 2018 to 31st March 2019 in full, via the presentation to the Authority of valid ROCs and/or via making a payment (or balancing payment, taking into account the value of any ROCs produced) to the Authority;

H. TOTO Energy Limited failed to present sufficient ROCs and/or make payments to discharge its RO, for the 2018-2019 obligation period, by 1 September 2019 as required by article 7 and as provided for in article 67 of the ROO and the equivalent provisions of the ROS;

I. The Authority has engaged with TOTO Energy Limited and sought suitable assurances (for example, a bank guarantee, confirmation of undrawn credit facilities, or confirmation of support from a parent company or other investor) that TOTO Energy Limited will be in a position to make payment of the outstanding sums and interest as provided for under article 68 of the ROO and article 44 of the ROS in order to meet its RO within the late payment period in 2019;

J. TOTO Energy Limited has refused or failed to provide the Authority with satisfactory assurances that it will be able to make the necessary payment within the late payment period;

K. 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 EA89, which, pursuant to section 25 of and Schedule 6A to EA89, are provisions imposing obligations enforceable as "relevant requirements" by the Authority; and

L. The Authority is satisfied;

a) that TOTO Energy Limited is likely to contravene the ROO and/or the ROS, by failing to produce ROCs to the Authority, or to make payments as an alternative, sufficient to discharge its RO, which is an obligation enforceable by the Authority as a relevant requirement for the purposes of section 25 of EA89; and

b) that the inclusion of an obligation upon TOTO Energy Limited within a Final Order, made under section 25(1) EA89, to compel payment to the Authority of the outstanding monies including interest accrued within the late payment period (that is, by 31 October 2019), is requisite for the purpose of securing TOTO Energy Limited's compliance with that relevant requirement.

NOW THEREFORE: The Authority, pursuant to section 25(1) of the EA89 makes a Final Order requiring TOTO Energy Limited to:

- 1) make a payment to the Authority in full settlement of its RO, for the obligation period of 1 April 2018 to 31 March 2019, in the sum of £4,555,880.04 plus accrued interest by no later than 31 October 2019; and
- 2) notify the Authority by email to Silvia.Mariani@ofgem.gov.uk of such payment immediately after it has been made.

Dated: [...]

Enforcement Decision Panel
Duly authorised on behalf of the Gas and Electricity Markets Authority