

## **Notice of reasons pursuant to Section 49A(1)(f) 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 31 October 2019, the Authority made a provisional order in respect of likely contraventions by Nabuh Energy Limited (company number 09812753) of 2 Pinfold Street, Sheffield, England, S1 2GU ("Nabuh") of its obligations under the Renewables Obligation Order 2015 ("the ROO") and the Renewables Obligation (Scotland) Order 2009 ("the ROS"), which together provide the statutory basis for the Renewables Obligation Schemes ("the schemes").
2. The ROO and the ROS are enforceable as relevant requirements for the purposes of section 25 of the Electricity Act 1989. They require each licenced electricity supplier to produce to the Authority a prescribed number of Renewables Obligation Certificates ("ROCs"), and/or make payments to discharge its Renewables Obligations (RO) by 1 September each year. Suppliers who fail (in whole or part) to discharge their RO by production of ROCs or by payments before 1 September, are able to make late payments (with additional prescribed interest) up until 31 October in the relevant year.
3. 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.
4. 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.
5. Given that a significant number of suppliers failed to make the necessary payments on time for the obligation period ended 31 March 2018, in the summer of 2019, the Authority was concerned to ensure that there would not again be such a poor attitude to compliance – and significant non-compliance – with the schemes (and indeed with other regulatory obligations requiring payments to be made). 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 more robust approach to compliance and enforcement for the 2018/19 obligation period.
6. Despite this engagement, a number of suppliers failed to make payments (or present ROCs) before the 1 September deadline. The Authority engaged with these suppliers individually, seeking (in particular) robustly evidenced<sup>1</sup> assurances that they would be

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<sup>1</sup> The Authority warned suppliers that merely restating their intention or ability to comply would be unlikely to be sufficient, and invited suppliers to submit supporting evidence such as cash flow forecasts,

in a position to make the necessary payments during the late payment period ending on 31 October. 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<sup>2</sup>.

7. Nabuh consistently provided satisfactory assurances that it would make the necessary payments by 31 October. However, it failed to do so and on 30 October 2019 admitted that it was unable to make the necessary payment<sup>3</sup> and hence was likely to contravene the relevant requirements (ROO and/or ROS). This is wholly unacceptable. The applicable legislation provides a two month window for late payments to be made and (beyond this) makes no provision for flexible or extended payment arrangements. The Authority is not in the business of providing commercial credit to suppliers that fail to make the appropriate arrangements commercially.
8. The relevant legislation 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. It is also required to distribute the buyout and late payment funds 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 late payment deadline against those suppliers who refused or failed to provide such assurances. For this reason, the Authority took the view that a provisional order (rather than a final order with the associated delay) was requisite on this occasion.
9. 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 payment 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).
10. The Authority has had regard to the matters in sections 25(3), 25(4A), 25(4B), and 25(5), and 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 does not consider that its principal objective and statutory duties preclude the making of the order (on the contrary, it considers that its duties require it to make the order).

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evidence of undrawn credit facilities, bank guarantees, or letters of support from parent companies or other investors confirming a willingness to supply additional equity or other financial support if required.

<sup>2</sup> <https://www.ofgem.gov.uk/publications-and-updates/gnergy-limited-final-order>

<sup>3</sup> On 31 October 2019 Nabuh made a payment which fully discharged its ROS obligation and reduced the outstanding amount under the ROO to £650,582.11, inclusive of interest to 31 October 2019

11. For the above reasons, the Authority decided to make the provisional order requiring the outstanding payment to be made forthwith.
12. The provisional order is available at <https://www.ofgem.gov.uk/publications-and-updates/nabuh-energy-ltd-provisional-order>

**Charles Hargreaves**

**Deputy Director, Enforcement**

**Duly Authorised on behalf of the Gas & Electricity Markets Authority**

4 November 2019