

Notice of Proposal to make a Final Order

The Electricity Act 1989

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

1. Background

- 1.1. Tonik Energy Limited (“Tonik”) (company number 09812673) whose registered office is situated at Lombard House, 145 Great Charles Street, Birmingham B3 3LP, is the holder of an electricity supply licence issued by the Authority under section 6(1)(d) of the Electricity Act 1989 (“Act”).

The Feed In Tariff

- 1.2. Tonik is a Voluntary Feed In Tariff (“FIT”) Licensee¹ and is required to comply with the conditions of Standard Licence Condition (“SLC”) 33 of the electricity supply licence. SLC 33.3 provides that licensees shall comply with Part 3 of Schedule A (FIT obligations applicable to all licensees) with effect on and after 1st April 2010. Condition 3.1 of Part 3 of Schedule A to SLC 33 provides that licensees shall participate in the Levelisation Process as set out in Part 6 of the Feed-In Tariffs Order 2012, in accordance with the Authority’s instructions. Condition 3.1.2 of Part 3 of Schedule A, further provides that licensees will make FIT Levelisation Payments in accordance with the Authority’s instructions. SLC 33.5 states that Section C and Schedule A to Standard Condition 33 are “relevant conditions” for the purposes of section 25(8) of the Act and a non-complying licensee shall be subject to the enforcement powers of the Authority under the Act.

¹ All the defined terms in this Order are defined by the SLCs

- 1.3. Where a supplier has failed to make a Levelisation Payment by a date specified by the Authority it will breach the requirements of SLC 33.3 and conditions 3.1 and 3.1.2 of Schedule A, Part 3 of SLC 33.
- 1.4. For FIT Year 10 (1 April 2019 - 31 March 2020) the deadline for Annual FIT Levelisation Payments to be paid to the Authority was 21 September 2020. Licensees are notified of the deadlines for payment and instructed to make payments as per the Feed-In Tariff Levelisation process Schedule 2020/2021.² The Authority instructed Tonik on 7 September 2020 to make its Year 10, Annual Levelisation Payment of £124,868.96 by 21 September 2020.
- 1.5. Tonik failed to make payment by the due date of 21 September 2020, and has not made payment as of the date of the publication of this Notice of Proposal. It owes a total amount of £124,868.96 in relation to its unpaid Levelisation Payment, which remains unpaid to date.
- 1.6. Tonik has contravened (and continues to contravene) the requirements of SLC 33.3, conditions 3.1 and 3.1.2 of Schedule A, Part 3 of SLC 33 and the Feed-In Tariff Order 2012 by not making its Levelisation Payment by the specified deadline of 21 September 2020. This is an obligation enforceable by the Authority as a relevant requirement for the purposes of section 25 of the Act. It is, in the Authority's view, requisite to make a final order requiring Tonik to make the required Levelisation Payment.

The Renewables Obligation

- 1.7. Tonik is also a designated electricity supplier ("supplier") subject to the requirement to discharge its Renewables Obligation ("RO") under the arrangements set out in the

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https://www.ofgem.gov.uk/system/files/docs/2020/03/fit_levelisation_schedule_year_11.xlsx

Renewables Obligation Order 2015 (“the ROO”) and the Renewables Obligation Order (Scotland) 2009 (“the ROS”) .

- 1.8. 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 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.
- 1.9. Under these arrangements, a supplier was required to discharge its RO for the obligation period of 1st April 2019 to 31st March 2020 in full, via the acquisition of ROCs and/or via making a payment (or balancing payment, taking into account the value of any ROCs produced) to the Authority.
- 1.10. Tonik failed to present sufficient ROCs and/or make payments to discharge its RO, for the 2019-2020 obligation period, by 1st September 2020 as required by article 7 and as provided for in articles 67 of the ROO. Thereafter, Tonik failed to make payments as provided for under article 68 of the ROO and the equivalent provisions of the ROS.
- 1.11. Tonik owes £8,651,815.92 in relation to its RO, together with late payment interest accruing daily³, which total amount remains unpaid as at the date of this Final Order.
- 1.12. The Authority has engaged with Tonik 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 2020. Tonik has failed to provide the Authority with such assurances (and indeed has indicated that it is

³ The exact amount of interest due may be confirmed with the Authority’s RE Compliance Team if required

unlikely to be in a position to make the required payment) and accordingly the Authority is satisfied that Tonik is likely to contravene the requirements of the ROO and/or the ROS.

- 1.13. 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.
- 1.14. 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.
- 1.15. 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, and placed at an unfair competitive disadvantage, due to other suppliers' failure to comply with their obligations. This distorts the market and is not acceptable to the Authority.
- 1.16. The Authority reiterates that compliance with regulatory obligations, including financial obligations, is not optional. Suppliers must meet these obligations in full and on time. The Authority is not in the business of providing commercial credit to suppliers and will not do so.
- 1.17. 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.

- 1.18. The Authority proposes to make a Final Order requiring payment of the outstanding amounts, plus applicable interest, by no later than the prescribed late payment date of 31 October 2020 or in the case of the FITS levelisation payment which was due on 21 September 2020, forthwith, as applicable. 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 and FITS schemes.
- 1.19. If Tonik fails to comply with the FO by making the required payment(s) the Authority may initiate the process of revocation of the licence or take other action to enforce payment.
- 1.20. 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.
- 1.21. 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 requirement to make FITS levelisation payments is contained in SLC 33, which is a relevant condition for the purposes of section 25 of the Act
 - c) 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 above
 - d) It is, in the Authority's view, requisite to make the FO in the form set out in the Annex to this notice
 - e) Any representations or objections with respect to the proposed FO may be made to the Authority by **10am Monday 26 October 2020** (see paragraph 2 below).

1.22. Therefore, the Authority proposes to make a FO requiring Tonik to:

- 1.22.1. Make a payment to the Authority in full settlement of its RO in the sum of £8,651,815.92 plus accrued interest by no later than 31 October 2020
- 1.22.2. make a payment to the Authority in full settlement of its Annual Levelisation Payment for FIT Year 10 in the sum of £124,868.96 forthwith ; and
- 1.22.3. notify the Authority by email to susan.paget@ofgem.gov.uk of such payment immediately after it has been made.

Representation or Objections

2.1. The Authority invites representations or objections in relation to its proposal to make the FO in the form set out in the Annex to this notice.

2.2. Any representations or objections with respect to this proposed notice to make the FO must be made in writing on or before 10am Monday 26 October and sent to Megan Pickard & Susan Paget, OFGEM, 10 South Colonnade Canary Wharf London E14 4PU⁴ or by email to: megan.pickard@ofgem.gov.uk and susan.paget@ofgem.gov.uk . Should you have any questions about this notice you can contact Susan Paget on 0141 331 6045.

2.3. 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 case by case basis.

2.4. Any representations or objections which are made within the timeframe specified above and not withdrawn will be duly considered by the Authority.

Date: 1 October 2020

Signed:

⁴ Due to the Covid pandemic, staffing and arrangements for the handling of postal mail at Ofgem's offices are currently very limited. There is also a risk that postal mail may be delayed. Accordingly, it is strongly preferred and recommended that representations are made by email if at all possible. If you need to make a representation by post, please notify the contact person above by email or telephone and ensure you allow sufficient time for the representation to reach the Authority before the deadline.

MEGAN FORBES
PETER HINCHLIFFE
PHILIP MARSDEN

Enforcement Decision Panel

Duly authorised on behalf of the Gas and Electricity Markets Authority

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: Tonik Energy Limited (“Tonik”) (company number 09812673) of Lombard House, 145 Great Charles Street, Birmingham, B3 3LP, holder of an Electricity Supply Licence issued by the Authority under section 6(1)(d) of the EA89

WHEREAS:

- A. Tonik 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”);
- B. Specifically, to meet the RO, article 7 of the article 5 of the) require each supplier to produce to the Authority the number of Renewables Obligation Certificates (ROCs) determined in accordance with the ROO, 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 ROO⁵ as the period starting on 1 April 2016 and ending on 31 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 by no later than 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 (article 68(3) and (4));
- 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 2019 to 31st March 2020 in full, via the acquisition of ROCs and/or via making a payment (or balancing payment, taking into account the value of any ROCs produced) to the Authority;

⁵ And the equivalent provisions of the ROS

- H. Tonik failed to acquire sufficient ROCs and/or make payments to discharge its RO, for the 2018-2019 obligation period, by 1 September 2020 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 Tonik 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 Tonik will be in a position to make payment of the outstanding sums and interest as provided for under article 68 of the ROO and the equivalent provisions of the ROS in order to meet its RO within the late payment period in 2020;
- J. Tonik has refused or failed to provide the Authority with satisfactory assurances that it will be able to make the necessary payment(s) within the late payment period as applicable;
- K. Tonik has also refused or failed to make its annual FITS levelisation payment by the due date of 21 September 2020 or at all;
- L. 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;
- M. The FITS levelisation payments are provided for under SLC 33 which is a “relevant condition” for the purposes of section 25 of EA89; and,
- N. The Authority is satisfied;
 - a. that Tonik is likely to contravene the ROO and 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;
 - b. that Tonik is contravening SLC 33 by failing to make its FITS levelisation payment by 21 September 2020; and
 - c. that the inclusion of an obligation upon Tonik 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), and the FITS levelisation payment forthwith, is requisite for the purpose of securing Tonik’s compliance with those relevant conditions and requirements.

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

- 1) make a payment to the Authority in full settlement of its RO, for the obligation period of 1 April 2019 to 31 March 2020, in the sum of £8,651,815.92 plus accrued interest⁶ by no later than 31 October 2020;
- 2) make a payment to the Authority in settlement of its FITS levelisation obligation in the sum of £124,868.96 forthwith and
- 3) notify the Authority by email to susan.paget@ofgem.gov.uk and megan.pickard@ofgem.gov.uk of such payment(s) immediately after it they have been made.

⁶ The amount of interest due will depend on the exact date of the payment – this may be confirmed with the Authority’s Renewable Energy Compliance Team if required

Dated: [insert date]

MEGAN FORBES
PETER HINCHLIFFE
PHILIP MARSDEN
Enforcement Decision Panel