

Notice of reasons pursuant to Section 49A(1)(f) and 49A(2) of the Electricity Act 1989 (“EA89”) for the decision of the Gas and Electricity Markets Authority (‘the Authority’) to make a Final Order under section 25(1) of the EA89

Date: 29 October 2020

The Electricity Act 1989

Notice of reasons 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: the making of the Final Order

- 1.1. This document sets out the reasons why, on 28 October 2020, the Authority made a Final Order (“FO”) in respect of contraventions by Robin Hood Energy Limited (“RHE”) (company number 08053212) whose registered office is situated at Loxley House, Station Street, Nottingham, NG2 3NG.
- 1.2. RHE is the holder of an electricity supply licence issued by the Authority under section 6(1)(d) of the Electricity Act 1989 (“Act”).

2. Background: Notice of Proposal to make the FO and inviting representations to the Authority.

- 2.1. The Authority has published, pursuant to section 26(1) and (2) of the EA89, a notice of its proposal to make the FO, dated 2 October 2020, and invited representations and objections to the notice to be made to it. The Notice of Proposal to make the FO can be found at: <https://www.ofgem.gov.uk/publications-and-updates/robin-hood-energy-limited-final-order-0>
- 2.2. As well as explaining the reasons why the Authority proposed to make the FO, the Notice of Proposal sets out the likely contravention the FO was made in respect of, namely RHE’s anticipated failure to comply with the Renewables Obligations (“RO”) under article 7 of the

Renewables Obligation Order 2015 (“ROO”) and article 5 of the Renewables Obligation (Scotland) Order 2009 (“ROS”). The Notice of Proposal explains in particular how RHE is likely to fail to present Renewables Obligation Certificates (“ROCs”), and in the alternative to make payments of £12,057,879.42, to the Authority in relation to the ROO and ROS obligation period 2019-20 by the relevant deadlines.

2.3. The Authority received representations from RHE in which it confirmed that it was unable to make the required payments but presented other objections and arguments against the making of the Final Order. RHE has informed the Authority that it is in the process of exiting the market and is entering administration in terms of the Insolvency Act 1986. RHE claims the Authority may not make a Final Order against it in the circumstance that a moratorium under the Insolvency Act applies. The Authority does not consider that a moratorium prevents it from proceeding to make the Final Order. The Authority has fully considered these representations¹ and remains of the view that RHE is likely to contravene its obligations under the Renewables Obligations and that the Final Order remains requisite.

3. Reasons for the Authority’s decision to make the FO

The Feed In Tariff

3.1. RHE is a Voluntary Feed In Tariff (“FIT”) Licensee² 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”

¹ It is the Authority’s practice not to canvass the content of such representations in detail when publishing its reasons, as the contents are frequently commercially sensitive to the companies concerned, as is the case here. The Authority is mindful of its duty under section 105 of the Utilities Act not to unnecessarily ventilate the commercial affairs of a supplier in the public domain. The Authority has, however, given full and careful consideration to all material submitted to it when arriving at this decision.

² All the defined terms in this Order are defined by the SLCs.

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.

- 3.2. 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.
- 3.3. 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 2019/2020.³ The Authority instructed RHE on 7 September 2020 to make its Year 10, Annual Levelisation Payment of £33,945.51 by 21 September 2020.
- 3.4. RHE 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 Reasons. It owes a total amount of £33,945.51 in relation to its unpaid Levelisation Payment, which remains unpaid to date.
- 3.5. RHE 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 RHE to make the required Levelisation Payment.

The Renewables Obligation

- 3.6. RHE is also 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") .

³ https://www.ofgem.gov.uk/system/files/docs/2019/02/levelisation_schedule_yr_10.pdf

- 3.7. 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.
- 3.8. 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.
- 3.9. RHE 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, RHE failed to make payments as provided for under article 68 of the ROO and the equivalent provisions of the ROS.
- 3.10. RHE owes £12,057,879.42 in relation to its RO, together with late payment interest accruing daily⁴, which total amount remains unpaid as at the date of this Final Order.
- 3.11. The Authority has engaged with RHE 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. RHE has failed to provide the Authority with assurances (and indeed has indicated that it is unlikely to be in a position to make the required payment) which are sufficiently robust and accordingly the Authority is satisfied that RHE is likely to contravene the requirements of the ROO and/or the ROS.

⁴ The exact amount of interest due may be confirmed with the Authority's RE Compliance Team if required.

- 3.12. 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.
- 3.13. 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.
- 3.14. 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.
- 3.15. 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.
- 3.16. 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.
- 3.17. The Authority has published the proposed Final Order for the statutory consultation period and reviewed representations provided.

- 3.18. The Authority notes that RHE was the subject of a notice of proposal of a Final Order in relation to the Renewables Obligation in the previous scheme year. It subsequently paid its obligation in relation to that scheme year. The Authority has taken RHE's payment history into account in deciding to issue this notice of reasons.
- 3.19. In addition to the representations received from RHE outlined above, the Authority received one other representation from a third party which has been taken into account. The Authority has also taken into account the impact of the Covid 19 pandemic on industry. Having weighed up these considerations, the Authority remains of the view that RHE is contravening, and is likely to contravene, its obligations and that the Final Order is requisite to secure its compliance.
- 3.20. The Authority has decided 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. The Authority considers it requisite to make the FO to this notice to secure compliance with the RO and FITS schemes.
- 3.21. If RHE 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.
- 3.22. In reaching its conclusion that it should proceed 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 to protect current and future consumers. As noted above the Authority has also had regard to the representations received.
- 3.23. 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

3.24. It is, in the Authority’s view, requisite to make the FO.

3.25. Therefore, the Authority has decided to to make a FO requiring RHE to:

- 3.25.1. make a payment to the Authority in full settlement of its RO in the sum of £12,057,879.42 plus accrued interest⁵ by no later than 31 October 2020;
- 3.25.2. make a payment to the Authority in full settlement of its Annual Levelisation Payment for FIT Year 10 in the sum of £33,945.51 forthwith; and
- 3.25.3. notify the Authority by email to susan.paget@ofgem.gov.uk and megan.pickard@ofgem.gov.uk of such payment immediately after it has been made.

Date: 29 October 2020

Signed:

MEGAN FORBES
PETER HINCHLIFFE
PHILIP MARSDEN

Enforcement Decision Panel

Duly authorised on behalf of the Gas and Electricity Markets Authority

⁵ The amount of interest due will depend on the exact date of the payment – this may be confirmed with the Authority’s Renewable Electricity Compliance Team if required.

