

To: Stuart Cook[stuart.cook@ofgem.gov.uk]
From: Robert Hull
Sent: 2013-01-07T11:03:06Z
Importance: Normal
Subject: RE: NI RHI at EPC
Received: 2013-01-07T11:03:13Z
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Stuart

I missed your e-mail before the meeting so didnt know where you were coming from on this. The attached agreement with DETI, while not legally binding, covers our admin costs 'howsoever incurred' – it would be good if we could get something similar with DECC. Please note this agreement is confidential.

Do you still want to pick this up at the next meeting – alternatively, might be useful to table in the wash-up.

Bob

From: Stuart Cook
Sent: 07 January 2013 08:43
To: Matthew Harnack
Cc: Ashley Malster; Robert Hull
Subject: NI RHI at EPC

Matthew,

Most of the issues arising from the QER that could be discussed at the EPC next week are already on the agenda. Given this, I wondered if you would mind providing a 5 minute verbal update on our NI RHI work. Something that emphasised the positive working relationship and the way in which we had resolved MOU-type issues would be really useful.

Rgds

Stuart Cook
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These Arrangements are entered into on *[date to be the date when the last to sign signs]*

BETWEEN:

- (1) The Department of Enterprise, Trade and Investment ("**DETI**"), whose principal address is Netherleigh, Massey Avenue Belfast BT4 2JP; and
- (2) The Gas and Electricity Markets Authority ("**GEMA**"), a body corporate established under section 1 of the Utilities Act 2000, whose principal address is 9 Millbank, London, SW1P 3GE

1. BACKGROUND AND STATUS OF THESE ARRANGEMENTS

- 1.1 Section 114 of the Energy Act 2011 provides that DETI and GEMA may enter into arrangements for GEMA to act on behalf of DETI for, or in connection with, the carrying out of any functions that may be conferred on DETI under, or for the purposes of a scheme established under section 113 of the Energy Act 2011.
- 1.2 Certain functions are conferred on DETI under the scheme established by the Renewable Heat Incentive Regulations (Northern Ireland) 2012.
- 1.3 This document sets out the arrangements in accordance with which GEMA intends to carry out certain of those functions on behalf of DETI.
- 1.4 These arrangements are not intended to be legally binding and no legal obligations or legal rights will arise between the parties from these Arrangements. However both parties will endeavour to comply with the provisions of these Arrangements. For the avoidance of doubt, nothing in these Arrangements is intended to, or will be deemed to, give rise to a relationship of agent and principal between the parties or overrides or is intended to pre-empt the ability of either party to discharge any of its powers or duties that arise as a matter of law.

2. DEFINITIONS AND INTERPRETATION

- 2.1 The definitions and rules of interpretation in this Paragraph are intended to apply throughout this document:

"Administration Costs" means the costs to GEMA of carrying out the Conferred Functions and Ancillary Activities and any other activities under these Arrangements, howsoever incurred. The budget and charging methodology for calculating the Administration Costs, and the types of activity which can contribute to the Administration Costs, will be agreed separately between the parties in advance of the Administration Costs being incurred.

"Ancillary Activities" means the activities that GEMA considers are necessary or desirable for the Conferred Functions to be carried out properly.

"Commencement Date" means *[date same as date of second signature]*.

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"Conferred Functions" means all of the Functions other than the Retained Functions.

"Confidential Information" means information which has been designated as confidential by either of the Parties, whether, if it is passed to the other party, at the time it is so passed or at a later stage, or is of a confidential nature concerning DETI, GEMA or any third party.

"Functions" means the duties and powers conferred on DETI under the Regulations.

"Guidance" means [the document(s) entitled "Northern Ireland Renewable Heat Incentive Guidance Volume 1, eligibility and how to apply" and Northern Ireland Renewable Heat Incentive Volume 2, ongoing obligations, payments" , published in accordance with regulation 51 on 1 November 2012, as amended from time to time.

"Local Regulations" means the laws and regulations of Northern Ireland applicable to performance of the Functions.

"Party" means DETI or GEMA as a party to these arrangements, and "Parties" shall be construed accordingly.

"the Regulations" means the Renewable Heat Incentive Scheme Regulations (Northern Ireland) 2012, and reference to a particular "regulation" is reference to that regulation in the Regulations;

"Retained Functions" means the powers and duties conferred on DETI pursuant to:

- (i) regulation 36(8).
- (ii) regulation 47(1)(a);
- (iii) regulation 50; and
- (iv) regulation 51.

2.2 Words used in these Arrangements and in the Regulations shall have the meaning given to them in the Regulations, unless otherwise defined herein.

2.3 Paragraph headings will not affect the interpretation of these Arrangements.

3. GEMA'S RESPONSIBILITIES

3.1 GEMA will carry out the Conferred Functions and the Ancillary Activities and will at all times act in a manner which is consistent with any applicable obligations that arise as a matter of law, including any requirement to respect any personal or commercial confidentiality.

3.2 Subject to paragraph 3.1, GEMA will:

- (a) provide DETI with –

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- (i) such information as is necessary to enable DETI to carry out in a proper manner the powers and duties imposed on DETI by regulations 47(1)(a) and 50; and
 - (ii) such other information as DETI may reasonably request, which GEMA may hold in relation to the Conferred Functions;
- (b) inform DETI of any complaint or request for a formal review that is received by GEMA in connection with the carrying out by it of the Conferred Functions or the Ancillary Activities;
 - (c) provide such assistance as DETI may reasonably request in connection with any court proceedings or other dispute with third parties in connection with the carrying out of the Functions on condition that any costs incurred by GEMA are charged to DETI at a daily rate to be agreed in advance of the provision of such assistance;
 - (d) nominate a person as a contact point for the purposes of these Arrangements and inform DETI of the identity of that person;
 - (e) take all reasonable steps to ensure that wherever possible it will facilitate the ability of DETI to operate effectively in relation to the Regulations. This may mean providing briefing or attending meetings with industry, providing resources are available to do this. GEMA will communicate with DETI on matters of common interest and common concern as appropriate;
 - (f) share in advance with DETI proposals for public announcements relating to or impacting on the scheme established by the Regulations when appropriate;
 - (g) ensure that any information it requests from DETI should be relevant to the Administration Costs, the Functions, the Ancillary Activities, the Regulations, the Guidance, Local Regulations, or any legislation made or proposed to be made under section 113 of the Energy Act 2011;
 - (h) ensure that where it requests information from DETI under these Arrangements, it will specify the information or nature of the information it requires, the format in which it requires it, the deadline for providing it and the reason it is required; and
 - (i) give DETI reasonable notice of the date by which it requires information, wherever possible.
 - (j) take the steps referred to in the Annex to these Arrangements

4. DETI'S RESPONSIBILITIES

4.1 DETI will:

- (a) pay the Administration Costs, on a pass through basis;

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- (b) transfer to GEMA the monies necessary for payment of the periodic support payments;
- (c) nominate a person as a contact point for the purposes of these Arrangements and inform GEMA of the identity of that person;
- (d) take all reasonable steps to ensure that wherever possible it will facilitate the ability of Ofgem to operate effectively in relation to the Regulations. This may mean providing briefing or attending meetings with industry, providing resources are available to do this. DETI will communicate with GEMA on matters of common interest and common concern as appropriate;
- (e) share in advance with GEMA proposals for public announcements and consultations relating to or impacting on the scheme established by the Regulations when appropriate;
- (f) share information with GEMA necessary to enable GEMA to carry out the Conferred Functions and the Ancillary Activities in a proper manner. In doing so, DETI will comply with all relevant legislation and have respect for any personal or commercial confidentiality. Where DETI is made aware of such information, it will notify GEMA that it holds the information and provide it to GEMA on request;
- (g) only request information from GEMA under these Arrangements which is relevant to the Administration Costs, the Functions, the Ancillary Activities, the Regulations or the Guidance;
- (h) provide GEMA with all information necessary to ensure that GEMA is aware of any Local Regulations that will impact upon the carrying out by GEMA of the Conferred Functions or the Ancillary Activities, and to give GEMA as much advance notice as possible of any prospective or actual changes in the Local Regulations if such would impact in any way upon the carrying out by GEMA of those functions or activities, provided that DETI could reasonably be expected to be aware of these Local Regulations. Should there be any Local Regulations that impact upon the carrying out by GEMA of the Conferred Functions or the Ancillary Activities which DETI has not notified GEMA of, GEMA will not be liable for any loss which arises as a result of not taking into account the requirements of those Local Regulations;
- (i) where it requests information from GEMA under these Arrangements, specify what information it requires, in what format, by when and why it needs it;
- (j) where it requests information from GEMA under these Arrangements, wherever possible give GEMA reasonable notice of the date by which it requires the information;
- (k) where GEMA provides DETI with information under these Arrangements, prior to the publication of that information, not without GEMA's express consent circulate that information outside the Northern Ireland Executive until after the date of

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publication by GEMA and treat such information as Confidential Information, unless otherwise agreed; and

- (I) provide such assistance as GEMA may reasonably request in connection with any court proceedings or other dispute with third parties in connection with the carrying out of the Functions.

5. AMENDMENT TO THE SCOPE OF THE CONFERRED FUNCTIONS AND THE ANCILLARY ACTIVITIES

- 5.1 The Parties anticipate that the Regulations and/or the Guidance may be amended from time to time.
- 5.2 Where either Party becomes aware of any actual or proposed amendments to or re-enactments of the Regulations or the Guidance, or that there is a need to effect such amendments or re-enactments, it will be responsible for informing the other Party as soon as reasonably practicable. For the avoidance of doubt such amendments are not covered by these Arrangements.
- 5.3 The Parties will discuss in good faith amendment of these Arrangements to reflect any changes to the Regulations or the Guidance.
- 5.4 In the event that the Regulations are amended or re-enacted but the parties have not been able to agree amendments to these Arrangements to reflect the same by the end of the date on which the amending or re-enacting Regulations come into force, these Arrangements will be deemed to be terminated with effect from the next day.

6. DURATION AND TERMINATION

- 6.1 These Arrangements will come into effect on the Commencement Date and will continue indefinitely until terminated by either Party giving prior written notice to the other Party in accordance with paragraph 6.2 or, as the case may be, until termination in accordance with paragraph 5.4.
- 6.2 Termination of these Arrangements other than in accordance with paragraph 5.4 will take effect on expiry of the period specified in the written notice referred to in paragraph 6.1.
- 6.3 For the purposes of paragraph 6.2, the notice period will not be less than 60 days from the date of the written notice, unless otherwise agreed by the Parties.
- 6.4 On termination of these arrangements, the Parties intend that (subject to applicable legal constraints, including any requirements to respect personal or commercial confidentiality) provide DETI with all information reasonably requested by DETI and held by GEMA on DETI's behalf at GEMA's premises in connection with the carrying out of the Conferred Functions and the Ancillary Activities, on condition that at least one week's notice is provided in advance to GEMA by DETI. The parties envisage that this would include all

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data that the applicant/participant had provided, such as application forms, meter readings, payment history and original drawings.

7. ASSETS

- 7.1 The Parties intend that any assets, including but not limited to intellectual property rights, created or purchased by GEMA in connection with the carrying out by it of the Conferred Functions and Ancillary Activities, will vest in GEMA following termination of these Arrangements.
- 7.2 Subject to paragraph 7.1, any materials, plant or equipment owned or held by DETI and provided by DETI for use by GEMA in carrying out the Conferred Functions or Ancillary Activities will be returned to DETI following termination of these Arrangements.

8. CONFIDENTIALITY

- 8.1 Each Party agrees to be responsible for ensuring (both during the term of these Arrangements and after their termination) that the Confidential Information is kept confidential, is not used other than strictly for the purposes of these Arrangements and is not disclosed to any third party without the prior written consent of the other Party, unless the information:
- (a) is public knowledge at the time of disclosure;
 - (b) has become public knowledge other than by breach of this paragraph;
 - (c) has come lawfully into the possession of the Party in question from a third party without any restrictions regarding confidentiality attaching to such information; or
 - (d) is required by law to be disclosed, as set out in paragraph 8.2.
- 8.2 Each Party recognises that disclosure of the Confidential Information may be required by law, in particular under the duties imposed on GEMA and DETI under Freedom of Information Act 2000 and/or the Environmental Information Regulations 2004 and any subordinate legislation or codes of practice issued in accordance with such legislation ("the Legislation") as amended from time to time. Where disclosure of Confidential Information is required by law, each Party agrees to consult where possible with the other in advance of making any disclosure of information which is held in relation to the subject matter of these Arrangements. Each Party agrees to offer all reasonable assistance to the other in handling any requests for information made under the Legislation which relate to the subject matter of these Arrangements and to transfer any information requests received by that Party to the other Party if appropriate.
- 8.3 GEMA may disclose Confidential Information to any relevant governmental or other authority or regulatory body, and to any employees or contractors of GEMA or of any of the above, provided that before any such disclosure GEMA will make those persons aware that the information is confidential and of these Arrangements.

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Where GEMA discloses such Confidential Information to another body under this paragraph, it will have consulted DETI prior to doing so, subject to any legal constraints on its ability to do so.

- 8.4 Both Parties intend, both during the term of these Arrangements and after their termination, to ensure that any employee or contractor to whom Confidential Information is disclosed is made aware that the information is confidential and of these Arrangements.

9. VARIATION

- 9.1 These Arrangements may only be varied by written agreement of the Parties.

10. NOTICES

- 10.1 Any notice to be given pursuant to these Arrangements should be in writing and sent by electronic mail to the relevant contact point nominated by the parties under these Arrangements.

11. DISPUTE RESOLUTION PROCESS

- 11.1 In the case of a dispute between GEMA and DETI about the interpretation or implementation of these Arrangements, the parties intend to comply with the following process:
- (a) the dispute will first be discussed by the contact points from GEMA and DETI, with a view to resolving the dispute at that level;
 - (b) if the contact points are unable to resolve the dispute amongst themselves within two weeks of first being notified thereof, they will each escalate the dispute to a more senior staff member within their respective organisation;
 - (c) senior staff members should arrange an informal resolution meeting;
 - (d) if the senior staff members are unable to resolve the dispute within four weeks of being notified thereof, they will then each escalate the dispute to the Senior Civil Service or Director level of each of the organisations for final resolution.

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28th December 2012

Signed by A. F. Hepper
for and on behalf of
The Department of Enterprise, Trade and
Investment



Signed by R N HULL
for and on behalf of
The Gas and Electricity Markets Authority

21 December 2012

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Annex: Auditing

Ofgem shall notify DETI immediately in writing if any financial irregularity in relation to the NI RHI is suspected, and indicate the steps being taken in response. Irregularity means any fraud, theft or other impropriety, mismanagement, or use of funds for purposes other than that approved.

Ofgem will communicate with DETI regarding the Terms of Reference for the audit activity undertaken by Deloitte/AEA, and endeavour to ensure that any DETI concerns regarding the NI RHI are adequately addressed. Upon completion of the audits, Ofgem will share the outcomes where they relate to the NI RHI.

While being consistent with the obligations set out in the arrangements, including the requirement to comply with any legal obligations, Ofgem will provide any records, information, or explanations which may reasonably be required to enable DETI to follow scheme payments, including but not limited to information relating to accredited installations, calculation of payments and transfer of funds from Ofgem to the installer. If DETI has any issue requiring further consideration, Ofgem will provide DETI, or the Northern Ireland Audit Office, with access rights relating to the payments made to accredited installations.