

To: Keith Avis[Keith.Avis@ofgem.gov.uk]
Cc: Matthew Harnack[Matthew.Harnack@ofgem.gov.uk]; Andrew Amato[Andrew.Amato@ofgem.gov.uk]; Ruth Lancaster[Ruth.Lancaster@ofgem.gov.uk]; Luis Castro[Luis.Castro@ofgem.gov.uk]
From: Marcus Porter
Sent: 2012-06-13T09:59:15Z
Importance: Normal
Subject: RE: NI RHI
Received: 2012-06-13T09:59:21Z

Keith

Thanks for this but it seems to me that they need to let us know *in writing* (if they haven't already done so) what their decision is on this, so that we are sure. If they simply send through now a further draft of the Regs that mirrors the existing DECC Regs with only unavoidable NI "twiddles" then that's certainly indicative of their intention but not in itself conclusive and a specific statement either way as regards their (hopefully settled) intention is what is needed for our purposes if we haven't already got that.

Assuming it will indeed initially be a pure "mirroring" exercise, we also need to know what their timetable will be in relation to the amendments. Do they intend to match DECC's timetable in relation to those or reproduce the amendments after the event? If the former, we need to know whether DECC are content for DETI to be copied in on relevant material as it emerges from DECC and is shared with us but in advance of it being aired in public. This is happening already of course as DECC are proposing to consult next month on significant amendments to the GB Regs, some of which will extend the scope of those Regs and some of which, it seems, will make improvements to existing provisions. Indeed DECC have started work on their consultation letter and I have already commented on several, important instalments of this.

In the same regard, as you know the current DECC Regs will be amended with effect from early next month in relation to interim cost controls. There has been no mention form NI so far as I am aware of their considering that they may require similar provisions but, again, we need confirmation of that.

I would again draw attention to the fact that there are a couple of amendments included as part of that exercise which are of a permanent nature and not directly related to the interim cost control provisions. I assume DETI will want to include those as they will be in force before the NI Regs are, but they will need to confirm.

As I have mentioned several times, we also need to know whether they have taken any steps as regards technical standards directive requirements. If they haven't already done so they need to consider whether that directive's requirements are engaged in relation to any provisions in their draft Regs and, if they are, their draft Regs have to be notified to the Commission and other member States before they can be enacted and there is a *minimum* three months standstill period following notification before enactment of the Regs is lawful. Failure to comply with these requirements makes the Regs unenforceable. As I understand it DECC notified certain provisions (I do not know which) of the GB Regs so, on the basis that the NI Regs will simply reproduce the GB ones, it appears the NI Regs will also be caught by this requirement.

Just to pick up on your observation below regarding the presentational perspective, I would point out (or rather re-iterate) that, whilst that is certainly part of the picture, it goes beyond that. There are significant problems with the current GB Regs which, viewed collectively, suggest the need for fairly substantial amendment to them and it appears DECC accept that. Some of these give rise to legal risks, others to difficulties in the administration of the scheme and some to both. If, therefore DETI make no amendments to the current scheme initially, either by reproducing those to be made by DECC or by acting on their own initiative, then they will be enacting the NI scheme in the full knowledge that they are (avoidably) importing into it the shortcomings in the GB Scheme.

DETI should, of course, already be aware of the above, having been advised last Autumn of the list of amendments to the GB Regs that appeared to us to be necessary at that time, but that was six months ago and in my view we should draw their attention to the above now as well, given that they seem to be intent on bringing the NI scheme into force at the earliest opportunity.

In the meantime I would reiterate that, as administrators of the scheme on behalf of DETI/NIAUR, the Authority will be in the frame as regards any legal risks generated by the re-production in the NI Scheme of provisions in the GB one that are less than ideal. It will help of course if DETI agree meet the costs of defending any legal challenge, including any awarded to the claimants and any damages awards against Ofgem, but I re-iterate that damages are not the only remedies available to a court in such cases, that there is also reputational risk and that judicial review proceedings can be lengthy and resource sapping.

Dealing with administrative headaches that could have been avoided or lessened will also fall to us, a good example being provided by the current difficulties the Ops team here are experiencing in relation to metering; in a significant percentage of cases audits have shown that applicants to the scheme are non-compliant with metering requirements and, largely as a result of that, applications are taking far longer to process than was previously anticipated.

It is to be hoped, of course, that this situation would not pertain for long but of course the date when DECC's amendments come into force is not a matter that is within our control and the possibility of unforeseen delays of course exists.

Marcus

From: Keith Avis
Sent: 13 June 2012 09:22
To: Marcus Porter
Cc: Matthew Harnack; Andrew Amato
Subject: RE: NI RHI

RECEIVED BY OFGEM on 18.10.2017
Annotated by RHI Inquiry

Marcus
Thanks. DETI have given every indication to me that the regs will mirror the GB regs. Of course we cannot be certain until we have sight of the draft but it looks to me that the only difference will be with regards the tariffs. Appreciate your point about awaiting DECC's forthcoming amendments, but DETI's view is to mirror the regs as they currently stand and then update them when DECC's amendments are in place. Appreciate that this is not ideal from a presentational perspective, but it is their call I guess. We should have sight of the draft regs today. As soon as I receive them I will pass them down to you so that we can check whether they do actually transpose the GB legislation.
Rgds
Keith

From: Marcus Porter
Sent: 12 June 2012 19:01
To: Keith Avis
Cc: Matthew Harnack; Andrew Amato
Subject: RE: NI RHI

Keith
I note the legal timelines but, as mentioned in my previous email, it really does depend on what they have in mind so far as the Regs are concerned, i.e. are they just going to copy DECC's existing Regs or make changes and, if so, which. I have of course urged that they await DECC's forthcoming amendments – principally with a view to avoiding replicating the deficiencies in the current GB Regs.
Marcus

From: Keith Avis
Sent: 07 June 2012 17:00
To: 'McCutcheon, Joanne'
Cc: Matthew Harnack; Andrew Amato; Marcus Porter
Subject: NI RHI

Joanne cc: Matthew, Andrew, Marcus, Luis

Thanks for coming back to me. On the basis of the letter I am assuming that you are content for Ofgem to incur costs in line with the detail of the Feasibility Study. Of course, we will be able to firm up the costs along with the scope and timeline once you pass on your updated draft regulations.

I attach the timeline as it currently stands. You will see that it is split into weeks rather than calendar dates as the receipt of the draft regulations is the starting point for us. For illustrative purposes I have included the Olympic period in the timeline. As I have mentioned before, Ofgem will not be able to operate at full capacity during this time, so it will be important to reflect this in the timeline. You will also see that the timeline does not include any provision for consultation on the draft guidance. I am assuming that as the Northern Ireland scheme will be reflected in the GB RHI guidance it will not be necessary to consult. However, if you did wish to consult this would add ten extra weeks to the development process to reflect an eight week consultation and two weeks post consultation to finalise and publish the guidance.

Please feel free to call me to discuss any aspect of the above. Suffice to say, once I have the draft regulations from you the timeline will become active and you will see that one of the first actions will be to review this on the basis of the detail in the regulations. I know that your legal team are close to finalising the regulations, but if you could give me a likely date that would be very helpful.

Regards
Keith

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From: McCutcheon, Joanne [<mailto:Joanne.McCutcheon@detini.gov.uk>]
Sent: 07 June 2012 11:55
To: Keith Avis
Cc: Hutchinson, Peter; Stewart, Susan
Subject: NI RHI

Keith
As requested.
Received from OFGEM on 18.10.2017
Annotated by RHI Inquiry

Regards

Joanne

Joanne McCutcheon

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