To: Marcus Porter[Marcus.Porter@ofgem.gov.uk]
Cc: Ruth Lancaster[Ruth.Lancaster@ofgem.gov.uk]; Mary Smith[Mary.Smith@ofgem.gov.uk]; Lindsay Goater[Lindsay.Goater@ofgem.gov.uk]; Deckerson Thomas[Deckerson.Thomas@ofgem.gov.uk]; Morag Drummond[Morag.Drummond@ofgem.gov.uk]
From: Keith Avis
Sent: 2012-10-15T14:56:27Z
Importance: Normal
Subject: RE: Administrative Arrangemnts
Received: 2012-10-15T14:56:28Z

Marcus cc: As above

Thanks for your continued input into the Admin Arrangements. We are at the stage now where we simply have to respond top DETi with comments. I have, therefore, worked up a response based on the previous EMail trail. Rather than take you comments via a further email, I would be grateful if we could meet tomorrow morning to go through this and agree on the text to be sent. I appreciate that the last two points are particularly contentious for you. My intention is for us to be seen to move this forward while obviously not compromising the Ofgem position.

Are you able to meet up tomorrow morning to discuss this please. I will put a suggested slot in our calendar. In the meantime, if any copy recipients want to discuss this with me then do please shout out. Of course, once we agree on this I will send this over to DETI and explain that an updated arrangement will shortly follow.

Rgds

Keith

1. We note that it is an informal agreement without the status of a legally binding document. That being the case, if GEMA was to breach any provision or were to terminate the Agreement, DETI would have no legal recourse. We are not entirely comfortable with this position. Grateful if you could outline your reasoning for adopting this informal approach and also advise us of the position for the GB RHI and for the NIRO (as you are aware we have not been able to have sight of either of these Agreements).

We agreed that the Administrative Arrangement should be an informal arrangement. The rationale from our legal team for this is:

(a) the relevant primary legislation (section 114 of the Energy Act 2011) uses the term "arrangements" rather than "contract" and, whilst it might be argued that the term "arrangements" is wide enough to embrace "contract", the latter word or similar would probably have been used had that been envisaged. Thus the assumption is that it was *not* envisaged and that "arrangements" implies something less formal. (There is certainly no *requirement* for a contract and it may be doubted whether any such would have been compatible with EU procurement requirements) That must mean something short of a contract and on that basis the provision specifying that the arrangements are not legally binding appears entirely appropriate;

(b) the parties to the agreement are two government departments who are seeking to reach agreement, pursuant to statute, as to the terms on which one will carry out on behalf of the other functions arising under that legislation and which that other Department would otherwise have to carry out itself, there being no lawful third possibility. Thus the relationship is not commercial in nature (it is grounded rather in legislation) and the parties are essentially not operating "at arm's length" in the sense that one would expect in a commercial context. The relationship is far more collaborative in nature and, in such cases, it is common practice for government departments to enter into relatively informal arrangements to reflect the nature of the relationship between them.

(c) given the nature of the relationship, it is not envisaged that either party would ever be minded to take legal action against the other and that any dispute would be resolved instead in a different fashion and in a non-confrontational spirit.

2. Clause 1.1 – Definitions of "Administration Costs" and "Ancillary Activities"

This appears to give GEMA the right to pass through all costs associated with the scheme without exclusion. We are not content with this position. Firstly we need clarity in exactly how NI costs are going to be calculated going forward. For example, we would like a list of the various costs you anticipate and precise information on how DETI costs will be calculated - will it be actuals relating to the NI installations, or will it be a percentage of overall costs? We consider this to be an important area given recent conversations between Fiona and Matthew which have highlighted the unreliability of the estimates contained in the feasibility study and the current difficulty in providing robust projections. Just to be clear, we are going to need some degree of certainty

going forward. I am sure you can appreciate we would be unable to agree to a 'carte blanche' on charging which this currently appears to be.

We agreed that Ofgem would stipulate all the NIRHI costs that we anticipate and a formula for calculating these. We anticipate that these will be a percentage of GB RHI costs. We will also provide a formula for calculating costs and will additionally set out a change request process to provide for agreement on unanticipated costs. This will be covered in a separate letter.

3. Under 'ancillary activities' GEMA appears to have an unfettered right to perform any duties it deems appropriate. This would not be acceptable and we would need to see a list of anticipated ancillary activities and would have thought that any additions to this list in the future would need agreement of both parties (and would need to be costed in advance).

We agreed to offer some indication of "ancillary activities". In this respect, ad-hoc IT issues; ad hoc issues with fraud and compliance team; additional training (specific to smooth running of the operation); more detailed liaison across other parts of Ofgem as necessary are some that fall under the "ancillary activity" umbrella.

4. Clause 2.2 GEMA's responsibilities

Under (a) (i) – 'in such a manner as it thinks best' – this should presumably be with the agreement of DETI.

You agreed to consider the indication of "ancillary activities" (above) before a decision is made whether to delete "in such a manner as it thinks best". Suffice to say, we would be content to delete 'in such a manner as it thinks best'

5. **Clause 3 (e)** – grateful for clarity on what is meant by 'matters of common interest and common concern' – we are content to consult GEMA on matters relating to the administration of the NI RHI. Are you thinking wider than this?

We confirmed that this would not extend beyond the boundaries of the NIRHI. You subsequently confirmed that the wording should remain as it stands.

6. Clause 5 – Payment of the Administration Costs

We note that you propose that any billing disputes in relation to Administration Costs (i.e. the costs to GEMA of performing the Conferred Functions and the Ancillary Activities) are not adjudicated by an independent party and are decided by GEMA's Chief Operating Officer. This causes us concern particularly when read in conjunction with Clause 1.1. We would require some form of dispute resolution process iro Administration costs and would wish third party involvement where agreement cannot be reached.

We agreed to re-word arrangement so that all efforts are made to resolve disputes between accounting officers – if this was not possible then the cases would need to be put up the management chain for adjudication between officials in our respective organisations. We will need to bear in mind that "deadlock" could arise and that, if it did so, the outcome could conceivably be termination of the arrangements.

7. Clause 7& 8

We will obviously need to agree review dates, breakpoints/notice for termination. Meanwhile, grateful if you could advise exactly what you are suggesting we would have a right of access to in terms of - data, metadata, systems, documentation etc., in the event of termination. Given our investment we would want to be clear on what we can expect.

The information that would be available would be non-system data, so this would primarily be installations approved, payments made, applications received.

8. Clause 9.3

Have you some specific examples in mind? DETI would probably want to be informed before such disclosure.

We passed on the NAO and Inland Revenue as examples and note that you were content to move forward on this basis.

9. Clause 12.1 e

DETI would wish the appointment of Counsel to be agreed between GEMA and DETI. Is there any reason why GEMA would be unhappy with this ?

We agreed to remove the need to jointly appoint counsel, however the stages covering the provision for joint dispute resolution would remain.

10. We would need the Agreement to include some detail on performance targets, remedies and safeguards in place for underperformance. I cannot see anything on these issues in the current draft.

You asked for a legal view on the provision of KPIs. We are not in the practice of providing KPI's as the view is taken that this would be incompatible with Ofgem's role as administrator. We will be exercising under statute functions that would otherwise have to be carried out by yourself and the effect is in essence that we *replace* you for as long as the arrangements are in place in relation to those functions that we agree with you that we will carry out. As a result, accountability in this context is a broad concept that would not embrace the kind of scrutiny that KPIs would encompass.

Of course, we do recognise that you would want some information on scheme progress.

Pulling on the model that we use for the GB RHI scheme we would be happy to provide you with a monthly report covering areas such as the number of installations approved, payments made, applications received, industry communications, audits carried out, fraud and compliance issues and where installations have received state aid. If there are other updates that would be beneficial to you then we would be happy to consider these.

11. We will also require a right of audit entry to be included – this was discussed some months ago.

We are not in the practice of providing KPI's as the view is taken that this would be incompatible with Ofgem's role as administrator. We will be exercising under statute functions that would otherwise have to be carried out by yourself and the effect is in essence that we *replace* you for as long as the arrangements are in place in relation to those functions that we agree with you we will carry out. As a result, accountability in this context is a broad concept that would not embrace the kind of scrutiny that KPIs would encompass.

Of course, we do recognise that you would want some information on scheme progress. Pulling on the model that we use for the GB RHI scheme we would be happy to provide you with a monthly report covering areas such as the number of installations approved, payments made, applications received, industry communications, audits carried out, fraud and compliance issues and where installations have received state aid. If there are other updates that would be beneficial to you then we would be happy to consider these.

From: Marcus Porter
Sent: 12 October 2012 14:31
To: Keith Avis
Cc: Ruth Lancaster; Mary Smith; Lindsay Goater
Subject: RE: Administrative Arrangemnts

Keith

Comments below in turquoise. Ruth may of course also have comments.

Copying to Lindsay for info

Marcus

From: Keith Avis
Sent: 12 October 2012 08:46
To: Marcus Porter
Cc: Ruth Lancaster; Mary Smith
Subject: FW: Administrative Arrangemnts

Marcus cc: Mary, Ruth

Attached is the feedback from the meeting with DETI yesterday. Good progress was made on the majority of the points, but the key sticking points are around performance targets and audits. Audits are absolutely key for DETI. There appears to have been an exchange with us on Audits in March, and DETI have since been operating on the assumption that this could be accommodated. This was before my time on the scheme, but I am looking at the background to this. In the meantime, grateful if you could feed me back your comments on the way forward flagged below. Of course, very happy to discuss this with you. Once we are agreed I'd like to send the summary with the updated admin arrangements for comment to DETI as soon as is practicably possible. In doing so we will also need to make clear all the updates that you have made (and the rationale for doing so) separate from those connected to the issues below. I appreciate that our position on the final two points may take a little longer to work through. If we don't think that we can offer up some compromise arrangement here we will need to take this to Bob's surgery on Monday, so grateful for a view in this regard. As mentioned yesterday, I am on an all day course on Monday and hence won't be available to attend.

I hope that this helps

Rgds

Keith

From: McCutcheon, Joanne [mailto:Joanne.McCutcheon@detini.gov.uk]
Sent: 03 October 2012 10:20
To: Keith Avis
Cc: Hepper, Fiona; Hutchinson, Peter
Subject: Administrative Arrangemnts

Keith

Thank you for the initial draft of the Administrative Arrangements. Having received feedback from our legal consultants and reviewed the Agreement within the Department, I have a number of points to make.

Issues with current content

12. We note that it is an informal agreement without the status of a legally binding document. That being the case, if GEMA was to breach any provision or were to terminate the Agreement, DETI would have no legal recourse. We are not entirely comfortable with this position. Grateful if you could outline your reasoning for adopting this informal approach and also advise us of the position for the GB RHI and for the NIRO (as you are aware we have not been able to have sight of either of these Agreements).

We agreed that the Administrative Arrangement should be an informal arrangement. Ofgem agreed to explain the rationale behind this. Rationale was set out at length in my initial comments on DETI's comments on the first draft arrangements. Not sure why they need the rationale if, as indicated here, they accept that it should be "informal" but if they really want it then they could doubtless be sent a sanitised version of my earlier comments, the wording for which we would need to discuss before it was sent.

13. Clause 1.1 – Definitions of "Administration Costs" and "Ancillary Activities"

This appears to give GEMA the right to pass through all costs associated with the scheme without exclusion. We are not content with this position. Firstly we need clarity in exactly how NI costs are going to be calculated going forward. For example, we would like a list of the various costs you anticipate and precise information on how DETI costs will be calculated - will it be actuals relating to the NI installations, or will it be a percentage of overall costs? We consider this to be an important area given recent conversations between Fiona and Matthew which have highlighted the unreliability of the estimates contained in the feasibility study and the current difficulty in providing robust projections. Just to be clear, we are going to need some degree of certainty going forward. I am sure you can appreciate we would be unable to agree to a 'carte blanche' on charging which this currently appears to be.

We agreed that Ofgem would stipulate all the NIRHI costs that we anticipate and a formula for calculating these. We anticipate that these will be a percentage of GB RHI costs. Ofgem will also provide a formula for calculating costs and will additionally set out a change request process to provide for agreement on unanticipated costs (this will be covered in a separate letter). Good. Look forward to seeing this/these once available. Will the change request procedure be in the same letter as the one containing the formula?

14. Under 'ancillary activities' GEMA appears to have an unfettered right to perform any duties it deems appropriate. This would not be acceptable and we would need to see a list of anticipated ancillary activities and would have thought that any additions to this list in the future would need agreement of both parties (and would need to be costed in advance).

Ofgem will provide an indication of "ancillary activities". Are Ops going to assist with this task? I did suggest one or two in my comments on DETI's comments on the first draft but Ops may well be able to bring others to mind.

15. Clause 2.2 GEMA's responsibilities

Under (a) (i) – 'in such a manner as it thinks best' – this should presumably be with the agreement of DETI.

DETI to consider the indication of "ancillary activities" (above) before a decision is made whether to delete "in such a manner as it thinks best". Noted, At our meeting earlier this week (KA and MP) I expressed the view that we could live without this if DETI were against its inclusion, but that my reason for so saying was not that I felt that GEMA should not carry out functions in this manner or that removal of this reference would have that effect, but rather that the reference is superfluous, given that it is already in effect a requirement of administrative law that we should carry out functions in this manner, that, irrespective of the arrangements, we are subject to that law and that we agree under the arrangements to comply with the law – which would include administrative law.

16. **Clause 3 (e)** – grateful for clarity on what is meant by 'matters of common interest and common concern' – we are content to consult GEMA on matters relating to the administration of the NI RHI. Are you thinking wider than this?

Ofgem confirmed that this would not extend beyond the boundaries of the NIRH – wording to be left as it stands. noted

17. Clause 5 – Payment of the Administration Costs

We note that you propose that any billing disputes in relation to Administration Costs (i.e. the costs to GEMA of performing the Conferred Functions and the Ancillary Activities) are not adjudicated by an independent party and are decided by GEMA's Chief Operating Officer. This causes us concern particularly when read in conjunction with Clause 1.1. We would require some form of dispute resolution process iro Administration costs and would wish third party involvement where agreement cannot be reached.

Re-word arrangement so that all efforts are made to resolve disputes between accounting officers – remove the need for resolution by a third party. So would the COO no longer have the final say then? My suggestion when we discussed earlier in the week was that provision would be made for reference to accounting officers at the intermediate stage but that, if that didn't work, it would go to the COO. If that's not now to be the case then of course you will need to bear in mind that "deadlock" could arise and that, if it did so, the outcome could conceivably be termination of the arrangements, whereas if the clause were as I envisaged there might be an enhanced chance of avoiding that.

18. Clause 7& 8

We will obviously need to agree review dates, breakpoints/notice for termination. Meanwhile, grateful if you could advise exactly what you are suggesting we would have a right of access to in terms of - data, metadata, systems, documentation etc., in the event of termination. Given our investment we would want to be clear on what we can expect.

Agreed to let DETI have an indication of the type of information that we would be will to let them have sight of. I re-iterate that any access would have to be afforded in accordance with the law, e.g. data protection and that this would need to be considered in some detail should termination occur or be threatened. DETI should be made aware of this if they haven't been already.

19. Clause 9.3

Have you some specific examples in mind? DETI would probably want to be informed before such disclosure.

Content with the wording as it stands (NAO and Inland revenue given as examples. noted

20. Clause 12.1 e

DETI would wish the appointment of Counsel to be agreed between GEMA and DETI. Is there any reason why GEMA would be unhappy with this ?

Agreed to remove the need to jointly appoint counsel. You advised me that this won't entail deletion of *all* of clause 12.1 and that the intermediate stages would thus be retained. I.e. only the provision relating to Counsel would come out. NB that in those circumstances the comment in para 6 above again applies.

21. We would need the Agreement to include some detail on performance targets, remedies and safeguards in place for underperformance. I cannot see anything on these issues in the current draft. I have already pointed out, in my comments on DETI's comments on the first draft, that DETI are not entirely without remedies - even without KPIs and audit. Also, from the further comments I make below it should be apparent that at least some of what they appear to want to achieve is achieved any

case – by means other than through KPIs (e.g. the complaints point below) or that DETI's objective is misconceived (eg the suggestion that we should commit to administer XXXX cases per year) . Thus the notion that (assuming it is not agreed that there should be KPIs and audit) DETI are left in a position in which they have inadequate safeguards appears highly questionable but, even if they are, the fact is that for us to sign up to KPIs and audit would be incompatible with the legal obligation on the Authority, in accordance with general administrative law requirements, to administer the Regulations without formal accountability to DETI for the nature of the decisions we take in so doing or the speed with which we carry out the various administrative processes.

Ofgem to take away and consider further. DETI could live with broad statements the fact that they were broad wouldn't assist; that is simply another way of saying that they are not set out in particularly specific terms. However broad or narrow the statements may be, providing them for use as performance benchmarks is open to the same objection, namely that specified above. Furthermore, in another respect broadening the statements makes matters worse since broadness often goes hand in hand with vagueness and indeed there are a couple of examples of this below, they suggest something like:

- Ofgem will administer up to xx cases per year? Even if we were content in principle to do this (and for the reasons given above, in my view we should not be), I don't see how a commitment of this kind could possibly be given with any confidence that we would be able to live up to it. For one thing, it's not clear what's meant in this context by "administer". Presumably it means "administer to the point where accreditation / registration is either granted or refused" but confirmation of that would have to be provided. Secondly the words "up to" muddy the waters; it is not clear what is their impact, taken in conjunction with "administer". Thirdly, how many cases are administered in a given time period must of course be dependent in part on how many applications are *received* and the Authority has no control over that. Fourthly, the fact that in GB take up has been very much lower than was initially anticipated should presumably make the Authority reluctant to provide any commitment as regards committing to target figures in NI. Fifthly, even once an application is received, speed of processing thereof is not entirely within the hands of the Authority. Often applicants are asked to provide specified information to enable us to determine whether accreditation/ registration is appropriate and whether/how quickly they provide this is again not within the Authority's control.
- Ofgem aims to reach a decision on eligibility of installations for the scheme within xx (even for simple cases)? See comments on previous bullet. Moreover it's not clear what criteria would be applied to determine if a case amounted to a "simple" one.

- Ofgem aims to make payments within xxxx ? a straight KPI requirement it appears and thus legally objectionable
- Ofgem will provide a helpdesk facility to assist applicants from (hours)? This is an "ancillary activity" as defined in the arrangements (probably a "desirable" rather than a "necessary" one) and it can be included in the indicative list referred to above. This isn't a "performance standard" as such so I don't see any objection to stating during what hours we envisage this service will be provided (especially as, under the arrangements as drafted, it is for us to decide what should be the ancillary activities) as opposed to agreeing to provide data as to whether those hours have been met.
- Ofgem will invoice DETI on the xx of the month iro that months payments? The arrangements already deal with billing by GEMA. Clause 5 obliges us to provide a bill monthly. This seems fairly close to what DETI are asking for and the clause could be subject to further modification if appropriate. Not sure indeed why this item is included in this list, since the commitment given in the arrangements simply deals with when we are to be paid in respect of carrying out for DETI functions that they would otherwise have to carry out themselves and isn't really a "performance" issue.
- Degree of accuracy on payments? We naturally aim to make the correct payments on each occasion and presumably this is achieved in most cases. If it isn't in a particular case then there is provision in DETI's draft Regs (as in the GB Regs) to deal with that by way of adjustments made to future payments etc. and of course that will be done so there is surely no real issue here.
- Time to deal with complaints (this is probably in guidance already)? Yes a link is provided in Chapter 12 of Vol 2 of the guidance to an explanatory leaflet and that sets out the timescales, and rightly so, but it is a commitment given to *scheme participants*, not to DETI. If we don't keep to those timescales or complainants are otherwise still aggrieved then, as participants are informed in the leaflet, they can lodge a complaint with the Ombudsman. All this amounts to a powerful incentive to us to ensure that we proceed in timely fashion and, In those circumstances, it's not clear to me why DETI should need an additional commitment from us to them.

Ofgem to offer up legal reason why we can't have KPI's (if we have one) see above! as that will enable DETI to sell this to their committees. We also agreed to provide details of the types of information we can update them on, as per arrangements with DECC on GB. Speak to Ops The other option DETI suggested was us providing more information on what our cost assumptions are e.g. number of installations, processing times, number of enquiries. Yes if it relates to costs calculations and not performance

22. We will also require a right of audit entry to be included – this was discussed some months ago.

Deal breaker for DETI. No commitment to change stance given by Ofgem, but we will need to consider options for taking this forward. DETI highlighted the need to have access to information for reassurance on what their money has been spent on – this might be achievable via confirming what information can be made available to them as under point 10, and through offering visits. **Marcus – There were discussions around March with Bob as I understand on the question of audits. Was this something that you had input on.** Not that I can recall no, but there may of course have been some discussion to which I was not party. If there was and we gave a commitment then that's unfortunate I guess but that doesn't constitute an argument for proceeding on the basis of it now, given that to do so would in Legal's view be unlawful. Come to think of it, surely not much was going on in March at all? My recollection is that there was a burst of activity last autumn, not long after I arrived and then virtually nothing until you became involved in the early

Summer.

I think this summarises the main issues. We obviously need to populate some of the gaps but I would have thought that this would be relatively straightforward.

There is probably no point in scheduling a meeting until you have had a chance to respond to the points raised and provided some of the detail requested. We will then need to revert to our own Accountability and Audit branches as well as our legal consultants. I think that would probably be the best point in time to have a meeting.

Fiona Hepper will be out of the office from the end of this week until Monday 29th October. We will off course be able to continue work on the Agreement in her absence and hopefully make substantial progress but you will wish to note that it will ultimately require her approval and signature.

Regards

Joanne

Joanne McCutcheon

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