

Allowing Local Authorities to Sell Electricity

Consultation on making regulations under The Local Government (Miscellaneous Provisions) Act 1976 and The Local Government (Scotland) Act 1973.

Contents

Chapter 1 - **Executive Summary**

Chapter 2 - **The Consultation Process**

Chapter 3 - **Policy Background**

Chapter 4 - **Legal Approach**

Chapter 5 - **Wider Issues**

Chapter 6 - **Consultation Question**

Annex A – **Draft Regulations for England**

Annex B – **Draft Regulations for Scotland**

Chapter 1 - Executive Summary

The Local Government (Miscellaneous Provisions) Act 1976, includes a provision preventing local authorities from selling electricity which is produced otherwise than in association with heat. This provision was introduced at the time of electricity privatisation and was designed to ensure the transfer of the electricity industry to the private sector, whilst recognising that local authorities did have a limited role to play in smaller-scale generation, in particular combined heat and power stations. The situation is slightly different in Scotland where the exception to the prohibition on selling electricity in the Local Government (Scotland) Act 1973 includes electricity produced from heat and waste.

The Government is keen to see local authorities play a full part in the development of renewable heat and electricity. Consequently a commitment was made in Heat and Energy Savings Strategy consultation document published on 12 February 2009 to consult on whether and how to change this restriction. Any changes will be made through secondary legislation – by DECC in respect of England and Scotland and by the Welsh Ministers in respect of Wales. This consultation is therefore being jointly conducted by DECC and the Welsh Assembly Government.

This consultation asks interested stakeholders to consider the merits of a change to this situation by allowing local authorities from across Great Britain to sell electricity generated by renewable sources. Responses will be shared with the Welsh Assembly Government. It also looks at some of the issues that local authorities will need to consider if they want to take advantage of any change in the provision.

Draft Regulations for England and Scotland are attached at annex A and B respectively.

Chapter 2 - The Consultation Process

Territorial Extent

This consultation looks at the regulatory position and considers whether changes should be made across Great Britain. Separate regulations need to be made for England, Scotland and Wales. The subject matter of these proposed Regulations is reserved under the devolution legislation for Scotland so the changes for Scotland can be made by the Secretary of State for Energy and Climate Change under the Local Government (Scotland) Act 1973.¹ The position for Wales is different as executive functions under the Local Government (Miscellaneous Provisions) Act 1976 have been exclusively transferred to Welsh Ministers.² In Wales, any regulations following this consultation would be made by the Welsh Ministers.

Next Steps

The responses to this consultation will inform the decision on whether a change to the existing provision is needed and, if so, how that change should be made. We intend to respond to this consultation within three months of its closing. Dependent on the findings of the consultation and following publication of a Government response, any necessary regulations would be made in Summer 2010.

How to Respond

We are inviting responses to this consultation by 2 June 2010 at the latest.

When responding, please state whether you are responding as an individual or representing the views of an organisation. If responding on behalf of an organisation, please make it clear who the organisation represents and, where applicable, how the views of members were assembled.

¹ Scotland Act 1998 Schedule 5

² National Assembly for Wales (Transfer of Functions) Order 1999 (SI1999/672) and Government of Wales Act 2006 [*which provides that the functions are exercisable by the Welsh Ministers, not the Assembly*]

A response can be sent by e-mail or letter to:

e-mail: steve.davies@decc.gsi.gov.uk

post: Steve Davies

Electricity Markets

DECC

3 Whitehall Place

London

SW1A 2AW

telephone: 0300 068 6088

You may make copies of this consultation document without seeking permission. Paper copies are available from the address above.

Other versions of the document in Braille, other languages or audio CD are available on request.

Confidentiality and Data Protection

Information provided in response to this consultation, including personal information, may be subject to publication or disclosure in accordance with the access to information regimes (these are primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 1998 (DPA) and the Environmental Information Regulations 2004). If you want other information that you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice with which public authorities must comply and which deals, amongst other things, with obligations of confidence.

In view of this it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstance. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be binding on the Department.

The Department will process your personal data in accordance with the DPA and in the majority of circumstances this will mean that your personal details will not be disclosed to third parties.

Help with Queries

Questions about the policy issues raised in this document can be addressed to:

Steve Davies

Electricity Markets

Department for Energy and Climate Change

3 Whitehall Place

London

SW1A 2AW

Tel: 0300 068 6088

E-mail: steve.davies@decc.gsi.gov.uk

This consultation follows the obligations outlined in the Government's Code of Practice on Consultations, which can be accessed here:

<http://www.berr.gov.uk/whatwedo/bre/consultation-guidance/page44420.html>

If you have any comments or complaints about the way this consultation has been conducted they should be sent to the DECC Consultation Co-ordinator:

Consultation Co-ordinator

Department of Energy and Climate Change, Area 6A

3 Whitehall Place

London, SW1A 2AW

Email: consultation.coordinator@decc.gsi.gov.uk

Consultation Question

1. Should local authorities be given the power to sell electricity generated by them from all forms of renewable generation as defined in the Renewables Directive³?

DECC invites views on this question from all interested parties. In particular DECC would welcome any evidence or examples that could help to support the case for making a change and what the extent of that change should be, or indeed that case for making no change at all.

³ Directive 2009/28/EC of the European Parliament and Council on the promotion of the use of energy from renewable sources (OJ 2009 L 140)

Chapter 3 - Policy Background

The Local Government (Miscellaneous Provisions) Act 1976 and the Local Government (Scotland) Act 1973 give local authorities power to generate heat and electricity, and power to purchase, sell and supply heat. However, the legislation currently prevents local authorities from selling electricity which is produced other than in association with heat (or from heat and waste in the case of Scotland). The current powers enable local authorities to continue to play a role in small-scale electricity and heating schemes. Until recently this was considered a suitable limitation on the role local authorities could play whilst the electricity sector in general was transferred to the private sector.

As part of their role in addressing the challenges of climate change and meeting their commitments to sustainability, some local authorities are now starting to consider developing renewable generation projects either themselves, or in partnership with for example a Trust. Under the existing regulatory regime, they are not allowed to sell the electricity generated from, for example, a local authority owned wind farm.

Government believes that local authorities have an important role to play in efforts to tackle climate change. Allowing them to sell electricity generated by them from renewable sources would encourage the development of local renewable electricity projects by those local authorities that are well-placed to undertake such projects either on their own or in partnerships.

The draft Regulations at Annexes A and B use the definition of renewable energy included in the Renewable Energy Directive⁴. This defines “renewable sources” to mean non-fossil sources including wind, solar, aerothermal, geothermal, hydrothermal and ocean energy, hydropower, biomass, landfill gas, sewage treatment plant gas and biogases. Government has suggested this definition because it is widely used and is consistent with the European Directive. If stakeholders disagree that this is the best definition to use, we would ask that they explain why not.

⁴ Directive 2009/28/EC of the European Parliament and Council on the promotion of the use of energy from renewable sources (OJ 2009 L 140)

Chapter 4 - Legal Approach

Current Legal Position

The existing legal position for England and Wales is set out in section 11 of the Local Government (Miscellaneous Provisions) Act 1976 which provides that a local authority may generate and sell heat and electricity, and may also purchase and supply heat. However, this power is limited by section 11(3) which provides that:-

“Except in such cases as may be prescribed, a local authority shall not be entitled to sell electricity which is produced otherwise than in association with heat.”

The position for Scotland is set out in section 170A of the Local Government (Scotland) Act 1973 in similar terms and section 170A(3) states:-

“Except in such cases as may be prescribed, or in cases where it is produced from waste, a local authority shall not be entitled to sell electricity which is produced otherwise than in association with heat.”

The term “local authority” is defined in section 44 of the Local Government (Miscellaneous Provisions) Act 1976 and section 235 of the Local Government (Scotland) Act 1973.

Power to Amend

Should the outcome of this consultation be that a change in the current regulatory position is required, section 11(3) and (7) of the Local Government (Miscellaneous Provisions) Act 1976 gives the UK Government (as regards England) and the Welsh Ministers (as regards Wales) the ability to extend the power for local authorities to sell electricity generated by for example, renewables by making negative regulations to prescribe the cases in which a local authority is entitled to sell electricity produced otherwise than in association with heat. This power could be used by UK and Welsh Ministers to give local authorities in England and Wales respectively power to sell electricity generated from renewable sources, other than heat.

In the case of Scotland parallel negative regulations could be made under section 170A(3), (9) and section 235 of the Local Government (Scotland) Act 1973 to extend the power of local authorities in Scotland to sell electricity from renewable sources other than waste and heat.

In accordance with section 11(2) of the Local Government (Miscellaneous Provisions) Act 1976 and section 170A(2) of the Local Government (Scotland) Act 1973, local authorities remain subject to the requirements of Part 1 of the Electricity Act 1989.

Post Consultation Legislation

Based on the legal position above, should the outcome of this consultation conclude that there is a case for widening the scope of the powers of local authorities to sell electricity, the Secretary of State for Energy and Climate Change will make the appropriate negative regulations in respect of England and Scotland.

Draft regulations are set out at Annex A and B for England and Scotland respectively. Government would welcome comments on their content. In particular we would welcome local authorities views on whether the wording of the draft regulations would give them the powers that they need to sell electricity generated by them from all renewable sources and in particular whether they feel this would also enable them to subcontract production or produce in partnership with others? If not, could you explain why the proposed powers would not cover partnership arrangements and subcontracting?

Responses will be shared with the Welsh Assembly Government. Regulations for Wales would, subject to those responses, substantively reflect the draft regulations for England in Annex A. They would, though, be made by the Welsh Ministers in both Welsh and English, as the Government of Wales Act 2006 requires.

Chapter 5 - Wider Issues

There are of course many issues that local authorities who wish to sell electricity produced by their own generation plant under the Local Government Act provisions will wish to consider. This will include considering what conditions they would need to meet in order to benefit from the Renewables Obligation⁵ or the feed in tariff⁶.

Licensing

It is particularly worth highlighting the issue of licensing in this consultation document.

As noted above, in accordance with section 11(2) of the Local Government (Miscellaneous Provisions) Act 1976 and section 170A(2) of the Local Government (Scotland) Act 1973, local authorities remain subject to the requirements of Part 1 of the Electricity Act 1989. Nothing in the existing legislation or the potentially widened powers therefore changes the need for anyone acting as an electricity generator, distributor or supplier to have either:

- (i) an appropriate licence under section 6 of the Electricity Act 1989 issued by Ofgem; or
- (ii) an exemption from the requirement to have a licence either through the Electricity Class Exemption Order (SI2001/3270) or an individual exemption granted by the Secretary of State under section 5 of the Electricity Act 1989.

This of course already applies to local authorities who are currently selling electricity under the existing Local Government Act powers.

⁵ Section 32 Electricity Act 1989 and The Renewables Obligation Order 2009 (SI 2009/785)

⁶ Section 41 Energy Act 2008 [and reference to current proposals?]

Chapter 6 - Consultation Question

The scope of this consultation is therefore limited to the following question.

Consultation Question	
1.	Should local authorities be given the power to sell electricity generated by them from all forms of renewable generation as defined in the Renewables Directive ⁷ ?

DECC invites views on this question from all interested parties. In particular DECC would welcome any evidence or examples that could help to support the case for making a change and what the extent of that change should be, or indeed that case for making no change at all.

The deadline for responses is 2 June 2010.

What happens next?

Following the deadline, the Government will consider responses and publish a formal response within three months. In parallel the Welsh Assembly Government will consider responses and publish a formal response in respect of Wales.

⁷ Directive 2009/28/EC of the European Parliament and Council on the promotion of the use of energy from renewable sources (OJ 2009 L 140)

STATUTORY INSTRUMENTS

2010 No. 0000

LOCAL GOVERNMENT, ENGLAND

**The Production and Supply of Renewable Electricity by Local Authorities
(England)⁽⁸⁾ Regulations 2010**

<i>Made</i>	- - - -	***
<i>Laid before Parliament</i>		***
<i>Coming into force</i>	- -	***

The Secretary of State makes the following Regulations in exercise of the powers conferred by section 11(3)⁽⁹⁾ of the Local Government (Miscellaneous Provisions) Act 1976.⁽¹⁰⁾

Citation, commencement and application

1.—(1) These Regulations may be cited as the Production and Supply of Renewable Electricity by Local Authorities (England) Regulations 2010 and come into force [date].

(2) These Regulations apply to local authorities in England.

Exception from the restriction on selling electricity in section 11(3) of the Local Government (Miscellaneous Provisions) Act 1976

2.—(1) For the purpose of section 11(3) of the Local Government (Miscellaneous Provisions) Act 1976 the cases where a local authority is entitled to sell electricity, other than electricity produced in association with heat, are those to which paragraph (2) applies.

(2) This paragraph applies where the electricity is produced by that local authority from the following renewable sources—

- (a) wind;
- (b) solar;
- (c) aerothermal;
- (d) geothermal;
- (e) hydrothermal and ocean energy;
- (f) hydropower;
- (g) biomass;

⁽⁸⁾ The functions of the Secretary of State under section 11 are, so far as exercisable in relation to Wales, vested in the Welsh ministers. Those functions were transferred to the National Assembly for Wales constituted by the Government of Wales Act 1998 (c.38) by the National Assembly for Wales (Transfer of Functions) Order 1999 (S.I. 1999/672), Article 2; see entry in Schedule 1 for the Local Government (Miscellaneous Provisions) Act 1976.

⁽⁹⁾ See section 11(7) for the definition of “prescribed”.

⁽¹⁰⁾ 1976 c.57.

- (h) landfill gas;
- (i) sewage treatment plant gas; and
- (j) biogases.

	<i>Name</i>
	Minister of State
Date	Department of Energy and Climate Change

EXPLANATORY NOTE

(This note is not part of the Order)

These Regulations prescribe the circumstances in which a local authority is entitled to sell electricity by way of exception from the requirements of section 11(3) of the Local Government (Miscellaneous Provisions) Act 1976 which generally prohibits local authorities in England and Wales selling electricity which is produced otherwise than in association with heat. These Regulations give local authorities power to sell electricity which they generate from renewable sources which includes wind, solar, aerothermal, geothermal, hydrothermal and ocean energy, hydropower, biomass, landfill gas, sewage treatment plant gas, and biogases.

In accordance with section 11(2) of the Local Government (Miscellaneous Provisions) Act 1976, local authorities remain subject to the requirements of Part I of the Electricity Act 1989 (1989 c.29).

A full regulatory impact assessment has not been produced for this instrument as no impact on the private or voluntary sectors is foreseen.

Annex B

STATUTORY INSTRUMENTS

2010 No.0000 (S.x)

LOCAL GOVERNMENT, SCOTLAND

The Production and Supply of Renewable Electricity by Local Authorities Regulations 2010

<i>Made</i>	- - - -	***
<i>Laid before Parliament</i>		***
<i>Coming into force</i>	- -	***

The Secretary of State makes the following Regulations in exercise of the powers conferred by section 170A(3)⁽¹¹⁾ of the Local Government (Scotland) Act 1973⁽¹²⁾.

Citation and commencement

1. These Regulations may be cited as the Production and Supply of Renewable Electricity by Local Authorities Regulations 2010 and come into force [date].

Exception from the restriction on selling electricity in section 170A(3) of the Local Government (Scotland) Act 1973

2(1)—(3) For the purpose of section 170A(3) of the Local Government (Scotland) Act 1973 the cases where a local authority is entitled to sell electricity, other than electricity produced from waste and electricity produced in association with heat, are those to which paragraph (2) applies.

2(2) This paragraph applies where the electricity is produced by that local authority from the following sources—

- (a) wind;
- (b) solar;
- (c) aerothermal;
- (d) geothermal;
- (e) hydrothermal and ocean energy;
- (f) hydropower;
- (g) biomass;
- (h) landfill gas;
- (i) sewage treatment plant gas; and
- (j) biogases.

⁽¹¹⁾ See section 235 for the definition of “prescribed”.

⁽¹²⁾ 1973 c65.

Date *Name*
Minister of State
Department of Energy and Climate Change

EXPLANATORY NOTE

(This note is not part of the Order)

These Regulations prescribe the circumstances in which a local authority is entitled to sell electricity by way of exception from the requirements of section 170A(3) of the Local Government (Scotland) Act 1973 which generally prohibits local authorities in Scotland selling electricity except where it is produced from waste or produced in association with heat. These Regulations give local authorities power to sell electricity which they generate from other renewable sources including wind, solar, aerothermal, geothermal, hydrothermal and ocean energy, hydropower, biomass, landfill gas, sewage treatment plant gas, and biogases.

In accordance with section 170A(2) of the Local Government (Scotland) Act 1973, local authorities remain subject to the requirements of Part I of the Electricity Act 1989 (1989 c.29).

A full regulatory impact assessment has not been produced for this instrument as no impact on the private or voluntary sectors is foreseen.

