



Stuart McMillan MSP  
Convener of the Delegated Powers and Law Reform  
Committee

By Email:

[DPLR.Committee@parliament.scot](mailto:DPLR.Committee@parliament.scot)

8 December 2022

Dear Mr McMillan MSP

## **UK Energy Bill**

I am writing in response to your letter of 24 November 2022, in respect of clauses 171 and 172 within the Legislative Consent Memorandum for the UK Government's Energy Bill.

You have asked for further information on the Scottish Government position on clauses 171 and 172, in particular with regards to powers conferred on the Secretary of State to amend Scottish primary legislation.

I have considered the question in relation to clauses 171 and 172 contained within the Energy Bill. With respect to clause 172, I thank the Committee for bringing this to our attention. My officials have further reviewed this clause, and as a result the Scottish Government is changing position on clause 172 and now recommends that the Scottish Parliament withhold consent to clause 172. This change of position will be included in a future supplementary LCM.

Clause 171 confers a power on the Secretary of State to appoint Ofgem (being the UK Government's regulator for the electricity and natural gas markets in Great Britain) as the licensing authority for heat networks in Scotland by means of amending the Heat Networks (Scotland) Act 2021 (HNSA21). The power to appoint and remove functions from Ofgem is a wholly reserved matter.

Scottish Ministers have agreed to the appointment of Ofgem as licensing authority and the mechanism for appointment. This will support de-risking investment, and delivery of the public benefits set as net zero and fuel poverty, as many operators will be working on a GB-wide basis.

During passage of the Heat Networks (Scotland) Bill, Ofgem was highlighted by stakeholders as a suitable body to take on the role of licensing authority in Scotland, as there is currently no existing devolved body in Scotland well placed to take on the role of licensing authority. Whilst it is technically possible to establish a new regulatory body for heat networks in Scotland, we judge that the costs to set up a new body would be disproportionate and the time required could be in excess of three years.

Ofgem has established energy regulatory expertise, including in terms of consumer protection which is reserved to the UK Government. Scottish Government officials have been working with Ofgem and BEIS to consider a suitable regime. On 23 February 2021, during the stage 3 debate on the Heat Networks (Scotland) Bill, the Scottish Government confirmed its position on appointing Ofgem as licensing authority – pending UK Government agreement.

The UK and Scottish Governments are in the process of setting up a Memorandum of Understanding confirming that the Secretary of State will unappoint Ofgem from its role as Scottish licensing authority should Scottish Ministers wish to appoint another body as the licensing authority.

It is on this basis that I recommend consent to clause 171 of the Energy Bill.

Clause 172 creates a power for the Secretary of State to amend the HNSA21 for the purpose of providing the licensing authority with enforcement powers similar to those which Ofgem currently has through the Gas Act 1986 and Electricity Act 1989.

The HNSA21 relies on the revocation of a licence to enforce licensing conditions, without any lower level sanctions being available. During consultation stage with industry stakeholders, a system of fines was considered. However, given the anticipated low operating margins of heat network projects, it was decided that fines could have an adverse effect of presenting further risks to operators, which may impact on market entry.

However, Ofgem raised concerns that a lack of lower level sanctions would hamper its role of licensing authority and intimated that it would only be willing to take on the role if further provision on enforcement were provided. Additionally, they highlighted the administrative challenge of enforcing the Scottish and GB systems in a very different way, given that Ofgem will have the additional powers for England and Wales.

Given the serious concerns expressed by Ofgem, and in acknowledgement that a system of fines would help drive compliance with a licensing regime without resorting to revocation of licenses (effectively compelling market exit), Scottish Government officials identified two mechanisms to amend HNSA21 to provide similar enforcement powers for the licensing authority in Scotland to those provided by BEIS for England and Wales: either we could use future Scottish legislation as a vehicle to make the necessary amendments, or use UK Government legislation to amend the Act. The UK Energy Bill was identified as the best option given the more favourable timeline.

The recommendation now to withhold consent to clause 172 is on the basis that the exercise of the powers in that clause by the Secretary of State should be subject to the consent of the Scottish Ministers.

Yours sincerely,

**MICHAEL MATHESON MSP**