

Decision of Bryan Welch, Deputy Legal Director, on behalf of the Secretary of State for Business, Innovation and Skills on the appeal by WERCS Limited trading as City Compliance Scheme under regulation 66 of the Waste Electrical and Electronic Equipment Regulations 2006 (SI 2006/3289) (as amended) against the decision of the Environment Agency to refuse WERCS Limited's application to operate a producer compliance scheme for the years 2010-2012

Background

1. On 28 August 2009 WERCS Limited trading as City Compliance Scheme ("City") submitted an application to the Environment Agency ("the EA") under regulation 41 of the Waste Electrical and Electronic Equipment Regulations 2006 (as amended) ("the Regulations") for approval to operate a producer compliance scheme for the years 2010, 2011 and 2012. City had previously been approved to operate a producer compliance scheme for the years 2007, 2008 and 2009.

2. Part 4 of Schedule 7 of the Regulations sets out the requirements for a producer compliance scheme ("PCS") to be approved and for continued approval of a scheme. Paragraph 4 requires that the operator of a proposed scheme has viable plans to collect an amount of waste electrical and electronic equipment ("WEEE") that is equivalent to the amount of WEEE it will be responsible for financing under the Regulations.

3. In June 2009 the EA and the Scottish Environment Protection Agency (which is responsible for the approval of schemes in Scotland) jointly issued "Guidance note WMP8: Guidance on operational plans for WEEE compliance schemes". This contains guidance on the operational plans required in applications for approval of a PCS. Paragraph 4 of the guidance explains what the EA and SEPA require an applicant to include in its application in order to show that it has a "viable plan". It states that such plans "must demonstrate that significant over or under collection will be avoided" and "must be supported by documentation to demonstrate that the plans are 'viable' and not simply aspirations or good intentions."

4. On 17 August, following an unsuccessful judicial review of the Regulations by Repic Limited, the Department for Business, Innovation and Skills, the EA and SEPA sent each PCS a joint statement with further guidance to applicants for approval of a PCS. Paragraph one sets out what information must be contained in an application for approval of a PCS where a scheme has agreed to collect WEEE on behalf of another scheme or have WEEE collected on its behalf by another scheme. Paragraph one includes the following—

"Details of such third party collection arrangements, including the amounts of WEEE per category and names of the relevant third party schemes involved, must be provided in schemes' operational plans. Schemes must also provide the relevant Agency [i.e. EA or SEPA] with written confirmation from the third party schemes they are collecting on

behalf of / collecting on their behalf. These details and confirmation must be contained in schemes application for approval under the Regulations and any subsequent material changes to the details must be notified to the Agencies.”

5. On receipt of City’s application there were a number of areas where the EA felt they required more information. The EA contacted and had further communications with City about those issues on 14, 15, 16, 23, 24, 25 and 28 September 2009. As a result City provided additional information on 21 and 23 September and a revised viable plan on the 28 September. The deadline for the EA to determine City’s application for approval was 1 October 2009. On that day the EA notified City that its application had been refused. The particular ground for refusal was that the information provided did not demonstrate that City had viable plans to collect an amount of WEEE that was equivalent to the amount of WEEE that it would be responsible for financing (i.e. the criteria for approval in Paragraph 4 , Part 4 of Schedule 7 of the Regulations) was not met. The EA stated in its notification of refusal that this was because:

“The arrangements with other schemes that you describe in your viable plan are not supported by the documentation you provided, and there is lack of clarity between arrangements for City Compliance Scheme and for *[excised]* Scheme.

There is no arrangement in place for a significant excess of Small Household WEEE”.

The appeal

6. On 23 November 2009 City submitted its appeal against the EA’s refusal of its application to the Secretary of State for Business, Innovation and Skills under regulation 66(1) of the Regulations. They requested that the appeal be determined on the basis of written representations.

7. In support of their appeal City stated that:

(a) the arrangements they had with other PCSs described in their viable plan were now supported by the correct documentation in terms of agreements,

(b) the agreed arrangements between City and *[excised]* had also been clarified within the correspondence,

(c) the significant excess of Small Household WEEE also now had an arrangement in place with other schemes; and

(d) that although City did have some categories of WEEE that were predicted to be in surplus they had contacted PCSs with approvals for the 2010-2012 compliance periods who had all stated that they had no requirements for the predicted surplus. City stated that were confident that the surplus generated would be obligated and would be required by schemes once obligations were calculated for the 2010 compliance period.

With regard to (a) to (c) above City referred to a written documentation file which accompanied their appeal. Included in this written documentation file was a new viable plan.

8. Following receipt of City's appeal the EA were invited to respond and did so by a statement dated 10 December 2009. By letter of the same date EA wrote to City setting out what, in their view, were the shortcomings with the information City had provided as part of their appeal. In paragraph 24 of their statement EA said:

"...we have raised our continuing concerns with the Appellant and are in discussion whether the deficiencies can be remedied. We would hope those discussion could be concluded within the next 14 days and if the Inspector would be willing to allow those discussions to continue would provide an update of any progress that can be made."

In the light of that request and in view of the impending Christmas holidays the Department wrote to City asking that if they had any additional representations to make arising from the agency's response these should be submitted, together with any relevant supporting documents, by Friday 8 January 2010.

9. On 22 December 2009 City wrote to EA in response to their 10 December letter providing further information and subsequently there were additional exchanges between City and EA resulting in City providing yet further information to EA on 7 and 8 January 2010. On 8 January 2010 EA requested a further 7 days within which to consider this information and this request was granted on the basis that there would be no further extensions after 15 January 2010. On the 15 January 2010, having considered all the additional information provided by City, the EA submitted their response.

Viability of City's plans

10. The only issue in this appeal is whether City has viable plans to collect an amount of WEEE that is equivalent to the amount of WEEE for which it will be responsible for financing under the Regulations for the compliance periods 2010 – 2012.

11. In their appeal City do not argue that the EA were wrong to come to the decision they did on the 1 October 2009 based on the information available to them at that date. There is nothing before me to show that the conclusion reached by the EA on 1 October 2009 that City did not have a viable plan was wrong. Faced with the same evidence I would have reached the same conclusion as the EA.

12. Instead, in support of this appeal City submitted a new viable plan and accompanying documentation. Since the submission of their appeal there have been further exchanges of information between EA and City which I refer to in paragraphs 8 and 9 above. The latest viable plan information was provided by City on 8 January 2010. In the circumstances I propose to

determine this appeal on the basis of the information available to me at today's date.

13. From the Agency's response dated 15 January 2010, my examination the viable plan submitted by City on 8 January 2010 and all the other paperwork submitted by both EA and City in connection with this appeal I find that:

(a) Discounting small differences between the obligations and WEEE collected in Categories [excised] WEEE the position is that at 8 January 2010 City's viable plan shows a surplus of WEEE collected of at least [excised] tonnes. In reality it appears this figure is considerably higher because for Category [excised] WEEE City's projected obligation is [excised] tonnes against a projected collection amount of [excised] tonnes whereas the real projected obligation is nearer [excised] tonnes. So instead of having a shortfall in this category (as set out in the 8 January viable plan) City have a significant, surplus in the region of [excised] tonnes.

(b) The surplus in (a) above is spread as follows:
[excised]

(c) For [excised] WEEE surplus there is no documentation supporting City's claim to have made an arrangement with [excised]. The EA indicate that these arrangements could be a continuation of arrangements that were in place for this category with [excised] in 2009.

(d) For the Category [excised] WEEE surpluses City state in their 8 January 2010 viable plan that these were "to be traded with [excised] until the revised 2010 membership was published. This has dramatically altered the level of obligation for [excised] and as a result, they no longer require our surplus. As a result the approved compliance schemes have been contacted for this surplus tonnage. The results to date are shown in the attached spreadsheet". That spreadsheet records that two PCS's have indicated that they would require additional WEEE but no indication of quantity is given.

(e) There is a deficit for [excised] of [excised] and there is no documentation supporting City's claim to have made an arrangement to balance this with [excised]. Again the EA indicate that these arrangements could be a continuation of arrangements that were in place for this category with [excised] in 2009.

14. Even if City had produced documentation to support the existence of the arrangements referred to in paragraph 13 (c) and (e) above (and ignoring the surplus in category [excised] – see paragraph 13(a) above) City would still have a surplus of WEEE collected of at least 429 tonnes. In the context of a projected obligation of approximately 141 tonnes I consider that such a surplus is significant. No documents have been produced to support the claim that City have in place arrangements to deal with this surplus. In those circumstances I consider that City do not have a viable plan to collect an amount of WEEE equivalent to that for which they are responsible for financing. I therefore find that the criteria for scheme approval in Paragraph 4, Part 4 of Schedule 7 of the Regulations is not met.

Decision

15. For the reasons stated above I determine on behalf of the Secretary of State that the decision of the EA should be upheld and that City's appeal be dismissed.

Signed on behalf of the Secretary of State

Bryan Welch

Bryan Welch
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