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Mr Patrick Millen
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Dear Pat

Additional queries – request for legal advice

You are well aware of the current issues around RHI payments and I am very grateful to you for your legal advice to date. The PWC investigation has raised additional queries, especially around the site inspections and Ofgem's response to the findings.

The independent investigation categorised the sites inspected into four categories:

Category 1 – Participants generating heat for an eligible purpose within the intentions of the scheme.

Category 2 – Participants generating heat for an eligible purpose which does not meet the intentions of the scheme.

Category 3 – Participants generating heat for an eligible purpose, but using heat in a way that is not energy efficient.

Category 4 – Generating heat for a purpose which may be ineligible and therefore may be in breach of the scheme.

The Department's initial view was payments should be withheld on all Category 2, 3 and 4 cases until Ofgem and the Department are satisfied of their ongoing eligibility. We therefore asked Ofgem to consider the site inspections for Categories 2, 3 and 4 and detail what further action, if any, can be taken. To date, we have had a response on their assessment of Category 4 site inspections which is attached. We have concerns about the robustness of their approach and would therefore appreciate your views in a number of areas.

- i) Is the current evidence (detailed PWC site inspection reports) sufficient to warrant stopping payments on all Category 2, 3 and 4 cases while further investigations are carried out?
- ii) Based on the PWC site inspection reports, is reasonable doubt sufficient for withholding payments? For example, one of the Category 4 reports sent to Ofgem was of a domestic house and Spa. The PWC concern was that it was a

predominantly domestic installation however Ofgem has responded saying 'No commercial evidence submitted at application stage, but a web search confirmed a fully developed website exists for the Spa. Satisfied this is of a commercial nature.' Is the existence of a website sufficient evidence of a commercial use? If there was no commercial evidence submitted at the application stage, should the application not be rejected or accreditation revoked? Or at the very least, can the Department insist that Ofgem suspends payments until it is satisfied that a thorough and appropriate investigation has been carried out?

- iii) Should non-compliance with the scheme exist on one or more boilers of a multiple boiler site, is that sufficient for the Department/Ofgem to revoke accreditation for all the boilers on the site or is each installation considered separately as each is a separate installation?
- iv) Given the significant budgetary pressures and costs to the NI Block, would the Department have any basis for taking legal proceedings against Arthur Cox, who drafted the regulations, or CEPA, who generated the original tariff and advised against the need for tiering?
- v) I know we have already discussed this, but legally, is the Department obliged to consult on proposed tariff changes? If so, what is the shortest possible time we could have the consultation open?
- vi) Would the Department be within its rights to shorten the RHI tariff payment period from 20 years to 10 years assuming payback and rate of return (12%) can be covered in this period? Would this need to be consulted upon?
- vii) Could you advise whether the Department could retain flexibility in the legislation to alter the fuel related element of the tariff in the future - should fuel costs change significantly in the future?

Grateful for your consideration and advice regarding the queries above.

Yours sincerely



Stuart Wightman
Energy Renewables Division

ANNEX A**Ofgem's response to PWC Site Inspections, Categories 2, 3 and 4****Category 4 reports**

As mentioned in our meeting in Belfast on 6 October and in our follow-up email update on 11 October, there are a number of reports where there is insufficient clarity to put payments on hold. For example, some key findings are caveated such as being described as 'appears *unlikely*', 'not used *during the audit*', '*probably* a commercial space'. We are still expecting to provide a summary of all Category 4 cases later today, so we can confirm that this is on track as per your email below.

We will of course support any instruction the Department may wish to make regarding payments to installations under the scheme, but we would suggest this is discussed (we are happy to prioritise this) following your considerations so that we can clarify how this would be implemented in practice, and to reflect any impacts this might have on our administration in line with Administrative Arrangements currently in place.

Category 2 and 3 reports

I received the detailed category 2 and 3 reports on 12 October 2016, and we are preparing a view on these. However, as per our agreed prioritisation we are focusing on providing an update on category 4 reports today, and I can confirm we will provide an update on Category 2 and 3 reports by Wednesday of next week. Please advise if you would like us to prepare anything in advance of that. However, we do need to reiterate as per previous dialogue and correspondence that while there are certainly a number of areas where it may benefit us to discuss next steps in line with the Departments view, given the nature of the reports and the issues identified it seems at this stage that there will be many sites where it would not be appropriate for us to take actions involving holding payments until, at the least, we had contacted participants to confirm information.



Category 4 PwC
cases - summary of C