Minutes

Northern Ireland RHI Ofgem / DETI Meeting

Teleconference between officials from DETI and Ofgem to discuss the development of the Northern Ireland Renewable Heat Incentive Scheme

From: Keith Avis 29 June 2012
Date and time of Meeting: 26 June 09:00 – 10:00
Location: 9 Millbank

1. Those Present

Ofgem
- Luis Castro
- Keith Avis
- Andrew Amato
- Paul Heigl
- Marcus Porter
- William Elliot

DETI
- Joanne McCutcheon
- Peter Hutchinson

2. View on Regulations

2.1. DETI confirmed that it was their intention that the NIRHI regulations would replicate the GB RHI regulations, although possibly with differences in the tariff structure, some amendments to the definitions section and no provision for payments for biomass installations over 1MW. Ofgem Legal had fed in comments on the regulations (including some changes of a permanent nature included in DECC’s interim cost control Regs) which DETI said were helpful and would consider as part of the process to finalise the regulations. DETI confirmed that it was their intention to have a phase two update to the regulations in summer 2013 which will reproduce the amendments on which DECC intend to consult this Summer.

2.2. Action: DETI to work on final draft of the regulations which they will share with Ofgem before laying before the NI Assembly. Timetable is to obtain clearance before summer recess, if possible, and then lay during recess. However, if all necessary signatures are not obtained in time this could lead to 4 to 6 weeks delay.

3. GB RHI Legislative Amendments

3.1. Ofgem raised concerns over the potential impact of the amendments to the GB regulations coming into force shortly after the NI RHI regulations. As the draft NI RHI regulations replicate the GB regulations as they currently stand, Ofgem could see logistical and presentational issues with the NI scheme initially being without these improvement updates. The point was made by Ofgem that that this would mean replicating the issues that have proven necessary to address in the GB regulations. Ofgem’s advice was to wait until the GB regulations are amended as the amendments will serve to negate any risk that the regulations currently pose. However, DETI were clear that they have a commitment with their Minister to bring the regulations into force by the end of September and this could not be put back to dovetail into the legislative updates to the GB regulations. It was also felt that to do otherwise would also put financial arrangements in jeopardy.
Action: In response to issues raised by Ofgem on embedding DECC GB RHI amendments into NI RHI regulations, DETI confirmed that this would need to be taken forward after their regulations came into force late September/October.

4. Administrative Agreement
4.1. Ofgem had sent a framework of the agreement to DETI prior to the meeting. DETI recognised that this was a critical workstream that would need to be taken forward at pace. William Elliot (seconded with Ofgem Legal) agreed to work on the first draft of the agreement which would be the focus for discussion between the two parties. It was recognised that agreement on the development workstreams (cost, scope, timescale etc.) would need to be secured quickly, so this is to be de-coupled from the Administrative Agreement and agreed as soon as is practicably possible.

Action: William Elliot to produce first draft of the Administrative Agreement.

Development requirements to be separated from the Administrative Agreement and produced over the next two weeks, for discussion and agreement. Paul Heigl to take this forward. DETI to consider whether there were any functions arising from the regulations that should not be carried out by Ofgem.

It was agreed that, at the least, it appeared appropriate that, as in the case of the NIRO agreement, taking enforcement action should be for DETI to undertake, though facilitated by associated Ofgem investigatory work and information gathering.

5. Timescales
5.1. DETI confirmed that they are committed to a scheme go-live late September ideally or during October if there is any slippage. The date was dictated by whether the regulations could be laid before summer recess. Ofgem expressed concern over the tightness of the September delivery timescale and said that October delivery would be preferable. However, as had previously discussed, if September delivery was essential for DETI, Ofgem felt that they could ensure that this was not compromised by manning enquiries, pending all operational requirements being in place.

Action: It was agreed that interim solutions would need to be explored to facilitate a September go-live.

6. State Aids Approval
6.1. DETI confirmed that they now had state aid approval for the NI RHI scheme. Ofgem Legal raised the issue of whether DETI had notified the draft Regulations to the Commission and other member states under the requirements of the Technical Standards Directive as the explanatory note stated that this was the case. In particular, the point was made that this would need to be done before the Regulations were signed, i.e. whilst they were still in draft, that it would entail a minimum 3 months standstill period requirement (running from the date of the notification) and that failure to comply with the requirements of the directive would result in the Regulations being unenforceable as a matter of law. DETI said that this
was something that they would need to explore with their internal EU
colleagues and lawyers, and took an action away to do this.

**Action:** DETI are to consider their obligations under the Technical Standard
Directive with a view to ensuring that DETI’s timetable can be met.

7. **Date of next meeting**

The next meeting has been set for 10:00 on 3rd July. Keith Avis agreed to put in
place further weekly catch-up meetings into the calendars of those in attendance.

8. **AoB**

Paul Heigl will arrange a date for DETI to visit Ofgem over the next few weeks.
Key focus for the day will be to discuss the first draft of the Administrative
Agreement, the development phase proposal/cost and to meet the new Glasgow
Band C.

Keith Avis

29 June 2012
From: Paul Heligl  
Sent: 04 July 2012 10:48  
To: (Joanne.McCutcheon@detini.gov.uk); DETI (Peter.Hutchinson@detini.gov.uk); Andrew Amato; Keith Avis; Luis Castro; Marcus Porter; Rita Chohan; William Elliott  
Subject: NI RHI minutes 03.07.12.docx

Dear All,

Please find attached the minutes, representing a record of our teleconference on Tuesday 3rd July 2012. Please let me know if you have any amendments to these.

Kind Regards,

Paul

[Internal Only]
Northern Ireland RHI Ofgem / DETI Meeting

<table>
<thead>
<tr>
<th>Teleconference between officials from DETI and Ofgem to discuss the development of the NI Renewable Heat Incentive Scheme</th>
<th>Date and time of Meeting</th>
<th>Location</th>
</tr>
</thead>
<tbody>
<tr>
<td>From K. Avis 3 July 10:00 - 11:00</td>
<td>9 Millbank</td>
<td></td>
</tr>
</tbody>
</table>

1. Those Present

Ofgem

Luis Castro
Keith Avis
Andrew Amato
Sophie Jubb
Paul Heigl
Marcus Porter
William Elliot

DETI

Joanne McCutcheon
Peter Hutchinson

2. Minutes of 26 June Teleconference

2.1. DETI wanted to clarify in paragraph 2.1 that although they will be making amendments to their legislation in summer 2013 to align with DECC’s planned changes in January 2013, the main objective of those amendments is to bring in Phase II of the NI RHI.

2.2. DETI also wanted to update Ofgem that the SL1 has been signed off by the Minister. There is a meeting this Thursday to see if wider Ministers are content with the SL1.

Action: DETI will inform Ofgem on the outcomes from the Enterprise, Trade and Investment Committee meeting by COP Friday 06/07/12

3. Draft Regulations

3.1. DETI have asked their external legal consultants to take on board the last round of Ofgem comments. DETI informed the group that next week is a national holiday week, but even with that they hope that their consultants can turn that piece of work round within 1-2 weeks.

3.2. Ofgem legal stated that they have a few more comments on one provision.

Action: Marcus Porter to send DETI comments on that one provision ASAP so it can be passed onto DETI’s external legal consultants for consideration and inclusion in any amendments being made.

4. Technical Standards Directive (TSD)

4.1. DETI have asked DECC for their notification documentation to see what DECC’s reasoning was for the necessity to notify the EC under the TSD. DETI are still waiting on a response from DECC. DETI believe currently that the standards within their legislation are already European standards and not new national standards so won’t need to notify. Marcus Porter commented that the draft regulations would not implement EU
requirements and was of the view that the obligations and standards they imposed appeared “national” in nature

4.2. DETI informed Ofgem that for the NIRO they didn’t need to notify the EC and see little difference is needed in approach. However DETI will seek external legal advice to clarify. Marcus Porter cautioned against assuming that there might be any read across between the 2 schemes in this respect and made the point that the NI scheme will be a discrete piece of legislation which falls to be assessed in its own right as regards technical standards compliance.

4.3. Keith Avis observed that, in the event that a technical standards notification proved necessary, there would be a minimum 3 months standstill period which could impact on the delivery timetable.

4.4. DETI acknowledged this but pointed out that if they do need to notify the EC and there is a 3 month standstill process, then their launch date of the scheme and Ofgem’s ideal go-live date would be much more aligned.

4.5. DETI observed also that, even if there is a standstill time under the TSD, work towards delivery at the end of October 2012 can continue in the interim.

Action: DETI will inform Ofgem as soon as they receive any further information concerning the NI RHI and the TSD.

5. Administrative Agreement

5.1. Ofgem are currently working on this document and will send over a draft to DETI as soon as it is ready. This is expected to be during week beginning 09/07/12. It was noted that it was likely that there would be some blank spaces initially.

5.2. DETI informed Ofgem that they would need to seek legal advice on the content of that draft and send comments back.

6. Development Phase Agreement

6.1. Ofgem are currently working on this document and will send over a draft to DETI as soon as it is ready. This is expected to be during week beginning 09/07/12.

6.2. Ofgem have secured an IT business analyst who is currently working on revising the IT costs and resource requirements to inform this first draft.

6.3. Ofgem pointed out again that when DECC make amendments to the GB RHI in January 2013, there may be a significant difference in the way the GB and NI schemes are administered which will add complexity to the schemes and costs.

6.4. Ofgem pointed out that synergies between IT system releases between RHI GB and NI are now unlikely. The impact of this will be assessed as part of the on-going work to revise IT and resource requirements.
7. **Development Team Staffing**

7.1. Ofgem have a new 50% Band C Policy Development Manager (Paul Heigl), a new 30% Project Manager (Rita Chohan) and are currently recruiting a 100% Band C to be based in Glasgow and hope to have that person in place during week beginning 16/07/12.

8. **DETI Visit to London**

8.1. Ofgem stated that this would be ideally used to discuss in person the administrative agreement and revised development phase agreement and potentially to meet the new 100% Band C as well.

8.2. Joanne is on holiday from 6 July, returning on 30 July and Peter on holiday during August (w/c 13 August and then between 27 July and 10 September) so either just Peter to visit during July or we will delay this visit until September.

8.3. DETI asked to see drafts of these two documents before we arrange the visit.

9. **AOB**

9.1. DETI asked about payment arrangements and when the 1st payment would be invoiced. Ofgem informed DETI that costs accrued during June would be rolled into the July invoice and would be sent to DETI at the beginning of August to be paid retrospectively.

9.2. Ofgem will proceed with next week’s teleconference, but it may only be attended by Peter Hutchinson from DETI. Meeting to be held on Tuesday 10th July at 10am.

**Action:** Luis Castro to check with Ofgem finance that the above statement is correct and inform DETI.

Paul Heigl

3rd July 2012
in place with Ofgem. We were trying to get the legislation in place and there was only so
much we could do. And stop everything to consult on a cost control mechanism — be it an
interim measure or a permanent measure — at that stage did not appear to be feasible
option for us. And that has come from discussions by either myself and Joanne or Joanne
and Fiona and that decision is, “Right, well let’s continue based on the GB scheme at this
stage with the level of confidence that that’s how they launched their scheme to bring in
cost control in the future, and we’ll look at this at the next stage”, if you like.

Mr Lunny: And, related obviously to the suspension mechanism is the degression issue —
Mr Hutchinson: Yes.

Mr Lunny: — and you had — back when we looked at the finance emails, we had seen
the email from Achel Patel in DECC on the 8th of June 2011, where he says, in terms, “This
poses a significant risk, this funding model. One of the things we’re looking at is a degression
system”. So, degression had been on your radar from that point; it’s referred to in the
business case as something that might be introduced. Why was it not introduced with the
regulations in November 2012? What was DETI’s rationale for that?

Mr Hutchinson: In November 2012?

Mr Lunny: Yes, why was degression not introduced?

Mr Hutchinson: I don’t think DECC —. DECC didn’t confirm their position until February
2013 or introduce that until April 2013, so a similar approach would need to be taken in
terms of well what is the degression methodology for the Northern Ireland scheme, what do
the regulations say and how that’s done, I think. So, I think then, once that’s made clear in
February/April 2013, then that leads us into the phase 2 consultation where I think —
obviously we’ll get into this on another day — you know, there’s a decision taken or, you
know, well is the degression methodology right or could we just have a simpler system at
this place and we consult on that with a view of having that in place with maybe the
Mr Lunny: But we do know a number of things. We know that you were prepared — DETI were prepared to go with a stopgap measure in relation to the domestic RHI; the RHPP was a stopgap.

Mr Hutchinson: With a grant; yes, yes.

Mr Lunny: And we know that when DETI consulted in relation to phase 2 in July 2013, they actually consulted on both types of cost control: suspension mechanism followed by degression at a later stage, isn’t that right?

Mr Hutchinson: Yes, I think that was a phase 2 proposal, ended up being a sort of a —

Mr Lunny: It ended up being an interim cost control and then a —

Mr Hutchinson: Yes.

Mr Lunny: — a longer-term cost control.

Mr Hutchinson: Yes.

Mr Lunny: It didn’t move straight to the long-term —

Mr Hutchinson: No.

Mr Lunny: — cost control. And we know that DETI were concerned about the need for cost controls; we saw that back in your evidence in relation to the Ofgem feasibility study — the joint monitoring board. You recall that?

Mr Hutchinson: Yes.

Mr Lunny: And the fact that DETI were concerned about needing cost controls and whilst we know that you were concerned about moving ahead of DECC — again this wouldn’t have required you to move ahead of DECC; it would’ve required just consistency. And was the principal reason then the one you’ve just mentioned: that to do this would’ve required further time, further delay?

Mr Hutchinson: Yes, well I think just, we were trying to get the scheme launched. We were trying to run a domestic grants scheme. We were trying to get the guidance documents
I might add that I’ve no objection to the minutes recording me as being the principal proponent of this view at the meeting. After all it was me that had most to say on that score!

Marcus

From: Luis Castro
Sent: 29 June 2012 10:23
To: Marcus Porter; Keith Avis
Cc: Paul Heigl; Luis Castro
Subject: RE: NIRHI teleconference Minutes

If it helps at all, I think that what is important is that we capture the fact that our clear recommendation to DETI was to wait until regs are amended due to the risk the current ones pose

Thanks,

Luis

From: Marcus Porter
Sent: 29 June 2012 10:16
To: Keith Avis
Cc: Paul Heigl; Luis Castro
Subject: RE: NIRHI teleconference Minutes

I hear what you say and you are of course the custodian of the minutes. However my own view, for what it’s worth, is that minutes are minutes and as such ought to reflect accurately the subject matter they record.

For the following reasons I don’t think you need to be unduly nervous regarding deficiencies in DECC’s Regs.

For one thing, the content of the minutes is presumably unlikely to be shared with DECC.

Secondly, it isn’t really any secret that the Regs are deficient. DECC themselves know that and that’s why they are doing something about it – i.e. amending The Regs. In particular they are well aware that there are major difficulties as regards metering. (The second draft of their consultation, on which I commented yesterday, provides some details). Moreover they have been in discussion for months with the development team here as regards the nature of the problems and what “fixes” might be applied in order to remedy them. DETI too are aware, having been sent a lengthy Table last Autumn detailing the issues and suggesting fixes.

Thirdly, I think it important that there is an official record that, at our first “meeting” with DETI we hammered home the fact that we had significant concerns regarding the course they are proposing to adopt.

Marcus

From: Keith Avis
Sent: 29 June 2012 09:50
To: Marcus Porter
Cc: Paul Heigl; Luis Castro
Subject: RE: NIRHL teleconference Minutes

A few changes on top of yours. Key point here is that I am nervous about stating in the minutes that we think the G8 regs are deficient and/or present a legal risk, so I have just reworked the text slightly. Otherwise your comments look good. I am happy to discuss further this morning as you wish (I am sitting at Luis’ desk today), otherwise I’ll aim to send the minutes off around midday.

Keith

From: Marcus Porter
Sent: 28 June 2012 19:45
To: Marcus Porter; Keith Avis; Luis Castro; Andrew Amato; William Elliott; Paul Heigl; Rita Chohan
Subject: RE: NIRHI teleconference Minutes

Having just sent the below I have bestirred myself and looked at the minutes this evening after all! I attach a further copy, showing with track changes my suggested amendments. I hear what you say re not producing a blow by blow account but I do think it necessary that all the most significant points raised be reflected in the minutes and I have tried to ensure that via my amendments.

Can I just clarify, as regards technical standards, that we are not going to be able to obtain Commission confirmation that DETIs timetable can be met, as the draft minutes suggested. The notification has to go to MS and the Commission and what happens next is laid down by...
advice was to wait until the GB regulations are amended as the amendments will serve to negate any risk that the regulations currently pose. However, DETI were clear that they have a commitment with their Minister to bring the regulations into force by the end of September and this could not be put back to dovetail into the legislative updates to the GB regulations.”

Mr Hutchinson: Yes.

Mr Lunny: And we know, if we scroll on down, then there’s an action and that is that:

“In response to the issues raised ... DETI confirmed that this would need to be taken forward after their regulations came into force late September/October.”

You’ve been asked a series of questions about that in your witness statement. We have already looked at them. You understood what Ofgem were recommending, but you made a decision not to copy it before your draft regulations came into force. Isn’t that correct?

5:30 pm

Mr Hutchinson: That’s the decision that was taken; yes.

Mr Lunny: And, was it your recollection that Ofgem were making their recommendation very clear to you? I ask you that because there are a number of internal Ofgem emails from the 29th of June where a Mr Porter suggests to Mr Avis that the message was “hammered home” about their “significant concerns” about the course DETI was “proposing to adopt”, and another email where they talk about a clear recommendation being made to DETI.

Mr Hutchinson: I think the minute is reflective of what —. So, I think, again, Ofgem will have said, “Are you aware of these issues that DECC are looking at?”. We would’ve agreed, and they said, you should—. They’ve obviously made their recommendation. We’ve outlined why we didn’t think it was possible at that stage, but we would need to look at it in the future. I don’t recall it coming up again in the future. I think we were having weekly teleconferences at that stage. I think they understood our position; they understood where we were coming from; and they agreed that it could be looked at in due course. I think it’s
38, so we had a 30-odd per cent rise at a time when the rest of the Department on average
was taking a 5% cut in their admin and staffing, and there was a cap on the numbers in the
Department.

**Mr Scoffield QC:** I want to come back and talk about the risk register again more
generally at a later stage.

**Dr MacLean:** Can I just ask on that one specifically? There’s two points. The first one
there, on sort of the middle on the right-hand side, about how the risk is managed, you’ve
got there:

> “Development of realistic timescales”.

Can you maybe explain what’s meant by that?

**4:00 pm**

**Ms Hepper:** I think, what we had to look at was the timing of bringing in some of the work
and the phasing of some of the work, so that, when we first started on the journey, we were
aiming for April 2012, and we just had to accept that the amount of work we could get done
internally, but also some of the external people that we were relying on, you know, we just
weren’t going to manage that, so we eased the timetable out to June 2012 and then to
October. So, that was the, sort of, realignment of what we could deliver and when; and,
likewise, that knocked on into things lie phase 2 and when we could manage that and when
we could manage the domestic scheme.

**Dr MacLean:** But there were limitations to that that you described earlier, in terms of not
being able to delay things to put in the suspension powers or —

**Ms Hepper:** Yes, that was in —. You know, we had delayed the phase 1, you know,
several times, and we got to the point where we were at a tipping point and we thought, you
know, we really must just move this on and get this delivered, so that we could then start
some of the other work, albeit that we had to do that on a revised timeline.
Mr Scoffield QC: Is there any paperwork or documentation which sets out this commitment either being asked for or given?

Ms Hepper: No.

Mr Scoffield QC: So it’s just an understanding from discussions with the Minister at that time.

Ms Hepper: That was a —. It was a form of working we had, you know, to keep things moving, and the Minister was comfortable with that and with discussions, so that’s how work was done, and, when needed, things were put on paper.

Mr Scoffield QC: When the Ofgem team are informed that there is a commitment with the Minister to bring the regulations into force by the end of September, you are satisfied that that was a commitment which the Minister was aware of?

Ms Hepper: Absolutely.

Mr Scoffield QC: OK. Because it might be the case that sometimes civil servants say that the Minister wants something or requires something, and that’s used, or can be used, as a means of reinforcing a position or exerting pressure on whoever it is that you’re dealing with. But this is a case where you’re satisfied that the Minister was specifically content with the fact that there was a commitment to bring the regulations into force by the end of September.

Ms Hepper: Or as soon as possible thereafter, yes.

Mr Scoffield QC: Just following up on that, the sentence goes on to say that this deadline of the end of September:

“could not be put back to dovetail into the legislative updates to the GB regulations.”

And I’m just wondering: why couldn’t it be put back? Was that just because the Minister had been assured that the regulations would be brought into force by the end of September, or was there some other reason?
Ms Hepper: It’s also the case that a change of this nature would’ve required consultation. So we would’ve had to draw up a consultation document, put it out — get that all approved internally, put it out to consultation for 12 weeks and then analyse it, redo the regulations, resubmit them to the Committee, who had just that very week got the SL1 and the tariffs, and to launch the scheme, probably at the earliest February or March of 2013.

So — you’ll probably come on to this — but after the team met with me and we worked out what our options were, I went and had a meeting with David Thomson to discuss with him what the Ofgem approach was, gave him the two options, which were to go with what Ofgem were suggesting and pull the SL1 and the tariffs from the Committee, start to draw up a consultation, put that out into the field and launch the scheme when all of that was done and the regulations were redone and resubmitted for the three-month standstill period to the European Commission, and launch around February or March 2013. Or, in the context of what DECC had done, which was to launch their scheme, run it for, as it was, about 10 months without this cost control but with their monitoring and profiling of the budget in place, and bring this forward in the consultation that would’ve come after the scheme launch. At that point, you know, we agreed that those were the two main options and that I should seek to speak to the Minister to draw this to her attention because, obviously, that would be a significant change in the time frame for this scheme, and we wouldn’t be launching into 2013 to do this. It was also the case that DECC did not think they would ever have to use this power: they’d done their projection, they’d seen that they wouldn’t breach the scheme, but they were bringing it in in any case, pending their work on degression. We were planning to follow that up, and we were also planning to do the work on degression.

So, once David was comfortable with that, those were the two options, I sought a word with the Minister, on the basis that I needed to have the word with her quickly, because the Committee were meeting in the next day or so, and there was a chance that this would be
on their agenda, and we would want to pull it from the agenda before it got there.
I did so. I spoke to the Minister, and she considered the options and agreed the way
forward.

Mr Scoffield QC: You’ve given us a lot of information in that answer, so I want to go back
to some of the things that you’ve said and just maybe try to understand a bit more of the
detail around them.
As I understand what you said there, you had the message after the meeting that Ofgem
was saying, “Hold off, and introduce the interim cost control”. That’s right?
Ms Hepper: That’s correct.
Mr Scoffield QC: OK. And the team discussed that with you after the teleconference, and
after that you went and spoke to Mr Thomson about it?
Ms Hepper: Uh-huh.
Mr Scoffield QC: OK. But, in reflecting on that, the reasoning that you followed was —
and, again, please correct me if any of this is an unfair summary of what you’ve said — but
the reasoning was, “If we do this, we will have to reconsult on this issue”.
Ms Hepper: Not reconsult. Consult. Because we had never consulted before.
Mr Scoffield QC: Yes. “We’ll have to consult on this particular issue”. That would take 12
weeks. You would also have to send a further notification to the EU. Now, was that in
relation to state aid, or was that in relation to the notification under the technical standards
directive?
Ms Hepper: The latter.
Mr Scoffield QC: The latter; OK. So, you would have to do that. That will take further
time. And when you add all of that up, it would likely be March 2013 or thereabouts before
the scheme is introduced.
Ms Hepper: That was my calculation of the amount of time it would take and the number
Mr Scoffield QC: OK. I just want to look at each of those steps for a moment. Firstly, the notion that you would need to consult if you were introducing the interim cost control: was that something that DETI took legal advice on?

Ms Hepper: I don’t think we needed to take legal advice. It was the approach that DECC had taken. And any time you’re introducing something which is a material difference, the advice would always have been from DSO that you need to consult and you need to do it in a proper, structured, orderly fashion and give appropriate time for the market to give their views.

Mr Scoffield QC: I know we discussed this on the last occasion in relation to consultation in the event that there was an emergency review of the scheme some time later on down the line, but I think you mentioned that it is possible to reduce the consultation time limits. Was any consideration given to having a shorter consultation period in relation to introducing an interim cost control?

Ms Hepper: On the basis that it would be normal that we would do either eight or 12 weeks, that was about the limit. It would still have been a sizeable period of time to, you know, have to put a pause on the scheme. It might’ve got us an extra few weeks, but also bear in mind that the Committee then would’ve had to have had time for its scrutiny, and it actually took from June through to the end of September or so to do its scrutiny and have their discussions with Action Renewables, so we would’ve had to have built in something along that lines as well for them to do their due diligence.

Mr Scoffield QC: We’ll come on to the ETI Committee in a moment. And I appreciate this is not the decision which was taken, and I want to ask you about the discussion with Mr Thomson and the discussion with the Minister, but, if a decision had been taken out of an abundance of caution to introduce the interim cost control, would it not have been possible
Mr Scoffield QC: OK. Can you remember anything about what was discussed, what the
Minister was told and what she said?

Ms Hepper: I recall that we — I outlined for her the detail of the issue; what DECC had
done; the point that Ofgem was raising now, at the end of June; where we were in the
context of the scheme with the Committee; and what the two main options were, as I saw it,
and the consequences of following one route or the other route. So, all of the information
was, you know, laid out in detail for her, and particularly that this was something that DECC
were bringing in, they didn’t think they needed — they would need it because they’d done
their projections, but it was a fail-safe, you know, a bit of belt and braces. They’d run for 10
months without it, and then Ofgem had been content with that. The consequences of us
stopping, pausing, doing the work and when we’d be launching the scheme versus following
what DECC had done, running for a period of time, consulting and then bringing it in.

She was content on the assurance that we would be bringing forward the consultation
the following spring/summer and bring it into play. And we did so. And, as I said, the
evidence shows that when we brought that consultation forward, there were 16 on the
scheme, so it was a balanced enough decision on the basis of the evidence that came to
pass.

Mr Scoffield QC: I just want to explore a bit more detail about what was discussed in the
course of the call, if you can remember. You’ve said, there, that the detail was laid out in
relation to both of the options. Can you remember what, in particular, the Minister was told
about the point that Ofgem was raising and the risk of proceeding otherwise than in
accordance with Ofgem’s advice?

12:15 pm

Ms Hepper: I think I would’ve told her that the Ofgem legal view was, you know, “Stop,
and take this forward now”, but that there were consequences for that that the Ofgem legal
people didn’t need to consider, which were the length of time that would take and the delay that that would have on the actual launching of the scheme, and also in the context of the approach that DECC had taken, and, you know, she would’ve had all of the information.

**Mr Scoffield QC:** Did she ask you or did you give any recommendation as to the way ahead?

**Ms Hepper:** I don’t think I’d gave a particular recommendation one way or the other. It was for me to give the two options as I saw them and for a decision to be made.

**Mr Scoffield QC:** And what was the Minister’s decision?

**Ms Hepper:** The Minister was content, in the context that we would be bringing this forward in the next consultation, that we go ahead and launch the scheme. But, also, it’s more than likely I would’ve said, “We’ll keep an eye on the uptake of the scheme as it rolls forward, and if the uptake is greater than we think it might be, we will pause other work and bring this one forward as a priority”. As it turned out, as I said, that didn’t need to happen because of the very, very slow uptake of the scheme.

**Mr Scoffield QC:** Now, we talked earlier on today at some length about the November 2011 Ofgem legal review, and what we discussed at that time was that DETI’s approach was to mirror as closely as possible what GB was doing. At this time, when GB was introducing the interim cost control — albeit, as you say, as a failsafe measure, and in circumstances where they hoped and expected not to use it — in line with the approach that DETI had adopted to date, did you not think at that stage, “We should try to stick with GB and do what they’re doing”?

**Ms Hepper:** And we, if you take it right back, we were doing what they did. They launched — ran their scheme for a period and then brought in this measure. So, in that context, we were doing the same as them, but we did have the option — that was discussed — of stopping and not launching the scheme for another x months until this was done, and we
to say to the ETI Committee, “You have the draft regulations. We’re proposing to introduce, or consult upon and if appropriate introduce, an interim cost control, which will stop the scheme going over budget in a scheme year. That will be added in, subject to the outcome of the consultation, but everything else is likely to stay the same”? You referred earlier on to using processes in parallel. Could you not have done that on this occasion?

Ms Hepper: Well, to be honest, we didn’t take that approach. This was the first time that the Committee were going to see this level of detail, and we thought it would be more appropriate for them to see the whole package as one, and that would be, sort of, the more likely approach that we would have taken and, in fact, is the approach that was put to the Minister and she was agreeable that’s what would have to have been done. But, maybe with hindsight, we could’ve tried that, but it was not something that we thought of at the time.

Noon

Mr Scoffield QC: OK. So you’ve received a report back from the team that Ofgem are saying, really at the eleventh hour, as far as you are concerned because you’re close to getting the legislation approved. “Hold on. Stop. Wait. We don’t think you should do this.”

Now, that, presumably, was viewed as something which was quite a significant development?

Ms Hepper: Well, it came from an individual on their legal side. When my team raised it with me, I thought it was sufficiently important that we would work through with the team — well, what would the options be for doing this? — and I also thought it was sufficiently important to raise it further up the line.

But I would say that, when the final decision was taken and the context within that was taken and the assurance that were given to the Minister, when I spoke to Ofgem, and it is reflected in their witness statements, the people I was dealing with were content with that. They could see what the approach that DECC had taken, what had worked and actually,
when it comes to the point where we are actually consulting on this interim measure, on this
cost control and flagging degression, we had 16 accredited on the scheme. So, it’s not as if it
wasn’t a measured approach that we took; that that was borne out by the evidence.

Mr Scoffield QC: Just take you back to one of the things you mentioned there: that the
people that you were dealing with Ofgem were content with DETI proceeding in this way. Is
that Mr Harnack?

Ms Hepper: Yes.

Mr Scoffield QC: And anyone else? Or —

Ms Hepper: Well, I didn’t know it at the time, but when I read the witness statements,
Bob Hull was also content with the assurances that were given that we would follow this
through. And indeed we did.

Mr Scoffield QC: But when you say you did, what you’re referring to there is the —

Ms Hepper: Consultation.

Mr Scoffield QC: — phase 2 consultation. And, as we know, after you left that that wasn’t
followed through, and we’ll talk about that —

Ms Hepper: That’s a different issue.

Mr Scoffield QC: Yes.

Ms Hepper: I delivered what I agreed I would do for the Minister and her agreement to
go down this path was on the basis that we would bring forward in the next consultation the
approach that had been outlined, and that was delivered.

Mr Scoffield QC: I want to talk to you about your discussion with the Minister about that
in a moment, obviously, in a bit of detail. Before we get to that, I understood you to say that
you discussed it with Mr Thomson first and you set out the various options. Was that a
meeting just with you and Mr Thomson, or were Mr Hutchinson or Ms McCutcheon there?

Ms Hepper: I’d left a message that I wanted a word with David. The team went off to get
on with what they had to get on with, and he gave me a call when he was free. So I went up
myself and talked to him.

Mr Scoffield QC: So, would that have been the same day; on the 29th of June?

Ms Hepper: It was either the same day or the following morning. I suspect it was the
same day because I was very conscious of the fact that the Committee were meeting on the
Thursday. We hadn’t seen the agenda for the Committee at that point is my recollection, so I
wasn’t sure whether this was going to be on the agenda or not and I wanted to act while we
had a chance, if it was all going to be on the agenda to pull it from the agenda.

Mr Scoffield QC: Is this a sequence of events of which you have a fairly vivid recall?

Ms Hepper: I can recall this one, yes. This particular bit of it, yes.

Mr Scoffield QC: OK. So you went to speak to Mr Thomson. Can you just describe what
was discussed and what the outcome of that was?

Ms Hepper: We discussed the issue that was raised by Ofgem that morning, discussed
that we had worked through with the team that there was potentially two options at how
this could be taken forward and David agreed that those were the two most appropriate
options. And we agreed that, given the timing, I should seek to have a conversation with the
Minister, which I did.

Mr Scoffield QC: And when you were going to speak to the Minister, were you going with
any particular advice or recommendation?

Ms Hepper: No, I was going with the two options and to have a discussion and see where
that landed.

Mr Scoffield QC: And can you remember the discussion with the Minister?

Ms Hepper: I can remember that I had a discussion with her. What I can’t remember, and
it’s in my witness statement, is whether it was face-to-face in her office or whether it was a
phone call. I would probably be on the side of it being a phone call, given it was probably the
Mr Thomson: I can’t recall.

The Chairman: But you’ve seen it since, so.

Mr Thomson: I’ve seen —. Yes, I know, and I can’t recall. I do recall reading it, and reading about financing in it.

Mr Lunny: It says, in terms, that although they think it’s unlikely that they are going to require the suspension mechanism, that they’re very conscious that schemes can be unpredictable, there can be a sudden uptake and they may need the protection of the mechanism. So, they were saying, “Although we think it’s unlikely, this is a measure we need”, and they brought it in quite quickly. They consulted, had their response out and their mechanism in place all within the first half of 2012.

Mr Thomson: I only said that because — I said I recall the issue and those are the sorts of things, from recollection, I can recall considering.

Dr MacLean: Did anyone make you aware of the reason why DECC had become so nervous? That the experience that they’d had with the small-scale, feed-in tariff.

Mr Thomson: I can’t recall what —. Fiona must have come to me — must have. It was a particularly busy week, because there were lots of other things happening, including a royal visit. And so, she must have had to make a point in my diary to get me or even call me up to Netherleigh to talk about it. So, I am sure she made the, you know, the relevant points to me.

Dame Una O’Brien: What do you think she was expecting in talking to you about it? What would have been the purpose of that conversation?

Mr Thomson: Well, she obviously was sufficiently well — sorry, sufficiently alerted by the conversation she had had with OFREG to say, “We do need to think about this and take a decision”. Now, whether she wanted me to endorse the decision, I don’t know. Certainly, I said, “That’s not something I would take. The Minister would need to be consulted on this”.

Page | 123
Dame Una O'Brien: And did you suggest that the Minister be consulted in writing?

Mr Thomson: I can’t remember.

The Chairman: What was your answer to, knowing as we all do know, the Northern Ireland intention to stay with DECC; whatever DECC did they were going to do? What was your answer to the consultation document where DECC gave a very clear indication of why they were doing it; why they were doing it at this time; why they were doing it with a very low take-up and the experience they’d had, as Dr MacLean mentioned? What did you say?

Mr Thomson: I’m not sure. To be honest, I’ve read the DECC consultation for this, but I’m not sure at the time whether I was aware of the detail of the DECC consultation. I knew they were doing it.

The Chairman: Pretty important point, wasn’t it?

Mr Thomson: Yes.

The Chairman: What now do you say you might have done if you had read that?

Mr Thomson: Well, I think, with respect, Chairman, that’s a hard thing to answer because I have read not just that but I have read so many other things and —.

The Chairman: All right. Let me ask you another question about it in that case. Do you think that that consultation and the detail of it should have been taken to the Minister, together with the warnings that Fiona had received from Ofgem?

Mr Thomson: Yes.

The Chairman: Is there any other way of making an informed decision on that?

Mr Thomson: No, I think the Minister should’ve been alerted to that and we — certainly, I didn’t — well, hindsight is wonderful — recognise the significance.

Mr Lunny: But one very obvious way of doing that and a way that’s been adopted for other aspects of the scheme is a submission, however short or long: attached to the submission a copy, perhaps, of the DECC consultation document or, even better by that
point, the DECC government response to the consultation with the draft mechanism because it was a simple mechanism. It was simple to understand, certainly compared to degression, and the documents make it very clear why it’s been brought in.

And, similarly, Ofgem’s advice, which was pretty clear, could’ve been either attached or rehearsed in the submission. That would be what you would normally have expected to happen. Do you know why that didn’t happen on this issue?

Mr Thomson: No, I don’t know. Although I — well, I’ve heard Fiona say subsequently to the Inquiry that there was —. Didn’t she say she was meeting — she was going to the Assembly Committee the following week? But I don’t know. I would’ve expected on something like that that you would’ve done what we normally do and go to the Minister with —

Mr Lunny: A submission.

Mr Thomson: — a submission.

The Chairman: Whatever your expectation may have been, should you, given your position, not have advised her to put it into a submission? You and she had talked about it.

Mr Thomson: Yes, and, Chairman, I can’t recall what I said and how I said about going to the Mi—. Did I just say, “We need to talk to the Minister”, did I say, “We need to go to the Minister” or did I say, “We need to do a submission”? I can’t tell you that because I just cannot remember the discussion.

The Chairman: But the reasons that Mr Lunny has just given you, it is difficult to the — almost impossible to understand why you would not have advised that in these circumstances.

Mr Thomson: But if —.

The Chairman: If, on the basis you don’t remember it, it’s highly unlikely I’d’ve thought that you did advise it.
Mr Thomson: No, except if I say to a senior civil servant or a colleague, “We need to take this to the Minister”, I don’t think you can read from that that it automatically means a conversation because normally — our normal practice would be to put it in writing to the Minister.

The Chairman: Well, then, the other question that needs to be asked is why Fiona wouldn’t understand that?

Mr Thomson: Well, I don’t know whether Fiona thought this was so critical. I mean, I don’t know. Again, I am lacking the detail. I certainly don’t remember and I don’t have notes to tell me what we discussed.

Mr Lunny: But if you had assumed it would be in a submission, for example, you’d’ve expected that submission to be cc’d to you, as they all were, and you’d’ve seen that there hadn’t been a submission. And, taking your point that you mightn’t have felt it necessary to say, “You need to tell the Minister about this. You need to put it in writing”, you might’ve assumed it would be put in writing. Well, not seeing, then, a submission about it but being told the Minister has gone for option 2 rather than option 1, would you at that point not have queried was there a submission, or, if there isn’t a submission, we need to record that important decision in writing. Because there isn’t a — we discussed it earlier — there isn’t a follow-up email or —.

Mr Thomson: I accept that there isn’t a follow-up email.

Mr Lunny: But do you know why that didn’t raise any concerns with you or have you taken any action to make sure that there was a [inaudible]?

Mr Thomson: I do not remember. I may have discussed it with the Minister at the time or in the days afterwards because I spent — because of what was happening, I spent a lot of time with the Minister in those few days. I don’t know.
Mr Lunny: At the end of that engagement with Mrs Hepper and her engagement with the
Minister, you’d have been in absolutely no doubt that there were no cost controls in the
scheme as it stood; it needed cost controls; DECC had picked up their cost controls within
nine months of their scheme starting; and that you had committed — you as in energy
division or the Department — had committed to the Minister that you would pick it up after
your scheme went live.

Mr Thomson: Yes.

Mr Lunny: You’d’ve had no doubt about that.

Mr Thomson: I knew then that we were going — or the scheme hadn’t been launched.
You know, it hadn’t been launched at that stage.

Mr Lunny: No; it wasn’t launched till the 1st of November.

Mr Thomson: That’s right. I knew that we were doing it and we would be consulting, and
the consultation would include — that was the intention — cost controls and, hopefully,
within a year to 18 months of scheme launch, we would be bringing forward proposals for
cost controls.

Mr Lunny: Why a year to 18 months? You would’ve known DECC’s scheme went live in
November ’11; the cost control in place by July ’12 —.

Mr Thomson: Yes, because the consultation plan at that stage was we would consult once
the scheme went live.

Mr Lunny: So, did you mean, then, when you say, “12 to 18 months”, do you mean 12 to
18 months from June ’12?

Mr Thomson: That’s — yes. I mean — sorry; I used 12 to 18 months in a very rough way in
that answer.

Mr Lunny: But from June ’12 rather than November ’12.

Mr Thomson: Yes.
Mr Scoffield QC: It’s something that we could maybe take up with Miss Aiken in —

Mrs Foster: Yes.

Mr Scoffield QC: — in due course, because, of course, it might’ve been the case that, even if the call is put straight through, that she may have made a record that the call had gone through and put it into the diary.

Mrs Foster: Yes.

Mr Scoffield QC: We’re just not sure.

Now, I recognise that what we’ve now got on the screen isn’t terribly helpful because all of the entries around this time are, on their face, unrelated to RHI and therefore have been taken out by the Inquiry team.

The Chairman: There is one telephone call.

Mr Scoffield QC: There is, yes. I think probably the point that Mrs Foster is wanting to make by reference to this is that there’s an awful lot going on which is nothing to do with RHI and therefore her time would’ve been particularly pressed. We’ll have that redaction removed, either over the short adjournment or over lunch, and we’ll come back to that.

Are you also making the point, then, Mrs Foster that, where it is a particularly busy time and where you are out and about quite a bit, it’s more likely that there would be an entry in the diary because an official would have to speak to your private secretary to try to find a slot?

Mrs Foster: Yes. That’s exactly the point I’m making.

Mr Scoffield QC: Well, I just want to see where that point is leading to. I mean, are you ultimately saying that you think it’s more likely than not that there wasn’t a telephone call and the discussion didn’t happen at all?

Mrs Foster: Well, I certainly don’t have any recollection of a discussion, either on the telephone or in person with Mrs Hepper. I’d like to think that if I had a discussion of such an
important issue of a stark nature, which, frankly, this was — I mean, these were people saying that we shouldn’t proceed with a scheme for which I had signed off a couple of days earlier. I think I signed off on the 28th of June the submission to go ahead. I mean, this was a very big deal, and I have absolutely no recollection of having a discussion with Mrs Hepper either on the telephone or in person.

Mr Scoffield QC: Just to explain the reference to the 28th of June. We know that your approval for the scheme was given in April. I think you're referring there to —.

Mrs Foster: Yes, 28th of June is the SL1, I think, is it not and the consultation?

Mr Scoffield QC: Yes, there’s correspondence going to the ETI Committee. I think there’s a submission of the 22nd of June, which you sign off on the 28th. The point that you’re making is that you had on the 28th — I’ll find a reference to this for the panel in due course —. On the 28th, you’d given approval to take a further step forward.

Mrs Foster: Yes.

Mr Scoffield QC: And is the point you're making out of that then that, if there was something which happened soon after that to say, “Hold on, we need to put the brakes on this”, that’s more likely to have stood out in your memory?

Mrs Foster: Yes.

Mr Scoffield QC: I wanted to take you to paragraph 14c of your second witness statement, which we find at WIT-20581. Again, it’s just to try to tease out what your ultimate position is on this insofar as you can assist us. But we see there again you are asked some questions around the exchanges at this time, and you say:

“I have no recollection of being clearly informed about the risks of proceeding without cost controls. If this issue was raised to me I believe that Ofgem’s warnings must have been significantly downplayed”.

We’ll come back to that. But you’ve said:

“I have no recollection of being clearly informed about the risks of proceeding without cost controls.”
Now, I accept, as we discussed on the last occasion, that, at this remove, several years later, you won’t have a perfect recall of a conversation which may have been a short conversation at a time when you were preoccupied with other things. That sentence:

“I have no recollection of being clearly informed about the risks of proceeding without cost controls.”

could mean a variety of things. It could mean that you’re saying, “I just wasn’t informed”. It could mean that you accept that you might have been informed but you just can’t recall. Or it could mean that you do recall being informed of the risks, but you know that you weren’t informed clearly. I’m just not entirely sure what your ultimate evidence is on this: whether you’re saying the call didn’t happen, or the call did happen but it wasn’t clear, or where you ultimately get to, or if you know yourself.

Mrs Foster: Well, I am saying to you that I have no recollection that either a telephone call or a meeting took place with Mrs Hepper. I do recognise that that is somewhat different to saying it didn’t take place, which is why I then go further to say, if it did take place, then I wasn’t warned in stark terms that I had to make a decision as to whether to proceed or not with the scheme, because I certainly would recall that, cos this was a scheme that was about to go live. I’m simply saying to you, looking at the diary, circumstantial evidence seems to point to the fact that I didn’t have a telephone call, although I do understand that I might’ve had a call that wasn’t put down in my diary. So I’m sorry I can’t be any clearer on that, but what I am saying is that if I had’ve been given the very stark warning that I understand was given by Ofgem to the DETI officials, that I would recall that.

Mr Scoffield QC: I think what you say in paragraph 15b of your statement — maybe if we just go on to the next page — is consistent with what you’ve just described. So, again, you’re being asked some detailed questions about this. You’re being pressed for clarity. You refer back to your previous response. You say:

“I have no recollection of being provided with a choice on these terms” —
Mrs Foster: Yes, I am saying that. It was a fundamental change to the GB scheme, which we were tracking or, at least, I thought we were tracking.

Dr MacLean: Mrs Foster, are you saying, just through the sequence of events, that the legal review at the end of 2011, this consultation and then the issues of the Ofgem meeting, those are all things that you would have wanted a legal — a written submission on?

Mrs Foster: Yes. I think they all merit a written submission.

Mr Scoffield QC: Now, Mrs Hepper's evidence is that, in this conversation, which, I accept, you can't recall, the discussion was that, albeit if the scheme proceeded at that time, it would be without the interim cost control and without the other scheme improvements. That's precisely what DECC had done. They'd started their scheme off in the preceding year, and they'd then fixed it at some stage into the scheme, and they were able to do that at a time when nothing really was lost, because the scheme uptake had been fairly low since the introduction of the scheme. Mrs Hepper also says that you were assured and accepted the assurance that DETI, in the next iteration of its scheme, would address these issues and, in particular, that the interim cost control would be introduced in phase 2. So those are the reasons why she says that it was a legitimate option to proceed without taking the Ofgem advice to pause. And the further point that she makes about that is if DETI had paused at that stage, had consulted on an interim cost control, and had followed that through and amended the regulations, and so on and so forth, that would have pushed scheme launch back into 2013, probably, I think she said, around March 2013, as a guess. Can you remember any discussion around that last issue, the timescale of how long it would take if the Ofgem advice was adhered to?

Mr Foster: No, I can't. But I do note your use of language to say that Mrs Hepper has
development piece of work that was going on there as well. I was preparing to go to
Kurdistan shortly after the 12\textsuperscript{th} of July.

So, if you look at my diary, it’s an incredibly busy time. There is no reference to any
meeting, either on the telephone or in person, with Fiona Hepper, but yet, elsewhere in the
diary, there are references to officials coming to meet with me on different subs, including
Mrs Hepper. And there are records of phone conversations with officials and, indeed, with
other outside people as well, so the diary is quite clear in terms of not having anything noted
in it. So, if the statement is that there was a meeting or there was a telephone call, there is
no record of either of those, and, in any event, given the seriousness of this issue, I should
have been given a submission to explain the background to it.

And can I say, thirdly, as well, if the allegation is that I had a phone conversation with Mrs
Hepper, there is no way I would have taken that decision not to proceed without having
spoken to Dr Crawford, and I’m very clear in relation to that.

\textbf{Dame Una O’Brien:} Sorry, Mrs Foster, can you just run through the logic of what you’re
saying? If there had been a phone call —

\textbf{Mrs Foster:} Yes.

\textbf{Dame Una O’Brien:} — and that had led you to question whether or not to proceed,
you’re saying you would have then discussed it with Dr Crawford?

\textbf{Mrs Foster:} Yes, I would have, most definitely.

\textbf{Dame Una O’Brien:} I just want to be clear —

\textbf{Mrs Foster:} Yes.

\textbf{Dame Una O’Brien:} — that I’ve understood that. Thank you.

\textbf{Mrs Foster:} So, there was no submission, there’s no dates in the diary for either a
telephone call or a meeting. It was an incredibly busy time in terms of the end of
June/beginning of July, and I think it might be helpful to the panel if they were to look at my
indicated that I was “assured” that we could deal with these matters earlier on, which seems
to run contrary to what Mrs Hepper says around I didn’t give a recommendation in terms of
what the best way forward was.

Mr Scoffield QC: I think Mrs Hepper’s evidence is that she wasn’t pushing you down one
particular route or another, but, in looking at the option of proceeding with the scheme
then, if that was the option that was chosen, she did say, “And, in that context, we will be
coming back to this in phase 2”.

Mrs Foster: Yes.

Mr Scoffield QC: You can’t recall any discussion about timescales in terms of how long
scheme launch would be delayed if the Ofgem advice was followed?

Mrs Foster: No, I can’t. And, I mean, I do go back to the point that, if this was a phone
conversation, it seems to have been a very long phone conversation, and I cannot think that
I would not have asked for a submission in that context. I know I’m repeating myself around
that, but I’m just making the point again.

Mr Scoffield QC: As I’ve said, we will come on to this, but just since you’ve raised it, why
didn’t you ask for a submission? Is it because you’re saying the call didn’t happen?

Mrs Foster: That is the point. I mean, I — it’s not in the diary. I have no recollection of it.
Mrs Hepper says it did take place. The point I’m making to you if it did take place, if this all
had been laid out in front of me, which is why I go to the point that if the call did take place
it must have been downplayed because if everything had’ve been laid out in front of me in
the fashion that is now claimed, I would’ve asked for a submission in relation to that, is the
point I’m making.

Mr Scoffield QC: And —.

Mrs Foster: So that leads me to the point that, if there was a telephone conversation, the
warnings must have been downplayed. Because, bear in mind, this was the first time I had
logistical and presentational issues with the NI scheme initially being without these improvement updates.

The point was made by Ofgem that this would mean replicating the issues that have proven necessary to address in the GB regulations. Ofgem’s advice was to wait until the GB regulations are amended as the amendments will serve to negate any risk that the regulations currently pose. However, DETI were clear that they have a commitment with their Minister to bring the regulations into force by the end of September and this could not be put back to dovetail into the legislative updates to the GB regulations. It was also felt that to do otherwise would also put financial arrangements in jeopardy”.

Now, what I want to ask you in the first instance: do you have any recollection of being made aware contemporaneously — so I’m talking about June 2012, July 2012 — of Ofgem expressing concern about DETI proceeding to bring in the Northern Ireland RHI?

Dr Crawford: No.

Mr Aiken: And you explain in your second witness statement — if we look, please, at WIT-21587 and paragraph 14c ii — you explain that:

“I do not believe” —

this is the latter part of the sentence — of the paragraph:

“I do not believe that the Minister chose to proceed with the introduction of NI RHI Scheme in the knowledge that it did not contain a suitable cost control mechanism.”

Now, the basis for you saying that, as I understand it, Dr Crawford, is that you don’t accept you were at a meeting with Fiona Hepper and the Minister where the subject of Ofgem warning, interim cost control or cost control generally being discussed occurred.

Dr Crawford: No. I’ve no recollection of that whatsoever.

Mr Aiken: And, I think, in fairness, Ms Hepper suggested it might’ve been a telephone call between her and the Minister, and you go on to explain in your statement that that was something that was —. If we look at 14e, please, if we just maximise that:

“I was not present at any meeting” —
this is to do with the Ofgem warning —

“not present at any meeting with Fiona Hepper. I don’t believe there was a face to face meeting between
Fiona Hepper and the Minister as if there had been I would have been at it. If there had been a telephone
conversation directly with the Minister on this issue, she would have discussed it with me.”

And then you make a different point, which I’m going to come to, is that:

“There should have been a submission coming up either in advance of or following any meeting or discussion
of this type, particularly where a significant decision was being made.”

Now, you explain, in paragraph 15b, which is at 21589, that:

“I do not believe that the Minister was made aware of the amendments to the GB RHI Scheme and
therefore she could not have made an informed decision”.

Now, the basis for you saying that is there is no submission to that effect, which you
describe as the “bedrock”. I presume you obviously can’t help with what conversation may
or may not have taken place on the phone. You maybe could express a view to the panel
about whether that would be a satisfactory way to convey the type of messages that we
were looking at in the March 2012 DECC interim cost control submission or the warning
that’s contained within the Ofgem minute.

Dr Crawford: Well, I don’t recall, at any stage, of a telephone conversation taking place
between the Minister and Fiona Hepper in terms of a critical energy issue like this. You
know, it’s not the way business was done. I don’t recall any record of that. Now, if the
Minister happened to be away from the office or whatever and a phone call did come
through on a nature like that or any phone call on an important issue, normally, the Minister
would have updated me the next time I was talking to her or phoned me at a — phoned me
about it at a later stage. So, at no stage do I recall the Minister saying: “I was speaking to the
head of energy division, and, by the way, you need to be aware of this”.

In terms of the submissions, you know, this, again, is a critical issue, and, you know, if a
phone call did take place and I was involved in that phone call, the natural thing to do would be to say, “Very good. We take your point. Now please follow that up in a submission”. That did not happen.

Mr Aiken: And you explain, in paragraph 14e, that you say this should have been dealt with in a submission. Now, what I understand you to mean by that is that this issue of whether or not some form of cost control was necessary in the Northern Ireland RHI scheme, arising from the material we’ve been looking at to do with DECC’s interim cost control and its consultation and what Ofgem had to say, that issue in its entirety should have been articulated to the Minister so the Minister could make an informed decision, having understood from the submission what the issues were, what the risks were and what was the right way to proceed in the view of the officials — but it should have been a decision, ultimately, for the Minister to take.

Dr Crawford: Yes, that’s correct.

Mr Aiken: And, in fairness to you, just as we’re closing today, because one of the allegations that we have to come back to in 2015 is an allegation that you were involved in delaying the introduction of cost controls, obviously, this is a critical point in time where there’s been a DECC process that doesn’t seem to have been, certainly, communicated by way of submission to the Minister — you’re saying you were never made aware of it — over the interim cost control. Ofgem have then, as a second method, been raising issues, and the interim cost control appears to be part of that that’s being discussed by them, and you’re saying, “I wasn’t made aware of that”. And, in fairness to you, you say in your first statement, at paragraph 6d, which is WIT-21518:

“At no stage did I seek to delay the introduction of cost controls.”

Dr Crawford: That’s correct.

Mr Aiken: And, if I understand your position, if I summarise it this way, you didn’t even
with her pretty quickly, because of the fact that the ETI Committee was sitting on the paperwork in relation to an SL1 and the banding and were going to be taking their decisions on the basis of that information. So, the question was — and agreed with Mr Thomson — get a word with the Minister as quickly as possible.

**Mr Scoffield QC:** OK. And the decision to do it just by way of oral discussion and oral decision from the Minister was something that was specifically discussed with Mr Thomson? Is that right?

**Ms Hepper:** Well, certainly at the end of the meeting it was, “Let’s get a word with the Minister as soon as we can”. And it was not unusual way of working with the Minister to have discussions with her to keep things moving. It was something that we were all comfortable with on the officials’ side and the Minister was comfortable with. Had she not been, she would have specifically asked us to put it on paper or to write something up for her to consider further.

**Mr Scoffield QC:** Did that ever happen? Did this Minister in particular ever say to you, in the course of one of these discussions, “I want this in writing, so that there’s a paper trail or so that I can go off and consider it”?  

**Ms Hepper:** Not in the context of this, no. But that’s not to say over the x number of years that I worked with that Minister or others that it wouldn’t’ve been the case, but not in this case.

**Mr Scoffield QC:** OK. So you’ve said:

“I do not believe there was a written submission to the Minister on this particular issue. To the best of my recollection there was an oral update to the Minister in the context of the ongoing progress with the SL1 at Committee and this particular issue was covered. She would have been appraised [sic] that if this provision was to be brought in the Scheme would not be launching until after the matter was consulted on and a new SL1 submitted to the Committee in the autumn.”
Then you say in paragraph 334:

“I would also have let the Minister know that DECC had run their Scheme without such a provision since November 2011 and that DECC regarded it as an interim measure pending the introduction of degression. Also, that we would pick this matter up in the work which would start immediately after the Scheme launched in a new Consultation. And we followed through on this commitment.”

That’s the point you just made a few moments ago.

“It was also the case that the whole approach to RHI was to be on a phased, evolving basis (as per GB) and this was known from the outset. My recollection is that I briefed the Minister but cannot recall if I did so face to face or in a telephone call and who accompanied me.”

And then you say:

“I also would have informed my line manager.”

Now, that last sentence, that you would’ve informed your line manager, is that referring to the meeting which you’ve told us this morning happened before the discussion with the Minister, or is that referring to going back to Mr Thomson after you’d discussed it with the Minister?

Ms Hepper: Actually both. It would — I spoke to hi— After I, um, met with the team, I had a discussion with David Thomson, spoke to the Minister and then updated David on where we were going.

Mr Scoffield QC: OK. You’ve said that you recall that you briefed the Minister but you can’t recall if you did so face to face or in a telephone call. I think you said today you think it was more likely to have been a telephone call —

Ms Hepper: Probably more likely. I think, around that time, I would have been seeing the Minister on a range of issues, so I don’t want to cloud the issue and give you a definitive it was one or the other. The fact that I don’t recall being in her company — I can’t visualise that — it’s more likely it was a phone call, which, again, would not have been unusual.
Mr Scoffield QC: I know, of course, we’re looking at all of these issues now with the benefit of hindsight. You’ve said that on a number of occasions in your evidence. But I think you would accept in relation to these two meetings that we’ve been discussing where, in terms of now determining what advice the Minister was given, what was discussed with her, what her decision was and the reasons for that, we have to do that on the basis of recollections. I think you would accept it would be much better to have had both a submission and a note of the meeting in each of these cases. Is that right?

Ms Hepper: I think the hindsight point is that that would’ve been helpful as we sit here today, but it was the working practices of the time that prevailed.

Dr MacLean: Mrs Hepper, I find that answer almost more difficult than the fact that it wasn’t recorded: that you, even now, don’t think that it should be good governance to record key decisions that are being made, as the Chairman rightly emphasises, on issues about how public money is going to be spent and what risks are being undertaken in the public sector. I have a company that I am the only person in. I still have to record any decision that is made that is relevant for an annual return in a formality. I find it completely difficult to understand that you still do not think that best practice, or actually fundamental practice, should be to record these things in writing.

Ms Hepper: I think the contrary. I think I was agreeing with the point that, with hindsight, it would’ve been the right thing to do and would be more than helpful now, and I think it’s a learning point for going forward. So, I’m actually agreeing with you.

Mr Scoffield QC: I have to say I hadn’t understood Mrs Hepper to be disagreeing what I put to her. I think possibly the issue that Dr MacLean is on is: not only with hindsight but actually at the time in light of the guidance, it should’ve been done then irrespective of how things turned out.

Ms Hepper: And, again, I’m not disagreeing, but what I’m saying is that we fell into a way
Also, in terms of risk, an RHI delivers earlier against the target. In the event that corrective action were required then the RHI option would identify this need earlier and also allow more time, scope and budgetary flexibility for action to be taken to put the scheme back on track.

- **Consistency with GB**
  Whilst energy is a devolved matter Energy Division is mindful that a high number of commercial operators wishing to avail of support for renewable heat in Northern Ireland will operate jointly in GB. Whilst it is wholly appropriate for a specific incentive mechanism to be developed in Northern Ireland given the variances in the two energy markets, Energy Division is conscious that consistency in approach with GB would be beneficial to those availing of support in both Northern Ireland and GB. Therefore a specific NI RHI, whilst addressing the NI heat market, would be a more consistent approach with GB and will assist policy development options in the future.

- **Example of the NIRO**
  The NIRO was launched in Northern Ireland in 2005 to support the development of renewable electricity installations. Similar to the RHI, the NIRO offers no up-front capital support for installations but instead offers 20 years of payments over the lifetime of the technology with payments determined by actual energy output. This example has proved successful with installers and has led to an increase of renewable electricity levels from 3% to over 12% currently. This experience increases confidence in a RHI scheme to generate investment in renewable heat. On the other hand the potential uptake under the Challenge Fund option would be subject to greater unknowns.

On the basis of the information presented above, the Casework Committee accepted that the RHI was the most appropriate method of incentivisation for the Northern Ireland renewable heat market.

TC asked how the tariffs had been designed and whether Energy Division felt that the various tariffs and types of technologies were appropriate.

PH advised that the tariffs vary depending on the type and size of technology to ensure that financial support is targeted for the specific installation and so over-compensation is avoided. Tariffs are paid for 20 years (the lifetime of the technology) and are ‘grandfathered’. This provides certainty for an investor by setting a guaranteed support level for projects for their lifetime in a scheme, regardless of future reviews. The tariffs will be amended on a yearly basis, for existing installers and new schemes, to reflect the rate of inflation (RPI).

PH further explained that the tariff setting methodology has three general principles:

- Renewable installations are divided depending on the type of technology and size of installation;
- Within each banding a reference technology is chosen to develop a consistent tariff across technologies and scales; and
Good to hear from you.

Rita and I manage what is known as the levies control framework (LCF), which is a new framework which came in this year and which seeks to limit the imputed spend on levies policies (even though they are demand-led schemes etc). The RHI is not actually a levy as it is funded out of direct taxation but given that it is demand-led it is subject to similar controls as the main levies policies (the RO, Feed in Tariffs and the Warm Home Discount). Further information on the LCF can be found here and here.

I say this as policy specific points ought to be officially answered by the policy team.

On your questions: you'll have to ask the policy team what they have announced about the RHI. There is definitely an ongoing issue with HMT about what we say about spending beyond 2015. Of course, since generators receive a multi-year tariff there will definitely be some RHI spend beyond 2015, however you'll have to ask the policy team what we've said about the RHI being open to new generation beyond 2015 and at what level. I would be able to answer that.

On the second question: the AWE budget for the RHI is an annual one and we currently do not have any ability to roll forward underspends. If we overspend against our budget then we would have to adjust the policy such that we underspent against our future annual budgets by a corresponding amount. So we are not automatically required to close the scheme if we overspend. However, if we do not manage to find these savings we would have to fund the residual overspend from DEL. Clearly, this represents a large financial risk on the department so the policy team is currently looking to develop a system of tariff depressions that could be deployed at key points to ensure (among other things) that we manage the risk of overspending against our budget.
The annual AME budgets do not rise in line with inflation, i.e. we bear the inflation risk (this is true of departmental budgeting anyway, so this is not a surprise).

I hope that this helps. My direct line is below should you want to follow up on these answers now or as your scheme is worked up.

Best wishes,

Akhil

Akhil Patel | Levies Framework Manager
Department of Energy and Climate Change
Area 2B | 3 Whitehall Place | SW1A 2HD

0300 068 5359 | akhil.patel@decc.gsi.gov.uk

From: Hutchinson, Peter [mailto:Peter.Hutchinson@detini.gsi.gov.uk]
Sent: 08 June 2011 17:10
To: Patel Akhil (Finance); Varsani Rita (Finance)
Subject: Northern Ireland RHI - Funding arrangements

Akhil / Rita,

Jonathan Marshall kindly passed me your contact details so I could ask a couple of questions regarding the funding procedures for the Renewable Heat Incentive (RHI). I am currently working on the design and the development of a Northern Ireland incentive scheme, for this we have £25m over the spending period (£2m/£4m/£7m/£12m) which was allocated from HMT/DECC on a pro-rata basis on the GB funding.