



INQUIRY INTO THE RENEWABLE HEAT INCENTIVE SCHEME

RHI REF:

DATE: 18 April 2019

Witness Statement of: DAVID FLETCHER

I, **David Fletcher**, will say as follows: -

1. I am a Deputy Director in Ofgem's E-Serve division. I make this statement further to my first statement to the Inquiry, which was dated 13 October 2017 and given in response to Section 21 Notice 482 of 2017 dated 3 October 2017. A restructure of the E-Serve division took place in 2018, and has been briefly considered by the Inquiry in evidence to date (see [TRA-14885 – TRA-14886] and [TRA-16431]). Following that restructure, I have oversight of the delivery by other Ofgem teams of environmental schemes and social programmes for the Government, including the Department.
2. I make this statement further to Dermot Nolan's third statement dated 29 March 2019, which was given in response to the Inquiry's Section 21 Notice 10 of 2019, dated 12 March 2019.
3. I am aware that Dermot Nolan's third statement was given in response to questions related to Ofgem's interpretation of the term "heating system" as it is used in the secondary legislation which gives effect to the GB RHI Scheme and the NI Scheme. My role includes an awareness of legislative developments as they affect the NI Scheme. Those include changes which came into force after Mr. Nolan's statement and which are relevant to the evidence that he gave, as I shall explain in this statement.



4. I have made this statement in order to alert the Inquiry to recent changes in tariffs which illustrate, in stark terms, Ofgem's position that its role is to apply the law according to the correct legal interpretation and to adhere to that interpretation (see Ofgem's Written Closing §§441- 444). There has been much discussion before the Inquiry about whether Ofgem could or should have adopted an "aggregated" approach to the interpretation of "heating system" in order to better achieve value for money in the RHI Scheme. Under the most recent tariff changes, outlined below, were Ofgem to have adopted an aggregated approach to the definition of heating system, payments could have been significantly higher than the payment under a disaggregated approach.

Northern Ireland (Regional Rates and Energy) Act 2019

5. On 1 April 2019 sections 2 and 3 and the Schedule to the Northern Ireland (Regional Rates and Energy) Act 2019 came into force. That Act amends the Renewable Heat Incentive Scheme Regulations (Northern Ireland) 2012 ("2012 Regulations"). The amendments include conferring new tariffs on all NI Scheme participants with solid biomass boilers with installation capacities of up to (but not including) 200 kilowatts. For boilers with installation capacities of 20 kilowatts and above but less than 100 kilowatts the tariff is 1.7 pence per kilowatt hour.
6. Further to regulation 36(9C) of the 2012 Regulations, as inserted by the 2019 Act, in a 12 month period commencing with a boiler's "date of accreditation" the new tariff is only available for the "initial heat" generated by it. No further heat within such a period may be eligible for periodic support payments under the NI Scheme. An installation's initial heat is defined as its output whilst operating at its capacity for 1,314 hours each year.
7. The tariffs for solid biomass boilers with installation capacities of 200 kilowatts and above but not exceeding 999 kilowatts are unaffected by the 2019 Act. Currently those tariffs are, also, 1.7 pence per kilowatt hour. But unlike the tariffs for the 20



- 99 kilowatt boilers there is no limit on the heat that may be eligible for payments.

The “multiple boiler” problem

8. For the purposes of preparing this statement I have read Dermot Nolan’s second witness statement 1 June 2018 and given in response to the Inquiry’s section 21 Notice 16 of 2018. At paragraph 20 of that statement Mr. Nolan commented as follows, in response to questions put to him by the Inquiry:

20.

20.1. *These questions concern whether Ofgem had been monitoring the RHI scheme, including to see whether it was being “gamed”, whether owners of accredited installations were being over-compensated and / or whether assumptions used for the reference installation for the purpose of tariff design were being materially departed from.*

20.2. *In context, I understand that the reference to whether the NI Scheme was being “gamed” in this question is to the use of two or more boilers each with thermal capacities of 99 kW or less serving independent heating systems to meet the same heat demand(s). This is as opposed to making alternative arrangements to meet the relevant heat demand(s), such as linking the boilers within the same heating system, or using fewer boilers with larger thermal capacities. I understand that such arrangements allowed participants to claim the 99 kW solid biomass tariff for each of the boilers involved, which resulted in higher returns being available under the NI Scheme than would have been the case had the alternative types of arrangements for meeting heat demands been used. I understand that the “gaming” opportunity arose because of both:*

20.2.1. *the absence of a definition of “heating system” in the 2012 Regulations, and*

20.2.2. *the relationship between (a) the costs of purchasing and installing more, smaller capacity, boilers (for this purpose and for the following, as opposed to fewer, larger capacity, boilers to meet a given heat demand)*



(b) the costs of installation of more separate heating systems (c) the relatively higher fuel costs associated with the lower efficiencies of using more, smaller capacity, boilers (d) the relatively higher maintenance costs associated with using more, smaller capacity, boilers and (e) the income potentially available under the NI Scheme tariffs from subsidy payments for more, smaller capacity, boilers.

9. During Mr. Nolan's evidence to the Inquiry, the Inquiry reflected on possible steps that could have been taken to have addressed the multiple boiler problem. One such step was assessing multiple hydraulically separate heating circuits supplied by discrete boilers on a single site as a single heating system (day 109, [TRA-16377 – TRA-16378] and [TRA-16435 at lines 16 and 17]). Had it been possible to have taken such a step, and had it in fact been taken, then I understand that the installation capacities of the relevant boilers would in principle have been aggregated for the purposes of allocating a tariff, further to regulation 36(6) of the 2012 Regulations. The Inquiry's attention was also drawn to how DECC's policy development had considered this issue at [TRA-16395 – TRA-16398] and [TRA-16438 – TRA-16441].

10. Further, the Inquiry considered evidence which reflected the points made by Mr. Nolan in his statement as excerpted above, about how the multiple boiler problem arose as a result of the relationship between certain factors at [TRA-16456]. One of those factors is the interpretation of "heating system" as used in the 2012 Regulations.

11. In his evidence to the Inquiry, Mr. Nolan also identified that the interpretation of "heating system" was ultimately a legal issue for Ofgem, and he reflected on the possible implications of its status as such [TRA-16433 – TRA-16436]. In his second witness statement Mr. Nolan explains that Ofgem had taken advice from leading counsel about whether Ofgem could interpret the term differently, and that leading counsel's advice was that Ofgem could not. I understand that Ofgem's instructions [OFG-217448 to OFG-217481] and leading counsel's advice [OFG-217482 to



OFG-217489] in this respect have previously been disclosed to the Inquiry as legally privileged material.

The relevance of the 2019 tariff changes to the Inquiry's consideration of the multiple boiler problem

12. The 2019 tariff changes illustrate the point made by Mr. Nolan in his second statement, as excerpted above, about the legal meaning of “heating system” being only one of the factors that resulted in the multiple boiler problem. I have referenced above that alternative approaches to “heating system” were discussed by the Inquiry during Mr. Nolan’s evidence, such as, for example, that where heat is conveyed from separate boilers through hydraulically discrete heating circuits and is put to the same use in the same building, then those heating circuits should be considered to be part of a single heating system. It was implied this “aggregate” interpretation was preferable from the perspective of value for money.
13. If “heating system” were to be approached in this aggregate way, then the 2019 tariff changes would have other unexpected consequences associated in principle with relatively high scheme expenditure, details of which are as follows.
14. For the purposes of the explanation given here I will use material which is already before the Inquiry. On 15 May 2014 Edmund Ward sent Peter Hutchinson a case study, which Nadia Carpenter had prepared for him [OFG-25717] and which involved high load factors (c.22 hours’ operation each day) in the large type of solid biomass boiler which is now supported at the un-tiered tariff of 1.7p, which I mentioned above.
15. Ms. Carpenter’s case study assumed a boiler capacity of 990 kilowatts. In her example this was a single boiler. But here I will assume a “multiple boiler” situation involving 10 99 kilowatt boilers.
16. Ms. Carpenter’s case study assumed 85% boiler efficiency, and annual operating



hours of 7,956 hours.

17. On the basis that each “multiple boiler” is a separate installation, payments would be calculated as follows. Where I have used parenthesis “(…)” in the calculations it is to reference the relevance of the figures used, and does not form part of the calculation:

- a) Initial heat = 1,314 hours x 990 (capacity in kilowatts) = 1,300,086 hours
- b) 1,300,086 (eligible hours) x 0.85 (efficiency) = 1,105,731 actual (metered) hours eligible for payment
- c) 1,105,731 (eligible hours) x £0.017 (tariff) = **£18,797.43**

18. But if it were possible to assess each of the boilers as supplying heat to a single heating system then their installation capacities would be aggregated for the purposes of tariff allocation. As such they would be eligible for the un-tiered 1.7p tariff mentioned above. Payments would be calculated as follows:

- a) 7,956 x 990 = 7,876,440 hours
- b) 7,876,440 (hours) x 0.85 (efficiency) = 6,694,974 actual (metered) hours eligible for payment
- c) 6,694,974 (eligible hours) x £0.017 (tariff) = **£113,814.56**

19. The 2019 tariff changes, as illustrated by the above example, demonstrate Mr. Nolan’s comments about how problems such as multiple boilers on the NI Scheme are a product of an interaction between various factors (in this case, tariff levels and structures). The term “heating system” as used in the 2012 Regulations and as interpreted by Ofgem can be associated with relatively high levels of scheme spend (such as occurred in connection with the multiple boiler problem). But the same interpretation of the same term is in principle equally capable of having a relatively benign and low effect on levels of scheme spend, as is illustrated by the 2019 amendments and as is explained above.

20. In the case of “heating system” it would have been possible for the term to have been defined to address the multiple boiler problem. As reflected in Edmund



Ward's statement dated 9 March 2018 [WIT-114098 – WIT-1141103] the Department took significant steps toward doing that in 2015. However, had that been done, then (again in principle) it might now be necessary to amend the definition once more in response to the issue arising from the 2019 Act. As described above

21. This illustrates the challenge for policy makers such as BEIS and the Department to be aware of the interaction between the legislation which gives effect to their policies, and all other potentially relevant considerations. Focussing on the interpretation of legislative terms alone is not an adequate means of addressing issues. It also demonstrates that Ofgem's task is to apply the correct legal interpretation of the terms used in legislation: in the context of the legislation which this statement relates to Ofgem can't tailor or adjust the legal interpretation to reflect factors which do not presently appear in the legislation (such as the requirement to have regard to value for money). Neither can Ofgem attempt to rectify issues which arise from time to time wholly or in part from legislation through a reactive interpretation of that legislation. By way of illustration, had Ofgem adopted an "aggregate" approach to multiple boilers, would Ofgem now have to adopt a different, disaggregated approach, to reduce payments under the 2019 tariffs? Such an approach would jar with the certainty and predictability which legislative provisions ought to provide.

Statement of Truth

I believe that the facts stated in this witness statement are true.

Signed:  _____

Dated: 18 April 2019