Neutral Citation Number: [2021] EWHC 84 (Admin)

Case No: CO/245/2020

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL
Date: 22nd January 2021

Before:
MR JUSTICE FORDHAM

- -

Between:

HAVANT BIOGAS LIMITED **NELSON BIOGAS LIMITED** **PURBROOK BIOGAS LIMITED** **THORNEY BIOGAS LIMITED**	**Claimants**
- and -	
THE GAS AND ELECTRICITY MARKETS AUTHORITY	**Defendant**

- -
- -

Thomas Sharpe QC and Ben Lewy (instructed by Burges Salmon) for the **Claimants**
Sam Grodzinski QC and Emily Neill (instructed by the Government Legal Department) for the **Defendant**

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Hearing dates: 25th and 26th November 2020
Further written submissions: 2nd and 4th December 2020

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Approved Judgment

MR JUSTICE FORDHAM :

Introduction

1. This is a judicial review case which raises questions about whether a regulator's decisions, rejecting applications to participate in a green energy "Subsidy Scheme", were in accordance with the law. The Subsidy is called the "Renewable Heat Incentive" ("RHI") and is governed by "Scheme Regulations" made under section 100 of the Energy Act 2008 ("the 2008 Act"). The defendant is the regulator (described in the Scheme Regulations as "the Authority"), whom I shall call "Ofgem" (a collective term used in respect of civil servants employed by, and carrying out functions on behalf of, the Authority). The claimants are four of 37 special purpose vehicle companies ("the SPVs") who made applications on 9 May 2018 ("the 2018 SPV Applications"). A further four similar applications were made on 19 June 2018. The SPVs each applied to be a "Participant" in the Subsidy Scheme, by being "Registered" as a producer of biomethane for injection ("BFI Producer") pursuant to regulation 25 of the Renewable Heat Incentive Scheme Regulations 2011 (SI 2011 No.2860) ("the 2011 Regulations"). "Injection", in relation to a BFI Producer, means that biomethane suitable for conveyance through pipes to premises in accordance with a gas transporter licence ("Suitable Biomethane") is injected into the national gas network. As Registered BFI Producers, the SPVs would be paid Subsidy in respect of "Future Activity" involving subsequently arranging for Suitable Biomethane to be Injected.

2. Two sets of Scheme Regulations are relevant to this case. First, there are the "Old" 2011 Regulations as they stood on 9 May 2018 when the 2018 SPV Applications were made. Secondly there are the "New" regulations which replaced them in 2018: the Renewable Heat Incentive Scheme Regulations 2018 (SI 2018 No.611) ("the 2018 Regulations") were made on 21 May 2018 and amended four days later on 24 May 2018 (SI 2018 No. 635), those amendments taking effect from 20 June 2018, 27 June 2018 and 1 October 2018. In broad outline, the Subsidy Scheme works like this. The Subsidy has an intended "Facilitatory Function": to facilitate and encourage renewable (green) heat generation. Those concerned with producing green energy can be approved by Ofgem to be "Participants" in the Subsidy Scheme. The approval route depends on the type of green energy production process. One route (applicable to BFI Producers) is "Registration" by Ofgem as a "Registered Producer", by meeting "Registration Requirements". Another route is to be the owner (or co-owner) of a relevant plant ("Installation") which Ofgem gives "Accreditation". A Participant gets a "Contingent Entitlement" to receive the Subsidy for twenty years, running for twenty years from (and at a rate referable to) "the Tariff Start Date" (a date based on "the Date of Registration" or "the Date of Accreditation"). The Scheme Regulations contain a "Prohibition on Recourse to Public Funds" and protection against "Double-Counting". The Participant's Future Activity must comply with "Applicable Ongoing Obligations" and with "Appropriate Conditions" imposed by Ofgem with the Registration or Accreditation, and Ofgem has power to withhold Subsidy if they fail to do so: hence Subsidy is a Contingent Entitlement.

3. At the time of the 2018 SPV Applications the SPVs were owned by Qila Holdings Ltd or one of its subsidiaries ("Qila"). The application by Havant Biogas Limited ("Havant") typifies what happened. Mr Paul Thompson, as the responsible project developer, gave "Overall Declarations" required by Ofgem. Using Ofgem's online portal, information was given and documents uploaded, responding to Ofgem's

questions and prompts. The uploaded documents included a "Schematic", a "Biogas Producer Declaration" and a "Network Entry Agreement". Other documents followed, including an "FMS Questionnaire" (FMS stands for Fuel Measurement and Sampling). Each applicant SPV described the prior production of biomethane for injection, for which it had been responsible ("Commencement Activity"). "Further Information" was requested by Ofgem (11 October 2018): in some cases (including Havant) this was provided on 22 October 2018; in other cases on 16 October 2018. Other special purpose vehicles owned by Qila had made applications in 2016 ("the 2016 SPV Applications") which Ofgem had granted ("the 2017 Decisions"). Unlike them, the 2018 SPV Applications were unsuccessful. Havant's application was refused on 30 November 2018. Havant's request (20 December 2018) for a "Formal Review" was accompanied by additional information and documentation. The Formal Review decision was adverse (27 February 2019). Havant then requested a "Statutory Review". On 22 October 2019 Havant's application for Statutory Review was refused by the statutory review officer ("SRO"): that is the decision impugned in these judicial review proceedings ("the Operative Decision"). It is common ground that the judicial review claim stands or falls with the question of whether the Operative Decision was in accordance with the law: I will not therefore be describing or analysing the prior decision-making and reasoning. There are five Grounds for judicial review, as follows. (1) It was a material error of law to conclude that the New 2018 Regulations, rather than the Old 2011 Regulations, were applicable to the question whether these were "Properly Made Applications". (2) Ofgem made a public law error as to the Registration Requirements. (3) The refusal of Registration was an unjustified and unfair breach of a substantive legitimate expectation arising from the 2017 Decisions. (4) Ofgem took into account material legal irrelevancies. (5) The SRO was disqualified on the correct application of a "Prior Involvement Test".

This Hearing

4. Two aspects of the hearing are worth explaining. (1) This was a "rolled up" judicial review hearing. Judicial review proceedings usually involve: (i) a permission stage; and (if permission is granted) (ii) a substantive stage. The permission stage is a filter which protects public authority defendants by testing whether (and which) grounds of claim are properly arguable and asking whether there is any discretionary bar (such as delay, lack of standing or an alternative remedy). Contesting a discrete permission stage may reduce cost and delay; but it may increase them too. A rolled up hearing, as was sensibly invited in this case by Ofgem, fuses the permission and substantive stage into a single composite hearing with all issues and arguments open. Having heard the arguments, I am quite satisfied that all five Grounds are properly arguable and attract no discretionary bar: I grant permission on all Grounds. (2) The mode of hearing was a remote hearing by Microsoft Teams. Counsel were satisfied, as was I, that this mode involved no prejudice to their clients' interests. Open justice was secured: the hearing and its start time were published in the cause list, with an email address usable by any member of the press or public to arrange to observe the hearing. A remote hearing eliminated any risk to any person – whether associated with the parties or a member of the press or public – from having to travel to, or be present in, a court room. I am satisfied that that mode of hearing was necessary, appropriate and proportionate during the Covid-19 pandemic.

Section 100 of the 2008 Act

5. Section 100 of the 2008 Act is entitled "Renewable Heat Incentives". By section 100(1), Parliament empowered the Secretary of State to make Scheme Regulations, that is:

> ***… regulations (a) establishing a scheme to facilitate and encourage renewable generation of heat, and (b) about the administration and financing of the scheme.***

Section 100(1)(a) makes explicit the Facilitatory Function of the Subsidy Scheme. Section 100(2)(a) empowers Scheme Regulations to confer Subsidy entitlements on:

> ***… (i) the owner of plant used or intended to be used for the renewable generation of heat, whether or not the owner is also operating or intending to operate the plant; (ii) a producer of biogas or biomethane; (iii) a producer of biofuel for generating heat;***

Section 100(2)(a)(i) is reflected by Accreditation of an Installation (plant) owned by the applicant. Section 100(2)(a)(ii) and (iii) are reflected by Registration of a Producer and BFI Producers fall within section 100(2)(ii). Parliament made clear in section 100(2)(a)(i) that, even for Accredited Installations, "Third Party Operators" are permissible. Section 100(3) includes these relevant definitions:

> ***"biogas" means gas produced by the anaerobic or thermal conversion of biomass;***
> ***"biomass" means material, other than fossil fuel or peat, which is, or is derived directly or indirectly from, plant matter, animal matter, fungi or algae;***
> ***"biomethane" means biogas which is suitable for conveyance through pipes to premises in accordance with a licence under section 7 of the Gas Act 1986 (gas transporter licences);***

Parliament thus emphasised that a BFI Producer must produce Suitable Biomethane, whose Injection is regulated under a separate statutory and licensing scheme ("External Regulation"). Parliament also emphasised that "Eligible Feedstock" (suitable "biomass") must be used to produce the Biogas from which Suitable Biomethane is then produced.

BFI Production: "Four Stages"

6. As can be deduced from the section 100(3) definitions there are Four Stages which are relevant in the case of BFI Producers. In principle, all Four Stages could take place at the same geographical location, or at various different locations (with intermediate transportation stages in between). In principle, a single operator could be responsible for all Four Stages, or there could be many Third Party Operators. The Four Stages are:

(1) **"Stage 1": "Feedstock Production".** Eligible Feedstock ("biomass") is produced. Feedstock attracts compliance standards and Applicable Ongoing Obligations. It is the subject of the FMS Questionnaire.

(2) **"Stage 2": "Biogas Production".** Using Eligible Feedstock, biogas is produced, by a "Biogas Producer" using appropriate "Equipment" at an appropriate "Facility". The 2008 Act requires that Biogas Production be by "anaerobic or thermal conversion". Anaerobic conversion is also called anaerobic digestion.

(3) **"Stage 3": "Biomethane Production".** Using biogas, Suitable Biomethane is produced, by a "Biomethane Producer" using appropriate Equipment at an appropriate Facility, or Facilities: impurities may be removed from biogas at one Facility and odorant (a safety additive) added at another.

(4) **"Stage 4": "Biomethane Injection".** Suitable Biomethane is Injected into the national gas network, in accordance with the External Regulation.

Old regulation 25 (Registration as a BFI Producer)

7. As at 9 May 2018, Old regulation 25 provided as follows:

> ***25. Producers of biomethane.***
> ***(1) A producer of biomethane for injection may apply to the Authority to be registered as a participant.***
> ***(2) Applications for registration must be in writing and supported by –***
> ***(a) such of the information specified in Schedule 1 as the Authority may require;***
> ***(b) a declaration that the information provided by the applicant is accurate to the best of the applicant's knowledge and belief;***
> ***(c) details of the process by which the applicant proposes to produce biomethane and arrange for its injection;***
> ***…***
> ***(e) in relation to applications for registration made after [28 May 2014], declaration as to the volume in cubic metres of biomethane which the applicant expects to produce for injection each year.***
> ***(2A) Before registering a producer of biomethane as a participant, the Authority may arrange to carry out an inspection of any equipment which is being used to produce the biomethane for which the applicant is intending to claim periodic support payments (including equipment used to produce the biogas from which that biomethane is made) in order to satisfy itself that the applicant should be registered.***
> ***(2B) Where an application for registration is made after [28 May 2014], and the applicant is not also the person producing the biogas used to make the biomethane in respect of which that application is made, the Authority may require –***
> ***(a) that the applicant has the authority from all persons who produce the biogas from which the biomethane is made to be the participant; and***
> ***(b) that the applicant provides to the Authority, in such manner and form as the Authority may request, evidence of that authority.***
> ***(2C) Where the Authority considers that further information is necessary for the purpose of determining an application, it may by notice –***
> ***(a) specify further information which the applicant is required to provide;***
> ***(b) specify a period of no less than 12 weeks starting with the date of the notice within which that information must be provided; and***
> ***(c) inform the applicant that failure to provide the requested information within that period may result in the application being rejected.***
> ***(2D) The Authority may by notice extend the period specified in a notice under paragraph (2C)(b) where it is satisfied that it is reasonable to do so.***
> ***(2E) The Authority may refuse to register an applicant if, within the period specified under paragraph (2C)(b) or, where applicable, (2D), the applicant has failed to provide the information specified in a notice given under paragraph (2C).***
> ***(3) The Authority may in registering an applicant attach such conditions as it considers appropriate.***
> ***(3A) In relation to applicants who are registered after [28 May 2014], the Authority must specify the maximum initial capacity in respect of which the participant is registered.***
> ***(4) Where the application for registration is properly made in accordance with paragraph (2), the Authority must (subject to regulation 23 and paragraphs (5) to (8)) –***
> ***(a) notify the applicant in writing that registration has been successfully completed and the applicant is a participant;***
> ***(b) enter on a central register maintained by the Authority the date of registration and the applicant's name;***
> ***(c) notify the applicant of any conditions attached to their registration as a participant; and***
> ***(d) send the applicant a statement of eligibility including such of the information specified in regulation 22(6)(f) as the Authority considers applicable.***
> ***(5) The Authority may refuse to register an applicant if the applicant has indicated that one or more of the applicable ongoing obligations will not be complied with.***

> ...
> *(7) The Authority must not register an applicant if it would result in periodic support payments being made to more than one participant for the same biomethane.*
> *(8) Where an application for registration is made after the 31st July 2012, the Authority must not register an applicant unless at the time of making the application, injection of biomethane produced by that applicant has commenced.*
> *(9) Where the Authority does not register an applicant it must notify the applicant in writing that the application for registration has been rejected, giving reasons.*

Features of Old regulation 25 include the following. (1) "Proposed Process Details": regulation 25(2)(c). (2) "Inspection of Equipment": regulation 25(2A). (3) Biogas Producer Declaration: the evidenced third party producer authority referred to in regulation 25(2B). (4) Further Information: regulation 25(2C)-(2E). (5) Appropriate Conditions: regulation 25(3). (6) "Contingent duty to Register": regulation 25(4). (7) Properly Made Application: regulation 25(4). (8) Prohibition on Recourse to Public Funds: this is the effect of "subject to regulation 23" in regulation 25(4) (see §12 below). (9) "Ongoing Non-Compliance": regulation 25(5). (10) Double-Counting: regulation 25(7). (11) Commencement Activity: regulation 25(8), being distinct from the Future Activity as a Registered Participant: regulation 25(1). An intended BFI Producer who had not undertaken Commencement Activity could apply for "Preliminary Registration" with a view to full registration: regulation 26A.

Old regulation 22 (Accreditation of Installations)

8. Regulation 22 provided as follows:

> ***22. Applications for accreditation***
> ***(1) An owner of an eligible installation may apply for that installation to be accredited.***
> ***(2) All applications for accreditation must be made in writing to the Authority and must be supported by—***
> ***(a) such of the information specified in Schedule 1 as the Authority may require;***
> ***(b) a declaration that the information provided by the applicant is accurate to the best of the applicant's knowledge and belief;***
> ***(c) a declaration that the applicant is the owner, or one of the owners, of the eligible installation for which accreditation is being sought...,***
> ***(d) if the eligible installation is a large installation, a declaration as to the total heat in kWhth which the applicant expects the eligible installation to generate each year for eligible purposes and***
> ***(e) any other declarations which the Authority may require.***
> ***(3) The Authority may, where an eligible installation is owned by more than one person, require that—***
> ***(a) an application submitted under this regulation is made by only one of those owners;***
> ***(b) the applicant has the authority from all other owners to be the participant for the purposes of the scheme; and***
> ***(c) the applicant provides to the Authority, in such manner and form as the Authority may request, evidence of that authority.***
> ***(3A) Where the Authority considers that further information is necessary for the purpose of determining an application it may by notice—***
> ***(a) specify further information which the applicant is required to provide under Schedule 1;***
> ***(b) specify a period of no less than 12 weeks starting with the date of the notice within which that information must be provided; and***
> ***(c) inform the applicant that failure to provide the requested information within that period may result in the application being rejected.***
> ***(3B) The Authority may by notice extend the period specified in a notice under paragraph (3A)(b) where it is satisfied that it is reasonable to do so.***

> ***(3C) The Authority may reject an application for accreditation if, within the period specified under paragraph (3A)(b) or, where applicable, (3B), the applicant has failed to provide the information specified in a notice given under paragraph (3A).***
> ***(4) Before accrediting an eligible installation, the Authority may arrange for a site inspection to be carried out in order to satisfy itself that a plant should be accredited.***
> ***(5) The Authority may, in granting accreditation, attach such conditions as it considers to be appropriate.***
> ***(6) Where an application for accreditation has, in the Authority's opinion, been properly made in accordance with paragraphs (2) and (3) and the Authority is satisfied that the plant is an eligible installation the Authority must (subject to regulation 23 and regulation 47(3))—***
> ***(a) accredit the eligible installation;***
> ***(b) notify the applicant in writing that the application has been successful;***
> ***(c) enter on a central register maintained by the Authority the applicant's name and such other information as the Authority considers necessary for the proper administration of the scheme;***
> ***(d) notify the applicant of any conditions attached to the accreditation;***
> ***(e) in relation to an applicant who is or will be generating heat from solid biomass, having regard to the information provided by the applicant, specify by notice to the applicant which of regulation 28, 29 or 30 applies;***
> ***(f) provide the applicant with a written statement ("statement of eligibility") including the following information—***
> ***(i) the date of accreditation;***
> ***(ii) the applicable tariff;***
> ***(iii) the process and timing for providing meter readings;***
> ***(iv) details of the frequency and timetable for payments; and***
> ***(v) the tariff lifetime and tariff end date.***
> ***(7) Where the Authority does not accredit a plant it must notify the applicant in writing that the application for accreditation has been rejected, giving reasons.***
> ***(8) Once a specification made in accordance with paragraph (6)(e) has been notified to an applicant, it cannot be changed except where the Authority considers that an error has been made or on the receipt of new information by the Authority which demonstrates that the specification should be changed.***
> ***(9) The Authority must not accredit an eligible installation if it has not been commissioned.***
> ***(10) The Authority may refuse to accredit an eligible installation if its owner has indicated that one of the applicable ongoing obligations will not be complied with.***
> ***(11) The Authority may refuse to accredit a plant which is a component plant within the meaning of regulation 14(2).***
> ***(12) The Authority must not accredit a plant if—***
> ***(a) it is, or at any time has been, an accredited domestic plant within the meaning given by regulation 2 of the Domestic Renewable Heat Incentive Scheme Regulations 2014;***
> ***(b) an application for accreditation of the plant has been made under those Regulations and that application has not been withdrawn by the applicant or rejected by the Authority;***
> ***(c) it provides heat to the same property as an accredited domestic plant or a plant for which an application for accreditation under those Regulations has been made which has not been withdrawn or rejected.***

9. As can be seen, there are many parallels between Old regulation 25 (Registration of a BFI Producer) and Old regulation 22 (Accreditation of an Installation). In addition to those parallel features, these distinct features of regulation 22 are noteworthy. (1) By contrast with the Properly Made Application in regulation 25(4) ("properly made in accordance with paragraph (2)"), the equivalent provision in regulation 22(6) states "properly made in accordance with paragraphs (2) and (3)": this brings within "properly made" the co-owners declaration (an equivalent of the Biogas Producer Declaration in regulation 25(2B)). (2) By contrast with the Properly Made Application in Old regulation 25(4) ("properly made"), the equivalent provision in regulation 22(6) includes "has, in the Authority's opinion, been". (3) By contrast with the Contingent

Duty to Register in regulation 25(4), regulation 22(6) reflects the additional need – in the case of an Accredited Installation – for Ofgem to be "satisfied that the plant is an eligible installation": that means meeting prescribed "Eligibility Requirements" found in Part 2 of the 2011 Regulations for each class of Installation. (4) By contrast with the Commencement Activity in regulation 25(8), regulation 22(9) provides that Ofgem "must not accredit an eligible installation if it has not been commissioned": under Old regulation 2(1), "commissioned" means having demonstrated operational capability through the completion of industry standard procedures and tests. So: the focus for Accreditation is on an Installation, owned by the applicant, which must already have been built and the Equipment Commissioned, and must meet Eligibility Requirements. The 2011 Regulations also deal with what happens where, after Accreditation of an Installation, there is a change in ownership (Old regulation 24) or a change in location (Old regulation 24A). A proposed eligible installation – not yet built and commissioned – can be the subject of a preliminary accreditation as a pathway to full accreditation absent a material change in circumstances: Old regulation 26.

Old Schedule 1 (Specified Information)

10. Regulation 25 has to be read together with a number of other key provisions of the 2011 Regulations. In the first place, Old regulation 25(2)(a) refers to "such of the information specified in Schedule 1 as the Authority may require". Schedule 1 is entitled "Information required for accreditation and registration" and specifies the information that Ofgem can require from an applicant (Schedule 1 paragraph 1(1)). Particularly noteworthy are Schedule 1 paragraphs 1(2)(o) and (w), and 1(3), which provide as follows:

> ***(2) The information is, as applicable to the prospective participant –***
>
> ***…***
>
> ***(o) in respect of a producer of biogas or biomethane, details of the feedstock which the producer is proposing to use;***
>
> ***…***
>
> ***(w) such other information as the Authority may require to enable it to consider the prospective participant's application for accreditation or registration…***
>
> ***…***
>
> ***(3) Information specified in this Schedule must be provided in such manner and form as the Authority may reasonably request.***

Old regulation 2(1) (Date of Registration/Accreditation)

11. The idea of a Properly Made Application (seen in Old regulation 25(4) and Old regulation 22(6)) also has an important function regarding the Date of Registration (or Date of Accreditation) producing the "tariff start date" from which the 20 years of Contingent Entitlement to Subsidy runs (under Old regulation 37(1)). Old regulation 2(1) provides:

> ***'date of registration', in relation to a producer of biomethane for injection, means the first day falling on or after the date of receipt by the Authority of the application for registration on which the application was properly made***

For an Accredited Installation, the regulation 2(1) definition of "date of accreditation" makes equivalent reference to (inter alia) "the first day … on which" an application for Accreditation was "properly made". These dates are notifiable to the successful

applicant, pursuant to regulation 22(6)(f)(i) (for Accredited Installations) and regulation 25(4)(d) (read with regulation 22(6)(f)(i)) (for Registered BFI Producers).

Old regulation 23 (Prohibition on Recourse to Public Funds)

12. Old regulation 25(4) refers to Ofgem granting Registration "subject to regulation 23" (and the equivalent caveat is found in Old regulation 22(6)). Old regulation 23(1)(a) provides, as a general rule and subject to specified exceptions, that Ofgem:

> ***… must not accredit an eligible installation or register a producer of biomethane… unless the applicant has given notice (which the Authority has no reason to believe is incorrect) that … no grant from public funds has been paid or will be paid in respect of any of the costs of purchasing or installing the eligible installation or any of the equipment used to produce the biomethane for which the applicant is intending to claim periodic support payments…***

There are other moving parts within Old regulation 23, whose provisions as a whole constitute the Prohibition on Recourse to Public Funds.

Old regulations 33, 34 and 50 (Applicable Ongoing Obligations)

13. Old regulation 25(5) refers to the refusal of Registration where the applicant has indicated that one or more of the "applicable ongoing obligations" will not be complied with (the equivalent provision for an Installation is in regulation 22(10)). Applicable Ongoing Obligations specifically relating to BFI Producers are contained in Old regulation 33. These include obligations relating to the Eligible Feedstock from Stage 1, used in Stage 2: Old regulation 33(2)-(6) together with regulation 32(2) (incorporated by regulation 33(5)). Other Applicable Ongoing Obligations relate to arrangements with Third Party Operators ("Third Party Operator Contracts"), found in Old regulation 33(7) and (8), which provide:

> ***(7) The participant must keep and provide upon request copies or details of agreements with third parties with whom the participant contracts to carry out any of the processes undertaken to turn the biogas into biomethane and to arrange for its injection.***
> ***(8) The participant must keep and provide upon request written evidence including invoices, receipts, contracts and such other information as the Authority may specify in relation to biogas purchased and feedstock used in the production of the biogas used to produce biomethane.***

These provisions reflect (as seen in section 100(2)(a)(i) for Accredited Installations) the permissibility of using Third Party Operators. Applicable Ongoing Obligations which are general (applying to all Scheme Participants) are found in Old regulation 34. One concerns access for Inspection of Equipment. Under regulation 34(i) Participants:

> ***… must allow the Authority or its authorised agent reasonable access in accordance with Part 9.***

Part 9 includes Old regulation 50(1), which provides:

> ***The Authority or its authorised agent may request entry at any reasonable hour to inspect an accredited RHI installation and equipment used to produce biomethane and its associated infrastructure to undertake any one or more of the following—***
> ***(a) verify that the participant is complying with all applicable ongoing obligations;***
> ***(b) verify meter readings;***
> ***(c) take samples and remove them from the premises for analysis;***
> ***(d) take photographs, measurements or video or audio recordings;***

> ***(e) ensure that there is no other contravention of these Regulations.***

Regulation 50(1) – the post-Registration equivalent of the Registration-stage regulation 25(2A) – makes clear that the function of ongoing Inspection of Equipment is to verify compliance with Applicable Ongoing Obligations.

Applicable Guidance

14. Old regulation 52 obliges Ofgem to:

> ***… publish procedural guidance to participants and prospective participants in connection with the administration of the scheme.***

Basic public law principles require a public authority to adhere to guidance – especially that issued pursuant to a statutory duty – at least absent some good reason to depart from it: R (Aozora GMAC) v HMRC [2019] EWCA Civ 1643 [2010] 1 All ER 803 at paragraph 38. Within the papers placed before the Court in this case was a suite of guidance documents emanating from Ofgem and relevant to a 9 May 2018 application.

"Application Guide" (and questions)

15. This "Guide to the GB RHI Application Form Questions (August 2016)" sets out prescribed questions (with reference numbers) which populate the online portal by which an applicant – having given Overall Declarations (including the Old regulation 25(2)(b) accuracy declaration and regulation 23(1)(c) notice of no Recourse to Public Funds) – answers questions and uploads documents. Questions and prompts in the Application Guide, for a May 2018 applicant for Registration as a BFI Producer, included these:

> ***HA160*** ***… Please state which route of compliance you intend to use to demonstrate you meet the sustainability criteria.***
>
> ***WARN48 [Where] you have selected that you will be self-reporting… a … FMS questionnaire will need to be uploaded and submitted as part of your application…***
>
> ***HC110*** ***Please enter the date on which the installation was first commissioned or the date the biomethane producer first injected into the grid…***
>
> ***HC140*** ***Please enter the installation postcode.***
>
> ***HD120*** ***Has a grant from public funds been paid or will be paid for any of the costs of purchasing or installing the renewable heat installation or any of the equipment used to produce the biomethane?***
>
> ***HD150*** ***Do you have the consent of the other parties to apply for the RHI with respect to this installation or the producer of the biogas from which the biomethane is made?***
>
> ***HG100*** ***Which of the following conversion processes is used to convert the biomass feedstock into biogas? Please select from one of the following options from this list: Gasification; Pyrolysis; Anaerobic digestion.***
>
> ***HK 120*** ***Please provide a comprehensive description of your installation, including the make & model of the main components. For further details of the information that should be included here, please refer to guidance and available applicant information.***
>
> ***HL 160-1 Please provide a comprehensive schematic diagram, providing details of the biomethane production process.***
>
> ***HL 160-3 Please upload evidence of a signed agreement from all persons who produce the biogas used to make the biomethane that confirms you are authorised to be the participant.***
>
> ***HL 160-4 Please upload a copy of your Network Entry Agreement.***

Biogas Producer Declaration

16. Ofgem's "Biomethane Declaration – Information and Template (Version 2.0) (August 2014)" is the Biogas Producer Declaration, described in the Application Guide question reference HL160-3, which Ofgem is empowered by Old regulation 25(2B) to require.

"Guidance Volume 1" and "Volume 2"

17. Ofgem's "Guidance Volume 1: Eligibility and How to Apply (Version 9) (23 March 2017)" deals with how to apply for Accreditation or Registration, with a specific chapter on Registration of BFI Producers (chapter 12). Guidance Volume 1 includes this:

> ***2.16 For producers of biomethane, the 'date of registration' is the first day on or after we receive your application on which the application was 'properly made'. A 'properly made' application must include all information we ask for in the application form to a suitable standard, to enable us to make a decision on the eligibility of your installation.***
>
> ***…***
>
> ***12. Registration for biomethane producers***
>
> ***…***
>
> ***Requirements***
>
> - ***The existing regulatory framework external to Ofgem must be adhered to at all times. No further RHI-specific accreditation standards exist.***
> - ***Documents required to demonstrate that the biomethane produced meets, or is expected to meet, all of the Health and Safety Executive requirements on gas safety.***
>
> ***Integral equipment usually included in the definition of 'equipment used to produce biomethane'***
>
> - ***Equipment required to convert raw biogas into biomethane suitable for injection (eg where appropriate – CO_2 and oxygen removal, pressurization equipment, propanation, odorant equipment).***
> - ***Biogas production plant …***
>
> ***…***
>
> ***12.1 As few biomethane facilities currently operate within the UK, the technology and regulatory framework around biomethane production is still developing. We will therefore seek to introduce more detailed guidance in this area as the sector develops.***
>
> ***…***
>
> ***12.6 Biomethane producers are treated differently to other participants in the RHI. This is because the government has decided that the Regulations and standards currently in place for biomethane injection are sufficient to ensure that the RHI requirements are met and no further RHI-specific accreditation standards are necessary. As a result, the Regulations describe the process for biomethane producers as 'registration' rather than accreditation.***
>
> ***…***
>
> ***12.8 As biogas is derived from biomass, we therefore need assurance at the registration stage that the biogas is indeed from biomass and not some other source. This may include, for example, a description of where the feedstocks came from and what processes the feedstocks have gone through.***
>
> ***12.9 For the gas to be considered 'suitable for conveyance' (or transported in accordance with a gas transporter's license), it will have to meet the health and safety criteria (as defined in the transporter's Safety Case), regulated by the Health and Safety Executive, and any consumer protection measures that have been agreed by our Networks Team and/ or industry (e.g. as laid out in the Uniform Network Code).***
>
> ***12.10 We will require documentation from the participant to demonstrate that the biomethane produced meets, or is expected to meet, all of the Health and Safety Executive requirements on gas safety. We will also require, where appropriate, evidence that any consumer protection conditions (e.g. relating to the gross calorific value (GCV) of the gas) have been met, in order for us to verify that the biomethane produced may be considered 'suitable for conveyance'.***

> ***12.11 There is a point at which biogas (which itself is the gas formed by the conversion of biomass) becomes biomethane under the Regulations. This point is when the biogas has met all of the conditions required to be 'suitable for conveyance'. For example, biomethane production may involve adding propane to the biogas in order to alter its GCV or odorising or pressurising the biogas before it is suitable for conveyance. We therefore consider that, where more than one entity is involved in producing the biomethane from biogas (or, ultimately, from biomass), the person applying for the RHI must have permission from all other parties involved. The biomethane declaration template is available on our website …***
> ***12.12 The Regulations state that biomethane producers will need to provide 'details of the process by which the applicant proposes to produce biomethane and arrange for its injection'. This is to determine that the party has arranged access for its conveyance through pipes.***
> ***12.13 We will ask for the following information to accompany the application for registration:***
> - ***a schematic diagram showing the process of biomethane production from the biogas plant(s), and the point of entry on to the network***
> - ***extracts of contracts and the Network Entry Agreement (NEA) with relevant third parties relating to the agreement to convey the gas on to the pipeline network***
> - ***for applications made on or after 28 May 2014 a declaration of the volume of biomethane in cubic meters you expect to produce for injection each in a typical year following any initial ramp up period in the first year).***
>
> ***This estimate of your typical annual production is important as it will feed into the forecast data used in degression calculations… The estimate must be accurate to the best of your knowledge and belief.***
>
> ***…***
> ***12.21 Where a participant contracts with third parties in relation to the generation of renewable heat or the production of biomethane, it is the participant's responsibility to ensure via contractual or other arrangements, that these parties also comply with any relevant ongoing obligations under the RHI. The obligations which must be complied with by the participant on becoming accredited or registered remain those of the participant rather than being transferred to the third party concerned.***
> ***12.22 We have the right to inspect all plants involved in the biomethane production process (from the biogas production to the biomethane injection point) and we may wish to do so as part of a pre-registration check. It is your duty to ensure, where you do not own all the plants involved, that you have the permission from all the other parties involved to grant us access to their sites. You will be required to submit a declaration to this effect as part of registration. This declaration is included in the biomethane declaration template found on the website.***
> ***12.23 Applicants will be asked to complete an FMS questionnaire to inform us of how you will calculate the renewable proportion of the gas that is injected, what meters are to be used at the facility and how the GCV and volume are to be measured accurately for the relevant quarterly period. For further information on the FMS questionnaire, please see the document 'Fuel Measurement Sampling Guidance'.***
> ***…***
> ***12.25 We will agree an appropriate assurance regime with biomethane producers to allow us to verify that agreed procedures have been followed.***

"Guidance Volume 2: Ongoing Obligations and Payments (Version 8) (21 September 2017)" deals with Applicable Ongoing Obligations and payment of Subsidy.

Self-Reporting Guidance/FMS Guidance/FMS Questionnaire

18. Ofgem's "Sustainability Self-Reporting Guidance (Version 2) (25 November 2016)" corresponds to question reference HA160 in the Application Guide. Ofgem's "Fuel Measurement and Sampling (FMS) Guidance" is accompanied by Ofgem's "FMS Questionnaire for biomethane producers (Version 2.0)", corresponding to prompt WARN48 under question reference HA160 and as Feedstock details required of an applicant pursuant to Old Schedule 1 paragraph 1(2)(o) read with paragraph 1(3).

New regulation 32 (with New regulation 2(1))

19. Old regulation 25 was replaced by New regulation 32 of the 2018 Regulations:

> ***32. Producers of biomethane.***
> ***(1) A producer of biomethane for injection may apply to the Authority to be registered as a participant.***
> ***(2) Applications for registration must be in writing and supported by –***
> ***(a) such of the information specified in Schedule 2 as the Authority may require;***
> ***(b) a declaration that the information provided by the applicant is accurate to the best of the applicant's knowledge and belief;***
> ***(c) details of the process by which the applicant proposes to produce biomethane for injection; and***
> ***(d) a declaration as to the volume in cubic metres of biomethane which the applicant expects to produce for injection each year.***
> ***(3) Before registering a producer of biomethane for injection as a participant, the Authority may request access without notice at any reasonable hour to carry out inspections of any equipment which is being used to produce the biomethane for which the applicant is intending to claim periodic support payments (including equipment used to produce the biogas from which that biomethane is made) in order to satisfy itself that the applicant should be registered.***
> ***(4) Where the applicant is not also the person producing the biogas used to make the biomethane in respect of which that application is made, the Authority may require –***
> ***(a) that the applicant has the authority from all persons who produce the biogas from which the biomethane is made to be the participant; and***
> ***(b) that the applicant provides to the Authority, in such manner and form as the Authority may request, evidence of that authority.***
> ***(4A) Where a producer of biomethane for injection makes an application for registration on or after 20th June 2018, the Authority must not register an applicant unless—***
> ***(a) the applicant has specified the biogas production plant to be used for the purposes of its registration; and***
> ***(b) the equipment used to produce biomethane has been commissioned***
> ***(5) Where the Authority considers that further information is necessary for the purpose of determining an application, it may by notice –***
> ***(a) specify further information which the applicant is required to provide;***
> ***(b) specify a period of no less than four weeks starting with the date of the notice within which that information must be provided; and***
> ***(c) inform the applicant that failure to provide the requested information within that period may result in the application being rejected.***
> ***(6) The Authority may by notice extend the period specified in a notice under paragraph (5)(b) where it is satisfied that it is reasonable to do so.***
> ***(7) The Authority may refuse to register an applicant if, within the period specified under paragraph (5)(b) or, where applicable, (6), the applicant has failed to provide the information specified in a notice given under paragraph (5).***
> ***(8) The Authority may in registering an applicant attach such conditions as it considers appropriate.***
> ***(9) The Authority must specify the maximum initial capacity in respect of which the participant is registered.***
> ***(10) Where the application for registration has, in the Authority's opinion, been properly made, the Authority must (subject to paragraphs (11) to (14) and regulations 31 and 81(4)) –***
> ***(a) notify the applicant in writing that registration has been successfully completed and the applicant is a participant;***
> ***(b) enter on a central register maintained by the Authority the date of registration and the applicant's name;***
> ***(c) notify the applicant of any conditions attached to their registration as a participant; and***
> ***(d) notify the applicant of the maximum initial capacity specified in accordance with paragraph (9); and***
> ***(e) send the applicant a statement of eligibility including such of the information specified in regulation 30(9)(f) as the Authority considers applicable.***
> ***(11) The Authority may refuse to register an applicant where it considers that one or more of the applicable ongoing obligations will not be complied with.***
> ***(12) Where an application for registration is made on or after [22 May 2018], the Authority must not register an applicant unless any necessary planning permission has been granted in***

> ***respect of the processes by which the biogas which is used to produce the biomethane is produced, the biogas is converted into biomethane, or the biomethane is injected.***
> ***(12A) Where an application for registration is made on or after 1st October 2018, the Authority must not register an applicant unless—***
> ***(a) any necessary environmental permits have been granted in respect of the processes by which the biogas which is used to produce the biomethane is produced, the biogas is converted into biomethane, or the biomethane is injected; and***
> ***(b) a declaration is made that the processes by which the biogas which is used to produce the biomethane is produced, the biogas is converted into biomethane, or the biomethane is injected comply, and will continue to comply, with all local and national laws including those relating to the protection of the environment.***
> ***(13) The Authority—***
> ***(a) must not register an applicant if it would result in periodic support payments being made to more than one participant for the same biomethane;***
> ***(b) must not register an applicant where the applicant refused to allow the Authority access for the purposes of an inspection under paragraph (3), and—***
> ***(i) the Authority is not satisfied that the refusal was reasonable; and***
> ***(ii) any subsequent access granted by the applicant for the purposes of an inspection was not sufficient to enable the Authority to satisfy itself that the applicant should be registered;***
> ***(c) may refuse to register an applicant if the Authority refused a previous application for registration made by the applicant, or a connected person, on the ground that information contained in the previous application was incorrect or misleading in a material particular;***
> ***(d) in the case of an application for registration made on or after 20th June 2018, may refuse to register an applicant where the Authority is satisfied that the biogas production plant specified in accordance with paragraph (4A)(a) has been used for the purposes of the registration of any other participant.***
> ***(14) The Authority must not register an applicant unless at the time of making the application, injection of biomethane produced by that applicant has commenced.***
> ***(15) Where the Authority does not register an applicant it must notify the applicant in writing that the application for registration has been rejected, giving reasons.***

New regulation 2(1) includes this new definition (emphasis added):

> ***"properly made", in relation to an application, means—***
> ***...***
> ***(b) in the case of an application made under regulation 32, an application which provides the information required by regulation 32(2) and (4)***

Other definitions in New regulation 2(1) include (emphasis added):

> ***"date of registration", in relation to a producer of biomethane for injection, means the first day which falls on or after the date of receipt by the Authority of the application for registration on which the application was, in the Authority's opinion, properly made;***
> ***"tariff start date" —***
> ***...***
> ***(b) in relation to … biomethane in respect of which a producer of biomethane is registered, means the date of registration for that biomethane;***

Other familiar features of the 2011 Regulations are found in the 2018 Regulations. For example: Accreditation of Installations is New regulation 30; the Prohibition on Recourse to Public Funds is New regulation 31; Applicable Ongoing Obligations for BFI Producers are New regulation 42; Applicable Ongoing Obligations in general are New regulation 43; and Information required for accreditation or registration is New Schedule 2.

Comparing New regulation 32 with Old regulation 25

20. We can start with the following. (1) New regulation 32(1) replicates Old regulation 25(1). (2) New regulation 32(2) replicates Old regulation 25(2), but with Schedule 2 taking the place of Schedule 1 in regulation 32(2)(a), and with some words ("and arrange … its") deleted in regulation 32(2)(c). (3) New regulation 32(3) replicates Old regulation 25(2A) but with the addition of the phrase "request access without notice at any reasonable hour to carry out inspections" in place of "arrange to carry out an inspection". (4) New regulation 32(4) replicates Old regulation 25(2B). (5) New regulation 32(5) replicates Old regulation 25(2C), but replaces "12 weeks" with "4 weeks". (6) New regulation 32(6) to (9) replicates Old regulation 25(2D), (2E), (3) and (3A). (7) New regulation 32(10)(d) inserts a newly required component of notification to the successful applicant: the maximum initial capacity specified under regulation 32(9). (8) New regulation 32(13)(a) replicates Old regulation 25(7). (9) New regulation 32(13)(b) is a newly expressed basis for refusal of Registration: unreasonably-refused access for Inspection of Equipment pursuant to regulation 32(3). (10) New regulation 32(13)(c) is a newly expressed basis of refusal, where a previous application was materially misleading. (11) New regulation 32(14) and (15) replicate the relevant content of Old regulation 25(8) and (9).

21. There are then these changes. (1) New regulation 32(10) introduces "in the Authority's opinion" before the words "been properly made" (aligning with the equivalent wording in Old regulation 22(6)). (2) New regulation 32(10) also replaces "properly made in accordance with paragraph (2)" from Old regulation 25(4) with "properly made", read with the new definition in New regulation 2(1): "an application which provides the information required by regulation 32(2) and (4)" (aligning with the equivalent wording regarding the co-owner declaration in Old regulation 22(6)). (3) New regulation 32(11) repeats Old regulation 25(5) but replaces "if the applicant has indicated that one or more of the applicable ongoing obligations will not be complied with" with "where it considers that one or more of the applicable ongoing obligations will not be complied with". (4) New regulation 32(4A) and 32(13)(d) introduce, from 20 June 2018, a newly expressed substantive precondition: the specification of a Stage 2 Biogas Production plant, exclusive to that applicant as Participant. (5) New regulation 32(4A) also introduces a second newly expressed substantive precondition, from 20 June 2018: prior commissioning of the Stage 3 Biomethane Production Equipment (aligning to the Old regulation 22(9) requirement for an Accredited Installation). (6) New regulation 32(12), taking effect from 22 May 2018, introduces a third newly expressed substantive precondition: that any necessary planning permission has been obtained for Stages 2 to 4. (7) New regulation 32(12A), with effect from 1 October 2018, introduces a fourth substantive precondition: that any necessary environmental permit has been obtained for Stages 2 to 4 (and a newly-required declaration of environmental compliance given).

New regulation 92(3)

22. Regulation 92(3) of the 2018 Regulations provides as follows:

> ***Where an application for accreditation or registration has been made before the date on which these Regulations come into force and has not been determined before that date—***
> ***(a) where the tariff start date for that eligible installation or producer of biomethane for injection is before the date on which these Regulations come into force—***
> ***(i) the Authority must determine the application in accordance with the 2011 Regulations as if they had not been revoked by these Regulations; but***

> ***(ii) if the application is granted, the eligible installation is treated as accredited or the producer of biomethane is treated as registered under these Regulations;***
>
> ***(b) where the tariff start date for that eligible installation or producer of biomethane for injection is on or after the date on which these Regulations come into force, the Authority must treat the application as having been made on the date on which these Regulations come into force.***

The "date on which these Regulations come into force" is 22 May 2018.

This Court's Limited Supervisory Function

23. I must, and do, undertake my analysis remembering that this Court's function on judicial review is limited to a supervisory review. My role is to analyse relevant questions of law and consider the compatibility of Ofgem's actions with applicable public law standards. I must identify the meaning of the legislation: *interpretation* involves identifying the objective, legally correct meaning. I must identify any relevant public law duties and restrictions on Ofgem's decision-making and must decide whether Ofgem has acted compatibly with those. Ofgem is and remains the primary decision-maker. Questions of *application* of the legislation and guidance, questions of evaluative judgment and appreciation including evaluative relevance and weight are all for Ofgem to decide, provided that it acts consistently with its public law duties. Ofgem's public law duties include having a correct appreciation of the legislation and adhering (absent good reason for departure) to Applicable Guidance, asking itself the right questions, having regard to legal relevancies, disregarding legal irrelevancies, and acting reasonably. It is no function of the judicial review Court to substitute its own view on the merits of matters of evaluative judgment and appreciation.

Discussion of the Position under the 2011 Regulations

Biomethane Unsuitability is a Basis for Old regulation 25 Refusal

24. Section 100(2)(a)(ii) and (3) of the 2008 Act and Guidance Volume 1 paragraph 12.7 make clear that a BFI Producer must produce Suitable Biomethane, consistently with External Regulation. Paragraph 12.6 convincingly explains why no "RHI-specific accreditation standards are necessary" in the case of a BFI Producer – a key distinction with Accredited Installations meeting Eligibility Requirements (Old regulation 22(6)) – namely because External Regulation of the Stage 4 Injection Process is sufficient. One function and consequence of the Commencement Activity precondition (Old regulation 25(8)) is that the applicant must demonstrate responsibility for "injection of biomethane" which it has "produced". Pursuant to Old Schedule 1 paragraphs 1(2)(w) and 1(3), and therefore regulation 25(2)(a), Ofgem through its guidance requires "documentation … to demonstrate that the biomethane produced meets, or is expected to meet, all of the Health and Safety Executive requirements on gas safety" as well as "evidence that any consumer protection conditions … have been met" (Guidance Volume 1 paragraphs 12.9-12.10). The stated focus of Proposed Process Details (Old regulation 25(2)(c)) is that Ofgem can "determine that the [applicant] has arranged access for [the] conveyance through pipes" (Guidance Volume 1 paragraph 12.12). Ofgem requires with the application "extracts of contracts and the Network Entry Agreement (NEA) with relevant third parties relating to the agreement to convey the gas on to the pipeline network" (paragraph 12.13 second indent; Application Guide question reference HL160-4). An Overall Declaration required by Ofgem is that: "the gas will meet the health and safety criteria (as defined in the Transporter's Safety

Case), regulated by the Health and Safety Executive, and any other consumer protection measures agreed with our Networks Team and/or industry". An applicant for Registration as a BFI Producer is seeking to become a "participant" (Old regulation 25(1) and 25(4)(a)), defined as a producer of "biomethane" who has been Registered (Old regulation 2(1)): "biomethane" under Scheme Regulations must bear its overarching section 100(3) definition (Suitable Biomethane). In my judgment, what follows from all of this is as follows. (1) When Ofgem asks whether there has been Commencement Activity (Old regulation 25(8)) it will appropriately ask whether what was produced was "biomethane" (ie. Suitable Biomethane). If there was any "Biomethane Unsuitability" (ie. any indicated non-compliance with the appropriate standards applicable to Suitable Biomethane), Ofgem would be entitled to conclude that there has not been the requisite Commencement Activity. (2) So far as concerns Future Activity, when Ofgem asks whether there is an "application for registration" triggering the Contingent Duty to Register (Old regulation 25(4)), it will appropriately ask whether the applicant, if registered, will be a producer of "biomethane" (regulation 25(1)), meaning (section 100(3)) Suitable Biomethane. (3) Ofgem will therefore ask, in essence, *whether – having regard to all of the information from the applicant and about the application, including the Proposed Process Details – there is any indicated Biomethane Unsuitability.*

Using Third Party Operators is Compatible with Old Regulation 25

25. As section 100(2)(a)(i) of the 2008 Act expressly recognised in the case of an Accredited Installation, and as Old regulation 33(7) and (8) and Guidance Volume 1 paragraph 12.21 reflect in the case of a Registered BFI Producer, the Participant in the Subsidy Scheme may make arrangements with Third Party Operators. This is true at each of the Four Relevant Stages. It is true for the Commencement Activity and the Future Activity. The Third Party Operator Contracts are the subject of the Applicable Ongoing Obligations: Old regulation 33(7) and (8).

Future Activity Stage 2/3 Third Party Operator Contracts are not a Precondition

26. Mr Grodzinski QC drew back (in my judgment, rightly) from submitting that it was an express or implied precondition of an application for Registration under Old regulation 25, properly interpreted, that the applicant needed to have and produce Third Party Operator Contracts relating to Future Activity in respect of Stage 2 or Stage 3 (he submitted instead that their absence was a 'highly material factor'). Third Party Operator Contracts are expressly dealt with under Old regulation 33(7) and (8), where the provision to Ofgem on request of copies of details of Third Party Operator agreements is an Applicable Ongoing Obligation, on a Participant, once Registration is granted. There are Third Party Operator Contracts which applicants are required by Ofgem to provide with their applications (Schedule 1 paragraph 1(2)(w)), but these are for Stage 4 (Guidance Volume 1 paragraph 12.13 second indent; Application Guide question reference HL160-4). Whenever a Registered Participant BFI Producer has Third Party Operator Contracts for Future Stage 3 (regulation 33(7)) or Stage 2 (regulation 33(8)) it is necessary to secure compliance with the Applicable Ongoing Obligations (paragraph 12.21 of Guidance Volume 1), including (regulation 34(i)) ensuring Ofgem's access to inspect Equipment (regulation 50(1)). A required Overall Declaration is that: "if registered, the applicant… will comply with all of the ongoing obligations under the RHI scheme… [which] includes… to ensure access (by contractual or other means) for Ofgem (or [its] authorised agents) to any off-site

equipment including the equipment used to produce the biogas for biomethane production".

"Two-Phase Model" is Compatible with Old Regulation 25

27. An application based on the Two-Phase Model is a type of project accepted by Mr Grodzinski QC (in my judgment, rightly) to be consistent with Old regulation 25. It is common ground that the 2018 SPV Applications used the Two-Phase Model, as did the 2016 SPV Applications granted by the 2017 Decisions. The essence is this:

    (1) **"Phase-1".** The applicant has carried out the Commencement Activity (old Regulation 25(8)).

    (2) **"Phase-2".** As Registered BFI Producer and Scheme Participant, the successful applicant will carry out a distinct Future Activity, with continuity as to Stage 4, but using a Future Stage 2 and Stage 3 Facility and Equipment not yet built and commissioned.

    In the Operative Decision, Ofgem calls applications on the Two-Phase Model "two phase commissioning projects". This reflects the fact that – unlike Old regulation 22(9) for Accredited Installations and unlike New regulation 32(4A)(b) – Equipment to be used for the Stage 2 and Stage 3 Future Activity did not need, under Old regulation 25, already to have been Commissioned. As Ofgem's pleaded Defence recognises, Phase-1 can include "short-term and interim arrangements" for biomethane production and injection, with Registration preceding a Phase-2 which can involve funding then being secured and "assets" built. The Two-Phase Model was legally permissible under the 2011 Regulations as they stood at 9 May 2018. The Operative Decision (at §26) stated this explicitly (see §50 below). Using the Registered Participant's Conditional Entitlement to Subsidy to raise the investment for the post-Registration Phase-2 was recognised as consistent with the Facilitatory Function of the Subsidy described in section 100(1) of the 2008 Act: the Subsidy thus encouraging renewable energy projects by encouraging investment.

Two-Phase Model is Incompatible with New Regulation 32

28. As is common ground (rightly, in my judgment) the Two-Phase Model became impermissible under the 2018 Regulations, as amended, given the new substantive requirements, especially the need for Commissioned Stage 3 Equipment (see §21(5) above). The Explanatory Memorandum to SI 2018 No. 635 expressed as a purpose to "remove a practice known as 'staggered commissioning' which can complicate scheme budget management". On 29 May 2018 the Government explained the exclusion of "two-stage commissioning" by requiring applicants to "specify their intended biogas production plant" and "confirm that the equipment used to produce biomethane has been commissioned". There had been a Government consultation which included this topic.

Two-Phase Model shows "Permissible Detachment" as to Stages 1-3

29. The compatibility of the Two-Phase Model with the 2011 Regulations shows a Permissible Detachment between (1) the Commencement Activity (regulation 25(8)) and (2) the Future Activity (as a Registered BFI Producer, attracting Subsidy). Mr

Grodzinski QC (in my judgment, rightly) does not submit that the Commencement Activity described in Old regulation 25(8) ("injection of biomethane produced by the applicant has commenced") means that there must already have been the commencement of the biomethane production process for which the applicant is intending to claim Subsidy (Stage 2 of Phase-2). There is a Permissible Detachment as to: (i) at what location or Facility Future Stages 2 and 3 would take place and using what Equipment; (ii) what Future Stage 1 Feedstock will be used for Future Stage 2; and (iii) with what Third Party Operator arrangements. The Future Activity might, in these respects, be distinct from the past Commencement Activity, and yet Registration could lawfully be granted. As Mr Sharpe QC convincingly submitted, the Commencement Activity is therefore really about conducting arrangements as proof that the applicant is competent and capable of fulfilling the requirements of the Subsidy Scheme, having demonstrated an ability to do so to an appropriate standard.

Two-Phase Model needs "Continuity" (i) of BFI Producer and (ii) as to Stage 4 Injection

30. As is common ground (rightly, in my judgment), compatibility with old Regulation 25 – including for the Two-Phase Model – does require Continuity between Commencement Activity and Future Activity in two respects. (1) Continuity as to who is the "Producer": the applicant (regulation 25(8)) once Registered (regulation 25(1) and 25(4)(a), read with the definition of "participant" in regulation 2(1)). (2) Continuity as to Stage 4 (the Injection Process): because Ofgem requires the Network Entry Agreement (question reference HL160-4; Guidance Volume 1 paragraph 12.13 second indent) and needs Proposed Process Details "to determine that the party has arranged access for [the] conveyance [of biomethane] through pipes" (Guidance Volume 1 paragraph 12.12). This links to the convincingly stated rationale at Guidance Volume 1 paragraph 12.6; and the fact that even preliminary registration would not be given without "a Connection Agreement" covering Stage 4 (regulation 26(4)). Mr Sharpe QC (rightly, in my judgment) emphasised that, while there may be a disconnect between Phase-1 and Phase-2 in terms of other aspects, the Stage 4 gas entry point is fixed and tied to the Network Entry Agreement, Injection – which is heavily Externally Regulated – being seen as an "all-important thing".

Two-Phase Model shows Existing Phase-2 Stage 2/3 Equipment not a Precondition

31. The compatibility of the Two-Phase Model with Old regulation 25, as Mr Grodzinski QC (rightly, in my judgment) accepts, also shows this. Ofgem is entitled to "arrange to carry out an inspection of any equipment which is being used to produce the biomethane for which the applicant is intending to claim periodic support payments" (regulation 25(2A)), as a "pre-registration check" (Guidance Volume 1 paragraph 12.22). But – unlike the Continuity of Stage 4 – the Equipment to be used in Future (Phase-2) Stages 2 or 3 may not yet exist. Mr Grodzinski QC drew back (in my judgment, rightly) from submitting that existing Phase-2 (Future Activity) Stage 2 or Stage 3 Equipment, capable of being inspected under Old regulation 25(2A) was, as a matter of interpretation of regulation 25, a legal precondition to Registration. Mr Grodzinski QC also drew back (in my judgment, rightly) from submitting that the commissioning requirement introduced by New regulation 32(4A)(a) – for applications made on or after 20 June 2018 – was already a requirement (express or implied) of regulation 25. His submission, rather, was that the absence of these was a 'highly material factor'. It follows that the phrase "any equipment which is being used" in

regulation 25(2A), so far as concerns Future Activity, connotes "such equipment" and includes "if any".

Two-Phase Model shows Stage 2/3 "Installation" and "Commissioning" not a Precondition

32. The Permissible Detachment (with Continuity in relation to Stage 4), and the fact that Future (Phase-2) Stage 2 or 3 Equipment may not yet exist or have been Commissioned is also linked to a correct understanding, in the context of a regulation 25 application for Registration as a BFI Producer, of Application Guide question reference HL181-1 ("Please upload a copy of your commissioning certificate or commissioning report"), question reference HC140 ("Please enter the installation postcode") and question reference HK120 ("Please provide a comprehensive description of your installation"). This is language resonant of applicant-owned Accredited Installations (regulation 22(1) and 22(6)) with pre-Commissioned Equipment (regulation 22(9)). Mr Sharpe QC (rightly, in my judgment) emphasises this distinction. Mr Grodzinski QC (rightly, in my judgment) drew back from submitting that Proposed Process Details (old Regulation 25(2)(c)), as a matter of interpretation, required an identified Future Stage 3 location. He accepted that this is not a precondition in law and that Registration could be granted in its absence (he said: 'if there were otherwise solid information'). As seen in the context of the Two-Phase Model, with Stage 4 Continuity, the applicant may only be able to identify the "Installation" and "commissioning report" referable to Stage 4. The 2018 SPV Applications (typified by Havant) answered question reference HC140 by giving the postcode of SGN's Injection Facility at Portsdown Hill and question reference HL181-1 was answered by uploading a "commissioning confirmation from SGN" (an email regarding the Commencement Activity Stage 4 successful Injection at SGN's Portsdown Hill Facility). Neither of these answers were said by Ofgem to have been inappropriate or insufficient. Havant's answer to question reference HK120 also began by identifying the Stage 4 installation (whose postcode had been given): "injecting at SGN's existing facility at Portsdown Hill".

Two-Phase Model shows Future Stage 2 Producer/Location/Feedstock not a Precondition

33. Mr Grodzinski QC (in my judgment, rightly) accepted that if an applicant is not in a position to identify Future Stage 2 Biogas Producer(s), it could still be lawful to grant Registration under Old regulation 25. He ultimately also drew back (in my judgment, rightly) from submitting that Old regulation 25(2)(c) Proposed Process Details (including when read with Properly Made in regulation 25(4)), as a matter of interpretation, required an identified Future Stage 2 Biogas Production location. He gave an example involving a Third Party Producer Contract for Future Stage 2, but no presently known Stage 2 location. He also drew back (in my judgment, rightly) from submitting that the precondition imposed by New Regulation 32(4A)(a) was 'already implicit' in Old regulation 25(2)(c). His submission was that the absence of all of these features would be a 'highly material consideration'. So far as concerned Future Stage 1, Mr Grodzinski QC, while emphasising the importance of Eligible Feedstock, accepts (rightly, in my judgment) that Old regulation 25 did not require an applicant to specify where and by whom Future Stage 1 (Feedstock Production) would take place. So far as Feedstock is concerned, the "assurance" at the registration stage (Guidance Volume 1 paragraph 12.8), through the FMS Questionnaire, is concerned with "details of the feedstock which the producer is proposing to use" (Schedule 1 paragraph 1(2)(o)). The FMS Questionnaire was answered by Havant by describing Phase-2 as "on-site digester" giving the following as the name and source of future feedstock

consignments: "grass silage; maize silage; whole crop rye; straw; chicken manure; cattle manure; pig manure". Mr Grodzinski QC did not submit that Havant had failed to satisfy the requirement of Schedule 1 paragraph 1(2)(o) read with regulation 25(2)(a) and Properly Made in regulation 25(4).

Biogas Producer Declaration from Future Stage 2 Producer not a Precondition

34. It follows from all this that the Biogas Producer Declaration (question reference HL160-3; Guidance Volume 1 paragraph 12.11), which Ofgem is entitled to require (regulation 25(2B)) and which embodies permission for Ofgem to arrange inspection of that operator's Equipment, need not in law – on the correct interpretation of Old regulation 25 – necessarily be given by a Future Stage 2 Producer of biogas. As I have said, Mr Grodzinski QC (in my judgment, rightly) accepts that if an applicant is not in a position to identify Biogas Producers in relation to Future Activity (ie. Stage 2 of Phase-2), it could still be lawful to grant Registration. Mr Sharpe QC's case is that the Biogas Producer Declaration described in Old regulation 25(2B) is not, by virtue of that provision or Ofgem's guidance relating to it, required to be given by specified Future Activity (Phase 2) Stage 2 Biogas Producer(s). He submitted that such a requirement would be tantamount to requiring identification of a Future Stage 2 Biogas Producer, something which became a precondition only under the 2018 Regulations. Mr Grodzinski QC ultimately drew back from submitting that Old regulation 25(2B) Biogas Producer Declaration, as a matter of interpretation, required the identification of a Future Stage 2 Biogas Producer. He submitted that its absence was 'highly material'. This means the focus in providing the Biogas Producer Declaration can, compatibly with regulation 25 and Ofgem's guidance, lawfully be on the Biogas Producers involved in the Phase-1 Commencement Activity (regulation 25(8)): rather like the focus in the co-owner declaration for an Accredited Installation (regulation 22(3)) being on present not future ownership (cf. regulation 24).

"Extant Production" not a Precondition

35. Also common ground is that neither regulation 25(8) (Commencement Activity: whether "injection of biomethane produced by that applicant has commenced") nor any other provision in regulation 25 in law requires as a precondition that the applicant is undergoing a presently-occurring Stage 3 or 4 process. Mr Grodzinski QC accepts (rightly, in my judgment) that the Commencement Activity may be a "one-off" activity at some time prior to the application. In the light of this, I can deal briefly with the following points. (1) In the Further Information of 16 October 2018 and 22 October 2018 Mr Thompson described the Phase-1 Commencement Activity as having been "for a one-off supply of gas, so I would not regard these arrangements as still active either now or at the point at which I submitted the applications". (2) In the original decision letter of 30 November 2018, Ofgem concluded – by reference to this response – that the absence of any Extant Production was fatal to Registration because it meant there was no BFI Producer (regulation 25(1)). (3) In response, Mr Thompson on 20 December 2018 provided updated information which stated that his Further Information emails had been "drafted in haste" and "incorrect" and that: "the overall framework for the sale of raw biogas and its upgrading remains in place". Supporting documents were provided. The "framework" was for replicating the Phase-1 Commencement Activity. (4) In Ofgem's later decision-making, Ofgem recognised the point made in its original decision letter as a bad one. (5) If and insofar as the extant "framework" answer was unconvincing, it was an unnecessary answer to a bad point taken by Ofgem. There was

force in Mr Sharpe QC's submission that this diversion was both a red herring and a blind alley. (6) The true focus is on Ofgem's approach in the Operative Decision in relation to Phase-2.

The 2016 SPV Applications and "Portsdown Three" were lawfully Registered

36. I have mentioned that the 2018 SPV Applications were not the first Two-Phase Model applications made by special purpose vehicle companies owned by Qila. The 2016 SPV Applications were twelve successful Two-Phase Model applications, granted by the 2017 Decisions. Three of them – memorably described by Mr Sharpe QC as the Portsdown Three – were by companies whose Stage 4 Commencement Activity and Phase-2 Stage 4 Continuity involved Injection at SGN's Portsdown Facility. They are typified by Solent Biogas: Solent was in 2016 what Havant was in 2018. The 2016 SPV Applications, including those of the Portsdown Three, were made on various dates between 31 March 2016 and 21 December 2016 via Ofgem's portal, with their Overall Declarations, Biogas Producer Declaration, and so on. Applicants responded to Ofgem's follow up email questions. The 2017 Decisions were issued on various dates between 13 December 2016 and 28 April 2017 by decision letters confirming Registration on Appropriate Conditions and summarising the Applicable Ongoing Obligations. The Commencement Activity for Solent (typifying the Portsdown Three) was described to Ofgem in the online application in June 2016 (question reference HK120) and can be encapsulated as follows (the encapsulation is mine):

> ***In April 2017, Solent had purchased raw biogas produced (from Feedstock) by a company called Tuxford Renewable Energy Ltd based at Askham near Newark. Solent had arranged, by contract, for Tuxford's raw biogas to be transformed into biomethane using a Pressure Swing Adsorption unit manufactured by Schmack Carbotech. Solent had arranged for the biomethane to be compressed and transported by lorry to Portsmouth where odorant was added and the Suitable Biomethane had been injected onto the national network, under a network entry agreement with SGN.***

Solent uploaded its documents, including its "commissioning" document and Network Entry Agreement, and its "comprehensive schematic diagram" (question reference HL160-1 and Guidance Volume 1 paragraph 12.13 first indent). The narrative in answering question reference HK120 said this (quoting from the application):

> ***In around 12 months, the project intends to source raw biogas from one or more other sites, at which point the project will provide further details to Ofgem. None of the sites being contemplated will have received a grant from public funds for any of the equipment used to produce the biomethane for which we would intend to claim periodic support payments…***

Ultimately, Mr Grodzinski QC submitted that the 2017 Decisions were "not lawful decisions". I cannot accept that submission. The 2017 Decisions including the Registrations of the Portsdown Three were, in my judgment, entirely consistent with the correct interpretation of the 2011 Regulations and what Ofgem requires of applicants through the applicable guidance.

Close parallels between the Portsdown Three and the 2018 SPV Applications

37. As Mr Sharpe QC (rightly, in my judgment) emphasised, there was a close parallel between the Portsdown Three (typified by Solent) and the SPVs (typified by Havant). Havant's Commencement Activity as described to Ofgem in the online application in

May 2018 (question reference HK120) can be encapsulated as follows (again, the encapsulation is mine):

> ***In March 2018, Havant had purchased raw biogas produced (from Feedstock) by a company known as Buchan Biogas Ltd based at Black Hills near Peterhead. Havant had arranged, by contract, for Buchan's raw biogas to be transformed into biomethane using an Amine Wash supplied by Purac involving the use of equipment owned by SGN. Havant had arranged for the biomethane to be compressed and transported by lorry to Portsmouth where odorant was added and the Suitable Biomethane was injected onto the national network, under a network entry agreement with SGN.***

Like Solent, Havant uploaded its documents, including its "commissioning" document and Network Entry Agreement, and its "comprehensive schematic diagram" (question reference HL160-1 and Guidance Volume 1 paragraph 12.13 first indent). The narrative in answering question reference HK120 said this (quoting from the application):

> ***In around 12 months, the project intends to source raw biogas from one or more other sites, at which point the project will provide further details to Ofgem. None of the sites being contemplated will have received a grant from public funds for any of the equipment used to produce the biomethane for which we would intend to claim periodic support payments…***

The Portsdown Three: 'Identified Sites' and Date of Registration

38. Mr Grodzinski QC submitted that there was a 'material distinction' between the Portsdown Three and the 2018 SPV Applications. As it was put in Mr Grodzinski QC's skeleton argument, what distinguished the 2016 SPV Applications (including the Portsdown Three) was that those projects had "identified sites for biogas production". Mr Grodzinski QC emphasised the follow-up email and Further Information for the Portsdown Three. He submitted that "identified sites for biogas production" were key parts of the Proposed Process Details and of the applications being Properly Made. Mr Grodzinski QC's submission was that the Portsdown Three applications were not Properly Made until that information was supplied on 24 February 2017. I cannot accept these submissions. In the 2017 Decisions (28 April 2017), Ofgem identified the Date of Registration (Old regulation 25(4)(d) read with Old regulation 22(6)(f)(i)) as 30 June 2016. That day was important because it was the Tariff Start Date (Old regulation 2(1)): the date from which the 20 year Contingent Entitlement to Subsidy, at a rate referable to the date, arose. It reflected Ofgem being satisfied that the 2016 SPV Applications had been Properly Made, including by reference to Proposed Process Details, on 30 June 2016. Mr Grodzinski QC's response was to submit that the Date of Registration was "a mistake". I cannot accept that. In my judgment, this is what happened. (1) Ofgem's query (22 February 2017) had a specific purpose. The concern was whether the Portsdown Three, since they had all purchased raw biogas from the same Biogas Producer (Tuxford) and were all injecting at the same site (SGN's Portsdown site), were in fact *distinct applicants*. In answering that question (24 February 2017), and in explaining that these were *three distinct applications* for Registration, Ofgem was given a description of three distinct sites which had been identified for the building of biomethane production plants which would feature at Phase-2. As Mr Thompson emphasised in his witness statement evidence, and can be seen from the documents themselves, what the follow-up information was explaining was that the Portsdown Three would "build out their projects separately" with their "own digester" and their own distinct "contracts". (2) What mattered was not that they were locationally definitive, but that they reassured Ofgem as to distinctiveness of

applicants. In answering that question the sites that were described were not fixed and finalised but were provisional. (3) The decision letters clearly and consciously identified the Date of Registration as 30 June 2016, reflecting the fact that the applications had been "properly made" as at that date. Identifying the relevant tariff start date was significant and reflected a function under the 2011 Regulations (regulation 25(4)(d) read with regulation 22(6)(f)(i)). The submission that this was a "mistake" is unsupported, including by evidence, and I do not accept it.

Functional Meaning of "Properly Made": Sufficiency to Enable Determination

39. A Properly Made Application under Old regulation 25(4) meant "properly made in accordance with paragraph (2)". That language explains *by reference to what elements required of an application* must the application be Properly Made (answer: the application must be Properly Made *by reference to each of the elements required by regulation 25(2)(a) to (e)*). That leaves a distinct question: in considering the required elements, by reference to which an application must be Properly Made, *what is the standard of sufficiency* to be met? Properly Made – and the standard of sufficiency – also matters because of the definition of "date of registration", governing the "tariff start date" (Old regulation 2(1)). I can illustrate the distinct aspects by taking Feedstock. Old Schedule 1 paragraph 1(2)(o) requires Feedstock "details", falling therefore within regulation 25(2)(a) as a *required element* for the Properly Made Application. But it still has to be met to the requisite *standard of sufficiency*, whatever that is. In my judgment, the correct position is as follows. (1) The standard of sufficiency for Properly Made has a correct, discernible legal meaning. An application is Properly Made, by reference to required elements, when what is required to accompany the application, by virtue of the Scheme Regulations and Ofgem's guidance documents, has been supplied to a sufficient standard for the purpose of Ofgem determining the application. Answering that question is a matter for Ofgem, but it must ask the right question. (2) This gives "properly made" its proper, functional meaning. It means "properly made" is not a freestanding formality. There is a functional link between the required elements of an application and the substantive criteria being applied by Ofgem in determining the application. This also fits with Old Schedule 1(2)(w) (information required with the application which enables Ofgem to consider the application). It also provides a principled symmetry with Further Information under regulation 25(2C) (information which, albeit not required of an applicant with the application, is "necessary for the purpose of determining an application"). (3) This fits with why the provisions relating to "tariff start date" and "date of registration" also use the concept of the application being "properly made": it prevents an applicant from being able to place a 'holding' application, with a view to securing Subsidy entitlement at a Tariff Start Date (and rate referable to that date) but without providing, until later, the basic information required to accompany the application and needed to determine the application. (4) This Functional meaning of "properly made" is also reflected in Ofgem's own guidance, to which I now turn.

40. In Guidance Volume 1 paragraph 2.16 Ofgem says this (emphasis added):

> ***2.16 For producers of biomethane, the 'date of registration' is the first day on or after we receive your application on which the application was 'properly made'. A 'properly made' application must include all information we ask for in the application form to a suitable standard, to enable us to make a decision on the eligibility of your installation.***

The words "on the eligibility of your installation" are resonant of applicant-owned Accredited Installations (Old regulation 22(6)). As has been seen (see §32 above), a key aspect for Ofgem is Stage 4 and the Injection Process, which may be the only Commissioned Installation so far as Continuity and Future Activity are concerned. Elsewhere, the same Guidance Volume 1 explains (paragraph 12.6) that Registered BFI Producers do not have to meet Installation Eligibility Requirements; and a parallel paragraph (paragraph 2.14) gives the equivalent Functional Meaning of "properly made" for Accredited Installations. The language at the end of paragraph 2.16 is more aptly expressed as "a decision on the eligibility of your application" (or, even more simply, "a decision"). But none of this detracts from the substance of what is being said about what "properly made" means. Properly Made means that "all information we ask for in the application form" is provided "to a suitable standard to enable us to make a decision". That means that, even if I am wrong that this is the correct meaning, but rather if "properly made" is a matter for Ofgem's judgment, Ofgem has identified its approach in its guidance (absent a good reason for departure, and none has been given).

Seven Identifiable Bases for refusing Registration under Old regulation 25

41. Mr Sharpe QC and Mr Grodzinski QC each made submissions on whether the express bases for the refusal of Registration, identified by the drafter of Old regulation 25, are materially incomplete. Mr Grodzinski QC held to the idea that Old regulation 25(4) is 'not the drafter's finest hour', since regulation 25(2A) ("satisfy itself that the applicant should be registered") is not picked up in regulation 25(5). Mr Sharpe QC ultimately – in his reply submissions – did not accept that there was any 'lacuna' or incoherence in the express language of regulation 25. In my judgment, the correct analysis is as follows. (1) Regulation 25 is clear and workable by reference to its express terms and design. (2) Regulation 25(4) does not involve any overarching, open evaluative judgment (such as Registration 'if the Authority considers it appropriate': cf. Regulation 25(3) with its reference to "such" Appropriate Conditions "as it considers appropriate"). Regulation 25(4) imposes a Contingent Duty to Register, subject only to limited bases on which the application may be refused. (3) Seven can be identified:

Five substantive bases for refusal of Registration under Old regulation 25:

(1) Registration is refused because there has been no Commencement Activity. This is the basis for refusal of Registration under Old regulation 25(8) and may be because the activity relied on involved Biomethane Unsuitability (see §24 above).

(2) Registration is refused because there has, or would be, Recourse to Public Funds. This is the basis for refusal of Registration under Old regulation 25(4), read with Old regulation 23. That includes where the applicant has given the requisite notice, but which Ofgem has "reason to believe is incorrect" (Old regulation 23(1)).

(3) Registration is refused because there would be Biomethane Unsuitability. This basis for refusal of Registration (see §24 above) arises under Old regulation 25(4) read with regulation 25(1) and section 100(3); also regulation 25(2)(a) and (c).

(4) Registration is refused because there would be Ongoing Non-Compliance. This is the basis for refusal of Registration under Old regulation 25(5).

(5) Registration is refused because there would be Double-Counting. This is the basis for refusal of Registration under Old regulation 25(7).

These five substantive bases collectively mean Ofgem asks, in essence: *Is our determination (having regard to all of the information from the applicant and about the application) that: (i) there has been Commencement Activity; and (ii) there is no indicated Recourse to Public Funds, Biomethane Unsuitability, Ongoing Non-Compliance or Double-Counting? (**"The Essential Substantive Question"**)*

Two additional informational bases for refusal of Registration:

(6) Registration is refused because the application was Not Properly Made. This is the basis of refusal of Registration under Old regulation 25(4). That means the information, required with an application by reference to regulation 25(2), has not been supplied to a sufficient standard 'to determine the application' (see §39 above): that means sufficient to determine the Essential Substantive Question.

> This basis of refusing Registration means Ofgem asks, in essence: *Has the information which we required applicants to include with their application been provided to a sufficient standard for us to decide whether: (i) there has been Commencement Activity; and (ii) there is no indicated Recourse to Public Funds, Biomethane Unsuitability, Ongoing Non-Compliance or Double-Counting? (**"The Properly Made Question"**)*

(7) Registration is refused because there has been a Further Information Default. This is the basis of refusal of Registration under Old regulation 25(2E).

> This basis of refusing Registration means Ofgem asks, in essence: *Has the applicant failed to provide the further information that we required it to provide as being necessary for the purpose of determining the application? (**"The Further Information Question"**)*

Other features and scenarios fit with this analysis

42. There is, in my judgment, no other freestanding basis, express or implied, for refusing Registration. Subject to the Essential Substantive Question, the Properly Made Question and the Further Information Question – and subject to ancillary questions like the imposition of conditions (regulation 25(3)) and specification of maximum initial capacity (regulation 25(3A)) – Registration is to be granted. This interpretation reflects the words used, in their context and setting, and by reference to their purpose. It avoids 'reading-in' provisions which are not there. It fits with the fact that the Subsidy Scheme arises under primary legislation with its Facilitatory Function (section 100(1) of the 2008 Act). It makes sense. It means other features and scenarios fit in the following way:

(1) Information specified in Schedule 1 and required by Ofgem (Old regulation 25(2)(a)). In relation to any problems arising from this information, Ofgem would ask, in essence: (a) the Properly Made Question; and (b) the Essential Substantive Question. That is the function and purpose of the Schedule 1 information required by Ofgem to accompany the application.

(2) Further Information required by Ofgem (regulation 25(2C)-(2E)). In relation to any problems arising from this, Ofgem would ask, in essence: (a) the Further Information Question; and (b) the Essential Substantive Question. That is the function and purpose of the Further Information required by Ofgem.

(3) Biogas Producer Declaration (regulation 25(2B)). This is most directly linked to Ofgem's evaluative judgment regarding Double-Counting (regulation 25(7)). Where Ofgem requires this Declaration (regulation 25(2B)) and does so as information which it requires applicants to include with their application (as with Application Guide question reference HL160-3; Guidance Volume 1 paragraph 12.11) it falls within paragraph (1) above. (If, alternatively, Ofgem had required this as Further Information, it would fall within paragraph (2) above.) That is the function and purpose of the Biogas Producer Declaration.

(4) Feedstock Details. This is the subject of Schedule 1 paragraph 1(2)(o) ("details of the feedstock which the producer is proposing to use"), Application Guide question reference HA160 and WARN48, the FMS Questionnaire, and Guidance Volume 1 paragraph 12.8 ("assurance at the registration stage"). It therefore falls within regulation 25(2)(a) and within paragraph (1) above.

(5) Proposed Process Details. This is required of an applicant by Old regulation 25(2)(c). In relation to any problems arising from or in relation to this information, Ofgem would ask, in essence, the same two questions as in paragraph (1) above. That is the function and purpose of Proposed Process Details.

(6) Other Declarations. These may be required of an applicant by direct operation of Old regulation 25 (as in the case of regulation 25(2)(b)), or as information which Ofgem requires with the application (as with the Overall Declarations). They may be linked to a necessary ancillary matter. The declaration as to expected annual volume (regulation 25(1)(e)) links to Ofgem's duty to specify maximum initial capacity (regulation 25(3A)): Ofgem could ask 'has this Declaration, which we required applicants to include with their application, been provided to a sufficient standard for us to be able to do our duty?' A declaration may have particular relevance to an aspect of the Essential Substantive Question: eg. the Overall Declarations about no Recourse to Public Funds and Ongoing Compliance. In relation to any problems arising from or in relation to a required Declaration, Ofgem would ask, in essence, the two questions at paragraph (1) above.

(7) Inspection of Equipment. Ofgem is empowered to Inspect Equipment (Guidance Volume 1 paragraph 12.22) "to satisfy itself that the applicant should be registered" (regulation 25(2A)). Inspection is most directly linked to Ongoing Non-Compliance and regulation 25(5) refusal (providing a functional symmetry with regulation 50(1)): Mr Grodzinski QC gave an example of Equipment shown on Inspection to be incapable of making Ongoing Compliance measurements. In relation to any problems arising from or in relation to Inspection of Equipment, Ofgem would ask, in essence, the Essential Substantive Question. This is the function and purpose of the Inspection of Equipment.

Proposed Process Details (i) focus on Future Activity and (ii) include Stages 2-4

43. Mr Grodzinski QC submits (rightly, in my judgment) (i) that the Proposed Process Details required by Old regulation 25(2)(c) are directed at Future Activity ("proposes to"). In the case of an application using the Two-Phase Model, given the Permissible Detachment, this will not be a description of Commencement Activity (regulation 25(8)). The future focus fits alongside the future declared volume (regulation 25(2)(e)) and Inspection of Equipment "used to produce the biomethane for which the applicant is intending to claim" Subsidy (regulation 25(2A)). Mr Grodzinski QC also submits (rightly, in my judgment) (ii) that Proposed Process Details is wide enough to allow Ofgem to require details as to Future Stage 2; not merely Future Stages 3 and 4. That gives regulation 25(2)(c) a broader meaning than the equivalent language in regulation 33(7) (describing Stages 3 and 4, when read alongside regulation 33(8) describing Stage 2). The importance of a compliant Stage 2 is reflected in: the definitions in section 100(3) of the 2008 Act; the Inspection of Equipment (regulation 25(2A)); and the Applicable Ongoing Obligations (regulation 33(8)). The phrase "process by which" is sufficiently broad to include Future Stage 2. There is no equivalent of regulation 33(8) to indicate a narrow ambit as with regulation 33(7). The Functional Meaning of "Properly Made" extends to Future Stage 2, as would Schedule 1 paragraph 1(2)(w). I do not accept Mr Sharpe QC's submission that Future Stage 2 is excluded from regulation 25(2)(c). It follows that Guidance Volume 1 paragraph 12.13 second indent and Application Guide question reference HL160-1 (see §49 below) are consistent with the legally correct meaning of Proposed Process Details in regulation 25(2)(c).

Proposed Process Details and Future Stages 2 and 3: Mr Grodzinski QC's Viability Thesis

44. Emphasising "details" in Old regulation 25(2)(c), and "comprehensive" in Application Guide question reference HK120, Mr Grodzinski QC submits that Proposed Process Details (Old regulation 25(2)(c)) in principle entitles Ofgem to treat as "highly material" the absence, accompanying the application, of details of Future Activity Stages 2 and 3 location, Facility, Equipment, Third Party Operator and Third Party Operator Contracts. Mr Grodzinski QC's explanation of the function of Proposed Process Details (Old regulation 25(2)(c)), with the need for what he called 'solidity over every stage in the process', is for Ofgem to conduct a viability assessment. He submits: 'the short point is that Ofgem does not grant a person the right to be registered as a participant on the scheme if, having looked at the details supplied with the application, it has no confidence that the person is in fact going to participate in the scheme by producing biomethane for injection in accordance with scheme terms'. Thus, he says, Ofgem is assessing proposed projects as to their 'viability': 'whether they are going to come to fruition'. In support of this Viability Thesis, Mr Grodzinski QC emphasises that the purpose of the primary legislation is to facilitate the actual generation of green energy. He emphasises targets which exist for cutting emissions and Ofgem's reporting obligations (Old regulation 53). I cannot accept Mr Grodzinski QC's Viability Thesis. Mr Grodzinski QC was in my judgment unable to point to any supportive feature of the 2008 Act or the 2011 Regulations, nor any passage in any of Ofgem's guidance, to support this 'viability' thesis (nor, on examination, his pleaded Grounds or skeleton argument). None of the criteria, nor the questions asked of applicants, involve asking for evidence relating to commercial viability: business plans and so on. There is a Contingent Duty to Register. Ofgem has to focus on the Essential Substantive Question, giving "properly made" its Functional Meaning. The function and purpose of the Proposed Process Details, like Schedule 1 information, is the one I have identified (see §42(5) above). The Scheme is intended to ensure that, if a project

succeeds (comes to fruition), energy produced and attracting Subsidy will be compliant with the requirements of the Scheme. There is no basis to conclude that Ofgem is intended to refuse Registration to a BFI Producer – in respect of whom it has no reason to doubt that any Future Activity would be fully compliant – because it doubts that the project 'will come to fruition'. It is entirely consistent with the scheme's statutorily-identified Facilitatory Function and the 2011 Regulations for an applicant for Registration under regulation 25, who wishes to secure investment for a project which will 'if it comes to fruition' involve compliant BFI Production, to secure Registration enabling project investment then to be sought. Suppose Ofgem has ten applicants for Registration, assesses each as having a 30% prospect of coming to fruition, but is satisfied that each would be compliant (Ongoing Compliance, no Biomethane Unsuitability, no Recourse to Public Funds, no Double Counting). Under the 2011 Regulations, and consistent with the Facilitatory Function, Ofgem grants all ten, three come to fruition and Subsidy is paid to them in relation to actual, compliant green energy. On Mr Grodzinski QC's Viability Thesis, Ofgem would refuse all ten.

Knock-on Effect: Neutrality and Degression

45. It is significant in relation to the Viability Thesis that, in granting Accreditation or Registration, Ofgem is not 'dividing up the pie', or 'allocating the first-class seats', with a direct and adverse knock-on consequence disadvantaging a later applicant. It was common ground that the *grant or refusal* of Registration to BFI Producer A is neutral as to whether a later application by BFI Producer B is granted, or at what rate of Subsidy. An agreed post-hearing Note confirmed two things. First, the very fact of *making an application* with the specified sought capacity can impact on calculations made by BEIS relating to degression, affecting later Subsidy rates. This is explained in the Guidance Volume 1 at paragraph 12.13 in relation to an applicant's declaration of expected annual volume (Old regulation 25(2)(e)): "This estimate of your typical annual volume is important as it will feed into the forecast data used in degression calculations". That same impact is felt whether the application is granted or refused: hence, neutrality of the decision whether to grant Registration. Secondly, the Scheme has a budget within which a portion of the expected annual volume of a Participant features before its removal after two years if the project does not come to fruition. The Scheme could be closed, by legislation, if the budget cap is exceeded. These potential consequences, in my judgment, give no support for the Viability Thesis. Registration, in no real or practical sense, secures a slice of pie, or first-class seat, to the disadvantage of another later applicant.

Proposed Process Details and Future Activity: Mr Sharpe QC's Overview Thesis

46. Mr Sharpe QC submits that Proposed Process Details (Old regulation 25(2)(c)) in law requires *an overview of how the project will be delivered, giving technical details on technical matters, with a focus on technologies and processes, relating to what is a standard technical process*. Mr Sharpe QC submits that this is "light-touch" regulation by Ofgem. Mr Sharpe QC relies, as illustrative, on the 2016 SPV Applications' responses to question reference HK120, together with the 'schematic diagrams' they provided. Mr Sharpe QC's case is that 'what applicants have got to do is described in Ofgem's guidance documents' and that 'what are particularly relevant are paragraphs 12.6 to 12.13' of Guidance Volume 1. He submits that, on the correct interpretation of regulation 25, it is <u>legally irrelevant</u> that an applicant has not – in relation to Future Activity – identified and described: any Stage 2 Biogas Producer; any Stage 2 or 3

location, Facility, Equipment, Third Party Operator or Third Party Operator Contracts. Mr Sharpe QC emphasises that regulation 25(4) imposes a Contingent Duty to Register; that there is no general open 'suitability' judgment; and no RHI-specific accreditation standards.

Proposed Process Details (Old Regulation 25(2)(c)): the Legally Correct Approach

47. In my judgment, the correct position in law as regards Proposed Process Details begins with four propositions. (1) First, the function and purpose of Old regulation 25(2)(c) Proposed Process Details (see §42(5) above) in a Properly Made Application (regulation 25(2)(c) and 25(4)) is to engage the Properly Made Question and the Essential Substantive Question (see §41 above). I have explained why this is so (see §§39-40, 42(5) above). (2) Secondly, Ofgem must approach Proposed Process Details (in a Properly Made Application) by reference to the Applicable Guidance. That is both because regulation 25(2)(c) has to be read alongside Schedule 1 paragraph 1(2)(w) and 1(3), and because Properly Made focuses on information which Ofgem requires applicants to include with their application (see §§39-40 above). I will analyse below Proposed Process Details by reference to the most directly relevant parts of the Applicable Guidance (see §§48-49 below). (3) Thirdly, Ofgem must correctly appreciate that the following – in relation to Future Activity – are not Preconditions: Stage 2 Biogas Producer; Stage 2 or 3 location, Facility, Equipment, Third Party Operator or Third Party Operator Contracts. I have analysed these (see §§26, 31-34 above). (4) Fourthly, beyond the first three propositions, lies Ofgem's judgment and appreciation, acting reasonably (see §23 above). In asking and answering the Essential Substantive Question and the Properly Made Question, Ofgem may reasonably and lawfully have regard to all information from the applicant and about the application. Ofgem may choose to have regard to any matter which, in its judgment, is relevant to those questions and assists it in answering them, giving those matters such weight as it considers appropriate. Ofgem may, moreover, identify Further Information which it considers necessary for the purpose of determining an application. In my judgment, although it must appreciate that they are not Preconditions, and provided that it asks the Essential Substantive Question and Properly Made Question, by reference to the Applicable Guidance, Ofgem could – without committing a public law error – choose to have regard to the absence of: a Future Activity Stage 2 Biogas Producer; Stage 2 or 3 location, Facility, Equipment, Third Party Operator or Third Party Operator Contracts. These are not Preconditions but Mr Sharpe QC goes too far in characterising them as <u>legal irrelevancies</u>.

Proposed Process Details and Applicable Guidance: "Installation" (HK120) and Stage 4

48. For the purposes of the Proposed Process Details (regulation 25(2)(c)), Mr Grodzinski QC submitted that the 'critical' Application Guide question is reference HK120. But he properly invited my attention to the questions as a whole and to Guidance Volume 1 paragraph 12.13 first indent, requiring what he called a diagram showing the process of biomethane production from the biogas plant. Question reference HK120 ("Please provide a comprehensive description of your installation, including the make & model of the main components") is asking for a description of an existing Installation. HK120 continues: "For further details of the information that should be included here, please refer to guidance and available applicant information". The Application Guide says "include as much information as possible about each of the components of the installation". This language of 'Eligible Installation' was also seen at the end of

Guidance Volume 1 paragraph 2.16 (see §40 above). But an existing Stage 3 Installation, with already-Commissioned Equipment, are not preconditions for Registration of a BFI Producer. As is explained at paragraph 12.6 of its Guidance Volume 1, that is because of the focus on the Stage 4 Injection Process with its External Regulation. As has been seen in the context of the Two-Phase Model (see §§30, 32 above), for the purposes of a regulation 25 application and Future Activity (Phase-2), "installation" (and "commissioning") focus on Stage 4 with its Continuity. What can be described by the applicant – including one using the Two-Phase Model – as to the Future Activity are concrete Stage 4 Injection Process arrangements, including Network Entry Agreement and other Stage 4 contractual arrangements. That is what the applicant is required to provide (Guidance Volume 1 paragraph 12.13 second indent). All of this fits with Guidance Volume 1 paragraph 12.12 read with the second indent of paragraph 12.13:

> ***12.12 The Regulations state that biomethane producers will need to provide 'details of the process by which the applicant proposes to produce biomethane and arrange for its injection' [fn: Old Regulation 25(2)(c)]. This is to determine that the party has arranged access for its conveyance through pipes.***
>
> ***12.13 We will ask for the following information to accompany the application for registration:***
> ***- …***
> ***- extracts of contracts and the Network Entry Agreement (NEA) with relevant third parties relating to the agreement to convey the gas on to the pipeline network***
> ***…***

Paragraph 12.12 refers specifically to regulation 25(2)(c), which it footnotes and quotes. Its second sentence unmistakeably emphasises the Future Stage 4 arrangements. The second indent of paragraph 12.13 picks up on this and makes clear that there are Third Party Operator Contracts which Ofgem requires to be provided with the application: namely contracts relating to Stage 4 (see too Application Guide question reference HL160-4). Mr Grodzinski QC sought to distance Ofgem from the second sentence of paragraph 12.12, submitting that it "should not have been written in that way". I cannot accept that submission. The Future Stage 4 focus of the second sentence of paragraph 12.12 fits alongside paragraph 12.6 and 12.9 to 12.10, the second indent of paragraph 12.13, and Stage 4 Continuity (see §30 above). No good reason was given by Ofgem for departing, or distancing itself, from its own guidance; nor is any departure even acknowledged. Ofgem's Head of Operations Mr Russell, in his witness statement evidence for these proceedings, unflinchingly described the second sentence of paragraph 12.12 among Ofgem's guidance statements relevant to Registration of BFI Producers.

Proposed Process Details and Applicable Guidance: The Schematic (HL160-1)

49. The Future Stage 4 focus in paragraph 12.12 – important though it is – is not the whole story in relation to Proposed Process Details: it needs to be read with what follows and the directly relevant question HL160-1. Paragraph 12.12 is immediately followed by this (emphasis added):

> ***12.13 We will ask for the following information to accompany the application for registration:***
> ***- a schematic diagram showing the process of biomethane production from the biogas plant(s), and the point of entry on to the network***
> ***…***

The first indent of paragraph 12.13, and Application Guide question reference HL160-1, pick up specifically the topic of the *overall* Proposed Process Details. I have held these to be consistent with regulation 25(2)(c) (see §43 above) and to support Mr Grodzinski QC's submission that the Proposed Process Details include Future Stage 2. The guidance is clear. Ofgem asks applicants to provide "a schematic diagram showing the process of biomethane production from the biogas plant(s), and the point of entry on to the network". The language "showing the process of biomethane production from the biogas plant(s), and the point of entry on to the network" is clearly reflective of regulation 25(2)(c) ("details of the process by which the applicant proposes to produce biomethane and arrange for its injection"). Moreover, the first indent of paragraph 12.13 clearly reflects question reference HL160-1, which beyond doubt has in mind regulation 25(2)(c) when it tells applicants, using the word "details" (emphasis added):

> ***HL 160-1 Please provide a comprehensive scheme diagram, providing details of the biomethane production process.***

The Applicable Guidance thus requires of an applicant Proposed Process Details *through the Schematic*, as was done with the 2016 SPV Applications (including the Portsdown Three). This is similar to the way that "details of the feedstock which the producer is proposing to use" (Schedule 1 paragraph 1(2)(o)), providing the appropriate "assurance" (Guidance Volume 1 paragraph 12.8), are required by Ofgem's guidance to be provided through the FMS Questionnaire. In my judgment, this content of the Applicable Guidance provides powerful support for that part of Mr Sharpe QC's Overview Thesis: applicants are required to provide *an overview of how the project will be delivered, giving technical details on technical matters, with a focus on technologies and processes, relating to what is a standard technical process*. Mr Sharpe QC is right in my judgment: to rely on *the schematic diagrams that were provided*; that what applicants have got to do is *described in Ofgem's guidance documents*; and that *what are particularly relevant are paragraphs 12.6 to 12.13 of Guidance Volume 1*. Mr Thompson's witness statement evidence explains how, in the 2018 SPV Applications:

> ***In response to question reference HL 160-1 ('please provide a comprehensive schematic diagram, providing details of the biomethane production process'), I uploaded a document which set out two schematics: the biogas production plant and the Portsdown Hill facility.***

Ofgem's Head of Operations Mr Russell specifically described the first indent of paragraph 12.13 and question reference HL160-1 in his witness statement prepared as Ofgem's evidence for these proceedings. As I have explained (see §47(2) above), Ofgem is required in law to address Proposed Process Details with regard to the Applicable Guidance. Again, no good reason was given by Ofgem for departing, or distancing itself, from its own guidance; nor is any departure even acknowledged.

The Operative Decision

50. To do justice to the SRO's detailed reasoning and make sense of the analysis which follows under Ground 2, I will set out in full the substantive content of the Operative Decision (adding paragraph numbers in square brackets for subsequent referencing).

> ...
> ***[1] The requirements of the Regulations have been applied appropriately to the individual facts of your application. Reasons in support of these conclusions are as below.***
>
> ***1. Applicable regulations***

[2] Your request for statutory review states that the Regulations do not apply to this application and that Ofgem should have only applied the 2011 Regulations. The 2011 Regulations were repealed on 22 May 2018, with some savings for certain circumstances. Regulation 92(3) of the Regulations relates to applications made before 22 May 2018 and not determined by that date, and provides that the 2011 regulations apply if the relevant 'tariff start date' falls before 22 May 2018. In this respect:

1. *The 'tariff start date' is defined in regulation 2 as the date of registration for biomethane applications.*
2. *The 'date of registration' is the first day on or after the date on which Ofgem receives an application which, in Ofgem's opinion, was 'properly made'.*
3. *'Properly made' is defined as being (in respect of biomethane applications) an application which provides the information required by regulations 32(2) and (4).*
4. *In relation to regulation 32.*
   a. *Regulation 32(2)(c) requires that an application for registration should be supported by details of the process by which the applicant proposes to produce biomethane for injection. That includes identifying the source of the biogas to be used in the production of the biomethane.*
   b. *Regulation 32(4) provides that Ofgem may require evidence of authority from all persons who produce such biogas, in such manner and form as Ofgem may request, for an applicant to be a scheme participant.*
   c. *The application for registration which this review concerns did not identify that Havant Biogas (the prospective biomethane producer) would produce its own biogas – or, that it would use biogas to produce biomethane. Instead, the application disclosed that it would procure these outcomes from third parties. Biomethane producers may use such arrangements and comply with the requirements of the Regulations. However, in this case the application did not identify with sufficient certainty arrangements that had been reached for those procurements. The application provided statements and indications of intentions on the part of Havant Biogas and on the parts of third parties in these respects, as opposed to evidence of binding commitments and rights. This is discussed in further detail in section "2" of this letter.*
   d. *In Ofgem's assessment, the information provided in support of your application did not therefore disclose definite processes for the production of biogas. Neither did it provide details of the process by which it was proposed to produce biomethane for injection. As I have mentioned above, that information is required in support of applications for registration.*
   e. *Because no firm arrangements existed for the supply to you of biogas to be upgraded to biomethane, it was not possible either to conclude that biogas originating from specific sources would be used to produce the biomethane. As such, neither did the applications provide authority from persons producing biogas for you to be the scheme participant, as is also required in support of applications for registration under the Regulations. This is also discussed in further detail in section "2" of this letter.*

[3] In light of the above, the application for Havant Biogas was not 'properly made', and so the date of registration and tariff start date had not occurred by 22 May 2018. Accordingly, the tariff start date did not fall before the date on which the Regulations came into force. Under regulation 92(3)(b), this means that Ofgem must treat the application as having been made under the Regulations, and so these are the regulations that apply to the Havant Biogas application. References to regulations in the remainder of this letter are to provisions in the Regulations.

[4] The provisions in the 2011 Regulations that were cited in Ofgem's original decision letter dated 30 November 2018 and formal review dated 27 February 2019 have been replicated in the Regulations. The outcome of the application which this review concerns would have been the same under either set of regulations.

2. Application was not "properly made"

[5] During the formal review stage, you supplied further evidence to support your statement that the arrangements used for the initial injection of biomethane by Havant Biogas remain in place, and that the statement in your email dated 22 October 2018 to the contrary was incorrect.

[6] Even taking into account these further statements, and ignoring the 22 October 2018 email on the basis that it was erroneous, I have reached the conclusion that the registration requirements under regulation 32 still are not met.

[7] The emails dated 14 December 2018 that you forwarded to Ofgem are not sufficient to establish that certain and binding arrangements are in place for the supply of biogas. They only indicate a willingness to sell or upgrade biogas in future and, in the case of the email from GFD, this offer is only on an 'intermittent basis' and is contingent on them having excess gas available. The Gas Sale and Purchase Agreement that you provided is entered into with Ceres Energy Limited as gas shipper of biomethane, so it does not address the purchase of gas from a biogas producer. Ofgem did seek further clarification in these respects during the formal review stage, but your email dated 31 January 2019 stated that there is no other documentation relating to the arrangements other than what has already been provided.

[8] I have not seen evidence of the full chain of supply from biogas production to biomethane injection. This means that regulation 32(2)(c), which requires details of the process by which the applicant proposes to produce biomethane for injection, has not been complied with.

[9] Additionally, regulation 32(4)(a) entitles Ofgem to require that the applicant has authority from all persons producing the biogas that is to be used to produce biomethane. Ofgem does require that such authority is provided. Regulation 32(4)(b) entitles Ofgem to request evidence of authority in such manner and form as it requires. Ofgem has made a standard "declaration form" template available for use in recording the necessary authority. I note in support of your application you have provided the declaration form that is made available by Ofgem, signed on behalf of Buchan Biogas Limited. As noted above there is however no evidence of binding and certain arrangements in place between Havant Biogas and Buchan Biogas Limited (or anyone else) for the supply of biogas that would substantiate that declaration. Notwithstanding the submission of the declaration form, it follows from the absence of binding and certain arrangements for the supply of biogas to Havant Biogas that Ofgem has not been supplied with the necessary authority from the persons producing such biogas as may be upgraded to biomethane and injected by Havant Biogas. For these reasons, regulation 32(4) has also not been complied with.

[10] Under regulation 32(10), Ofgem's duty to register a biomethane producer only arises where the application has been 'properly made', as is mentioned in section 1 above. In this case, because regulation 32 paragraphs (2) and (4) are not met, that duty does not arise.

3. Access to site for inspection

[11] The reasons for Ofgem's initial refusal to register included that there was inadequate evidence to assure Ofgem that Havant Biogas would be able to grant access to the site for the inspection of equipment used to produce the biomethane that its application related to (including equipment used to produce the biogas from which that biomethane was to be made). This is required by regulation 32(3) (which provides Ofgem with the power to request access before deciding whether to register the applicant).

[12] Regulations 43(j) and 85 together comprise an ongoing obligation, requiring that registered biomethane producers allow Ofgem access to the "equipment used to produce biomethane and its associated infrastructure".

[13] For the reasons given above in sections "1" and "2" of this letter, your application did not disclose that Havant Biogas had entered into specific arrangements for the production of biomethane, although non-binding statements of intention on the part of SGN were provided. It follows from this that no definite location and biomethane facility is associated with your application. As such, Ofgem's conclusion is that you will not be able to allow access to such equipment as may be used to produce any biomethane which ultimately Havant Biogas Limited may inject.

[14] Further, and in any event, from reading the information and evidence that was provided in support of your application, I understand that the biogas that was intended to be used in connection with biomethane production is produced and upgraded at the same site – in order to be able to comply with the ongoing obligation mentioned above, Havant Biogas would need to be able to provide Ofgem with access to that site. However, the evidence and information that you submitted in support of your application did not establish that it would be able to do so.

[15] In this respect I have reviewed the Network Injection Site Services Agreement ('NISSA') provided in support of your application and would comment that the site referred to in the NISSA is the injection site only. The NISSA does not provide you with rights to access the site where the biogas is upgraded. Similarly, the emails from SGN that you have provided

appear to relate to the injection site, not the site where the biogas is upgraded. And in any event, those emails do not establish access rights sufficient to demonstrate that Havant Biogas will be able to comply with the ongoing obligation mentioned above. The offers of support and assistance are not necessarily ongoing and permanent. As our formal review letter states, these email statements could be withdrawn at any point.

[16] Page 7 of your statutory review request makes the argument that, because Ofgem never requested inspection under regulation 32(3), the issue of access was never tested. Regulation 32(3) does not impose an obligation on Ofgem to carry out an inspection, it is merely a right for Ofgem to exercise if it wishes to before deciding whether to grant registration. Ofgem chose not to exercise this right in this case.

[17] Under regulation 32(11), Ofgem may refuse to register an applicant where it considers that one or more ongoing obligations will not be complied with. For the reasons given above, I am not satisfied that Havant Biogas would (if registered) be able to allow Ofgem access to the site where biomethane is produced as is required under regulations 43(j) and 85. Accordingly I consider that the initial decision to refuse the application for registration on this basis was appropriate.

4. Provision of information

[18] Regulations 42(6)-(8) are ongoing obligations whereby registered biomethane producers must provide Ofgem with specific and detailed information relating to biogas production, biomethane production and biomethane injection. Regulations 48-49 are ongoing obligations requiring information about the sustainability of the biogas used, and regulation 50 is a further ongoing obligation requiring the submission of sustainability audit reports.

[19] Ofgem's initial rejection letter stated that without information about the type of biogas and biogas production plant to be used, the applicant would not be able to comply with ongoing obligations, specifically regulation 33 of the 2011 Regulations (now regulation 42 in the Regulations). Ofgem's formal review stated that insufficient evidence was provided of the applicant's ability to comply with ongoing obligations relating to the provision of information.

[20] Ofgem has not been provided with any supplementary evidence to alter this position. Your email dated 31 January 2019 stated only that the applicant expects to have the information to comply with the ongoing obligation, but no actual evidence of this ability to comply was provided. Schedule 3 to the Network Entry Agreement contains some information provisions, but these relate to biomethane injection, rather than the biogas production plant or the production and purchase of biogas.

[21] The application for registration submitted for Havant Biogas identified that the biogas production and biomethane production processes will be undertaken by third parties. However as identified above in sections "1" and "2" of this letter, no evidence was received by Ofgem of definite arrangements being concluded between Havant Biogas and third parties in relation to those processes. Such arrangements could have included provision for the supply of the information to Havant Biogas that would have been necessary for Havant Biogas to have complied with it its ongoing obligations.

[22] However, Ofgem has not received any evidence that Havant Biogas will be able to compel the production from any third parties undertaking the biogas and biomethane production processes of such information as will be necessary for Havant Biogas to be able to comply with its ongoing obligations. Ofgem is satisfied that the lack of evidence in these respects means that no arrangements are in place for Havant Biogas to be able to obtain the required information. As such Havant Biogas will not be able to supply such information to Ofgem.

[23] As mentioned above, under regulation 32(11) Ofgem has discretion to reject applications where it considers that one or more ongoing obligations will not be complied with. Having reviewed this application I am satisfied that Havant Biogas will not be able to comply with ongoing obligations arising under regulations 42, and 48 to 50 of the Regulations.

5. Consistency of outcome with previous applications

[24] Ofgem, as required by the Regulations, may only accept applications that comply with regulations 32(2) and 32(4). As explained above, your application does not comply with these provisions. I acknowledge what is said in your request for a review in relation to the consistency of this decision with previous applications. However, even if there were to be any material inconsistency as between this decision and decisions made in respect of previous applications, that cannot override the Regulations' legislative requirements.

> ***[25] Further, whilst I acknowledge that regulation 32(11) grants Ofgem a discretion as to its approach to cases in which it considers that one or more ongoing obligations will not be complied with, I am satisfied that the circumstances of this case warrant the refusal of the application. The relevant ongoing obligations relate to provision of information that is material to requirements related to the sustainability of feedstocks used to produce biogas and to Ofgem's knowledge of the processes being undertaken by scheme participants for biomethane production. I am satisfied that in this respect inadequate provision has been made by Havant Biogas for that information to be made available to Ofgem.***
> ***[26] Your statutory review request quotes two government consultations to suggest that these should have warned of any changes regarding two-phase commissioning or information requirements. You also note on page 5 of your request that Ofgem has changed its approach to now no longer accept two-phase processes. I would like to take this opportunity to clarify that Ofgem does not object to two-phase biomethane commissioning projects. The issue with this case is not that the applicant wishes to carry out its operations in two phases – the issue is that insufficient evidence has been provided to demonstrate that each of these phases satisfy the requirements of the Regulations, as I have outlined above.***

Ground 5 (SRO Prior Involvement)

51. In analysing the five Grounds for judicial review, I think it makes best sense to start with Ground 5. This is that Ms Clifton was disqualified from being the SRO on the basis of Prior Involvement, in breach of one or both of two "Prior Involvement Provisions". The first is paragraph 16.23 of Guidance Volume 2 (21 September 2017) which describes the Statutory Review entitlement of a prospective Participant affected by an adverse decision (regulation 51 of the 2011 Regulations) and provides:

> ***The [SRO] will be of equal or greater seniority to the original decision-maker or the [formal review officer], as applicable, and will not have been involved in the events leading to the decision.***

The second is New regulation 86, applicable to a Statutory Review decision under those regulations, including one determined in accordance with regulation 92(3)(a)(i) (the saving provision under which the 2011 Regulations apply). Regulation 86(4) provides:

> ***A review under this regulation may not be carried out by any person who was involved in the decision which is being reviewed.***

Mr Sharpe QC submits, and Mr Grodzinski QC disputes, that the guarantees in these Prior Involvement Provisions – or either of them – were breached in this case.

52. Two key things were common ground. First, the function and purpose of the Prior Involvement Provisions. Mr Grodzinski QC agreed with Mr Sharpe QC's own characterisation (in his pleaded Grounds) that the Prior Involvement Provisions serve to ensure that the SRO is a person "expected to bring a fresh pair of eyes to… decisions rather than reconsidered decisions that he or she had made earlier", so as to provide "assurance to all claimants that their reviews would not be prejudged or subject to the inevitable 'confirmation bias' when one person reviews his or her own work for faults, and seldom finds them". Secondly, the role of the Court, at least in the present case: to look at the facts and circumstances and evaluate objectively whether there was or was not Prior Involvement. Mr Grodzinski QC accepts that he is unable to point to any evaluative decision by any person within Ofgem in which the Prior Involvement Provisions were applied and a reasoned decision made as to why it was not contravened by the appointment of Ms Clifton as SRO. Mr Grodzinski QC submits that, on the evidence, Ms Clifton herself was aware of the Prior Involvement Provisions and must

have been satisfied. But he does not suggest that there is any reasoned evaluative judgment of a primary decision-maker which could attract a decision-making latitude to be respected by a judicial review Court. Since the Prior Involvement Provisions are prescribing a procedural standard, it may be that the Court would, even then, be exercising a substitutionary objective judgment, but that point does not arise.

53. Mr Sharpe QC relies in particular on the following, by reference to the evidence including documents disclosed by Ofgem. (1) In May 2018 Ms Clifton was involved in reviewing the 2018 SPV Applications and allocating review tasks. (2) In May 2018 and again in December 2018 Ms Clifton participated in email exchanges involving the Department for Business, Energy and Industrial Strategy (BEIS), which emails referred to rejection of the 2018 SPV Applications and the rationale for such rejection. (3) In January 2019 and February 2019, in the context of the formal review decision-making, Ms Clifton was present and participated in meetings of Ofgem's Operations Hub Board at which the 2018 SPV Applications were discussed, the terms of reference of the Hub Board including "executive decision-making powers for matters falling within its scope" and allowing for "decisions made at the meeting… made by the relevant person holding Delegated Authority" in relation to a decision constituting one of the "Authority functions under the relevant legal framework". (4) In June and July 2019 Ms Clifton was liaising closely with Amy Humphrey, the Head of Operations who had written the adverse formal review decision letters on 27 February 2019. (5) The circumstances of this case are directly comparable to those described by Lang J in R (Farmiloe) v Secretary of State for Business Energy and Industrial Strategy [2019] EWHC 2981 (Admin) at paragraphs 52 to 54 and paragraphs 28 to 32.

54. Mr Grodzinski QC submits, when the circumstances and communications are considered and understood in their context, there was no contravention of the Prior Involvement Provisions. I accept that submission. I start with what happened in May 2018. On 10 May 2018 Mr Russell as Head of Operational Delivery at Ofgem emailed several officials at BEIS to give them "advanced warning" of the 2018 SPV Applications received by Ofgem the day before, describing his "awareness that this may impact the budget" and "the timing" recording his expectation that BEIS "may need some additional data to run the numbers". Ms Clifton was copied into that email and followed it up with an email of her own to an Ofgem official asking that they "prioritise anything BEIS might ask for on this". Further emails followed concerning the applications, asking about "the commission dates and capacity" and whether the SPVs were "applying for feedstock restrictions". Ms Clifton was the recipient of an email which attached "the requested information". Those emails were exchanges which concerned the 2018 SPV Applications and data as to what the SPVs were asking for. This fits with the position as to the fact of applications and degression (see §45 above). Nothing in those email exchanges related, still less directly, to the decision-making which culminated in the rejection of the 2018 SPV Applications on 30 November 2018. Nothing in these emails would have prevented Ms Clifton from acting either as a formal review officer or SRO. As Mr Grodzinski QC rightly pointed out, Ms Clifton was not copied into an exchange of emails in the period 10 and 12 May 2018 in which BEIS had raised the question of whether the applicants were "breaking up the plant into smaller units to maximise [Subsidy] payments" and asked whether there was "any way to challenge this practice under existing rules", to which Mr Russell had replied: "If the applications are not in the spirit of the scheme… then we will [look] at the various routes we have for challenging this and come back to you on the proposed approach".

55. Following the adverse decisions of 30 November 2018, Ms Clifton was one of several people at Ofgem who were copied into an email from the Analysis Directorate at BEIS, responding to an "applications summary" received from Ofgem, and asking about the "41 biomethane dropouts". She was not copied into any of the follow up emails. I accept that the exchanges about the applications summary were concerned with a routine update to BEIS providing details of applications and associated spend into which Ms Clifton was copied as a senior manager with operational responsibilities. These emails did not look at or comment on the substance of the adverse decisions that had been made. Ms Clifton was copied into a BEIS email dated 17 December 2018 from a BEIS official who referred to the "huge swing" and said they had not been made "aware at all that this entire cohort of applications was at risk of being rejected outright", asking whether it was possible to have a discussion as to "whether they really must be rejected". Mr Russell copied Ms Clifton into his response of 17 December 2018 which stated that the applications had been "rejected as we are satisfied that they can't meet the eligibility requirements for the scheme, and the decision was run through Director level internally before we did. They have been assessed as we would any other application, against the relevant Regs". In my judgment, the fact that Ms Clifton was copied in to a BEIS email asking for a discussion as to whether the applications must be rejected, and copied into a response that said they had been assessed under the regulations, did not constitute involvement in the decision-making. It was not being said, or indicated, nor is there any evidence which supports or suggests: that she had been involved in the "we" who had assessed and rejected the applications; nor that she was part of the internal "Director level" through which the decisions had been run; nor that there was any discussion involving her as to whether the applications "really must be rejected". Mr Russell's email of 13 December 2018, to colleagues at BEIS and Ofgem, had confirmed that "Gareth [John]" had "confirmed with Richard" that Ofgem was going to reject the 37 applications.

56. I turn to the Operations Hub Board Meetings on 22 January 2019 and 22 February 2019. What happened can be seen from the minutes. At this stage the disappointed applicants had on 20 December 2018 requested formal review. That was ultimately rejected by the formal review officer Amy Humphrey on 27 February 2019. One of the items on the agenda for the Operations Hub Board meeting on 22 January 2019 was "review of DDR/On the Radar". DDR stands for "Difficult Decisions Register". The DDR had recorded that on 16 November 2018: "A paper has been taken to Trish and James and we have decided to reject all 37 biomethane applications as they do not meet the requirements of the regulations. This has been moved from 'on the radar' to the [DDR]". Ms Humphrey updated the Hub Board on 22 January 2019. A matter (redacted in the minutes) was discussed on which legal advice had been obtained and

> ***… it was agreed that this did not appear to be the right approach.***

Ms Clifton's witness statement states that what lies behind the redaction, as describing "this … approach" is:

> ***… a reference to the procedural approach to progressing with the applications, and not to the substantive approach to their determination. The discussion concerned the internal process to be followed rather than any assessment of the merits of the applications or the approach to be taken in relation to whether they should be accepted or rejected.***

I accept that as an accurate and reliable description of the "approach" recorded (but with redaction) in the minutes. Mr Sharpe QC did not seek to challenge it or invite me

to reject it as incorrect or unreliable. At the Hub Board meeting on 22 February 2019 there was a further update ("Review of DDR/The Radar"). The minutes state:

> ***[Amy Humphrey] noted we have completed a formal review of all information and uphold our decision. We have drafted a letter to inform which BEIS has reviewed.***

That was an update telling the Hub Board what those involved in the formal review decision-making for Ofgem ("we") had decided. It did not involve the Hub Board collectively, nor Ms Clifton individually, in: the decision-making events or decision-making process; the "review"; the decision to "uphold"; the decision being "reviewed"; or having "drafted a letter" to BEIS. The minutes continue as follows:

> ***[Gareth John (chair)] to confirm in writing his support of this outcome.***

It follows from that recorded statement that what was decided at this Hub Board meeting was that the chair, Mr John, was to consider the substance of the decisions which Ms Humphrey was proposing to make, to address in writing whether the "outcome" was one which had "his support". The Hub Board was not, collectively, itself doing so at or after the meeting. Nor was Ms Clifton individually. It is also relevant that the Court has evidence from Ms Clifton, whose witness statement says that by this stage:

> ***I was aware that, should the applications be rejected and proceed to a statutory review, I would likely be asked to conduct the statutory reviews because I was the only person with sufficient seniority and knowledge of the eligibility requirements to undertake the review who had not been involved in the earlier decisions. As such, I was careful to maintain my independence and ensure that I was not involved in any discussions relating to making a decision on the formal reviews. My knowledge of the formal reviews was limited to the status updates given in the Difficult Decisions Register and Operations Hub Board meetings.***

I accept that evidence and place it alongside the minutes. Had there been a discussion of the substance at the Hub Board, or had there been the suggestion that the Hub Board collectively, or Ms Clifton herself, should consider the substance of the proposed decisions in order to confirm "support" of the "outcome", Ms Clifton could only in those circumstances have preserved her ability to act subsequently as SRO by recusing herself from any such discussion, consideration or approval. As it was, that position did not arise.

57. That leaves the email exchanges between Ms Clifton and Ms Humphrey in June and July 2019. By this stage the DDR recorded the fact that the Delegated Authority dealing with the statutory review was now Ms Clifton as SRO. It follows that – whatever happened now – it could not constitute Prior Involvement. What happened was that Ms Clifton on 19 June 2019 emailed Mr Morrall referring to having collected information relating to the rejection decisions in respect of which she was now the SRO. In the context of a "legitimate expectation" point being made (in the SPV's requests for the statutory review) about the 12 positive 2017 Decisions made on the 2016 SPV Applications, Ms Clifton had indicated that she wished to elicit information about them. It was in that context that Ms Humphrey emailed Ms Clifton on 26 June 2019, saying it "would be helpful to have a bit more detail on exactly what the focus should be on these 12 so I can make sure I am looking at the right stuff". Ms Clifton then asked specific questions about the 2016 SPV Applications. She also told Ms Humphrey: "I don't need you to look at anything in relation to the 41 [2018 SPV Applications] as I have that as part of the formal review". The exchanges between Ms Clifton and Ms

Humphrey about the 2016 SPV Applications culminated in an email 15 July 2019 in which Ms Clifton said to Ms Humphrey: "It seems clear to me that these earlier 12 cases are basically the same as the 41". Nothing in these email exchanges indicate that Ms Clifton had Prior Involvement in the earlier decision-making. Nor, for that matter, was she now discussing with Ms Humphrey the decisions which Ms Humphrey had made on the formal reviews for the 2018 SPV Applications in February 2019. Indeed, Ms Clifton made very clear that she did not wish for, and was not asking, Ms Humphrey to provide input in relation to the 2018 Applications "as I have that as part of the formal review".

58. Having considered all of the contemporaneous documentation relied on by Mr Sharpe QC I am quite satisfied that nothing happened which constituted Prior Involvement by Ms Clifton in the earlier decision-making. She was, on the evidence, in no way embroiled in the consideration of the substantive merits either when the 2018 SPV Applications were originally considered and rejected, or when the formal review was considered and refused. I am satisfied that she was able to provide the 'fresh and independent pair of eyes' required of a SRO. That is what she did. The circumstances in Farmiloe were very different. What had happened in that case was that on 21 August 2018 Ofgem had taken two closely related steps. It had both (i) implemented a decision to request a new Energy Performance Certificate (EPC) by requesting this as Further Information and (ii) issued a decision letter giving an audit rating which was weak because of the EPC inadequacy which needed to be addressed by providing the new EPC: see Farmiloe at paragraphs 33-34. The SRO for the subsequent statutory review of the decision letter was Ms Morris, who was "incorrect" to have claimed no Prior Involvement: see Farmiloe paragraph 53. The Prior Involvement breach was accepted by Ofgem (Farmiloe paragraph 54). The breach was because Ms Morris had been directly involved in the decision-making, as well as in prior communications as to the substance of the matter under consideration in the decision-making. Ms Morris had attended the meeting at which the decision to require the new EPC had been made and took part in the decision: Farmiloe paragraphs 31-32. Prior to that, she had received an 11 April 2018 email describing the audit report review regarding the EPC provided by the applicant (Farmiloe paragraphs 27-28), in the light of whose contents she had requested a view from Ofgem's policy team, and was then copied into later emails (Farmiloe paragraph 28).

59. For all these reasons, I reject ground 5. It is appropriate to add a footnote at this stage regarding the relationship between Ofgem and BEIS. The documents before the Court include Ofgem's Register which, from 23 May 2018 onwards, had said this:

> ***[W]e have received 40 biomethane applications in one day just before the introduction of the new RHI regulations. The majority of which were submitted by a single authorised signatory and investment company. We informed BEIS of the influx of biomethane applications and there are concerns this may exceed the RHI budget. Through email correspondence, BEIS have suggested we find [a way] in which we can reject the applications. As we (Ofgem) are the administrators of the scheme we do not believe we should be influenced by BEIS in whether we determine these applications to be eligible. This has therefore been put on the radar [in case] we receive a formal written request from BEIS on how they wish us to proceed with the applications.***

Ground 3 (Legitimate Expectation based on the 2017 Decisions)

60. I turn next to Ground 3. Mr Sharpe QC submitted that the 2016 SPV Applications and the 2017 Decisions granting Registration, including to the Portsdown Three, gave rise to a legitimate expectation as to the information required from an applicant under Old regulation 25, from which the Operative Decision constitutes an unfair and unjustified departure and is thus unlawful and an abuse of power. Mr Sharpe QC located his argument on substantive unfairness squarely within the doctrine of substantive legitimate expectation. In those circumstances it is inappropriate to look beyond that and unnecessary to venture into what Lord Carnwath and Lord Sumption said about substantive unfairness, conspicuous unfairness, abuse of power and unreasonableness (irrationality) in R (Gallaher Group Ltd) v Competition and Markets Authority [2018] UKSC 25 [2019] AC 96. Both Lord Carnwath (paragraph 41) and Lord Sumption (paragraph 68) recognised legitimate expectation as a freestanding principle of public law, independent of 'irrationality'. Mr Sharpe QC's pleaded Grounds on legitimate expectation characterised this as a 'practice' case (where 'a public body [has] adopted a consistent policy of accepting applications made in a certain manner'), which his oral submissions described as 'special facts sufficient to constitute an unambiguous representation'. Mr Sharpe QC thus acknowledged the need to identify 'a practice tantamount to a clear and unambiguous representation' that similar applications on similar information would be granted in future. It suffices to say that this acknowledgment fits with Farmiloe at paragraph 80, citing R (Davies) v HMRC [2011] 1 WLR 2625 at paragraph 80, where Lord Wilson referred to a "practice … so unambiguous, so widespread, so well-established and so well-recognised as to carry within it a commitment to a [relevant] group … of treatment in accordance with it". A more recent authority is R (Heathrow Hub Ltd) v Secretary of State for Transport [2020] EWCA Civ 213 at paragraph 69 ("what is required is that there must be a practice (even though there is no express promise) which is impliedly tantamount to such a promise. That practice must … give rise to a representation which is clear, unambiguous and devoid of any relevant qualification") and paragraph 75 ("although an express promise is not required to found a legitimate expectation, there must be a consistent practice which is sufficient to generate an implied representation to the same effect").

61. In my judgment, the 2017 Decisions in relation to the 2016 SPV Applications – specifically the Portsdown Three – do not constitute a practice tantamount to a clear and unambiguous representation such as can give rise to a legitimate expectation. In granting those applications Ofgem was acting in accordance with its understanding of the Scheme Regulations and exercising its evaluative judgment. There was, in and associated with Ofgem's action of granting Registration in those cases, no clear – still less consistent, established or settled – implied representation about future applications, about how Ofgem would in future understand and apply the statutory scheme, about what evaluative judgments it would arrive at. Nothing about the 2017 Decisions or their communication, and nothing about the pattern of conduct, was so clear, unqualified, settled, established or recognisable as to constitute the equivalent of a promise or representation or commitment. The legitimate expectation of the SPVs, in making the 2018 SPV Applications, did not in my judgment go further than this: that their applications would be considered on a legally correct interpretation, and a reasonable and procedurally fair application, of the Scheme Regulations and Applicable Guidance.

62. That is not to say that the 2016 SPV Applications or the 2017 Decisions to grant them are without any significance in the legal analysis. They are not factual precedents

requiring Ofgem to make the same decision on a materially equivalent application in 2018. But the Two-Phase Model they embody stands as a helpful reference-point for testing the correct interpretation of the 2011 Regulations (see §§29-34 above). There is a further point. The 2016 SPV Applications and 2017 Decisions – in particular in relation to the Portsdown Three – were capable of providing Ofgem with *a relevant body of experience* on which it could choose to draw, provided that it acted procedurally fairly in doing so. Mr Grodzinski QC submitted that 'track record' could in principle be treated as relevant to decisions made on later applications. I agree. Take the twelve 2016 SPV Applications which, in the 2017 Decisions, Ofgem had taken as satisfying itself so far as concerns: Recourse to Public Funds; Ongoing Non-Compliance; or Double-Counting. I agree with Mr Grodzinski QC that Ofgem would have been entitled – provided that it acted procedurally fairly – to have regard to what its experience arising from the 2016 SPV Applications from Qila companies indicated. If, for example, serious problems had subsequently arisen as to matters such as Recourse to Public Funds, Biomethane Unsuitability Ongoing Non-Compliance, or Double-Counting, Ofgem might reasonably consider that there was an evolving lack of confidence in the sort of information provided with this species of application. If, on the other hand, statements made in conjunction with the 2016 SPV Applications had proved to be reliable – with impeccable compliance as to Recourse to Public Funds, indicated Biomethane Unsuitability, and lack of Double-Counting – Ofgem might reasonably consider that there was an evolving additional confidence in the sort of information provided. As it happens – and as can be seen from the Operative Decision – Ofgem did not identify from the 2016 SPV Applications and 2017 Decisions a body of experience on which it drew in either direction.

63. For these reasons I reject Ground 3. It is not capable of adding as a distinct ground to Grounds 1, 2 and 4. If Ofgem has responded to the 2018 SPV Applications by discharging its public law duties – including asking the right questions, in the light of the Scheme Regulations and its own guidance, and exercising its evaluative judgment reasonably – then the claim cannot succeed for any breach of any legitimate expectation. There are three footnotes to add in the context of Ground 3. First, I am not persuaded by Mr Grodzinski QCs submission that the 2016 SPV Applications, and in particular the Portsdown Three, were "materially distinct" from the 2018 SPV applications. Mr Grodzinski QC emphasised in the case of the Portsdown Three the follow-up emails in February 2017 and the response identifying Phase-2 Stage 3 sites. I do not accept that this is capable of constituting a material distinction, for the reasons I have given (see §§36-38 above). Secondly, a dispute arose as to whether a legitimate expectation would in principle have to yield to Ofgem's merits-evaluation in the application of criteria said to constitute public law 'duties' to refuse Registration. Mr Grodzinski QC cited R (Sovio Wines Ltd) v Food Standards Agency [2009] EWHC 382 (Admin) at paragraphs 95-97. In my judgment, whether there is space to vindicate a legitimate expectation – consistently with the public authority's statutory duties including merits-evaluation – must be a highly-contextual question depending on close analysis of the precise nature of the express or implied 'representation' and the precise nature of the public authority's statutory duties. In a Scheme where guidance is legally significant (old regulation 52), where the regulator addresses the manner and form of information (old Schedule 1 paragraph 1(3)), where Properly Made is linked to the information asked of an applicant by Ofgem, and where at least some bases of refusal are framed as permissive (old regulation 25(5)), there may very well be room for a 'legitimate' expectation to arise within Ofgem's latitude for judgment and appreciation.

But the question does not arise and further analysis of a hypothetical question is neither fruitful nor necessary.

64. Thirdly, the parties joined issue as to the economic implications for the SPVs of the refusal of Registration. Had I concluded that a legitimate expectation had arisen from the 2017 Decisions granting Registration in the case of the 2016 SPV Applications, the question would have arisen as to whether it was lawful – applying the appropriate standard of substantive unfairness or lack of justification – for Ofgem to have departed from that legitimate expectation. As to the 'high threshold' applicable to that analysis, Mr Grodzinski QC cites Aozora especially at paragraph 37. As to the nature and scale of economic consequences, Mr Grodzinski QC compares this case to R (Veolia ES Landfill Ltd) v HMRC [2016] EWHC 1880 (Admin) [2017] Env LR 15 especially at paragraph 201. The question of justification does not arise and a hypothetical balancing exercise positing a 'representation' would not be appropriate. I make these observations as to 'economic detriment'. If and insofar as there were substantive unfairness constituting an abuse of power, in departing from a clear 'representation', it would in my judgment be unlikely to turn on the nature and extent of 'economic detrimental reliance'. Mr Sharpe QC's pleaded Grounds claimed that the Claimants "relied on" their legitimate expectations "to their detriment", including by having "incurred a substantial financial liability to SGN Commercial Services Limited in return for the right to inject biomethane until 2038" which "liabilities amount to c.£1.5m per Claimant". Mr Thompson's witness statement said: "I estimate that funds spent by each Claimant are in excess of £15,000 on purchase, upgrading and transportation of gas, with ongoing financial commitments in excess of £90,000 per year to maintain these arrangements" which "would equate, over the 20 year period over which these arrangements are put in place, to expenditure in excess of £1.5million". I am satisfied of the following: (a) the actual financial outlay of payments made was the £15,000 per Claimant; (b) the other amounts described do reflect, on the face of it, a contractual liability for ongoing Injection-related services in respect of which demands could be made (and which could have insolvency consequences); (c) those contractual arrangements were entered into by the SPVs with no guarantee of Registration (and could in principle have been made conditional upon Registration); (d) the Claimants could have chosen to terminate the arrangements at any time up to 7 March 2019, after the initial refusals and the refusal of Formal Review – this means it could not be said in (or of) the Statutory Review that 'it is unfair not to give us Registration *because we have committed to £1.5million*' when that commitment had ultimately crystallised only in the period after a double refusal of Registration.

Ground 1 (Material Error of Law as to Applicable Regulations)

65. I deal next with Ground 1 which alleges a material error of law in Operative Decision §§2-4. Mr Sharpe QC submits that (i) it was an error of law to apply the definition of "properly made" in New regulation 2(1) to the saving provision in New regulation 92(3)(a) (Operative Decision §3) in deciding whether the 2018 SPV Applications were "properly made" and (ii) the error was material because the relevant provisions of the 2011 Regulations were not "replicated" in the 2018 Regulations (contrary to the view expressed in the Operative Decision §4). Mr Grodzinski QC submits (i) that there was no error of law and (ii) any error of law was immaterial.

66. So far as concerns Ground 1, I would summarise the key points made in the Operative Decision (see §50 above) as follows: (1) Approach to regulation 92(3). For the

purposes of "tariff start date" under New regulation 92(3)(a) the definitions in New regulation 2(1) govern, so that the application was "properly made" by 22 May 2018 only if it provided the information required by New regulation 32(2) and (4). (Operative Decision §2(1)-(3)). (2) Two Requirements Unsatisfied. Focusing on the information required by New regulation 32(2)(c) (Proposed Process Details) and 32(4) (Biogas Producer Declaration) of the 2018 Regulations, there was a failure to provide information required by Ofgem (Operative Decision §2(4)), meaning that the 2018 Regulations were applicable (Operative Decision §3). (3) No Material Difference. However, since both New regulation 32(2)(c) (Proposed Process Details) and 32(4) (Biogas Producer Declaration) replicate equivalent requirements of a "properly made" application under the 2011 Regulations (Old regulation 25(2)(c) (Proposed Process Details) and 25(2B) (Biogas Producer Declaration)), it made no difference whether the 2011 Regulations or the 2018 Regulations were applied: the outcome would be the same (Operative Decision §4).

Was there an error of law?

67. The SRO's approach in the Operative Decision is encapsulated by this contention in Ofgem's pleaded Defence, that in applying New regulation 92(3)(a) "in order to determine the 'tariff start date' – and accordingly whether the 2011 or 2018 Regulations apply – Ofgem applies the definition of that term (and the other terms comprised within its definition) as set out in the 2018 Regulations". In my judgment, "the tariff start date" in regulation 92(3)(a) – on its correct interpretation – means "the tariff start date (applying the 2011 Regulations)": "the date of accreditation" and "the date of registration" in turn have their meanings under Old regulation 2(1); "properly made" for "date of registration" means "properly made in accordance with paragraph (2)" of Old regulation 25 (Old regulation 25(4)); "properly made" for the "date of accreditation" means "has, in the Authority's opinion, been properly made in accordance with paragraphs (2) and (3)" of Old regulation 22 (regulation 22(6)). The reasons why I prefer that interpretation are as follows. (1) In New regulation 92(3)(a) the drafter is not only describing the situation where there is "an application … [which] has been made before the date on which [the 2018] regulations came into force" but – more importantly – is describing the position where there is a "tariff start date" which "is before the date on which these Regulations come into force". The only "tariff start date" which in law existed "before the date on which these Regulations come into force" was the one defined by Old regulation 2(1). On a natural meaning of regulation 92(3)(a), it is the pre-existing "tariff start date" which is applicable within this provision. There is no language within regulation 92(3)(a) which speaks of Ofgem being under a duty to "treat" the "tariff start date" as having been governed by "these Regulations", by contrast with similar language in regulation 92(3)(a)(ii) and (b). (2) The clear purpose of New regulation 92(3)(a) is to protect – for determination in accordance with the 2011 Regulations as if not revoked by the 2018 Regulations – an application that has already been made – and "properly made" – before the date on which the 2018 Regulations came into force. It is odd and artificial, in a provision which is all about "determin[ing]" the "application" under the Old 2011 Regulations, to remove the component governing whether that "application" was "properly made" under those Regulations and replace it with a provision in the New regulations. Especially when the function of "properly made" is as a threshold test which, when satisfied, stops the clock (and would start the tariff). (3) The point can readily be tested. If an application was "properly made" under the 2011 Regulations while they were still

in force, and would meet the criteria for favourable determination under those 2011 Regulations, the clear purpose of regulation 92(3)(a) is threatened by an overlay of definitional provisions from the New 2018 Regulations. The secure and straightforward way to achieve the clear purpose of regulation 92(3)(a) is to guard against the question of "properly made" being approached, adversely, by reference to New regulation 2(1). It suffices that it would be approached, favourably, by reference to Old Regulation 2(1). (4) This interpretation does not remove utility from the definitions in New regulation 2(1). Those definitions still operate – as equivalent provisions always have – to control Tariff Start Date (New regulations 30(9)(f)(i), 32(10)(e) and 59(1)) while the New regulation 2(1) definition of "Properly Made" also applies to the Contingent Duty to Register (or Accredit). (5) It makes sense that "properly made", for the purposes of New regulation 92(3)(a), be linked to the criteria in regulation 25 of the 2011 Regulations rather than those in regulation 32 of the 2018 Regulations. As has been seen – and as is explained in Ofgem's guidance – "properly made" means (see §§39-40 above): has the information which applicants are required to include with their application been provided to a sufficient standard for Ofgem to determine the application applying the relevant criteria? A focus on the information required by and decision-making criteria under Old regulation 25, as well as the Applicable Guidance, alone make sense in the context of New Regulation 92(3)(a).

68. This last point, and the oddity and artificiality of treating the definitions in New regulation 2(1) as governing "tariff start date" in New regulation 92(3)(a), can be illustrated by reference to required information about planning permission. New Schedule 2 paragraph 1(2)(bb)(i) specifies – as "information that may be required of an applicant" – "evidence from the relevant planning authority that … any necessary planning permission has been granted". New regulation 32(12) prohibits Registration in the case of any application made on or after the date on which the 2018 Regulations come into force unless Stage 2, 3 and 4 planning permissions have been granted. Such an application must be supported by the specified Schedule 2 information required by Ofgem (New regulation 32(2)(a)). The application is only "properly made" under New regulation 2(1) when it "provides the information required by regulation 32(2) …" This, in my judgment, illustrates a logical problem – unexplored in the Operative Decision – "properly made" means an application which "provides the information required by regulation 32(2) and (4)": a phrase which connotes an application made under the 2018 Regulations. Obviously, it cannot have been intended that new Regulation 92(3)(a) protection is lost in the case of an application "made before the date on which these Regulations come into force", by reference to standards of a "properly made" application applicable only to applications after that date. The straightforward way to achieve and secure that position, in my judgment, is the interpretation I have identified: giving regulation 92(3)(a) a purposive – but in my judgment entirely possible – interpretation. All that would be required is that regulation 92(3)(a) "tariff start date" be interpreted as meaning "in accordance with the 2011 regulations as if they had not been revoked by these regulations". That produces a symmetry with New regulation 92(3)(a)(i).

69. So, in my judgment, it was a misdirection in law for the Operative Decision not to address "properly made" by reference to the 2011 Regulations. The correct legal focus should in my judgment have been on "tariff start date" and "date of registration" as defined in the 2011 Regulations as they stood immediately prior to their revocation and replacement by the 2018 regulations, together with the Applicable Guidance. Had

Ofgem then been satisfied that the applications were "properly made" under those provisions, it was then required to determine the applications in accordance with the remaining criteria in the 2011 regulations namely the various bases for refusing registration under regulation 25, together with the power to impose conditions. Had Ofgem not been so satisfied, it would then be required to apply the 2018 Regulations to determine the applications and they would necessarily have failed (it not being suggested that information provided after the 2018 Regulations came into force transformed the 2018 SPV Applications into Properly Made and satisfied the criteria in New Regulation 32).

Was the error of law material?

70. The Operative Decision stated that the provisions by reference to which the 2018 SPV Applications were rejected had done no more than "replicate" the equivalent provisions under the 2011 Regulations (Operative Decision §4), meaning that "the outcome … would have been the same under either set of regulations". In my judgment, the way to test the lawfulness of the Operative Decision is to consider its reasoning against the 2011 Regulations, and the Applicable Guidance: (a) on the issue of "properly made" (Operative Decision §§2(4), 3 and 5-10); and (b) on the issue of determination of the applications under the relevant criteria (Operative Decision §§11-23 and 25-26). What matters is whether, in substance, the reasoning in the Operative Decision was a lawful approach to the contents of the Scheme Regulations (Ground 2) and involved no material legal irrelevancy (Ground 4). The place to conduct that analysis is under Grounds 2 and 4 (see §§75-91 below).

71. It is appropriate to deal here with contested issues arising out of changes in the 2018 Regulations, on which Mr Sharpe QC specifically relied as changes of substance. My conclusions, based on the analysis which follows, is that Ground 1 does not succeed as a freestanding ground for judicial review, given the following. (1) The phrase "properly made" did not change from "fact" (Old regulation 2(1) with Old regulation 25(4)) to "opinion" (New regulation 2(1) with New regulation 92(10)) (see §72 below). (2) The Biogas Producer Declaration was already (Old regulation 25(2)(a), old Schedule 1 paragraph 1(2)(w), Guidance Volume 1 paragraph 12.11 and Application Guide question reference HL160-3) within "properly made" for the purposes of Old regulation 25(4) (see §73 below). (3) The phrase "the applicant has indicated" (Old regulation 25(5)) meant "it was indicated from information emanating from the applicant in conjunction with the application" (see §74 below). (4) No other provision of the 2018 Regulations referred to in the Operative Decision has been shown to be materially different from the equivalent provision of the 2011 Regulations. Mr Grodzinski QC was content to conduct the analysis under Grounds 2 and 4 under the 2011 and 2018 Regulations interchangeably. I will conduct that analysis under the 2011 Regulations. Importantly, Mr Grodzinski QC did not submit that the Applicable Guidance was rendered irrelevant or superseded. In all these circumstances, the error of law as to the "applicable Regulations" is not a material error. Put another way, Ground 1 has no force independent of Grounds 2 and 4.

72. Mr Sharpe QC submits that the phrase "properly made in accordance with paragraph (2)" in Old regulation 25(4) means that "properly made" is a question of "fact" for Ofgem (judicially reviewable on a reasonableness basis) rather than a question of "opinion" for Ofgem (judicially reviewable on a reasonableness basis). Mr Sharpe QC draws for his contrast on the new wording in the definition of "date of registration" in

New regulation 32(10) and in the new definition of "properly made" in New regulation 2(1). In fact, Old regulation 22(6) – dealing with Accreditation of Installations – framed "properly made" with the same additional language of "opinion". Mr Sharpe QC says there must be a difference between a formulation which includes the "opinion" phrase and one which does not, and that there is here a material change. I cannot accept those submissions, for these reasons. (1) Whether an application is "properly made", and the date at which it was "properly made", clearly calls for an evaluation. The absence of "in the Authority's opinion" does not make the question one of "fact" as distinct from "opinion". There will necessarily be a factual element in the evaluative judgment, including when that evaluative judgment is expressly described as "opinion". (2) As I have explained, the essence of "properly made" is properly and lawfully encapsulated in Guidance Part I paragraph 2.16 (and the equivalent paragraph 2.14 for Accreditation of Installations): whether the applicant has included "all information we ask for in the application form to a suitable standard, to enable us to make a decision …" That question – whether the required information has been supplied to a standard suitable to allow a decision applying the statutory decision-making criteria – is necessarily an evaluative judgment, in which Ofgem is the primary decision-maker. (3) The language "in the Authority's opinion" spells out that there is an evaluative judgment for Ofgem. That is an understandable improvement in language and alignment of provisions for Registered Producers and Accredited Installations. But it was in any event already necessarily implicit in Old regulation 25(4). (4) This analysis avoids the bizarre outcome that the evaluation in Old regulation 22(6) is distinctly "opinion", whereas that in Old regulation 25(4) is distinctly "fact", when they: play the same role; involve equivalent Guidance; and each feed into the definitions of "date of accreditation" and "date of registration" and therefore "tariff start date". (5) "Properly made" calls for an evaluative judgment by Ofgem, whether that is made explicit through the language of "opinion" or not. It follows that there was no material change in New regulation 32(10) and the new definition of "properly made" in New regulation 2(1), by the introduction of "in the Authority's opinion".

73. Mr Sharpe QC submits that "properly made in accordance with paragraph (2)" in Old regulation 25(4) excludes the question whether any (or any adequate) Biogas Producer Declaration (under Old regulation 25(2B)) had been provided to Ofgem. He submits that regulation 25(2B) is "freestanding" from regulation 25(2). He emphasises that Old regulation 25(4) says "in accordance with paragraph (2)" and not – as it could have done – "in accordance with paragraph (2) and (2A)". On that basis, submits Mr Sharpe QC, "properly made" in the New regulation 32(10) when read with the new definition in regulation 2(1) ("an application which provides the information required by regulation 32(2) and (4)") was a material change: it brought the Biogas Producer Declaration (New regulation 32(4)) within "properly made" for the first time. I cannot accept those submissions, for these reasons. (1) New regulation 32(10), read with the new definition of "properly made" (New regulation 2(1)), brought the Biogas Producer Declaration (New regulation 32(4)) within "properly made" *by direct operation of the legislation*. That matched the pre-existing approach, in Accredited Installation cases, to the co-owner declaration (Old regulation 22(3)) within "properly made" in Old regulation 22(6). (2) However, Ofgem's invocation of its power to require the Biogas Producer Declaration (Old regulation 25(2B)) had already as at 9 May 2018 brought the Biogas Producer Declaration within "properly made" in Old regulation 25(4) *by indirect operation of the legislation*. Ofgem, in the exercise of its power to require a Biogas Producer Declaration (Old regulation 25(2B)), had decided to require this from

applicants, as part of the application (§42(3) above): Application Guide question reference HL160-3 and Guidance Volume 1 paragraph 12.11. That made the Biogas Producer Declaration "information" that Ofgem "require[d] to enable it to consider the … application for … registration" under Schedule 1 paragraph 1(2)(w) and 1(3), bringing it within Old regulation 25(2)(a) and (4). (3) The new language was achieving directly, a position currently achieved indirectly by the statutory scheme and Ofgem's actions through Applicable Guidance. It follows that there was no material change in New regulation 32(10) read with the new definition of "properly made" in New regulation 2(1).

74. Mr Sharpe QC submits that the phrase "the applicant has indicated" in Old regulation 25(5) means that the applicant must have "volunteered" that there will be Ongoing Non-Compliance. The same would be true of the same language ("its owner has indicated") for Accredited Installations under Old regulation 22(10). On that basis, submits Mr Sharpe QC, the language in New regulation 32(11) ("where [the Authority] considers") was a material change. I cannot accept those submissions, for these reasons. (1) The phrase "the applicant has indicated" in Old regulation 25(5) (and "its owner has indicated" in Old regulation 22(10)), although the language was undoubtedly clumsy, connotes information emanating from the applicant in conjunction with the application. An 'indication' need not be in the nature of a 'confession' which has been 'volunteered', and which 'voluntarily' contradicts the Overall Declaration required by Ofgem: namely that, "if registered", the participant "will comply with all of the ongoing obligations under the RHI scheme". An 'indication' could arise from what the application says and does not say, and what the documents in support of the application say and do not say. It would include "details of the feedstock which the producer is proposing to use" in Schedule 1 paragraph 1(2)(o) (and the FMS Questionnaire) which – by reference to what it says or omits to say – Ofgem is satisfied 'indicates' that an applicable ongoing obligation will not be complied with. It would also include information which Ofgem obtains through an inspection which it is empowered to require (regulation 25(2A)), and which the applicant is necessarily therefore required to permit. An 'indication can emanate from an applicant without it being 'volunteered' as if it were a confession. It may arise from something that the applicant has said, which Ofgem accepts or rejects, something which the applicant has conspicuously failed to say, or something which Ofgem has seen with its own eyes from an inspection which an applicant is required to permit. (2) It would make no sense and would defeat the clear purpose if Old regulation 25(5) required Ofgem to grant Registration although satisfied of a clear indication that an important and Applicable Ongoing Obligation would not be complied with, simply because the applicant had given the requisite Overall Declaration of future compliance and, when asked about the problem, protests the contrary. It would be very odd if indications of non-compliance, which need not be "volunteered" in the case of Double-Counting (Old regulation 25(7)), or Commencement Activity (Old regulation 25(8)), or the Prohibition on Recourse to Public Funds (Old regulation 23 read with Old regulation 25(4)), need to be "volunteered" in the case of Ongoing Non-Compliance (Old regulation 25(5)), including where it relates to Feedstock (old Schedule 1 paragraph 1(2)(o), read with regulation 25(2)(a)). Such an interpretation would undermine the manifest purpose of Old regulation 25(5), within a scheme in which Registration (and Accreditation) are granted following an assessment intended to provide appropriate confidence, and where future compliance matters. The language does not drive such a conclusion. There is no sensible reason why Ofgem should be entitled to reject an applicant's notice relating to

recourse to public funds because it has "reason to believe [it] is incorrect" (regulation 23(1)), but not take a similar course in relation to the important question of ongoing compliance. (3) It follows from this that the, undoubtedly clearer and improved language of New regulation 32(11) (and New regulation 30(13) for Accredited Installations) was not a material change.

Ground 4 (Legal Irrelevancies)

Three Unspoken 'Irrelevancies'

75. Mr Sharpe QC submits that the Operative Decision is vitiated on the basis that, albeit not found expressly within the reasoning, the inference which should be drawn is that it took into account these legal irrelevancies: (i) Ofgem's hostility to Two-Phase Model developments; and/or (ii) Ofgem's desire to bring forward the substantive policy changes made by the amended 2018 Regulations; and/or (iii) Ofgem's concerns about internal budgeting and accounting and the cost of the applications. I cannot accept those submissions. I accept that Ofgem was 'under the spotlight' in relation to the 2018 SPV Applications. They arose on the eve of the 2018 Regulations which constituted a policy position adopted by the Secretary of State to exclude applications on the Two-Phase Model from Registration as BFI Producers. Government's policy position was that "the process of 2-stage commissioning… undermines the degression mechanism, complicates scheme budget management and may also restrict the ability for future biomethane developers to access the RHI". Moreover, the 2018 SPV Applications came at a time of particular scrutiny. Concerns had been raised about the operation of the Subsidy Scheme. The National Audit Office had issued a report on 20 February 2018. The Chief Executive of Ofgem had given evidence to the Public Accounts Committee on 21 March 2018. In my judgment: (1) There is no evidential or other support for an inference that any of these three 'unspoken' matters materially influenced the decision. (2) The Operative Decision was a conscientious exercise of regulatory judgment which set out to apply the applicable law correctly and reach an evaluation which, in the mind of the decision-maker, was the correct one. Ms Clifton as SRO, in making her reasoned decision, was giving the required "reasons" (Old regulation 25(9)): making explicit and transparent her assessment and why she had reached the conclusion described. (3) Ground 4, based on these three 'unspoken' matters, therefore fails.

Viability as a legal irrelevancy

76. Mr Sharpe QC submits that the Operative Decision was vitiated through regard to this further material legal irrelevancy: concerns about the SPVs' ability to develop their projects on time or at all. This point introduces a concern. Mr Grodzinski QC submitted that the function of providing the decision-maker with Proposed Process Details was to conduct a viability assessment. He also told me that his 'clients at Ofgem' had specifically confirmed their agreement with his submissions. I have rejected this Viability Thesis submission (see §44 above). The concern is whether, if Ms Clifton was part of the 'agreement' with the 'submission', that itself supports an inference that she laboured under a legal misappreciation. Ultimately, I do not consider that such an inference is fair or justified. The Operative Decision is a clearly and transparently reasoned document. Neither it nor Ms Clifton's witness statement evidence indicate that the Operative Decision was directed at deciding whether the projects were viable or would succeed. This aspect of Ground 4 fails.

Four express aspects of the Operative Decision as 'Legal Irrelevancies'

77. Mr Sharpe QC submits that the following further matters, expressly referred to in the Operative Decision, each constitutes a 'legal irrelevancy' which the decision-maker was obliged to disregard: (i) The absence of "binding and certain arrangements for the supply of biogas". (ii) The absence of "a full chain of supply from biogas production to biomethane injection". (iii) The absence of a specified "definite location and biomethane facility". (iv) Whether the applicants would "be able to compel the production from any third parties undertaking the biogas and biomethane production processes of such information as will be necessary for [the applicant] to be able to comply with its ongoing obligations". I cannot accept those submissions. I have substantially covered this topic within my analysis as to Proposed Process Details (see §§46-47 above). In my judgment, matters such as these are matters to which Ofgem was at least entitled to choose to have regard, as factors in arriving at its regulatory judgment in the exercise of evaluative appreciation in the application of the scheme regulations. In doing so, Ofgem needed to understand the applicable regulations correctly, asking itself the legally correct questions, acting reasonably and (absent good reason for departure) adhering to the Applicable Guidance, recognising Non-Preconditions. Whether it did so is the subject of Ground 2. This part of Ground 4 fails. For all these reasons, I reject Ground 4.

Ground 2 (Public Law Error as to the Registration Requirements)

78. I have rejected Grounds 1 and 3-5. Whether the Operative Decision is lawful therefore turns on Ground 2. I remind myself of the Court's Limited Supervisory Function (see §23 above). For reasons I explained in the context of Ground 1 (see §§65-74 above), I will focus on the substance of the Operative Decision, viewed in terms of the Old 2011 Regulations, and Applicable Guidance. I analysed the position in law in my Discussion (see §§24-49 above). Mr Grodzinski QC submits that there is no public law error in the Operative Decision, which fell squarely within the SRO's evaluative judgment. He submits, ultimately, that matters to which the SRO referred in the Operative Decision were matters to which she was entitled to have regard, in the exercise of her judgment, as material considerations, giving them such weight as she considered appropriate.

Points at the Heart of Ofgem's Operative Decision

79. I will analyse the reasons in the Operative Decision (see §50 above) in detail, taking each topic in turn. It is clear, however – and will become yet clearer in the analysis below – that there are core and recurrent themes in the SRO's reasoning. In relation to the position overall, the fundamental point at the heart of the Operative Decision is identified in this way in Mr Grodzinski QC's skeleton argument:

> ***… it is plain that it was the absence of an identified site or firm arrangements for the production of biogas which proved the fundamental obstacle to the registration of the Applications".***

That skeleton argument also describes as:

> ***Ofgem's core concern … the absence of an identified site and the absence of sufficient arrangements with any third party.***

So far as concerns Proposed Process Details, the essence of the Operative Decision is encapsulated as follows in the same skeleton argument:

> ***Ofgem's position was that [Proposed Process Details] required identifying the source of the biogas to be used in the production of biomethane and that the Applications did not identify with sufficient certainty the arrangements for the procurement of biogas. The Applications therefore failed to comply with a mandatory requirement for registration.***

That same essence is put in this way in Ofgem's pleaded Defence:

> ***… in relation to the proposed phase 2 of the project there were no specific proposals to procure biogas at all.***

So far as concerns the Biogas Producer Declaration, the essence of the Operative Decision is put in Ofgem's pleaded Defence in terms of this "anterior defect":

> ***If there were no arrangements for the supply of biogas in the first place, plainly authority cannot have been obtained 'from all persons who produce the biogas from which the biomethane is to be made' within the meaning of the regulations.***

Mr Grodzinski QC's skeleton argument encapsulates the same essential point in this way:

> ***… the absence of arrangements for the procurement of biogas had the consequence that the Applicants were unable to … produce [the] authority [required by Old regulation 25(2B)] …***

So far as concerns Applicable Ongoing Obligations, Mr Grodzinski QC's skeleton argument encapsulates the essence of the Operative Decision as follows:

> ***… the absence of arrangements for the procurement of biogas had the consequence that the Applicants were unable to … satisfy Ofgem that the Applicants would be able to meet certain ongoing obligations …***

In my judgment, these are all helpful encapsulations of key points lying at the heart of the Operative Decision.

Points at the Heart of Mr Sharpe QC's Attack

80. What Mr Sharpe QC says under Ground 2, in essence, is as follows. He says the Operative Decision emphasises matters – such as the absence of binding third party contracts and the absence of identification of sites – effectively 'read into' the Registration Requirements (including as to Proposed Process Details) when they do not appear in the applicable Scheme Regulations, nor in any of Ofgem's guidance documents. He describes as a non-sequitur Ofgem proceeding from the absence of existing Third Party Operator Contracts to a conclusion that the SPVs would not in future secure Ongoing Compliance; and characterises as unreasonable (irrational) and unsupported by evidence the conclusion that the SPVs, if Registered, would not engage with third parties in a way ensuring that Applicable Ongoing Obligations are mirrored in those contracts.

Proposed Process Details: Absence of an Identified Future Stage 2 Biogas Producer

81. I am going to examine each strand of the reasoning in the Operative Decision in turn. First, the Operative Decision reasoned as follows. The 2018 SPV Applications were not

"properly made" by reference to the statutorily-required Proposed Process Details (Operative Decision §§2(4), 3), and had not "complied with" this requirement (§§7-8), because of the absence of an identified Future Stage 2 Biogas Producer: Proposed Process Details (New regulation 32(2)(c), replicating Old regulation 25(2)(c)) "requires … identifying the source of the biogas to be used in the production of the biomethane" (Operative Decision §2(4)(a)). In my judgment: (1) It was not a Precondition "require[d]" by or by reference to Old regulation 25(2)(c) (replicated in New regulation 32(2)(c)) that the applicant must "identify[] the source of the biogas to be used in the production of the biomethane" (ie. Stage 2 Biogas Producer(s)). (2) It became a requirement that an applicant should specify a Stage 2 biogas production plant to be used for the purposes of its Registration. But that was a new Precondition, for applications made on or after 20 June 2018, by virtue of New regulation 32(4A)(a) (and 32(13)(d)) as amended by SI 2018/635. There was no express or implied previous "require[ment]" of that kind. (3) Ofgem's Application Guide question reference HK120 ("a comprehensive description of your installation"), properly understood, was not requiring an identifiable pre-existing Facility in relation to Future Stage 2 or Stage 3. (4) Ofgem's guidance told applicants for Registration two key things about Proposed Process Details. (i) First, that the key purpose was so that Ofgem could "determine that the [applicant] has arranged access for … conveyance through pipes" (Guidance Volume 1 paragraph 12.12), in conjunction with which contracts with third parties for Stage 4 were required of an applicant by Ofgem (Guidance Volume 1 paragraph 12.13 second indent; Application Guide question reference HL160-4). (ii) Secondly, that "details of the biomethane production process" were to be provided by a "comprehensive schematic diagram", "showing the process of biomethane production from the biogas plant(s), and the point of entry on to the network" (Guidance Volume 1 paragraph 12.13 first indent; Application Guide question reference HL160-1). (5) Ofgem's guidance matters: (a) because of the public law duty of adherence to guidance (absent a good reason); (b) because the guidance is the way in which Ofgem requires information of an applicant (Old Schedule 1 paragraph 1(1)); and (c) because the true, functional meaning of "properly made" is whether *the information which applicants are required to include with their application* has been provided to a sufficient standard for Ofgem to determine the application asking the Essential Substantive Question (applying the criteria of whether: (i) there has been Commencement Activity; and (ii) there is no indicated Recourse to Public Funds, Biomethane Unsuitability, Ongoing Non-Compliance or Double-Counting). (6) The reasoning in the Operative Decision: (a) treats as a Precondition something which, in law, was not; (b) fails to identify that there is no such Precondition; and (c) fails to appreciate the significance of the relevant Applicable Guidance (of which no mention is made) and identifies no good reason for departing from it. The approach is therefore erroneous in law.

Proposed Process Details: Absence of Definite Future Stage 2 and 3 Processes

82. The Operative Decision also reasoned as follows. The 2018 SPV Applications were not "properly made" by reference to the statutorily-required "details of the process by which the applicant proposes to produce biomethane and arrange for its injection" (Operative Decision §§2(4), 3), and had not "complied with" this requirement (§§7-8), because of the absence of definitive Stage 2 and 3 Processes. The "information … required" as Proposed Process Details includes "definite processes": "for the production of biogas", and also "by which it was proposed to produce biomethane" (Operative Decision §2(4)(d)). In my judgment: (1) This reasoning has to be read in the

light of the reasoning as a whole. It was not a Precondition "required" by or by reference to Old regulation 25(2)(c) (replicated in New regulation 32(2)(c)) that the applicant must identify "definite processes", either "for the production of biogas", or "by which it was proposed to produce biomethane". (2) It became requirements that an applicant for Registration should specify a Stage 2 biogas production plant to be used for the purposes of its registration; and should identify a Stage 3 biomethane production plant to be used for the purposes of its Registration whose Equipment had been Commissioned. But those were new preconditions, for applications made on or after 20 June 2018, by virtue of regulation 32(4A)(a) (and 32(13)(d)), and regulation 32(4A)(b) of the 2018 Regulations as amended by SI 2018/635. There was no express or implied previous "require[ment]" of that kind. (3) The points set out at §81(3)-(6) above apply equally here.

Proposed Process Details: Absence of Future Stage 2 and 2 Third Party Operator (i) Binding Commitments (ii) Firm and Binding Arrangements (iii) Full Chain of Supply

83. Further, the Operative Decision reasoned as follows. The 2018 SPV Applications were not "properly made" by reference to the statutorily-required Proposed Process Details (Operative Decision §§2(4), 3), and had not "complied with" this requirement (§§7-8), because of the following specific information needed where there were to be third party operators at Stage 2 and 3. First, binding Stage 2 and 3 third party commitments: to "identify with sufficient certainty arrangements that had been reached for those procurements" in the nature of "evidence of binding commitments and rights" (Operative Decision §2(4)(c)). Secondly, firm and binding Stage 2 Arrangements: "firm arrangements… for the supply to [the applicant] of biogas to be upgraded to biomethane" (Operative Decision §2(4)(e)); "certain and binding arrangements… in place for the supply of biogas" (Operative Decision §7). Thirdly, a stages 2-4 full supply chain: "evidence of the full chain of supply from biogas production to biomethane injection" (Operative Decision §8). In my judgment: (1) It was not a Precondition required by or by reference to Old regulation 25(2)(c) (replicated in New regulation 32(2)(c)) that the applicant must "identify with sufficient certainty arrangements that had been reached for those procurements" in the nature of "evidence of binding commitments and rights"; or "firm arrangements… for the supply to [the applicant] of biogas to be upgraded to biomethane"; or "certain and binding arrangements… in place for the supply of biogas"; or "evidence of the full chain of supply from biogas production to biomethane injection". (2) Where Third Party Operator Contracts are referred to in the Scheme Regulations that is in the context of the Applicable Ongoing Obligations of a Participant once Registered as a BFI Producer: New regulation 33(7) and (8) (replicated in Old regulation 42(7) and (8)). Those provisions were referenced in the Operative Decision at §18, but this significant point was not identified. (3) The point set out in paragraph 81(2) also applies here. (4) Ofgem's guidance reinforced the need to produce third party contracts in the context of Applicable Ongoing Obligations, where a Registered BFI Producer (Participant) enters into Third Party Producer Contracts (Guidance Volume 1 paragraph 12.21). (5) Ofgem's Applicable Guidance described expressly third party contracts which constituted "information" required "to accompany the application for registration", namely those relating to Stage 4: "extracts of contracts and the Network Entry Agreement (NEA) with relevant third parties relating to the agreement to convey the gas on to the pipeline network". (6) The points set out in §81(3)-(6) above apply equally here.

Biogas Producer Declaration: No Firm, Binding and Certain Future Stage 2 Arrangements involving Specific Sources

84. The Operative Decision reasoned as follows. In relation to the Biogas Producer Declaration (New regulation 32(4); replicating Old regulation 25(2B)), the applicants had failed to "provide authority from persons producing biogas for you to be the scheme participant, as is… required in support of applications for registration", so that the application was not "properly made" (Operative Decision §§2(4), 3) and this requirement had "not been complied with" (§9), because there were no firm, binding and certain Stage 2 arrangements involving identifiable specific sources of biogas. The absence of "firm arrangements… for the supply to [the applicant] of biogas to be upgraded to biomethane" meant that "it was not possible… to conclude that biogas originating from specific sources would be used to produce the biomethane" (Operative Decision §2(4)(d)). As it was later put: "It follows from the absence of binding and certain arrangements for the supply of biogas to [the applicant] that Ofgem has not been supplied with the necessary authority from the persons producing such biogas as may be upgraded to biomethane and injected" (Operative Decision §9). In my judgment, this reasoning suffers from the same problems as are identified above. In relation to "firm arrangements" for Stage 2 of the Future Activity, the points set out at §83(1)-(2) and (4)-(5) above apply. In relation to "specified sources" of biogas for Stage 2 of the Future Activity, the points set out at §81(1)-(5) above apply. The reasoning in the Operative Decision treats as Preconditions features which, in law, were not; fails to identify that there is no such Precondition; fails to appreciate the significance of provisions (in the Scheme Regulations and the Applicable Guidance) treating third party contracts for Stages 2 and 3 as part of a Participant's Applicable Ongoing Obligations; it fails to appreciate the significance of the relevant guidance (of which no mention is made) and identifies no good reason for departing from it. It is erroneous in law.

Biogas Producer Declaration: Ofgem Requires All Future Stage 2 Biogas Producers to Sign the Declaration

85. The Operative Decision reasoned as follows. Again, in relation to the Biogas Producer Declaration, the applicants had failed to "provide authority from persons producing biogas for you to be the scheme participant, as is… required in support of applications for registration", so that the application was not "properly made" (Operative Decision §§2(4), 3) and this requirement had "not been complied with" (§9), because the Biogas Producer Declaration requirement "entitles Ofgem to require that the applicant has authority from all persons producing the biogas that is to be used to produce biomethane", and "Ofgem does require that such authority is provided" by means of the "standard 'declaration form' template" (Operative Decision §9). In my judgment: (1) Correctly interpreted, "all persons" in regulation 25(2B) of the 2011 Regulations (replicated in regulation 32(4) of the 2018 Regulations) did not entail as a precondition that an applicant was required to specify Stage 2 third party producers of biogas in relation to the Future Activity. (2) Nor did Ofgem's guidance (Guidance Volume 1 paragraph 12.11) state that this was what Ofgem required of applicants. (3) The Biogas Producer Declaration was required in circumstances where an application on the Two-Phase Model was consistent with the statutory scheme, and where there was no Precondition requiring identifying a particular Stage 2 Biogas producer. Such a requirement was imposed in relation to applications made on or after 20 June 2018. (4)

The function in law of Ofgem considering whether an application was "properly made" by reference to the Biogas Producer Declaration (regulation 25(2B) read with Schedule 1 paragraph 1(2)(w) and regulation 25(2)(a)) was to ask whether the information which Ofgem required applicants to include with their application had been provided to a sufficient standard for Ofgem to determine the application, deciding whether: (i) there has been Commencement Activity; and (ii) there is no indicated Recourse to Public Funds, Biomethane Unsuitability, Ongoing Non-Compliance or Double-Counting. This approach was the correct interpretation of "properly made", but in any event was the approach identified by Ofgem in its guidance (Guidance Volume 1 paragraph 2.16). (5) The points set out at §81(6) above apply equally here.

Ongoing Non-Compliance (Access): No Specific Future Stage 3 Arrangement and Location/ Third Party Operator Contracts Only for Future Stage 4

86. The Operative Decision reasoned as follows. On the question of Ongoing Non-Compliance (New regulation 32(11); replicating Old regulation 25(5)) in relation to access to the site for inspection (New regulations 43(j) and 85; replicating Old regulation 34(i) and 50), "one or more ongoing obligations will not be complied with" in that the applicant – if Registered – would not be able to allow Ofgem access to the site where biomethane is produced (Operative Decision §§13-15), because there was no specific Stage 3 arrangement and no definitive Stage 3 location. The application "did not disclose that [the applicant] had entered into specific arrangements for the production of biomethane" and "no definitive location and biomethane facility is associated with [the] application": "As such, Ofgem's conclusion is that you will not be able to allow access to such equipment as may be used to produce any biomethane which ultimately [the applicant] may inject" (Operative Decision §13). Ofgem went on to say that contractual arrangements had been provided but only in relation to "the injection site", so that they did not cover "rights to access the site where the biogas is upgraded" (Operative Decision §15). In my judgment: (1) The starting point is that Ofgem was right in law to ask (a) whether in its determination, having regard to all the information from the applicant and about the application, there was indicated Ongoing Non-Compliance; and (b) whether the information which it required applicants to include with their application had been provided to a sufficient standard for it to decide that question. (2) Ofgem needed to recognise, in its determination read as a whole, that there was no Precondition under the Scheme Regulations or under Ofgem's Applicable Guidance requiring an applicant (a) to describe specific third party arrangements for Stage 3 Future Activity or (b) to identify a definitive Future Stage 3 location and Facility. (3) In relation to Third Party Operator Contracts the points set out in §83(1)-(2) and (4)-(5) apply equally here. (4) The precondition of a definitive Stage 3 location and Facility with Commissioned Equipment became a Precondition, but only in respect of applications made on or after 20 June 2018. (5) Reading the Operative Decision as a whole, Ofgem's reasoning did not reflect such an understanding. The reasoning in the Operative Decision treated these features as being "require[d]" as a precondition for Registration. The Operative Decision emphasised, as a shortcoming, that the contracts provided related to Stage 4 (injection) (Operative Decision §15, also § 20): but that was what the Applicable Guidance described as the necessary information (Guidance Volume 1 paragraph 12.13 second indent). Again, no reference was made to the relevant guidance. (6) The points set out at paragraph 81(6) above also apply here.

Ongoing Non-Compliance (Access): Insufficient Stage 2 Information/Third Party Operator Contracts Only for Future Stage 4

87. The Operative Decision also reasoned as follows. Again, on the question of Ongoing Non-Compliance in relation to access to the site for inspection, "one or more ongoing obligations will not be complied with" in that the applicant – if registered – would not be able to allow Ofgem access to the site where biomethane is produced (Operative Decision §§13-15), because there was insufficient information as to Stage 2: as to biogas production, in relation to the site at which biogas is produced the applicant "would need to be able to provide Ofgem with access to that site" but "the evidence and information that you submitted in support of your application did not establish that it would be able to do so" (Operative Decision §14). Here again, contractual arrangements had been provided but only in relation to "the injection site" (Operative Decision §15). In my judgment: (1) The points described at §86(1)-(2) above apply equally here. (2) In relation to Third Party Operator Contracts the points set out in §83(1)-(2) and (4)-(5) above apply equally here. (3) In relation to information about Future Stage 2 the points set out in §83(2)-(6) above apply equally here. (4) The point set out at §86(5) above also applies here. (5) Even if Ofgem were to be taken as having treated the absence of Future Stage 2 and 3 Third Party Operator Contracts as a relevant factor in an evaluative assessment, there is this problem. It does not follow, in logic or reason, that the absence of existing contractual arrangements for the future – especially where no such existing contractual arrangements are a Precondition and the Scheme Regulations and Applicable Guidance speak of those arrangements being entered into as a Registered Participant – is, of itself, an indication that future contractual arrangements would be defective in Ongoing Compliance terms for failure to secure access to Equipment for inspection. The Operative Decision gives no reasoned basis for concluding why that consequence did follow from that premise. Mr Sharpe QC is right to submit that the Operative Decision failed to identify reasons why Ofgem – in the exercise of a reasonable evaluative judgment – proceeded from the premise to the conclusion. The question was whether, in circumstances where third-party arrangements were not currently in place and not a prerequisite, Ofgem considered that the future obligation to ensure that future contractual arrangements contained an access right would not be complied with. The question was this: would future contracts include the appropriate access requirement? That question could not logically be answered simply by saying: there are no contractual arrangements yet. Moreover, Ofgem had specifically required of the SPV applicants an Overall Declaration which, like the regulations and its own guidance, reflected the future obligation to ensure access through appropriate contractual arrangements. The declaration had stated that the applicant (if registered) would comply with all ongoing obligations including keeping and providing upon request copies of third-party contracts and acting "to ensure access (by contractual or other means) for Ofgem (or [its] authorised agents) to any offsite equipment including the equipment used to produce the biogas for biomethane production". That was a commitment to discharge an obligation to ensure access within future contracts. To give, as the reason for concluding that that obligation would be breached, the fact that the contracts did not currently exist did not provide a logical (nor a legally adequately reasoned) basis for the adverse conclusion.

Ongoing Non-Compliance (Information): No Definitive Future Third Party Operator Arrangements, Except for Future Stage 4

88. The Operative Decision reasoned as follows. On the question of Ongoing Non-Compliance (New regulation 32(11); replicating Old regulation 25(5)) in relation to the provision of information (New regulations 42(6)-(8) and 48-50; replicating Old regulations 33(6)-(8) and 36B-36D), one or more ongoing obligations would not be complied with so far as the provision of information was concerned (Operative Decision §§20-24, 25), because the only evidenced, definitive third party contractual arrangements related to Stage 4, not Stages 2 or 3. It had been "stated only that the applicant expects to have the information to comply with the ongoing obligation" but the applicant had provided "no actual evidence of this ability to comply": contractual documents with information provisions had been provided "but these relate to biomethane injection, rather than the biogas production plant or the production and purchase of biogas" (Operative Decision §20). Biogas production and biomethane production processes were to be undertaken by third parties but "no evidence was received… of definite arrangements … concluded between [the applicant] and third parties in relation to those processes", which "could have included provision for the supply of the information to [the applicant] that would have been necessary for [the applicant] to have complied with its ongoing obligations" (Operative Decision §21). The applicant had provided no "evidence that [it] will be able to compel the production from any third parties undertaking the biogas and biomethane production processes of such information as may be necessary for [the applicant] to be able to comply with its ongoing obligations". What that "means [is] that no arrangements are in place for [the applicant] to be able to obtain the required information": "As such [the applicant] will not be able to supply such information to Ofgem" (Operative Decision §22). Accordingly, the position was that "inadequate provision has been made" by the applicant for "information that is material to requirements relating to the sustainability of feedstocks used to produce biogas and … of the processes being undertaken by scheme participants for biomethane production" (Operative Decision §25). In my judgment: (1) The starting-point is the same one set out in §86(1) above. (2) Ofgem needed to recognise, in its determination read as a whole, that there was no Precondition under the scheme regulations or under Ofgem's own guidance requiring an applicant to describe specific third party arrangements for Stage 2 or Stage 3 Future Activity. The points set out at §83(1)-(2) and (4)-(5) above apply equally here, as do the points set out at §82(2) and §86(5) above. (3) The equivalent point, in relation to information, applies here as is described, in relation to access, at §87(5) above. So, even if the absence of Third Party Operator Contracts were being treated as a relevant evaluative factor, it does not follow in logic or reason that the absence of any existing contractual arrangements is, of itself, an indication that future contractual arrangements would be defective in Ongoing Compliance terms for failure to secure access to information. The rest of §87(5) above applies equally here.

Material Factors and Evaluative Judgment

89. It is no answer, in my judgment, for Mr Grodzinski QC to say that the Operative Decision did no more than involve matters of appreciation which Ofgem was entitled to choose to regard as 'highly material' as an exercise of reasonable judgment. In my judgment, Mr Grodzinski QC's own encapsulations (see §79 above) do not support that characterisation. Moreover, in undertaking its evaluative judgment Ofgem needed to ask the right questions – including the functional question as to Proposed Process Details provided to a sufficient standard (Properly Made Application). It needed to appreciate that features being referred to were not Preconditions. The Operative

Decision has to be read as a whole and there are – as is common ground – key themes which pervade the entirety of the Operative Decision, with the unmistakeable language of Precondition (and the absence of recognition that features were *not* Preconditions). Further, an exercise of evaluative judgment needs to be addressed having regard to the Applicable Guidance – including as to Proposed Process Details, Properly Made Applications, and Future Third Party Operator Contracts.

Source of the Problems with Ofgem's Approach

90. Drawing the themes together, it is possible to trace certain problems lying at the heart of the public law errors in the SRO's approach and reasoning. (1) The Operative Decision nowhere recognises or reflects the Functional Meaning of "properly made" (see §§39-40 above), notwithstanding that the standard of sufficiency is articulated clearly in Ofgem's own guidance (Guidance Volume 1 paragraph 2.16). Nowhere does the Operative Decision ask the Properly Made Question (see §41(6) above). (2) The Operative Decision nowhere recognises or reflects the Function and Purpose of the Proposed Process Details (see §42(5) above). Nowhere does it reflect what is said in Ofgem's own guidance on this very topic (Guidance Volume 1 paragraph 12.12 and paragraph 12.13 first indent), nor does it address the clear relevance of Ofgem's own most directly relevant question (reference HL160-1). (3) The Operative Decision focuses on a number of features as though they are Preconditions, and without recognising that none of them are Preconditions, to Registration; and without having any regard to Ofgem's unmentioned Applicable Guidance. (4) The Operative Decision focuses on Third Party Operator Contracts without any recognition that it is Stage 4 contracts that are required of applicants by Ofgem (Guidance Volume 1 paragraph 12.13 second indent) and that the Scheme Regulations and guidance (Guidance Volume 1 paragraph 12.21) themselves describe Third Party Operator Contracts as entered into by a Registered Participant and needing to be provided as an Applicable Ongoing Obligation.

Conclusion on Ground 2

91. Ground 2 succeeds. I have kept in mind throughout my Limited Supervisory Function and the distinction between interpretation and application (see §23 above). Mr Sharpe QC explained that the claimants seek an order that 'the decisions be quashed and the matter remitted, to be looked at de novo in the light of the judgment'. I see the force of Mr Sharpe QC's further submission that, if he succeeded on Ground 2 as he has, Ofgem would have 'little choice but to approve the applications on remittal'. I certainly cannot say that a lawful decision would be 'highly likely' to be 'not significantly different'. But nor have I concluded that the sole reasonable and justifiable course in this case was, or would now be, to grant the 2018 SPV Applications. I did not accept Mr Sharpe QC's Thesis to its full extent of his suggested 'legal irrelevancies' (see §§46-47, 77 above). I have given such clarity as I can on legal matters. It is inappropriate for me to construct a decision, past or future, with substitute reasoning: that would trespass on the area for Ofgem's judgment and appreciation. I have concluded that the Operative Decision misappreciated and overlooked the objectively correct meaning and effect of key provisions of the Scheme Regulations and Applicable Guidance, failing to ask the right questions, and making public law errors. Given the way that themes recur and interrelate within the Operative Decision, and the need to read it as a whole, it is unlikely that any strand would have been insulated from error elsewhere, despite Ofgem's contention that "each of Ofgem's reasons for rejecting the Applications in the

Decision would have independently justified a refusal of the Applications, so that even if one of the reasons is found to be unlawful, the decision to reject should be upheld on the basis of the other reasons; and the Court should refuse relief under section 31(2A) Senior Courts Act 1981". As it is, there are public law flaws in relation to each key strand.

Overall Conclusion and Order

92. In conclusion, Grounds 1 and 3-5 fail; but the claim succeeds on Ground 2. A key function of circulating a judgment in draft is to elicit written submissions on consequential matters, including relief, enabling me to deal at the end of this judgment with any ruling on the appropriate relief and any consequential matters. Following helpful cooperation for which the Court is always grateful, the parties submitted an agreed draft Order which they jointly invited the Court to make, as I do. The Order I make (omitting recitals) is as follows. (1) The four Decisions of 22 October 2019 be quashed. (2) The Claimants' applications to be registered as participants in the Renewable Heat Incentive scheme shall be remitted to the Defendant ("Ofgem") for reconsideration and decision in accordance with the findings of the Court. (3) Ofgem shall, within 28 days of the date of this Order, issue a decision regarding the registration of the Claimants as participants in the Renewable Heat Incentive Scheme. (4) If registration should ensue in relation to some or all of the Claimants' applications, then: (a) within 28 days of Ofgem giving notice of any decision to register, the parties shall seek to agree the terms of an order in relation to the claim for just satisfaction; (b) if the parties are unable to reach agreement under the provisions of sub-paragraph (a) they shall apply for directions in relation to the further management of the claim, including for its transfer (to the Commercial Court or the Technology and Construction Court) and for further pleadings and evidence in relation to the issue of just satisfaction under section 8 of the Human Rights Act 1998. (5) The parties shall seek to reach an agreement as to an appropriate order in respect of costs. If the parties reach an agreement within 7 days of the date of this Order, they shall notify the Court of that agreement and of the order which they invite the Court to make. If the parties are unable to reach agreement within 7 days of the date of this Order, then they shall file submissions on costs within 14 days of the date of this Order and, if so advised, shall file reply submissions on costs within 21 days of the date of this Order. (6) Liberty to apply in writing on notice to vary, or for further order, in relation to paragraphs (3) to (5) of this Order.