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IN THE COMPETITION
APPEAL TRIBUNAL

Case No. 1099/1/2/08

Victoria House,
Bloomsbury Place,
London WC1A 2EB

23rd May 2008

Before:

THE HON. MR JUSTICE GERALD BARLING
(President)
PROFESSOR PAUL STONEMAN
DAVID SUMMERS

Sitting as a Tribunal in England and Wales

BETWEEN:

NATIONAL GRID PLC

Appellant

- v -

THE GAS AND ELECTRICITY MARKETS AUTHORITY

Respondent

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Mr. Jon Turner QC and Mr. Josh Holmes (instructed by Pinsent Masons) appeared for the Appellant.

Mr. Brian Kennelly and Mr. Tristan Jones (instructed by Ofgem) appeared for the Respondent.

CASE MANAGEMENT CONFERENCE

PROPOSED INTERVENERS

Mr. Fergus Randolph (instructed by SJ Berwin) appeared on behalf of Meter Fit (North West) Ltd and Meter Fit (North East) Ltd.

Mr. Christopher Vadja QC (instructed by Reed Smith) appeared on behalf of Siemens Plc.

Mr. Michael Rowe (partner of Slaughter and May) appeared on behalf of Capital Meters Limited.

(The hearing commenced at 2.05 pm)

1
2 THE PRESIDENT: Good afternoon everyone. I think I know who everyone is. There are just a
3 couple of preliminaries before we start on the agenda. I just want to put on the record that I
4 have, over the years, advised both Ofgem and elements of what has become National Grid.
5 To the best of my recollection I have not advised in relation to any matter which has
6 anything to do with the issues in this particular Appeal. In fact, I cannot really remember,
7 other than very, very vaguely, what it was I did advise on! I thought it right just to mention
8 that.

9 Also, in a similar vein Professor Stoneman has, in the mists of time, advised the Electricity
10 Regulator in some previous incarnation, again nothing to do with these issues; and
11 similarly he also, in the order of ten years ago, did some consultancy work with NERA,
12 who we have seen referred to in the papers, but that was a long time ago and again as far as
13 he can remember certainly had nothing to do with anything that we are concerned with here.
14 We mention that just so that you can bear it in mind and if anyone wants to say anything
15 about it then we will hear them.

16 There is another preliminary matter. I cannot remember what date it was, but in the last
17 week or so one of the Tribunal members received an unsolicited email relating to Smart
18 Metering. It came out of the blue. It is almost certainly a matter of complete coincidence,
19 but we thought it right that we should tell you. There are some copies of it so that you can
20 see what it actually says. We will give anyone who wants a copy of it. It has not been
21 responded to. We have taken out of the copies the name and the email address, because it
22 was his personal email address that was on it, but there are no prizes for guessing which one
23 of it was, especially as it begins "Hi David"!

24 The only other matter is that we might need to go into Camera. Will we go into Camera
25 when we start talking about some of the material that needs to go into a confidentiality ring?
26 Can we just bear that in mind. I am quite happy to do that if you think it is necessary in
27 order to resolve any issues that may remain about the ring. You may tell me that you have
28 agreed everything now and there is no problem.

29 With that preamble, shall we proceed to the matters are that included in the agenda for this
30 CMC? I think we can leave forum aside. There is no issue that forum should be England
31 and Wales.

32 Interventions: we have got three applications from Capital Meters, who Mr. Rowe is
33 representing; we have got Siemens Plc, Mr. Vadja; and we have got two Meter Fits, North-

1 East and North-West, and that is Mr. Randolph. There are no objections as such to those
2 interventions, and we are minded therefore to grant permission to intervene.

3 There is the issue of the connection between Capital Meters and Siemens. There ought to
4 be some rationalisation there, ought there not? I am looking at you, Mr. Vadjja, but not to
5 victimise you.

6 MR. VADJA: It may help just to explain briefly to the Tribunal the respective functions of the
7 companies. Siemens is a meter company, in the sense that it is involved in all aspects of
8 meters, the supply and, very important for the present case, maintenance. That is one of the
9 issues in the Appeal. Just so the Tribunal has got the picture, in September 2006 we had
10 some 1,400 employees and a turnover of £68 million. Most of that turnover derived from
11 maintaining meters, both the CML meters and also meters in other areas of the country. So,
12 in a sense, the abuse has, so far as Siemens is concerned, a “double-whammy” effect,
13 because, first of all, it has the effect on CML and new business and also the maintenance
14 that Siemens has been doing for those meters, but also the maintenance that Siemens does
15 for non-CML meters elsewhere in the country. That is the position.

16 Also it is important that the Tribunal bears in mind that CML is an 80/20 company.

17 Macquarie Bank has 80 per cent. It is not controlled by Siemens in any way, I think it has
18 six employees. I, in no way, want to diminish the role of CML. It has an important role in
19 relation to the British Gas contract and also – I think Mr. Rowe will mention this – its
20 expectation when it came on to the market. The position is that Siemens has a much
21 broader interest, but we, particularly because of the length of the documents and the size of
22 this case, are certainly not going to wish to duplicate our submissions. We would not accept
23 that it would be right in those circumstances for us to be required to do a joint intervention,
24 as was suggested by National Grid. The companies are very different and they cover
25 different areas.

26 THE PRESIDENT: Yours is broader and theirs is narrower?

27 MR. VADJA: Yes.

28 THE PRESIDENT: Mr. Rowe, do you want to say anything?

29 MR. ROWE: Really just to place on record that we agree with that. We would recognise the
30 scope for rationalisation. We have got a keen incentive ourselves to avoid duplication. We
31 certainly think that CML can speak with some authority to the question of its expectations
32 at the time of market entry and its subsequent experience. Siemens can speak perhaps with
33 more authority on the questions which I understand will be important in this case of the
34 density of meter installation and its importance to the viability of a business in this area.

1 THE PRESIDENT: This applies to all the Interveners really, we do expect you to liaise if there
2 are issues on which you can feed into each other, if you can split the issues up or not if you
3 need to see carefully how Ofgem is dealing with things. We are pretty keen that we do not
4 have duplication either in writing or orally. It is quite hard at this relatively early stage for
5 us to be more specific than that, but we assume that you will liaise with each other on
6 written and oral presentations.

7 I do not know whether you wish to say anything, Mr. Turner, you look as though you do?

8 MR. TURNER: Yes, sir. On behalf of the Appellant we do have concerns about the separate
9 representation of Siemens and CML. We do accept that the CML has a sufficient interest in
10 the outcome. It provides meters to British Gas. Siemens maintains these meters and also
11 has a commercial interest. On the Tribunal's case law and practice it has a sufficient
12 interest. It is a matter of concern that there should be separate submissions in this case,
13 separate evidence. It will generate additional cost, it will lead to delay, it will lead to
14 complexity, and we therefore ask the Tribunal that in these circumstances – and I will
15 elaborate in a moment – to require the parties to submit joint representations and joint
16 evidence which reflects by and large what has happened hitherto in the lengthy
17 administrative procedure.

18 If I may just elaborate on that. The first point, the links between the companies: Mr. Vadja
19 says that his company has a 20 per cent stake in the other and the link should not be
20 exaggerated. Capital Meters is the entity that was specifically set up as a meter provider as
21 a joint venture between Siemens and Macquarie Bank. As Siemens itself says in para.4 of
22 its Request, its provision of meters and customers is carried out through CML. It is the sub-
23 contractor which procures the meters and maintains them. So there are very strong links in
24 practice.

25 Secondly, their roles in the administrative procedure should be mentioned. Since the time
26 of the first Statement of Objections way back in May 2006, two years ago, CML has been
27 the primary participant in this procedure. CML put in the substantive response, the main
28 substantive response, to the first Statement of Objections, with Siemens putting in only a
29 two page letter and a two page follow-up. After that Siemens fades from the picture over
30 the entire period. Ofgem holds further meetings so far as we are only with CML, Ofgem
31 directs two further information requests at CML asking about matters of relevance, as they
32 were described, to both companies, and CML, and we can show you the note of the meeting
33 if the Tribunal wishes to see it, in at least one of the meeting speaks for or as though it is

1 Siemens. Then by the time of the supplementary SO, which is April last year, you have
2 only got CML putting in representations.

3 So to regard the companies as separate and certainly divergent interests enough to put in
4 separate submissions before this Tribunal we say would be wrong, because you can see that,
5 although one asks the parties to liaise, in practice we are going to get duplication. There is
6 no good reason that has been put forward to you as to why they cannot liaise and put
7 forward a single separate representation and evidence. There is nothing that has been said
8 which would explain why that is the case.

9 So we say that they can both be formally admitted, but they should be required to file joint
10 submissions and evidence.

11 I would mention one more thing, which is that there are two sets of City solicitors firms
12 representing the two companies here as well. We have Slaughter and May with Capital
13 Meters, we have Reed Smith with Siemens. It is wholly unclear to us why the costs of
14 representation and the risks of bearing those costs should be duplicated in that fashion. That
15 is not a matter on which we ask the Tribunal to make an order. They can have duplicative
16 representation if they wish, but they should be required to liaise in order to file common
17 evidence and submissions.

18 Sir, those are our submissions.

19 MR. VADJA: Perhaps I can reply to that, starting with the last point. As far as costs are
20 concerned, plainly that is a matter for the Tribunal at the end of the case. The Tribunal,
21 even if there has been no duplication, has a total discretion as to costs. With respect, it
22 would be wholly improper, in my respectful submission, for the Tribunal to make any
23 decision on intervention now based on a potential costs order.

24 So far as the administration procedure is concerned, my primary submission is that that is
25 not determinative. There are, in fact, references, and I can take the Tribunal to that, in the
26 Decision, but perhaps the important point – and obviously time is pressing, we do not want
27 to spend the whole afternoon on intervention – is that the relevant market which the
28 Authority found as part of the issues in dispute is the provision of installed gas meters and
29 the ancillary service of meter maintenance. CML has absolutely nothing to do with
30 ancillary service, and that is something which may well be of critical importance.

31 THE PRESIDENT: What is the ancillary service?

32 MR. VADJA: The ancillary service is effectively you go round, you have to maintain meters.

33 We are looking at two sorts of meters, we are looking at pre-pay and the standard ones.

34 What happens, I am instructed, is when one goes round a number of the meters turn out to

1 be faulty, or with the PPMs they need replacement because the batteries need to be charged
2 up. Then there is sometimes quite a difficult cost approach as to whether it is cheaper to
3 repair it or to put in a new one.

4 THE PRESIDENT: This is the PPMs?

5 MR. VADJA: Exactly. I do not know to what extent the Tribunal has read the Decision, but
6 obviously one of the concerns of Ofgem was effectively how there has been bundling in the
7 circumstances which effectively excludes people like my client from the maintenance
8 market, which could lead to the provision of new meters. That is something that falls solely
9 within the province of Siemens with its 1,400 employees.

10 THE PRESIDENT: So Siemens does the maintenance and CML does the ----

11 MR. VADJA: As I understand it, and Mr. Rowe will correct me if I am wrong, there is
12 contractual arrangement as between BGT and CML, and CML in fact rents the meters to
13 British Gas, and then it sub-contracts back to Siemens all the activity, including maintaining
14 those meters. In a sense, the issue so far as Siemens is concerned is not in this case
15 maintaining, it is all the other things.

16 THE PRESIDENT: I think the point Mr. Turner is making is that no doubt there are these
17 different distinctions, but both aspects can be dealt with in a single set of submissions, I
18 think is what he is saying.

19 MR. VADJA: If CML concentrates, as Mr. Rowe says, on their positions and their expectations,
20 of course CML is a new player on to the market – I am giving evidence here – as I
21 understand it, CML was set up in the expectation that there would be new opportunities
22 with competition coming into the market.

23 With respect, we have got experienced counsel here, we have heard what the Tribunal has
24 said, this is not going to be a case where you are going to get pages and pages of
25 duplication. We would say that, as a matter of fairness to the parties, it is important to bear
26 in mind that one takes instructions from one client, they are two totally different bodies, it
27 would be wrong to be forced to do a single intervention. The appropriate approach, as the
28 court has made clear that it does not want duplication – I have heard that, Mr. Rowe has
29 heard that, and no doubt if there is duplication that will be visited on us on grounds of costs,
30 if nothing else.

31 THE PRESIDENT: Yes, but we do not want it, that is the point.

32 MR. VADJA: Yes, but there is no reason why you should get it, that is the point I am making.

33 THE PRESIDENT: Thank you very much. There is nothing else you want to add?

1 MR. VADJA: I have dealt with the administrative procedure point. I could take the Tribunal, if
2 they wanted me to, to where Ofgem actually relied on evidence from Siemens. Perhaps
3 again I could just say that Ofgem directed its s.26 notices separately to Siemens and CML
4 and there is reference in the Decision not only to an answer that Siemens gave but also to a
5 meeting that Ofgem had with Siemens.

6 Unless I can assist the Tribunal further, those are my submission.

7 THE PRESIDENT: That is very helpful, thank you. Mr. Rowe?

8 MR. ROWE: If I could just say, sir, if I may, whatever suppositions may be made at this stage as
9 to interest, we would have a concern, given the different profiles of Siemens and CML, that
10 divergence of interests may emerge in the course of these proceedings. It is difficult for us
11 to judge that at this stage without having had sight of the papers. I would emphasise for our
12 part that we would be anxious to avoid any duplication and think that that can be achieved
13 effectively by close liaison between respective counsel without the heavy handed approach
14 of mandated joint representation.

15 THE PRESIDENT: Thank you. Mr. Kennelly, you have been very quiet so far.

16 MR. KENNELLY: Just to say very briefly for Ofgem, what Mr. Vadja says is correct in relation
17 to s.26 notices. There is not a complete overlap between the two. Also, and separately, it is
18 important to bear in mind that there is a very substantial amount of documentation in this
19 documentation in this case and it may well be appropriate for Siemens and CML to look at
20 it separately, and it may not be a waste of time. This is a very heavy case in relation to
21 documents and a great deal of work needed to be done in preparing the Statements of
22 Intervention. It may well be appropriate to have separate representation in the way they
23 have described.

24 THE PRESIDENT: Thank you very much. Unless there is something absolutely crucial I think
25 we can probably park this point for now.

26 MR. TURNER: Sir, you have had my submissions.

27 THE PRESIDENT: Indeed, thank you very much. Let us move on. Can we turn to the Notice of
28 Appeal. I was just going to say that we were – and perhaps you will understand why –
29 dismayed when we saw the length of the Notice of Appeal when it came it, not just the 280
30 odd pages but the fact that there were so many files of documents with it. Leave aside the
31 files for the moment, the length of the Notice of Appeal was, we were unanimous in
32 thinking, too long. First of all, the Notice of Appeal is, as it says in the Rules, a summary of
33 arguments, “succinct” is another word used, and in our Guidance we say that other than in
34 exceptional cases one should not be looking at more than 50 to 60 (I cannot remember the

1 exact figure) pages. This is four or five times longer than that. It is very long indeed. Our
2 initial reaction was to reject it and ask for something that was more succinct and
3 manageable. However, as you can gather, we did not do that. The position now is that it is
4 probably not appropriate to do that in view of the need to get on with the case – and we will
5 come on to the timetable in due course but I think we all want – and I know that Professor
6 Stoneman wants to say something about this too – to say that this is probably the only case
7 where we do not reject something which is as long as this in terms of a Notice of Appeal.
8 Quite a lot of it looks as though it is fit to be in either witness statements or some other kind
9 of document. It does actually make the task of the Tribunal, and often the other parties,
10 quite difficult. I am not sure that there is a remedy for it in view of where we are now,
11 because it would require a further document, a shorter document, and that would only give
12 rise to delays which we are anxious to avoid. The fact that we have not rejected it should
13 not be taken as an indication that we would accept one of this length in the future.

14 PROFESSOR STONEMAN: I would not like to actually say that we have made a final decision
15 not to reject it. I would like to know why we should not reject it, plus I would really like to
16 know at what stages in the preparation of the 280 page Notice of Appeal to a 140 page
17 Decision were our guidelines taken into account, which say that it should be no more than
18 50 to 70 pages. That is for complex cases. Can you provide some response to that?

19 MR. TURNER: Sir, I am grateful. You will by now have had a chance to peruse the Notice of
20 Appeal. In our submission, the Notice of Appeal is, while certainly long – we do not seek
21 to take anything away from that – it is not unnecessarily long, it is not prolix or repetitive.
22 We did everything that we could in the time available therefore to abbreviate it, to make it a
23 self-contained document, but a document which would set out as succinctly as possible
24 National Grid's case in its defence.

25 PROFESSOR STONEMAN: I argue with you there, it is repetitive. The same material appears
26 many times. If you cannot state your case in less than 280 pages, I do not think we have
27 time in this world to deal with it.

28 MR. TURNER: Sir, it is certainly the case that certain documents might be referred to in so far as
29 they are relevant to different issues. I can assure you, and I apologise profusely if you take
30 a different view, that we sought to do everything we could in the time available to reduce it
31 to the most clear and succinct account of our case as was possible.

32 PROFESSOR STONEMAN: May I interrupt you, how long is the theory of relativity?

33 MR. TURNER: The theory of relativity, sir, is very, very short, but it is, of course, an entirely
34 different exercise.

1 PROFESSOR STONEMAN: It is a little bit more complex than your case.

2 MR. TURNER: Yes, sir, but may I explain. As you say, this was a decision of around 140 pages.

3 We say that this case is exceptional in that the Decision did not fairly reflect the case file
4 and gave an entirely misleading impression of the facts which it was necessary to correct by
5 giving a full account of the relevant evidence on the file, which we would have expected to
6 have been seen in the Decision. Not only evidence, but in certain cases even some of the
7 arguments which had been presented to Ofgem, are not to be found anywhere in the
8 Decision. That is an exceptional set of circumstances.

9 Combined with that, you have a Decision which, it perhaps goes without saying, is of
10 unusual technical complexity on the abuse side. In order to explain the way in which the
11 processes work and the way that contract early replacement charges function we felt it was
12 necessary to set out the account in the way that we did.

13 Once again, sir, I can only apologise if you feel that it is too long. I would hope that on a
14 full reading, and perhaps a re-reading of the Notice of Appeal, you will find it of assistance
15 in this procedure as we go forward.

16 PROFESSOR STONEMAN: I have given it a full reading. I have read it from cover to cover,
17 that is how I know there is a lot of repetition in it. I also know there is still a lot of work in
18 it to be done to actually bring it together as a reasonable document putting forward the case.
19 It is excessively long. I cannot hold in my head 280 pages of argument in one document.
20 Although it is my profession, 280 pages of argument in one document is not what you
21 describe as a Notice of Appeal. A Notice of Appeal is 50 pages, it says, in exceptional
22 cases. You are claiming you are exceptional, you should provide 50 pages in exceptional
23 cases, less in other cases. Would you please tell me in the preparation of this document at
24 what stages the 50 page limit was taken into account?

25 MR. TURNER: Sir, in the preparation of this document in the time available, I can assure the
26 Tribunal that we did everything that we could to minimise the size of the document as far as
27 we possibly could. It became apparent at a very early stage that we would not be able to
28 comply with any like that particular limit.

29 I would say, sir, and you will know this also perhaps from previous cases, that in the other
30 abuse cases the Notices of Appeal have not managed to comply with that particular
31 stricture, although I do confess that they have been significantly shorter than in this case –
32 for example, in the *Napp* case, the very first case I seem to recall, 75 or 80 pages, in
33 *Genzyme* maybe 120 pages. I accept this is far in excess of that. On the other hand, the

1 guidance in the Tribunal is guidance and the particular Notice of Appeal does have to
2 reflect the difficulty of the particular case.

3 Once again, I can only apologise. I can say that our team worked flat out and did
4 everything that it could to make the document as manageable for the Tribunal as possible.

5 There was no disregard. On the contrary, we did everything that it was possible to do.

6 THE PRESIDENT: I think we will leave it there at the moment. I cannot recall for my part ever
7 seeing even written observations in the European Court as long as this. I think it is right
8 that if you put anything in that is more than 100 pages you get it rejected out of hand. I
9 think one has really got to take on board the fact that if arguments are good arguments they
10 can still be presented, albeit with annexes maybe, but it does not help to have a vast morass
11 of paper.

12 MR. SUMMERS: I would just concur with Professor Stoneman. He has the ability to speed read,
13 so he has actually read it twice. I do not, and I can tell you that it took me a good eight
14 hours plus to read it, and some parts I had to read several times just to understand the
15 particular paragraph. From my background in publishing, I would say that further editing
16 was certainly possible.

17 MR. TURNER: Sir, I will conclude perhaps just by emphasising that within the time available –
18 it is perhaps reminiscent of the Mark Twain quotation, “I had to write a long letter because I
19 did not have time to write a short one” – we did work flat out, we did all we could to reduce
20 it to the minimum possible size. It is our hope that in the procedure going forwards that the
21 Tribunal will not only not be prejudiced by the length of the Notice of Appeal, but that we
22 may show you that it will prove to be of assistance in speeding things as we go forward.
23 That is our hope.

24 THE PRESIDENT: We will leave it there for now.

25 MR. KENNELLY: Sir, forgive me, I hope I am not unnecessarily lengthening this proceeding,
26 but I wish to make one point. Sir, you suggested it may be too late to do anything about this
27 now because we need to get on with things and obviously we have been working on the
28 Defence.

29 THE PRESIDENT: Yes, we have that very much in mind.

30 MR. KENNELLY: Indeed, and I wish to make some short submissions on that. There may be a
31 possibility to do something in view of the suggested timetable that the parties have been
32 discussing in advance of this hearing. There may actually be time to write the “short letter”
33 that my learned friend referred to.

1 Just taking the points very quickly, the Notice of Appeal is extremely long. It is long and
2 complex. We do not accept that the facts in the Decision are misleading. In any event, the
3 facts section in this Notice of Appeal is 55 pages long. They cannot all be correcting the
4 facts in the Decision.

5 You will appreciate that we have had some difficulty in dealing with this, not only with the
6 Notice of Appeal, but the very substantial quantity of documents. It is not enough to say
7 that they were already before us in the investigation period. We have to see those in the
8 context of this Notice of Appeal. That is why we seek a further week.

9 My principal concern is that the Tribunal is anxious to have succinct documents. Our
10 difficulty in replying is seeking to put in a succinct Defence. My concern is that you will
11 receive from us a document which you may also think is too long, but is necessarily lengthy
12 in order to address each and every point raised in the Notice of Appeal. This is not to create
13 a new case, clearly we must be bound by our Decision. In order to show you that we have
14 dealt with it and to do it in one go, as the Tribunal requires – we are not permitted to come
15 back later with new ideas – we are producing a very lengthy document.

16 If the Tribunal would bear that in mind it may be better for all of us, including National
17 Grid, to allow them time to produce a shorter document, which will allow us to produce a
18 shorter document. Why I think that is useful and possible is that the hearing date that we
19 have discussed – and the Tribunal will see National Grid's observations, in general those
20 have been accepted in terms of the possibility, indeed the desirability, of a hearing in
21 January 2009 – if that is the hearing date, and this is also subject to the Tribunal's views, it
22 may well allow a further period of time for National Grid to turn the long letter into the
23 preferable shorter letter and permit the Authority to put in a much more succinct and useful
24 Defence.

25 THE PRESIDENT: Mr Kennelly, you and your clients are already some way down the road
26 presumably?

27 MR. KENNELLY: We are, but it would not be difficult for us to use that work to produce a
28 shorter Defence to a shorter Notice of Appeal. Because there is an element of repetition in
29 the Notice of Appeal we are in difficulty in addressing those points. We have pointed out
30 repetition where necessary, but inevitably we must be seen to address each and every point
31 raised by National Grid and it is leading to a very lengthy document. I think it would be of
32 benefit to all the parties if they were given an opportunity to convert their Notice of Appeal
33 into something shorter and time given to Ofgem to produce a shorter document.

1 THE PRESIDENT: You are saying that if the hearing were to take place as far as January then
2 there would be time to do some further work, but that is a big “if”. Can we leave that for
3 the moment.

4 MR. RANDOLPH: Sir, sorry, just to say from our perspective, we have not got down any road
5 yet, because you have just indicated, I think, that you were minded to give us permission to
6 intervene and I hope the Tribunal will order that.

7 THE PRESIDENT: You are going to be given permission to intervene.

8 MR. RANDOLPH: Thank you. We do not particularly want to wade through 18 lever arch files
9 and two hundred and something odd pages, if we do not have to. Our Statement of
10 Intervention in so far as it is produced, apart from a skeleton – at the moment it may well
11 have to be by way of a Statement of Intervention – will be as short as it possibly can.
12 Again, taking up my learned friend Mr. Kennelly’s point, if we have got to address 298
13 pages then that is something we would rather avoid if at all possible.

14 If, and we are agreed on the date of January but obviously that is subject to the Tribunal’s
15 approval, that is going to be the trial date then there is a certain amount of wriggle room.

16 MR. VADJA: Although I am not entirely sure who I will be representing, I take it that either
17 CML and/or Siemens are going to be involved, I would adopt exactly what Mr. Randolph is
18 saying. I would ask the Tribunal to look at p.13 of the skeleton argument of National Grid
19 for the case management conference today, and this is a point that I was going to come to,
20 “Statements of Intervention be served not later than two weeks after this”. That is wholly
21 unrealistic in relation to an appeal that runs to 280 pages and 17 lever arch files. I will be
22 making submissions on that in due course when we get to timing. Again, I would support
23 what Mr. Kennelly and Mr. Randolph say, that it is not too late to think again.

24 THE PRESIDENT: I will hear from Mr. Rowe, because Mr. Rowe’s clients want expedition.
25 How is a January hearing going to lead to expedition?

26 MR. ROWE: Sir, having read the representations of both sides, and taking into account the length
27 of the pleadings that have already been filed, we came to the Tribunal today minded to
28 withdraw the request for an expedited procedure, although we do very much retain a keen
29 interest in having an expeditious set of proceedings. So I think we can perhaps put to one
30 side the question of an expedited procedure.

31 THE PRESIDENT: I am not sure you can, because all our procedures are expedited. We do
32 everything as expeditiously as we can.

33 MR. ROWE: Absolutely, and if there is any scope within settlement of the timetable to make the
34 proceedings as expeditious as they possibly can be, we would certainly be supportive if that

1 included a more abbreviated version of the Notice of Appeal for the reasons previously
2 mentioned.

3 THE PRESIDENT: So you all want to make Mr. Turner do a lot more work.

4 MR. TURNER: Sir, may I say, it is entirely understandable in the forensic theatre why my
5 friends would all seek to make us do that. I would urge you to follow your initial instinct on
6 this which is rightly to raise concerns about the length of the Notice of Appeal, and we
7 absorb that blow and take that on the chin, but to resist the opportunistic claims of the other
8 parties, which is to take us back to a situation in which we have to reinvent the wheel.
9 Point one, Ofgem is only a short while away from producing its Defence on the default
10 timetable of six weeks under the Tribunal's rules. We have heard from Mr. Kennelly and
11 we know that it is already fairly well advanced. It would conduce only to delay if we had to
12 go back and attempt to produce a much shorter document deciding what has to be thrown
13 out, what has to be kept at this stage. That is the opposite of expeditiousness, and it would
14 result only in confusion. It would not lead to a faster or more just outcome in this case.
15 Secondly, so far as the Interveners are concerned, the Tribunal will be aware that they are
16 ancillary parties, a point which the Tribunal's guide makes quite clear. Their role is not to
17 come in as main parties in this dispute, which is between Ofgem and National Grid. They
18 are there to assist the Tribunal within their own experience of the industry in their own
19 capacity. That is why in ordinary cases, sir, as you know, Statements of Intervention follow
20 very shortly after the Defence, because the Interveners will see what is relevant to them and
21 make appropriate submissions.

22 In this case I fully accept that in the light of the length of the Notice of Appeal the period
23 which is traditionally adopted, which is sometimes only one week – in some cases in my
24 experience it has been two weeks – might be even longer, say three weeks, which would
25 still be, if they got the material and there is a non-confidential version of the Notice of
26 Appeal ready to go, quite a long time for them to produce their own materials in response.
27 So for those reasons, sir, we strongly resist the suggestion that we all have to go back now
28 and try to start again. It would not be the just outcome.

29 THE PRESIDENT: All right, We have got the points that people make on that and we are
30 obviously going to have a chat on this ourselves. Let us just move on. I think the parties
31 are reluctant about trying to agree facts, and in my experience statements of agreed facts are
32 quite difficult to achieve anyway. Lists of issues are extremely useful, so we are likely to
33 make a provision for an agreed list of issues at a certain stage, and we will come back to
34 that as well.

1 MR. RANDOLPH: I am sorry to interrupt you, sir, I just wondered whether the Tribunal was
2 minded on the basis of the list of issues to adopt the new approach taken by the Commercial
3 Court which is ----

4 THE PRESIDENT: For long trials.

5 MR. RANDOLPH: It is misnamed because it applies to all trials I think now. List of issues now
6 are effectively sought to be agreed between the parties and then endorsed by the court and
7 then it becomes a court document, which has the benefit of effectively funnelling, focusing,
8 the Tribunal and indeed the parties with regard to Commercial Court disclosure, witness
9 statements and the trial itself. It also helps the court.

10 THE PRESIDENT: I agree.

11 MR. RANDOLPH: So it may be that the Tribunal might wish to use the document in that
12 manner.

13 THE PRESIDENT: We might well. Thank you very much for reminding me of that.

14 Coming on then to the issue of disclosure. There is not a particular problem, is there, it is
15 taking place. The real issue at the moment, if there is one, is likely to be the confidentiality
16 ring – is that right?

17 MR. RANDOLPH: There may well be. First of all, we have been instructed relatively recently.
18 The approach appears to be from National Grid that everything that is redacted should fall
19 within the confidentiality ring. That appears to be the approach. That is how I understood
20 it. If that is not the case then that is my misunderstanding. That is what I had understood.
21 My concern was the concern that had been raised before this Tribunal, indeed before you,
22 sir, in the *BSkyB* case, where there was the issue of whether there should be a preliminary
23 sifting. There will be matters, we assume, that are extremely confidential to our clients, and
24 Ofgem have made the point in their written submissions, that may not be relevant to the
25 Decision and the Appeal, but which nonetheless were provided to Ofgem pursuant to
26 Ofgem's request. We would like to have sight of our confidential material so that a
27 preliminary sift could take place. Again, this was the argument that was raised in *BSkyB*
28 and I believe the Tribunal took a view that the parties could try and sort something out
29 amongst themselves over a very short period of time and then come back. I think, on that
30 basis, that was the manner in which it was determined. We are just concerned that if – and I
31 may have got this all wrong – if everything that is redacted is to fall within the
32 confidentiality ring ----

33 THE PRESIDENT: Material may be going out which really does not need to?

1 MR. RANDOLPH: Exactly, that is the first point. Then obviously there is the porous nature of a
2 confidentiality ring, the fact that we are head to head competitors, and these are all issues
3 which should be taken into account, and were recently taken into account in the *Nokia* case
4 in the Chancery Division.

5 THE PRESIDENT: I understand those points. If we turn to the confidentiality ring and start at
6 that end and see where we get to and then we can fine-tune things. Where does it stand at
7 the moment? In your bundle, Mr. Turner, we did have the latest draft order, did we not?

8 MR. TURNER: Yes, and I can tell you that, since then, my friend and I, that is Mr. Kennelly for
9 Ofgem, have had a further discussion about one small aspect of the draft order. Subject to
10 that, I believe that the text of the order is pretty well agreed as between ourselves.

11 THE PRESIDENT: Almost agreed, yes.

12 MR. TURNER: I will hear from Mr. Kennelly if that is not the case.

13 THE PRESIDENT: Is it agreed in the terms in which we have it, or are there some further
14 changes to it?

15 MR. KENNELLY: Yes, there is a further agreed change. The one matter which remained
16 between us is potentially the unnecessary language in para.5 of the draft order where the
17 provision is made that:

18 “In the event that any Relevant Advisor takes up a commercial role within National
19 Grid at any time before this Appeal has concluded or the deadline for the appeal to
20 the Court of Appeal has passed they be immediately excluded from the
21 confidentiality ring.”

22 For our part, we could not see why there was a limitation of time. If the relevant advisors
23 take a commercial role in National Grid they are excluded from the confidentiality ring for
24 all purposes, and we could not see why that applied only to during these proceedings or the
25 Court of Appeal.

26 My learned friend makes the point that in the schedule at part B, para.5, there is provision
27 made for the return of confidential documents to Ofgem at the conclusion of the
28 proceedings. We have agreed an amendment to that.

29 THE PRESIDENT: Have you added in “or at the time of any exclusion from the confidentiality
30 ring”? That is one I was going to suggest actually.

31 MR. KENNELLY: It is very close to what has been agreed.

32 MR. TURNER: Sir, we have copies here if the Tribunal wishes to see them.

1 MR. KENNELLY: So that has been addressed, and also the issue about proceedings or any
2 appeal to match the meaning of para.5 of the order, because obviously it may be necessary
3 to hang on to the documents after these proceedings if there is an appeal.
4 We could not understand why in 5 it was necessary to limit the exclusion to the time of this
5 proceeding, and we suggested to National Grid that that be excluded and National Grid has
6 agreed.

7 THE PRESIDENT: “If the proceedings are concluded” – is there an agreement that those words
8 are otiose, or do you think they are not?

9 MR. TURNER: All it is saying is that when proceedings are concluded there is no confidentiality
10 ring to re-enter, and therefore there is nothing wrong, as we see it, with para.5 of the main
11 body of the order.

12 THE PRESIDENT: It is probably right in practice, but I just wondered what the words add? You
13 are probably right.

14 MR. TURNER: If it is understood between us that I have no difficulty with it. As it stands it
15 would seem to be perfectly innocuous.

16 THE PRESIDENT: I would be tempted to get rid of it because it just makes it shorter!

17 MR. TURNER: Sir, on that basis we are very happy with it.

18 THE PRESIDENT: You have got some words that you have added in to the other 5?

19 MR. TURNER: Yes.

20 THE PRESIDENT: It does not say so in terms but it could do, I suppose, but obviously the
21 undertakings continue, notwithstanding they have been excluded for any reason. If both
22 sides are happy that that is not spelt out, I think it is probably implicit anyway.

23 MR. TURNER: Again, sir, this follows the format of previous orders in which the same
24 formulation has been used.

25 THE PRESIDENT: So as between National Grid and Ofgem, we can say that there is an agreed
26 version?

27 MR. KENNELLY: Yes, sir, the order in this form is agreed, subject to the change which the
28 Tribunal has adopted.

29 THE PRESIDENT: Yes.

30 MR. KENNELLY: There is one further matter. The number of people on the ring is going to
31 increase the number of extra economists. It has doubled the number, in fact.

32 THE PRESIDENT: They have got six now, have they not?

33 MR. KENNELLY: Indeed. When we went to the parties to check with them, “Is it acceptable
34 and you agree this order”, we had three, and now it is six. I think it would be useful for

1 Mr. Turner to explain to the Tribunal why it is necessary to have six independent expert
2 economists within the confidentiality ring. Obviously this creates concerns because the
3 Tribunal is anxious to get this on quickly.

4 THE PRESIDENT: They are all from one firm.

5 MR. KENNELLY: They are, but there are still six people and that cause concern.

6 MR. TURNER: Again, sir, very briefly. As you say, NERA is one organisation. It is an
7 economic consultancy. Our experts who have filed reports in support of the Notice of
8 Appeal are both from NERA, Mr. Matthew and Mr. Williams. The additional NERA
9 economists who are mentioned in that list are assistants, part of the team assisting the
10 experts. They are working on the case and the reason why they were not included in the
11 initial draft list sent to Ofgem way back is as the result of an oversight. Sir, I would say that
12 this practice is not unusual in the Tribunal and there are some very recent examples where
13 confidentiality orders of the Tribunal have included fairly large numbers of economists
14 from the same firm. In the recent *mobile termination rate disputes* my friend's clients, for
15 example, had ten economists, of whom seven were from the same firm. In the *Mastercard*
16 appeals in which I participated the Office of Fair Trading had nine economists, eight of
17 whom were from one particular firm. So if one inspects the history of these matters it is not
18 unusual, and there is considerable precedent for it.

19 THE PRESIDENT: The only issue we have picked up is the question of the internal... – has that
20 been resolved now between you?

21 MR. TURNER: That is ongoing, sir, but there is no issue to raise before the Tribunal this
22 afternoon.

23 THE PRESIDENT: I see, in relation to the internal legal advice.

24 MR. TURNER: Not internal legal advice, internal Ofgem documents, they are completing a trawl
25 for relevant documents.

26 THE PRESIDENT: Sorry, I meant in relation to the participants in the confidentiality ring. There
27 was an issue – I cannot remember who raised it now, it was British Gas.

28 MR. TURNER: Sir, that is right, and thank you for reminding us of it. None of the parties
29 represented before the Tribunal today have taken a point concerning Mrs. Bidwell, who is
30 the in-house legal advisor on matters relating to competition law for National Grid, being
31 included within the confidentiality ring; nor of the, I believe, 24 parties whom Ofgem
32 consulted about this, were there any objections to this with the exception of British Gas. In
33 practical terms, for our part, we consider Mrs. Bidwell to be indispensable part of any
34 confidentiality ring because there is a mass of technical material. There are, as we

1 understand it, around 3,000 significantly or fully redacted documents to look through and
2 the external advisors who are unconnected with this world will not be able to manage it
3 without the assistance of an in-house lawyer. She is not someone who has a connection
4 with the commercial business, and we have explained in a detailed letter to Ofgem, which
5 they accept, her lack of connection with the commercial side. From the point of view of
6 being able to do justice to this case, as the principal consideration in any balance, we really
7 need her to be part of the ring.

8 THE PRESIDENT: Whereas it is perfectly standard form, where there are no external counsel,
9 for in-house counsel to be in ring, where there are external counsel it is not quite as normal
10 for internal legal advisors to be part of the ring. You mentioned Mrs. Bidwell, you have not
11 mentioned Mrs. Mahy. Are there any different considerations in respect of her?

12 MR. TURNER: Nobody has taken any point concerning Mrs. Mahy at all.

13 THE PRESIDENT: I think they have. I think British Gas say that in principle internal legal
14 advisors should not be – if my memory serves me correctly.

15 MR. TURNER: It may be sensible to turn up their letter in the file. You have our CMC bundle.
16 The relevant letter is ----

17 THE PRESIDENT: It is p.91 or 92.

18 MR. TURNER: Yes, that is right. There is a second letter.

19 THE PRESIDENT: Yes, there is one of 15th May, which I am looking at:

20 “Whilst we do not object to the concept of a confidentiality ring extending to
21 named external legal advisors, we would argue that the ring should not include
22 internal legal advisors.”

23 I do not think actually that they distinguish in any way between the two. Have you got that
24 letter, it is 15th May?

25 MR. TURNER: Yes, sir, I have that. I believe that there was, in fact, a second letter. It is at
26 p.115.

27 THE PRESIDENT: I think this relates to other matters.

28 MR. TURNER: It does. It may be that I have a false recollection. I thought that there was a
29 second letter.

30 Sir, I can cut through this, however. Mrs. Mahy is content not to form part of the
31 confidentiality ring. You can take her out. If there was a need for her or for anybody else
32 to be included at a subsequent date we would come back and specifically justify that to you.

33 THE PRESIDENT: That still leaves the problem of Mrs. Bidwell from the point of view of
34 British Gas.

1 MR. TURNER: It does. Sir, I will make a few short further points in amplification. First, and
2 now I am looking at that letter on p.92, British Gas do not refer to any specific information
3 which they say would be valuable or misused in dealings.

4 Mrs. Bidwell, secondly, is a solicitor. She is bound by the professional obligations of
5 solicitors and she has not, and never has been employed, by the metering business. She
6 advises, and her role going forward would also be to advise, on compliance with
7 competition law and regulatory obligations. She has not given National Grid's metering
8 business legal advice on general commercial issues or proposals. It is our understanding
9 that she would not do so in the future either. She does not get involved in business
10 discussions. She does not get involved in the formulation of strategic or operational plans.
11 Finally, and the most important point which I repeat on our behalf, it is crucial, given the
12 features of this case, for the confidentiality ring to work and Mrs. Bidwell to be included in
13 it. Her knowledge of the industry, of the participants, of the terminology is necessary to
14 enable us to understand the many documents here which we will otherwise not be able to
15 interpret in order to the assist the company to exercise its right of defence. This is not a
16 case where there are a small number of documents coming our way, there are some 3,000
17 which we are entitled to and must see. Without Mrs. Bidwell's participation, it is a racing
18 certainty that will not be able to do the job properly on behalf of the Appellant.

19 THE PRESIDENT: We obviously have not made our minds up on anything, but just sounding
20 you out, one way it could be done – everyone who is in the ring *prima facie* can see, subject
21 to Mr. Randolph's point, the documents?

22 MR. TURNER: Sir, I demurred that before, I do so again. There is a confusion here. So far as
23 National Grid is concerned, as you are aware, our entitlement is to see the case file, the
24 unredacted case file, the full case file to exercise our rights of defence, and there is authority
25 on that. So far as the Interveners are concerned, it is a different matter. None of the
26 potential Interveners, as you will have seen in their request, ask you for anything more than
27 what is set down in the Tribunal's Rules and what is normal practice, which is to see the
28 documents filed with the Tribunal. That does not include the 11,000 documents, not all of
29 the 11,000 documents on the administrative file. So that is a different kettle of fish so far as
30 they are concerned.

31 THE PRESIDENT: That is a separate point which we will shall come to. I am still on
32 Mrs. Bidwell at the moment. Those people of yours who are in the ring, namely yourself
33 and the other external legal advisors and no doubt economists, will presumably see what
34 they need to see of the redacted documents in the unredacted form on the file. The reason

1 Mrs. Bidwell is so important to you is because there will be things to understand, there will
2 be technological matters, there will be matters of detail, and so on and so forth. Is it
3 necessary that she has access to everything that you have access to, or can there not be a
4 filtering process so that she can see things, as it were, that you cannot understand without
5 her?

6 MR. TURNER: I understand that thought in principle, sir, very well, and we have thought about
7 that. In the circumstances of this case it genuinely is not going to be a possibility because
8 there is going to be a large number of documents coming our way, and Ofgem have said in
9 an earlier communication that they can provide them in short order within, they said at an
10 earlier stage, three working days. When these 3,000 documents arrive for us to sit down
11 and work through these, even to know what we do not know is not going to allow us to
12 exercise the company's rights of defence properly. There are bound to be – and I can assure
13 the Tribunal, having looked at a lot of the documents on this case – many instances where
14 we will simply not pick up on points that are relevant and valuable for the company's
15 defence by ourselves.

16 The alternative, which is us seeking to say, "Well, could you explain this document to me",
17 would require, on the filtering process approach, us to come back to the Tribunal perhaps
18 periodically and laboriously to explain why we do not necessarily understand certain
19 documents. In my submission, it will not be practicable, and in the circumstances of this
20 case that is why she ought to be included in the ring.

21 THE PRESIDENT: Does anybody else want to add anything on Mrs. Bidwell, or shall we move
22 on?

23 I will just make sure that all the points that British Gas have raised have been dealt with.
24 We have dealt with commercial advice, you say it does not give any.

25 MR. TURNER: It may be helpful – the Tribunal does not have the letter which I was
26 paraphrasing which we wrote to Ofgem setting these points out. If you want to consider
27 these points it may be helpful for us just to pass you copies so that you can see all of these
28 points written down.

29 THE PRESIDENT: It may be that we do have it, but if there is a handy copy.

30 MR. TURNER: It is unlikely because it precedes the documents that we put in the bundle. We
31 will provide that to the Tribunal at the conclusion of the hearing.

32 THE PRESIDENT: So the ring as agreed at the moment includes – it is really a question of the
33 Interveners, is it not, now? Mr. Turner's main point there, how is the ring going to work
34 with the Interveners? That is what we would like to hear from you on now.

1 MR. VADJA: Mr. Turner is entirely right in so far as the Interveners that I represent, what we are
2 concerned with are the documents in front of the Tribunal, not the documents on file. I saw
3 this draft order at two minutes to two this afternoon and we would obviously like at some
4 point to be included it. I suggest that we might sort that out amongst ourselves.

5 THE PRESIDENT: The short point is that, in the first instance as far as the Interveners are
6 concerned, you have talked to National Grid and Ofgem. If you fail to agree ----

7 MR. VADJA: Yes.

8 THE PRESIDENT: Mr. Rowe?

9 MR. ROWE: If I could just place a marker effectively, we may need to have access to the
10 documents that are on the Ofgem file. We do not necessarily see the issues being limited to
11 the documents which will be filed before the Tribunal. I would just like to reserve our
12 position on that.

13 THE PRESIDENT: Yes, you would make an application, if appropriate.

14 MR. RANDOLPH: Sir, on that basis, it might be possible for us, amongst ourselves, to discuss
15 this issue of filtering or sieving, which was the approach that was taken in *BSkyB*. There is
16 a deep concern, especially with the breadth of the confidentiality ring, that things that
17 simply are not going to be relevant, but are matters of mixed credential, should not be put
18 into the wheelbarrow.

19 THE PRESIDENT: That would presumably apply to everybody, so there might be a common
20 interest.

21 MR. RANDOLPH: Exactly. As Ofgem have said in their submissions, the Interveners did put in
22 a large amount of confidential material.

23 THE PRESIDENT: So we can leave that issue for you to try and agree amongst yourselves.
24 Where does that get us to?

25 MR. TURNER: Sir, I would perhaps just conclude by saying that we did give this matter some
26 thought before court, and for the record it may be that the existing form in its structure will
27 do, save that the definition of “confidential information”, which for National Grid’s
28 purposes is the information on the file, is changed to conform with previous orders of this
29 Tribunal – and we have in mind particularly again the most recent one in the mobile call
30 termination rate disputes – to refer to the confidential aspects of the pleadings and other
31 documents before the Tribunal. It can be done quite simply.

32 THE PRESIDENT: Right. Thank you for that.

33 MR. RANDOLPH: Sir, I am sorry to interrupt, but I am just thinking about the practicalities of
34 what we were just discussing about discussing it amongst ourselves. At the moment, if

1 Ofgem and National Grid on this order, if slightly tweaked, that would mean according to
2 my learned friend Mr. Turner that in short order large amounts of redacted documents
3 would be sent to National Grid. Our sifting process would then become otiose. That is my
4 only concern. I was just thinking about that, having said, yes, we can try and decide it.

5 THE PRESIDENT: What would be handy – at some point we are going to need to retire and have
6 a chat about these issues – is if in that space perhaps you could talk. I think what we need
7 to do is put a timetable on this. In the normal course of events, you would get also a lot of
8 materials and you need really to make a provision for it if you can agree one. You might be
9 able to do that as part of an order that emerged from today.

10 MR. RANDOLPH: Yes.

11 THE PRESIDENT: Could I suggest, subject to anything else anyone else wants to say, that you
12 try and see whether you can agree a mechanism for the sift to take place and a timetable for
13 particular aspect of it. Otherwise, it just happens straight away.

14 MR. RANDOLPH: Exactly, and then the sift does not happen. Thank you.

15 MR. TURNER: Sir, in response to that, you have heard our points about the sift and the
16 impracticability of the notion in general. If there is to be something of that kind, may I
17 suggest, because it is to us a rather surprising suggestion, that one way of approaching it is
18 for my friend or anybody else in that position, who know what documents they have
19 provided and who know what the sensitivities are, to say to themselves, “Well, we cannot
20 have for some reason or other Mrs. Bidwell seeing this document”, in which case the
21 initiative should be on them to come forward and say within short order, “Here are some
22 documents which we are uncomfortable with her seeing”, for some reason.

23 THE PRESIDENT: Obviously it has got to have come from you, has it not?

24 MR. RANDOLPH: Yes, absolutely, it is our confidentiality. The confidentiality rests in my
25 client.

26 THE PRESIDENT: It may be that it will have to be done through Ofgem who have got these
27 documents.

28 MR. RANDOLPH: Indeed, because we have not ----

29 THE PRESIDENT: You probably have copies of them, but I imagine that both sets will have to
30 be done fairly quickly. You will have to say to Ofgem, “These are things that we think are
31 completely irrelevant but confidential” ----

32 MR. RANDOLPH: Exactly, “can you take a view”.

33 THE PRESIDENT: Yes, initially, “can you take a view”. Hopefully they will agree, and there
34 can be a sort of semi-redacted form, or something of that kind.

1 MR. RANDOLPH: Yes, we would be very happy with that.

2 THE PRESIDENT: We need a mechanism.

3 MR. RANDOLPH: We need a mechanism, and that just a timing mechanism.

4 THE PRESIDENT: It is not just that. You need people to set out what is happening.

5 MR. RANDOLPH: Indeed.

6 THE PRESIDENT: Is that all right, Mr. Turner?

7 MR. TURNER: Well, sir, a qualification to what my friend has said. You are aware of the *ICI*

8 case and the principle that it is not for the Competition Authority to take the decision of

9 what we should see.

10 THE PRESIDENT: They would not be taking the final decision, it is just that they would be

11 having a look too.

12 MR. RANDOLPH: In *ICI*, of course, the European Commission, a totally different approach,

13 absolutely guaranteed access to files. They do not have confidentiality rings, they do not

14 have protective orders, you have non-contentious summaries. My friend cannot have it both

15 ways. It seems to me that this is a sensible middle course taking the Tribunal's approach.

16 THE PRESIDENT: It may be that the external lawyers and counsel ought to have a look too.

17 MR. RANDOLPH: Absolutely, I would have no problem at all with that. It is going beyond that.

18 I do not actually count as external counsel as being within the ring because they have got

19 obvious obligations.

20 THE PRESIDENT: This is what I mean by the mechanism. If you could try and work that out

21 when we retire, and if everyone agrees with it then that is the way we will go.

22 MR. RANDOLPH: Thank you very much.

23 THE PRESIDENT: There is a request for a witness summons to deal with an issue about two of

24 the witnesses, Mr. Avery and Mr. James. Is that still a live issue or can we leave that one?

25 MR. TURNER: Sir, that is a live issue, I am afraid to say. It is not between ourselves and any of

26 the parties here. It arises because of British Gas, who are not here. You have in tab 4 of the

27 bundle the draft witness summonses, and you will see that National Grid seeks two of those

28 for Mr. Avery and Mr. James, who are two of its witnesses pursuant to Rule 23. The

29 summonses are there to order their attendance as witnesses at the final hearing. The reasons

30 for the request, which were foreshadowed in our skeleton, are that British Gas has raised the

31 suggestion in correspondence, which we deny and which the witnesses also resist, that

32 Mr. Avery's statement in particular – and both Mr. Avery and Mr. James are former

33 employees – contains confidential information which he, Mr. Avery, they say had a

34 contractual obligation not to tell National Grid about. That is, I am happy to say, the letter

1 from British Gas which is at p.115 of your bundle. They say on the second page of that
2 letter that, as a minimum, according to them, and they are not here, Mr. Avery's statement
3 should be disclosed only within the confidentiality ring, and that there is a question as to
4 how, if at all, it should be admitted in these proceedings. That is their case.

5 They are not here, but I will make my submissions in any event. We say that their claims
6 are misplaced because the information is historic, that it does not relate to trade secrets, it
7 does not relate to customer lists or any of the usual matters which attract confidentiality in
8 this sort of employment contract. Nor does British Gas in that letter even point to any
9 particular item of confidential information.

10 Sir, that is our position, but because of what British Gas say in their position, there is a
11 concern, particularly on the part of the two witnesses who are worried for their own sakes,
12 that Mr. Avery and Mr. James as well may be attacked by British Gas for giving evidence to
13 National Grid and the Tribunal about facts which they believe to be non-confidential, which
14 we believe to be relevant, but which British Gas says, "You should not have been speaking
15 to National Grid about".

16 I can go into the statements as necessary – I hope that that is not necessary – but the
17 problem is, in practice, solved very crisply by the issue of witness summonses because the
18 contracts of employment allow disclosure of confidential information as required by law.
19 There cannot be any question of criticising either of the witnesses for giving relevant
20 evidence to the Tribunal, putting it forward before the Tribunal, in accordance with a
21 witness summons with that requirement.

22 For those reasons, we would ask the Tribunal to order these summonses to be issued as soon
23 as possible in the interests of the witnesses concerned. So we would ask respectfully for
24 that order to be made today if the Tribunal sees fit.

25 THE PRESIDENT: Has anyone else got any observations about the witness summons issue? No.

26 PROFESSOR STONEMAN: I think it would be useful to us when looking at the timetable if we
27 knew what the intentions were in terms of calling other witnesses in the hearing.

28 MR. KENNELLY: Sir, you mean the witnesses, what we intend to do?

29 PROFESSOR STONEMAN: Yes, would you be calling witnesses?

30 MR. KENNELLY: Oh, we certainly will, yes.

31 PROFESSOR STONEMAN: How many?

32 MR. KENNELLY: At least two.

33 THE PRESIDENT: Of which one is presumably an economist?

34 MR. KENNELLY: Indeed.

1 THE PRESIDENT: One a witness of fact and one an economist?
2 MR. KENNELLY: Indeed, at least two.
3 THE PRESIDENT: Yes, Mr. Rowe, you wanted to say something about that?
4 MR. ROWE: Sir, in terms of our own witnesses, I think it is a little early for us without sight of
5 the Notice of Appeal, but obviously we would be trying to keep it to a minimum and co-
6 ordinate as closely as possible with Siemens.
7 THE PRESIDENT: Mr. Turner, we have got a report from an economist from your side.
8 MR. TURNER: From two economists.
9 THE PRESIDENT: From two economists, and we have got two or three witnesses.
10 MR. TURNER: That is so, sir.
11 THE PRESIDENT: Of course, the fact that we have got these, it does not mean that they will
12 need to come and give evidence. Do you envisage at this stage, and obviously you cannot
13 commit yourselves, but do people think it is likely that there to be cross-examination in this
14 case?
15 MR. TURNER: That is primarily for Mr. Kennelly to speak to, sir?
16 MR. KENNELLY: Sir, I think that is highly likely.
17 THE PRESIDENT: Highly likely.
18 MR. KENNELLY: Yes. As you have seen, there are disputes of fact and economic principle as
19 between National Grid and Ofgem.
20 THE PRESIDENT: Hence the time estimates.
21 Let us get down to one of the things that is often the most intractable issue, which is the
22 timetable. We have obviously got to have a discussion amongst ourselves. I think what we
23 will do now is rise. We will be as quick as we can, but I imagine we will be ten minutes.
24 That might be time for you just to work things out. What we are going to discuss is
25 obviously whether we are going to adopt one of the suggestions, which is that we should re-
26 plead the case – if we do that it will obviously affect the steps and the procedure and the
27 timetable – or whether we are going to bash on and leave the pleading as it is.
28 (The Tribunal adjourned between 3.25 pm and 3.45 pm)
29 THE PRESIDENT: Shall we tell you where we have got to at the moment? Would that be the
30 easiest thing, or do you want to tell us something first?
31 MR. TURNER: Sir, we were talking outside, and in case it affects what you were about to tell us,
32 we, National Grid, were able to confer because of the pause, and we took on board
33 everything that the Tribunal has said. We do take that to heart. We therefore went back and
34 talked about the practicability of boiling this down, with a little bit more time, and to see

1 what the effect would be on the proceedings in practical terms for everybody's sake.
2 Thinking as quickly as we could do, it was our thought that if we had three weeks – bearing
3 in mind that next week is quite difficult for various reasons and the document has got to go
4 through certain processes – we could make a fist of trying to get this thing much shorter,
5 much crisper than, sir, you found it to be. Having said that, as you point out, it is now
6 almost 300 pages, how far we can reduce that in the time available is a real question that we
7 will have to grapple with. I must say, I doubt very much that we would be able to get it
8 down to anything like the 50 pages that is the standard mentioned in the guide. If we were
9 to reduce that by half, or reduce it even further than that, would the Tribunal find that of
10 assistance? It might mean that going forwards there is a gain for everybody.

11 We put this to Ofgem. Ofgem responded by saying that assuming what we are doing is
12 truly boiling it down, we are not adding anything else in, they would be able to produce
13 their presumably now scaled down Defence within a further two weeks. The Interveners
14 have said that if that were the case they would want a bit more time themselves still to put
15 in their Statements of Intervention. They have talked of two or three weeks.

16 What that then leaves is a knock-on effect so far as the further conduct of the case and the
17 Reply is considered. It would mean, without us being able to produce a Reply in the month
18 of August, we would be looking at the 5th or the 12th, the first two Fridays in September for
19 a Reply.

20 Sir, we can address how that fits with the proposal that you have already seen between the
21 parties for a case management conference and reviews, and so forth. If we are looking, and
22 I realise that this is a matter still to be addressed, at a trial possibly in January, this is a
23 process that could work. Therefore, from National Grid's part we make that offer
24 voluntarily to the Tribunal.

25 THE PRESIDENT: I wonder whether we should not go to the end first and try and work it out.

26 There has been talk of another CMC, I am not sure whether we need one, but obviously I
27 will hear you on that.

28 What we had in mind, frankly, was an earlier hearing because we obviously had in mind,
29 first of all, that there was an application for expedition. That is perhaps not so material,
30 because we try and expedite everything as much as we can. With the kind of procedural
31 steps that we had envisaged everything would be in, or would have been in, by about the
32 end of September or a little bit before, which would mean that we would be looking at
33 having a hearing mid to late October, from then onwards.

1 That is where we would have wanted to be, subject to hearing you on the various points that
2 are foreshadowed in some of the written submissions that have been made about
3 availability, and so on. If we did have a hearing that might affect how we proceed in
4 relation to what you have just said.

5 Shall we go to the end first and try and see where we are on whether we need a CMC,
6 whether we are in a position now to give a reasonably accurate estimate of length of
7 hearing. So far we have seen that your view was two weeks, Ofgem's is a bit longer
8 possibly, but it is in that region, it is looking like about ten days. It is quite a long hearing.

9 MR. TURNER: Sir, absolutely, we say that two weeks is the outside estimate, we really do, even
10 with a few witnesses being heard. Submissions should not extend this to two weeks.

11 THE PRESIDENT: So we are not likely to be in a position where there are no witnesses and
12 there is no cross-examination from what you are saying?

13 MR. KENNELLY: There will certainly be cross-examination and four or five witnesses at least.
14 I agree with my learned friend Mr. Turner that it may well be more two weeks than three
15 weeks. We were concerned that two weeks was too little it was more out of an abundance
16 of caution, but it may well be a ten day hearing. If the Tribunal wants to allow some
17 slippage then it will be more rather than less than that.

18 THE PRESIDENT: We are looking at a ten day hearing in which one would hope this will be
19 completed. In the usual way, if it was not, we may have to find another day or two some
20 time.

21 What do you therefore envisage? We might need another CMC, but it is difficult to see at
22 the moment that we will definitely need one. What is to stop us just setting out the steps
23 that we envisage being necessary, with sufficient leeway in between them so that if we have
24 to have another CMC we can have one.

25 MR. TURNER: Sir, there are two main aspects that play into that, and I will mention them both.
26 The first is that in this case we are going to have disclosure to the confidentiality ring of a
27 very large number of documents which have got to be read. There may be within that
28 material exculpatory documents, exculpatory information, matters that National Grid would
29 like to and is entitled to take into account in the process. There may as a result be not only
30 the need to read all this stuff, but to reflect it in further points in the Tribunal's process. If
31 we put in further issues then they must have a chance to respond to those. Because there is
32 a real risk of that, that is the first matter to draw to your attention. This is a heavy case and
33 an unusual case from that perspective.

1 The second matter arises from a very large difference of view between myself and my
2 friend about the nature of the case, which is that, as we see it, we have not raised any new
3 issues beyond what was already canvassed in the administrative procedure with one or two
4 minor exceptions that I can refer to. By and large, there are not a host of significant issues,
5 whatever view you take about the length of the Notice of Appeal.

6 Ofgem appears to take a rather different view in the sense that they feel that there is a need
7 for substantial further evidence from them to be filed of a factual and expert nature. They
8 are not, therefore, content to rely in large part on the Decision. They say that they have the
9 opportunity under the Tribunal's case law to bring in new material. Because of that
10 difference in view there may be a need for us to apply to the Tribunal for an order
11 disallowing parts of the Defence. I put it no higher than that, there is that risk.

12 When you put those two factors together it seems to us sensible to allow time at least
13 somewhere in the diary for a further hearing, which may not be effective but which might
14 be needed for those reasons and perhaps for some ancillary reasons – you have heard from
15 my friend Mr. Randolph about possible disputes about access to certainly confidential
16 documents. It is really because this case presents those sorts of difficulties that it seems
17 procedurally sensible to make some allowance for them. That is why we thought that it
18 would be useful to envisage a slot for a case management conference near the end of July,
19 which would fit with the timetable that we have in mind on any view. It would not interrupt
20 it.

21 THE PRESIDENT: All you need in by then presumably is the Defence. I think on what we were
22 sketching out ourselves tentatively one would have a list of issues and one would have all
23 the pleadings in certainly by the end of July.

24 MR. TURNER: Yes, subject to the Reply.

25 THE PRESIDENT: When do you have in mind for that?

26 MR. TURNER: If there is the rationalisation process that we have volunteered, we do think that
27 this is a case where it is sensible to envisage a Reply.

28 THE PRESIDENT: You might be pushing at an open door.

29 MR. TURNER: In view of the knock-on effect it pushes it into early September. By that time,
30 early September, and we have suggested either the 5th or 12th September, you have then got
31 all the pleadings.

32 THE PRESIDENT: What I was really getting at was should the main hearing not be – I am trying
33 to fix when this really can sensibly be – we would have thought having it starting in mid to
34 late October there would still be plenty of leeway for all these matters.

1 MR. TURNER: Sir, I am available then. I am afraid that my friend's leading counsel for Ofgem
2 who is engaged in this case is not available, and I believe my friend also has difficulties.
3 We, for our part, could make that, they cannot.

4 My problem, which I flagged in the skeleton argument is that I have a heavy trial with a
5 four week window beginning on 24th November. In reality, the need to actually deal with
6 that will take me out for November and December. That trial window ends on something
7 like 19th December.

8 I discussed this with my friend prior to this case management conference. It was for those
9 reasons, for mutual availability issues, that we were looking at January. We then compared
10 the length of time that would have elapsed in this case with some of the benchmarks from
11 previous cases and with the Tribunal's guide, and you have seen that reflected in the
12 skeletons. It is our submission – my friend will add what he wants – that that is still an
13 expeditious mode of dealing with what is a heavy case, and it in accordance with the
14 Tribunal's expeditious practices.

15 THE PRESIDENT: Shall we go round everybody on that. You could do mid to late October.
16 Your problems start in the lead up to 24th November?

17 MR. TURNER: That is right, sir. Effectively, and to be realistic about it, the entirety of
18 November, the first three weeks, and the final week in October would also be difficult,
19 although if it were absolutely necessary I could make. The problems in October relate to
20 my friends and not myself.

21 MR. KENNELLY: Sir, just taking what my learned friend says, first of all, forgive me for
22 repetition, the Authority is anxious to get this case on as quickly as possible. We, as the
23 guardian of the public interest, in effect, in this sphere are aware of the uncertainty that
24 these proceedings are causing in the market. We are anxious to get it on as quickly as
25 possible, but we must be realistic. This is a substantial case and there are over 12,000
26 documents in the case files, 3,000 of which are redacted. We have already heard flagged by
27 the Interveners their potential interest in seeing those documents. There are certainly
28 applications coming in this case. As my learned friend Mr. Turner says, we must be
29 realistic and anticipate those and make sure there is space for that in the timetable. For that
30 reason, a CMC in July or later in September may well be a good idea. It is important to
31 realise that there is very likely to be a dispute about documents in this case and we need to
32 make provision for that.

33 Turning to the main hearing, my learned friend Mr. Turner is absolutely right. I have great
34 difficulty at the end of September and my learned friend Miss Carss-Frisk ----

1 THE PRESIDENT: I am so sorry, at the end of?

2 MR. KENNELLY: At the end of September, early October. My learned friend Miss Carss-Frisk
3 has professional commitments for most of October, and my learned friend Mr. Jones with
4 Miss Carss-Frisk has difficulties at the end of October. Her involvement in this case has
5 already been quite substantial, it would not be feasible to replace us, even for a trial in
6 October. Realistically in a case like this, it just simply would not be feasible or cost
7 effective to replace the barristers or the team. I apologise to the Tribunal, but these are pre-
8 existing court commitments. As far as my learned friend Miss Carss-Frisk is concerned, she
9 cannot get out of her commitments.

10 THE PRESIDENT: She probably has not had as much exposure as you have, I suspect.

11 MR. KENNELLY: On the contrary, sir, Miss Carss-Frisk has been involved for some time. This
12 is a case where both teams of counsel have met. Mr. Turner and I have met in this case
13 previously. We have been involved from an early stage. It is not as if we are coming late in
14 the day. Certainly, for our part, mid to late October is not possible, and we have heard what
15 Mr. Turner says about November and December.

16 THE PRESIDENT: I am sorry, what do you say about November and December?

17 MR. KENNELLY: Mr. Turner is in difficulties, and obviously we can hardly criticise him for
18 that, having raised our own problems.
19 I concur entirely with what Mr. Turner says about the fact that if we have a hearing in
20 January in a case of this size and complexity that is still an expeditious hearing from the
21 Authority's point of view, bearing in mind our duty and in the public interest to ensure that
22 the uncertainty of the market is resolved. The object is to achieve that as soon as possible.
23 We feel that that is compatible with a hearing in January. We do not feel that that an
24 excessive length. We think it is the most realistic timetable. Of course, the public interest
25 is to achieve the correct result. As we have learned from this Tribunal in the past, when we
26 squeeze time estimates it leads to broad issues of confusion re pleadings ----

27 THE PRESIDENT: I do not think anyone is suggesting that we need to squeeze the time
28 estimate, it is just a question of finding the right window. I have got those points. Do any
29 of the Interveners want to add anything?

30 MR. VADJA: I would say that we have no concerns about a January hearing. We do not object
31 to a January hearing and nor, should I say, in terms of the timetable that Mr. Turner has
32 proposed. So far as the potential CMC is concerned, if an issue arises then a summons can
33 be taken out in the normal way as happens in normal courts. I think there is a danger in this

1 Tribunal of having a CMC for the sake of it and everyone has to turn up. If there are issues
2 then a summons can be issued and then they can be dealt with. That is all I have to say.

3 MR. RANDOLPH: Sir, we are very content with Mr. Turner's timetable. In fact, I am in slight
4 disagreement with my learned friend Mr. Vadja in that I think it would be sensible to pencil
5 in a CMC. It can always be vacated. It is easier now to put something in in July so that we
6 are all available. If, on the other hand, something just turns up, and we have heard from
7 Mr. Kennelly that there may be a dispute over documents, it can be more difficult to deal
8 with it. It seems to me that just for a day or half a day that would be a more appropriate
9 course to take.

10 MR. ROWE: We would clearly prefer a hearing date in or around mid-October, but if it cannot
11 practically be achieved then we are content to live with a January 2009 hearing date.
12 The periods proposed by Mr. Turner in relation to the Statements of Intervention – he
13 mentioned two to three weeks after the filing of a Defence – we would be content with three
14 weeks on the basis that we were to get access to the Notice of Appeal, as filed rather than as
15 abbreviated, immediately after the granting of permission to intervene.

16 THE PRESIDENT: Thank you.

17 (The Tribunal conferred)

18 THE PRESIDENT: Just so we have all the information we might need, we have got a problem
19 ourselves, I am afraid, with January and indeed with February in that Professor Stoneman is
20 not available until March, probably until 16th March. Just for the record, do people want to
21 tell me how they are placed for then? I am not saying that we are going to fix it then, we
22 may have to reconstitute ourselves.

23 MR. TURNER: Sir, I am sorry to say that in March, beginning on 2nd March, I have a 19 day trial
24 in Chancery Division.

25 THE PRESIDENT: So one of you is out. Anyone else know what their position is?

26 MR. KENNELLY: I have three diaries to check. Miss Carss-Frisk is available in March for the
27 entirety of March, and so am I, and Mr. Jones is as well. I will just double-check. Yes, the
28 three of us are available for the entirety of March.

29 MR. VADJA: I am afraid, sir, I have only brought my diary up to 27th February, but I can let the
30 Tribunal know if I am in difficulties in March.

31 THE PRESIDENT: We are just going to retire for five minutes and we will work it out.

32 (The Tribunal adjourned between 4.10 pm and 4.20 pm)

33 THE PRESIDENT: I think we have bowed to the inevitable and the main hearing will be in
34 January as you are all agreed, including the Interveners who had originally applied for

1 expedition. We will make ourselves – it may not be the Tribunal as presently constituted –
2 available from 15th January until 28th January. That is a ten day period and it may be that
3 that will not all be necessary, but that is the window, as it were, that we are looking at.

4 Working back through the timetable, we are grateful to Mr. Turner and his clients for what
5 they have offered to do by way of boiling down. We are very conscious of costs and time,
6 and we think that, in the circumstances given that Ofgem are already some way advanced,
7 in this case we will not require that to be done, and it would be better as things stand if the
8 matter were pleaded out. We have made the remarks that we have made and we hope that
9 they will be noted in future.

10 That means that with the week's extension that has been applied for and is not objected to,
11 the Defence will be filed on 10th June by 5 p.m.

12 I will run through what we have got in mind for the other steps. I think the intention is that
13 this will leave – particularly bearing in mind the trial date – plenty of time in the timetable
14 for any interlocutory applications that are not expressly provided for. The Interveners
15 should file their Statements of Intervention by 5 p.m. on 24th June. The order that we draft
16 will make a provision requiring that they liaise and that they avoid duplication of written
17 submissions as well as oral submissions. Permission to intervene will be conditional upon
18 that.

19 We will make an order for the parties and Interveners to jointly prepare a list of issues and a
20 chronology and a *dramatis personae* and we think that that could be done by 1st July.

21 We are sympathetic to the idea that in a case of this kind there is likely to be a need for a
22 Reply and possibly evidence in reply, so we were minded to say 29th July for that.

23 Then we are into skeleton arguments. We think that probably by then any applications,
24 such as have been mentioned, will probably have come to light and provision can be made
25 for them to be heard. The date we have for skeleton arguments may not be a universally
26 attractive one, but in view of people's commitments later on it may be better to have it
27 sooner rather than later. I will hear you on skeleton arguments, but we would be minded to
28 have the skeletons by the end of August from the Appellants. That is quite soon, I
29 appreciate. That was really when we were envisaging that there might be a hearing at the
30 end of October. There really seems to be no reason why it should not be done, particularly
31 if, as we suggest, any problems with the pleading, the length of the pleading in particular,
32 might be cured by appropriate inclusions in the skeleton. If that were the case the sooner
33 that were done the better. That our suggestion at the moment, subject to hearing you. So
34 we would have that by 26th August.

1 Just so you have the framework, we were going to ask the Respondents to put theirs in by
2 9th September and the Interveners by 16th September, and bundles by the 23rd.

3 I think we are sympathetic to a bit of slippage on that in the light of the January hearing
4 date. I do not know that we would like a huge amount of slippage, particularly if,
5 Mr. Turner, you are going to be heavily engaged until virtually Christmas in a long trial. I
6 think it would be better if we had the skeletons sorted out before that. So you can make a
7 suggestion, but I think we will not be particularly sympathetic to not having all the
8 skeletons by some time in mid-October, say.

9 So that is the timetable that we have got in mind. Shall we just see what you think about
10 that at the moment before we move on to some of the other issues which I hope we can deal
11 with quite quickly.

12 MR. TURNER: Sir, I am very much obliged to the Tribunal. There are two points that we would
13 make in relation to the timing of the skeleton beyond what, sir, you have mentioned. The
14 first is that so far as we are concerned, it is going to be, as a result of availability, extremely
15 difficult, in fact, impossible to produce a skeleton during the month of August. We will not
16 be there and we will not be able to produce it.

17 THE PRESIDENT: Give me a date.

18 MR. TURNER: We are proposing the third week in September. That would be Friday,
19 19th September. If your timetable picks up from there, subject to hearing my learned
20 friends, that should be manageable. I am just checking with my side that that is all right by
21 them.

22 THE PRESIDENT: I think it will have to be. I think that is about the latest we would envisage.

23 MR. TURNER: Sir, the second point is the advantage. We do have in mind what you have said
24 about trying to condense it. If you give us that bit of extra time it will help the process.

25 THE PRESIDENT: All right, we will. We had envisaged you having about two weeks,
26 Mr. Kennelly, after that, so that would take us to ----

27 MR. KENNELLY: 10th October.

28 THE PRESIDENT: Can you manage that?

29 MR. KENNELLY: Yes, we can. That is three weeks. I am afraid, because of our availability,
30 the 10th October is the realistic date.

31 THE PRESIDENT: 10th October, right, yours on 10th October. I think, given that you will have
32 the Appellant's skeleton on 19th, Mr. Vadja, Mr. Randolph and Mr. Rowe, you probably
33 will not need much more than week. Is that fair?

1 MR. VADJA: Can I just make two observations. First of all, so far as the suggested timetable is
2 concerned for putting the intervention, you have suggested 24th June. That places me in
3 considerable difficulties. I have to say, I am away next week. I then come back and I
4 prepare for two trials I have in the following weeks. The first time I would really be able to
5 look at this is the 23rd June. If we were going to have a hearing on 1st July I would say that
6 is too bad, but as we are going to be having a hearing in January, in my respectful
7 submission, it would be doing justice to our concerns if we could have a little bit longer to
8 5 p.m. on 27th June, as opposed to the 24th June. I really cannot see in terms of
9 proportionality how that could jeopardise a trial that is going to take place in January. I can
10 see that might have a small impact in terms of list of issues, which I know you have
11 pencilled in for 1st July, but it is going to be a knock-on effect of only a few days in relation
12 to a trial that is taking place in January.

13 THE PRESIDENT: I am not going to argue about three days. So 27th June then for the
14 Interveners. I think that means probably that we should push the list of issues back a few
15 days.

16 MR. VADJA: We can do that by either the 3rd or the 4th, which is a Friday. I think there seems to
17 be consensus of this part of the room for the 4th.

18 THE PRESIDENT: I am writing in the 4th.

19 MR. VADJA: I do not know if that causes Mr. Turner any difficulty in terms of the Reply by the
20 29th, I would not have thought so.

21 THE PRESIDENT: I doubt it, it is only a list of issues. He should know what the issues are by
22 then.

23 MR. VADJA: I rose in fact in relation to your question of skeletons, whether we should have ----

24 THE PRESIDENT: We have got to 10th October.

25 MR. VADJA: We have got to 10th October for Ofgem. I think the present proposal is that we do
26 it by the 17th. I think we are happy to do that, but if I can flag up that if we need an extra
27 day or two we may need to apply, we hope not to. I am, for my part, happy to commit to
28 17th October.

29 THE PRESIDENT: Then the bundles of documents can be put in – when would you like to put in
30 the bundles of documents? How long do you need for that?

31 MR. TURNER: Sir, it would probably be sensible to allow at least three weeks after the
32 skeletons. If one was to say two weeks, that takes you to the very end of October,
33 31st October.

34 THE PRESIDENT: Yes. Do you want another week, or would that be all right?

1 MR. VADJA: I would suggest another week, because there is nothing more irritating if one has a
2 trial where the documents are not in apple pie order.

3 THE PRESIDENT: Very well, 7th November then.

4 MR. RANDOLPH: Sorry, sir, certainly in other courts one tends to have one's bundles before the
5 skeletons go in simply because they need to have cross-referencing to the paginated bundle,
6 and that helps. This way it will be the other way round. Therefore, there will, by definition,
7 be no cross-referencing in the skeletons to the paginated bundles because they will not be in
8 existence. It might be – it depends how many pages are going to be referred to – but it
9 certainly aids the Tribunal if reference is going to be made to a paginated bundle which is
10 going to be used for the trial. That is the only point I would like to make.

11 THE PRESIDENT: What sometimes happens is that people can in a skeleton of references.

12 MR. RANDOLPH: Does one need a special trial bundle?

13 THE PRESIDENT: There are an awful lot of bundles. I think if ever we needed something
14 boiled down we need it here.

15 MR. VADJA: Indeed, this might be a case, we do not know how many documents are actually
16 gong to be referred to, for a core bundle.

17 THE PRESIDENT: That is what I was thinking really, which is another reason why it might be
18 better to leave it until after we have got the skeletons. I take your point, Mr. Randolph, but
19 it probably means actually that somebody is going to have to have to put in references after
20 the event. So we will say 7th November for that.

21 Just running through the other things fairly quickly, we will try and get an order out as soon
22 as we can. I think I have dealt with the fact that we are going to grant permission to all
23 three applicants to intervene, and there will be a suitable provision in the order about
24 duplication and liaison.

25 The Appellant presumably will serve a non-confidential version of the Notice of Appeal?

26 MR. TURNER: Yes, sir, we have one ready. That will be served on my learned friends on
27 Tuesday. What we do not yet have, but I am assured it can be done very quickly, is four
28 non-confidential copies of the accompanying documents. We can get that to my learned
29 friends within one week.

30 THE PRESIDENT: So Tuesday is when you are going to serve the Notice of Appeal.

31 MR. TURNER: Tuesday will be the non-confidential Notice of Appeal. The accompanying
32 documents and full non-confidential versions we will get to them by Friday of next week.

33 MR. VADJA: What I did in the short adjournment was to try and draft something out in terms of
34 a confidentiality order.

1 THE PRESIDENT: Thank you very much.

2 MR. VADJA: I have not yet had an opportunity of showing it to Mr. Turner. I would not want to
3 trouble the Tribunal by taking time now, but I would like to put down a marker that we very
4 much hope that it can be agreed and then those who are going to be confidentiality ring can
5 be served the confidential version of the Notice of Appeal and documents. I would hope
6 that could be within a week. I would hope there is not going to be a big issue on agreeing it.
7 I do not know whether an appropriate course is for us to agree and then to send it to the
8 Tribunal to sort of bless or endorse. It is obviously important that time does not tick away.

9 THE PRESIDENT: We need the ring first, do we not? I think what we envisage was that the
10 order which is now agreed between you and Mr. Kennelly, we can make that order straight
11 away, can it, with some appropriate amendments.

12 MR. RANDOLPH: Subject to my sifting.

13 MR. TURNER: Sir, that is a matter of concern for us because we can see scope for this sifting to
14 really cause delay which will then cause prejudice.

15 MR. RANDOLPH: Sir, we would hope that it would not, and we would do our utmost to ensure
16 that it did not.

17 THE PRESIDENT: Is there a form of words about it or is that what Mr. Vadja has just
18 mentioned?

19 MR. VADJA: I am afraid I have not dealt with sifting. That is very much Mr. Randolph. I have
20 just done something to effectively pick up Mr. Turner's words in terms of broadening the
21 confidentiality ring which at the moment exists between NG and Ofgem to cover all the
22 parties. I have not dealt with sifting.

23 MR. RANDOLPH: Sir, it was not possible in the short adjournment because there were lots of
24 things going on, not least the issue about the boiling down, which took some time for
25 Mr. Turner to deal with.

26 I would say simply this: our position is that we would be more than happy for all redacted
27 documents relating to my client to be seen by National Grid's external lawyers now, as at
28 the date of an order. What we would do in short order would be to look at our client's
29 redacted documents, raise issues in so far as there are issues regarding relevance, point that
30 out to Ofgem and also point that out at the same time to National Grid's external lawyers.
31 Hopefully that should be agreed. In so far as it could not be agreed then the matter would
32 have to be debated.

33 THE PRESIDENT: The first step is that you are going to get these documents.

34 MR. RANDOLPH: We have...

1 THE PRESIDENT: Do you know which they are?

2 MR. RANDOLPH: Yes, on file our clients have the redacted documents. We need to look at
3 them.

4 THE PRESIDENT: So you need to make a list of the ones that you think are relevant.

5 MR. RANDOLPH: That we are unhappy in terms of relevance – only in terms of relevance.
6 Obviously exculpatory, inculpatory, anything else, my learned friend is entirely entitled to
7 look at, it is just irrelevant material that is confidential that we do not want to go into the
8 confidentiality ring.

9 THE PRESIDENT: The first step is for you to identify the ones that you say are irrelevant,
10 supply that list to both.

11 MR. RANDOLPH: Yes, and they can revert.

12 THE PRESIDENT: With a view to them not being supplied into the ring, and then they can
13 revert.

14 MR. RANDOLPH: But in the meantime we are happy for all documents to go the external legal
15 team. So that would not cause a delay.

16 THE PRESIDENT: That can work, can it not?

17 MR. TURNER: Well, sir, the concern is this: previously the way that this was expressed was
18 that there were some documents that they have put in to Ofgem on the file which are so
19 sensitive that they would not want the in-house lawyer, Mrs. Bidwell, to see them. I had
20 understood, therefore, that what Mr. Randolph was going to do was identify such
21 documents and then we can ----

22 THE PRESIDENT: I think he is on a different point.

23 MR. TURNER: Now he is talking about relevance. I think they are withdrawing documents from
24 the case file.

25 THE PRESIDENT: Only if you agree, if everybody agrees, that they are not relevant, that they
26 are confidential and not relevant. I think this is a sort of proportionality exercise, you
27 should keep these things as narrowly confined as possible. It seems to me that that is
28 perfectly sensible. It is a slightly different thing about Mrs. Bidwell.
29 The understanding now is you will prepare a list and supply it to external solicitors to the
30 others, presumably also to the other Interveners, I do not know.

31 MR. RANDOLPH: I think not.

32 THE PRESIDENT: Maybe you do not want to have them.

33 MR. VADJA: We may not want one, but we are seeking instructions.

34 THE PRESIDENT: Supply them at any rate to external solicitors ----

1 MR. RANDOLPH: And counsel.

2 THE PRESIDENT: Yes, that would save time.

3 MR. RANDOLPH: Yes, both to solicitors and counsel.

4 MR. TURNER: It is to those in the ring other than Mrs. Bidwell.

5 MR. RANDOLPH: And to NERA.

6 THE PRESIDENT: I do not think it needs to go to the economists.

7 MR. RANDOLPH: No, it does not need to go to any economist.

8 THE PRESIDENT: Only if you think it should and you can agree it. Hopefully there will not be
9 too many of those. Then if there are documents which everyone agrees do not need to be
10 seen because they are not actually relevant and they are confidential then that solves that
11 problem.

12 MR. RANDOLPH: Exactly. I would be happy with that. Are those words going to be
13 incorporated into the order? One might want a timetable.

14 MR. TURNER: Sir, I was going to pick up on Mr. Randolph's remark there. We think that a
15 timetable is very important because this could otherwise become quite clunky. Looking at
16 the calendar – I do not know whether Ofgem are still happy to produce to ourselves, those
17 who are external advisors in the confidentiality ring – the full file within three working
18 days. That was their previous proposal. If that remains, I think that is Thursday of next
19 week, bearing in mind that we have the Bank Holiday. So they get that done without delay
20 by, let us say, 5 p.m. on Thursday, 29th May. At the same time, Mr. Randolph identifies any
21 of these documents about which he has concerns and signals to us and to Ofgem what those
22 concerns are within the same time frame, by Thursday, 29th May. We then have a period
23 within which we can react to that and, if necessary, the matter can be brought back before
24 the Tribunal. Does that sound sensible?

25 THE PRESIDENT: Yes, rather than draft it ourselves, I would much rather you agree that.

26 MR. RANDOLPH: Yes, to a certain extent it is dependent on Ofgem's position with regard to
27 producing documents this Thursday or Friday.

28 THE PRESIDENT: I thought you said you knew what the documents are.

29 MR. RANDOLPH: We do, but they are going to send it. Therefore, we need to make our list
30 prior to that being sent. Just to emphasise it, it is external legal advisors so far as I
31 understand it.

32 THE PRESIDENT: Yes.

33 MR. RANDOLPH: So it excludes ----

1 THE PRESIDENT: Yes, external legal advisors at this stage. It may be immediately obvious,
2 "This cannot be relevant".

3 MR. TURNER: Sir, the only point I would make there is that the economist who has been
4 assisting us with the case most directly, Mr. Matthew of NERA, would be extremely helpful
5 to us in being able to take a view, because he can point out matters of economic relevance
6 that might not immediately occur to us. Given that there is no confidentiality issue as
7 against him that surely cannot be objected to in terms of rights of defence.

8 THE PRESIDENT: The whole purpose of this exercise is to restrict the circulation of irrelevant
9 confidential material, so I think one economist is probably fine. They may need to take a
10 view.

11 MR. RANDOLPH: Sir, I would, with respect, say you are right first time round. This is a
12 question of relevance, it is a legal issue.

13 THE PRESIDENT: I am not sure, I think there may be some call for it.

14 MR. RANDOLPH: I am not going to die in a ditch on that.

15 THE PRESIDENT: Who is the person, Mr. Turner?

16 MR. TURNER: It is Mr. David Matthew.

17 THE PRESIDENT: I think that is probably sensible.

18 MR. RANDOLPH: Equally, if we are timetabling, then we need to timetable when National Grid
19 are going to respond to our list.

20 THE PRESIDENT: Can you agree a timetable?

21 MR. RANDOLPH: Yes, certainly.

22 THE PRESIDENT: I think we have agreed the mechanism. It clearly ought to be done very
23 quickly, as quickly as it can be done. The process can start. You know what the documents
24 are. You can draw your list up and then send it to them.

25 MR. RANDOLPH: Yes, exactly.

26 THE PRESIDENT: That can happen. I think the whole process should have been completed by –
27 do you have a view as to how many documents are involved?

28 MR. RANDOLPH: I have no idea. There are 3,000 redacted documents, but they are obviously
29 not all my client's, at least I hope not.

30 MR. KENNELLY: I think I can be of assistance here. Mr. Randolph's clients, their documents
31 are in the tens as far as I am aware. This is a very unusual step that Mr. Randolph is
32 seeking. It is very important that a strict timetable is applied. As Mr. Turner says, this
33 could turn into a bit of a time-wasting side show, if you will forgive the colloquialism, so
34 we need to be fairly disciplined in terms of time.

1 THE PRESIDENT: Can we have it completed by 6th June? If you could just agree the
2 mechanism and, Mr. Randolph, perhaps you could send a proposal to the others.

3 MR. RANDOLPH: Yes, I will, I will copy everybody in.

4 THE PRESIDENT: Then you can agree it.

5 MR. RANDOLPH: Then we will send the agreed text to the Tribunal.

6 THE PRESIDENT: So that is the sifting point.

7 MR. RANDOLPH: I am grateful.

8 THE PRESIDENT: As far as Mrs. Bidwell is concerned, it seems to us that in the circumstances
9 of this you ought to be able to take instructions. I think the position is you do not need
10 Mrs. Mahy?

11 MR. TURNER: That is so, sir.

12 THE PRESIDENT: I think the understanding is that you are voluntarily removing her from the
13 ring, but we do think that Mrs. Bidwell ought to be in the ring.

14 MR. TURNER: I am obliged, sir.

15 THE PRESIDENT: We also agree in principle that we will issue those witness summonses to
16 each of Mr. David James and Mr. Neil Avery. Maybe they can now be completed. You can
17 send us at some appropriate time perfected versions of them. Bear in mind we have a date
18 now, so those dates can be inserted. If someone could just check them against our Rules – I
19 am afraid I have not had time to do that – but I did wonder whether they set out everything
20 that ought to be set out. Subject to that, we are happy that they should be issued and we will
21 issue them.

22 I think that is probably close to everything, is it not? Is there anything else? Yes, we give
23 you leave to adduce that witness statement, the second witness statement of David James,
24 containing a correction.

25 I just wanted to ask Mr. Turner – I assume that everybody is happy, are they, with the
26 amendments that have been made to the Notice of Appeal. There is an amended version of
27 the Notice of Appeal.

28 MR. KENNELLY: We consent. We have no objections to those, sir.

29 THE PRESIDENT: I think they are mostly corrections.

30 MR. TURNER: They are pure corrections. Sir, thank you very much for pointing that out, it only
31 occurred to us this morning.

32 THE PRESIDENT: I am sorry about the lateness of the hour. We will do a draft order which we
33 will send round in the usual way. You know what is going to be in it now, so it will run
34 from now. The only thing we need, as it were, is the perfected confidentiality ring

1 arrangements. I think you did indicate that there were going to be some amendments to the
2 schedules for that. You will want that to be incorporated in the order.

3 MR. TURNER: Sir, we have copies available already.

4 MR. VADJA: I just wonder whether, unless an order is going to be drawn up tonight, it might be
5 possible that we could get one order that includes the Interveners, that we do it all in one
6 go?

7 MR. TURNER: Sir, we would prefer this to be done and dusted so far as National Grid's external
8 advisors' access to the files are concerned.

9 THE PRESIDENT: I think they ought to be able to start now. I do not want a delay. Let us start
10 the process. Is that in a form in which it can be made now?

11 MR. TURNER: Sir, I believe so. Mr. Kennelly ought to just cast his eye over it, because we
12 have not shown him that before this hearing.

13 MR. KENNELLY: Based on the discussions we have had, we can do that in a couple of
14 moments. We have agreed it so it could be done immediately.

15 THE PRESIDENT: Do we need to know though? When do you want to start looking at this
16 material? It is Friday today and it is Bank Holiday on Monday. If we do not make an order
17 on that now, it might be some time next week.

18 MR. KENNELLY: Sir, if we agree, I do not see why we cannot proceed immediately.

19 THE PRESIDENT: The undertakings have to be given, do they not?

20 MR. TURNER: The undertakings do have to be given. If the order is got under way today the
21 undertakings can be given in the early part of next week, Tuesday, and there will be no hold
22 up to the documents coming.

23 MR. RANDOLPH: Save for my little point, my list. I am very concerned about the fact that if
24 you start the order now, Mr. Kennelly sends all the documents off to Mr. Turner, but it has
25 got to be subject, with respect, to my ability to put in a list. Sir, it does not hold things up
26 because their external legal advisors, plus Mr. Matthew, get to see everything come what
27 may. It cannot go beyond that at the moment. That is why I am slightly concerned that we
28 are saying, "The order as drafted", which I have not actually seen, is effectively made now.
29 It is made but subject to that very important proviso which you, sir, have agreed.

30 MR. TURNER: Sir, my learned junior has suggested a very easy way of dealing with that which
31 is that in the schedule to the draft order that you have already we simply strike out for the
32 moment the names of the National Grid people and the names of the external economists
33 apart from Mr. Matthew. Then we are done.

34 MR. RANDOLPH: I am very happy with that.

1 THE PRESIDENT: All right, if you can do that now on a copy, we can make that order now.
2 Then we can make an amended order at an appropriate time. If you will let us get away
3 now, we will do that. Have these undertakings been given at all yet? Has anyone given an
4 undertaking?
5 MR. TURNER: Not yet, sir.
6 THE PRESIDENT: Mr. Wells points out that the order actually recites that the undertakings have
7 been given – is that right?
8 MR. TURNER: Sir, I am told that as we have copies here, and the relevant people apart from
9 Mr. Matthew are here, those can be signed now.
10 THE PRESIDENT: You can deal with that if you want us to make the order today.
11 MR. TURNER: We would prefer that, sir.
12 THE PRESIDENT: I think in that case we will rise. I do not think we will need to come back in
13 for this purpose, but if you can take the relevant undertakings and indicate to us when you
14 have done it, then we will make the order, deleting for the moment the names of Mrs. Mahy
15 and Mrs. Bidwell and the external economists – is that right?
16 MR. TURNER: Other than Mr. Matthew.
17 THE PRESIDENT: Other than Mr. Matthew, yes. That order can be signed and then you are free
18 to start the process. Then no doubt when Mr. Randolph has done the other step we will be
19 able to sign an amended order.
20 Does that deal with everything that we need to deal with today?
21 MR. TURNER: It does from our point of view.
22 MR. KENNELLY: And from ours.
23 THE PRESIDENT: Thank you all very much indeed for your help, and I am sorry it is a bit later
24 than we would have hoped.

25 (The hearing concluded at 4.55 pm)