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IN THE COMPETITION
APPEAL TRIBUNAL

Case No. 1099/1/2/08

Victoria House,
Bloomsbury Place,
London WC1A 2EB

8th October 2008

Before:

VIVIEN ROSE
(Chairman)

Sitting as a Tribunal in England and Wales

BETWEEN:

NATIONAL GRID PLC

Appellant

- v -

THE GAS AND ELECTRICITY MARKETS AUTHORITY

Respondent

supported by

SIEMENS PLC
CAPITAL METERS LIMITED
METER FIT (NORTH WEST) LIMITED
METER FIT (NORTH EAST) LIMITED

Interveners

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CASE MANAGEMENT CONFERENCE

APPEARANCES

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

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

Mr Fergus Randolph (instructed by United Utilities Group plc) appeared on behalf of Meter Fit.

Miss Kassie Smith (instructed by Reed Smith LLP) appeared on behalf of Siemens Plc.

Mr Ben Rayment (instructed by Slaughter and May) appeared on behalf of Capital Meters Limited.

1 THE CHAIRMAN: Good afternoon, ladies and gentlemen. I have had an opportunity to
2 consider how the submissions that National Grid lodged yesterday and the further
3 submissions which Siemens and CML lodged today should affect my decision on what
4 should be excluded from the Interveners' material. It is not appropriate at this point to
5 make revisions to the Draft Ruling which has been circulated to the parties. Rather I will
6 hand down that Ruling at the end of today's hearing and will provide further reasons for the
7 terms of the order when the order following today's hearing is issued. I will now set out my
8 preliminary views on what National Grid has said.

9 I keep in mind the fact that this is not a Ruling on whether parts of the Notice of Appeal
10 should be excised. None of the parties has made an application to exclude any passages
11 from the Notice. My task is to consider how National Grid's decision to withdraw certain
12 paragraphs of its Notice of Appeal affects the admissibility of the corresponding passages in
13 the Interveners' material.

14 I will deal with each of the four areas in turn.

15 **1. Barriers to entry and expansion.**

16 National Grid's application heard at the previous case management conference sought to
17 exclude para.20 of Siemens' statement of intervention and para. 37 of Mr. Lee's statement
18 dealing with barriers to entry in relation to the issue of dominance. Paragraph 20 contains
19 the sentence:

20 "… from Siemens' point of view one of the major barriers to entry was National
21 Grid's control of the Legacy installed base; see paragraph 37 of David Lee's
22 witness statement where he mentions other barriers to entry as well."

23 In para. 37 of his statement Mr. Lee states that National Grid's position gave it a number of
24 key areas of control that have been a constraint on Siemens' growth: in particular in
25 para.37.1 he says that the reservation of any or all maintenance work automatically creates a
26 barrier for CMOs and in para.37.2 he refers to the market for skilled gas engineers and
27 asserts that National Grid's retention of a substantial level of activity generated by
28 maintenance work on legacy meters means that fewer former National Grid employed
29 engineers have joined the pool available for recruitment by the CMOs.

30 In the Draft Ruling I said that I agreed that there was nothing in the Decision itself
31 concerning barriers to entry that would justify an exploration of work densities and scale
32 economies of CMOs metering businesses. But in paras. 287 to 298 of the Notice of Appeal
33 National Grid challenges as its third point on barriers to entry the fact that the Decision does
34 not analyse the degree to which economies of scale can be achieved by new entrants.

1 National Grid then goes on to explain why its ownership of the legacy does not result in
2 superior economies of density; why potential entrants may have competitive advantages of
3 their own and discusses documents and statements from Eco European, Capital Meters and
4 SSE which were referred to in the Decision.

5 In its submissions for today National Grid first, confirms that it does not wish to pursue any
6 argument which puts in issue the effect of the bundling of maintenance work for its installed
7 meter base on the economies of density of the CMOs.

8 Secondly, it withdraws paras. 289, 293 and 297 of the Notice of Appeal; and thirdly, it
9 argues that the remaining paragraphs referred to in the draft ruling are properly responsive
10 to points raised in the decision and would not justify allowing Siemens to raise the issue of
11 whether National Grid's bundling of the maintenance work precludes the CMOs from
12 achieving economies of scale and density.

13 I have reconsidered the paragraphs which National Grid does not wish to withdraw to
14 determine whether the points that Siemens makes in para.20 of its Statement of Intervention
15 and in para.37 of Mr. Lee's statement are justified in order to refute them. My conclusion is
16 that I am satisfied that all but one of the paragraphs retained by National Grid do not justify
17 going down the avenue which Siemens invites us to go down.

18 My concern remains with para. 287 of the Notice of Appeal – it would be helpful to turn
19 that up. The Tribunal undertakes a merits review and in relation to an allegation that Ofgem
20 has failed to include an analysis of a particular point in the Decision, the Tribunal will need
21 to consider whether *if* Ofgem had investigated this point it would have made any difference.
22 The Tribunal, for example, needs to consider whether it should disturb the finding of
23 infringement as a result of this alleged lack of analysis by Ofgem or whether it should remit
24 the matter back to Ofgem for investigation. In considering either of those two approaches,
25 or results, it will be important to gauge the significance of the absence of analysis as to the
26 final outcome of the case. At present, therefore I remain concerned that para. 287 does raise
27 the question of economies of scale and density, that the CMOs are able to achieve in the
28 current market and hence might justify the inclusion of para.20 of Siemens' statement of
29 intervention and Mr. Lee's para.37 and I therefore invite any comments the parties may
30 have on that point in due course.

31 National Grid also raises the question of paras. 48 to 51 of Mr. Lee's witness statement;
32 those were not covered in the Draft Ruling because National Grid had said at the earlier
33 case management conference that they agreed that those paragraphs were a proper response
34 to para. 289 of the Notice of Appeal. But now that para.289 of the Notice of Appeal has

1 been withdrawn those paragraphs in Mr. Lee's witness statement are no longer relevant and
2 should be excluded.

3 **2. Policy Replacement provisions**

4 In the Draft Ruling I stated that the Decision criticises National Grid's policy replacement
5 provisions only because the meters removed pursuant to that policy count towards reaching
6 the glidepath. This does not justify, in my judgment, the Interveners raising other
7 complaints about how the policy replacement provisions affect their businesses.

8 However, I considered that paras. 428 and 429 of the Notice of Appeal, together with paras.
9 32-44 in Section 2 of the Notice and paras. 458 to 461 of the Notice of Appeal did appear to
10 be putting forward a case that policy meter replacement provisions are beneficial for CMOs
11 and allow them to organise their work efficiently. The passages in the Interveners' material
12 which I considered might be retained to meet this point, even though they go beyond the
13 issues raised by the Decision were: in Mr. Williams' statement paras 24-31 dealing with the
14 problems allegedly encountered by British Gas in handling the policy requirements.

15 Paragraphs 19 to 32 and 53 to 64 of Mr. Lee's witness statement, and para. 51 of Mr.
16 King's witness statement insofar as it responds to paras. 428 and 459 of the Notice of
17 Appeal and to an exhibit in Mr. Avery's witness statement.

18 In its submissions for today National Grid has confirmed that it is not mounting a positive
19 case that policy meter replacement provisions are beneficial for CMOs. It has therefore
20 agreed to withdraw para. 428 and agrees that the other paragraphs should be read as not
21 making any such assertion.

22 As regards para. 32 to 44 of the Notice of Appeal, National Grid says that these are intended
23 to be non-contentious and are drawn from the first Statement of Objections or the Decision.
24 National Grid also notes that the parties will endeavour to identify which parts of section 2
25 of the Notice of Appeal are agreed and which are not.

26 As regards para.429 of the Notice of Appeal, I accept that this paragraph is not contentious
27 insofar as it simply describes the expected reduction in the number of policy replacement
28 requirements in the future because of the change in National Grid's policy and provided that
29 it is not being put forward as a point that policy replacement provides flexible work for the
30 CMOs. It is, of course, contentious in that Ofgem argues in the Defence that this is not
31 relevant because it occurred after the infringement.

32 As regards paras. 458 and 459 I accept, in light of National Grid's clarification of this point
33 that the point being made here is not about policy replacement but about the way in which

1 the age related PRC counterfactual is likely to affect the choice of meters to be replaced as
2 compared to the application of the legacy MSA glidepath.

3 How does this affect the relevant passages in the Interveners' material?

4 As regards Mr. Williams's witness statement paras. 24-31 I do not see that the alleged
5 problems encountered by British Gas in implementing the policy requirements are relevant
6 to this appeal and these paragraphs should be excluded.

7 As regards paras 19-22 of Mr. Lee's statement I agree with Siemens' submission for today
8 that if paras. 32-44 of the Notice of Appeal stays then these should stay. I consider that
9 these should be treated in the same way as section 2 of the Notice of Appeal. The parties
10 should consider how much of what is said by Mr. Lee can be agreed. In relation to those
11 parts which are not common ground the parties should consider carefully whether the time
12 and resources which would need to be devoted to resolving the disputes of fact is
13 proportionate to the relevance and importance of the issue. So I will not order them to be
14 excised.

15 As regards paras. 53-64 of Mr. Lee's witness statement, these clearly go beyond the scope
16 of this appeal and should be excluded. As regards para. 51 of Mr. King's statement, in so
17 far as it addresses para. 428 of the Notice of Appeal, this can now be excluded because that
18 paragraph has been withdrawn. The assertion in the witness statement as regards para. 459
19 that by their very nature the National Grid policy exchange requirements impose a
20 constraint on the freedom of CMOs to plan and schedule meter exchanges must be excluded
21 and so must the reference to this in the comment on Exhibit NA1 to Mr. Avery's statement
22 where Mr. King says that policy meters are having an impact on Meter Fit's density and
23 access problems and the policy meters influence the general "pot" of meters available to be
24 exchanged.

25 **3. The Linear Nature of the Glidepath.**

26 On this point I indicated in the Draft Ruling that Siemens' complaint about the linear nature
27 of the glidepath would be legitimate as an answer to the point which National Grid appears
28 to make in para. 440 in the Notice of Appeal. That paragraph appeared to assert that there is
29 nothing to suggest that the rate of replacement of meters envisaged by the glidepath was
30 different from the rate that would occur under "normal competitive conditions".

31 National Grid, in their submissions for today accept that para. 440 could be read that way
32 and offered to delete the heading above para. 440 which reads: "the replacement rate as
33 envisaged under the glidepath is normal" and the first sentence of para. 440 which reads:

1 “Finally there is nothing to suggest that the rate of replacement of meters under the
2 glidepath differ from what would be expected under normal competitive
3 conditions.”

4 Siemens has raised concerns in its submissions today that National Grid might still be
5 seeking to raise the point that the rate of replacement is no different, but National Grid have
6 said in para. 22 of their submissions for today that para. 440 of the Notice of Appeal is not
7 intended to go beyond the two points made in the following sentences in that paragraph. I
8 am prepared to take them at their word and if the paragraph is limited in the way that is
9 proposed I do not consider that we need to embark on a consideration of whether the
10 glidepath should have been adjusted to reflect the uneven distribution of meters in terms of
11 age or geographic spread. I therefore consider that para. 43 of Siemens’ Statement of
12 Intervention, and paras. 69-72 of Mr. Lee’s witness statement should be excluded.

13 **4. Payment completion and whether it is a “normal feature” of competition.**

14 In the Draft Ruling I accepted that the terms of the CMOs contracts are relevant to the
15 appeal because Ofgem relied on them as illustrations of less restrictive ways in which the
16 perceived problem of customer specific sunk costs could be approached by the meter
17 operators. The legacy MSA PRCs were not, Ofgem therefore concluded, objectively
18 justified.

19 The question is: how much does the Tribunal need to know about the CMO’s contracts in
20 order to assess the merits of Ofgem’s conclusions on objective justification? In a sense this
21 should be as much a concern for Ofgem seeking to uphold the Decision as regards objective
22 justification as it is for National Grid.

23 I note that in its letter of today’s date CML has provided some additional information about
24 the contracts and how many have been entered into of each kind, whilst this is helpful it is
25 clearly not satisfactory to have this evidence presented in a letter it will need to be
26 incorporated in a proper witness statement in due course.

27 The Tribunal will need to have some information before it about these contracts since they
28 appear to have been important in Ofgem’s reasoning on objective justification. Equally
29 clearly National Grid’s application for disclosure was too wide. I am not prepared to order
30 the Interveners to disclose the “circumstances” in which particular forms of contract are
31 used because that is too uncertain a term to be included in an order. But we will need to see
32 the form of contracts themselves and, if particular contracts are used wholly or primarily
33 only for specific types of customer as suggested in para.29 of National Grid’s submissions
34 for today then that needs to be made clear. We do not need to see who has entered into

1 which contract and there may be parts of the contracts which are confidential and wholly
2 irrelevant to the case. I would welcome submissions from Ofgem and the parties as to what
3 would be appropriate here.

4 I realise that the parties have not had an opportunity to absorb everything that I have just
5 said but I am keen to move on to resolve the timetable issues and other issues today and I do
6 not consider that timetabling should be affected by what I have just said since it has resulted
7 in a narrowing rather than an expansion of the issues raised as compared with the Draft
8 Ruling.

9 As far as other matters to be covered today, so far as timetabling is concerned, it was not my
10 intention to go into the level of detail in setting a timetable as is suggested in Pinsent
11 Masons' letter of today's date. I had in mind that I would simply replace the dates set in the
12 order made on 23rd May with new dates and add in dates for National Grid's further
13 submissions referred to in para. 45 of the Draft Ruling. We must focus on those steps.
14 I am concerned that agreeing the chronology has generated so much correspondence. Can
15 we limit this, please, to a chronology of non-contentious and agreed events, it is not
16 intended to be a place for submissions or disputed facts.

17 The way the chronology has been handled does not make me optimistic about the
18 production of the list of issues. Again, this should be a short, non-contentious document
19 and it should not be a distraction from the main preparation for the January hearing.

20 The steps that need to be taken, as far as the timetable are concerned, seem to me to be as
21 follows:

- 22 (i) we need to make the confidentiality order, including Mr. Rothwell and Mr.
23 Pickering in the confidentiality ring and I am grateful to the parties for
24 submitting the draft order. In order for that to be made, we need the
25 undertakings from Mr. Rothwell and Mr. Pickering. Are they in court today?

26 MR. TURNER: They are behind me, here.

27 THE CHAIRMAN: Thank you.

- 28 (ii) to set a timetable for National Grid's additional submissions on the price
29 comparisons and the reasonableness of the assumed achievable volumes of
30 replacement, bearing in mind what I said in the Draft Ruling on the
31 limitations of that point having regard to what Ofgem actually relied on in
32 arriving at its decision;

- 33 (iii) there then needs to be a date set for any submissions in response to those
34 additional submissions from Ofgem and the Interveners;

- 1 (iv) National Grid's skeleton submissions;
2 (v) Ofgem's skeletons;
3 (vi) the Interveners' skeletons; and
4 (vii) the bundles need to be delivered, though if, as I understand it, some parties
5 have suggested this could be slotted in earlier than I am certainly prepared to
6 agree to do that.

7 I am determined to attach dates to all these stages and to make sure that all the skeletons and
8 the bundles are delivered no late than 10th December to give the Tribunal an opportunity to
9 read up on the case in time for 15th January.

10 On the confidentiality, since the last case management conference the gas suppliers have
11 broadly agreed that Mr. Rothwell and Mr. Pickering should be able to see the confidential
12 material provided they are not involved in the metering business for one year after the end
13 of this appeal or their move to a different post.

14 There are a couple of points to iron out. The first is in relation to Siemens' more recent
15 confidential information arising in the case but not on Ofgem's file. At present I am
16 minded to agree with Siemens that there does not seem to be a good reason for Messrs.
17 Rothwell and Pickering to see information which was not in front of Ofgem when it took
18 the decision.

19 The second point is that British Gas raised the possibility of a monitoring arrangement and
20 they suggested this in the form of an undertaking by National Grid's general counsel
21 undertaking on behalf of National Grid to ensure that the undertakings were complied with.
22 I do not consider it appropriate to require general counsel to undertake this on behalf of the
23 company as a matter of her professional conduct.

24 Since Mr. Rothwell and Mr. Pickering are present I take this opportunity to impress upon
25 them the unusual nature of the extension of the confidentiality ring to include them and to
26 impress upon them also the seriousness of the undertakings that they are giving to the
27 Tribunal to comply with the confidentiality ring. If they have any concerns at any time in
28 the future about what they should or should not do in order to ensure their compliance, they
29 should take that matter up directly either with their in-house counsel or with the external
30 legal advisers of the company.

31 I will pause for a moment there, that has been a lot, as I say, for everybody to absorb, but I
32 hope that it was clear. If the parties would like me to rise for a short time for them to gather
33 their thoughts, then I am certainly willing to do that. Mr. Turner?

34 MR. TURNER: Madam, we would be grateful, for our part, for five minutes.

1 THE CHAIRMAN: I will rise then – I will give you 10 minutes – I will come back at 20 to 3.

2 Thank you.

3 (Short break)

4 THE CHAIRMAN: Just one further point I was reminded of that I should have made as regards
5 the result of the decisions today about the pleadings and evidence, I do not consider it is
6 necessary for everybody to serve their revised pleadings at this stage, but you should, of
7 course, include revised versions of the pleadings and evidence in the trial bundles, and by
8 “revised versions” I mean with the passages withdrawn or excluded, crossed out, rather than
9 just omitted. The exception to this is exhibit TPH1 to Mr. Hoskin’s witness statement
10 referred to in paras. 8(b) and 32(b) of the Draft Ruling, where for clarity it would be useful
11 to have this re-filed now. Yes, who has something to say first?

12 MR. RAYMENT: Madam, I was simply going to say in relation to Mr. Hoskin’s exhibit, which
13 you have just referred to, we intend to file a revised version by the end of the week.

14 THE CHAIRMAN: Thank you very much, Mr. Rayment. Mr. Turner?

15 MR. TURNER: Madam, first many thanks for giving us the time to consider your preliminary
16 remarks, which has been useful. In relation to those if I may provide an initial response
17 three matters arise in relation to the contents of the Notice of Appeal and next steps as we
18 see it. The first is whether we have any reactions to your observations on para.287, we do
19 and then the other parties will be able to say something as well. Secondly, remarks in
20 relation to the CML contract point; and thirdly, a point of clarification: Siemens also
21 remarked in its submissions that there would be a knock-on effect of your Ruling, madam,
22 in relation to the reply evidence served by National Grid because some of that, they fairly
23 pointed out, was responsive to paragraphs which were removed. We accept that, we will
24 need to discuss with Siemens precisely which paragraphs there are but we do not apprehend
25 that it would be useful to go into the detail of that today.

26 Madam, if I may start then with para. 287 of the Notice of Appeal? We fully understand the
27 point that if and insofar as we are saying you should have investigated, or it was
28 insufficiently investigated the point about the flow of maintenance work allowing
29 economies of scale and density to be achieved that that may raise an issue for the Tribunal
30 in case it wishes to consider that point. We had not intended para. 287 to be read in that
31 way. It is intended to be merely a response to paras. 3.66 to 3.74 of the Decision, which are
32 the paragraphs identified in the Draft Ruling under the heading “Barriers to Entry and
33 Expansion.” Those are the relevant paragraphs in the Decision concerned with this issue
34 under the heading of “Dominance”, and which as the Draft Ruling found did not put in issue

1 whether the flow of maintenance activity that arises from the installed meter base affects
2 economies of density of National Grid and its competitors. Paragraph 287 is certainly a
3 response to those paragraphs as one sees from the introduction above para.281, which is a
4 general section dealing with those paragraphs in the Decision. It is intended to say that the
5 findings in the Decision, which are concerned with economies of scale and density in meter
6 replacement, have not been made out on the basis of the reasoning presented in those
7 paragraphs of the Decision. It is not concerned with the flow of maintenance activity at all
8 and nor is it meant to say you have not proved this point because there is this area, the flow
9 of maintenance work, which has been insufficiently investigated and which should have
10 been looked at. If you look at para. 287 in the Notice of Appeal therefore in the sentence it
11 could read, and should be understood to read:

12 “Thirdly, although Ofgem asserts that National Grid enjoys significant economies
13 of scale and density in meter replacement work, the Decision presents no
14 analysis ...”

15 In other words, it is intended merely to say on the basis of the findings and reasoning in the
16 Decision the conclusion drawn by Ofgem is not made out. It is not intended to say: “The
17 Decision is inadequate because it failed to investigate the additional area concerning the
18 flow of maintenance activity” thereby opening up that new area in the Notice of Appeal.

19 THE CHAIRMAN: But is the area generally of what economies of scale and density a CMO
20 needs in order to be able to be a thriving competitor to National Grid, is that an area that we
21 inevitably have to go into? Putting aside just the maintenance work aspect of it?

22 MR. TURNER: Insofar as the Decision finds that National Grid is dominant for a number of
23 reasons, one of those being that it enjoys, because of the installed base of meters, economies
24 of density and scale in meter replacement work that is an issue raised by the Decision. But
25 the maintenance activity providing fuel for the operations of meter operators, whether
26 National Grid or other people, is not addressed by the Decision, and that is not an area that
27 we are intending to open up by the bare statement in 287 that Ofgem has not proved its
28 case.

29 THE CHAIRMAN: Yes, I suppose it is also relevant that the interveners have withdrawn their
30 assertion that they might be forced to leave the market ----

31 MR. TURNER: Yes.

32 THE CHAIRMAN: -- and also in Ofgem’s defence it makes clear that it is not saying that no
33 entry has been possible because of your contracts, simply that there would have been
34 more ----

1 MR. TURNER: There would have been more.

2 THE CHAIRMAN: -- without the contracts?

3 MR. TURNER: Yes. It says it is no part of its case to examine the success or failure of any
4 particular operator in the market and that there may well be viable operators in the market,
5 but that its point is different, and that is the case which we are meeting. So madam, we
6 would respectfully say understood in that way and we would be prepared to insert those
7 clarificatory words, 287 does not open up the area of the flow of maintenance work as a
8 new issue in the style of a Pandora's box.

9 The second observation that you made on which I would like to comment, relates to the
10 CML contracts and the question of their relevance to the issues in the proceedings. We
11 accept the contents of CML's letter. We understand and agree with your remark that that
12 should be crystallised in the form of a witness statement. For our part we are content with
13 that, subject to the point that we would wish to have clarified in accordance with your
14 remarks whether the only one of the contract options for which there are customers – the
15 short form contract – is a contract that applies to the customer groups, the gas suppliers,
16 who have inherited a meter sitting on the wall as a result of a change of gas supplier for the
17 consumer. CML has identified the number of customers involved and if it is those
18 customers to whom this contract is offered that is enough for our purposes.

19 Madam, that is all that we, National Grid, wish to say about the substantive part of your
20 opening remarks. Would it be convenient then for others then to speak or for me also to
21 briefly address the remaining points on the timetable?

22 THE CHAIRMAN: I think please briefly address the remaining points on the timetable.

23 MR. TURNER: I think first there is the question of the conditions of admissibility of Mr.
24 Rothwell and Mr. Pickering to the confidentiality ring. In relation to that, madam, you
25 made one qualification which is potentially significant to their admission, namely, that you
26 were provisionally inclined to agree that there was no particular reason that they should see
27 new information not relied on by Ofgem which has not been served with the statement of
28 intervention or subsequently. That new information falls into two parts. There is, first, the
29 witness statement of Mr. David Lee, as evidence in the appeal, and I believe subsequently
30 Siemens have provided copies of management accounts pursuant to a request from National
31 Grid.

32 THE CHAIRMAN: For which period?

33 MR. TURNER: For the year to September 2007. You may have seen in their letter where they
34 express concern they specifically refer to a concern about Mr. Rothwell and Mr. Pickering

1 seeing such recent financial figures. We accept that. We do not ask that Mr. Rothwell and
2 Mr. Pickering should have to see those accounts. We restrict the ambit of our request to
3 their seeing the parts of the statement of Mr. Lee remaining in this appeal which are
4 concerned with the technical aspects of the meter business. Madam, you will remember that
5 paras. 32-44 of the Notice of Appeal in the facts section remains in, and that in response to
6 that you have ruled that Mr. Lee's statement, paras. 19-32 stay in. If one turns to those
7 paragraphs you will see that they contain an amount of technical material, that is their
8 function and their purpose, dealing with the meter business (tab 7, second bundle produced
9 for the second CMC).

10 THE CHAIRMAN: Which paragraphs?

11 MR. TURNER: Paragraphs 19-32 and essentially all of the statement which has not been
12 excluded as a result of the Ruling. You will see there under the heading "Economics of
13 Operating Meter Services Efficiently" above para.17 and following, there is evidence about
14 the economics of the business.

15 THE CHAIRMAN: Is the confidential material only that that is in square brackets?

16 MR. TURNER: Yes, yes it is, and I am reminded any accompanying redactions from the exhibits
17 which are the tables at DLL 1. Here it is precisely in relation to those figures, if one looks
18 for example at para.19, and at para.31, that external advisers such as ourselves can
19 contribute very little whereas individuals such as Messrs. Rothwell and Pickering can spot
20 points that we would not be able to, and it is for that reason, if anything is to be made of that
21 evidence, the figures in this appeal before the Tribunal that it would be appropriate for
22 people who understand their implications to be able to see them.

23 THE CHAIRMAN: But they presumably are absolutely confidential to Siemens. That is the kind
24 of information which one competitor should absolutely not be disclosing to another.

25 MR. TURNER: Madam, that may be right; I am not in a position to say to what extent.

26 THE CHAIRMAN: And I am also struggling at the moment to see how it really is relevant to
27 what we have to decide. Would it be possible, Miss Smith, sometimes the way one gets
28 around this is to put in between a range, but you may feel that that discloses too much, but I
29 will wait to see what you have to say; I see your point, Mr. Turner.

30 MR. TURNER: It may be that it will not be relevant as the proceedings develop and as points are
31 taking at the hearing you may suddenly find that it becomes an issue in which case the only
32 people who can deal with it would not have been able to see it. Beyond that you have the
33 point that Mr. Rothwell and Mr. Pickering are not currently working in the business, they
34 have not been for some time, and they would not be for a full year afterwards.

1 Madam, that is all we wish to say therefore about the confidentiality order. Subject to that I
2 apprehend that we are in a position to allow the order to be made, subject to the
3 observations of my friends, and if that is the case it will have the desirable result that Mr.
4 Rothwell and Mr. Pickering will be able to assist in the review of the large number of
5 unredacted documents.

6 Madam, that takes us finally to the litigation timetable. So far as the chronology is
7 concerned, I do not believe it is breaking counsel confidence to say that your remarks
8 chimed with the sentiment expressed by counsel yesterday about the degree of effort that
9 had already gone in to agreeing what should have been uncontroversial. However, it is fair
10 to say that there was also consensus that we ought to be able to knock this on the head
11 pretty expeditiously now. The indication given in the letter from Pinsent Masons is that this
12 can be done without too much additional effort.

13 THE CHAIRMAN: This is a chronology you are talking about?

14 MR. TURNER: This is the chronology of events. The Pinsent Masons letter ----

15 THE CHAIRMAN: Let me just find it.

16 MR. TURNER: -- deals with it on the second page under the heading "Chronology Schedule of
17 Issues" "first – parties to liaise in order to seek to agree the chronology of events to be
18 lodged with the Tribunal by 24th October." All counsel believe that that is achievable and
19 take on board your strictures about not engaging in unnecessary expenditure of time and
20 effort.

21 So far as the list of issues is concerned, in fact a list of issues was finalised, albeit before the
22 reply and before this Ruling. It is, nonetheless, in our submission a useful if not definitive
23 document. We would propose, therefore, that the existing list of issues should stand in
24 order to avoid precisely the form of trench warfare that could become a distraction subject
25 to perhaps, as indicated by the second dash under that heading, the possibility of the
26 interveners proposing such changes to the schedule of issues as they consider necessary
27 following your Ruling. The disadvantage of that, however, is that if it does precipitate
28 further discussions then there is the possibility of the parties becoming mired in a distracting
29 sideshow.

30 THE CHAIRMAN: Well why do you not let us have the existing list of issues, and if the
31 interveners have any comments they want to make they can perhaps do that in an annex to
32 their skeletons?

33 MR. TURNER: Yes. So far as the outstanding submissions from National Grid are concerned,
34 we take on board and will comply with the steer that you provided in the Draft Ruling about

1 the role and nature of those. They are there to deal with the price comparisons, including
2 CML's price comparison and the paragraph in the Decision concerning the volumes of
3 meter replacements contracted for by the CMOs with British Gas ahead of the MSAs. It is
4 material to the reasoning in the Decision because it is the jumping off point for the
5 following counterfactual, and because the figures there are used to illustrate the supposedly
6 high cost of additional replacements under the MSAs. We will restrict what we say about
7 that paragraph in line with the Ruling. We have proposed in the letter of Pinsent Masons
8 how we will deal with that at the foot of the first page and over the page, and it really is a
9 short and intensive burst of effort which we envisage with first Mr. Rothwell helping us by
10 looking at the reasoning that Ofgem have provided to explain what they did. We ask for
11 any clarification about CML's pricing model within a short time as well because Mr.
12 Rothwell will have been able to see that, and we will serve any additional submissions and
13 evidence, which we promise will be brief, within no more than one week after we have that
14 clarified.

15 THE CHAIRMAN: So if we were to put an actual date on that where would that take us to?

16 MR. TURNER: The problem with putting a final date, which we originally thought of doing, is
17 that it depends on certain steps taking place which are difficult to timetable, for example
18 CML responding to any request for information. I would say that I apprehend it will not
19 take more than two weeks in total to deal with this exercise as a whole.

20 THE CHAIRMAN: I am wondering what the sequencing needs to be between this and the
21 production of the skeleton, because these additional submissions are an important part, but
22 nonetheless a small part of the total, so I think if we are going to say two weeks then for you
23 to put in the additional submissions, I am not sure we can then start the clock running for
24 the skeleton from that time rather than time running parallel.

25 MR. TURNER: I understand that. On the other hand, you will appreciate that the same
26 individuals are likely to need to deal with both exercises.

27 THE CHAIRMAN: I think I would prefer to set a date of two weeks on the assumption that CML
28 will respond as rapidly as they possibly can, and if you are having trouble with getting a
29 timely response from that no doubt you will let us know and we can deal with that.

30 MR. TURNER: Madam, we will.

31 THE CHAIRMAN: So that then would take us until ----

32 MR. TURNER: 22nd, my friend says, is two weeks from today.

33 THE CHAIRMAN: Well let us say to 24th October.

34 MR. TURNER: I am obliged.

1 THE CHAIRMAN: So additional submissions by 24th October and then Ofgem and the
2 Interveners' responses by 31st?

3 MR. TURNER: That is what is envisaged by the timetable that has been agreed, namely, within
4 one week ----

5 THE CHAIRMAN: I will ask everybody for their comments on this, I am not making any orders
6 at the moment but just everyone to take a note of where we are getting to on this.

7 MR. TURNER: That takes us to the issue of skeletons.

8 THE CHAIRMAN: Yes.

9 MR. TURNER: Madam, if we heard you correctly you would wish to place an end stop for the
10 Tribunal's purposes on receiving submissions by 10th December to enable the Tribunal to
11 actually get down to the detailed work of preparing for the hearing. On that basis we would
12 propose as follows, and this takes into account certain considerations which I will mention
13 in a moment that the Interveners serve the last skeletons on 10th December; that Ofgem
14 serves its responsive skeleton on 1st December thereby allowing time between Ofgem and
15 the Interveners' skeletons for them to take that into account, and there be a three week
16 period between National Grid's skeleton and Ofgem's which brings you to 10th November.
17 The basis for this is as follows: first, that this ought, in accordance with your guidance to
18 allow the Tribunal to have enough time to prepare for the hearing with all the skeletons
19 being in. Secondly, that the skeletons ought to be, and we hope will be, the last shot in the
20 case, rather than there be a messy process leading up to the hearing with uncertainty
21 infecting the hearing itself and its conduct.

22 Thirdly, it is important to ensure that the skeletons are as helpful as possible, and I say
23 particularly feelingly from National Grid's part, we will endeavour to comply with the
24 guidance that you have given about the way in which this skeleton will work. It will not be
25 a re-run of the Notice of Appeal, it will not be a re-run of the reply, which are the pleadings.
26 It will, in accordance with your guidance, clarify what we apprehend to be the chain of
27 reasoning in the Decision, set out the respects in which, as clearly and as simply as possible,
28 we take issue with that reasoning because there are errors of fact, law or discretion, and we
29 will give relevant references to try to explain our points, because we believe that will be the
30 most helpful document for the Tribunal. It is not, however, a light document to prepare,
31 because there is a lot to distil. Between now and 10th November is something less, I
32 believe, five weeks. During that period as well as dealing with tasks such as the outstanding
33 submissions and engaging in the review of the unredacted documents, we will obviously
34 need to clear our skeleton internally, and we wish to create a document of maximum utility

1 to you and to the other parties. With all those considerations in mind we would commend
2 that timetable to you as likely to be the best.

3 Madam, subject to any remarks, those are our submissions.

4 THE CHAIRMAN: Thank you very much, that is very clear, Mr. Turner. Miss Smith?

5 MISS SMITH: Can I address the points and exclusion of evidence, particularly exclusion of
6 Siemens' evidence, madam?

7 THE CHAIRMAN: Well, I can help you there. I think, Miss Smith, I am certainly not going to
8 allow those figures to be disclosed to Mr. Rothwell and Mr. Pickering at the moment. As I
9 indicated in my opening remarks, I expect the parties to go through as part of their exercise
10 for preparing for trial s.2 of the Notice of Appeal and those paragraphs in Mr. Lee's
11 evidence, and it is certainly premature at the moment to consider disclosing such highly
12 confidential information to Mr. Rothwell and Mr. Pickering.

13 MISS SMITH: Madam, I am grateful on that, if I could just clarify, your order will remain that
14 which you indicated initially, that Mr. Rothwell and Mr. Pickering should not be given
15 access to information that was submitted by Siemens subsequent to the start of the appeal
16 process, which would be the witness statements and the subsequent evidence contained in
17 management accounts?

18 THE CHAIRMAN: You accept that it is those two classes of information which fall within that
19 category?

20 MISS SMITH: Yes.

21 THE CHAIRMAN: Is the draft order that was prepared by ----

22 MISS SMITH: The draft order does not reflect Siemens' concerns. It is not an agreed draft order.
23 It was a draft order produced simply by National Grid's solicitors and so at the moment the
24 draft order I think explicitly says not only should ----

25 THE CHAIRMAN: Well let us try, because obviously we want to get this draft order out as soon
26 as possible because that is the starting pistol for Mr. Rothwell and Mr. Pickering. Can
27 someone provide me with a copy of the draft?

28 MISS SMITH: Madam, I should also say that Mr. Kennelly has indicated that he wishes to make
29 one small comment on the draft order so I should not sit down before letting him make his
30 submission.

31 THE CHAIRMAN: Well I do not want to ask you to draft on the hoof.

32 MISS SMITH: But you will see, madam, that para.1 sets out the different types of confidential
33 information that fall under the ambit of the order, and you will see:

34 "(a) information on Ofgem's case file,

1 (b) confidential passages contained in pleadings, annexes thereto or witness
2 statements,
3 (c) confidential information disclosed to National Grid by any of the parties
4 during the course of the proceedings.”

5 Siemens’ concerns arise as regards subparagraphs (b) and (c). You will have seen the type
6 of information contained in our witness statements, financial information is also annexed to
7 the witness statement of Mr. Lee, and confidential financial information was disclosed to
8 National Grid about the management accounts during the course of these pleadings.

9 THE CHAIRMAN: Looking at this order then, the preambular: “AND UPON Helen Mahy,
10 general counsel ...”, that presumably comes out because I have decided that is not
11 appropriate, are you saying then that really confidential information should be defined as
12 just (a) and not (b) and (c)?

13 MISS SMITH: That would be our position, yes.

14 THE CHAIRMAN: Do you accept, Mr. Turner, that that is right?

15 MR. TURNER: Madam, it should be for (b) and (c) “except in relation to Siemens”, because
16 CML has expressly accepted that it does not have a problem with that, and there is no
17 confidential information in relation to Meter Fit.

18 MISS SMITH: Madam, we are happy with that, yes.

19 THE CHAIRMAN: And there are no points on Part A, the undertaking there, everyone is content
20 with that?

21 MISS SMITH: Madam, there is one point I might just highlight, if I may, which is in para.7 of
22 Part A, simply to say that there appears to be some asymmetry in that paragraph as regards
23 the length of time which the undertaking persists. You will see there that half way down
24 that para.7 the period of the undertaking starts with the date of the undertaking and expires
25 one calendar year after either the end of the proceedings, or “(ii) the date on which I cease
26 work in relation to the current proceedings due to transferral to another internal post.”
27 Madam, I simply raise the point that there could be some asymmetry there if, for example,
28 Mr. Pickering or Mr. Rothwell stop working on this case over the next few weeks, the
29 undertaking will then persist only for a year after that, even though in other circumstances it
30 would persist for a much longer period, it would persist for a year after the end of the
31 appeal. Our client’s concerns are simply that if, in the situation where either of these
32 individuals is transferred to another post the period of the undertaking is potentially
33 significantly reduced. I simply highlight that.

1 THE CHAIRMAN: Yes, it is but that is because it is supposed to be a year after they stop
2 handling this information and they will stop handling this information either because the
3 case comes to an end or because they are posted to do something completely different.

4 MISS SMITH: Madam, I think I would only make the point that, as I understand it, the mischief
5 is that the order is meant to protect against coming into possession of the information and
6 the period of quarantine after having come into possession of the information will be
7 different. But if you are not persuaded by that madam ----

8 THE CHAIRMAN: Well this has been trawled over by all sorts of people now, I am rather
9 hesitant to make changes to the wording that has been sent round to the relevant gas
10 suppliers.

11 MISS SMITH: Madam, I do have a number of other points in response to Mr. Turner as regards
12 the question of deletions from Siemens' evidence and statement of intervention, I do not
13 know if it would be helpful for me to make those submissions now, or to finish off the
14 confidentiality order?

15 THE CHAIRMAN: Yes, I think let us finish off the confidentiality point. Is there anyone else
16 who wants to make a point on the draft order assuming that the "AND UPON Helen Mahy"
17 paragraph is deleted, and that (b) and (c) of para.1 do not apply to Siemens.

18 MR. KENNELLY: Madam, there was one further point. The order at the moment, in our
19 submission, is rather too broad and needs one further qualification, because the confidential
20 information which Grid seeks and which we consulted suppliers and interveners was limited
21 to the six major suppliers and the interveners. The order, as presently drafted, will also
22 provide Mr. Rothwell and Mr. Pickering with access to the confidential information
23 provided by the Meter Asset Managers, they are a further category of undertaking who have
24 provided information to Ofgem in response to s.26 requests, and so we would suggest to
25 that Tribunal that para.1 (b) and (c) ----

26 THE CHAIRMAN: Where is the Meter Asset Manager mentioned?

27 MR. KENNELLY: It is drafted, madam, in such a way, as to include all confidential information
28 provided, all the information held by Ofgem, and so the information provided by the Meter
29 Asset Manager, which has not been sought by the Grid ----

30 THE CHAIRMAN: But it says: "... and which is claimed as confidential by (i) any of the parties
31 to these proceedings; and (ii) ..."

32 MR. KENNELLY: It is (b) and (c) madam, the annexes in our pleadings. "Confidential
33 information" is defined under (a), (b) and (c), and under (b) and (c) it is drafted so as to
34 include all confidential passages contained in the annexes to our pleading for example, and

1 that includes information which has been provided by Meter Asset Managers, who are not
2 obviously one of the six major suppliers or the Interveners, and we simply ask that their
3 information be excluded.

4 THE CHAIRMAN: Well in 1(a) then if we move the words "... and which is claimed as
5 confidential by (i) any of these parties these proceedings ..." and the parties in (ii) if that
6 was moved so that it then applied to all three, (a), (b) and (c), would that meet your point?

7 MR. KENNELLY: Madam, yes, it would. It is not a large exclusion.

8 THE CHAIRMAN: No, no, it is important to get these things right.

9 MR. KENNELLY: Mr. Sinclair makes the point that strictly speaking some of the information
10 which is confidential is not expressly claimed as confidential by them. We have chosen to
11 redact it because it is plainly confidential but I do not think that is going to cause any
12 problem.

13 THE CHAIRMAN: No, I do not think that is going to cause a problem. Thank you very much,
14 Mr. Kennelly. Does anybody else want to make any points? (After a pause) I understand
15 that unfortunately we do not have an electronic version of this draft order at the Tribunal
16 which would enable us to make those small amendments and get it sorted out, I do not know
17 if anybody can remedy that.

18 MR. TURNER: Yes, we have it in Chambers and we can email it across if it would assist the
19 Tribunal as it is, or with the changes that have been canvassed during this hearing – perhaps
20 as it is and then the Tribunal can make ...

21 THE CHAIRMAN: Will it be possible for Mr. Rothwell and Mr. Pickering to sign the
22 undertakings now before they leave?

23 MR. TURNER: Yes it will, madam, and my Junior was making the same point. If it is possible
24 to at least agree in manuscript what these points are then they will sign.

25 THE CHAIRMAN: Well let us try and get this sorted out before close of play today. So just to
26 be clear, the amendments to be made to the draft order as attached to the letter of 7th
27 October from Pinsent Masons is that the fourth preamble is excluded, paras. (b) and (c) of
28 para. 1 are expressed not to relate to Siemens, to relate to everyone except Siemens, and the
29 words which currently appear at the end of para.1(a) "and which is claimed as confidential
30 by ..." and then (i) and (ii) should be moved so that they apply to all subparagraphs (a), (b)
31 and (c). Part B of the annex is discarded and Mr. Pickering and Mr. Rothwell will sign their
32 respective copies of Part A. Thank you. Yes, Miss Smith, you want to continue with your
33 submissions.

1 MISS SMITH: Madam, I am grateful. If I may respond first of all to the submissions of Mr.
2 Turner as regards the exclusion of Siemens' evidence relating to barriers to entry and the
3 impact of maintenance on economies of scale and density, and if I could ask you, madam, to
4 look back at para.287 of the Notice of Appeal. Paragraph 287 does not contain only a
5 criticism of the reasoning contained in the Decision, not just a criticism that the Decision
6 contains no analysis of the degree to which this scale, scale of density and economies of
7 scale can be achieved by new entrants bidding for gas supplies and metering requirements,
8 but it also contains a positive assertion that UMS, which is I think OnStream, which is the
9 meter operating arm of National Grid, was in fact able to enter the market profitably, the
10 implication being that the problems with economies of scale and density did not affect its
11 entry into the market. In my submission that puts questions of economies of scale and
12 density squarely into issue as a matter of fact.

13 In considering those economies of scale and density, and what economies a CMO (a meter
14 operator) needs to enter the market in our submission one cannot ignore the question of
15 maintenance work, it is fundamental to the question of density. It is fundamental to the
16 organisation of engineers and their call-outs. If they are able to go on call-outs to
17 maintenance jobs those can be combined with call-outs to replacement jobs. So, in my
18 submission, it is fundamental to the question of economic sub-density.

19 If I could ask you, madam, also to look at para.292 of the Notice of Appeal. This is another
20 paragraph that National Grid have declined to delete from their Notice of Appeal and that
21 puts in issue the relevance of NG's installed base for CMOs to achieve economies of scale.
22 As I read it Ofgem claims that the installed base reduces opportunities for meter operators
23 to achieve economies of scale, while National Grid in this paragraph says that the installed
24 base merely provides the banks of meters that are available for replacement work by a
25 CMO.

26 In assessing Ofgem's decision, which is challenged in this paragraph, I say that the installed
27 base reduces the opportunities for CMO to achieve economies of scale, as I have already
28 said the question of maintenance is fundamental because it is the maintenance of that
29 installed base that allows us – or does not allow us – to achieve economies of density.

30 Madam, then moving on to a point that was not addressed by Mr. Turner but was addressed
31 by you in your preliminary indication, the policy replacement meters, you indicated that
32 paras. 19-32 of Mr. Lee's statement should remain in but that paras. 53-64 of Mr. Lee's
33 statement go beyond the scope of appeal and should be excluded. Madam, we say that the
34 question of the impact of policy meter replacement does still remain an issue, particularly

1 National Grid, in our submission, still makes a case that policy meters give the meter
2 operators (CMOs) flexibility, that it is a positive for CMOs. Madam, we make that point
3 because National Grid have declined also to delete para.429 of the Notice of Appeal, and if
4 I could ask you to look at that paragraph (p.148)? You will recall that National Grid have
5 said “We will delete para.428 ...” in which they make the positive case that their policy
6 replacement schedules have given suppliers considerable flexibility as to which meters to
7 replace, enabling them to plan their work in a way that achieves the necessary density, and
8 we responded to that in our witness evidence and statement of intervention, but they have
9 declined to delete para.429 which says: “This flexibility has recently increased even further
10 as National Grid has changed its policy to conform to the approach recommended by
11 IMAC”. Essentially it has increased the number of meters in the policy replacement pool.

12 THE CHAIRMAN: I do not think that is right. I think they are saying they have reduced the
13 policy replacement requirements, I am not sure this is to do with increasing the pool it is
14 just reducing the overall number of policy replacements.

15 MR. TURNER: I can help Miss Smith by removing those opening words: “This flexibility has
16 recently increased even further as”.

17 MISS SMITH: That is helpful but I was, if I may, going to ask you to look at the evidence that
18 has been put in by National Grid which I say makes clear what they are seeking to do by
19 continuing to make reference to this change in the policy meter requirement Pool. If I could
20 ask you to look at – and madam I hope you have this – the witness statement of Mr. Mark
21 Way which was submitted by National Grid with their reply. It is a small file – “Reply to
22 the Defence Bundle 1 Witness statements – just one paragraph in that witness statement
23 which is at tab 3 of that bundle, para. 10 of Mr. Way’s witness statement says: “At paras.
24 48-56 below ...” and I am not going to take you to those paragraphs but it sets out details,

25 “... I provide details of National Grid’s recent change of policy as to the election of
26 meters for replacement from an input based criterion to an output based criterion.

27 The change is in line of the principles ...” etc.,

28 and then this last paragraph:

29 “This should further assist suppliers and CMOs by reducing the number of meters
30 requiring policy replacement and providing greater discretionary meter
31 replacement opportunities.”

32 Madam, I simply make the point that there is a positive case being made there and continues
33 to be made that the replacement policy assists CMOs.

1 Madam, those are the only submissions I have to make on the application to exclude
2 evidence from Siemens and to exclude paragraphs from our Statement of Intervention
3 except this, which is a point I should make. Mr. Turner rightly accepted that if paragraphs
4 of our evidence come out then the paragraphs of his evidence which refer to that should also
5 come out. Madam, you indicated in your preliminary observations that you would be
6 drafting an order following today so it may be of assistance to you if the paragraphs of
7 National Grid's reply evidence are in fact identified. The last page of the written
8 submissions which I submitted for today's hearing, there is a table which compares
9 Siemens' evidence and National Grid's evidence.

10 THE CHAIRMAN: Yes, I see that, thank you.

11 MISS SMITH: And identifies those paragraphs of National Grid's evidence that respond to
12 Siemens' evidence. I am afraid I did not do the same exercise for the other Interveners.

13 THE CHAIRMAN: That is very helpful, thank you, Miss Smith.

14 MISS SMITH: As I am on my feet, madam – it may be of assistance – there is one submission I
15 have to make on the timetable, which of course concerns the date for the Interveners'
16 skeletons. At the moment, the proposal that Ofgem puts its skeleton on 1st December and
17 the Interveners' skeletons are put in on 10th December, gives the Interveners only seven
18 working days to produce their skeleton. Obviously we will have started work on our
19 skeletons well before we receive Ofgem's skeleton, but we are very alive to the point that
20 we have been required by the Tribunal not to duplicate the work already done by Ofgem
21 and, in fact, not to duplicate work done by each other so we will have to, in those seven
22 days, absorb Ofgem's skeleton and make sure that we have a limited duplication from our
23 skeletons, and to liaise with each other to ensure there is no duplication and, of course, to
24 finalise our skeletons internally with our clients. For our part we would find that quite
25 difficult to achieve in seven working days, and we have in the past suggested that we have
26 ten working days (two weeks) to prepare our skeletons which would involve moving
27 Ofgem's skeleton back to Friday, 28th November.

28 Madam, before I sit down, there is just one point that I should make the Tribunal aware of.
29 I had hoped to have a signed copy of it today but it will be served by the end of this week,
30 Mr. Duncan Southgate will be serving a very short – I think two pages – further witness
31 statement and I will tell the Tribunal what that deals with. In the witness statement of
32 David James, National Grid's witness statement which was served with its reply, Mr. James
33 identified an inconsistency between one paragraph of Mr. Southgate's statement and one
34 paragraph of Mr. Hoskins' statement – Mr. Hoskins being an employee of CML. Mr.

1 Southgate has revisited his witness statement in light of that and having now seen the
2 documents which were attached to Mr. Hoskins' witness statement says "Yes, I was
3 mistaken, I agree with what Mr. Hoskins said." This is something which, in the normal
4 course of things, we could have dealt with in evidence-in-chief in the witness box, but given
5 the wish to ensure transparency we will be putting it in a very, very short witness statement,
6 but it should not have any impact, I anticipate, on the timetable.

7 THE CHAIRMAN: Thank you very much, Miss Smith. Mr. Randolph?

8 MR. RANDOLPH: Madam, I can be brief. I do not intend to open up issues relating to the
9 submissions of the Interveners, basically because you gave a very clear indication of what
10 the position will be and we were happy to accept what National Grid said at para.18 of its
11 submissions, which was that they confirmed that they will not be seeking to advance any
12 positive case, which I hope answers Miss Smith's point, but that is for Miss Smith.
13 However, insofar as that is the case then we will go on and act on that basis. So off goes
14 459 and off goes the relevant part of Mr. King's evidence with regard to Mr. Avery's
15 witness statement.

16 So I can pass on immediately to the timetable. Madam, as far as I understand it the position
17 is as follows: we have the confidentiality order today, the 24th is going to be a busy day
18 because it is going to be National Grid's additional submissions plus potentially the
19 chronology and the list of issues. We are then going to have the opportunity to revisit that
20 in our skeletons. Then the responsive submissions by 31st, and then one is looking at 10th
21 November for National Grid, 1st December for Ofgem and then 10th December for the
22 Interveners. The only submission I would make would be if one moved Ofgem back – I
23 appreciate they will not like this – to the Friday, 28th November rather than the Monday;
24 that would give us a little bit more flexibility to deal with what Miss Smith I think, with
25 respect, rightfully identified, namely, it is important, we do not want to duplicate and it does
26 take time. Not only do we have to see what Ofgem are saying and liaise internally but then
27 we have to liaise with ourselves, and that we found in the intervention process does take
28 time. If we could change that so it would be filing for Ofgem close of play on 28th
29 November, that would give us the weekend at least to get going. Apart from that, madam,
30 those are my submissions.

31 THE CHAIRMAN: Thank you very much. Mr. Randolph.

32 MR. RAYMENT: Thank you, madam. Could I just deal with the two matters of substance which
33 concern CML. The first is our evidence on policy replacement issues. I think you have
34 seen what we have said about that in our letter and we are prepared to rest upon what

1 Siemens say. We say that if there is a case being positively advanced by National Grid then
2 our evidence is relevant in that respect.

3 In relation to the other substantive matter, namely payment completion, we have heard what
4 you have said about that. We will provide the information in our letter in the form of a
5 witness statement in the next few days, I would expect. We will also address the one
6 additional point I think which is the category of customers; it is actually quite a short point
7 and we can deal with that shortly.

8 We were not making any comment about the form in which this material should have been
9 submitted, it is just that we wanted to get it to you quickly so you could see what was
10 involved at today's hearing.

11 That brings me on to the procedural matters. In relation to the price comparison material, I
12 think your interchange with Mr. Turner earlier was starting to get away from what we had
13 understood was the core of our agreement with National Grid, which was that the entire
14 process, the intense burst of activity that Mr. Turner referred to, would be over in about two
15 weeks. The fact that we did not actually tie that firmly to dates was because of the slight
16 uncertainties about whether they had a clear response from us and so on.

17 THE CHAIRMAN: I thought we had tied it to a date. I thought that was now going to be ----

18 MR. RAYMENT: Well it was to a different date to what we ever talked about. What we
19 originally suggested was that, assuming Mr. Rothwell was admitted to the confidentiality
20 ring today, Grid would be able to make their request for clarification to us by this Friday,
21 we would be able to respond very shortly and Grid would be able to put in their response on
22 those matters by the end of next week give or take a day, and that we in turn would be able
23 to respond by the end of the following week, which would take us to about 24th October,
24 and that is what we envisaged using our best endeavours – both parties – to achieve. You
25 yourself have said that although this is a small matter ----

26 THE CHAIRMAN: So you are arguing for a tighter timetable than ----

27 MR. RAYMENT: Yes, effectively, I am, and I had understood that National Grid was more or
28 less in agreement with that sort of time frame. We had slightly stepped back from agreeing
29 an actual date because of the slight uncertainties involved in the process that we need to
30 follow. But assuming that all went well we felt that that was the sort of time frame and that
31 we would not need the extra week that you seemed to be envisaging with Mr. Turner, which
32 brings us out at 31st October. Although, as you said, this is a small matter, it is nevertheless
33 of some importance and therefore it is better in terms of filing further submissions, and the
34 timing of those further submissions that this is dealt with as soon as possible.

1 THE CHAIRMAN: But are you saying that you are disadvantaged by the fact that there is an
2 extra week in which this has to be sorted out?

3 MR. RAYMENT: Not necessarily, but the concern of the Interveners is that the more time that is
4 taken earlier on in the timetable the more the temptation is to squeeze us at the end on the
5 filing of our skeleton and that is what is of concern to us.

6 THE CHAIRMAN: Well, Mr. Turner's timetable was based on the assumption that at the same
7 time as putting together these additional submissions, they would also be busy sorting out
8 their skeleton for 10th November, and I understand your concern ----

9 MR. RAYMENT: Of course, I appreciate that, but I do not think anything has changed since we
10 were discussing that indicative time frame. Maybe he will tell me he has re-thought the
11 position.

12 THE CHAIRMAN: Well are you asking me to bring forward the time for National Grid's
13 skeleton?

14 MR. RAYMENT: Well yes, effectively.

15 THE CHAIRMAN: Not their additional submissions but their skeleton?

16 MR. RAYMENT: Well you appeared to suggest, when you were discussing the matter with Mr.
17 Turner, that this was a matter that was sufficiently important that it was desirable that it
18 should be agreed before the skeleton ----

19 THE CHAIRMAN: Where we are at the moment, Mr. Rayment, is that the additional
20 submissions will be served on 24th October, and Ofgem and you and the other Interveners
21 can respond by 31st October, and then National Grid's skeleton comes in on 10th November.
22 Now, if I were to shorten the time for the additional submissions and your response to those
23 submissions, I am not sure what advantage there is for the overall ----

24 MR. RAYMENT: I am reassured by that. I agree, I do not think in fact it does matter, we can
25 take the extra time.

26 THE CHAIRMAN: I think that would be wise, given one does not know what is going to happen
27 when Mr. Rothwell and Mr. Pickering finally see all this information. Do you have
28 anything else to say on timetable?

29 MR. RAYMENT: No, the only point is to echo that made by Mr. Randolph and Miss Smith
30 about us not getting unduly squeezed at the end. On any view there is quite a lot to do in
31 seven days and on top of the requirement to liaise and so on it would be much more
32 comfortable if we could have a bit of extra time – three extra working days I think is what I
33 am asking for.

1 MR. RANDOLPH: Madam, I wonder if I could make a suggestion. This looks as though it is
2 going to be quite a complex trial, the question of witnesses and everything else, I am just
3 wondering, I know the Competition Appeal Tribunal does not often do this, I wondering
4 whether a pre-trial review in the week leading up – or at least in writing where there may be
5 a suggestion from the Tribunal as to which witnesses might be called when, because
6 obviously we (the interveners) are going to be pretty much at the back of the queue, I
7 imagine, and I do not know where Meter Fit fits in with that, but it would be useful for us to
8 know and if there were some suggestions – obviously the windows are flexible – it would
9 be very helpful.

10 THE CHAIRMAN: Thank you, I will bear that in mind; I do not want to fix anything now, but as
11 things unfold that may certainly be a valuable step to take. Mr. Kennelly, everybody seems
12 to want to shorten the time that you have for producing your skeleton?

13 MR. KENNELLY: Well indeed, madam, we are only the respondents to the appeal, and the
14 competition authority responsible for the Decision, and I am slightly squeezed myself by
15 having the last 10 minutes of the day, but I would ask, madam, that you listen to my
16 submissions on this point because they are critical to the effective conduct of these
17 proceedings. I shall not talk about the contracts, madam, unless you ask me to, that point
18 has been replied to by Mr. Turner.

19 On timetable, Mr. Rayment said it did not make a difference if the timetable for skeletons
20 was brought forward, but in my submission it does make a difference. I have three main
21 points to make about the timetable. First, there is no justification for further delay by Grid.
22 Grid have delayed, in my submission, and they are asking for an inordinate amount of time
23 to prepare, which is unjustified.

24 Secondly, Grid's skeleton is critical. We have identified flaws in the Notice of Appeal, the
25 Tribunal has raised concerns. The skeleton may be shorter than the Notice of Appeal, but
26 the Notice of Appeal remains, and the skeleton will be a very important document.

27 Thirdly, there is the issue of fairness to Ofgem. We will need at least three weeks to reply
28 and we will need time when our team is available.

29 Taking the first point – justification for further delay – it is important to recall, madam, the
30 steps in these proceedings.

31 THE CHAIRMAN: Can I just be clear which aspects of the timetable you are taking issue with?
32 Are you happy with the additional submissions by 24th October and your response by 31st
33 October?

1 MR. KENNELLY: We have no objection to that except to say that we cannot see why it cannot
2 be done sooner. We have no objection to those dates in principle, but we are strongly of the
3 view that those dates should be brought forward by a week as Mr. Rayment suggested.
4 What is critical for us are the deadlines for the skeleton arguments.

5 THE CHAIRMAN: Right.

6 MR. KENNELLY: And it is really my submission on the skeletons that leads me to say that the
7 earlier submissions ought to be done a week earlier. But by way of background – and I
8 shall be brief, I realise the day is drawing to a close – Grid has had our reply and evidence
9 since June, and the Interveners’ evidence since July. The list of issues were actually agreed
10 on 10th July between Ofgem and National Grid, and they have had a very substantial
11 amount of time during which they ought to have been preparing their skeleton argument.
12 As you say, madam, the issue that they have identified relating to the further material from
13 the interveners, it is a small but important point, and there is no reason why the preparation
14 of the skeleton could not have been taking place in parallel. National Grid have significant
15 resources – looking at the confidentiality ring, they have four counsel and five solicitors;
16 there is no justification for suggesting that their drafting of a skeleton argument can only
17 begin after the further submissions have been replied to by Ofgem and the interveners.
18 There is the one further issue that was not raised about unredacted documents. Mr. Turner
19 might say it is necessary for Mr. Rothwell and Mr. Pickering to look at the unredacted
20 documents, and that creates a further delay. But, as we see from Miss Bidwell’s statement,
21 and also from the statement of Mr. Bryan, the lawyers have been doing an extensive trawl
22 of those unredacted documents and ought to have identified the documents which are of
23 particular importance which Mr. Pickering and Mr. Rothwell can look at. Mr. Pickering
24 and Mr. Rothwell are not starting from scratch. That is no justification for delaying the
25 service of their skeleton.

26 Turning to the importance of their skeleton, we have seen repeatedly flagged in the latest
27 stage of the pleadings that Grid say that the skeleton will offer the final and comprehensive
28 synthesis of their case, and their case has been, with respect, confused. It has been difficult
29 to identify which parts of the Notice of Appeal are relevant and irrelevant and which parts
30 require a response or not. So the skeleton will provide us with the final answer. However,
31 unless they withdraw the Notice of Appeal in some way (or parts of it) the Notice of Appeal
32 will still need to be examined by Ofgem for the purposes of our skeleton. If, for example,
33 Grid try and re-characterise parts of the Notice of Appeal in their skeleton, that will need to
34 be addressed. It is a very significant task for us and for the proper conduct of these

1 proceedings it is critical that we get it right the first time. We do not need to come back
2 later with some form of supplementary submission.

3 In terms of the fairness to Ofgem there are two main points. The first is that we require as
4 an absolute minimum three weeks to prepare our skeleton. With respect to the Interveners,
5 in our submission, our skeleton is more important. We are not to be squeezed in order to
6 facilitate the Interveners. Secondly, there is the issue of availability. We have prepared our
7 diaries on the basis of drafting the skeleton argument in September. Then we revised our
8 diaries in order to prepare it in October. Now, we are told that we must have only these last
9 weeks in November in which to prepare our skeleton, and Miss Carss-Frisk, who is leading
10 me, has a hearing in the House of Lords at the very beginning of December, and it is
11 impossible for her to give the critical input, and as you know, madam, it is the input at the
12 very end – I am not saying Silks are not involved at the beginning of the drafting – it is at
13 the very end when their involvement is very important, and we will need Miss Carss-Frisk
14 to be available, and under the proposed timetable she will not be available.

15 The solution, in my submission, is not a radical one, it is to move the skeletons back a week
16 and, if it makes it easier to move the earlier submissions back a week also. Looking at what
17 that does to the timetable and you have before you the various proposals put by the parties,
18 and you see that we have put forward suggestions, Grid have suggestions and then the
19 CMOs have offered an alternative. I will not labour our points I will go straight to the
20 compromise which is put forward by the CMOs, and in that you see that National Grid is to
21 put its skeleton in on 7th November, and we are to put our skeleton in on 28th November.
22 The last date should not be 12th December on the basis of what you, madam, have said.
23 That would be 10th December under my proposal. That is the very latest date on which we
24 can ----

25 THE CHAIRMAN: So you are saying it should be 7th November ----

26 MR. KENNELLY: For National Grid.

27 THE CHAIRMAN: Yes, then for Ofgem.

28 MR. KENNELLY: 28th November, and then 10th December for the Interveners. It gives the
29 Interveners the extra time they say they need. It means Grid is forced to put its skeleton in
30 by the Friday, three days earlier. I could give you detailed reasons why 28th November is
31 already very difficult for us, but ----

32 THE CHAIRMAN: No, I understand your position. And the bundles?

33 MR. KENNELLY: The bundles, madam, we agreed to be done two weeks before Grid's
34 skeleton, but again there is no reason at all why the bundling cannot begin immediately and

1 we can then supplement it with such further material as emerges from the additional
2 evidence in reply – if any. Certainly, from our point of view we are happy to agree to the
3 earlier deadline of the 24th October in order to reply to the further submissions of Grid
4 which we say ought to be done by 17th October for the reasons Mr. Rayment gave.

5 Madam, those are my submissions.

6 THE CHAIRMAN: Thank you very much. (After a pause) I will think further about the
7 skeletons' timescale, but for the moment parties should work on the basis that I will allow
8 until 24th October for the additional submissions, and then 31st October for the response
9 from Ofgem and the Interveners to those submissions, but I will also do my best to
10 accommodate what everyone has said as to the time that they need for their submissions.
11 Now, I need to actually hand down the Draft Ruling.

12 (After a pause) I therefore hand down this Ruling on the admissibility of evidence and
13 disclosure, and it will be followed up in due course, as I intimated earlier, by a draft order
14 which I will circulate amongst the parties with the reasoning as set out in my introductory
15 remarks, and I will obviously take into account the points that have been made in relation to
16 para. 287 and the other issues that were still left unclear this morning.

17 Is there anything else that we need to consider before we finish? Mr. Turner?

18 MR. TURNER: Madam, I am extremely conscious of the time. I did have some brief reply
19 observations on what my learned friends have said. If you guide me as to whether they will
20 be helpful or not I will let you know what those are.

21 THE CHAIRMAN: On which points?

22 MR. TURNER: So far as Miss Smith is concerned her observations on the substance, those
23 paragraphs – 287, 292, 429, and then as to the timetable.

24 THE CHAIRMAN: Well can you be very brief on the substantive points?

25 MR. TURNER: I can; I can be extremely short. In relation to 287 she raised the point that the
26 second part of that paragraph goes on to give the example of UMS and the fact that it has
27 entered profitably where the gas supplier, British Gas has only a 20 per cent share of
28 electricity. Our short submission is that the point is still Ofgem's decision relating to
29 economies in meter replacement work. We produce UMS as an example of successful
30 entry, despite any such putative economies in meter replacement work; it does not touch on
31 the question of maintenance.

32 So far as para.292 is concerned, this was to some extent going back over your opening
33 remarks, what you had already concluded in relation to that, and I say no more about that,

1 that is a point that can be dealt with by the excision of minor wording, but otherwise it does
2 not take matters further.

3 So far as para. 249 is concerned in relation to policy replacement, madam you have the
4 point, we are not advancing a positive case about policy replacement. We should say in
5 relation to evidence in reply, we will exclude the evidence that is responsive to evidence
6 that is excluded. I must say that the table that Miss Smith has put forward is not entirely
7 uncontroversial and I would not want that to be thought ----

8 THE CHAIRMAN: Well it would be helpful if the parties could liaise and send in the relevant
9 paragraphs because obviously that will need to be included in the order.

10 MR. TURNER: Yes, she referred to a part of Mr. Way's statement, and I am happy to accept
11 there are parts of that that may well be responsive; however, that does not affect the point
12 that in the relevant paragraph with the reduction in the policy replacements there are clear
13 parts of the Notice of Appeal that make the very response to Ofgem's Decision which I had
14 indicated was the thrust of the point.

15 THE CHAIRMAN: Well the evidence must follow the pleadings, not vice-versa.

16 MR. TURNER: Yes, the Notice of Appeal has, for example, para.710 and following in relation to
17 that. So far as the timetable is concerned, I hear everything my learned friends say. So far
18 as National Grid is concerned, we would find it extremely difficult to move anything
19 forward beyond 10th November. 10th November is a Monday, ultimately after what you
20 have heard from Mr. Kennelly we were talking about the difference between that and 7th
21 November, which is a Friday. So as between the close on Friday and the Monday it makes
22 a lot of difference to us potentially – although I am not looking forward to that weekend – it
23 will not make, in my submission, a great deal of difference to Ofgem, and I would urge on
24 the Tribunal – I am not going to go into all of the points that Mr. Kennelly has made about
25 fault ----

26 THE CHAIRMAN: No, I think I have heard everybody's submissions on timetable, and I will
27 make up my mind.

28 MR. TURNER: I am obliged. One matter relating to bundles, my solicitor drew to my attention
29 that although we had said "two weeks prior to the skeleton being produced" that was on an
30 assumption which may now not be safe. He would ask that any date for bundles not be
31 timetabled for earlier than the end of October.

32 Madam, those are our submissions.

33 THE CHAIRMAN: Thank you very much, we really must close now. Thank you to everybody
34 for their submissions both written and oral. I will produce a reasoned order as soon as

1 | possible, but I hope I have given enough indication as to what the timetable is going to be
2 | for the parties to crack on in the meantime. Thank you very much.

3 |
