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**IN THE COMPETITION**  
**APPEAL TRIBUNAL**

Case No: 1754/12/13/25

Salisbury Square House  
8 Salisbury Square  
London EC4Y 8AP

Wednesday 28<sup>th</sup> January 2026

Before:

James Wolffe KC

(Sitting as a Tribunal in England and Wales)

BETWEEN:

**Zenobē Energy Limited**

**Applicant**

And

**Gas and Electricity Markets Authority**

**Respondent**

**A P P E A R A N C E S**

Nicholas Gibson on behalf of Zenobē Energy Limited (Instructed by Norton Rose Fulbright)

Joseph Barrett KC and Rupert Paines on behalf of Gas and Electricity Markets Authority

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Wednesday, 28 January 2026

(10.30 am)

### Housekeeping

**JUDGE WOLFFE:** Good morning, Mr Gibson. I think, before we start, I should just give the warning that those who are joining us on livestream on the website should be advised that an official recording is being made and an authorised transcript will be produced.

It is strictly prohibited for anyone else to make an unauthorised recording, whether audio or visual, of the proceedings and breach of that provision will be punishable as a contempt of court.

Mr Gibson, good morning.

**MR GIBSON:** Yes. As you say, I am Mr Gibson. I appear for the applicant Zenobē. Mr Barrett KC and Mr Paines appear for the respondent GEMA. Mr Chim appears for the first proposed intervenor, Gresham House; Mr Halliday appears for the second proposed intervenor, the Secretary of State. Mr Ashley appears for the third proposed intervenor, NatPower. You'll have seen by email last Friday, the fourth proposed intervenor, the BHA, informed the registry that it would not be represented here today. For the avoidance of doubt I'm referring to the intervenors as the first to fourth because that's the chronological order in which they filed their applications. I know that's apparently a contentious issue but that was how the bundle was prepared as well, with the agreement of GEMA. So hopefully that contention may dissipate during the course of the hearing.

**JUDGE WOLFFE:** That's very helpful. I don't want to take you off your stride, Mr Gibson, and I thank you for agreeing an agenda. I thought before we did anything else, I should make a determination on forum because that has substantive consequences.

1 **MR GIBSON:** That was my first order of the day in fact, sir, yes.

2 **JUDGE WOLFFE:** Good. Then once we've done that, I would like, just with the help  
3 of the parties, to make sure that I've got clarity about what the issues in the  
4 proceedings are and that may be of assistance when we come to consider the  
5 interventions.

6 So I understand it's a matter of agreement that the forum is England and Wales.  
7 Because that has substantive consequences, Mr Gibson, I think I would like just to  
8 understand the underlying analysis upon which that flows.

9 **MR GIBSON:** The basis on which we propose England and Wales?

10 **JUDGE WOLFFE:** Yes.

11 **MR GIBSON:** That's set out most conveniently perhaps, if you turn up our notice of  
12 appeal, which is in bundle B, tab 1. And forum, if I recall correctly, is dealt with at  
13 page 2 of -- so it's page 5 of the bundle, sir.

14 **JUDGE WOLFFE:** I'm in bundle --

15 **MR GIBSON:** Bundle B, tab 1.

16 **JUDGE WOLFFE:** Bundle B, tab 1.

17 **MR GIBSON:** Which is the notice of appeal. Page 5 of the tabulated numbering, 2 of  
18 the internal referencing. Paragraph 7. We set out there in outline the facts that we  
19 say mean that England and Wales is the appropriate forum for these proceedings.

20 **JUDGE WOLFFE:** Just so I'm clear, those who you represent have facilities in both  
21 Scotland and England and Wales.

22 **MR GIBSON:** Yes, that's my understanding. People will shout at me if I'm getting  
23 something wrong.

24 **JUDGE WOLFFE:** My impression from the pleadings is rather more in Scotland than  
25 England than Wales?

26 **MR GIBSON:** Yes, sir, I think that would be fair to say, yes.

1 **JUDGE WOLFFE:** Ofgem, clearly its decisions have application across the whole of  
2 Great Britain. I think Ofgem, I'm right in understanding, has offices in London,  
3 Edinburgh and Cardiff --

4 **MR BARRETT:** Glasgow I believe also.

5 **JUDGE WOLFFE:** Sorry?

6 **MR BARRETT:** Glasgow I believe also.

7 **JUDGE WOLFFE:** Glasgow, sorry. It may be Glasgow rather than Edinburgh. But  
8 the principal office in London. Mr Gibson, your client's principal office is also in  
9 London.

10 **MR GIBSON:** That's correct, sir.

11 **JUDGE WOLFFE:** So in circumstances where in a sense the parties have interests,  
12 the parties' interests encompass both Great Britain jurisdictions, you say the  
13 tiebreaker is the principal place of business of the two organisations.

14 **MR GIBSON:** Yes, sir. And the primary consequence of that is procedural. I think  
15 the substantive content of obviously what you decide is going to have wider application  
16 but we're focused more on how we're going to deal with things procedurally. I suggest  
17 it's probably a greater affinity for those in the room with English procedure. It may well  
18 have swung well -- to be frank. Those are the outline points, sir.

19 **JUDGE WOLFFE:** I think the reason I'm keen that I make a determination at this point  
20 and that I understand the analysis and can endorse it, is that when we come to relief,  
21 the statute makes different provision for proceedings in Scotland and proceedings in  
22 England and Wales and that may or may not have any practical consequence but  
23 I think it's important that we know which set of statute provisions we're operating  
24 under. But, as I understand it correctly, what your position is, the tiebreaker is the  
25 principal place of business of the two organisations.

26 **MR GIBSON:** Yes, sir and the practical consequence of where we are and the counsel

1 representing, their familiarity with the law I would say is another important factor. But  
2 you're right, the tiebreaker fundamentally is the principal place of business.

3 **JUDGE WOLFFE:** Mr Barrett, do you have anything you wish to add on this point?

4 **MR BARRETT:** Not unless it's helpful, my Lord. We regard that as the most relevant  
5 consideration in the circumstances. We don't disagree with what my learned friend  
6 said about that.

7 **JUDGE WOLFFE:** No, that's helpful. I'm content to endorse the parties' agreement  
8 that these should be treated as proceedings in England and Wales and we can then  
9 endeavour to follow through on the consequences of that in due course.

10  
11 **Submissions by MR GIBSON**

12 **MR GIBSON:** I'm grateful, sir.

13 I was going to touch on a few housekeeping matters and then touch on the agenda  
14 which we've obviously updated a little there.

15 Can I confirm, sir, whether in soft or hard copy, you have with you five bundles in total?

16 In fact there may be six now actually. Just to run through them, what they are. There's  
17 bundle A, which is key documents and skeletons. A relatively slimline volume.

18 Bundle B is pleadings and witness statements.

19 Bundle C is correspondence. Just tell me if I'm going too fast, sir.

20 Bundle D is authorities. The additional bundles, the bonus balls, there was a request

21 that we provide an unredacted, ie confidential, copy of bundle B, which I think you  
22 have, and there's also -- I hope you received from NatPower an authorities bundle.

23 We received it around about 9 o'clock last night. Apologies, we hadn't appreciated  
24 they were going to prepare their own bundle otherwise we would have suggested

25 merging them. There are a few duplicates that I can explain to you and I propose that  
26 where we deal with duplicates, we deal with the joint authorities version of those

1 authorities to avoid confusion. Do you want me to tell you what the duplicates are or  
2 shall we deal with that when it arises?

3 **JUDGE WOLFFE:** We can deal with that as and when it comes.

4 **MR GIBSON:** Very good, sir. The only other document I hope has made its way to  
5 you is, I have prepared a table comparing the rival or at least differing timetabling  
6 directions proposals, a multi-colour affair.

7 Yes, indeed, sir, that's the one.

8 So I think you have everything you need. Have you had an opportunity to undertake  
9 any of the pre-reading that was outlined?

10 **JUDGE WOLFFE:** I have. I think you can assume that I've read into the case.

11 **MR GIBSON:** Thank you, sir. Are you otherwise content to deal with the agenda  
12 items in the order they are set out on the agenda or is there anything else you wanted  
13 to comment on in that regard? The agenda is tab 1 of bundle A.

14 **JUDGE WOLFFE:** Yes, I'm entirely content that we proceed in that way. But I think  
15 before we deal with the intervention requests, I wonder if I could just, with your help  
16 and Mr Barrett's help, make sure that I have clarity on the issues that arise. I am  
17 starting with, in thinking about the issues, starting with your notice of appeal --

18 **MR GIBSON:** Yes, sir.

19 **JUDGE WOLFFE:** -- and the grounds upon which you bring the appeal which start  
20 at -- well, they're in part D of that document, at page 22 of volume D.

21 If I could take it fairly shortly, but I'm really looking for either confirmation or correction,  
22 if I've misunderstood anything. On grounds 1 to 4, as I understand it, Ofgem accepts  
23 that it didn't consider the subsidy control principles or the energy and environment  
24 principles and it accepts that it didn't refer the scheme to the CMA, and Ofgem says  
25 that those obligations don't apply for two headline reasons.

26 First of all, it says there's no subsidy scheme and it says there's no subsidy scheme

1 first of all because it says that what has been promulgated doesn't meet the statutory  
2 definition of a scheme as explained in the *Durham* case, and you no doubt will dispute  
3 that.

4 Secondly, it says that -- Ofgem says that the arrangements don't provide support to  
5 be provided directly or indirectly from state resources. Again, no doubt that will be  
6 a matter for debate in due course.

7 **MR GIBSON:** You can be assured of that, sir.

8 **JUDGE WOLFFE:** But taking grounds 1 to 4, is that your understanding of the sort of  
9 head structure of the argument?

10 **MR GIBSON:** Yes. I think this is very productive and helpful. I find it quite helpful if  
11 you turn up the table of contents to our notice of appeal at page 2 of that bundle. The  
12 way in which I structured this, under the grounds of review, you'll see that I've  
13 attempted to break down each of the elements of each of the grounds of challenge  
14 into the constituent elements. So you can always tick and cross where we are. What  
15 one sees is, in respect of all of those four grounds you outlined, and indeed whilst it's  
16 not specifically said, ground 6 as well, there's all kinds of arguments about whether  
17 ground 6 has any merit but the real view is it is also, if you like, consequential upon  
18 whether or not we are dealing with the subsidy scheme at all.

19 **JUDGE WOLFFE:** Yes.

20 **MR GIBSON:** So to that extent that too falls within that. So the contested elements  
21 are all the first of those under each one. So D1.1, D2.1, D3.1, D4.1, D6.1, all turn on  
22 those questions you've outlined about subsidy, whether it's a subsidy. Specifically, if  
23 you look at the limbs under D1, at the bottom of page 2 and over to page 3, it's only  
24 that limb A, the public resources limb that's contested.

25 **JUDGE WOLFFE:** Yes. It's the public resources limb and the question of whether it  
26 is a scheme as described in --

1 **MR GIBSON:** And, importantly, and no doubt my learned friend will come on to this,  
2 importantly the question about whether Schedule 3 bites --

3 **JUDGE WOLFFE:** Well, I was going to come onto that in the second limb of the  
4 defence because if I understand the structure of the debate, if I were with you, or the  
5 Tribunal ultimately in due course were with you on those points, Mr Barrett says,  
6 Ofgem says, that in any event the scheme is protected by the Act when it comes into  
7 force. I'll maybe ask Mr Barrett some questions about that in a moment. But, as  
8 I understand it, your response to that, at a high level, at least at this stage, is that you  
9 say there's a question of interpretation of the Act and whether it's properly to be  
10 regarded as creating a power or a duty.

11 And would I also be right to understand that you raise a question of whether the Act in  
12 effect applies retrospectively to protect the scheme?

13 **MR GIBSON:** Yes.

14 **JUDGE WOLFFE:** Which you say is already in force.

15 **MR GIBSON:** Indeed, sir. It might be convenient just to turn up the relevant provision  
16 in reply at tab 8 of the same bundle, B/8, to page 383 to 384.

17 So the second point at paragraph 29.2 is the one you touched on there, the statutory  
18 interpretation point, if I can put it that way.

19 We say section 10P properly construed is actually a legal power for the purposes of  
20 Schedule 3, paragraph 4(b), and obviously my learned friend takes the opposite view  
21 in relation -- and leans on paragraph 4(a). So that's one area of debate.

22 The reason why we've logically put it first, paragraph 29.1, is that we don't even get  
23 there because there's a chronological problem. The way you put it to me, sir, is  
24 actually really important. If you're with us on the question about whether there's  
25 a subsidy and whether that subsidy was promulgated through a scheme, then the  
26 relevant decision is the decision taken on 23 September. There's no debate, as far as



1 I am aware, that the relevant provisions of section 10P were not in force at that time.  
2 Indeed they're still not in force. That's not until 18 February, the Act having passed on  
3 18 December last year.

4 Secondly, I do not understand there to be any debate that section 10P does not  
5 operate retrospectively. There's never been any suggestion it does and on the face  
6 of the statute there's no suggestion it does.

7 So we say, and I'll come on to this to elaborate in more detail but our key point on the  
8 primary issue is it's a damp squib. It goes nowhere because it doesn't materially add  
9 to the first two issues. It's been put first in the list but if I may say, the way you  
10 approached it today, sir, is actually the most logical way to take it. The first question  
11 is, are we dealing with the subsidy and that turns on the limb A, public resources point,  
12 because that's the only one that's disputed. If we are, then they say, in the alternative,  
13 even if it is a subsidy, it's not a scheme. If we win on that, then we're dealing with  
14 a decision that was taken on 23 September before section 10P was even passed, let  
15 alone entered into force. So section 10P is an irrelevance. That's our primary point  
16 and that really disposes of the preliminary issue altogether we say, sir.

17 **JUDGE WOLFFE:** That's helpful. I mean perhaps this hearing is not to enhance the  
18 arguments.

19 **MR GIBSON:** No, I understand.

20 **JUDGE WOLFFE:** I just want to make sure I've got the structure of the debate. I think  
21 we put ground 5 to one side, there's an issue about the Tribunal's jurisdiction. If the  
22 Tribunal has jurisdiction, then it's an issue about vires. Those are legal arguments.  
23 Just looking at the debate, the arguments that we've identified so far --

24 **MR GIBSON:** Could I just, sorry to interrupt you, sir. Just on that point, obviously  
25 there is a big legal debate on those two issues, both procedural -- jurisdictional and  
26 actually substantive content. There is actually a factual question as well which goes

1 to the disclosure we received under the Environmental Regulations indicating that,  
2 internally, in January 2025, GEMA had identified a key risk as to whether or not we  
3 say -- it appears a key risk as to whether or not they had power to take the action they  
4 wanted to. And then, two months later, we see legislation coming in to bring that power  
5 in. We haven't had any disclosure on that. We don't yet understand it. So there is  
6 a factual question to be bottomed out there too, sir.

7 **JUDGE WOLFFE:** That's helpful to understand.

8 Just in terms of the three points that are the answers to ground 1, 2, 3, 4 and 6, on the  
9 state resources issue, what the Tribunal -- that really depends on a correct  
10 understanding of the way in which support is provided under the scheme, as I read it,  
11 but correct me if you think it different.

12 **MR GIBSON:** Yes, it can require a very deep -- yes, we've set out in some detail, I'm  
13 not suggesting you would have dealt with all 108 pages of Palmer 1 and the two and  
14 half thousand pages of exhibits but a part of that goes into some detail about how the  
15 scheme will operate by reference to the way the primary mechanism they use, which  
16 is the BSUoS recovery mechanism, works, and of course it will also involve  
17 a comparison with the way in which similar mechanisms work in the context of the  
18 capacity market and the CFD scheme, both of which are recognised as being  
19 subsidies. We say that the analogy there is also telling.

20 **JUDGE WOLFFE:** And on the question of whether what's been promulgated is  
21 a subsidy scheme applying statutory definitions, the Tribunal will resolve that by  
22 getting an understanding of the scheme and comparing it with the requirements of the  
23 statute. I suppose what I'm getting at, Mr Gibson, this is why I feel it's important to try  
24 to unpick this, is in due course I'm going to have to consider to what extent what the  
25 various intervenors have to add is actually of any --

26 **MR GIBSON:** Sir, you have anticipated --

1 **JUDGE WOLFFE:** Any volumes of sufficient material of assistance to the Tribunal on  
2 the issues that the Tribunal is going to have to address and in order to resolve that  
3 I think I need just to make sure I've got a reasonable, very high-level understanding of  
4 the way in which the issues are going to be dealt with.

5 **MR GIBSON:** If I may say so, sir, this is extremely important to understand and exactly  
6 the approach that I would encourage. The only point I can say in relation to the  
7 analysis of scheme is that we say what one needs to look at is the decision-making  
8 process as it's flowed through, from when Ofgem first became involved and the various  
9 different decisions that have been taken and precisely how much was decided and  
10 how much was not decided at each point. The amount that's been left over, what point  
11 you get sort of the crystallisation of sufficient clarity, we say, that the scheme was  
12 crystallised with sufficient clarity in September 2025. My learned friend, as  
13 I understand it, says, no, no, there was too much discretion at that point, it couldn't  
14 have been the scheme. So we'll need to look at what the law says but also need to  
15 analyse at each stage what is happening. So there is a sort of chronological  
16 continuum and a factual analysis across the piece that we need to undertake.

17 But the key point you're going towards, sir, is there is I think a legitimate question as  
18 to what the intervenors can add, given how the points have crystallised now.

19 I should say, in fairness to the intervenors that intervened within the deadline, they did  
20 so before 5 December, which is the point at which the defence came through and  
21 crystallised and in fact left a lot of the issues that could have been in dispute, where  
22 the intervenors may have had a lot more to say, such that they were no longer disputed  
23 issues. In that world, I can see that if one wants to take a more -- you know, a greater  
24 degree of scrutiny, which I think is a legitimate approach to take, there is a question  
25 as to what any of them really add in that context.

26 **JUDGE WOLFFE:** That's very helpful. Then just looking at Mr Barrett's point relying

1 on the Act, that essentially turns, as I read it but correct me if you take a different view,  
2 is that that really depends on the question of statutory interpretation, power of duty  
3 point, and a legal discussion about the impact, if any, of the Act on what has gone  
4 before.

5 **MR GIBSON:** Subject to two important provisos, sir. The first is that, the point I've  
6 already made, that there is a factual decision we're supposed to be looking at. So  
7 I don't think one can actually divorce the first reason, which logically would come third,  
8 from the second reason, over which decision we are looking at. So in some ways the  
9 first reason, which we think should come third, doesn't actually make any sense  
10 without that. So the two are fused. So there's a factual question there.

11 Even leaving that to one side, imagine that we were in a world where actually the Act  
12 had been in force as at 23 September, so we were looking at the second of my points  
13 in reply, paragraph 29(2), about the construction of legal power versus legal duty. We  
14 say actually, in order to understand what actually section 10P means, it's important to  
15 look very closely at what the discretion that was left for Ofgem is as being informative  
16 of what it means, with all these references to specification and discretion within the  
17 body of section 10P. We say that is assisted by a fine-grained factual analysis of the  
18 content of the decision, the way in which the design of the scheme has been  
19 promulgated.

20 So we think there's a factual dimension there as well.

21 **JUDGE WOLFFE:** Again, I'm perhaps thinking about this in the context of the  
22 applications to intervene.

23 **MR GIBSON:** In relation to intervention, sir, yes, I agree.

24 **JUDGE WOLFFE:** Whether on that issue there's really anything that any of the  
25 intervenors can add that the two parties are not well able to articulate.

26 **MR GIBSON:** On that I'm inclined to agree, sir. The one point, being candid, as one

1 has to in this context, we're looking here at the issues of liability. Of course there is  
2 also a question of relief. Now, I've got things I want to say about that.

3 **JUDGE WOLFFE:** I was --

4 **MR GIBSON:** I apologise, sir.

5 **JUDGE WOLFFE:** Not at all. I was about to come to relief because that's the  
6 substantive issue. When we come to relief, Mr Barrett deals with that in part 5 of his  
7 defence and he points me to the provision, now that we're clear that these are England  
8 and Wales proceedings, to the effect that the Tribunal has the power to refuse relief if,  
9 shortly, it's likely to cause substantial hardship to or substantially prejudice the rights  
10 of any person or be detrimental to good administration. One of the questions that  
11 I may want to understand is whether, that being put in issue by Ofgem, whether that's  
12 where the interest of the intervenors actually may be able to add something and that  
13 may be the focus for debate on the interventions.

14 **MR GIBSON:** I think that would be their best shot of showing where they had a  
15 relevant interest, speaking candidly.

16 There is, I think, a very important question about the way in which GEMA has raised  
17 this point on relief is actually really a question, properly understood, of relief for the  
18 Tribunal to determine. As against precisely the task that GEMA should be undertaking  
19 in balancing the interests of the whole market and undertaking, we say, the fine-  
20 grained analysis of the impact on SDES, on consumers, and I think, precisely that  
21 we've been urging on them, both in these proceedings and in judicial review  
22 proceedings and in lengthy correspondence leading to both and we say it would be an  
23 odd thing if the Tribunal were to essentially usurp that role that GEMA should really be  
24 taking for itself, by looking at relief, and particularly if it were to do so on a basis of  
25 self-selecting sample of those people who had chosen to intervene in these  
26 proceedings. Which by nature is not a representative sample of everyone.

1 **JUDGE WOLFFE:** And there might be issues as to whether an applicant to a subsidy  
2 scheme, which on the hypothesis we're considering is found to be unlawful, you know,  
3 whether it's a relevant prejudice. I suppose the question at this stage, because I'm not  
4 going to pre-judge any of the interesting questions that might or might not come into  
5 focus at a later point, is whether there's relevant and material assistance to be  
6 obtained at that point in the analysis. I'll hear you once we've heard from the various  
7 applicants to intervene. At this stage I'm just keen to make sure I've understood, as it  
8 were, the structure of the issues, as you see it, at a very high level.

9 **MR GIBSON:** Yes, sir. I understand the way this has been approached and the  
10 purpose of it. For those purposes you have outlined things very nicely, if I may say  
11 so.

12 **JUDGE WOLFFE:** No, that's helpful.

13 Anything else you want to say at this very high level before I ask Mr Barrett whether  
14 he wishes to comment on this kind of discussion of what the issues are?

15 **MR GIBSON:** No, I don't think so. I think in terms of the outline of the issues for this  
16 purpose that is sufficient from my perspective. I'll just double-check, if I may turn my  
17 back.

18 **JUDGE WOLFFE:** Of course.

19 **MR GIBSON:** Thank you, sir.

20 **JUDGE WOLFFE:** Thank you Mr Gibson.

21 Mr Barrett, you've heard the discussion I've had with Mr Gibson. At this point really all  
22 I'm trying to do is make sure I have clearly in my mind what the issues are between  
23 the parties, the extent to which those are dependent on issues of fact and law in which  
24 the intervenors are likely to be able to provide anything additional.

25  
26 **Submissions by MR BARRETT**

1 **MR BARRETT:** I would have thought my lord, I respectfully agree that that is  
2 obviously the starting point on the application.

3 My Lord, I would broadly agree with the comments that I've heard you make about the  
4 relevant issues that arise in the proceedings. I wonder, though, could I just give you  
5 my summary of those issues --

6 **JUDGE WOLFFE:** Of course.

7 **MR BARRETT:** -- and just make some very short observations. There are some  
8 points of difference between the parties as to what the correct answer is.

9 **JUDGE WOLFFE:** Of course. And at this point, you understand, I'm just interested  
10 in understanding where the points of difference are and where the points of agreement  
11 are, rather than having any view as to where we will end up.

12 **MR BARRETT:** So, as my Lord has identified, the crux of the case, certainly on the  
13 SCA, the subsidy grounds are the three grounds of defence which we advance to  
14 resist the appeal. As my Lord has identified, two of those are I think very  
15 straightforward. Does the arrangement use public resources? That, my Lord, is  
16 essentially a question of law, you'll be applying the statutory definitions in Section 2  
17 and you'll be looking at the terms of Section 26 of the Act, which actually sets out what  
18 the arrangements for the transfer of resources must be. You'll also be looking,  
19 potentially at least, at the practical arrangements whereby that is implemented. So  
20 there will be some evidence about that. But principally, a point of law looking at the  
21 terms of Section 2 of the Act, in my respectful submission.

22 **JUDGE WOLFFE:** Yes, and in terms of evidence, really looking to the documents  
23 that set up the scheme, presumably supplemented by a witness statement potentially.

24 **MR BARRETT:** Precisely so in my respectful submission, my Lord.

25 The second point, are the September publications a subsidy scheme? Again, you will  
26 be construing applying Section 10 of the Act principally and you will be doing that, in

1 my respectful submission, by reference to the content of those September  
2 publications, those written documents. You'll be asking yourself, given the terms, the  
3 content of these written documents, are they or are they not within the statutory  
4 definition of a subsidy scheme? That's the question for the Tribunal.

5 The third issue, my Lord, Section 26 of the Planning and Infrastructure Act, that's the  
6 area where, as my Lord will have seen in the papers, there's a difference of approach  
7 between the parties and people characterise things in different ways.

8 Just to make clear if I can our position on that, my Lord. Firstly, we say that in terms  
9 of the substantive debate between the parties about the application of Section 26, the  
10 only substantive issue about its construction is whether it's a duty or a power. You'll  
11 have seen that in the pleadings. That is the point of difference.

12 We say it's surprising that it is suggested it's a power in circumstances where it says  
13 "must", but no doubt in due course my learned friend will have a number of ingenious  
14 reasons as to why that's nevertheless so.

15 There's then the timing point, my Lord. Now, in relation to that, the issue is that  
16 the September publications were published in September. My learned friend, quite  
17 rightly, says that Section 26 wasn't in force at that time. We don't dispute that. We  
18 also don't dispute or we don't positively contend that Section 26 is retroactive in its  
19 effect. What we say, my Lord, twofold; firstly as you know we say that actually on  
20 proper analysis a subsidy decision was not made in September. It will be made, to  
21 the extent it would be made hypothetically, after Section 26 came into force. We then  
22 say, secondly, even if we were wrong about that, even if we were completely wrong,  
23 even if this was a subsidy scheme and we unknowingly, unintentionally, made  
24 a subsidy decision in September, we say we're going to make a fresh decision after  
25 Section 26 is in force, to adopt the work we've done to date as the statutory scheme  
26 we're obliged to provide by Section 26. We say that renders any complaint and judicial



1 review about any September decision entirely academic, because there's going to be  
2 a decision post coming into force whereby we adopt that work pursuant to Section 26.

3 I hope that's clear, my Lord. That's how we put the case. You will decide in due course  
4 whether we are right or wrong about that but I hope it's clear that that's our position.

5 **JUDGE WOLFFE:** Yes. Just on the point of -- the second point, do I take it from the  
6 way you've put it that you, in order to run that argument, a fresh decision or a decision  
7 under the Act will be a necessary part of the case?

8 **MR BARRETT:** Yes.

9 **JUDGE WOLFFE:** So we'll no doubt come onto this in -- you know, amendment, is  
10 that something that in due course you will be seeking leave to amend into your  
11 pleadings?

12 **MR BARRETT:** That's precisely what the amendment we've already made deals with,  
13 my Lord.

14 **JUDGE WOLFFE:** Well, I'm more interested in -- you know, at the moment you say  
15 you intend to make a decision.

16 **MR BARRETT:** Yes.

17 **JUDGE WOLFFE:** Until there is such a decision, if I understand the argument, until  
18 there is such a decision, the argument you've outlined doesn't really get off the ground.

19 **MR BARRETT:** Precisely. There's a timing point. Sorry, my Lord, I didn't follow your  
20 observation initially. That's absolutely right and we have made clear in  
21 correspondence that when that decision is made, we will communicate it and it will be  
22 made clear to the other party. As my Lord says, we will amend when the decision has  
23 been made to reflect the decision. We will apply to amend to introduce that decision,  
24 yes.

25 **JUDGE WOLFFE:** Okay. Is there anything else you want to say on the question of  
26 relief?

1 **MR BARRETT:** In relation to relief, my Lord, we say, very simply, that's plainly an  
2 issue in respect of which we -- in our analysis, the proposed intervenors do indeed  
3 have a separate interest and do have a good deal of relevant evidence to give. The  
4 core of the court's analysis under that head will be looking at the practical implications  
5 of the decision to grant quashing relief and these are the parties who would be most  
6 directly significantly affected by such relief.

7 **JUDGE WOLFFE:** Perhaps I may well ask you the question at this stage, the kind of  
8 obvious question here, is why the points in relation to prejudice to third parties and  
9 good administration can't be perfectly well articulated and advanced by you on behalf  
10 of Ofgem, and to the extent that you need a without prejudice discussion about -- at  
11 what level one looks at this, whether one looks at it at a fairly high level or looks at  
12 numbers and figures, is there any good reason why Ofgem couldn't in a sense ingather  
13 the relevant information and put it before the Tribunal itself, if necessary with the  
14 assistance of the intervenors and potentially other third parties of whom you are aware  
15 and others may not be?

16 **MR BARRETT:** Yes, I think there are a few factors, my Lord, I would draw attention  
17 to. The first one is, in relation to the ability to properly advance and articulate that  
18 evidence, I would respectfully submit that that is much better done by the parties  
19 whose businesses, whose interests are actually directly impacted. No doubt there  
20 would be an exercise that could be conducted of us seeking to do that second-hand  
21 but, speaking for myself, my Lord, I would say, given the magnitude of what you're  
22 talking about here, it would be important and fair that these parties were given the  
23 opportunity to do that themselves in the terms that they would choose and not have it  
24 filtered through Ofgem.

25 There's also a second point, my Lord, which is a practical point. As you will know from  
26 the papers, the process of assessing applications is currently ongoing. On behalf of

1 my client, we would feel that we need to be very careful, if I could use that word, in  
2 close engagement with parties who are participating in that ongoing process for the  
3 sort of purpose that my Lord is referring to. I'm not saying, my Lord, that I'm certain  
4 it's impossible but certainly it would be an exercise that we would feel would need to  
5 be handled with great care, given that ongoing process.

6 **JUDGE WOLFFE:** Thank you, that's helpful. I'll come back and give the parties  
7 a chance to make any observations they wish to make.

8 Yes, I've heard --

9 **MR BARRETT:** Can I make a final point on this, my Lord, before I sit down? In  
10 relation to the intervenors, there is another aspect of the case and the evidence that's  
11 in the case that is not entirely straightforward. There's a good deal of evidence and  
12 submission from the claimant which we say, on proper analysis, is not relevant to the  
13 issues in the case. It's prejudice or it's seeking to put a particular spin on things. We  
14 say that actually, for the reasons I've sought to explain, really at the heart of this case  
15 the Tribunal is interpreting and applying a small number of statutory provisions to  
16 a relatively small number of published documents. That's really what this case is  
17 about. But there is an issue, in my respectful submission, that arises from the way the  
18 claimant has advanced its case.

19 Just to give you an example, there's a good deal of evidence in Mr Palmer's witness  
20 statement where he suggests that those who have applied in the scheme aren't  
21 necessarily serious about applying and they may just be maintaining a holding  
22 position, hedging their bets. Now, I would say that's really neither here nor there and  
23 is really not admissible evidence in this case. But if those sorts of things are being  
24 said and they're in evidence, speaking for myself I can well understand why other  
25 parties, who don't have the same position as the claimant, may strongly feel that they  
26 may need to and should be able to answer that sort of evidence. I just wanted to

1 mention that, that is a bit of a wrinkle, in my respectful submission, as to the position  
2 we're in.

3 **JUDGE WOLFFE:** Thank you.

4 Mr Gibson.

5 **MR GIBSON:** I'm conscious we don't want to spend all day discussing this but just  
6 very briefly on that point. I won't take points that we can deal with later about the  
7 pleadings and what have you, because they can really be dealt with later. Just on that  
8 point about the facts. You'll appreciate that at the time Mr Palmer's witness statement  
9 was prepared, we were putting in evidence to support the full gamut of all the elements  
10 of the claims that we were setting out. Obviously, the position that Mr Barrett is talking  
11 about is the position after his client has filed its defence, when it has chosen which  
12 issues it wants to dispute and to that extent some issues, without prejudice to actually  
13 thinking about this carefully, it may be that some issues, some factual matters are no  
14 longer extant. To that extent, it doesn't render the evidence inadmissible. It is still  
15 admissible, it is still relevant to issues that are not disputed, in fact if anything it has  
16 proven that the issue was indisputable. So we do rather cavil with that.

17 The other thing that is important is, for the avoidance of doubt, we don't accept the  
18 presentation of the issues that our remaining dispute has been narrow legal issues  
19 which don't require any factual analysis. I've already made my submissions on that  
20 but I think it's very important to put down a marker because what that is trailing is the  
21 possibility that there will be virtually no candour even when they get round to eventually  
22 providing candour in due course. We will take great exception to that. So I just want  
23 to put a marker down.

24 **JUDGE WOLFFE:** Thank you, Mr Gibson, that's helpful.

25 Okay, Mr Chim, please. You're here for --

**Submissions by MR CHIM**

**MR CHIM:** Gresham House.

**JUDGE WOLFFE:** -- Gresham House, that's right. You've heard the discussion and you've heard the areas that I'm interested in exploring. Obviously -- I'm open to persuasion if you take issue with the preliminary observations that I've made. I suppose perhaps a good place to start is your written application.

**MR CHIM:** Yes, bundle A, tab 2.

**JUDGE WOLFFE:** Sorry?

**MR CHIM:** It is in bundle A, tab 2.

**JUDGE WOLFFE:** Thank you, that's very helpful.

If we think about first of all the substantive issues as opposed to questions of relief, I suppose --

**MR CHIM:** Perhaps it would assist the Tribunal by saying that, having seen the issues being crystallised, especially after this morning, our position is that we would not make any submissions or adduce any evidence in relation to the issue of liability. We maintain our position that we can add value to the issue of relief.

**JUDGE WOLFFE:** Well, that's very helpful.

I'm thinking about the issue of relief from the perspective of Gresham -- am I right that Gresham is a party that has put in applications --

**MR CHIM:** Applications, yes.

**JUDGE WOLFFE:** -- but has concerns of its own about the scheme?

**MR CHIM:** Yes.

**JUDGE WOLFFE:** It's not itself challenging, you know -- brought proceedings to challenge the scheme, it simply wants to intervene in these proceedings?

**MR CHIM:** Yes.

**JUDGE WOLFFE:** Perhaps you could just crystallise for me, at a reasonably high

1 level, what it is that Gresham would wish to put forward in relation to the issue of relief?

2 **MR CHIM:** Right. Just let me start with taking the Tribunal to the witness statement  
3 of Mr Tom Palmer, which is in bundle B, tab 6. In particular, paragraph 272, on  
4 page 280. So in that paragraph, which we say is important in determining how the  
5 Tribunal would exercise its discretion on relief, our position is that --

6 **JUDGE WOLFFE:** Sorry, can you remind me of the paragraph number?

7 **MR CHIM:** Paragraph 272.

8 **JUDGE WOLFFE:** 272, thank you.

9 **MR CHIM:** On page 280.

10 So we say that this paragraph is important in determining how the problem will exercise  
11 its discretion in relation to relief. And Gresham or GHES, is in a position to provide  
12 additional assistance in respect of the following items. Firstly, we'll be able to explain  
13 why GHES felt obliged to make applications under the C&F scheme, despite its  
14 concern that the design of the scheme is deeply flawed and will cost UK consumers  
15 dearly. That's the first point.

16 Secondly, we can provide assistance in the sense that we can explain how the BESS  
17 assets can now be deployed as one of the viable LDES technologies.

18 Thirdly, we can elaborate on the points that a commercial market has been established  
19 for the floor and tow arrangement in off-take arrangements, based on GHES' own  
20 experience. That is the points mentioned in that particular paragraph of the witness  
21 statement. We would be able to also explain the anticipated impact of the scheme on  
22 GHES' business. These are all, we say, relevant to the issue of relief which have not  
23 been adequately covered by Zenobē.

24 Importantly, may I also take the Tribunal to Ofgem's skeleton, which is in bundle A,  
25 tab 18. In particular paragraph 14, subparagraph 3 on page 150. So Ofgem's position  
26 in that paragraph is that NatPower has ten of the 73 LDES projects that are currently

1 in the project assessment stage. The Tribunal and Ofgem knows the number of LDES  
2 projects that GHES has. It is in the unredacted version of GHES's intervention request  
3 and the confidential schedule. I'm not in a position to disclose the number but I trust  
4 that the Tribunal and Ofgem would agree with me that this is not a factor that can  
5 distinguish GHES from NatPower.

6 That paragraph went on and said its projects BESS, the same applies to GHES. And  
7 it went on and said it has submitted detailed applications to intervene, explaining the  
8 grounds on which it can assist the Tribunal on liability and remedy. Our position is  
9 slightly different because, as I explained earlier, we will only focus on the issue of  
10 relief.

11 Then that paragraph went on and said NatPower would be able to explain the impacts  
12 of the scheme or the abolishment of the scheme or delay whatsoever on NatPower.

13 And again the same can be said of GHES.

14 So based on this paragraph alone, we can say, well, there is a high degree of  
15 similarities between GHES and NatPower, and we wonder why Ofgem now takes the  
16 position that NatPower can satisfy the added value test while GHES can not.

17 So to make our position clear, it is not an admission or repulse that NatPower is able  
18 to meet that threshold or satisfy the test. This is only to illustrate the inconsistent  
19 approach being adopted by Ofgem on this matter.

20 And also these are the added values that we are able to make if we are given the  
21 opportunity to intervene, and we would only intervene in a very limited manner. We  
22 are satisfied with only introducing a witness statement of in the region of five to ten  
23 pages, excluding the exhibits, on the condition that they would not be duplicated.

24 **JUDGE WOLFFE:** Sorry, did you say excluding or including?

25 **MR CHIM:** Excluding. Excluding exhibits.

26 And if necessary, if the Tribunal finds it helpful, we are happy to produce a short

1 statement of intervention as well, again on the condition that the statement and the  
2 evidence would be non-duplicative with that of the applicant. In order to avoid any  
3 unnecessary delay we would be able to submit all this within two weeks of today, which  
4 means it can be filed and served by 11 February. We do not require any oral  
5 submission unless the Tribunal directs otherwise and GHES would bear its own cost.  
6 So unless I can assist the Tribunal any further, these are our submissions.

7 **JUDGE WOLFFE:** One question I would like to have your submission on is, is there  
8 any good reason why, rather than intervening, if essentially what those whom you  
9 represent wish to do is to be able to put before the Tribunal information about the effect  
10 of, as I understand it, delay and cost on them as applicants to this scheme, but to put  
11 that in the context of a broader submission about the impact of the scheme on  
12 Gresham's business, is there any reason why, insofar as that's factual information, it  
13 couldn't be provided by one or other parties, again with the assistance of Gresham?

14 **MR CHIM:** Yes.

15 **JUDGE WOLFFE:** It's really going to why you need to intervene in order for this  
16 material to be, in a practical sense, before the Tribunal.

17 **MR CHIM:** Yes. With the benefit of hindsight, it might be a good alternative as well.  
18 I see why the Tribunal may take that view. But we have to look at it in context. At  
19 a time when GHES made the application we did not know -- we didn't have the defence  
20 filed by Ofgem. So at that time it would be said that we need to prepare for the worst  
21 case scenario when we make that application. So in that sense, at that time we  
22 thought it would be necessary to --

23 **JUDGE WOLFFE:** You shouldn't take anything I'm saying as being critical of the  
24 application being made, Mr Chim. It's really just in determining the application one of  
25 the things I need to consider is whether in fact, you know, if the material -- if GHES  
26 has relevant material going to relief, you know, why that can't be adequately presented



1 to the Tribunal by one or other of the parties?

2 **MR CHIM:** Yes.

3 **JUDGE WOLFFE:** There may be a reason so please tell me if there is. And obviously  
4 I would need to hear from Mr Gibson and Mr Barrett in due course.

5 **MR CHIM:** GHES is one of the largest players on the BESS market so the outcome  
6 of the case, well, it impacts not only on GHES, it has a wider impact on the entire  
7 industry. Being the market leader in the BESS market, GHES would be able to provide  
8 an industry-wide view on the impact of the scheme on the players of the market. So  
9 that is something GHES would be able to provide, a distinct perspective, especially  
10 when it has also applied to the LDES scheme as well.

11 **JUDGE WOLFFE:** That information is going to be provided through -- I understand it,  
12 principally through a witness statement.

13 **MR CHIM:** Can I --

14 **JUDGE WOLFFE:** Yes, of course.

15 **MR CHIM:** That's a very good reminder from those behind me, because we can't  
16 really do it through Zenobē, for example, because the information that GHES is going  
17 to provide may involve some commercially sensitive information, which we do not want  
18 to share with Zenobē, who is actually a competitor to GHES.

19 **JUDGE WOLFFE:** That's helpful, that information.

20 **MR CHIM:** Thank you.

21 **JUDGE WOLFFE:** Is there anything else you want to say just now?

22 **MR CHIM:** May I double check?

23 **JUDGE WOLFFE:** Please.

24 **MR CHIM:** Thank you very much.

25 **JUDGE WOLFFE:** I'm minded, Mr Gibson and Mr Barrett, to hear each of the  
26 intervenors and then to give you both a chance to respond.

1 Mr Halliday, you're for the Secretary of State?

2 **MR HALLIDAY:** Yes, the Secretary of State For Energy, Security and Net Zero.

3 **JUDGE WOLFFE:** Now, again, you've heard the discussion we've had so far and, as  
4 I say, I'm open to being corrected on the sort of provisional view that I think you will  
5 have detected that I have reached, that it's quite hard to see what the intervenors have  
6 to add on the substantive grounds. But I'm open to a submission if you think that's  
7 a wrong view.

8  
9 **Submissions by MR HALLIDAY**

10 **MR HALLIDAY:** I will try to make some inroad into that so far as the Secretary of  
11 State is concerned, sir. What I propose to do is deal with the application in two parts,  
12 first the threshold question, whether the Secretary of State has a sufficient interest in  
13 the proceedings and, secondly, if it does, your discretion which turns essentially on  
14 the question of whether the Secretary of State's intervention would, quote unquote,  
15 "add value".

16 **JUDGE WOLFFE:** Yes, and in that part of the discussion, I think what I really need to  
17 understand is what the Secretary of State can add that GEMA can't perfectly well  
18 articulate in terms of the legal structure, the policy underpinning and indeed the impact  
19 in terms of the matters that are relevant to relief.

20 **MR HALLIDAY:** Yes, thank you. I will do my best.

21 **JUDGE WOLFFE:** Okay.

22 **MR HALLIDAY:** On the threshold question, sufficient interest, you will have seen, sir,  
23 that it was the Government which decided in October 2024 that an LDES cap and floor  
24 scheme was needed and that it was needed quickly. Speedy implementation of such  
25 a scheme is of direct interest to the Secretary of State because it's critically important  
26 to the Government's energy and climate policy. The scheme is critical to the

1 Government's clean power action plan, which sets out a pathway to a clean power  
2 system by 2030 and the actions under that plan include the need for a prompt  
3 introduction of a cap and floor scheme for LDES.

4 The scheme is also critical to other Government policies, clean energy, super power  
5 emission, the maintenance of security of electricity supply in a cost effective manner  
6 and achieving statutory carbon reduction budgets under the Climate Change Act 2008.

7 So that is why, sir, the Secretary of State decided the scheme needed to be introduced  
8 as quickly as possible, so as to reach those policy goals which had timelines attached  
9 to them.

10 That in turn is why the Department for Energy Security and Net Zero promoted what  
11 is now Section 26 of the Planning and Infrastructure Act, which required Ofgem to  
12 implement the scheme as quickly as reasonably practicable.

13 Now, in these proceedings, Zenobē asks the Tribunal to make an order quashing the  
14 decision. It defines that decision as a decision to make the scheme. That relief, sir,  
15 will directly affect the Secretary of State because it will disrupt and delay a scheme  
16 whose speedy implementation the Secretary of State has decided was necessary.

17 The Secretary of State's interest in these matters is not identical to Ofgem's. Ofgem  
18 is the electricity regulator and a delivery body for the scheme, but it is the Secretary of  
19 State who bears responsibility for the Government policies I've alluded to, including  
20 Clean Power 2030. That will be of some relevance to the second question of  
21 discretion.

22 So moving on to discretion, sir. Would the Secretary of State's intervention add value?

23 I say that it would in two particular respects and I'm grateful for the formulation of the  
24 issues earlier in today's discussion. The two respects concern, first of all, discretionary  
25 relief but also, secondly, the effect on these proceedings of Section 26 of the 2025  
26 Act.

1 So dealing first with discretionary relief. The Tribunal is aware that the CAT has the  
2 discretion under Section 72.8 of the Subsidy Control Act to refuse relief on the grounds  
3 of either undue delay or, amongst other things, detriment to good administration.

4 Now, in this case, sir, the Secretary of State is in a special position to provide evidence  
5 and submissions on why the quashing relief sought should be refused on both of those  
6 grounds. The Secretary of State is uniquely well placed to explain the harm and  
7 disruption --

8 **JUDGE WOLFFE:** When you say both grounds, which grounds are you referring to?

9 **MR HALLIDAY:** Undue delay and detriment to good administration.

10 **JUDGE WOLFFE:** Okay. I'm not sure undue delay has been focused on by --

11 **MR HALLIDAY:** That is one of my points as to why the Secretary of State would wish  
12 to intervene.

13 The delay point requires a little bit of explanation. Zenobē says that  
14 the September 2025 documents constituted a subsidy scheme. Ofgem says they did  
15 not because they're not a scheme and they don't provide the subsidies. If Zenobē is  
16 right on that issue, which the Secretary of State does not accept, then on that  
17 hypothesis the Secretary of State would say that the alleged subsidy scheme was  
18 actually introduced much earlier, possibly as early as October 2024 when the  
19 Secretary of State decided that a cap and floor scheme for LDES was required.  
20 Certainly no later than March 2025 on joint publication by Ofgem and the Secretary of  
21 State of a technical decision document, which set out various characteristics of the  
22 scheme.

23 We would submit that on that hypothesis Zenobē has been guilty of serious delay in  
24 failing to challenge that earlier decision to make the scheme. That is not a point made  
25 in Ofgem's defence. It deals with relief at paragraph 93 of its defence. It quotes the  
26 whole of Section 72.8, including the undue delay provision but then makes no

1 submissions about undue delay.

2 So as to detriment to good administration, the Secretary of State is uniquely well  
3 placed to explain the harm, the disruption and delay caused by quashing relief would  
4 cause to the achievement of Government goals, including clean energy by 2030 and  
5 achieving statutory carbon reduction targets.

6 **JUDGE WOLFFE:** So read good administration as including substantive objectives?

7 **MR HALLIDAY:** Yes, interference with important Government policy, we would  
8 submit, is detriment to good administration.

9 Could I ask you, sir, just to turn up one page. It's bundle B, page 399.

10 **JUDGE WOLFFE:** Sorry, did you say B?

11 **MR HALLIDAY:** You're looking here at the end of Zenobē's reply. In section A it deals  
12 with relief. Paragraph 92, subparagraph 3, it says:

13 "It is further denied that the grants of relief would be prejudicial to others or detrimental  
14 to good administration. On the contrary, Zenobē's motivation in bringing this claim is  
15 to avoid the likely substantial harm, eg to SDES operators, to HMG's ability to achieve  
16 its Clean Power 2030 climate change targets and to consumers arising ...(Reading to  
17 the words)... choices in making the scheme [as read]".

18 So the Secretary of State would certainly like the opportunity to rebut what is said  
19 there.

20 More generally, sir, in an attempt to answer the points you've made already this  
21 morning about the possibility for evidence to be put in via one of the primary parties,  
22 probably via Ofgem.

23 **JUDGE WOLFFE:** I think you haven't addressed the point that you wished, that the  
24 Secretary of State would also wish to make submissions about the effect on these  
25 schemes on of 26 --

26 **MR HALLIDAY:** Yes, I can deal with that now.

1 **JUDGE WOLFFE:** -- and you'll bear in mind that what I'm interested in is whether the  
2 Secretary of State has anything to say on that that can't perfectly adequately be said  
3 by the respondent --

4 **MR HALLIDAY:** The relevant context on that, sir, is that it was the Department for  
5 Energy, Security and Net Zero, the Secretary of State's department, which was  
6 responsible for promoting the relevant provisions of the Planning and Infrastructure  
7 Bill, so clause 25 of the bill, now Section 26 of the Act. For that reason, the Secretary  
8 of State is uniquely well placed to ensure that the Tribunal has before it any relevant  
9 external aids to construction of that legislation; explanatory notes, other preparatory  
10 papers, Government reports preceding the bill and any admissible extracts from  
11 Hansard under *Pepper v Hart*.

12 **JUDGE WOLFFE:** All of which is publicly available.

13 **MR HALLIDAY:** Publicly available but certainly it would be easier for the Secretary of  
14 State with greater knowledge of the background to gather those materials.

15 I would suggest, sir, that the Tribunal might even expect the Secretary of State, as  
16 head of the department responsible for drafting and promoting this provision, to assist  
17 the Tribunal by ensuring that those relevant materials and any relevant submissions  
18 were placed before it as to the correct interpretation.

19 Now, on those materials, it might be possible for them to be funnelled through Ofgem,  
20 though I do submit it would be preferable if they came from the horse's mouth and  
21 perhaps more efficient.

22 On materials relevant to discretionary relief, I do submit that it would be far from  
23 optimal for the Secretary of State's evidence to go via Ofgem, because the Secretary  
24 of State has a different interest and a different perspective from Ofgem on the matters  
25 relevant to relief. Ofgem is not responsible for the Government policies I've alluded  
26 to. It won't necessarily know, certainly to the degree the Secretary of State should

1 know, what impact delay and disruption would have on those policies. It may not know  
2 which points the Government would wish to take in arguing that quashing relief would  
3 be detrimental to good administration. So I do submit that it would be preferable to  
4 permit the Secretary of State to intervene so that those materials could come, so to  
5 speak, from the horse's mouth.

6 On the extent of our intervention, I would invite the Tribunal to permit us to put in both  
7 evidence and written and oral submissions.

8 **JUDGE WOLFFE:** Do you have a proposition in terms of the scope of evidence and  
9 written submissions that you would wish the opportunity to put in? Because I'd  
10 certainly be minded, if I grant any of the application requests, to impose page limits.

11 **MR HALLIDAY:** Yes. I'm not instructed to propose a page limit. I am instructed to  
12 limit our intervention to the two areas I've described.

13 **JUDGE WOLFFE:** We are talking about a single witness statement, if you were  
14 granted leave or permission to intervene, a single witness statement covering the  
15 issues that you say arise in relation to relief, and a written submission of an appropriate  
16 short length.

17 **MR HALLIDAY:** Yes. Can I just take instructions?

18 **JUDGE WOLFFE:** I think it would be helpful.

19 **MR HALLIDAY:** So the Secretary of State would impose a 15-page limit for the  
20 witness evidence, excluding exhibits, and the same limit for any written submissions.

21 **JUDGE WOLFFE:** Do you have any submission you want to make about why the  
22 issue of delay in particular and detriment to good administration isn't -- I suppose  
23 detriment to good administration may be implicit in your written intervention but  
24 I certainly hadn't picked up that there was any issue of delay that you were proposing  
25 to raise.

26 **MR HALLIDAY:** My oral submissions have certainly been more detailed than the

1 written application. I don't shy away from that. I'm not sure there's anything I can add.

2 **JUDGE WOLFFE:** No, that's helpful, Mr Halliday. Thank you.

3 Mr Ashley?

4  
5 **Submissions by MR ASHLEY**

6 **MR ASHLEY:** I appear for NatPower Development Limited. Hopefully you've  
7 received our application to intervene. That should be at bundle A, tab 7, page 24  
8 onwards.

9 **JUDGE WOLFFE:** Yes.

10 **MR ASHLEY:** May I enquire whether you've had an opportunity to read?

11 **JUDGE WOLFFE:** I have.

12 **MR ASHLEY:** That's helpful.

13 **JUDGE WOLFFE:** I think the first thing you need to do is to -- I understand you're  
14 seeking abridgment of the time limit under rule 19.2?

15 **MR ASHLEY:** Yes and we set out the facts and matters in relation to that at the tail  
16 end of our application to intervene.

17 **JUDGE WOLFFE:** Let me just get the application in front of me. The way you put it  
18 is the implications and significance of the proceedings only became apparent following  
19 receipt of a letter on 7 January.

20 **MR ASHLEY:** Correct.

21 **JUDGE WOLFFE:** Do I take it from the way it's put that NatPower was aware of the  
22 proceedings before that date?

23 **MR ASHLEY:** I'm not aware of that. What I'm aware of is they had not sought legal  
24 advice prior to having received that letter. On having received that letter, they sought  
25 legal advice. At that point, within two days of that letter, CMS had written to this  
26 Tribunal to make enquiries as to what next steps it should take. Directions were then



1 given by the CAT that an application should be made within a set period of time if  
2 NatPower wished to do so, and that was done.

3 **JUDGE WOLFFE:** So you're not giving me an indication one way or another of  
4 whether they were aware at an earlier date?

5 **MR ASHLEY:** I'm not aware whether they were aware or not. They'd certainly not  
6 understood the significance of it.

7 **JUDGE WOLFFE:** Yes. And there's no one in court who can help you with that factual  
8 matter?

9 **MR ASHLEY:** They cannot.

10 **JUDGE WOLFFE:** In the written submission, NatPower is described as an interested  
11 party in the JR proceedings. Is that -- perhaps I should say, who has determined that  
12 they are an interested party?

13 **MR ASHLEY:** Of course. In the context of the JR proceedings, one is an interested  
14 party by virtue of who one is and the relevant test. There is an application outstanding  
15 by Zenobē in the JR proceedings that they need not serve the interested parties in the  
16 JR; partly they say because they weren't aware of who the interested parties were.  
17 Hence the delayed nature that the JR proceedings also came to NatPower's attention  
18 and it was upon Ofgem writing to NatPower to make them aware of the JR proceedings  
19 having been commenced, that this train started.

20 **JUDGE WOLFFE:** Is there anything else you want to say in terms of the application  
21 to abridge time?

22 **MR ASHLEY:** Just to pass on the apologies of NatPower for being late in relation to  
23 that. They do understand they were late but they sought legal advice as soon as it  
24 was brought to their attention and they acted immediately on that.

25 **JUDGE WOLFFE:** Just on the substance of the intervention. You've heard the  
26 discussions that I've had with the other parties, taking first the question of the grounds

1 of relief that Zenobē bring forward; does NatPower maintain the position that it has  
2 additional and useful material that it would wish to put before the Tribunal on those  
3 issues?

4 **MR ASHLEY:** Absolutely. Absolutely. Can I start by making a couple of broad  
5 submissions at the beginning as to the scope of the intervention that we're seeking  
6 and then, if I may, I'll go into the detail of where the added value is, both in relation to  
7 remedies and liability.

8 So, first of all, NatPower expects its intervention to be limited, short and in writing. As  
9 set out in the written application to intervene it is willing to limit any witness statement  
10 to ten pages plus exhibits and it anticipates that written submissions should be no  
11 more than seven pages.

12 So we're really talking about a limited intervention here with no further oral  
13 submissions.

14 The second point is that submission will be targeted at specific facts and matters where  
15 NatPower can add value and what it means by that is put forward facts and matters  
16 before this Tribunal that the claimant, defendant and indeed any other intervenor is  
17 not in a position to make, for reasons that I'll go on to make good.

18 **JUDGE WOLFFE:** I'm just looking at the time. I think the Tribunal usually takes  
19 a break at this point. How long do you have to go with --

20 **MR ASHLEY:** It rather depends on how many questions but if you really wish to know  
21 the value that we're going to add and I'm going to need to take you to the relevant  
22 materials and show you where we can add value, I would imagine I'll be at least  
23 another ten minutes.

24 **JUDGE WOLFFE:** Okay. Well, let's have a short break for a cup of coffee.  
25 Mr Gibson.

26 **MR GIBSON:** Just on timing, I hesitate to cut my learned friends off in their stride, I'm

1 a bit concerned about how much we have to get through after we've got through the  
2 interventions. Obviously this listing was originally listed before the panoply --

3 **JUDGE WOLFFE:** Indeed. The way I'm thinking about the day is that we'll hear from  
4 the interveners. I'll hear anything that you have to say, that Mr Barrett has to say. I'm  
5 minded to think that it would be -- we may be -- it may be a slightly early break for  
6 lunch, but take a break for lunch. I will come back and give rulings on the interventions  
7 and that we then get on with the rest of the business.

8 I know there are a number of issues but my own sense of them, if I can put it that way,  
9 is that we should be able to deal with them in the course of the afternoon.

10 **MR GIBSON:** Obviously I'll do what I can but I have to say that the issues that we  
11 have later on the agenda, particularly the preliminary issue which obviously is crucially  
12 important to the way this case progresses, is one that I have quite a lot to say about  
13 and the amendments are obviously closely related to that. I'm just concerned that  
14 whilst the intervenors want to have their say, this is obviously not their  
15 proceedings -- not their hearing and it is becoming a little bit imbalanced.

16 **JUDGE WOLFFE:** Indeed. It's fair to say I've had the benefit of reading both parties'  
17 skeletons on the various issues that we're coming to and I'll obviously have to hear  
18 what you both have to say but it may be that matters will proceed --

19 **MR GIBSON:** My hope would be that we don't get constrained but I'm just a bit  
20 uncomfortable that this part of the proceedings is taking on a disproportionate  
21 influence, if we can say.

22 **JUDGE WOLFFE:** Well, I'm grateful for that, Mr Gibson. I appreciate the point but  
23 let's have a short break just now. Let's come back at 12 o'clock. I'll hear Mr Ashley  
24 and I'll hear you both on the interventions and then we'll see where we are at that  
25 point.

26 **(11.49 am)**

1 (A short break)

2 (12.01 pm)

3 **JUDGE WOLFFE:** Mr Ashley.

4 **MR ASHLEY:** Thank you very much.

5 Before the break, I had just started to make some initial points in relation to the scope  
6 and nature of NatPower's application to intervene. I just want to make one further  
7 point building on the two initial points that I started to make, before moving on to the  
8 added value. That is we really will be focusing -- or NatPower really will be focusing  
9 upon, as I said, areas where it can add value to what other parties say.

10 **JUDGE WOLFFE:** It would be helpful if you could identify what those are.

11 **MR ASHLEY:** One of the background points that is of some import here, as already  
12 raised before the Tribunal, is that there is an ongoing process here in which NatPower  
13 is involved and will continue to be involved. In that context, we will obviously or  
14 NatPower will obviously be doing all it can to co-ordinate with other parties, and in  
15 particular GEMA, to ensure that there is no duplication or overlap and it is not saying  
16 things that could be said by somebody else.

17 But there are facts and matters that go to the nature of its business and business  
18 model that it would not be appropriate in a live process to be sharing with GEMA.

19 **JUDGE WOLFFE:** I understand that point but to what extent is that relevant to any  
20 issue in the case?

21 **MR ASHLEY:** That then takes us on -- and I propose to start with the remedies point  
22 and then go on to some liability issues where we say NatPower may also add value.  
23 The starting point is the remedies point. That has already been addressed by  
24 a number of the counsel here. NatPower has obviously ten LDES projects going  
25 forward to the next stage of the cap and floor scheme, that's ten out of the 77 that were  
26 selected.

1 In the circumstances where it is requested that the September decision be quashed,  
2 that would obviously have a very significant impact on NatPower. It has made  
3 a significant investment to date to get this far. It continues to make investments and  
4 it would wish to put evidence before this Tribunal on the impact of the quashing order  
5 both on it and the position of participants in the market in its position when it comes to  
6 investor confidence and raising finance for these types of scheme.

7 Obviously where it adds value there is twofold. First, as a participant in the scheme,  
8 it is well placed to add a counterpoint to what is said by Zenobē in a manner that  
9 GEMA is not. Second, the nature of that evidence is such that co-operation with  
10 GEMA to go through those facts and matters in order that GEMA can understand the  
11 relevant facts in relation to NatPower's business model, if we want to make that  
12 submission, would be inappropriate to share with GEMA at that time.

13 Therefore it's our submission that NatPower can be genuinely additive in a short and  
14 targeted way in relation to these proceedings. Now, that is what we have to say on  
15 the remedy side of things.

16 There are a number of other targeted areas in relation to what one might call liability  
17 where NatPower also considers that it can add value. The first is the issue of sufficient  
18 clarity, that in order for there to be a subsidy scheme, Zenobē is going to have to show  
19 that there was sufficient clarity on key questions in relation to the September 2025  
20 decision, such that it can be properly characterised as a subsidy scheme.  
21 And evidence is proffered in that regard at Palmer 1, paragraph 376, and that is at  
22 bundle B, tab 6, page 311. There it's said in that paragraph:

23 "The decision made on 23 September 2025 provides sufficient clarity on key questions  
24 which an LDES developer would need to know in order to be satisfied that the support  
25 offered by the LDES scheme ... [as read]" et cetera et cetera et cetera.

26 So the evidence given there goes to sufficient clarity and it is given in the context of

1 | what an LDES developer would need to know.

2 | Again, we would say that NatPower is perhaps uniquely well placed to give  
3 | a counterpoint to that evidence as to what an LDES provider does in fact need to know  
4 | and whether in fact there was sufficient clarity at that point in order that the test may  
5 | be passed for there to be a subsidy scheme.

6 | In relation to whether anybody else could make that point, with respect, nobody to my  
7 | left is going to be in that position or not on my side. On the right we bump into the  
8 | same issue again, which is in order to get to that point of giving that evidence,  
9 | NatPower, if it was to do it through GEMA, would have to take GEMA in some detail  
10 | through what it needed to know and therefore its business model, and we would  
11 | respectfully say that in the context of a live process that would not be appropriate. So  
12 | that's the sufficient clarity point.

13 | If I may now go on to the next liability point where we say that we can be of some  
14 | assistance, that's the comparable position point. So in order for something to be  
15 | a subsidy scheme, it obviously needs to be a subsidy. In order to be a subsidy, it  
16 | needs to satisfy section 2, subsection 1 of the Subsidy Control Act. What that looks  
17 | at is a test of specificity --

18 | **JUDGE WOLFFE:** Nobody is taking a point about --

19 | **MR ASHLEY:** -- in relation to the scheme.

20 | Well, we understand that that is put forward by our colleagues and they do say that  
21 | the scheme was indeed specific enough to be a subsidy and that evidence is led  
22 | extensively in Palmer 1 on that very subject. I can take you to some of the extracts in  
23 | Palmer 1 that go to that if that's of assistance.

24 | We would say, just jumping through them fairly quickly, that the broad parts of Palmer  
25 | 1 that go to that are paragraph 245, about halfway down, where it says:

26 | "The assessment is not representative of the reality [as read]."

1 **MR GIBSON:** It's not contested that we, when we made our application, put in  
2 evidence that went to all of the limbs. The relevant question is whether any of those  
3 limbs are in dispute as between the primary parties.

4 **JUDGE WOLFFE:** Indeed, Mr Gibson. That's not lost on me.

5 **MR GIBSON:** Sorry, sir.

6 **MR ASHLEY:** If that evidence is not relevant for the purposes of these proceedings,  
7 that might be a different point. But insofar as it is said to be relevant, we would have  
8 something to say on that.

9 **JUDGE WOLFFE:** Yes. It's not an issue that's contested between the parties, as  
10 I understand it. Mr Barrett is not making any point, he's not resisting that that limb of  
11 the definition is satisfied.

12 **MR ASHLEY:** My instruction is that we might say that there is not, in our written  
13 submissions.

14 **JUDGE WOLFFE:** One consequence of allowing your intervention would be that  
15 a wholly new issue would --

16 **MR ASHLEY:** Well, if permitted on that point, my instructions are that we do not  
17 consider there to be a subsidy in this regard and we would wish to make short  
18 submissions and lead a short amount of evidence on that point. But, again, my  
19 instructions are that that would be a short and targeted submission.

20 **JUDGE WOLFFE:** So you're proposing to do all these matters within --

21 **MR ASHLEY:** Seven pages.

22 **JUDGE WOLFFE:** And a ten-page witness statement?

23 **MR ASHLEY:** Correct.

24 **JUDGE WOLFFE:** Plus exhibits amounting to what sort of volume?

25 **MR ASHLEY:** I don't have instructions of that but I'm anticipating they will not be long.  
26 But I'm anticipating that if we do not attach the relevant documents, the point will be

1 taken against us that we've not been sufficiently candid in relation to what we're saying,  
2 you can always get a disclosure application. So I think a sensible line needs to be led  
3 there.

4 **JUDGE WOLFFE:** Sorry, I took you off your train of thought.

5 **MR ASHLEY:** No. I was just pointing -- because there are extensive parts of the  
6 witness statement that do deal with this point. In addition to paragraph 25, there's  
7 a whole section in Palmer 1, starting at paragraphs 251, going to 269, on the impacts  
8 on the BESS industry. There's another section in paragraph 270 to 278 on analysis  
9 of impact on short duration storage.

10 What we say is that seeks to draw a position where it says that short and long duration  
11 is comparable for the purposes of there being a subsidy, which falls into limb C of  
12 section 2.1, and NatPower wishes to make submissions, short submissions, and lead  
13 short evidence on that point.

14 Finally, there's the point that my learned friend for GEMA raised which goes to  
15 motivations, which he raises in his skeleton argument at paragraph 14.3, where it is  
16 said that a significant number of applicants applied speculatively or to hedge their risk.  
17 Now, NatPower represents ten of the 77 -- we understand it's now down to 73 -- of the  
18 applicants who have gone forward to the next stage of the process. NatPower is  
19 uniquely placed, well placed to make comments on that at least in relation to  
20 a significant proportion of the market. And, again, the same points apply as to why it  
21 would not be appropriate at this stage in a live process to feed that evidence or  
22 submission through GEMA.

23 So they are the points on which NatPower believes that it can add value to the Tribunal  
24 and be useful in a targeted additive way, with short submissions in writing,  
25 accompanied by a short witness statement, with no further oral submissions.

26 **JUDGE WOLFFE:** Thank you, Mr Ashley.



1 Mr Gibson.

2  
3 **Further submissions by MR GIBSON**

4 **MR GIBSON:** Thank you, sir. I'll try to be as quick as I can, mindful of the time.

5 I'd like to make three short points. The first is in relation to the test which doesn't seem  
6 to be an issue of great dispute. I just want to highlight a couple of points. I think one  
7 can summarise the test in this way, that interventions which are brief and focused on  
8 the relevant issues, point one, two, made by parties in a timely and sufficiently detailed  
9 manner, point three, where they can show sufficient interest, and point four, where  
10 they can add value and assist in a way that's proportionate to the disruption that they  
11 may cause, should be allowed, and those that do not satisfy those four points should  
12 not.

13 On that last point about disruption and balance, I would like to just highlight one point  
14 about the fact that one must not expand the scope of the proceedings between the  
15 primary parties. I'll take you to two authorities very quickly on that if I may. The first  
16 is at tab 15 of bundle D, the authorities bundle. This is the *Gutmann* case. I won't  
17 take you to the facts, sir, because I think I can just take you straight to paragraph 32  
18 on page 364. It's paragraph 32, sir. This is, as I said, the Secretary of State seeking  
19 to intervene in the collective proceedings brought by Mr Gutmann in respect of trains.

20 The beginning of the paragraph talks about:

21 "Even with robust case management this aspect of the intervention brings the prospect  
22 of the trial turning into a broad-ranging examination of the funding and finance of  
23 various operations ... [as read]" et cetera.

24 The last sentence is crucial:

25 "In our judgment, that would significantly expand the scope of the case in a manner  
26 that is wholly disproportionate and contrary to the governing principle in Rule 4 [as

1 read]."

2 Then just at tab 17 is the *Durham v Max Recycle* case, which obviously is directly  
3 relevant to the subsidy control context. And on page 394, paragraph 9 -- sorry,  
4 sir -- paragraph 9:

5 "They reject TBD's participation even on a limited basis because it would add  
6 complexity and cost to the proceedings, the subsidy control jurisdiction needs to be  
7 fast, cheap and simple which includes avoiding the expanding the scope of such  
8 applications unduly [as read]."

9 Sir, against that backdrop, the second point that I would like to make is just to endorse  
10 the written reasons we've given in relation to why we say that, on the one hand,  
11 Gresham's intervention should be allowed and the others should be refused, and to  
12 take you through quickly by reference to those four points that I outlined, why we say  
13 it falls in that way, on a principled basis.

14 Gresham intervened in a timely fashion, two days before the deadline as it happens,  
15 and set out a clear and sufficiently detailed explanation of its interest and how it can  
16 add value and its submissions today have been consistent with what it said then in the  
17 way that one would expect, save to address specifically the points you, sir, have raised  
18 and asked them to address today.

19 Point two, they clearly have a direct and substantial interest in the outcome of the  
20 proceedings. I don't think that can be doubted. They are both an SDES operator and  
21 an LDES applicant. They have a foot, if you like, in both camps.

22 And therefore the third point is they clearly can add value. They do have a distinct, if  
23 not unique, perspective as a party who has both applied for LDES and nonetheless  
24 had serious concerns about the likely impact of the design choices for the scheme on  
25 SDES consumers and the achievement of Clean Power 20230 objectives.

26 The fourth point, it is proposing only a very limited intervention in writing with no

1 participation at the substantive hearing. Therefore it ticks all the boxes and we say  
2 should be allowed. That's what I wanted to say on Gresham.

3 The Secretary of State made its intervention at the last minute but before the deadline,  
4 but however if one looks at its intervention, it is threadbare. The written intervention  
5 filed at the time failed comprehensively to meet the requirement set down in the case  
6 law that we have quoted in our skeleton that the intervention must be sufficiently  
7 detailed to enable the Tribunal properly to engage with the request.

8 That needs to be done in advance of the time of filing the application in accordance  
9 with the CAT Rules so that everyone can prepare properly and meet what is said in  
10 that regard. They've failed in that.

11 They also failed in relation to the second and third points that I've flagged about  
12 articulating interest and about explaining how it would add value. In both respects  
13 they haven't really explained how what they are proposing to say would meaningfully  
14 add or distinguish themselves from what GEMA is more than capable of saying itself.

15 You, sir, also made the point that there is abundant public published material in relation  
16 to policy objectives and the like and we've cited that in our skeleton and pointed out  
17 that it's been dealt with exhaustively, we would say, in accordance with candour, by  
18 Mr Palmer in his witness statement. There's no shortage of information on that so the  
19 Secretary of State is really not going to add anything at all.

20 Worse, it candidly accepts that it will be expanding the scope of what's being discussed  
21 between the primary parties in dispute and you, sir, highlighted the fact that they're  
22 going to be focusing on undue delay. Now, without prejudice to the fact we obviously  
23 thoroughly disagree with what's said there. It's simply unacceptable for an intervenor  
24 to come in and seek to widen the scope of the disputed issues between the parties.

25 So we say that on that basis we should be very careful about letting them in,  
26 particularly when, in relation to limb four, we say that their intervention is completely

1 disproportionate. The idea that whereas all the other intervenors are content to put  
2 submissions in in writing, I mean the BHA, to their -- I'm not sure whether we call it  
3 credit or discredit given it was directly contrary to the directions of the Tribunal, has  
4 put in a five-page witness statement and done it obviously even before the question  
5 of a deadline has even arisen. I'm not endorsing that intervention for one moment but  
6 it does show that it can be done. I don't think that we're going to be assisted,  
7 particularly as I look at the clock and see how much of today has been taken up by  
8 the intervenors, by having -- much as I love to see Mr Halliday -- by having him there  
9 at the substantive hearing. So with the greatest of respect, we say that the Secretary  
10 of State ticks none of the boxes outlined and should be rejected on that basis. If and  
11 to the extent they want to liaise with GEMA behind the scenes to put input in, that is  
12 obviously a matter for them and GEMA to discuss. They have liaised perfectly well in  
13 creating this scheme. There was an extensive consultation about whether the  
14 Secretary of State should deal with things or whether they should pass the baton to  
15 GEMA and the decision was made that GEMA was the appropriate person to deal with  
16 it.

17 It seems somewhat inconsistent and undermining one's confidence in GEMA's ability  
18 to do that to be coming in behind and saying they have to have a seat at the table  
19 when we come to these present proceedings.

20 NatPower, going through my limbs, has made its intervention, we would say, not only  
21 very late but inexcusably late.

22 With the greatest of respect, what was said in writing about the excuses for delay didn't  
23 hold water and I'm not entirely convinced by the explanation given today. The fact that  
24 they are unable to assist you, sir, on a point that we would with respect say would  
25 have been obviously a question to be asked, is not particularly candid and not  
26 particularly helpful. I'm not casting professional aspersions on anybody, it's obviously

1 the way things fell out today but it's obviously unhelpful.

2 It may be convenient if you are minded to consider this point further, they take  
3 instructions about whether they were actually at any webinars shortly after the  
4 application was issued. I think there may be something to look into there.

5 That's in relation to the first point. Very late.

6 Then taking the third limb, because we accept that, I think, in the same way as  
7 Gresham House has got sufficient interest, so NatPower would satisfy that limb. But  
8 what they don't satisfy is how they would add value and whether what they would add  
9 would be proportionate. They don't add value because, with respect, almost  
10 everything they've said seems to be something that GEMA would be perfectly capable  
11 to say and in fact better placed as the regulator, looking at the whole industry, than  
12 one self-appointed representative of all applicants.

13 We can see from the fact that Gresham House takes a different view from NatPower  
14 that NatPower cannot purport to speak on behalf of applicants generally.

15 Secondly, again, just as with the Secretary of State, we have real concerns that  
16 NatPower's intervention would seek to expand the scope of the dispute between the  
17 primary parties. Mr Ashley, to his great credit, did not try to shy away from the fact  
18 that his instructions are to do precisely that. We say that is precisely the reason why  
19 the application should be refused.

20 They do say that they will keep their intervention much tighter than might have been  
21 suggested in their written application, which only said that it was their expectation to  
22 keep it brief at this stage. I think they should be held to that expectation if they're  
23 permitted to come in at all. And any page limits should not exclude annexes, as the  
24 application says, they should be inclusive of the annexes. I don't include exhibits in  
25 that. I accept the point about documents being important for candour.

26 But we would say, and I'll come on to the third point I'll make at the end, that if anybody

1 is allowed to intervene they do so on a strictly controlled basis. I'll come back to that  
2 point.

3 That just leaves the BHA, which obviously has chosen not to represent itself here  
4 today. I would just say that they're even later than NatPower. They too haven't really  
5 articulated any proper excuse for that. The Tribunal publishes everything on its  
6 website. Anybody that's interested in this area would know that subsidy control was  
7 a potential matter and it would be reasonable to be looking out for that. As I said, there  
8 has been widespread publicity, webinars about these matters where people have an  
9 opportunity to find out about it.

10 They haven't properly explained how they have a proper interest, in part because  
11 they've misunderstood the scope of the case. They do talk to relief but they haven't  
12 explained how they would add materially, as someone who is only indirectly involved,  
13 and after all there's no part of what we on this side are doing is trying to do down the  
14 interests of the hydro power. Far from it. We're actually trying to come up with  
15 a solution that sees a scheme for LDES implemented that benefits long duration  
16 without damaging short duration. So there's no misalignment of objectives in that  
17 respect.

18 As I've said, they have sensibly limited their application to only five pages. They have  
19 put in a statement of intervention which reads far more as evidence, so we do have  
20 problems with the fact that, if they were going to do that, it would need to be compliant  
21 with the Tribunal's guidance in Practice Direction 2 of 2025 about the format and  
22 content and of course have a statement of truth to be of any real probative value at all.  
23 In summary, they too fail to tick multiple boxes and should be rejected on that basis.

24 Those are the two points I wanted to make.

25 The third point, and final point, you'll be relieved to know, is in respect of the  
26 appropriate directions if you're minded to allow the intervention. Should I address you

1 on that now, sir, or will you be ruling on that separately after you've made an in principle  
2 decision on the interventions?

3 **JUDGE WOLFFE:** It would help if you said what you would like to say.

4 **MR GIBSON:** Absolutely, sir. Then I shall.

5 My headline submission is that if and to the extent anybody is permitted to intervene,  
6 including Gresham who we support the intervention of, they should be permitted to do  
7 so only on very strict and limited terms. We have serious concerns about the  
8 intervening tail wagging the primary dispute's dog, if we allow them to do so in an  
9 unfettered way. And frankly the last minute and frankly chaotic interventions that have  
10 come in over the last week have only exemplified the problems that we could see. It's  
11 been very disruptive to preparation of this CMC for that to have happened.

12 We would therefore propose that any participation should be, one, in writing only; two,  
13 lodged very soon after the CMC. 11 February is the date that we propose in the  
14 directions, which is two weeks, and we say, given what I am going to come on, the  
15 third point about the scope of it, should be more than ample to put anything in. The  
16 third point is, whilst the BHA's intervention should be rejected for the reasons I've  
17 already outlined, it does provide a template, subject to the formalities and putting the  
18 statement of truth on it, for a very short intervention that is directed to the limited issues  
19 where they think they can contribute. We say if the BHA can do that, then all the other  
20 parties can do that just as well.

21 Our draft directions, which I'll come on to deal with obviously later in the day, make  
22 provision for five pages of either a statement of intervention or witness evidence with  
23 the intervenor deciding where they think they can add best value. I would submit it's  
24 probably better just to put one document in but if they want to split their five pages, it's  
25 up to them. And that should apply to all the intervenors.

26 The final point I would make is that any decision on intervention you make after lunch,

1 | sir, I think should be provisional till we get to the end of the day and we have actually  
2 | satisfied ourselves and we're working through the timetable and directions, that it's  
3 | consistent with the proper conduct of these proceedings. Because I don't want things  
4 | to unravel, having given an in principle decision, things expand later in the day. So it  
5 | should be in principle, provisional and confirmed later in the day. That's all I wanted  
6 | to say on intervention, sir, unless I can assist further. I will just check that I haven't  
7 | missed anything. That is everything, thank you, sir.

8 | **JUDGE WOLFFE:** Thank you very much, Mr Gibson.  
9 | Mr Barrett.

10 |  
11 | **Further submissions by MR BARRETT**

12 | **MR BARRETT:** Thank you, my Lord. The points about delay and so on, we  
13 | respectfully submit they're probably not very important points. The material has been  
14 | put before the parties, they've been able to address it, there's no real prejudice in that  
15 | regard so we would respectfully invite the court to focus on the substance as to  
16 | whether there's good basis to permit these interventions or not.

17 | **JUDGE WOLFFE:** I ought to just check with Mr Gibson. Neither of you suggest that  
18 | I couldn't exercise the power to abridge time in Rule 19.

19 | **MR BARRETT:** No, of course not.

20 | **MR GIBSON:** I am sorry, I am cutting across my learned friend. In principle you can.  
21 | I think as a matter of discretion one would need to think very carefully whether it's  
22 | really appropriate for the Tribunal to be allowing this freewheeling approach and where  
23 | that's going to lead if one doesn't set down firm boundaries.

24 | **JUDGE WOLFFE:** No, I understand that point. Thank you.

25 | **MR BARRETT:** So we would respectfully invite you to focus on the substance, is  
26 | there a sufficient interest? Is there added value to the Tribunal?



1 In respect of that, my Lord, we do say the position the claimant takes is rather  
2 obviously incoherent. It's said that the intervenor who supports their stance obviously  
3 has sufficient interest and the parties on the other side of fence obviously don't. That's  
4 not a terribly, we say, helpful or coherent submission.

5 The true difference between Gresham House and the other two intervenors is that  
6 Gresham House are essentially saying the same thing as the claimant. The claimant  
7 is already here and in litigation making those points. Indeed it's the very same legal  
8 team representing Gresham House and Zenobē. As my Lord may or may not have  
9 seen, this whole claim was actually initiated with Gresham House writing letters.  
10 They've then taken a step back but the very same legal team are running the very  
11 same points for Zenobē.

12 So insofar as there's a distinction between the various intervenors, the distinction is,  
13 my Lord, in my respectful submission, Gresham House have their proxy here already  
14 with their own legal team. They can provide any evidence they wish via a witness  
15 statement which is served on behalf of Zenobē.

16 On the substance, my Lord, I think my learned friend submitted to you that the two  
17 authorities he mentioned indicate that the intervention of a third party must not add to  
18 the issues. That's not what either of those cases say, my Lord. If one reads the  
19 relevant passages, they say that on the facts the particular interventions were  
20 regarded as significantly inflating the scope of the case, and on the facts that was  
21 regarded as telling against granting permission to intervene. The only point which has  
22 been raised by any party that adds anything to the picture, in terms of new issues, is  
23 the point that my learned friend Mr Halliday mentioned regarding if quod non there is  
24 a subsidy scheme being made, what is the point in time at which that occurs? He  
25 explained that he has a case to the effect that would be the technical decision  
26 document, not the September publications.

1 That's a very modest addition, if it's an addition at all, to the issues which are in dispute  
2 in litigation already.

3 **JUDGE WOLFFE:** Is that right? It's not a point that you're making.

4 **MR BARRETT:** It's not, my Lord.

5 **JUDGE WOLFFE:** And GEMA -- sorry, should I be calling you GEMA or Ofgem?

6 **MR BARRETT:** Ofgem, my Lord, but whatever you prefer.

7 **JUDGE WOLFFE:** GEMA or Mr Barrett -- GEMA presumably is just as well able to  
8 analyse the history of matters and have taken that point if you thought it was a point  
9 that was a good one.

10 **MR BARRETT:** We are but in my respectful submission that's a point which tells in  
11 Mr Halliday's favour, not a point against him. The reality is we are analysing it in  
12 slightly different legal ways. If I can just try to explain that, my Lord. As I hope you'll  
13 have from the documents we have you've seen, our case is that the proper analysis  
14 of this fact pattern is that there certainly wasn't a relevant subsidy decision being made  
15 in September at all. Our case is, that insofar as there are legally relevant decisions  
16 here, they're going to happen after 18 February this year, after the Act has actually  
17 come into force, because that's the first point in time at which we're going to be subject  
18 to this very important new statutory duty and we're going to have to act to discharge  
19 it. So that's our position.

20 Mr Halliday's analysis is to slightly different effect. He does not accept that there was  
21 a subsidy decision in September either but he says if the analytical framework of the  
22 claimant is right in principle, he says actually, on the true application of the claimant's  
23 own analysis, it would be an earlier point. It would be the technical decision document.  
24 So that, in my respectful submission, is actually a clear case where the Secretary of  
25 State, coming from his different perspective, has a different submission on that rather  
26 narrow discrete point that he wishes to put before the Tribunal. In my respectful

1 submission, it would be not right if the Secretary of State wasn't enabled to make those  
2 sort of submissions to the court.

3 If we just give you, my Lord, it's just an analogy but I hope it might be a somewhat  
4 helpful one, these are obviously in substance judicial review proceedings. We're in  
5 the CAT but the relevant principles are judicial review principles. In judicial review  
6 there would be no scope for debate but that the Secretary of State is an interested  
7 party and as of right he would be entitled to make these submissions in a judicial  
8 review. Obviously, my Lord, I entirely appreciate different forums, different rules, but  
9 I would just respectfully submit that one shouldn't be starting from the position or the  
10 assumption that the Secretary of State should be shut out from making a slightly  
11 different point that he wishes to advance.

12 **JUDGE WOLFFE:** I think it is a short point, on the face of it and the way that  
13 Mr Halliday described it, I was left with the impression that one might need to be -- if it  
14 were to be run -- taken through a tract of earlier documentation reflecting earlier stages  
15 in the process, potentially correspondence with Zenobē and possibly others. On the  
16 face of it, as Mr Halliday presented it, and I may have picked it up wrongly, it felt as  
17 though it would involve a significant addition to the volume of paperwork that the  
18 Tribunal would have to grapple with and a significant addition to the breadth of the  
19 factual issues that the Tribunal might have to consider.

20 Mr Halliday wishes to stand up.

21 **MR HALLIDAY:** There would essentially be two critical documents for the purposes  
22 of that submission. The October 2024 consultation response from the Secretary of  
23 State and the technical document which was published in March 2025.

24 **JUDGE WOLFFE:** But you're not -- so not correspondence and interactions with  
25 Zenobē and others?

26 **MR HALLIDAY:** Not so far as I'm aware at the moment. So far as I'm aware, the

critical decision documents are those two.

**JUDGE WOLFFE:** That's helpful, Mr Halliday. Thank you.

**MR BARRETT:** My Lord, if I could just pick up that. I mean I would respectfully agree with half of that. My submission is that it would be one document, it would be the technical decision document. That's what you would be construing because the claimant's thesis is that publicly promulgating a document which sets out parameters for how the scheme is going to work and the decision-making process is sufficient to make a subsidy scheme, that's the premise of the claimant's case in my submission. In determining whether that happens, if the claimant is right in that thesis, either at the technical decision document stage or at the September publication stage, in my respectful submission what you're going to be doing is looking at those two documents. Nothing more. That's the basis of the legal analysis.

**JUDGE WOLFFE:** I don't suppose there was a decision made at that point. It's Mr Gibson's case that there was a significant decision made which is the decision that he's challenging.

**MR BARRETT:** Yes.

**JUDGE WOLFFE:** How does it affect the question of delay and the running of time in respect of a second decision, that there was an earlier decision which, you know, might also have been challenged?

**MR BARRETT:** So what's critical for the claimant's case, my Lord, is the date at which the subsidy decision as defined by the Act occurred. If Mr Halliday is right and this is all on the hypothesis that the claimant's thesis is to be accepted, if Mr Halliday's case is right then the subsidy decision would have occurred in March 2025. The fact there's then further public law decisions doesn't matter for the purposes of the challenge under the Act. What matters is the date of the subsidy decision. As Mr Halliday submits, he would be saying to the court that the claimants delayed significantly because they

1 haven't acted promptly to challenge that decision.

2 **JUDGE WOLFFE:** But Mr Gibson is either right or wrong that the decision that he's  
3 challenging was a decision to make a subsidy scheme.

4 **MR BARRETT:** Yes.

5 **JUDGE WOLFFE:** And if he's right, then that's a decision that --

6 **MR BARRETT:** If he's right about that, then Mr Halliday necessarily is wrong that  
7 there was one at an earlier point in time, vis-a-vis the technical decision document,  
8 and the Secretary of State's submission will be rejected.

9 **JUDGE WOLFFE:** And if he's wrong about it then his case fails anyway.

10 **MR BARRETT:** Sorry, I don't think I've been quite clear there, my Lord. Mr Halliday  
11 I think perhaps wants to -- I don't want to put words in his mouth.

12 **MR HALLIDAY:** I'll try to be as quick as I can. I understand the concerns. The  
13 hypothesis on which our delay argument would arise is that the scheme,  
14 by September 2025, had become a subsidy control scheme.

15 The delay argument would be that, if that is right, if the scheme was by that point in  
16 time a subsidy control scheme, the decision to make the scheme was taken back  
17 in March 2025. I hope that assists.

18 **JUDGE WOLFFE:** Thank you.

19 Sorry, Mr Barrett.

20 **MR BARRETT:** Not at all, my Lord.

21 We say the Secretary of State in principle should be entitled to advance that argument  
22 and shouldn't be shut out from doing so. It won't add, we say, significantly or  
23 substantially to the case. It's rather, again, a short point of law, applying the law to  
24 a written document.

25 My Lord, unless I can be of assistance, I think those are my submissions.

26 **JUDGE WOLFFE:** What about Mr Ashley's specificity? That is not a point that you --

1 **MR BARRETT:** No, it's not, my Lord. I don't think I can assist on that. It's not a point  
2 that I've taken. Mr Ashley has made the points that he wished to in support of that.  
3 You'll need to form a view, in my respectful submission, as to whether you think there's  
4 been an adequate basis advanced to justify that plea being introduced and whether  
5 it's justified for it to do so based on what I say is the correct reading of the authorities.

6 The fact there a new point, it is not a bar, it's a question of assessing it in the context  
7 of the case. Would it unduly add to the scope and work involved in the proceedings?

8 **JUDGE WOLFFE:** Thank you. Nothing you want to say on any of the other points  
9 that have been raised?

10 **MR BARRETT:** No, my Lord. I don't want to repeat my submissions. You have my  
11 main submission which is in terms of the relief evidence from the interested parties,  
12 there is, in my respectful submission, a good reason why they should adduce that  
13 evidence themselves rather than going through us given the ongoing process.

14 **JUDGE WOLFFE:** I understand that point that Mr Ashley made. I think others may  
15 have made the same points.

16 **MR GIBSON:** I am conscious, having criticised time I shouldn't be jumping up and  
17 down like it's barrister whack-a-mole. But there were a couple of points I did think  
18 I should be allowed to reply to.

19 **JUDGE WOLFFE:** Of course.  
20

21 **Reply submissions by MR GIBSON**

22 **MR GIBSON:** Firstly there's a slight inconsistency with respect to Mr Barrett's position  
23 that they can't be a funnel for the intervenors that are supporting them, in  
24 circumstances where GEMA is not competing with those parties, whereas we, Zenobē,  
25 should be a funnel for Gresham's evidence, in spite of the fact that Mr Chim made very  
26 clear that they would be uncomfortable sharing their commercially sensitive

1 information. Just for the record, the other side, Zenobē don't want Gresham's  
2 commercially sensitive information. We're acutely conscious of our responsibilities as  
3 a market participant and competition law and that would be, in our view, an invidious  
4 position to put anyone in.

5 The second -- sorry?

6 **JUDGE WOLFFE:** Can you clarify one point. Mr Barrett made the point that you are  
7 joined in effect in common legal representation. So what is the position?

8 **MR GIBSON:** There is a single law firm sitting behind me, Norton Rose, who have  
9 been corresponding -- as I understand it, I am only instructed by those who are  
10 instructing me in relation to Zenobē. I think at least part of that team is siloed and  
11 dealing with Gresham and part of the team is dealing with Zenobē. I can't be  
12 categorical. I can take instructions if that would assist but that in outline is the point.

13 **JUDGE WOLFFE:** Yes, it might be thought to slightly undermine the point you've just  
14 made about the difficulty of passing information unless it was --

15 **MR GIBSON:** Save, sir -- no, precisely. There are obviously well-developed  
16 mechanisms within law firms. Having previously been a solicitor I'm probably more  
17 alive to those than perhaps most barristers. If and when you do think you are going  
18 to be dealing with that situation, there are information barriers put in and very strict  
19 controls put in place to avoid precisely that. So it can be done within a single law firm.

20 **JUDGE WOLFFE:** But it is implicit in the joint representation or the  
21 representation -- sorry, wrong phraseology, representation by the same firm that  
22 there's no conflict of interest perceived?

23 **MR GIBSON:** No, sir, there's not a conflict of interest, particularly because on the  
24 points that are actually raised we've been absolutely candid, and indeed that's what  
25 Gresham has said, they stand behind us on the points of principle that we've raised  
26 and the concerns. They do have very distinct commercial interests about, as

1 I understand it, where they would see things going. It's probably not a matter for us to  
2 go into today but I can assure you that there are points where they diverge but not  
3 ones that create a conflict in the bounds of this case. Just to reiterate, that's  
4 a separate point from the passage of information which should be dealt with very  
5 carefully.

6 The second point I wanted to make is that, with respect, it is unbelievably clear that  
7 this unheralded suggestion that the Secretary of State should be commenting on the  
8 question of delay, is it would significantly broaden the scope of what we're dealing with  
9 today.

10 It was open to GEMA -- we obviously dealt with the passage of the decision-making  
11 process and we explained why, in our pleading, the March 2025 decision was not  
12 one -- you'll have seen, sir, what we said on that -- it's not one that had the quality  
13 necessary to become a subsidy control decision. I would endorse the analysis you  
14 said, sir, that if we're wrong about the September being the subsidy control decision  
15 our case falls away and if we're right they're not really going to add anything to the  
16 sum of human knowledge on that.

17 It seems to me that what's really going on here is that GEMA would quite like to have  
18 its cake and eat it in terms of arguing that we're both too late and too early, but  
19 obviously can see that that would be an untenable position to try to come from one  
20 person. But it would be very useful if the Secretary of State could come in and make  
21 the argument that GEMA couldn't make on its behalf. But we say that's not an  
22 appropriate use of an intervention. We would invite you to reject it on that basis.

23 We would also say the suggestion that one is going to analyse these two decisions,  
24 the October 2024 decision and the March 2025 decision in isolation, without  
25 considering the context and therefore bringing a lot more factual material, is not  
26 seriously credible. So for all those reasons we would repeat what we've said about



1 the Secretary of State's intervention being inappropriate and it should be rejected.

2 **JUDGE WOLFFE:** Thank you, Mr Gibson.

3 Mr Barrett.

4 **MR BARRETT:** If my Lord looks at the application to intervene from Gresham House,  
5 which is on page 2, you'll see that the individual named as a contact, Ms Rogers, it's  
6 the partner who has conduct of the case on behalf of Zenobē. Just to be clear about  
7 that, it's the same partner running both.

8 **JUDGE WOLFFE:** Thank you.

9 **MR GIBSON:** Yes, that's absolutely correct. The associate teams underneath are  
10 the ones that are referred to as being separate in terms of the day-to-day conduct of  
11 the matter. Of course if there's confidential information, then obviously there wouldn't  
12 be an arrangement where Ms Rogers would be looking at both parties' information.

13 **JUDGE WOLFFE:** I think before I close this discussion, no one should read anything  
14 into this question but it's simply so that -- it's picking up on Mr Gibson's point about  
15 scope and exhibits. I think the way he's put it is that any page limit should apply to  
16 evidence or submissions plus annexes. But of course I think, he used the words of  
17 course exhibits are extra. It's fair to say from the Tribunal's point of view that I would  
18 be interested to know the scope of the exhibits that parties envisage, if they were  
19 allowed to intervene on the basis that they have been seeking, that they would  
20 envisage adding.

21 **MR ASHLEY:** Can I take instructions?

22 **JUDGE WOLFFE:** Yes, of course. And if it would be more helpful to leave that  
23 discussion over and it may be it becomes moot, potentially, if it's going to take a little  
24 time just to clarify the position, then so be it.

25 **MR GIBSON:** Sorry to cut across you, we could perhaps deal with that in timetabling  
26 directions as a matter consequential upon any substantive decision that you may take,

1 | sir. That would be consistent with my point about the decision being provisional,  
2 | subject to the details being worked out.

3 | **JUDGE WOLFFE:** Indeed. I suppose the only thing is if the information is readily  
4 | available, it might be helpful to me in terms of understanding just the scope of what it  
5 | is that various parties anticipate.

6 | **MR HALLIDAY:** It isn't readily available. I can't give you a suggestion, I'm afraid.  
7 | I can tell you the topics of the exhibits would be aids to interpretation of Section 26,  
8 | documentation of the detriment to good administration if the policy were frustrated and  
9 | then essentially the technical decision document on the question of delay.

10 | **MR CHIM:** My instructions is that we would like to put in some correspondence  
11 | between Gresham and the regulators before the introduction of the scheme. So that  
12 | amounts to in the region of 20 to 30 pages, not more than that. In the region of  
13 | 20 pages.

14 | **MR ASHLEY:** I don't have final instructions yet but my interim instructions are we  
15 | expect to be extremely limited indeed, down to a number of documents that will all be  
16 | short in pages. We're not expecting extensive --

17 | **JUDGE WOLFFE:** We've got ten minutes left before 1 o'clock and we can either make  
18 | a start on the next topic or we could rise now, start again slightly early in the afternoon  
19 | and by that point I'll make a decision on the interventions.

20 | **MR GIBSON:** The next topic is the amendment application, sir, which is Mr Barrett's  
21 | application. So it's a question I think really whether you think you would be assisted.

22 | **MR BARRETT:** I'm in your hands, my Lord. I'm entirely happy to deal with it as you  
23 | wish.

24 | **JUDGE WOLFFE:** It might be better if we could start again at 1.50 pm, if we broke  
25 | now, dealt with the issues we've had this morning and then get a clean run at the  
26 | various, you know, more -- issues that run into the scope and timetabling of the case

1 going forward.

2 **MR GIBSON:** I've been asked to confirm whether the intervenors should stay.  
3 Obviously there's the question of the ruling so I imagine they will want to be here for  
4 that but also timetabling directions come at the end of the agenda so I think that the  
5 intervenors will have to sit tight and listen to the debate throughout the day if they want  
6 to ...

7 **JUDGE WOLFFE:** I think that must be right. Obviously if I reject any of the  
8 applications, they cease to have locus. I think when you said I should make  
9 a provisional ruling, I didn't understand you to be saying that if I refuse an application  
10 that that should be provisional. So if I refuse any of the applications, then the relevant  
11 intervenors obviously can stay and watch if they wish but won't have a place in the  
12 front row, if I can put it that way. If I grant an application -- any of the applications,  
13 then I mention that that intervenor would wish to say but it's really a matter for them,  
14 in order that they can, you know, participate in a subsequent discussion, so far as  
15 they've any relevant locus to do so. But I can see that certainly when we get to the  
16 timetabling of things, there may be issues about timescales for further material being  
17 produced and so on, where they might have an interest. That seems right.

18 So I'm afraid, counsel for the intervenors, I'm going to have to ask you to hang around  
19 until 1.50 and I'll give you a ruling then and we'll just take it from there, depending on  
20 what my decision is. Okay?

21 **(12.51 pm)**

22 **(The short adjournment)**

23 **(1.50 pm)**

24 **(Ruling to be published separately)**

25 **JUDGE WOLFFE:** Are there any consequential matters that arise as far as any of the  
26 intervenors are concerned?

1 **MR HALLIDAY:** Not from me.

2 **MR CHIM:** No.

3 **JUDGE WOLFFE:** As far as the parties are concerned, in relation to the intervenors,  
4 before counsel disappear? No? Thank you very much.

5 I should say actually, I am minded to write a short written judgment on this because it  
6 is a novel point so you should take the reasons I've given as summary reasons that  
7 may be elaborated in due course.

8 Mr Barrett.

9  
10 **Application by MR BARRETT**

11 **MR BARRETT:** If it's convenient, I'll address the application to amend the defence if  
12 I may.

13 Submissions, my Lord, in four parts. Firstly, I'll just briefly refer you to the application,  
14 explain the context and background for the application. Secondly, I'll show you the  
15 amendments. Thirdly, I'll make some short submissions. And fourthly, I'll deal  
16 specifically with the objections which have been articulated in the claimant's skeleton  
17 argument.

18 My Lord, can I ask you first then just to remind yourself of the application. You'll find  
19 that it's in bundle A, behind tab 9, beginning at page 31. When my Lord has that, if  
20 I could ask you just to read, if you wouldn't mind, to yourself paragraphs 2 and 3, just  
21 2 and 3.

22 My Lord, the essential points. We have pleaded, we felt, sufficiently clearly, in Part  
23 57, that there was going to be a subsequent decision. They said in correspondence  
24 to us we don't think you've pleaded this or certainly you haven't done that sufficiently  
25 clearly. The amendments are intended to address that, that's the main purpose of  
26 amendments and then also some updating and tidying which you'll see as I take you

1 through the amendments.

2 My Lord, can I ask you to turn up the amendments? You'll find that behind tab 10, so  
3 just the next tab. I'll take you through those, if I may. The first amendment, page 41,  
4 paragraph 2, minor updating. The next paragraphs, 4 and 5 again, minor updating,  
5 referring to the now passed legislation.

6 The same point at paragraph 28. Paragraph 33.1, the penultimate sentence, a minor  
7 factual update on the award process. Page 59, paragraphs 41 and 42, again a minor  
8 update: Act, not bill.

9 Page 60, paragraph 43.3, and in particular, my Lord, I draw your attention to 43(a)  
10 which, as I apprehend it, really is the controversial paragraph, as it were, from the  
11 claimant's position.

12 We explain from our perspective, we say very clearly and unequivocally what we  
13 intend to do is to adopt the work that has been done to date as the statutory scheme,  
14 which we say there's an obligation to deliver. I'll come on to that, my Lord. This seems  
15 to be the controversial paragraph from the claimant's perspective but we say it's quite  
16 straightforward and we say the objection to it isn't a well-founded objection.

17 Next, then, my Lord, page 64, paragraph 59(a). This is the other controversial  
18 paragraph, my Lord. As I understand it, the part of the paragraph that's objected to, if  
19 I understand it, is the final three sentences. I think it's said that the claimant doesn't  
20 accept our characterisation of that correspondence.

21 Just, my Lord, in the interests of trying to cut through things, if I may, I just make two  
22 observations about that. Firstly we say, by reference to the correspondence, it is a fair  
23 characterisation or summary. My Lord, at the end of the day, we don't need to plead  
24 characterisation of correspondence. If it helps cut through, those final three  
25 sentences, I'm happy for them to be either redrafted or struck through if that gets us  
26 through this.

1 **JUDGE WOLFFE:** Indeed. At this stage it's fair to say I'm not hugely interested in  
2 whether one party regards the way another party has behaved is regrettable or not  
3 unless it bears on the decision that I have to make and, ultimately, the Tribunal will be  
4 interested in looking at material and hearing submissions rather than the sort of  
5 brickbats that go back and forth in the course of litigation.

6 **MR BARRETT:** Entirely so. If that's a convenient way through, my Lord, I'm content  
7 to accept that.

8 Pages 66 to 67, paragraph 70(a) and 70(b), that's a discrete point dealing with a point  
9 raised by the claimants regarding statutory guidance. As I understand it, no objection  
10 to that.

11 Page 70, paragraph 85, a minor typographical correction. Page 71, paragraph 86, the  
12 final sentence clarifying that the award et cetera will be conducted under PIA, the new  
13 Act. Again we say very straightforward. And then a clarification to our plea on relief  
14 at page 72, paragraph 93, which hopefully you can see.

15 So, my Lord, the legal test, I'm not going to ask you to turn it up, unless you would like  
16 me to. My Lord will indeed be, I think, very familiar with the relevant principles. Rule  
17 12 of the Tribunal rules, you have a broad discretion. In terms of the cases, in our  
18 respectful submission, probably the most useful authority in the bundle, is the HG  
19 case. That's authorities tab 18, beginning at page 406. The relevant passages are  
20 25 through to 34. What you get from that, my Lord, I say is there's a broad discretion.  
21 It's exercised by reference to the overriding objective. Two particularly significant  
22 factors are obviously the stage in the proceedings at which any amendment has been  
23 made, the other is whether the amendment is necessary to allow the true substance  
24 of the case to be decided fairly by the Tribunal. Those factors, we say, play out in the  
25 HG judgment. Permission is granted for an amendment even at a very, very late stage  
26 indeed, after argument has been concluded.

1 My Lord, applying those principles then to the facts of this case, we say in summary  
2 firstly the application is made at a very early stage in the proceedings, made in  
3 advance of the first CMC and being decided and considered at the first CMC. We say  
4 that it is significant, as I've shown you, that the amendments are being made as  
5 a clarification of the defence which was pleaded in response to a challenge that's been  
6 raised about that initial pleading. So we are acting, we say, promptly and responsibly  
7 in responding to that.

8 Thirdly, we say that the amendment is certainly necessary for the fair and just  
9 disposition of the substantive issues in the case. As I've sought to explain in my oral  
10 submissions already today, my Lord, this is a very significant part of our case.

11 **JUDGE WOLFFE:** As it was in the --

12 **MR BARRETT:** I say it was. My learned friend obviously disagrees with that. He  
13 says it wasn't there, it wasn't clear enough, and so on and so forth. I respectfully say  
14 it was. If I'm to be criticised, it's that I wasn't as clear as I perhaps should have been.

15 **JUDGE WOLFFE:** I had better wait and hear what Mr Gibson has to say on that.

16 **MR BARRETT:** Of course.

17 **JUDGE WOLFFE:** But it is fair to say on an initial reading I certainly picked up from  
18 your defence that you were relying on the bill and its prospective enforcement as part  
19 of your defence but Mr Gibson may well show me that that was a ... I haven't fully  
20 understood it.

21 **MR BARRETT:** Doubtless my learned friend will have many things to say.

22 My Lord, we respectfully say that subject to the specific objections which have been  
23 raised, which I'm going to deal with, this is a rather obvious case where permission  
24 should be granted, we would say with respect.

25 Can I then turn to my learned friend's specific objections in his skeleton argument?

26 Could I ask you, my Lord, to take up my learned friend's skeleton argument? Would

1 that be possible, please? If you could start, my Lord, by turning up paragraph 21, the  
2 first of the two crucial paragraphs.

3 **JUDGE WOLFFE:** Yes.

4 **MR BARRETT:** So it's said here, my Lord, that the amendments are defective, and  
5 I'll summarise, I hope in a way that's not unfair. Again my learned friend no doubt will  
6 tell us if it is, but what's said is that the amendments, in particular I apprehend  
7 paragraph 43(a), is defective because it does not explain how the proposed decision  
8 by Ofgem is going to be taken. I think the other complaint, as I understand it, is that  
9 the pleading does not specifically state whether the alleged decision in September,  
10 that is the September publications, is going to be withdrawn. As I understand it, that's  
11 the other criticism.

12 So if I could take those in turn, my Lord, the first complaint, the absence of an  
13 explanation as to Ofgem's internal decision-making process for making the proposed  
14 further decision, I say that's a misplaced objection. There is no need for Ofgem in this  
15 pleading to be narrating the internal decision-making process it intends to follow in  
16 respect of this subsequent decision. That's a matter that certainly can be explained in  
17 evidence once a decision has been made, but there's no need as a matter of pleading  
18 for that to be narrated in a defence. Indeed it might be said that if I'd done that it would  
19 be quite inappropriate, it would be giving evidence rather than giving a pleading. As  
20 I hope I've shown you, the pleading, in my respectful submission, is entirely  
21 straightforward. We state in terms what is going to happen, we intend, is a decision  
22 to adopt as the statutory scheme the work that's previously been done. That includes  
23 the September publications.

24 **JUDGE WOLFFE:** It might be said that's irrelevant unless and until such a decision  
25 is made and it might be said that I'd be interested in this, that in effect if you're going  
26 to rely on such a decision without prejudice to any of the legal arguments as to what



1 effect it has or doesn't have, you'll have to come forward in due course with a further  
2 application to amend.

3 **MR BARRETT:** Absolutely. Indeed precisely the point my Lord put to me this  
4 morning. If I may say so, my Lord, I entirely follow the logic of my Lord's suggestion  
5 that it would be necessary and appropriate to effect a further amendment when the  
6 decision is made, but that's no part of my learned friend's criticism in case. His  
7 criticism in this case is that there's some alleged defect in the current pleading because  
8 I haven't narrated how the internal decision-making process is going to work. That is  
9 a rather different point, in my respectful submission. That's a bad point.

10 As I say, my Lord, that's the first objection. That is the absence of how, the first alleged  
11 defect.

12 The second alleged defect is that it's said there's a problem because there isn't  
13 a specific plea as to whether or not the September publications are being withdrawn.  
14 That's a fundamentally bad point, my Lord. The plea in 43(a) is that the September  
15 publications are being adopted. If one is adopting something, one is not withdrawing  
16 it. You might say that they're opposites or close to opposites.

17 We say, my Lord, with respect, there's nothing unclear or equivocal about the word  
18 "adopts", with respect. So we do say, my Lord, what seems to be going on here is  
19 a really rather misplaced attempt by the claimant to micro-manage how the defendant  
20 wishes to plead its case. For the reasons I've sought to explain, these are the  
21 criticisms that have been articulated. These are not good criticisms.

22 My Lord, can I go into the second paragraph of my learned friend's skeleton? It's  
23 paragraph 22. That's a point I've dealt with already, my Lord. This is the short point  
24 about the characterisation of the correspondence.

25 **JUDGE WOLFFE:** So what's the amendment you're proposing to make to your  
26 amendment in order to deal with that?

1 **MR BARRETT:** My Lord, if you could turn up the amended defence, you'll find that in  
2 tab 10. Do you have that, my Lord? It's on page 64 internally. Does my Lord have  
3 that?

4 My Lord, I would propose, if it's helpful, we can strike through the language beginning  
5 from "Regrettably".

6 **JUDGE WOLFFE:** And just take out the rest of that paragraph?

7 **MR BARRETT:** Yes.

8 As I say, my Lord, that's, just to make clear, we stand by our characterisation but I'm  
9 trying to cut through and just get things in a sensible order.

10 **JUDGE WOLFFE:** No, I understand your position.

11 **MR BARRETT:** My Lord, unless I can give further assistance at this stage, those are  
12 my submissions. I'll obviously listen to what my learned friend has to say with interest.

13 **JUDGE WOLFFE:** Yes, I'm perhaps anticipating a discussion later on, not now but  
14 eventually, depending what view I take on this and other matters, but do you have  
15 a timescale for the putative future decision?

16 **MR BARRETT:** I don't have a definitive timescale that I can confirm today, my Lord,  
17 but certainly I anticipate that I can say we would intend to be seeking to make that  
18 decision within a short period after the coming into force of Section 26. As my Lord  
19 knows, that's on 18 February, in three weeks' time from today, and I can't, I'm afraid,  
20 I'm sorry, give you a fixed date but as I say certainly my instructions are the intention  
21 is to do it in short order after that occurs.

22 **JUDGE WOLFFE:** Well, it would not be an appropriate enquiry as far as making  
23 a decision, when comes to me --

24 **MR BARRETT:** Indeed, precisely so.

25 **JUDGE WOLFFE:** -- to be giving a hard commitment. But that's helpful. Thank you,  
26 Mr Barrett. Good.

1 Mr Gibson.

2  
3 **Submissions by MR GIBSON**

4 **MR GIBSON:** I'd like to start on a positive note which is we're not opposed in principle  
5 at all to my learned friend amending the pleadings.

6 **JUDGE WOLFFE:** I'd certainly picked that up so I was slightly surprised to find --

7 **MR GIBSON:** He's quite properly taken you through the appropriate test. I just want  
8 to give reassurance that that's not part of our submission today. And indeed subject  
9 only to the point about costs, because we say the normal approach should be taken  
10 there.

11 Indeed some of the proposed amendments my learned friend took you through are  
12 entirely unobjectionable and we raise nothing about that.

13 I should make one point clear though. Our position is a pragmatic one, that we don't  
14 accept the arguability necessarily of all these points but we're not taking a point on  
15 that because our real concern here is just to have sufficient clarity that we can reply  
16 meaningfully to the amendments once they've been made. That's the sole purpose of  
17 the submissions today.

18 **JUDGE WOLFFE:** Again I understand that position as well.

19 **MR GIBSON:** Thank you. I'm just going to highlight a few points on the principles.  
20 You've obviously seen our skeleton paragraphs 15 to 19, I'm not going to rehearse all  
21 of that. I'm just going to flag the reference to the White Book we make, citing Court of  
22 Appeal authorities. It makes two points. The first is that amendments must contain  
23 sufficient detail to enable the other party to understand the case that is being advanced  
24 in order to respond to it. The second point is that the court is entitled to reject a version  
25 of the facts which is implausible or self-contradictory and not supported by the  
26 contemporaneous documents.

1 The second point I wanted to say on legal principles arises from what GEMA says in  
2 their skeleton, paragraph 16, footnote 7, about what the CAT Rules require and what  
3 is expected in judicial review pleadings. So in light of that, you've seen I've put in  
4 a couple of additional authorities that will assist us in understanding the importance of  
5 rigour in the pleading of judicial review cases which has been stressed repeatedly.

6 The first case I'd like to take you to, sir, is the case of *Leighton* which is at tab 23 of  
7 the authorities bundle. If we turn to pages 72 to 73, I don't propose to take --

8 **JUDGE WOLFFE:** Can you just give me a moment? I was just looking at the footnote  
9 you were referring to.

10 **MR GIBSON:** Yes, the footnote -- over the page as well. So if you look at both sides  
11 of the page.

12 **JUDGE WOLFFE:** Now, you're taking me to --

13 **MR GIBSON:** I'm taking you to the case of *Leighton*, tab 23. I know that my learned  
14 friend Mr Paines is in this case so I won't try to summarise the facts. No doubt they  
15 won't be anywhere near accurate enough. I don't think we need to trouble ourselves  
16 unduly. What we need to turn to is to page 469 to 70 and paragraph 72 to 73. I don't  
17 know whether, my Lord, you prefer to read things yourself rather than have counsel  
18 purport to read things to you. I'll give you a moment.

19 **JUDGE WOLFFE:** If you give me a moment I'll read.

20 **MR GIBSON:** Page 469, paragraph 72 and over the page to 73, please.

21 **JUDGE WOLFFE:** Thank you.

22 Yes, that's helpful.

23 **MR GIBSON:** Cavanagh J, citing Lord Justice Singh in the *Talpada* case, making  
24 important points about the need for procedural rigour even in public law proceedings,  
25 indeed some might say especially in public law proceedings, because of the wider  
26 public law impact, particularly in relation to the claimant side of things, and

1 emphasising that this is important, that the other party to the case is able to respond  
2 properly to the allegations that are made. He makes the point that this applies equally  
3 to defendants as it does to claimants, albeit that the public law questions might not be  
4 exactly the same.

5 The second case I'd like to take you to, sir, is the case over the next tab, in tab 24.  
6 This is *R (on the application of TTT) v Michaela Community Schools Trust*. Here, it's  
7 quite a lengthy case, I'd just like to turn to page 566 of the bundle numbering. If we  
8 could just look at paragraph 249 and over the page down to 251, again, sir, if you  
9 would like to read from paragraph 249 to 251, please. **(Pause)**

10 So what Mr Justice Linden was highlighting there was Lord Justice Singh's  
11 requirement for procedural vigour applies not just to the grounds being pleaded but to  
12 the facts relied upon in support of the relevant ground. He highlights also that the aim  
13 of this rigour in pleading is fairness in accordance with the overriding objective which  
14 you'll probably be familiar, is very similar to the governing principles in this Tribunal, to  
15 enable the other party to know the case it has to meet and prepare accordingly.

16 We say, if there's any doubt about it, that whilst this particular reference is the claimant,  
17 by virtue of Leighton it obviously applies equally to the defendant and indeed CAT's  
18 governing principles of treating parties on equal footing would also support that  
19 conclusion.

20 That's what I wanted to say about what the expectations of procedural rigour and  
21 judicial review are.

22 The other point that was highlighted in that footnote you looked at a moment ago is  
23 about what the CAT Rules expect and I think we can take that relatively briefly. If you  
24 would just like to turn up the guide which is at tab 4 of this bundle in front of you and  
25 in particular if you go to page 187 of the pagination numbering. The same bundle as  
26 the cases we were just looking at, sir. Tab 4, page 187, please.

1 So paragraph 4.77 states what might be thought of as a matter of common sense or  
2 self-evident, that the defence is intended to respond in a reasoned manner to the  
3 grounds contained in the notice of appeal or application. We say reasoned manner is  
4 completely consonant with the point I've just taken you to, sir, from *TTT*, about  
5 pleading the facts supporting the grounds, not just making bald assertions.

6 The CAT also reminds us, if you just cast your eye down to paragraph 4.79, the powers  
7 of the Tribunal in relation to a defective notice of appeal mentioned at 4.53 above apply  
8 equally to defence. So if you turn back to 4.53, which is on page 183, you see  
9 reference there to rule 10. Rule 10 is in its terms a rule in relation to notices of appeal  
10 but by virtue of rule 15, subparagraph 7, that applies equally in relation to a defence  
11 and it gives the CAT power to give directions to putting a pleading in order if it  
12 considers them to be materially incomplete or lacking in clarity.

13 So those are the points that arise from what was said in the skeleton.

14 The third point, in correspondence, I understand my learned friend takes the position  
15 that they shouldn't pay the costs of this process. We obviously do take exception to  
16 that. I won't take you to it but you'll have seen in our skeleton at paragraph 17 we flag  
17 up the basic position that the expectation typically -- applicants who obtain permission  
18 are ordered to pay the other party's costs of and caused by the application.

19 So turning then to the concerns that we have regarding the pleading as it stands.  
20 Happily I think what my learned friend proposes in relation to paragraph 59(a) in  
21 relation to the incompleteness and inappropriateness of it, I'll take instructions in  
22 a moment when I finish this, but I imagine that that would be agreeable. There are still  
23 elements that we're not entirely happy with but I think on a pragmatic basis that would  
24 be sensible.

25 The remaining issue relates to the way in which the pleading currently deals with the  
26 intended decision to adopt the work that's been undertaken to date. In particular, the

1 reason why we take exception to this is these proceedings concern the decision, as  
2 we say, that was taken on 23 September 2025. What this amended pleading does is  
3 advert to this intended decision but it doesn't sufficiently explain how they say that  
4 intended decision impacts on the actual issues in this claim. What is the impact? What  
5 is the effect, they say, of that intended decision on the decision that's actually under  
6 challenge?

7 So leave apart the possibility that when they take any decision, we can challenge that  
8 if so advised. The question before the Tribunal is the allegations we make that the  
9 decision taken on 23 September last year was one that was unlawful for all the reasons  
10 set out in our grounds. In those circumstances, it's not of assistance to anyone, either  
11 us or the Tribunal, to have a reference to there being an intended decision to adopt  
12 work done previously if it's not spelled out with sufficient clarity to enable us to respond  
13 to it what the implications of that are for the decision.

14 That's the headline point. If I can now elaborate on that very briefly. The question we  
15 wanted answered, which was answered yesterday in correspondence after a lengthy  
16 to and fro that you'll be relieved to know I'm not proposing to take you through, was:  
17 does this mean that the decision on 23 September is to be withdrawn? My learned  
18 friend said, no, no, no, not withdrawn, it's going to be adopted. But that just gives rise  
19 to the question what is it to adopt a decision that was taken in September when you  
20 didn't have a power, to adopt that and say that you can -- because you've now got the  
21 power, you're just going to adopt that? What legally happens to the previous decision?  
22 In those circumstances that is the decision with which we are taking issue.

23 The only scintilla of an explanation that we see is in paragraph 59(a), where there's  
24 a reference to the fact that -- sorry, I'm drowning in different documents here -- the  
25 suggestion that the intention to adopt the development work will render the appeal  
26 academic or otiose. There is no particularization or explanation of how they say that

1 is the case. That, in a nutshell, is what we take exception to. We will now need to  
2 plead a reply to this pleading. And as things stand we are entirely unclear what they  
3 say that actually means. The only thing we can do, and I have done, is put an authority  
4 in the bundle on this, is try to engage with what they say -- because this is also  
5 relevant, I should say, to the preliminary issue which has been reformulated in  
6 correspondence and now also contains reference to the idea that the challenge "is  
7 academic".

8 This gives rise to what, in my mind, is particularly pertinent if they are seeking  
9 a preliminary issue which would be, they say, on their case, dispositive of our entire  
10 challenge, that we have to be clear about how they say that is the case. How else can  
11 we plead to that and prepare for a hearing at which this, if the permission were allowed,  
12 is going to be completely dispositive of a case which is of huge financial importance  
13 to my client, and, we say, of wider importance to the entire achievement of the energy  
14 storage sector's objectives and their support for the Clean Power 2030 targets. This  
15 is of monumental importance and it is simply not satisfactory to have a passing  
16 reference to this phrase academic or otiose without any explanation or  
17 particularization.

18 So having had the explanation in correspondence yesterday as to the fact that they're  
19 not going to withdraw, that gives rise to the question, well, if the decision remains  
20 extant, then all of the objections we have for that decision remain relevant and need  
21 to be answered and if the only question they're then saying is, oh, you don't need to  
22 look at that because it becomes academic or otiose, we need to understand what that  
23 actually means.

24 If I can take you very briefly, as I said without prejudice to the fact that we don't really  
25 understand what this means. If you look to tab 25 of the authorities bundle, you'll see  
26 a very recent authority of Mr Justice Sheldon in the *Hidenda Tax* case. Do you have



1 that, sir?

2 **JUDGE WOLFFE:** Yes.

3 **MR GIBSON:** At page 597, under the heading "Is the claim academic?"  
4 Paragraph 18, Mr Justice Sheldon outlines briefly a reference to prior authorities, that  
5 a claim is academic if there is no longer a *lis* to be decided which will directly affect the  
6 rights and obligations of the parties and disputes which are academic should be only  
7 heard if there's good reason in the public interest for doing so.

8 Well, that is no doubt all true but how on earth does it apply in our case? We say it's  
9 convenient just to briefly look at how it was that the decision became academic in the  
10 *Hidenda* case because it exemplifies how very different we say the circumstances of  
11 that case are from those that would eventuate if the intended decision is taken at some  
12 point after 18 February. In that regard, I'd invite you to look at first of all page 594 -- so  
13 one sees at paragraph 10, I'll just briefly outline it and then leave you  
14 to -- paragraph 10, Mr Justice Sheldon explains that he allowed permission on ground  
15 4 and observed that it was arguably irrational for the HMRC not to replace some  
16 mechanism for taxpayers to make their claims.

17 Then at paragraph 11, HMRC reacted to that and stated that it would take steps to put  
18 in place such a mechanism. At paragraph 12, specifically wrote to *Hidenda* and  
19 explained that it intends to take steps to mitigate the effect of that action.

20 I'll leave you to read that yourself and then I'll take you to the next point.

21 **JUDGE WOLFFE:** So in essence the public authority here is responding to the claim  
22 and is putting in place arrangements in order to address the complaint that's raised in  
23 the claim.

24 **MR GIBSON:** Specifically it's addressing the complaints and accepting them  
25 essentially and engaging them in that way.

26 If you look at paragraphs 16 and 17, immediately above the paragraph I took you to

1 earlier, you'll see there's a further facet.

2 At 16, shortly before the hearing of the judicial review claim, Hidenda sent the HMRC  
3 a spreadsheet containing details of the various claims which it said should have been  
4 processed. In paragraph 17, at the hearing before Mr Justice Sheldon, Mr Suterwalla,  
5 counsel for HMRC, made it clear, stating that he was making an open undertaking that  
6 HMRC was prepared to consider the spreadsheet provided and that those claims had  
7 been submitted blah, blah, blah.

8 So the key point is this is effectively a settlement of the claim. And in those  
9 circumstances it's completely obvious that there's nothing for the court to determine.  
10 That is truly an academic claim. There's no *lis*, the *lis* has been extinguished by virtue  
11 of the concession on the part of HMRC.

12 The equivalent here would be if they said, we've heard what you say about our  
13 unlawful decision on 23 September 2025. We are withdrawing that decision because  
14 we accept it's unlawful and there would be consequences that would flow from that.  
15 But to be absolutely clear, that is not what they're doing. On the contrary, they say  
16 there was no decision on 23 September.

17 So there are essentially two points of clarity that we require.

18 Firstly, if GEMA wants to deny that any decision was taken on 23 September, then it  
19 should plead that expressly, which it hasn't done, and it should particularise the factual  
20 basis for that denial in a way that can plausibly be understood as being consistent with  
21 the available evidence. I'm going to take you very briefly to that available evidence in  
22 a moment.

23 The second point, we say, that needs to be done is that they need to address in detail,  
24 in sufficient detail, how they say that the decision, the intended decision is going to  
25 render the existing decision, the extant decision that is, as it stands, we say unlawful,  
26 academic or otiose. On both those points we've got headline points without any

1 explanation. It's impossible to plead to them and we say it's impossible really to  
2 prepare for a hearing of them.

3 In terms of the contemporaneous documents, I think the most convenient way to do  
4 that is just to take you very briefly to what we say in the reply. If I can turn that up, it's  
5 in bundle B, tab 8.

6 I'd like to go to page 381 and 382. So here is where we are dealing with some of the  
7 pleading in the defence. In a similar vein, they say a bare denial -- they suggest that  
8 what we're actually challenging is the publication of documents on  
9 23 September 2025. With respect, sir, that's clearly not what we're pleading. We're  
10 not pleading that there's any -- we're not objecting to the fact they published them,  
11 we're objecting to what the substantive content of those documents is. Obviously  
12 they're entirely within their rights to claim that they're not what we say they are and we  
13 understand their point about whether or not it is a subsidy scheme. That's been  
14 sufficiently clearly pleaded. But if they're now saying, as they do in correspondence,  
15 that there was no decision at all, then we say it's incumbent upon them to explain why  
16 that is, in the circumstances outlined at paragraphs 21.2 and paragraph 21.3. So if  
17 you'd like to, sir, read those paragraphs, I can then make some brief points in relation  
18 to them.

19 **JUDGE WOLFFE:** Yes, if I look at page 39 in that bundle, it's the document behind  
20 your claim form, it's a document that's headed --

21 **MR GIBSON:** Yes, those are indeed the documents themselves, sir.

22 **JUDGE WOLFFE:** It's headed "Decision" and then it goes on to say, "Decision on the  
23 project assessment framework."

24 **MR GIBSON:** Yes, sir. I was trying to do it in a more truncated fashion. One can  
25 work through -- the documents at 2, 3, 4 and 5 tabs we say are documents that lay out  
26 in a great deal of detail, not only the fact that they are decisions, two of them actually

1 are described on the face of them as decisions, but we say all four of them are clearly  
2 decisions. And they are, in the passages that we summarise in reply, in  
3 a non-exhaustive fashion I should say, these are just examples that we say, they refer  
4 to the fact that it is a final decision on the financial framework and then the words "will"  
5 is repeatedly used. They "will" need to do certain things, they "will" support it, we "will"  
6 use things. We say it's perfectly clear that this is setting down firm decisions -- we can  
7 have a debate about whether or not they leave too much or too little discretion, that's  
8 a scheme point. But we say to say that there's no decision taken, if they want to plead  
9 that, they have to do it clearly but they have to do it by reference to the evidence. I've  
10 already referred to the need for amendments to be consistent with the  
11 contemporaneous evidential record, if that's going to be the point taken.

12 So in a nutshell, our objections to the pleadings as they stand are they now, in  
13 correspondence, explain that there was no decision taken on 23 September and we  
14 say that needs to be -- if and to the extent there was a hint of that on the previous  
15 pleading, that's one thing, but if this is now central to the understanding of this point it  
16 needs to be spelled out and needs to address in terms the evidence is consistent with.  
17 Then the second point is they need to explain this reference to academic or otiose,  
18 which has the feel it's going to be some sort of prestidigitation sort of at the hearing,  
19 suddenly going to be a rabbit out of a hat, we need to understand what's going on and  
20 we need to have an opportunity to prepare a pleading to it accordingly.

21 That's all I wanted to say for the basis of our concerns. I'll just double-check that's all  
22 I've got to say in a moment. The final point --

23 **JUDGE WOLFFE:** You need to just take instructions on the amendment --

24 **MR GIBSON:** Yes, I will do that as well, sir. Yes, thank you. Yes, the only point really  
25 is in relation to costs, which I can address you on now, sir, or afterwards.

26 **JUDGE WOLFFE:** It may be better to leave it until I've heard -- I have a couple of

1 questions for Mr Barrett.

2 **MR GIBSON:** I'll just take instructions on that paragraph 59(a) point.

3 **(Pause)**

4 Sir, yes, subject to the point that 59(a) also contains the words academic and otiose  
5 and I've already said that, the deletions to deal with the point at paragraph 22 of our  
6 skeleton we say on a pragmatic basis we can live with. If there's anything we can  
7 object to, we can plead back to it. But that's enough for us, sir.

8 **JUDGE WOLFFE:** Mr Barrett, just a couple of points if I may at the outset. The first  
9 is, are you taking a point that what happened in September 2023 was not a decision?  
10

11 **Reply submissions by MR BARRETT**

12 **MR BARRETT:** No, my Lord. That suggestion that was put to you is fundamentally  
13 misconceived and is contrary to the express terms of my pleaded defence.

14 **JUDGE WOLFFE:** That was my impression so I was slightly surprised to hear that  
15 being --

16 **MR BARRETT:** Yes. If it is convenient, my lord, could you just take a quick look just  
17 to refresh your memory.

18 **JUDGE WOLFFE:** I'm very happy to take it from you, Mr Barrett, that that's not part  
19 of your case.

20 **MR BARRETT:** For your note, my Lord, it's paragraphs 33 and 34. 34, just to read  
21 out and it may assist my learned friend:

22 "The September publications are those which ...(Reading to the words)... the decision  
23 to make the scheme, having regard to the chronology set out above Ofgem submits  
24 that this is not an accurate characterisation [as read]".

25 We're not denying that there was a decision. We're denying the characterisation that  
26 the decision comprises a subsidy decision.

1 The sole basis my learned friend put to my Lord for his assertion that we were taking  
2 this position was our letter of 27 January. Again I won't turn it up unless I need to,  
3 my Lord --

4 **JUDGE WOLFFE:** I'm not sure -- as I say I am very happy to take it from you, Mr  
5 Barrett, it is not part of your --

6 **MR BARRETT:** For your note, C/397. We make no such statement.

7 **JUDGE WOLFFE:** Thank you.

8 **MR BARRETT:** So I'm afraid that's just a frolic. A complete frolic.

9 **JUDGE WOLFFE:** That's helpful. On the issue about the intended decision, we did  
10 have a brief discussion about this before lunch and I'd just like to make sure I've got  
11 your position clear in my mind.

12 **MR BARRETT:** Of course.

13 **JUDGE WOLFFE:** Do you say that this future intended decision is essential to your  
14 case that the statute removes the --

15 **MR BARRETT:** Yes.

16 **JUDGE WOLFFE:** It's basically essential to your second line of argument.

17 **MR BARRETT:** It is.

18 **JUDGE WOLFFE:** So if you, let's say, although there is a statutory provision which,  
19 either a power or a duty, depending on the argument we will have one day, you accept  
20 that unless there's a further decision of the sort you postulated, that wouldn't be an  
21 answer on its own?

22 **MR BARRETT:** On its own. Of course my other submission, my Lord, is that there  
23 wasn't a decision in September that's a subsidy decision. But I think --

24 **JUDGE WOLFFE:** Of course. On the assumption that I was with Mr Gibson on it  
25 being a subsidy scheme.

26 **MR BARRETT:** Yes. Mr Gibson was quite right about that.

1 **JUDGE WOLFFE:** You pled the effect of the bill. You're proposing to update that so  
2 it is a reference to that.

3 **MR BARRETT:** My lord has fairly summarised that.

4 **JUDGE WOLFFE:** But as I understand it, your position is the coming into force of that  
5 provision on its own doesn't give you the answer that you seek to advance to  
6 Mr Gibson's case.

7 **MR BARRETT:** That's correct, my Lord.

8 **JUDGE WOLFFE:** So it's essential to your case that there be a decision following on  
9 the coming into force of the Act?

10 **MR BARRETT:** Following that submission, as I put that argument, yes.

11 **JUDGE WOLFFE:** Okay. And unless and until there's such a decision, it follows that  
12 you actually don't have -- this argument is not an argument that's available to you.

13 **MR BARRETT:** That's quite right.

14 **JUDGE WOLFFE:** So what you're putting in your proposed amendment is you're,  
15 I suppose, giving advance notice that in due course you are going to come forward  
16 with a further application to amend in order to plead the decision --

17 **MR BARRETT:** If I can just try to cut through, my Lord. We have tried to be as  
18 transparent and straightforward with the claimant as we possibly could. I'm not going  
19 to turn it up, it will take time unless you want me to. We wrote to them and what we  
20 tried to do in writing with them was to clearly explain what we intended to do and give  
21 them the opportunity to reflect and make a decision as to whether they wished to  
22 proceed. They've elected to proceed. That's entirely their prerogative.

23 By the same token, with this amendment, again we're seeking to be -- our friend is  
24 preoccupied with the duty of candour, we've sought to be very candid and transparent.  
25 We've sought to be as clear as we can from our perspective as to what the  
26 decision-making process here is. As my Lord has put to me this morning, I entirely

1 accept we will seek to amend in due course once that decision has been made. I'll  
2 just update my Lord. I did actually get some instructions on that while my learned  
3 friend was on his feet. I'm told that that decision is expected very shortly after  
4 18 February, within a matter of days I'm told is the intention and the expectation.

5 **JUDGE WOLFFE:** If I can perhaps disclose the way my mind is thinking at the  
6 moment, so the parties can react to that. Mr Gibson has not taken objection in  
7 principle to the amendment in effect to update pleadings to reflect the fact there's now  
8 an Act. Like I said, I think that's right.

9 **MR GIBSON:** Entirely correct, sir.

10 **JUDGE WOLFFE:** You accept that actually that amendment is not going to provide  
11 the foundation for the argument that you want to run in due course at the substantive  
12 hearing. I think an approach would be to allow this amendment with that position  
13 recorded, as it is recorded in the transcript, it will be for you to come forward with  
14 a further application to amend once the decision has been made and the Tribunal will  
15 have to consider that application. Then the question comes to be whether  
16 Mr Gibson -- I can see that if we proceed in that way, Mr Gibson may want to reply to  
17 this amendment and may have things he wants to say about any future application to  
18 amend and may want to respond further once that comes in.

19 **MR BARRETT:** Yes.

20 **JUDGE WOLFFE:** What I was wondering is whether actually there's anything of  
21 substance that Mr Gibson would need to reply to unless and until you are allowed to  
22 amend again but that's really a matter for him I suppose.

23 **MR GIBSON:** I wouldn't like to make a response to that on the hoof. My main concern  
24 is that, in circumstances where, as I outlined earlier, in relation to the preliminary issue,  
25 we say that this is actually all kind of irrelevant because unless you -- I'll outline it  
26 further. We're a bit concerned that we are trying to move these things forward as



1 speedily as possible. That's been our consistent position from the outset. We  
2 originally proposed a substantive hearing in the week commencing 9 February. We  
3 are getting pilloried for delay in circumstances where all the delay is being created by  
4 this and we say irrelevant. So that's what we want to say.

5 **JUDGE WOLFFE:** There's no pillorying from me.

6 **MR GIBSON:** I don't know who is pausing and waiting for whom, sorry.

7 **JUDGE WOLFFE:** I think I'm collecting my thoughts.

8 **MR GIBSON:** The only observation I'd make is we will at some stage need to know  
9 how it is that this decision, whether it's intended or taken or whatever, how it is that it  
10 actually is going to bite on the issues that are before this Tribunal in respect of the  
11 decision, which is extant. I'm grateful for the clarification.

12 I apologise, I'd apparently misread the phrasing of paragraph 4(a), not page 397,  
13 which says "To the extent there was any decision made on 23 September" and it  
14 continues to make the point about publication, but to the extent suggested that there  
15 may be no decision. I'm very glad if we've moved away from that and it's clear there  
16 was a decision, it's just a question what the quality of it was.

17 **JUDGE WOLFFE:** I think we have clarity on two points. That point is not being taken  
18 and also that this amendment, whilst it's necessarily updating, actually doesn't provide  
19 a foundation for the argument that Mr Barrett wishes to run unless and until there is  
20 the decision that is anticipated and that he will need to come forward with a further  
21 amendment or application to amend in due course in order to put that into the  
22 pleadings.

23 **MR BARRETT:** Can I say something about that?

24 **JUDGE WOLFFE:** Yes, of course.

25 **MR BARRETT:** I'll be direct. It is important that this point is flushed out and pleaded  
26 and settled. I think the only observation that I wish to make is if my Lord is minded to

1 proceed in the manner that you've articulated, I would ask that there's a timetable set  
2 down today to deal with that further amendment, because I think that does really need  
3 to be sorted out.

4 **JUDGE WOLFFE:** Can I say the point is well made, Mr Barrett, and I'm anticipating,  
5 once we've dealt with the other issues, timetabling the various actions that will need  
6 to be undertaken in order to get us to a substantive hearing as quickly as we can.

7 **MR BARRETT:** I don't know if it's helpful or necessary for me to take time up on it  
8 given the course the debate has taken. If it is of any relevance to what my Lord is  
9 considering, I probably would wish to say something about my learned friend's  
10 suggestion that there's a lack of clarity as to the legal analysis or the legal basis upon  
11 which we rely on for this submission. Again, I'll be very direct. I simply don't accept  
12 that the claimant doesn't understand what we say about this or it's got the slightest  
13 difficulty understanding what we say about this.

14 We say that on 18 February we are subject to a statutory duty to introduce a statutory  
15 LDES C&F scheme as soon as reasonably practical.

16 We intend to take a decision under that statutory duty but such a scheme is indeed  
17 going to be commenced and conducted. If there's such a lawful decision, in my  
18 respectful submission, authorities including many House of Lords authorities, suggest  
19 that a judicial review targeting a September decision to publish the rules of the  
20 decision-making process is entirely academic. I'm very happy to say that for the  
21 transcript, my Lord. I don't accept that I need to say it. I think my learned friend is  
22 probably long enough in the tooth at this stage that he understands the case that he's  
23 being asked to meet, but there we are. We're being told that there's some difficulty or  
24 some obscurity about our case. There we are.

25 My Lord, I don't know if there's anything further that would assist on this point.

26 **MR GIBSON:** In the spirit of directness, and my learned friend is also long in the tooth,

1 this is all on the hypothesis that we're correct about 23 September. So it's no use  
2 saying if a decision was taken about publishing. If a decision was taken that's unlawful  
3 on the basis we've said, on 23 September, then what does the decision taken  
4 in February add to it? Answer: nothing. If he wants to say it does because of some  
5 otiose or academic argument, it's incumbent upon him to explain it so we can actually  
6 answer that point.

7 **JUDGE WOLFFE:** I mean what I anticipate doing is that -- what I'm going to do is I'm  
8 going to allow the application to amend subject to the deletion of the passage that  
9 Mr Barrett offered to delete. I'm going to allow you time to respond, if so advised, at  
10 this stage. It will be for Mr Barrett to come forward if and when a decision is made of  
11 the sort that he's postulated, with a further application for me to amend. I am going to  
12 timetable this on the assumption that he will bring forward such an application and I'm  
13 not going to prejudice any discussion that we might have about whether or not that will  
14 be allowed.

15 Assuming it's allowed, though, you know, I have the impression you are both -- you  
16 can both at least see where the battle lines are going to start to be drawn in terms of  
17 the legal issues that will have to be addressed at the substantive hearing, and those  
18 can be articulated in a skeleton ahead of the hearing. Of course you, Mr Gibson, if an  
19 application to amend further comes forward and is allowed, you will of course have an  
20 opportunity to respond to that.

21 Take all of that into account in timetabling but on the basis that that's without prejudice  
22 to the decision the Tribunal will have to make at that point. If there's anything either  
23 of you wishes to say to try to divert me from that general approach, I'm very happy to  
24 hear it and take it into account.

25 **MR GIBSON:** I don't want to divert you from that, subject to the point about costs,  
26 save to emphasise that the point that comes from the authority I took you to, the

1 reference to academic or otiose is effectively a ground of defence. It's not good  
2 enough to set out a ground without particularizing the facts that support that. Simply  
3 saying that it's obvious, I think is another way of saying we haven't really worked out  
4 how on earth we're going to get round that. But that's the whole point. If we're going  
5 to try to resolve this, whether it's before the Tribunal or by way of settlement, the parties  
6 have to confront the logicity of their position and we say the pleading process is  
7 designed to flush that out. So we will insist that something needs to be pleaded that  
8 makes coherent sense. Factual support for that contention, sir.

9 **JUDGE WOLFFE:** You've laid down a marker, Mr Gibson. Logically, given what  
10 Mr Barrett said earlier, he doesn't even have the argument until a decision is made  
11 and no doubt he will have heard what you've said and when he comes forward with  
12 a further application to amend, he'll have to consider whether it's a point that he needs  
13 to address or not and you have put down a marker as far as the Tribunal is concerned  
14 that it's a point that you may wish to return to if you take the view that --

15 **MR GIBSON:** I'm just going to turn my back to check that. We're happy with that  
16 approach, sir.

17 **JUDGE WOLFFE:** Okay. Mr Barrett, anything else that you want to say?

18 **MR BARRETT:** No, thank you, my Lord. I'm not sure it's going to assist you if I say  
19 more at this point.

20 **JUDGE WOLFFE:** Thank you. Well, I'm going to allow the application to amend  
21 subject to deletion, the deletion of the part that Mr Barrett offered to delete.

22 Mr Gibson, I'll give you the opportunity to respond. I think perhaps that might be better  
23 once we get to the timetabling to work out how this factors in.

24 I'm minded to set a date, Mr Barrett, when we come to the timetabling, by which I will  
25 expect a further application to amend to be brought forward if you wish to bring such  
26 an application forward so the Tribunal can deal with that in good time in the context of

1 the timetable that we'll be setting. And that's an application that will be dealt with on  
2 its own merits in due course.

3 **MR BARRETT:** Yes.

4 **JUDGE WOLFFE:** Okay, good, excellent. Next point.

5 **MR GIBSON:** Costs of the amendment.

6 **JUDGE WOLFFE:** Costs of the amendment. I don't know whether, Mr Barrett, you  
7 want to say anything about --

8 **MR BARRETT:** Just what we said in our skeleton, my Lord. Sometimes it's  
9 appropriate to order the amending party to pay the other side's costs of dealing with  
10 it. Sometimes it's not. It depends on the background, the reason for the changes.  
11 Here we say it's updating the process of the Act to become law and dealing with  
12 a query that the claimant has raised about the defence in those circumstances. We  
13 would say each party should bear their own costs but that's all I would say about that.

14 **JUDGE WOLFFE:** I'm going to give Mr Gibson the costs of this amendment.

15 **MR GIBSON:** Thank you, sir.

16 **MR BARRETT:** Thank you, my Lord.

17 My Lord, the next issue then is a preliminary issue. In relation to that, again, just trying  
18 to be efficient, I apprehend from some of my Lord's remarks that your position may be  
19 that you don't feel you can or should deal with that today because it's contingent upon  
20 the amendment being made.

21 **JUDGE WOLFFE:** A slightly different preliminary view, and it's very much  
22 a preliminary view, Mr Barrett, and I'm very hope to parties seeking to dissuade me  
23 from it, which is this is essentially a pretty short judicial review.

24 **MR BARRETT:** Yes.

25 **JUDGE WOLFFE:** It ought to be capable of being dealt with on all grounds, assuming  
26 that you are allowed to amend further, to in effect provide the foundation for the

1 Section 26 point, in two days. If it's a difference between having a day on that  
2 preliminary point which at this stage is not even pled and fixing a two-day hearing at  
3 which we will deal with everything, it seems to me the balance firmly lies in favour of  
4 fixing the two-day hearing on the basis that everything will be dealt with.

5 I also think there's a certain lack of attraction in trying to carve out a preliminary issue,  
6 the hypothesis of which is that Mr Gibson is correct on everything else without actually  
7 just dealing with the points in the round.

8 There's also, on top of that, the risk that if we carve off a preliminary issue of the sort  
9 you've identified, we end up with an appeal and it actually delays the overall outcome.

10 **MR BARRETT:** Yes.

11 **JUDGE WOLFFE:** So you will detect that I've reached quite a strong view that that's  
12 the better course. But I am, as I say, very open if you've got -- you know, want me to  
13 take into account anything else before I make a decision.

14 **MR BARRETT:** Could I make a few observations about that and let me preface those  
15 by saying I certainly follow the points my Lord is putting to me and understand those  
16 points.

17 Some aspects I think of that analysis we would, my Lord, raise concerns about. Two  
18 days we do not think will be sufficient to properly hear this case.

19 **JUDGE WOLFFE:** I find that very surprising, Mr Barrett.

20 **MR BARRETT:** Can I try to explain that, my Lord?

21 **JUDGE WOLFFE:** Yes.

22 **MR BARRETT:** If I can take it in stages. In my respectful submission, if one is dealing  
23 with the SCA grounds, if I can call them that, the Subsidy Act grounds, and relief, in  
24 my respectful submission, I think it's a two and a half day case, is my time estimate  
25 based on my reading of the pleadings, the evidence and thinking about the  
26 submissions that I'm going to have to make to meet the case that's been put against

1 me. Just to be clear, it's not the case that I say is the correct analysis. I actually say  
2 the case is rather narrower than the claimant wishes to portray. But given the way the  
3 case has been put, dealing with the SCA grounds, my best time estimate is two and  
4 a half days for that, I think two days would be too tight to do it properly or fairly.

5 We then, my Lord, have the curious issue of the vires ground. So my Lord will have  
6 seen, I hope, in the papers, there's a parallel judicial review. The vires ground is raised  
7 there. What's sought to be done is to bolt it on to the SCA claim, notwithstanding that  
8 it's in a live judicial review that's currently before the Administrative Court. Now, as  
9 you've seen my defence and in my skeleton, my Lord, I say that's as plain an abuse  
10 of process as one can encounter and that shouldn't be permitted to proceed. But if it  
11 were permitted to proceed, that will add significantly, in my respectful submission, to  
12 the time estimate of this hearing. So first of all, my Lord, in terms of issues of law,  
13 quite tricky and quite important questions of vires, the vires that Ofgem relies for the  
14 development work undertaken in this case are in broad terms the same or very similar  
15 to vires used for other very important public projects such as the interconnector cap  
16 and floor, as I suspect my Lord will have encountered in another context perhaps.

17 There are also substantial issues around delay in respect of that ground so it's a matter  
18 of public record that Ofgem was conducting the development work in reliance on its  
19 existing vires from way back in 2024.

20 There will be quite a bit of factual evidence about that to deal with that ground. So,  
21 my Lord, I think I do need to make clear, if the court is minded to allow that to proceed,  
22 notwithstanding that we say that's an abuse of process, as part of these proceedings,  
23 I certainly don't think two days will be sufficient to allow us to deal with that. I don't  
24 think there's any way it will. I think you're looking at three days, maybe a shade over  
25 three days.

26 Also my primary position, my Lord, is it shouldn't be proceeding. It's before the

1 Administrative Court. It's quite wrong for this Tribunal --

2 **JUDGE WOLFFE:** Well --

3 **MR BARRETT:** Currently awaiting a decision on permission. Very odd, my Lord. I do  
4 say very odd. You have a rag bag of grounds and what is done is to take one of them,  
5 try to hive one of them off and bolt it on to the SCA claim, have you determine it, in  
6 circumstances where there could be a permission decision next week to say it's  
7 unarguable or it's time-barred on delay grounds.

8 Perhaps even worse, just to round off the point if the subsidy challenge fails it means  
9 that this Tribunal has no jurisdiction whatsoever to consider the separate judicial  
10 review grounds.

11 **JUDGE WOLFFE:** I entirely see those points, Mr Barrett. I would have to -- yes, I see  
12 those points. You're not inviting me and I'm not sure whether -- I have to think about  
13 whether as a single chair, doing a CMC, I can really address issues which would  
14 dispose of one of the grounds here one way or the other and neither party shouldn't  
15 read anything into that. Looking at it at a very high level it raises a set of interesting  
16 questions as a lawyer but whether it's a set of questions that this particular lawyer in  
17 this forum should be grappling with is, again, a question that the parties are at odds  
18 on. So I don't express a view on it.

19 **MR BARRETT:** I quite understand that, my Lord.

20 **JUDGE WOLFFE:** But I understand your point about the impact of that potentially on  
21 the time the hearing might take.

22 **MR BARRETT:** Yes. That's the first point I wished to make my Lord.

23 The second point is this. Obviously I say I have a very strong case, my learned friend  
24 says he has a very strong case. I do say, my Lord, that there is a place for a dose of  
25 reality. We have a statutory provision which says on its face "This must be established  
26 and operated as soon as reasonably practicable". On the face of it, absent an



1 ingenious legal submission, that is as plain as a pike staff a statutory duty.

2 **JUDGE WOLFFE:** It slightly undermines your position you have vires already  
3 perhaps. Or maybe not.

4 **MR BARRETT:** With respect, my Lord, it absolutely doesn't. We say that is the frankly  
5 bizarre characterisation the claimant wishes to place on the case. The whole point of  
6 the Government asking Ofgem to get on with the development work is that there was  
7 a view taken that they had the vires to do that. Therefore it would further Parliament's  
8 wish for the scheme to be enforced sooner rather than later.

9 What's happening with the Act is not conferring vires after lots of things have been  
10 done. It's imposing a duty to make sure that Ofgem actually has to do the thing that  
11 Government and then Parliament wish them to do. So we, with respect, say that's not  
12 my learned friend's best point.

13 So, my Lord, that's the first point I make about that.

14 The second point is you've obviously got our case, and there is no basis to doubt this,  
15 a decision is going to be taken and the reality is it is a very short point of statutory  
16 construction for you and this Tribunal to construe a Section 26 and decide whether it's  
17 a duty or a power. On the pleadings, that actually is the only substantive -- subject to  
18 the timing point, on the pleadings, whether it's a duty or power is the only issue  
19 between the parties on this point. So I do say it is, on any realistic view, a very short,  
20 decisive point. I entirely take my Lord's point and understand my Lord's view. How  
21 great a difference is there between a one-day listing and whether it's a two-day listing  
22 or a three-day listing --

23 **JUDGE WOLFFE:** Or even a three day listing.

24 **MR BARRETT:** I understand those points, my Lord, but what I say is in terms of trying  
25 to achieve speed and finality for the parties, minimising the strain on the judicial  
26 resources of this Tribunal and also minimising the extent to which this litigation is

1 disrupting and potentially delaying the actual conduct and delivery of this very  
2 important scheme, I do say there are strong reasons why one should just get on and  
3 decide that issue.

4 My Lord, I think those probably are the submissions I wish to make.

5 **JUDGE WOLFFE:** It's implicit in your last comment that you would have a one-day  
6 hearing before we had a two or three-day hearing?

7 **MR BARRETT:** It is. You may tell me I'm wrong about that.

8 **JUDGE WOLFFE:** I may have to take some advice on just when a Tribunal can be  
9 made available to you. I've got certain dates but -- no, that's helpful, Mr Barrett.

10 Mr Gibson, anything you want to say?

11 **MR GIBSON:** Obviously whether you want to hear from me depends on whether  
12 you've been persuaded away from your original position but there are a couple of  
13 points of detail I think I should respond to.

14 The question about how long the substantive hearing should be, two days versus two  
15 and a half, maybe a bit longer. I think our original proposal, which I stand by, is two  
16 days with a day in reserve. There is nothing worse than finding it does tip over slightly  
17 and then everyone's diaries aren't aligned properly. We would hope to be able to do  
18 it in two days but we accept with the best will in the world some things don't go  
19 smoothly -- I mean one plans this would only take half an hour and it takes most of  
20 half a day so these things do happen. We think a day in reserve would be prudent.

21 But even if it were a three-day hearing we say that doesn't alter the essential point that  
22 you make, and we endorse, which is that it makes no sense to have a one-day hearing,  
23 the time saving versus a three-day hearing is not going to be materially greater. If you  
24 look at the competing timetables, you will see that we say we can get to a unitary  
25 hearing of all -- turn to the second page, the back page -- row 16, our recommendation  
26 for a hearing of all the issues, a unitary hearing of all the issues, is the week

1 | commencing 20 April, subject of course to the Tribunal's availability. But we think it  
2 | can be done.

3 | **JUDGE WOLFFE:** The dates are -- the Tribunal can make itself available on 23 and  
4 | 24 April and in a sense regardless of the decision on this issue, I'm very keen that we  
5 | get to manage the case in a way that gets us to a hearing at that date because --

6 | **MR GIBSON:** We would very much welcome that.

7 | **JUDGE WOLFFE:** -- it's in everyone's interests, I would have thought, to get to  
8 | a decision on this as soon as we can.

9 | **MR GIBSON:** What I was going to do was compare that with the next column over  
10 | which is the preliminary issue suggestion from GEMA where they say they could get  
11 | the preliminary issue on for late April or May. We say in circumstances where we're  
12 | offering to do everything by the week commencing the 20th and they're proposing to  
13 | do one issue by late April or May -- I think it just doesn't have any procedural  
14 | time-saving merit at all.

15 | There's a question about the abuse of process. I'm not proposing you should decide  
16 | but we do take great exception to the suggestion that we've abused any process in  
17 | circumstances where not a single authority has been quoted. It keeps being said, and  
18 | it's quite a serious allegation. Just for the record, these proceedings were issued  
19 | before the judicial review, so it's not a question of us trying to do something by the  
20 | back door.

21 | The second point is we proposed there should be a rolled-up hearing of the judicial  
22 | review and they should be closely case-managed, precisely because we wanted to  
23 | make sure that everything was dealt with in a fair and transparent way across the two  
24 | proceedings. They objected because they said we were trying to avoid permission.  
25 | Rolled-up hearings are not avoiding permission. It is a pragmatic procedural technique  
26 | that all practitioners are well aware of. Indeed in the other judicial review proceedings

1 that have been mentioned in correspondence, that are due to be heard, ironically in  
2 the week commencing 9 February, which is the week that we proposed, that judicial  
3 review will be heard on a rolled-up basis.

4 So in circumstances where it's clear from the order that was made in that respect, that  
5 was done with GEMA's support. It's frankly strange to us that GEMA has resisted  
6 tooth and nail our attempts pragmatically to try to get this moving on forward. The  
7 reason I mention that, sir, is we have been committed from the outset to having this  
8 dealt with as quickly as possible because we say, regardless of the rights and wrongs,  
9 it's in everyone's interests, my client, the sector generally, that this is determined as  
10 quickly as possible. So we say it's very unfair for it to be suggested that we're doing  
11 anything to try to delay that progress and we would very much endorse anything that  
12 can be resolved in a comprehensive fashion as quickly as possible.

13 **JUDGE WOLFFE:** I must say to factor in an aspect of my thinking, if we come to this  
14 in the next phase, if we're thinking about a substantive hearing at the back end of April  
15 and in a sense you don't have the foundation for your preliminary issue until some  
16 point in the middle of February, and pled perhaps a little later in February, actually it  
17 makes sense just to get on with the whole case. Yes.

18 **MR GIBSON:** I don't know whether it's relevant to say but I suspect it might be  
19 because it may be relevant in future hearings. There is the suggestion that our  
20 ultra vires case doesn't make any sense, it's because, my Lord -- sorry, sir, I am  
21 catching my friend's habit now -- the way in which my learned friend looks at it, my  
22 learned friend looks at it is through his eyes but through our eyes the relevant decision  
23 was taken on 23 September and the question then is what power are you using. Their  
24 argument is we weren't taking a decision, therefore we were taking preparatory steps  
25 and we have the power to do those. Fine. That is an irrelevance.

26 If we're right that the decision taken on 23 September was a subsidy control

1 decision -- sorry, to implement an LDES scheme, what was your power then? That  
2 has not been answered. Essentially talking about what powers are being used for  
3 some other purpose that we are not challenging is neither here nor there. So we do  
4 take exception to the suggestion that ours doesn't make any sense because it does.  
5 Our position is coherent.

6 **JUDGE WOLFFE:** I'm going to refuse the application for a preliminary issue. I think,  
7 balancing everything -- I have taken into account what you said, Mr Barrett, and said  
8 with some persuasiveness but I think the balance is in favour of getting to  
9 a substantive hearing as expeditiously as we can, that will deal with all the issues and  
10 just determine the case one way or the other at that point.

11 Okay, what's the next point on the agenda?

12 **MR BARRETT:** We wanted to talk you about the duty of candour, my Lord --

13 **JUDGE WOLFFE:** Yes. Perhaps -- I mean I'll give you a chance --

14 **MR GIBSON:** To take this briefly, sir, I'm going to hopefully cut through this in a way  
15 that will be helpful for everybody. It's obviously generated a good deal of  
16 correspondence and there may be a time in the not too distant future where we have  
17 to revisit the battle lines, but I think being pragmatic, particularly given the time and  
18 the fact of what we need to do today, I think actually what it boils down to is two  
19 questions. One is in relation as to whether it would cover the preliminary issue, which  
20 has been disposed of, so it can be narrowed even more. The question now is what  
21 timetable we should set down for the disclosure to happen. I think that is really most  
22 conveniently dealt with under timetabling directions. Because if one looks at the  
23 orders proposed, both sides are referring to the word "candour" in what they propose.  
24 It's perfectly clear that both sides know there's a duty of candour and they're going to  
25 do what they think is consistent with it.

26 We've put down ample markers as to what we think will be consistent and if they

1 pursue the course they're proposing to do, I think we will be at loggerheads again. But  
2 today I don't think it's something we need to ask you to decide, sir.

3 **JUDGE WOLFFE:** That strikes me, subject to anything Mr Barrett says, as a very  
4 sensible approach. My own reaction to the issue was that, Mr Barrett, this is fair to  
5 say, I'm somewhat surprised that you had filed nothing with your defence but, you  
6 know, we are where we are in a sense with that and the practical and appropriate thing  
7 to do is to fix an appropriate timetable that is both realistic but also made sure that you  
8 are under some discipline in terms of producing what you require to produce in order  
9 for this to progress.

10 **MR BARRETT:** May I just make one point about that, my Lord? Noting your surprise,  
11 I wouldn't wish you to be surprised.

12 My Lord, I do say that the proper understanding of the legal issues in this case, that  
13 shouldn't be surprising given what the legal issues in this case are and are not. There  
14 is no challenge in this case to any evaluative or decision-making process. There is no  
15 proportionality challenge in this case. There is no challenge about the application of  
16 the subsidy control principles. As we've canvassed in debate a little bit earlier today,  
17 what this case is about is the application of a small number of statutory provisions to  
18 a small number of key documents which are already in the bundle. They're in the  
19 2000-page-exhibit, which is exhibited to Mr Palmer's witness statement. I do say there  
20 is -- and this is not for today, let's deal with it if we need to down the road, I do say  
21 there's quite a fundamental misconception going on. This was flushed out in the  
22 correspondence that was exchanged in the last two days. What became apparent in  
23 that exchange of correspondence is that the claimant was formulating disclosure  
24 requests, categories of documents they expected to be disclosed, on the basis not of  
25 their SCA claim but its separate judicial review claim, which does include grounds such  
26 as regard to considerations failure to undertake an enquiry, and I do say, my Lord,

1 that's obviously not the right approach.

2 **JUDGE WOLFFE:** Can I say, you very fairly point me to the discussion we had earlier  
3 and I absolutely take your point that the grounds of appeal are, you know, when taken  
4 along with the submission that you haven't taken into account the subsidy control  
5 principles and so on, you know, does significantly, on the face of it, narrow the issues.  
6 So I think then the question comes to be what -- because at the same time I think you  
7 have always foreshadowed that a witness statement and disclosure will be coming  
8 forward at some point.

9 **MR BARRETT:** Of course. And that will be prepared by responsible legal  
10 representatives in line with the guidance from the House of Lords in the *Tweed* case.  
11 There's no basis for anyone to be concerned about that or have any reservations about  
12 that. We do say there are very clear indications that this claimant has, we think, some  
13 really quite misplaced aspirations or expectations. But I think it's entirely sensible for  
14 my learned friend to say let's cross that bridge if we need to when the claimants have  
15 had the chance to actually consider what the witness evidence is.

16  
17 **Discussion re timetable**

18 **JUDGE WOLFFE:** I think the right approach is for me to fix an appropriate timetabling  
19 direction for the production of witness statement and disclosure by you, Mr Barrett,  
20 and that's the sensible way I think to deal with this issue today.  
21 I do anticipate, but, Mr Barrett, you'll correct me if I'm wrong, that once the prospective  
22 decision is made that there may be further evidence that you may wish to file at that  
23 point, vouching the decision.

24 **MR BARRETT:** Yes, it's my submission, it's a matter for my Lord really, but my  
25 submission in relation to timetable was going to be that the timetable fixed for the  
26 service of that witness statement should certainly postdate that decision being taken,

1 because that is, if not the only, in some respects it's going to be the most important  
2 component of the witness evidence that we are serving, my Lord.

3 **JUDGE WOLFFE:** Just remind me, the Act comes into force on --

4 **MR BARRETT:** The 18th, my Lord. So it's three weeks from today precisely, my Lord.

5 **JUDGE WOLFFE:** So Act in force. I foreshadowed a timetabling deadline in relation  
6 to any further application to amend by you and what would be a reasonable but  
7 suitably short period after that to allow for the decision to be taken and for you to make  
8 the application.

9 **MR BARRETT:** My Lord, can I ask that a week, seven days, seven days from  
10 18 February, to make the application?

11 **JUDGE WOLFFE:** So 25 February for the application to amend. Again, on your  
12 approach, which is that you roll up all witness material -- all evidence in terms of the  
13 first statement and a documentary disclosure after that, what would be a reasonable,  
14 from your point of view, a reasonable point for you to make that disclosure?

15 **MR BARRETT:** May I take some instructions on that, my Lord?

16 **JUDGE WOLFFE:** Yes.

17 **MR BARRETT:** My Lord, we do have some very real constraints, as my learned friend  
18 has mentioned, dealing with a separate expedited judicial review which is coming on  
19 for hearing in the early part of February. Until we're through that, we're very committed  
20 to the workstreams on that case. So there are some --

21 **JUDGE WOLFFE:** If I put it this way, my thinking at the moment, subject to parties,  
22 you know, thinking and some advice from those sitting in front of me about dates, is  
23 that we should be looking at a substantive hearing on 23 and 24 April with a day in  
24 reserve on the 29th -- okay, with a day in reserve on the 27th. So the 23rd and 24th  
25 for a hearing, day held in reserve on the 27th, on the hypothesis that we do -- on my  
26 optimistic view that we will do it in two days --



1 **MR GIBSON:** It's my birthday on the 26th, sir, so I'll be rooting for you being correct  
2 on that!

3 **JUDGE WOLFFE:** I'm in the parties' hands as to whether or not we achieve it, I'm  
4 afraid.

5 If that's the date we're looking to for the substantive hearing, then in a sense we have  
6 to -- and the other constraining factor is the Act coming into force and the date of the  
7 decision, which obviously, you know, there are certain things you can't do until that  
8 happens. But even allowing for that, there is going to be -- there should be enough  
9 time in between if parties are, you know, focused on this case and getting it ready to  
10 do what's required.

11 Mr Gibson.

12 **MR GIBSON:** I think it would be helpful to have a break and try to think things through,  
13 to talk to each other.

14 **JUDGE WOLFFE:** Shall we do that?

15 **MR GIBSON:** We obviously want this brought on as quickly as possible. My slight  
16 concern is that the timetable we put in place is on the basis that we were going to get  
17 on with it now, not wait for three weeks until we had an amended pleading. I think we  
18 need to be pragmatic about whether that amendment, whether things can be done in  
19 parallel, given they know the date it will come into force, it does seem surprising that  
20 they can't just take the decision on 18 February, have prepared an amended pleading  
21 on the basis of what's going to actually happen, doing everything on 18 February.  
22 Having an extra week after seems to me to be a very luxurious approach that we don't  
23 really have available to us, sir.

24 **JUDGE WOLFFE:** It may be -- I think perhaps the sensible thing -- I think it's a very  
25 sensible suggestion that we perhaps take a break. I perhaps collect my thoughts in  
26 terms of the various steps and if you could speak to one another and if that's --

1 **MR GIBSON:** Can I just ask, sir, obviously our aspiration as we've said from the outset  
2 is to get this done as quickly as possible. What I'm saying now is not intended to  
3 deviate from that but if we are being squeezed by the timetable to actually get our  
4 ducks in a row before we start this process, is being pushed to the middle of February,  
5 effectively three weeks out, is there any scope for having a hearing date that's a bit  
6 later so we still get the same preparation time? Because the timetabling that we  
7 proposed was looking to squeeze things about as tightly as we thought it could be  
8 sensibly done. Obviously inevitably we'll look to see if there's any fat that we can trim  
9 back further but I'm a little bit concerned that chopping those three weeks out, or  
10 possibly four weeks if my learned friend then needs an extra week to put his  
11 amendment in, we need to respond to that, we are looking at we have lost five weeks  
12 of what was already a challenging timetable. Our preference is to hit the 23rd/24th but  
13 we really need to start now and I'm a bit concerned there's a tension between the two  
14 objectives.

15 **JUDGE WOLFFE:** The parties are clear that we're working to a hearing for all issues.  
16 There is nothing to stop working on other issues.

17 **MR GIBSON:** Absolutely, sir. I accept that.

18 **JUDGE WOLFFE:** We know that Mr Barrett actually doesn't have a basis until he gets  
19 his amended pleadings in, if he's allowed to amend further.

20 But, yes, it's fair to say, at least as I perceive it, that the headline issue that he's  
21 seeking to advance is -- one can understand the argument that he's foreshadowed,  
22 and he may be right, he may be wrong. It may be that the pleading of it and the drafting  
23 of a skeleton can't happen until that comes in.

24 But it's, I suspect, you know, not impossible the parties may be able to do a bit of  
25 thinking around it in advance. I'm very keen --

26 **MR GIBSON:** I've expressed my view as provisional and I'll see if I can be more

1 optimistic when I come back into the room but I just wanted to put a marker that --

2 **JUDGE WOLFFE:** No, no, it's very fair, Mr Gibson. I think it's easy for the Tribunal  
3 to impose all sorts of expectations on the parties --

4 **MR GIBSON:** Indeed, sir.

5 **JUDGE WOLFFE:** -- as if parties had nothing else to do between now and then. But,  
6 you know, at the same time you've chosen to bring this application to the Tribunal.

7 **MR GIBSON:** Indeed, sir.

8 **JUDGE WOLFFE:** Everybody, I think, understands that it would be undesirable for  
9 this to drift off, not least because you've got a scheme which you're -- I don't use that  
10 with any pre-judgment on the issues, but there are decisions that you will be making  
11 under the arrangements and, you know, legal clarity sooner rather than later would be  
12 useful.

13 **MR BARRETT:** If I could, I would echo Mr Gibson's point about those dates, 23rd,  
14 24th. I think Mr Paines will not be able to do those dates. As I sought to explain in  
15 the skeleton, we are already very compressed indeed on the legal team. I am, just to  
16 be as perfectly candid as I can be, I am worried about that timetable. I entirely agree  
17 with the points my Lord said about the general benefits of proceeding here with  
18 expedition. There obviously are real benefits of proceeding with a measure of  
19 expedition. I do for the moment feel quite worried about our ability fairly and properly  
20 to prepare evidence and our submissions. It will be challenging for us.

21 **JUDGE WOLFFE:** What would it -- 27th, 28th, 29th? No, okay. If it's not that set of  
22 dates, I would need to make some enquiries about what could be made available.

23 I suggest we rise just now. I can make some enquiries about what other options could  
24 be made available. If parties could discuss with those behind them and with one  
25 another and identify the various steps that need to be put in place and a timetable, you  
26 know, and I would encourage you to be as ambitious as you feel you responsibly can

1 in terms of achieving the --

2 **MR GIBSON:** Can I make one observation, sir? One thing that's taking up time, which  
3 we think is essential if my learned friend is going to maintain the position, is the need  
4 to consider specific disclosure. This seems to me to be a really unfortunate state of  
5 affairs because we do think it's pretty obvious what the duty of candour entails. We  
6 also think it's pretty obvious that these aren't just narrow legal points. I can take you,  
7 sir, through to why we say on the pleadings -- if you look at our pleaded case, the legal  
8 points that are referred to, we cross-refer back to factual material in our pleadings that  
9 we say is essential to be resolved as the necessary bedrock for all of this. Candour  
10 will have to address that. If it were to address it, then obviously we buy ourselves two  
11 or three weeks which would accommodate the gap. If it doesn't, then we've got to  
12 allow for this step that we really shouldn't have to be dealing with. But I just wanted to  
13 put down a marker that we will be expecting to see candour evidence. Take the point  
14 my learned friend says about the issues having moved on in the intervening period  
15 since we wrote that original correspondence in October, because of what they've said  
16 in their December defence. We don't accept that that hives off any possibility of factual  
17 material. I already touched on that when we discussed issues at the beginning, sir.  
18 But I think it would be useful for everyone to approach things with that in mind rather  
19 than take this very guarded and we would say completely antithetical approach to  
20 candour in approaching what we are doing at this stage. And had candour been  
21 provided on 5 September, as one would have expected to be done, we wouldn't be  
22 here today. We wouldn't be trying to shoehorn it in at the last minute which is really  
23 why we should have had it much earlier.

24 **JUDGE WOLFFE:** Well, clearly it is entirely possible to have a stage -- but I'll leave  
25 the parties with that observation. I'm going to rise now. Would it be useful if I gave  
26 you half an hour?

1 **MR GIBSON:** 20 minutes might suffice. I think we need to have enough time to thrash  
2 things out with you, sir, properly afterwards.

3 **JUDGE WOLFFE:** I don't want to press things too hard at the other end.  
4 I'm being told that another option would be 28 and 29 April and then 1 May in reserve.  
5 Which would mean, Mr Gibson, if we went for that, that you would certainly be  
6 anticipating it on your birthday.

7 **MR GIBSON:** I'm not sure it's going to work with my wife's plans but there we go.  
8 Okay, so it is either the 23rd, 24th and 27th or the 28th, 29th and then the 1st, those  
9 are the two options. We'll have a think about those, sir.

10 **(3.25 pm)**

11 **(A short break)**

12 **(4.00 pm)**

13 **JUDGE WOLFFE:** Mr Gibson.

14 **MR GIBSON:** We've both put our thinking caps on and the good news is that we've  
15 come up with competing options that both achieve one of the dates you've suggested  
16 so we think we can do something in April, there's just two different options for you to  
17 feast on. So not agreement, but perhaps what I would propose to do is set out the  
18 dates that we propose, maybe Mr Barrett can set out the dates he proposes, and then  
19 we can perhaps comment on the relative merits of the two proposals.

20 I apologise, we had got an electronic marked-up version of our order which reflects  
21 our dates. I don't know whether it's worth us sending that and actually printing it and  
22 talking to it rather than me trying -- I can try to explain it, it's really a question of what  
23 you ...

24 **JUDGE WOLFFE:** It might be easier if it's possible for that to be printed out pretty  
25 quickly.

26 **MR GIBSON:** Which address should we use, sir?

1 **JUDGE WOLFFE:** Registry.

2 **MR GIBSON:** Registry, perfect. We'll do that. I can start -- well, it's probably best to  
3 wait until it's been printed.

4 **MR BARRETT:** If it's okay, my Lord, we'll send the version of ours as well so you  
5 have that.

6 **JUDGE WOLFFE:** Yes. That would make it easier.

7 While that's coming, I remind myself that one other issue on the agenda is  
8 confidentiality.

9 **MR GIBSON:** Yes, excellent point, sir. On that, Mr Barrett has indicated that he  
10 doesn't think he'll need to refer to the material that's redacted in the confidential  
11 material and therefore we can just deal with redacted and therefore non-confidential  
12 versions and therefore there's no need for a CRO.

13 From our side, as things presently stand, we think that's a very pragmatic and sensible  
14 approach to take. That's obviously subject to the Tribunal deciding that it is  
15 appropriate.

16 What we think would be helpful is, in parallel, after this hearing, we seek to agree what  
17 the terms of an order would look like if it were to be required in future so that if, for  
18 whatever reason, something else comes in, you decide you need to see something,  
19 we needed one, it's agreed and ready to go subject obviously to the Tribunal's  
20 approval, rather than us deciding we need it and having to go round the houses to try  
21 to achieve that at that time. So at the moment, no order required from you at all. We'll  
22 work behind the scenes to get an agreed form and then we can see whether it's ever  
23 actually required, sir.

24 **JUDGE WOLFFE:** Very helpful.

25 Mr Barrett, is that --

26 **MR BARRETT:** That's a fair summary, my Lord.

1 **JUDGE WOLFFE:** Good. I'm grateful to the parties for that approach.

2 **MR GIBSON:** I think that is the only remaining item on the agenda after we've dealt  
3 with timetabling. It's been emailed so we can see how long it takes to get from that  
4 desk to that desk.

5 **JUDGE WOLFFE:** While we're waiting for that, Mr Gibson, can you say, is there  
6 agreement on the various steps that need to be dealt with?

7 **MR GIBSON:** Not exactly, sir. I think the difference between us is -- and I don't want  
8 to spoil the surprise -- we're targeting to achieve the dates you originally proposed, the  
9 23rd and 24th with the 27th in reserve and we think we can do that. My learned friend  
10 obviously will speak to his but he's targeting the later dates, the 28th.

11 The difference between us is that we have adopted a staged process so that  
12 disclosure starts more or less on the timetable that we proposed, to actually get things  
13 moving, because we say that the amendments on the specific decision are only a very  
14 small subset, albeit one that may generate more disclosure and there's no reason,  
15 having waited for this long for candour -- and you'll see the dates in light grey in the  
16 timetabling comparison that I've pulled together. If you look at row 5, "GEMA  
17 evidence, documentary", you see we've proposed the date 11 February, and  
18 underneath that we indicate that's two weeks after the CMC, so that's Wednesday  
19 two weeks from now -- sorry, are you with me, sir?

20 **JUDGE WOLFFE:** Yes.

21 **MR GIBSON:** Then we also indicate the number of weeks and days after the notice  
22 of appeal and you'll see that it's almost 16 weeks since notice of appeal was served  
23 and we say that really is ample time for them to have thought about what they want to  
24 disclose.

25 Then we work from that. We go with those dates, we have that going in parallel. Then  
26 we introduce the process in order to resolve amendments arising from the anticipated

1 decision following 18 February. So I'll talk to the specific dates. So we have a staged  
2 process, they do not. We have provision for an amended reply and, as it stands, I don't  
3 think in their proposal they have one. Then obviously we're targeting the earlier date  
4 because we want to try to get things on as quickly as possible. So those, I think, are  
5 the main three differences but we'll talk through the minutiae in a moment.

6 **JUDGE WOLFFE:** I've been handed an electronic copy of the draft directions order.

7 **MR GIBSON:** Yes, sir. So I don't think my learned friend has access to that. I could  
8 get one too but I think we should wait for a hard copy.

9 **JUDGE WOLFFE:** Let's do that then. Thank you.

10 **MR GIBSON:** It may be that Ofgem has been emailed but I imagine it will take a while  
11 to get to Mr Barrett so it may be we just wait for the hard copies. As much as I like to  
12 have an unfair advantage over my opponent, I feel like probably it's a bit too much.

13 **MR BARRETT:** We've also sent through to the registry our proposal so I wonder if  
14 that might be printed as well, if that would be possible. Thank you.

15 **MR GIBSON:** The first point to note, sir, in our enthusiasm to prepare something for  
16 you, we've accidentally deleted the first provision which obviously needs to be  
17 reinstated, namely the refusal of the interventions. That's on page 1, at the bottom  
18 under the recitals, the first operative order. So that was an over-deletion, that will go  
19 back in.

20 We then deleted the rulings in relation to intervenors that may have been allowed.  
21 Obviously that's no longer relevant.

22 The provision numbered 1 -- which obviously will become 2 but I'll use the numbers  
23 as they are here to avoid confusion -- operative order number 1 is for GEMA to file  
24 and serve its amended defence. The date there is the date they've proposed.  
25 Obviously, we're very happy for them to have until 2 February if they need it but either  
26 way it doesn't make much difference. 9 February for ours. As I said, we'll take a view



1 whether we need to file a reply, and if so advised and so on, but that's in their case.  
2 Neither of those make much difference as things stand.  
3 The provisions in relation to amendment of paragraphs 3 to 6 are there because  
4 they're under the amendments heading. The prior dates fall in relation to the evidence  
5 from primary parties stage. That's over the page, orders 8 and so on. I'll try to take  
6 this in chronological order if I can keep everything in my head.  
7 With the stage process that we propose, the dates on evidence from primary parties  
8 at 8 through to -- 8 and 9 stay as they are. As it happens, I think the provisions at 10  
9 and 11 actually fall away for reasons that I'll come on to explain. It may just be easier  
10 for me to take you through it in chronological order, sir, because I'm a bit  
11 concerned -- although the order makes sense dealing with this thematically, I think  
12 dealing with the chronological approach will be easier and then we can point out the  
13 order.  
14 So amended defence on 30 January, amended reply on 9 February, they're both  
15 freestanding steps. The first round of GEMA's disclosure falls on 11 February, that's  
16 documentary disclosure, and that's followed by witness evidence on 18 February. We  
17 then propose that, on 23 February, GEMA should make its amendment application  
18 consequent upon the anticipated decision on or shortly after the 18th, with any  
19 supplementary disclosure relevant to those amendments to be provided on that date.  
20 That's a Monday.  
21 We would then propose that, on the following Monday, 2 March, we would respond to  
22 that application for amendment and also respond to the disclosure that's been  
23 provided up to that point. So that would include the supplementary disclosure provided  
24 a week before and our review of the disclosure that would be provided on 11 February.  
25 We don't know what the volume is going to be so we just think it's prudent to allow  
26 a bit of time. Since the dates are going to start overlapping, we thought it was the best

1 and most efficient way to deal with things.

2 We would then propose a CMC in the week commencing 9 March if the Tribunal is  
3 available in that week, at which to determine the amendment application and any  
4 disputes in relation to disclosure. We're conscious that the defendant may want an  
5 opportunity to respond to our response to the amendment application, the disclosure,  
6 so there may be a need to try and insert a date in between the two. We suggested  
7 Thursday, 5 February, noting that is obviously -- sorry, 5 March, forgive me. We note  
8 that's a very tight turnaround for them, because if we're putting in an application on the  
9 2nd, it only gives them three working days to respond.

10 If the CMC was listed towards the back end of that week commencing the 9th,  
11 obviously that would give more room for them to put a response in under a less  
12 compressed timetable. We're not trying to compress them unnecessarily, we're just  
13 trying to get everything done.

14 **JUDGE WOLFFE:** You said the week commencing the 9th. On the document I have  
15 it says week commencing the 16th.

16 **MR GIBSON:** I do apologise. Things have been put together quite quickly.

17 **JUDGE WOLFFE:** That's all right.

18 **MR GIBSON:** It should be the 9th. So the 9th. The week commencing the 16th, we  
19 propose provision for us to put in an amended reply on the assumption that the  
20 amendments are allowed. Obviously, we will have to take a view and it may be  
21 possible that the amendments are refused but we wanted to make provision for that  
22 eventuality. Either way we would propose that we put in our reply evidence on that  
23 date, which will be a week after whatever the date the CMC is, so that's just week  
24 commencing because we don't know when the CMC is. The thinking there being that  
25 if, obviously, the amendments have been disallowed, we still need to put in our reply  
26 evidence to the material that was put in in relation to the original pleading and what

1 have you.

2 That would mean that everything in relation to evidence and pleading would have  
3 concluded by the week commencing 16 March and we then turn to look at the steps  
4 that are currently -- well, I don't know whether -- I won't hop to the table.

5 We then need to think about when the agreed hearing bundle would be. We think that  
6 can be done on Monday, 30 March, which gives us roughly two weeks after we've  
7 finished all of that process for everyone to agree a bundle and then compile it. I think  
8 it would be hard to do it in any tighter timeframe.

9 We would put in our skeleton argument two days later, giving us an opportunity to  
10 reference it to the bundle, on 1 April. That's a Wednesday. The defendant would put  
11 in their skeleton argument a week later on 8 April. That's also a Wednesday. The  
12 authorities bundle would go in on 15 April and that would be one clear week before  
13 a hearing starting on Thursday, 23 April.

14 So we think we can make it work on that basis, sir, and, as I said, that has a staged  
15 process so that we're not dealing with all disclosure lumped towards the end. We can  
16 actually get on with things and I think that will ease the burden on everybody. It also  
17 allows provision of a separate amended reply if it is required and it hits that earlier  
18 date. The key point is whether the Tribunal can accommodate a CMC in the week  
19 commencing 9 March and obviously we're in your hands as to whether or not that's  
20 a possibility.

21 That's what we propose. Obviously, we'll comment on Mr Barrett's proposal after he's  
22 had an opportunity to introduce it to you, sir.

23 **JUDGE WOLFFE:** That's very helpful. Thank you very much. Mr Barrett.

24 **MR BARRETT:** My Lord, can I do it in this way if it's convenient, if I make my initial  
25 main observations regarding what I say are the problems with the claimant's proposals  
26 and then explain mine?

1 **JUDGE WOLFFE:** Of course.

2 **MR BARRETT:** My Lord, the main problems or the immediate problems are the  
3 proposals being made for the defendant to undertake what's called the candour  
4 disclosure and provide its initial witness statement. So it's said documentary  
5 disclosure should happen on 11 February -- that's the day before the hearing of the  
6 expedited judicial review we're dealing with in the other matter -- and then a witness  
7 statement should be filed dealing with everything except the fresh decision on  
8 18 February. That's about six days after the expedited judicial review that we're  
9 dealing with.

10 My Lord, I need to be perfectly honest, those are not dates that we can meet.  
11 Obviously if my Lord orders us to do something, we will bend over backwards and  
12 move hell and high water to try to achieve it, but those are not dates that properly at  
13 the moment I could tell you we can meet. They're being proposed despite the claimant  
14 being well aware of the other burdens and work that this legal team is facing and  
15 dealing with. They're not reasonable or sensible proposals. It was said, "Let's not  
16 lump disclosure towards the end, it will be easier for everyone". That's a pretty  
17 extraordinary submission, my Lord. This would not be easier for everyone; this would  
18 be subjecting my clients to a simply impossible burden.

19 The directions were also, my Lord, completely slanted. So you've got that happening,  
20 according to the claimant, on 11 and 18 February. The claimant then gives itself until  
21 16 March to do its reply evidence, over a month to prepare its reply evidence. So,  
22 my Lord, we do say these are not directions which are intended to be fair or balanced.  
23 Can I then introduce my proposed directions, my Lord, which I say provide an orderly  
24 process towards the hearing? Initial dates, my Lord, amended defence, 30 January.  
25 That's the one date the parties agree about so we can tick that. It's one small sliver of  
26 common ground.

1 Amended reply, we suggest the claimant do that slightly quicker than it proposes, we  
2 say 6 February, so a week to do its amended reply. It says a bit later, it wants to give  
3 itself a bit more than a week, 9 February.

4 Then getting to the substance, my Lord, what we propose is that, on 4 March, we  
5 would serve the application to re-amend the defence, our witness evidence which on  
6 4 March would deal with all of the points that we need to deal with, and any documents  
7 required to be disclosed pursuant to the duty of candour.

8 Just to deal with it then, my Lord, the concern that my learned friend said he had is  
9 that the witness evidence and disclosure is not happening too late. On our proposal  
10 it's happening on 4 March. We say that is prompt, we say it is well in advance of any  
11 of the hearing dates you're looking at, and it gives the claimant ample time to digest  
12 that material and take any steps it reasonably wishes to take.

13 Then, my Lord, the claimant's response to the reamendment application, we've  
14 proposed 11 March, so it has a week to formulate its response, having been served  
15 with our application. We say that's an entirely reasonable period of time. We've  
16 budgeted then, my Lord, for a half-day CMC that the Tribunal would provisionally list  
17 for 23 March. That would deal with the amendment application. If the claimant  
18 considers it necessary and appropriate to make other applications, they could also be  
19 dealt with in the hearing of that week.

20 Then, my Lord, just the final procedural steps, bundle, skeletons and so on, as my  
21 learned friend fairly pointed out, that's leading to a proposed hearing on 28th, 29th and  
22 1 May. I'll explain the reasons why we respectfully ask you to direct those dates, my  
23 Lord. We'll lose Mr Paines certainly if we don't have those dates and a little bit of extra  
24 time, we say, will help certainly the defendant but also all the parties to take the  
25 necessary steps to prepare the case properly for a final hearing.

26 My Lord, we have -- you may get the impression we haven't made any attempt

1 (inaudible - no audio). It's just that we have very different perspectives it seems.

2 **JUDGE WOLFFE:** That's understood.

3 Just if I take your proposal, I think before the break you anticipated -- or at an earlier  
4 point in the day you anticipated your application to re-amend by 25 February and I just  
5 wonder, first of all, why that's changed.

6 **MR BARRETT:** Yes. The answer to that, my Lord, is we think, in terms of just  
7 managing the workload, which as I've explained would be a significant burden, having  
8 the single date and working towards that date is going to be a more efficient approach  
9 for us. If my Lord tells me that that needs to be done, that piece needs to be done on  
10 the 25th, I think we can do that if my Lord thinks that's ...

11 My learned junior Mr Paines points out that part of the intention behind -- the statement  
12 will deal with the imminent application as well, so it's part of the package in that sense.  
13 That's why we're proposing that date. If my Lord tells me to do the application by the  
14 25th, we can do that. I think that can be done.

15 **JUDGE WOLFFE:** Okay.

16 The other thing that I wondered about was staging the witness evidence and  
17 disclosure so that you basically now address the issue of witness statement and  
18 disclosure in relation to the grounds that are already part of the case, leaving over  
19 a statement and disclosure in relation to the decision that's going to be made in  
20 February. I've heard what you say about the pressure on everyone involved with other  
21 matters, but if you were to, as it were, sit down as at today and with a view to  
22 that -- doing it in two tranches in that way, is that something that is simply  
23 unachievable?

24 **MR BARRETT:** It depends on the date that one is starting, my Lord. I do not think  
25 that it's achievable for us to do a witness statement earlier or certainly much earlier  
26 than 4 March. As I've sought to explain, it's simply the case that we will not be able to

1 sit down and start this tomorrow because the reality is we have hearings in the diary  
2 in advance of this that we must deal with. We've got court orders in respect of those  
3 proceedings, so that's just not going to be feasible. As I say, my Lord, I'm not trying  
4 at all to be in any way difficult but I can't properly, I think, commit people to things that,  
5 in my judgment, are not --

6 **JUDGE WOLFFE:** No. Part of your job is to take a responsible judgment of what's  
7 possible and what's not possible.

8 **MR BARRETT:** My Lord will form your judgment and we will do our best to do what  
9 my Lord tells us to do.

10 **JUDGE WOLFFE:** Yes.

11 Sorry, Mr Gibson. Sorry, I thought you were standing up --

12 **MR GIBSON:** I was standing and then I thought Mr Barrett might not be finished so  
13 I popped down again.

14 **JUDGE WOLFFE:** There was another point I wanted to raise with Mr Barrett, if I may.  
15 I'm just trying to identify the matters that are dealt with in Mr Gibson's note that are not  
16 in yours.

17 **MR BARRETT:** For my part, my Lord, I don't think there's anything that's not  
18 addressed in (inaudible). My learned thought said he thought that we hadn't provided  
19 for his amended reply.

20 **JUDGE WOLFFE:** And also I think responsive evidence on his part, if required.

21 **MR GIBSON:** Those are two things we think are lacking from this, sir, yes. They are  
22 things that are lacking from this proposal, as we understand it, sir, yes.

23 **JUDGE WOLFFE:** So responsive evidence and --

24 **MR GIBSON:** Amended reply if one is needed, if an amendment is allowed.

25 **JUDGE WOLFFE:** Yes.

26 **MR BARRETT:** Responsive evidence, my Lord, I'd suggest that could be (inaudible).

1 **JUDGE WOLFFE:** The other matter that I have a question about, Mr Barrett, is why  
2 the half-day CMC as far back as 23 March. I would have thought there was strong  
3 interest, if there's to be a dispute about the further amendment and also a dispute  
4 about the -- I'm not saying there should be a dispute but I anticipate there could be  
5 a dispute about the disclosure and so on. It strikes me that, unless those are resolved  
6 as quickly as possible after 4 March, there's a risk of the timetable being derailed.

7 **MR BARRETT:** That could be brought forward.

8 **JUDGE WOLFFE:** Yes, which is Mr Gibson's proposal.

9 **MR GIBSON:** We're in danger of agreeing if we carry on going too far, sir.

10 **JUDGE WOLFFE:** Well, indeed.

11 Indeed I wonder if -- I suppose, Mr Gibson, you need the opportunity to assimilate, if  
12 I were to accept that 4 March is the date for a re-amended -- application to re-amend  
13 and the evidence and documents, you need an opportunity to consider all of that  
14 before a CMC?

15 **MR GIBSON:** Yes, I'm conscious Mr Barrett may want to say more so I don't want to  
16 keep popping up and down.

17 **JUDGE WOLFFE:** If I were with Mr Barrett that the three actions that he indicates all  
18 come together and are dealt with on 4 March -- by 4 March, you then need time to  
19 consider. I suppose the question in my mind is, is a second CMC earlier than the week  
20 commencing 16 March realistic if you don't get his bundle until 4 March, his bundle of  
21 things?

22 **MR GIBSON:** Can I just take instructions on an idea I would like to make but I don't  
23 want to make it out --

24 **JUDGE WOLFFE:** Indeed.

25 **MR GIBSON:** Sir, I think if I understood my learned friend correctly -- and he will no  
26 doubt be astute to correct me if I have misunderstood -- when invited to explain why



1 4 March couldn't be 25 February, I think he said that would potentially be possible. If  
2 they make that concession on their side, then with some grumbling, and I will make  
3 the grumbling points, one could align 25 February to meet all the steps they want to  
4 take and then we more or less move onto our timetable, hitting the earlier hearing date.  
5 Can I just unpack that a little? Because the sticking point seems to be the suggestion  
6 that our dates of 11 February for their documentary evidence and 18 February for their  
7 witness evidence are unworkable because of the commitments they've got in the week  
8 commencing in February. The grumbling, and I'll just get it out the way, is that starts  
9 from the premise that they're taking a standing start now, they haven't thought about  
10 candour at all, they're having to do everything from scratch now, which I think is  
11 remarkable.

12 **JUDGE WOLFFE:** I understand that point, Mr Gibson, but we are where we are.

13 **MR GIBSON:** We are where we are, but nonetheless I make the --

14 **JUDGE WOLFFE:** I have responsible senior counsel who tells me that he -- the  
15 pressures in between now and then are what they are. I need to take a realistic view  
16 of what --

17 **MR GIBSON:** Take a realistic view which is why I'm putting forward this pragmatic  
18 proposal. We wanted to put that marker down there. This is actually, if you like,  
19 a problem of GEMA's creating because this all could have been a long time ago.  
20 I would point out also there is another member of the counsel team on the pleadings,  
21 Barney McCay. I'm not sure whether he is available to assist in this regard. But be  
22 that as it may, grumbling aside, if they were to have the date of the 25th or 23rd, some  
23 point in that week, for them to do the points that they have in their third box -- the one  
24 that we've got numbered 1, 2, 3 -- then one is more or less on the timetable that  
25 I proposed. We'd suggested 23 February for them to do that. If we make that the  
26 25th, then all the other dates that we proposed would fall into place, subject to

1 adjusting them by two days to take account of the fact that they're putting in their  
2 document two days later than we'd originally proposed.

3 I can run through those dates but it seems to me that's the sticking point between us.  
4 They don't want to do anything on 11 and 18 February for reasons which I understand,  
5 the difficulty they've created themselves. We say if we pragmatically accept that and  
6 wait even longer for candour disclosure, until 25 February, then everything else  
7 happens, including the provision in our timetable for us to actually put in an amended  
8 reply and amended response after the CMC.

9 One of the problems with their proposal is that we could put in an amended reply and  
10 put in reply evidence before the CMC which is deciding whether or not the  
11 amendments are going to be allowed, which is obviously slightly counterintuitive. I can  
12 go through my timetable again but it's essentially the same as I've already outlined,  
13 subject to a change of two days to meet the date proposed.

14 **JUDGE WOLFFE:** Let's see. It sounds like that's the date that we need to focus on  
15 in order to then identify what follows.

16 Mr Barrett, how does the 25th look? Remind me what's the date of your hearing?

17 **MR BARRETT:** It is 12 February.

18 **JUDGE WOLFFE:** 12 February. So the 25th --

19 **MR GIBSON:** Two weeks later.

20 **MR BARRETT:** My Lord, I think I could manage to do the application, to get it in by  
21 the 25th. I think a witness and any --

22 **JUDGE WOLFFE:** Looking at -- I'm conscious we're trying to ...

23 **MR GIBSON:** I shall just flag, just to be clear, the CMC week we were proposing was  
24 9 March, just to be absolutely clear, sir. We save two weeks on our timetable and  
25 that's how we can accommodate the reply steps afterwards.

26 **JUDGE WOLFFE:** I'm just going to take a moment to work my way through the

1 various steps here. **(Pause)**

2 The skeletons are proposed to be filed sequentially, that's not a necessary feature of  
3 the process but if parties strongly consider that that is a better approach obviously I'll  
4 bear that in mind.

5 **MR GIBSON:** That was prepared on the basis of the timetable as we had originally  
6 proposed. If you, sir, would like to make a proposal that allows things to be achieved  
7 in a more timely manner then we'll take instructions. I think sometimes it's more helpful  
8 to the Tribunal for submissions to emerge in that way, other times, we both set out our  
9 stall and then respond in opening submissions. I am in your hands really, sir.

10 **JUDGE WOLFFE:** There's two ways of doing it. It's just that we are pushed for time.

11 **MR GIBSON:** Yes, sir.

12 Another point occurs to me, it may depend on the what the availability of the Tribunal  
13 is to accommodate a CMC. I think the parties are agreed an oral CMC is the most  
14 efficient way of dealing with applications, particularly with the magnitude. We can try  
15 to work around whatever the Tribunal can accommodate, if that would help as well.

16 **JUDGE WOLFFE:** I'm going to list out actions and dates, give you both a chance to  
17 comment on whether either I've missed anything out and whether there's anything that  
18 you -- February is not listed. We're starting with I think the amended defence on  
19 30 January -- sorry, two days from now. Amended reply, 6 February. GEMA's further  
20 application to amend and all disclosure on -- that's to cover all issues -- 4 March.  
21 There may be a response to an application to amend, 9 March, CMC in the course of  
22 that week, later that week. I think the critical issue there, Mr Gibson, I suspect, is  
23 whether you feel that you'll be in a position, if you had the application to amend and  
24 disclosure on 4 March, in a position, to have a CMC in the course of that week to deal  
25 with response to application to amend, issues about disclosure that arise and that  
26 really depends on your availability to deal with those questions.

1 **MR GIBSON:** Yes, sir. I mean first of all, we don't have any objection to being asked  
2 to do our amended reply on the Friday rather than the Monday. That's fine. We do  
3 feel it's rather unfair that we are twisting ourselves in knots to accommodate the  
4 defendant on a 4 March date when they've indicated they may be able to do  
5 25 February and the consequence of that is that we've got to respond to all of the  
6 disclosure that we've been waiting for, for the best part of four months, if not even  
7 longer. We're going to be responding to that in five days, which I believe includes  
8 a weekend, I'd have to double-check the dates. We don't really think that's realistic or  
9 being remotely even-handed. I'm not meaning to sound critical, sir. As I said, our  
10 timetable required them to do their step one week earlier and otherwise set dates that  
11 we thought were reasonably even-handed. The point about -- that my learned friend  
12 took exception to, that we've got until 16 March in order to do an amended reply, was  
13 simply because the intervening steps in that period require us to respond to their  
14 amendment. It's not like we're sitting there twiddling our thumbs, basking in the winter  
15 sun. The fact is we've got to deal with their amendment process and then after that  
16 it's convenient to deal with the reply evidence once it's clear what we were going to be  
17 replying to.

18 **JUDGE WOLFFE:** I understand that but the step we're looking at, at this point, is not  
19 your own amended reply, assuming the application is allowed, it's simply any  
20 objection, your response to the application to amend.

21 **MR GIBSON:** I really appreciate that. I was just making a side point about our  
22 timetable. You'll see from our timetable, we proposed the CMC in the very week you're  
23 proposing, sir, but the steps leading up to that we say are more even balanced as  
24 between the two parties. I do think that it's rather difficult to swallow submissions  
25 about discomfort on the side of my learned friend when we then end up with being put  
26 under acute pressure to consider an as yet unclarified volume of disclosure. We

1 anticipate it's going to be very slimline given what my learned friend has said but that  
2 makes it all the more important that we then identify all the things we say are missing.  
3 Until then we've got what we've got. That could be quite an undertaking. If we were  
4 dealing with very, very fulsome disclosure and we were just identifying the odd  
5 document here or there, the contrary problem would eventuate, which means we have  
6 to dig through the disclosure to work out what the here and there is. Either way,  
7 I strongly resist the suggestion that we should only have five days to do that and would  
8 respectfully submit that we should revert to the timetable that we proposed, which, as  
9 I said, required them to take a step a week earlier but then creates much more scope  
10 for an orderly progression towards a CMC. Which is going to be potentially a crucial  
11 element of the case. They've been touting the section 10P point as a trump card, we  
12 say ill-advisedly, but we obviously need an opportunity to formulate why we say that  
13 is ill-advised and, with respect, we don't think it's going to be practical to do that within  
14 only five days. Three working days. I'm sorry to be such a naysayer.

15 **JUDGE WOLFFE:** No, it's fair to say I'm just trying to --

16 **MR GIBSON:** I know you're doing your best, sir, but I would --

17 **JUDGE WOLFFE:** As you've been talking, I've been formulating perhaps a slightly  
18 different approach. Amended defence, 30 January, amended reply 6 February,  
19 GEMA's application to amend, which I think, Mr Barrett, you accepted you could get  
20 in on 25 February.

21 **MR BARRETT:** Yes.

22 **JUDGE WOLFFE:** If I were to give you till 2 March to do the full disclosure on all  
23 issues? It's not an unreasonable point that Mr Gibson has made, that the grounds that  
24 are already in the pleadings are grounds that have always been there. If your  
25 commitment concludes a reasonable period before that, that gives, I think on the face  
26 of it, enough time. Mr Gibson, your response to the application to amend --

1 **MR GIBSON:** The proposal is they will put an application to amend in on Wednesday,  
2 25 February.

3 **JUDGE WOLFFE:** Yes, sorry, I'm now looking at your response to -- yes. But it's  
4 the -- yes, so we could bring forward your response to the application to amend, but  
5 that's simply the application to amend, you won't have had the disclosure until 2 March  
6 on this timetable.

7 **MR GIBSON:** Can I just -- I'm not clear why they can't provide disclosure on  
8 25 February which is two weeks after the hearing.

9 **JUDGE WOLFFE:** Well, Mr Barrett, as a responsible senior counsel --

10 **MR GIBSON:** Sorry, I hadn't understood --

11 **JUDGE WOLFFE:** I understood him to be telling me that it's simply not possible.

12 **MR BARRETT:** That is what I've said, my Lord. I thought I was quite clear about that.

13 **MR GIBSON:** I'm sorry, there's a lot of dates going around.

14 **JUDGE WOLFFE:** I'm pushing him back a little on that by saying 2 March, we could  
15 have your response to the application to amend but I suspect you don't want to do that  
16 until you've at least seen the disclosure.

17 **MR GIBSON:** I think it would make more sense, sir. So he puts the application to  
18 amend in on 25 February, the disclosure comes in on 2 March.

19 **JUDGE WOLFFE:** Zenobē's response -- I'm now thinking about a CMC in the week  
20 commencing 16 March to allow -- one of the reasons I was keen to bring that forward  
21 at an early date as possible is, frankly, I can anticipate there will be dispute and then  
22 further actions that may be required and I don't want to leave us too tight to the hearing  
23 date. But, you know, so be it if that's the ...

24 So your response, looking towards the CMC let's say in the early part of the week  
25 commencing 16 March. You could have that in say on 12 March?

26 **MR GIBSON:** Yes. I'll take instructions but that sounds a more reasonable approach.

1 **JUDGE WOLFFE:** And you will have had the application to amend and you will have  
2 had ten full days since the disclosure.

3 **MR GIBSON:** Yes, sir.

4 **JUDGE WOLFFE:** Then you'll have also the opportunity if we don't fix the CMC until  
5 a date in the following week, to think further about it. Your response, assuming that  
6 I allow the amendment, then your response to the amendment and evidence in reply,  
7 which I don't think was built into --

8 **MR GIBSON:** We had proposed that would happen on the week commencing the  
9 16th on the footing that the CMC would be in the week commencing the 9th. Is the  
10 position that we can work out what date the CMC would be on now because then  
11 obviously we can then be precise about the dates?

12 **JUDGE WOLFFE:** For my own part I could actually give you any date that week. I'm  
13 told in person we could have the 16th, 17th or 18th.

14 **MR GIBSON:** Shall we plump for the 18th to give us the maximum amount of time to  
15 prepare -- I'm conscious that my learned friend will actually want to see our application  
16 and have an opportunity to see it.

17 **MR BARRETT:** I can't do the 18th, I have already made that point.

18 **MR GIBSON:** Would the 17th be convenient?

19 **MR BARRETT:** I can do the 17th.

20 **MR GIBSON:** Shall we say the 17th? I'm conscious -- if the more time we leave in  
21 advance of the CMC, the more chance everyone will have an opportunity to consider  
22 what we've said, if the 17th works for the Tribunal.

23 **JUDGE WOLFFE:** Okay. Provisionally let's put that in.

24 **MR GIBSON:** Provisionally say the 17th.

25 **JUDGE WOLFFE:** I should say I'm also going to -- of course I'm conscious that this  
26 is expanding, I'm looking to the hearing date 28th, 29th April and the reserve on 1 May.

1 It's a week later than the other date, it gives us a little more flexibility. So CMC  
2 provisionally 17 March, to be confirmed. Your response to the amendment and any  
3 evidence in reply, 25 March, hearing bundle 14 April, exchange of skeletons 21 April,  
4 mutual exchange rather than sequential approach. Authorities 23 April. I'm going to  
5 say authorities et cetera because you've suggested a number of other things that we  
6 might --

7 **MR GIBSON:** Yes, the et cetera are the other things you might be assisted by, so  
8 chronology and so on and so forth. If you don't think the Tribunal will be assisted by  
9 any of that in the circumstances of this case, we don't need to prepare them but we're  
10 in your hands as to what you would like us to do.

11 **JUDGE WOLFFE:** Yes, I was going to turn to that point in terms of dates and then  
12 hearing on 28, 29 April, 1 May in reserve. Is that a timetable that the parties consider  
13 is feasible and allows the sufficient space -- I'm thinking particularly after the CMC in  
14 light of any rulings I might make, if there are disputed disclosure applications.

15 **MR BARRETT:** Yes, it does. We're grateful. I appreciate it.

16 **JUDGE WOLFFE:** No, not at all and I'm sorry if I'm a little slow in just kind of working  
17 out steps that need to be provided for.

18 **MR BARRETT:** I'm grateful, my Lord.

19 **JUDGE WOLFFE:** Yes.

20 **MR GIBSON:** The only -- obviously we can make that work. We are still keen to  
21 resolve this at the earliest opportunity but there's a gap between the amended reply  
22 and the evidence on 25 March to the hearing bundle on 14 April. One could shift that  
23 back -- whichever way round you look at it -- to 7 April for the hearing bundle, skeletons  
24 on the 14th and then we hit the 23rd/24th for the hearing dates.

25 **JUDGE WOLFFE:** I understand that point, Mr Gibson. My concern is that the  
26 outcome of the CMC, till that point we won't have determined the application to amend.



1 In fact if it's refused the case may take a slightly different shape anyway. But it would  
2 proceed on the footing that that's granted still without prejudice to the argument we'll  
3 hear. I anticipate there may well also be disputes about disclosure and there may  
4 be --

5 **MR GIBSON:** Building some fat into --

6 **JUDGE WOLFFE:** So I'm building a little bit of fat in to allow for the possibility. Either  
7 way there may be things that have to be done following the CMC which are not  
8 currently provided for.

9 **MR GIBSON:** Very good, sir.

10 **JUDGE WOLFFE:** That's my thinking.

11 **MR GIBSON:** I see the good sense of that approach. An experienced litigator  
12 speaking.

13 **JUDGE WOLFFE:** I don't know about that but thank you.

14 Just in terms of the various things we might order on 23 April, Mr Barrett, for your part,  
15 any issue with the list of Mr Gibson's note, authorities, updated version of hearing  
16 bundle. Actually I wonder if we need that, that's perhaps a little excessive, to reprint  
17 the whole bundle.

18 An agreed list of issues would be helpful, an agreed chronology would be helpful, an  
19 agreed list of essential documents for advance reading, all of that seems quite  
20 sensible.

21 The other things that may be helpful in cases like this, but I don't want to unduly burden  
22 parties is an agreed statement of facts that we can proceed on. That may or may not  
23 be a feasible proposition. The other is an agreed statement of propositions of law  
24 which would allow the Tribunal to focus on where there are truly disputes on the law.  
25 Again this may not be a case that lends itself to that particular way of trying to help  
26 focus the issues.

1 **MR GIBSON:** I readily understand the -- you know, the good sense of that being an  
2 aspiration. In my experience, attempting to agree those sort of documents actually  
3 involves an inordinate amount of cost and time, if it's achieved. Very often it's not  
4 achieved and you end up with some rather unpleasant document with colour all over  
5 it that I'm not sure really helps anybody. It's quite an expensive thing to achieve. For  
6 my part, every time we talk about our cases, we seem to approach from completely  
7 different standpoints. I just don't know that that's going to be a very productive  
8 process, sir, unless Mr Barrett has more optimism than I do.

9 **MR BARRETT:** I share my learned friend's pessimism, I'm sorry to say.

10 **JUDGE WOLFFE:** I don't want to load on parties an exercise that is unlikely to be  
11 fruitful and simply imposes cost. I'm also very conscious that these are judicial review  
12 proceedings and so in a sense, you know, we'll be approaching the facts as one would  
13 in a judicial review in any event.

14 Good. Is that everything that we need to resolve?

15 **MR BARRETT:** Yes, my Lord.

16 **JUDGE WOLFFE:** Thank you very much, Mr Barrett.

17 **MR GIBSON:** My learned friend beat me to it. The last order of the day is to thank  
18 you for your patience and tolerance, particularly given the time, sir.

19 **JUDGE WOLFFE:** Not at all. I am sorry we kept you as long as we have.

20 **MR GIBSON:** I blame the intervenors, sir, don't worry.

21 **JUDGE WOLFFE:** Thank you both. I look forward to seeing you on 17 March. I think  
22 that's been confirmed as a date that's available and we'll fix that and we'll fix the  
23 substantive hearing for April.

24 **MR GIBSON:** Sorry, I didn't mean to cut across Mr Barrett. Will you be drawing the  
25 order or would you like us to?

26 **JUDGE WOLFFE:** If you could --

1 **MR GIBSON:** We'll draw an order and make sure that Mr Barrett is in agreement and  
2 share it with you as timeously as we can.

3 **JUDGE WOLFFE:** That would be really helpful. Thank you very much.

4 **(4.55 pm)**

5 **(The hearing concluded)**

1  
2

### Key to punctuation used in transcript

|              |  |
|--------------|--|
| --           | Double dashes are used at the end of a line to indicate that the person's speech was cut off by someone else speaking  |
| ...          | Ellipsis is used at the end of a line to indicate that the person tailed off their speech and did not finish the sentence.   |
| - xx xx xx - | A pair of single dashes is used to separate strong interruptions from the rest of the sentence e.g. An honest politician - if such a creature exists - would never agree to such a plan. These are unlike commas, which only separate off a weak interruption. |
| -            | Single dashes are used when the strong interruption comes at the end of the sentence, e.g. There was no other way - or was there?  |