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IN THE COMPETITION

Case No: 1440/7/7/22 & 1518/5/7/22

APPEAL

TRIBUNAL

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Tuesday 20th May – Friday 6th June 2025

Before:

The Honourable Mr Justice Richards
Andrew Lenon KC
Anthony Neuberger

(Sitting as a Tribunal in England and Wales)

BETWEEN:

London Array Limited & Others.

Claimants

v

**(1) Nexans France SAS
(2) Nexans SA**

Defendants

AND BETWEEN:

Clare Mary Joan Spottiswoode CBE

Class Representative

v

**(1) Nexans France SAS
(2) Nexans SA
(3) NKT A/S
(4) NKT Verwaltungs GMBH
(5) Prysmian Cavi e Sistemi S.R.L.
(6) Prysmian S.P.A.**

Defendants

A P P E A R A N C E S

Ben Lask KC, Gerard Rothschild and Jamie Farmer (Instructed by Scott+Scott UK LLP) on behalf of Clare Mary Joan Spottiswoode CBE

Colin West KC (Instructed by Hausfeld) on behalf of London Array Limited & Others. Paul

Luckhurst and Tony Singla KC (Instructed by White & Case LLP) on behalf of Nexans Helen

Davies KC and Fiona Banks (Instructed by Macfarlanes) on behalf of Prysmian Daniel

Carall-Green (Instructed by Addleshaw Goddard) on behalf of NKT

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Tuesday, 20 May 2025

(10.30 am)

Housekeeping

THE CHAIRMAN: Right. Good morning. Some of you are joining us livestream on our website, so I'll start with the customary warning. An official recording is being made and an authorised transcript will be produced, but it is strictly prohibited for anyone else to make an unauthorised recording, whether audio or visual, of the proceedings, and a breach of that provision is punishable as contempt of court.

Yes, Mr Lask?

Submissions by MR LASK

MR LASK: Good morning. May it please the Tribunal, I appear for the Class Representative, Ms Spottiswoode, with my learned juniors Mr Rothschild and Mr Farmer. My learned friend Mr West KC appears for the London Array claimants and for the Defendants, my learned friend Ms Davies KC appears for Prysmian with Ms Banks; my learned friend Mr Singla KC appears for Nexans with Mr Luckhurst, and my learned friend Mr Carall-Green appears for NKT.

A quick word about bundles. We have the ROC trial bundle which runs from Volume A through to Volume H,

1 including Volume AB which currently contains the
2 Skeleton Arguments. For those working with hard copies
3 there ought to be some 18 hard copy files.

4 THE CHAIRMAN: I don't think any of us are working from hard
5 copy. Some of you may be but I don't think any of us
6 are.

7 MR LASK: Right. Well, if I see that any are I'll give
8 references to the volume number rather than just E, I
9 will say "E5" if necessary, but let us see how we get
10 on.

11 There is also an authorities bundle which is two
12 volumes. Subject to any other housekeeping, I propose
13 to press on with my Opening Submissions which I expect
14 will take the morning.

15 THE CHAIRMAN: I'm just having difficulty logging into Opus.

16 (Pause)

17 Okay. Sorry about that. Thank you.

18 MR LASK: So, the central issue for the Tribunal in this
19 trial is whether, in the absence of a 26 per cent
20 overcharge on cables caused by the Cartel, the
21 Government would have awarded fewer Renewable Obligation
22 Certificates in 2010. That is Question 2 of the ROC
23 issue questions, and it requires the Tribunal to reach a
24 view on what the Government would have done in the
25 counterfactual.

1 In the factual, it awarded two ROCs per megawatt
2 hour which was an increase on the 1.5 ROCs that had been
3 awarded only the year before in 2009.

4 In order to assist in addressing that central issue,
5 the parties' experts have calculated the value of
6 commerce, essentially the relevant costs, of those wind
7 farms whose data was before the Government at the
8 relevant time. That is Question 1 of the ROC issue
9 questions, and if the central issue is answered, "yes",
10 as we say it must be, then Question 3 will arrive for
11 determination, and Question 3 asks the Tribunal to
12 identify the minimum cost elevation the Cartel would
13 need to have caused in order for fewer ROCs to have been
14 awarded in the counterfactual.

15 I propose to structure my Opening Submissions under
16 the following six headings: first, the Renewable
17 Obligations regime in outline; second, the context for
18 the 2010 decision; third, the Government's approach to
19 the 2010 decision in the factual scenario; fourth, the
20 position that would have been facing the Government in
21 the counterfactual; fifth, the minimum cost elevation
22 under Question 3, and then finally I propose to
23 summarise the Class Representative's answer to the three
24 ROC Questions.

25 So the first heading, the RO -- "Renewable

1 Obligations" -- regime in outline.

2 It is common ground that the RO regime operated as
3 described in section 3.1 of Druce 4, so that is the
4 fourth expert report of the Class Representative's
5 expert, Mr Druce. I can take this matter quite briefly.
6 It is also outlined in section B of our Skeleton
7 Argument. It may assist the Tribunal, as I address this
8 matter, to have open the illustration in Figure 3.1 of
9 Druce 4, which is at file {ROC-D/1/26}. You can see
10 there the illustration of RO mechanics.

11 So the RO scheme is a subsidy scheme which aims to
12 encourage investment in renewable energy. So far as
13 relevant for present purposes it gives wind farm
14 developers a subsidy which, together with revenues from
15 the sale of electricity, enables them to cover their
16 costs, including a reasonable return on investment. The
17 subsidy is granted in the form of Renewal Obligation
18 Certificates -- ROCs. Supported generators receive a
19 certain number of ROCs determined by Government for each
20 megawatt hour of electricity they produce. They can
21 then earn revenue by selling those ROCs to electricity
22 suppliers.

23 The ROCs have a market value, because suppliers are
24 obliged to present a certain number of them to Ofgem
25 each year, or else pay a fine into a buyout fund, and

1 this fine, also known as the "buyout price" is also set
2 by Government. Now, the proceeds of the buyout fund are
3 distributed among suppliers annually in proportion to
4 the number of ROCs they present to Ofgem. These
5 distributed proceeds are referred to in the papers as
6 "Recycled Buyout Payments".

7 So the obligation on suppliers, plus the prospect of
8 receiving recycled buy out payments, creates incentives
9 for them to purchase ROCs from generators and increases
10 the market value of ROCs.

11 More specifically, the value of ROCs to suppliers,
12 and thus the price at which they are willing to purchase
13 them, is defined by the value of the avoided buy out
14 price, plus the supplier's expected share of recycled
15 buy out payments.

16 The level of the Renewable Obligation that is
17 imposed on suppliers is set according to the methodology
18 described by Mr Druce at paragraph 54 of this report on
19 page 24. I don't need you to go to it now, but in
20 outline, the obligation is set by reference either to a
21 fixed target or a guaranteed headroom calculation,
22 whichever is higher.

23 As a matter of fact, the guaranteed headroom
24 calculation has been used every year since 2010, and
25 what that means is that a higher banding decision by

1 Government, such as the one it took in 2010 to increase
2 the number of ROCs awarded, results in higher costs for
3 suppliers, and significantly, higher costs for suppliers
4 are, in turn, passed on to electricity consumers via
5 their energy bills, and that is why we are here.

6 It is also why, as I will show you, a key
7 consideration for Government in the 2010 process, was
8 the impact that a higher banding decision would have on
9 consumers.

10 Now, just to complete the picture, the RO regime
11 closed to new offshore wind generation from 1
12 April 2017, but the generators who were already
13 supported under the regime will continue to receive
14 support for 20 years. So, suppliers, and, ultimately,
15 consumers, will continue to pay for this scheme until
16 2037.

17 THE CHAIRMAN: That is a very helpful summary of how the ROC
18 scheme works. Am I right in this, that you explained
19 the incentive to purchase ROCs, and so the effect on
20 market value of a ROC, but presumably the market value
21 of a ROC is affected also by uncertain factors such as,
22 for example, how windy a year it is? The windier a
23 year, the more renewable energy is generated and so the
24 more ROCs are issued and so the more currency, if you
25 like, that comes on to the market. Am I correct on

1 that?

2 MR LASK: I think that is right. If it is wrong, I'm sure
3 one or more of the experts will point that out. It is
4 certainly right to say that when setting the level of
5 ROCs to be awarded under this scheme, the Government has
6 to forecast what is going to happen, and it has to make
7 predictions as to the likely value of ROCs, and,
8 therefore, the shortfall that needs to be made up
9 through the scheme.

10 Turning, then, to my second heading, the context for
11 the 2010 decision, there are five points I wish to
12 highlight by way of context, and these points bear
13 emphasis because they help explain the approach taken by
14 Government in 2010, and by logical extension they help
15 explain how the Government would have approached matters
16 in the counterfactual.

17 What I propose to do is outline the five points and
18 then illustrate them with a few documents.

19 First, the RO regime constituted State aid.
20 Government was, therefore, bound to set support at a
21 level that avoided over-compensation in order to obtain
22 State clearance. This meant ensuring that the revenues
23 afforded generators under the scheme did not exceed
24 costs, including a reasonable return.

25 Now, a key concept that you will hear lots about

1 during the trial is "Levelised Cost of Electricity", or
2 LCOE. There is a rather long technical definition which
3 is common ground between the experts, and it is set out
4 at footnote 31 of our Skeleton, but in broad terms it is
5 a measure of the cost of generating electricity in
6 pounds per megawatt hour terms, and it includes a rate
7 of return. I think it is common ground that it is the
8 relevant measure of cost for present purposes.

9 Second, the European Commission almost withheld
10 State aid clearance for the 2009 Order due to concerns
11 about overcompensation, including for offshore wind.
12 This close shave occurred at the same time that the
13 Government was beginning to revisit the level of support
14 for offshore wind for the purposes of the 2010 decision,
15 so Government was acutely aware of the risks of
16 overcompensation during the 2010 process.

17 Third, the decision to revisit the level of support
18 for offshore wind was triggered by a concern that the
19 existing level of support, 1.5 ROCs, was insufficient to
20 cover developers' costs. So, from the very outset, the
21 2010 process was all about setting support at a level
22 that better reflected costs of offshore wind.

23 Fourth, before taking any decision to change the
24 level of support provided through the ROC scheme,
25 Government was under a statutory obligation to take

1 account of the costs of generating electricity, the
2 income that generators could earn from such electricity,
3 and the impact on consumers of any decision to change
4 the level of support, among other matters, and I will
5 come and show you the relevant statutory provision.

6 Fifth, Government was under internal pressure during
7 the 2010 process, in particular from the Treasury, to
8 minimise consumer costs. In my submission, that meant,
9 by definition, limiting support to what was necessary,
10 and this was consistent with the need to avoid
11 over-compensation for State aid purposes, and it was
12 consistent with the statutory obligation to take account
13 of the consumer impact. The cumulative effect was to
14 create a powerful incentive for Government to ensure
15 that wind farms were granted only what was necessary to
16 cover their costs.

17 THE CHAIRMAN: And give them a reasonable return.

18 MR LASK: Yes. Well, that is included within costs. You
19 will see when it comes to looking at the detailed
20 calculation of LCOE that it includes a reasonable rate
21 of return, so it is part and parcel of the cost
22 calculation.

23 So, State aid. I'm now going to take you to some of
24 the documents. It is uncontroversial that the RO regime
25 constituted State aid for the purposes of EU law. In

1 2009 the relevant provision was Article 87 of the EC
2 Treaty, but by the time of the 2010 Order that had been
3 replaced by Article 107 of the Treaty on the Functioning
4 of the EU.

5 So far as material, the provisions were the same.

6 Now, because it constituted State aid, Government's
7 banding proposal had to be notified to the Commission,
8 and it would have been prohibited if the Commission had
9 found it to be incompatible with the internal market.

10 In assessing measures such as the RO scheme, the
11 Commission applied its State aid Environmental
12 Guidelines. I would like to show you those briefly,
13 please. They are at File E, tab 33.1. {ROC-E/33.1/1}.
14 The relevant page to go to is page {ROC-E/33.1/19}. You
15 will see there the heading, 3.1.6 -- it may be helpful
16 to enlarge -- yes. Thank you. 3.1.6:

17 "Aid for renewable energy sources".

18 Recital (101):

19 "Environmental investment and operating aid for the
20 promotion of energy from renewable sources will be
21 considered compatible with the common market within the
22 meaning of Article 87... if the conditions in points
23 (102) to (111) are fulfilled. State aid may be
24 justified if there is no mandatory community standard
25 concerning the share of energy form renewable sources

1 from individual undertakings", and so on.

2 Then if one goes over the page to Recital (110) we
3 see the heading "Option 2", and then subparagraph (a):

4 "Member States may also grant support for renewable
5 energy sources by using market mechanisms such as green
6 certificates or tenders".

7 "Green certificates", is another way of describing
8 ROCs. It is the Commission term for things like ROCs:

9 "These market mechanisms allow all renewable energy
10 producers to benefit indirectly from guaranteed demand
11 for their energy, at a price above the market price for
12 conventional power. The price of these green
13 certificates is not fixed in advance but depends on
14 supply and demand".

15 That was the point you were making, sir.

16 The next subparagraph is important:

17 "Where the market mechanisms constitute State aid,
18 they may be authorised by the Commission if Member
19 States can show that support is essential to ensure the
20 viability of the renewable energy sources concerned,
21 does not in the aggregate result in over-compensation
22 and does not dissuade renewable energy producers from
23 becoming more competitive. The Commission will
24 authorise such aid systems for a period of ten years".

25 So that is where you see the concept of

1 over-compensation being introduced.

2 That concept is explained further in the 2009 State
3 aid decision which is in Bundle E at tab 80
4 {ROC-E/80/1}. If we could go, please, to page
5 {ROC-E/80/11} of that document? So this is the decision
6 on the notification in respect of the 2009 Renewable
7 Obligations order which I said a moment ago as a close
8 shave, and we see the Commission addressing the issue of
9 over-compensation at paragraph 45:

10 "In order to verify whether there is no
11 overcompensation in the aggregate, the Commission needs
12 to verify that the revenues of the generators do not
13 exceed the costs of production and a reasonable benefit
14 in aggregate of the scheme -- i.e. over time and over
15 technologies. The UK authorities aimed to ensure that
16 introducing banding does not over-compensate particular
17 technologies, or the industry as a whole. The changes to
18 the scheme are based on cost analysis of the industry
19 and modelling of the impact of different banding
20 regimes".

21 What one sees is that the obligation was to avoid
22 over-compensation in aggregate, but in practice for the
23 UK, this meant ensuring that no individual technology
24 was over-compensated, and it is worth noting at this
25 point that the 2009 decision was concerned with a range

1 of technologies, whereas the 2010 decision was only
2 concerned with offshore wind, at least so far as
3 increasing the banding was concerned.

4 As I will show you, when scrutinising the
5 Government's 2010 decision, the Commission was
6 concerned, very concerned, to ensure that there was no
7 over-compensation in respect of offshore wind
8 specifically, and, indeed, the need to avoid
9 over-compensation is a prominent theme running
10 throughout the relevant disclosure.

11 Before we leave this document, if I could show you
12 one other passage, please, on page {ROC-E/80/19}? This
13 is paragraph 80 where the Commission says:

14 "As regards generation from electricity from
15 offshore wind the UK decided to band electricity from
16 offshore wind at the level of 1.5 ROC however it
17 indicated that it expects a fall in the costs of
18 investments in the future (Ernst and Young predictions
19 indicate £82-102/MWh in longer run) and therefore would
20 possibly band down electricity from offshore wind down
21 to one ROC in the future".

22 So here we are in 2009 and the UK is seeking
23 approval for 1.5 ROCs but it is saying to the
24 Commission, "we hope the costs are going to go down, so
25 hopefully this will go down to one ROC in the future".

1 The reason that is important is because it means that,
2 actually, when the UK had to go back to the Commission
3 and say "ah, we were wrong, we've now got to put it up",
4 it had to be extra careful to ensure that that was
5 justified, and that it was not putting it up, was not
6 increasing banding, any further than it absolutely had
7 to.

8 Now, you are going to hear lots about
9 over-compensation and you are going to hear lots about
10 uncertainty. We recognise that over-compensation isn't
11 necessarily a hard-edged assessment, because it depends
12 on estimates, and that will inevitably involve a measure
13 of uncertainty.

14 That may make the assessment more complex, but in my
15 submission it doesn't water down the obligation, because
16 a finding of over-compensation would have sunk the
17 banding decision, and, as such, and as the disclosure
18 shows, the Commission and the Government took the matter
19 very seriously.

20 So, this is the 2009 State aid decision that you
21 have in front of you, Clearance was eventually granted,
22 and you can see it in this decision. The 2009 Order
23 came into force on 1 April 2009, and, as I say, it set
24 banding for offshore wind at 1.5 ROCs, but, as I have
25 said, it was a close shave. Approval was almost

1 withheld, and the reason that is relevant is because it
2 heightened the Government's anxiety to avoid
3 over-compensation during the 2010 process.

4 If I may show you a couple of documents on this,
5 please, the first one is in Bundle E at tab 49.
6 {ROC-E/49/1}.

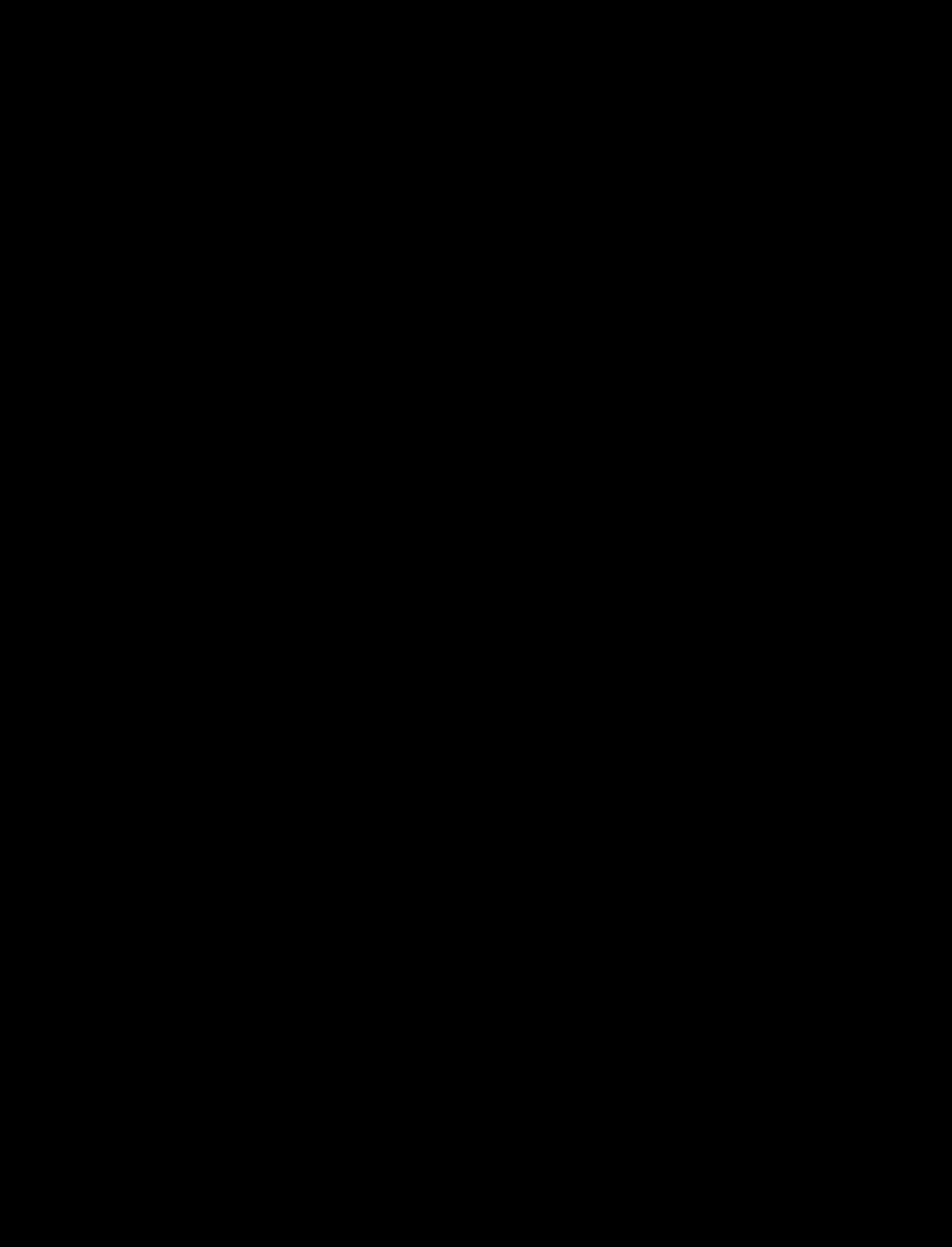
7 I should say that following the progress that was
8 made on confidentiality which was discussed at the PTR,
9 there are now very, very few documents that are
10 confidential, and I am not expecting to go to any of
11 them in these submissions but if we do I expect it would
12 be possible just to ask you to look at them so I do not
13 think that we will need to go into closed.

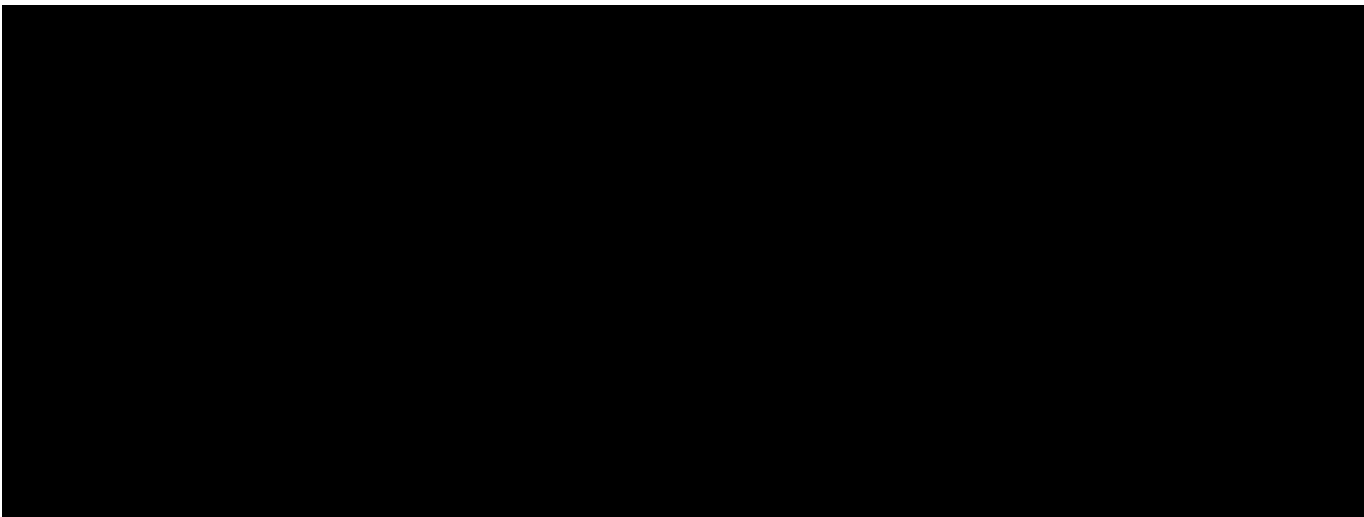
14 Yes, so tab 49, and this is -- one sees on page

[REDACTED] {ROC-E/49/3} at the end, this is [REDACTED]
[REDACTED]

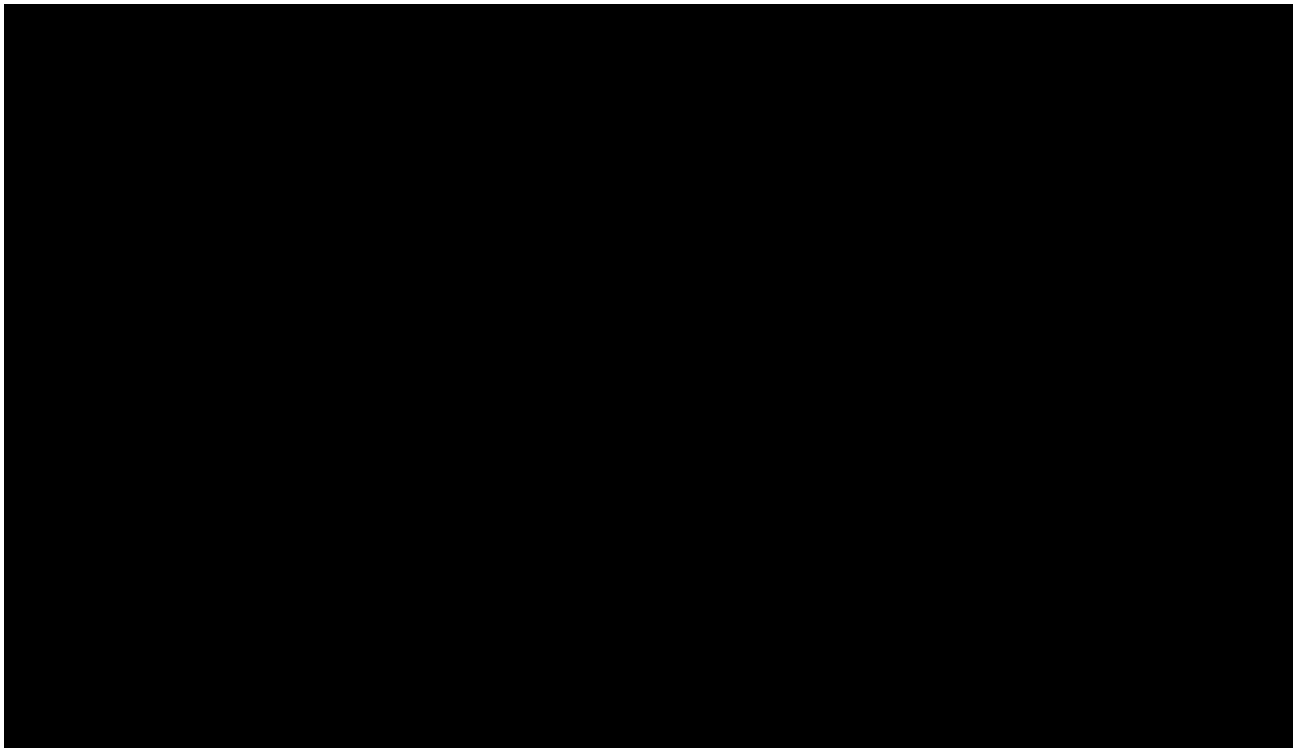
[REDACTED] -- sorry, back at page

[REDACTED] {ROC-E/49/1}, you see [REDACTED]
[REDACTED]





8 So, the Commission is really concerned that offshore
9 wind may be overcompensated, but the Government already
10 knows that even 1.5 ROCs is a problem for some
11 developers, so the Government is in a bit of a bind
12 here.



24 Now, the existing proposal was for 0.5 ROCs, so the
25 possible mitigation that is being discussed here is

1 reducing it from 0.5 to 0.33 recurring, or 0.25, and
2 0.33 recurring -- let us call it 0.33 -- that would have
3 been a reduction of 0.166 on the current proposal, from
4 0.5 down to 0.33.

5 In the end, they didn't do it, but it shows a
6 willingness to use relatively small increments where
7 necessary.

8 Now, officials remained acutely aware of this threat
9 during the 2010 process, and one can see this in a
10 document in Bundle E at tab 121. {ROC-E/121/1}. This

17 By this point the 2009 Order has come into force, so
18 this is about the 2010 process which is already in train
 at this point, and you will see the



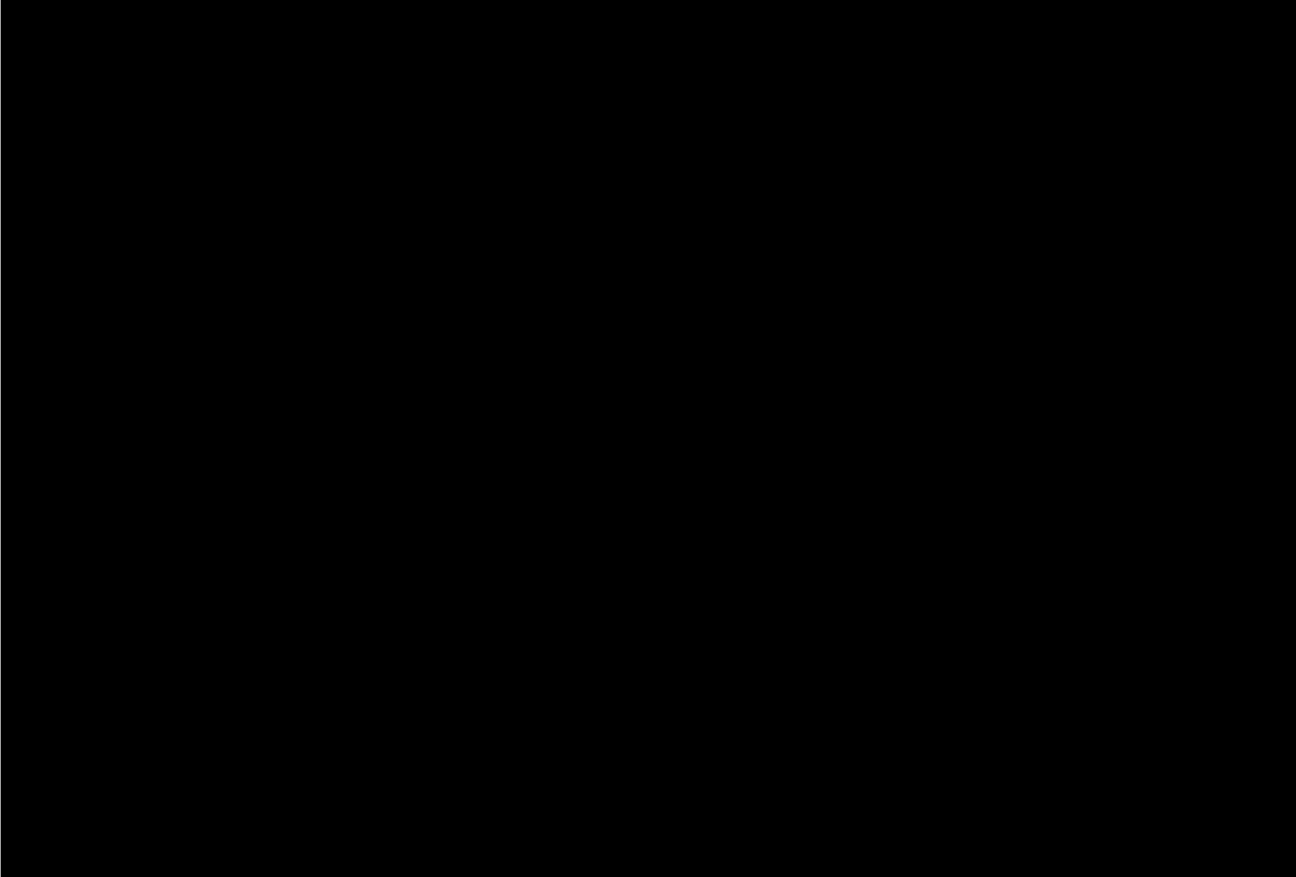
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So they don't want to give them any more because 1.5

4

must have been sufficient.



18

So the 2010 process was informed by the close shave

19

in 2009, and you will recall the Government had told the

20

Commission only a few months previous, that, if

21

anything, they expected offshore wind costs to fall, and

22

for the ROCs to come down. Now they are having to go

23

back and say "actually, they need to go up".

24

The trigger for the 2010 review.

25

As explained, the trigger was a concern that costs

1 had risen, and that key wind farm projects might not
2 proceed without further support, and for your note, one
[REDACTED] can see this, for example, from [REDACTED]

4 [REDACTED] -- we don't need to
5 go to it. It is at Bundle E, tab 115, page 2.

6 Indeed, Government was only entitled -- this was an
7 early review of banding -- Government was only entitled
8 to review banding early as one of the criteria in
9 Article 33 of the 2009 Order was met, and the criterion
10 that was relied on in this case was a significant change
11 this costs, so the entire 2010 process was motivated by
12 a recognition that banding needed to be set at a level
13 that better reflected the costs of offshore wind.

14 As I have said, the aim was to provide the level of
15 support that was necessary to cover those costs.

16 Next, statutory obligations.

17 If we could go, please, to the Authorities Bundle,
18 tab 1 {ROC-AUTH/1/1}. This is section 32D of the
19 Electricity Act 1989. The relevant provision is
20 subsection 4:

21 "Before making any banding provision, the relevant
22 minister must have regard to the following matters", and
23 then you see a series of matters set out. (a):

24 "The costs (including capital costs) associated
25 with generating electricity interest each of the

1 renewable sources or with transmitting or distributing
2 electricity so generated; (b) the income of operators of
3 generating stations in respect of electricity generated
4 from each of those sources ..."

5 And the other one I emphasise -- I should say the
6 other parties emphasise some of the other factors -- the
7 other one I emphasise is (e):

8 "The likely effect of the proposed banding
9 provision on the number of renewables obligation
10 certificates issued by the Authority, and the impact
11 this will have on the market for such certificates and
12 on consumers".

13 There are other factors there as well, and an
14 important one was encouraging investment. Another
15 important one was ensuring that renewable energy targets
16 were met. The Government was obliged to take into
17 account all of them, and it is implicit, I say, in
18 section 32(d), that the weight to be attached to any
19 given factor was a matter for the minister's judgment,
20 but because it needed to take into account all of them,
21 and as Mr McNeal explains in his witness statement,
22 banding decisions involved a trade-off between different
23 objectives, and the important point for present purposes
24 is two-fold.

25 First, any decision by the Government had to take

1 account of costs, and it had to take account of the
2 impact on consumers.

3 Second, Government's decision in 2010 struck a
4 balance as it was required to do between the different
5 factors in 32(d).

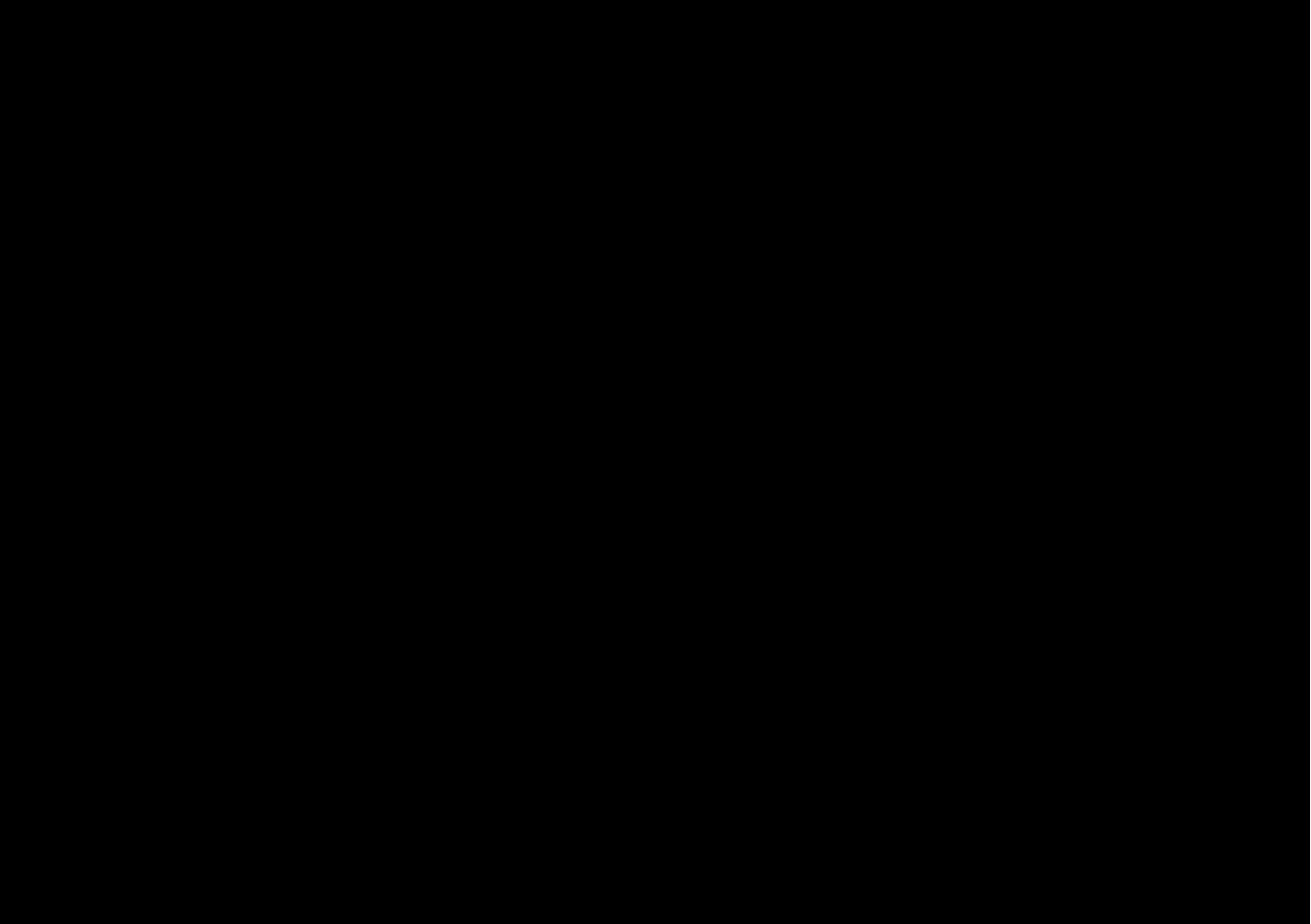
6 The Class Representative's case is that it would
7 have struck the same sort of balance in the
8 counterfactual without a 26 per cent overcharge, but
9 that lower costs would have meant that the same balance
10 produced a different outcome. That is the Class
11 Representative's case.

12 The aligned parties -- the other parties -- in
13 effect, in effect, they say, but for the reduction in
14 costs in the counterfactual, this would have caused
15 Government to alter the balance that it struck in the
16 factual, and provide a relatively more generous award to
17 offshore wind. That is one of the key battle lines in
18 this case.

19 Internal pressure. This is my final point by way of
20 context.

21 In addition to all these other matters, Government
22 was under internal pressure, in particular from the
23 Treasury, to minimise consumer costs, and the concern
24 about the impact on consumer bills can be seen
25 throughout the disclosure, and for your note we've cited

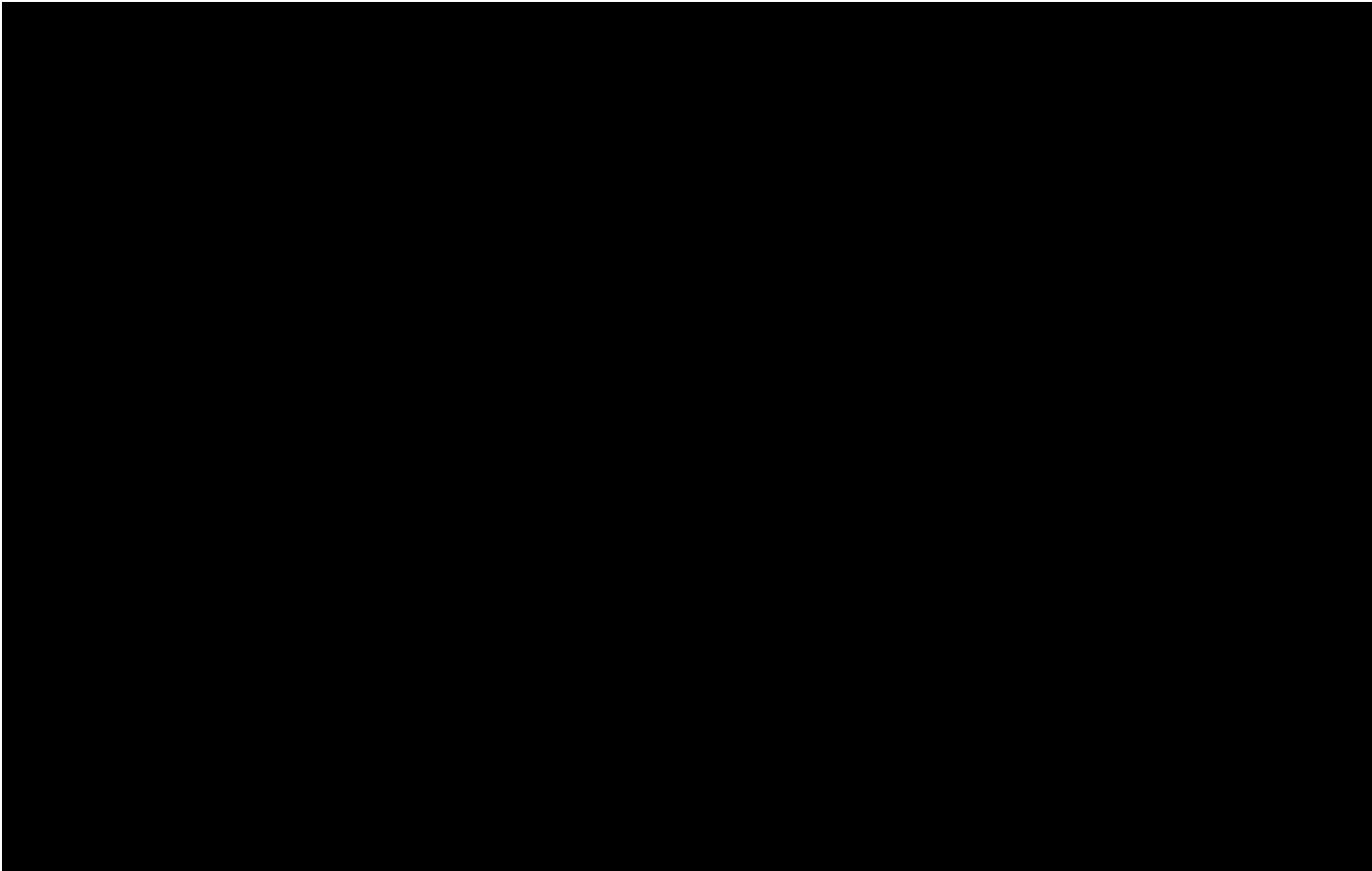
1 some of the relevant documents at paragraphs 35 to 37 of
2 our Skeleton, but one will suffice at this stage. It is
 [REDACTED] in Bundle E at tab 1. {ROC-E/1/1}. This is [REDACTED]



19 So there has been a provisional decision by this
20 point to increase banding to two ROCs, but it is subject
21 to consultation, it is subject to a formal review, so it
22 can't be done and dusted at this stage.

23 The next paragraph is important:





14 So the Treasury is holding DECC's feet to the fire,
15 and it is exerting pressure on DECC to ensure that the
16 banding decision minimises costs to consumers. As
17 I have said, that was entirely consistent with the
18 pressure that was coming from the European Commission to
19 avoid over-compensation, and with the statutory
20 obligation to take account of the consumer impacts. I
21 do submit that these factors, cumulatively, created a
22 powerful incentive for Government to ensure that wind
23 farms were only granted what was necessary to cover
24 their costs.

25 I turn, next, to my third heading: the Government's

1 approach in the factual scenario.

2 The approach taken by Government is evidenced by the
3 DESNZ(?) disclosure. That disclosure doesn't appear to
4 provide a complete record of Government's
5 decision-making, but it does enable the Tribunal to
6 obtain a good understanding of the Government's
7 objectives, and the analysis that underpinned its
8 decision. In my submission, two essential points emerge
9 from the disclosure. First, Government's key objective
10 was to set support at a level that was necessary and
11 sufficient to ensure the key wind farm projects went
12 ahead, while avoiding over-compensation and minimising
13 costs for consumers.

14 Second, in pursuit of that objective, Government
15 adopted a costs-based approach, an approach that was
16 firmly grounded in the evidence and analysis of offshore
17 wind costs, and the level of revenue that was required
18 to cover those costs.

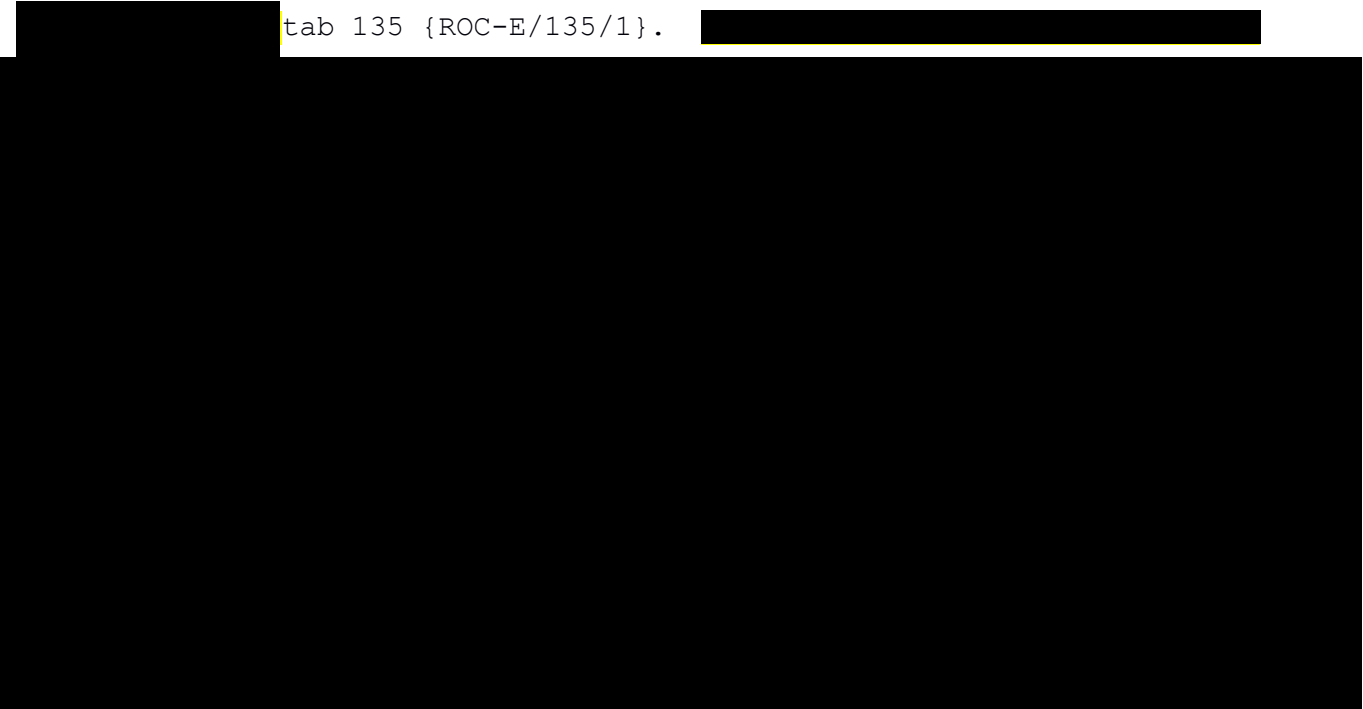
19 More specifically, Government investigated costs and
20 revenues very carefully -- did not take industry
21 requests at face value -- and it endeavoured to set
22 support at a level which aligned costs and revenues as
23 closely as practicable, as, indeed, it had to do in line
24 with its obligations and objectives. Government's own
25 words, it sought to provide a level of subsidy that was

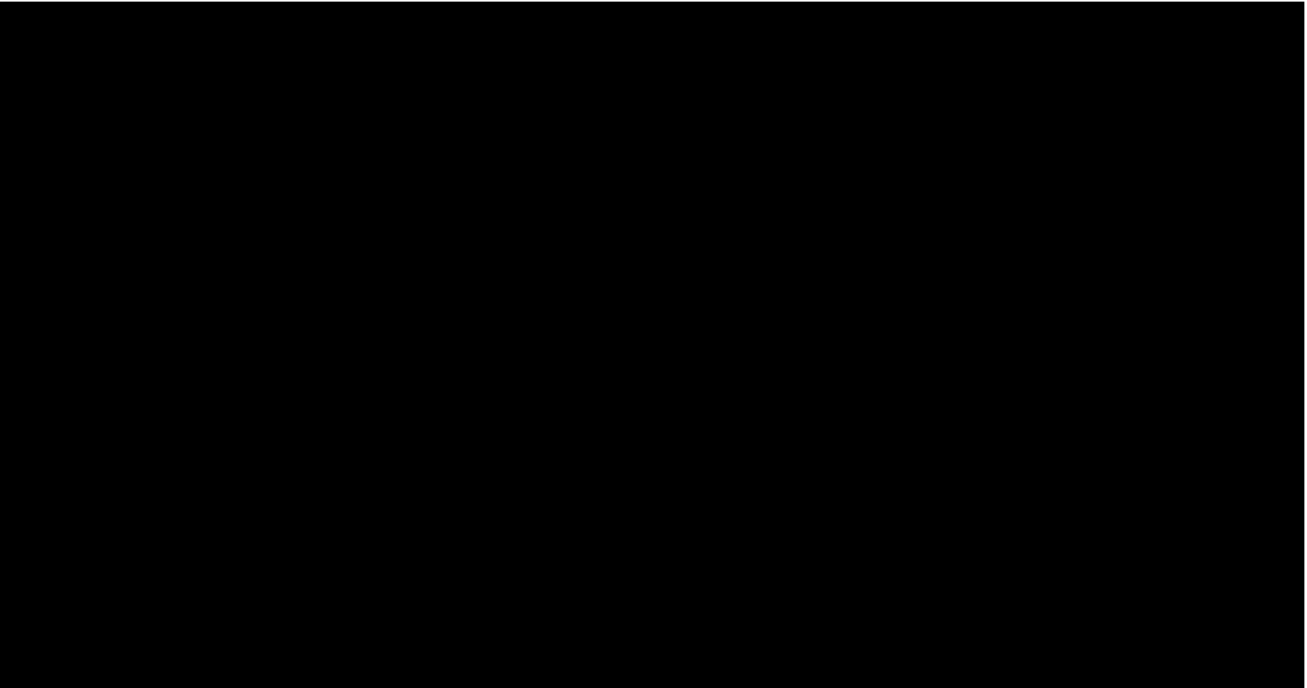
1 both necessary and sufficient.

2 THE CHAIRMAN: Because it is aligning revenue and costs in
3 your submission as close as possible, because reasonable
4 return is baked into costs that is giving it a
5 reasonable return. If it doesn't do that then it is
6 giving more than a reasonable return is the point you
7 are making.

8 MR LASK: Indeed. If it matched revenues and costs exactly,
9 that would give a reasonable return because those costs
10 include that return. As soon as it -- as soon as the
11 revenues are generated by a given number of ROCs, exceed
12 costs, the developers are getting a reasonable return
13 and then some more.


14 I want to show you some of the key documents to make
15 good my two key points, and the first is in Bundle E at
 tab 135 {ROC-E/135/1}. [REDACTED]

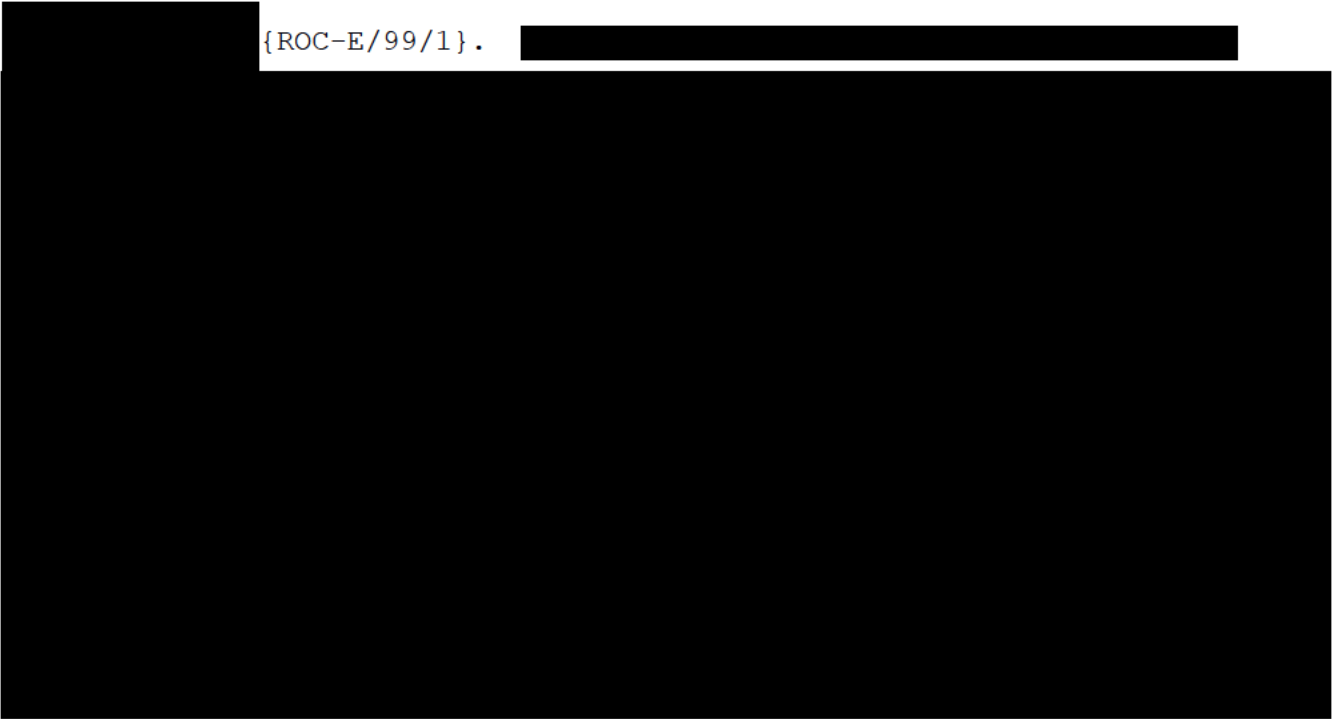




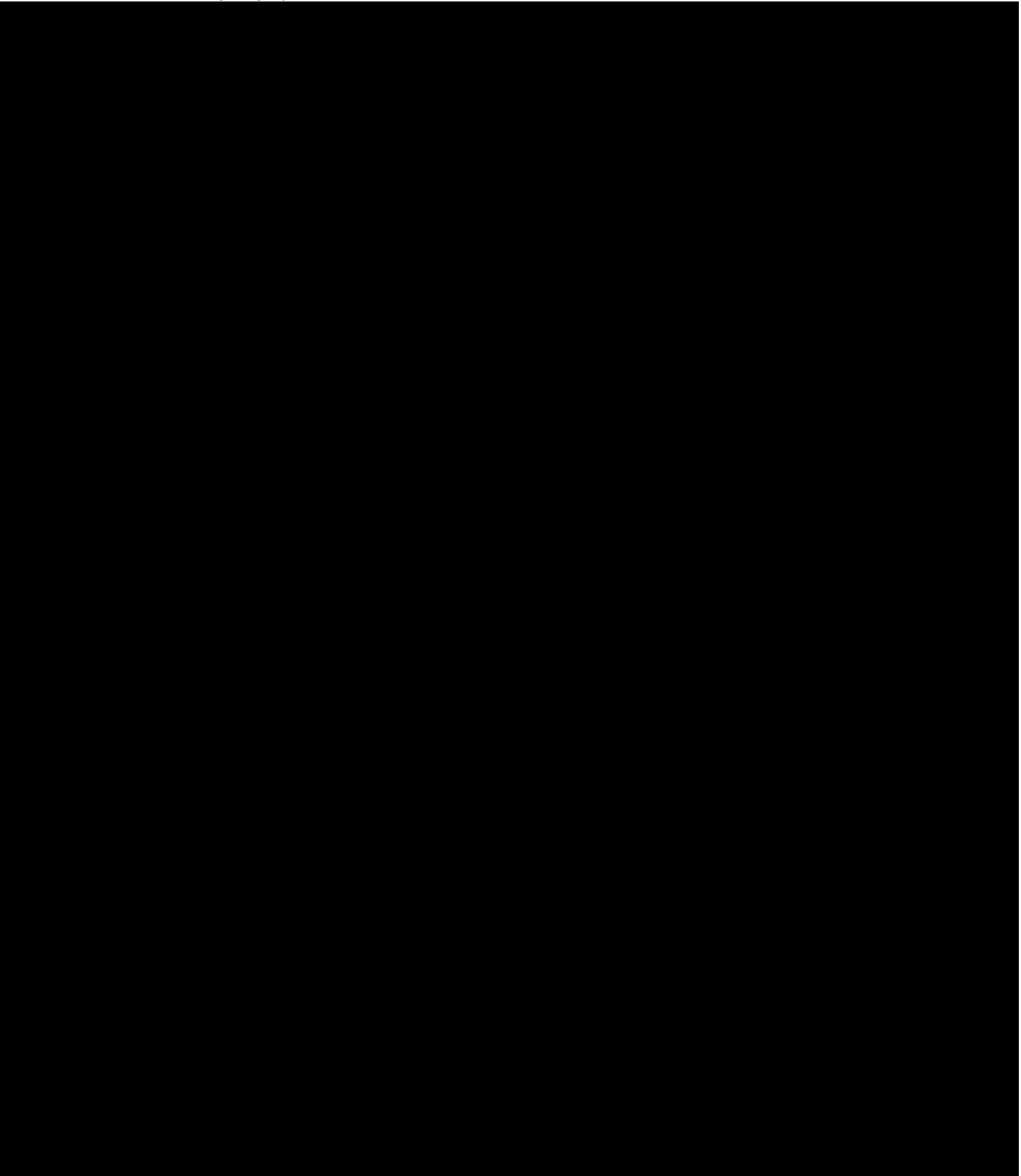
11 So you see there a sort of bringing-together of some
12 of the concepts we have been looking at, and so a neat
13 encapsulation of what the Government is setting out to
14 achieve.

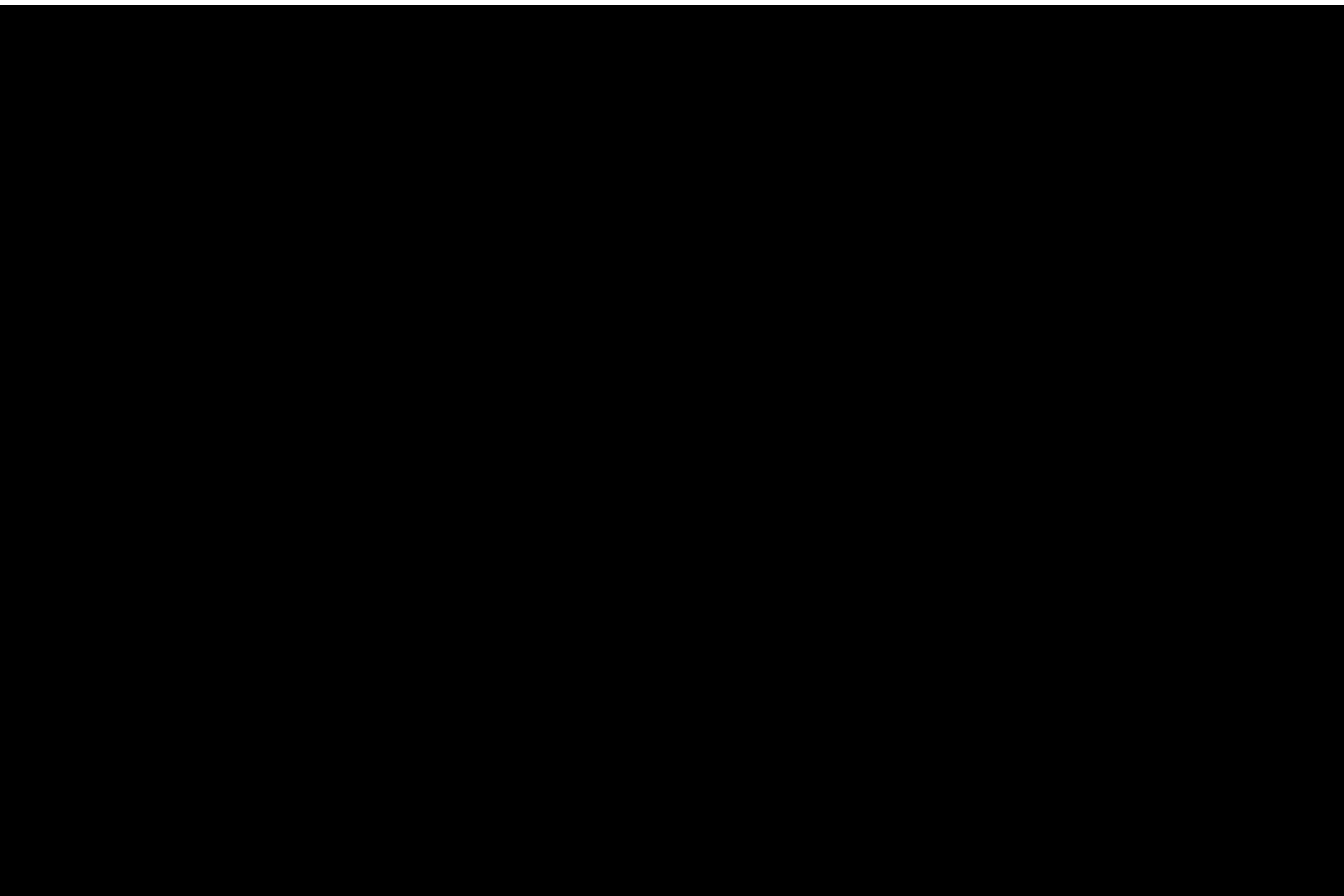
15 The next document is also in Bundle E at tab 99

{ROC-E/99/1}. 



1 So, that is my point about the trigger for the 2010
2 review.



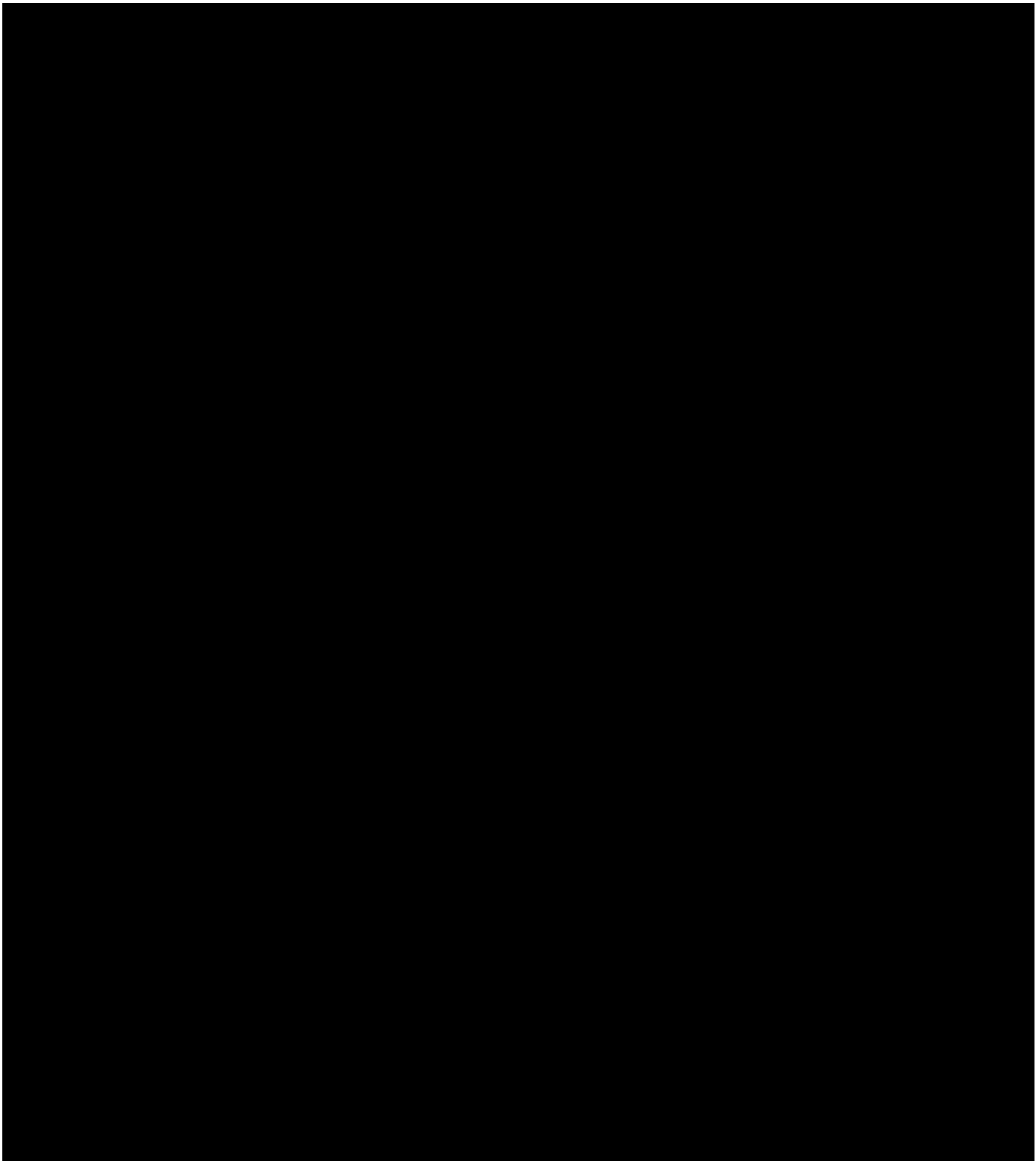



14 You will have seen in the Skeleton Arguments there
15 are differences between the experts as to the relevant
16 benchmark wind farms, and Mr Druce says that, actually,
17 the Government's decision to award two ROCs was driven
18 by the needs of these three particular wind farms, and
19 paragraph 9 supports that proposition.

20 There then follows a discussion of EY's analysis,
21 and you will see -- we do not have to dwell on it -- but
22 you will see at paragraph 11 the submission sets out
23 some of the key figures, including, under the first
24 bullet point, 144 megawatts per hour, and as I will show
25 you, that was EY's base case cost estimate for offshore

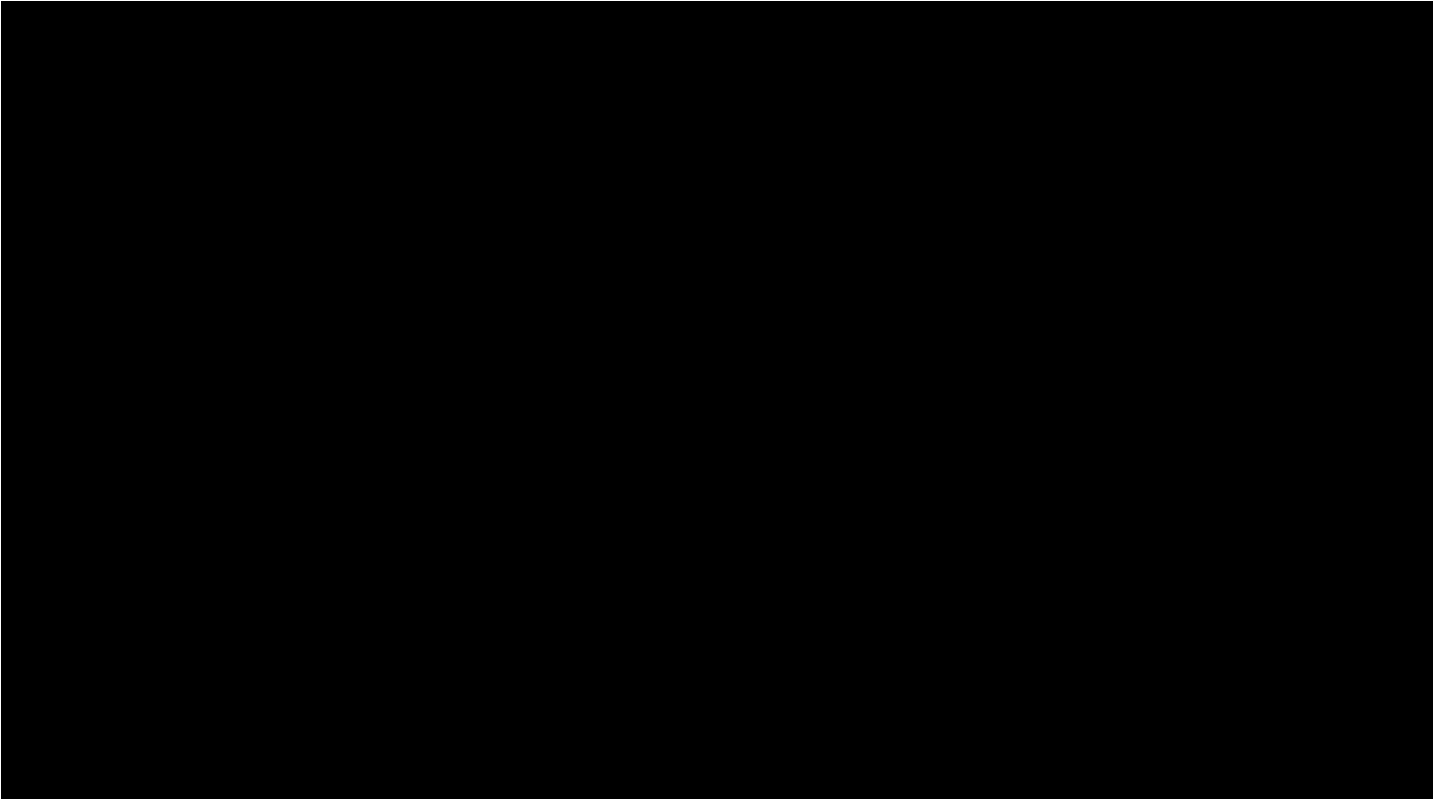
1 wind, and it is an important figure that you are going
2 to see lots about.

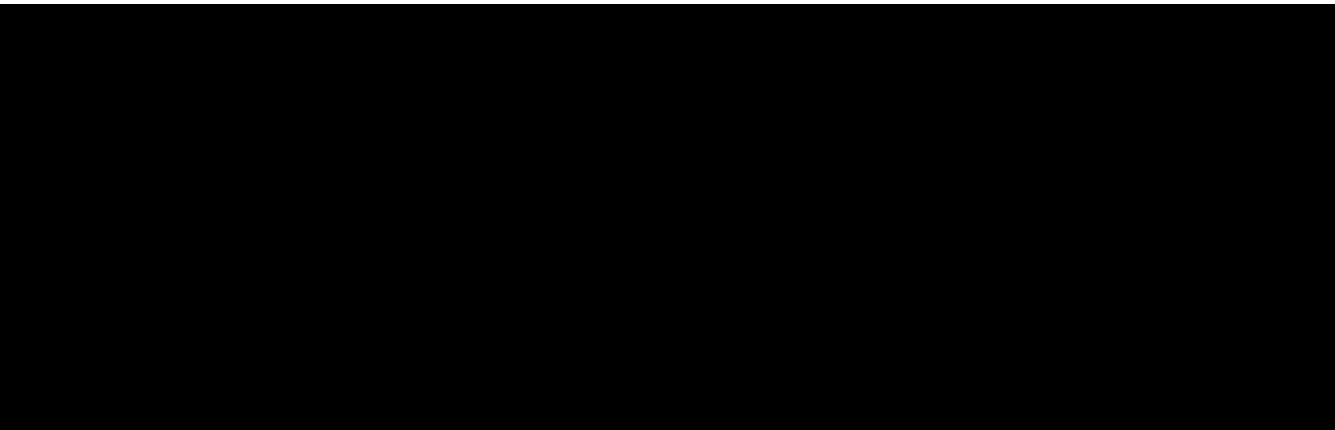
3 Paragraph 19 on page 6:





10 One sees that officials are acutely alive to the
11 risks involved in increasing banding, and acutely alive
12 to the impact on consumers, and evidently the fact that
13 this proposal would increase the cost of the scheme by
14 some 4 per cent was deemed worthy of attention.

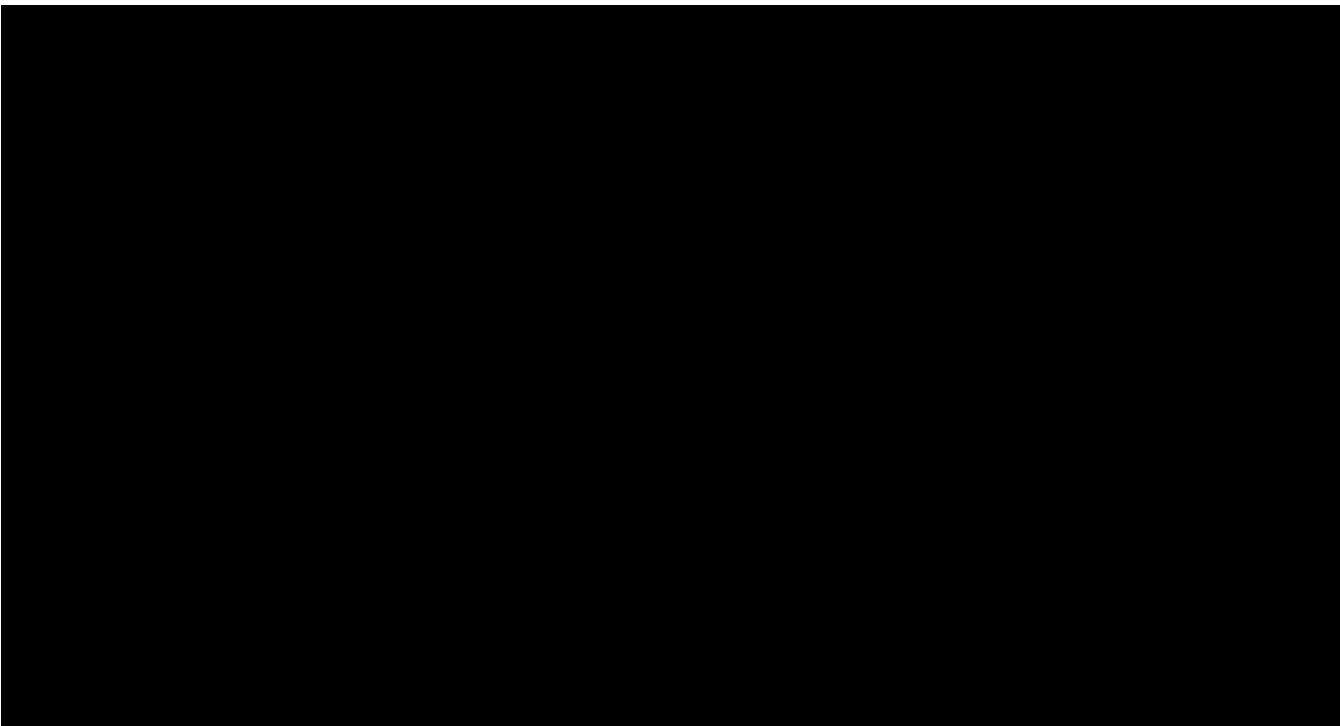


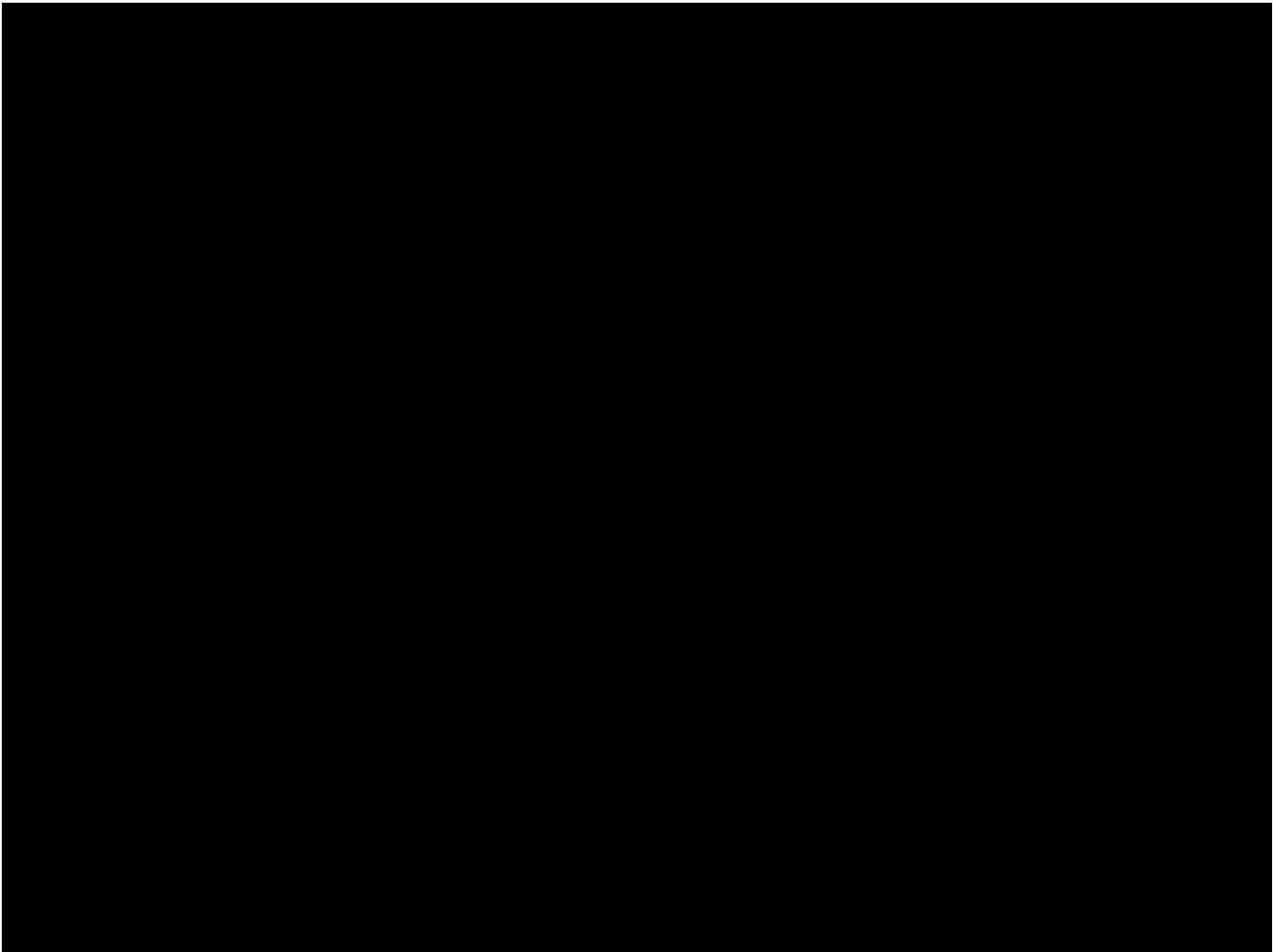


7 [REDACTED] {ROC-E/99/9}.

8 So, it is obvious, in my submission, that the impact
9 on consumers is a key consideration, and it is a
10 prominent theme running through not only this
11 submission, but the documents more generally.

12 The next document I would like to show you, please,
13 is at tab 179 of Bundle E {ROC-E/179/1}. You will see
[REDACTED] this document is titled [REDACTED]

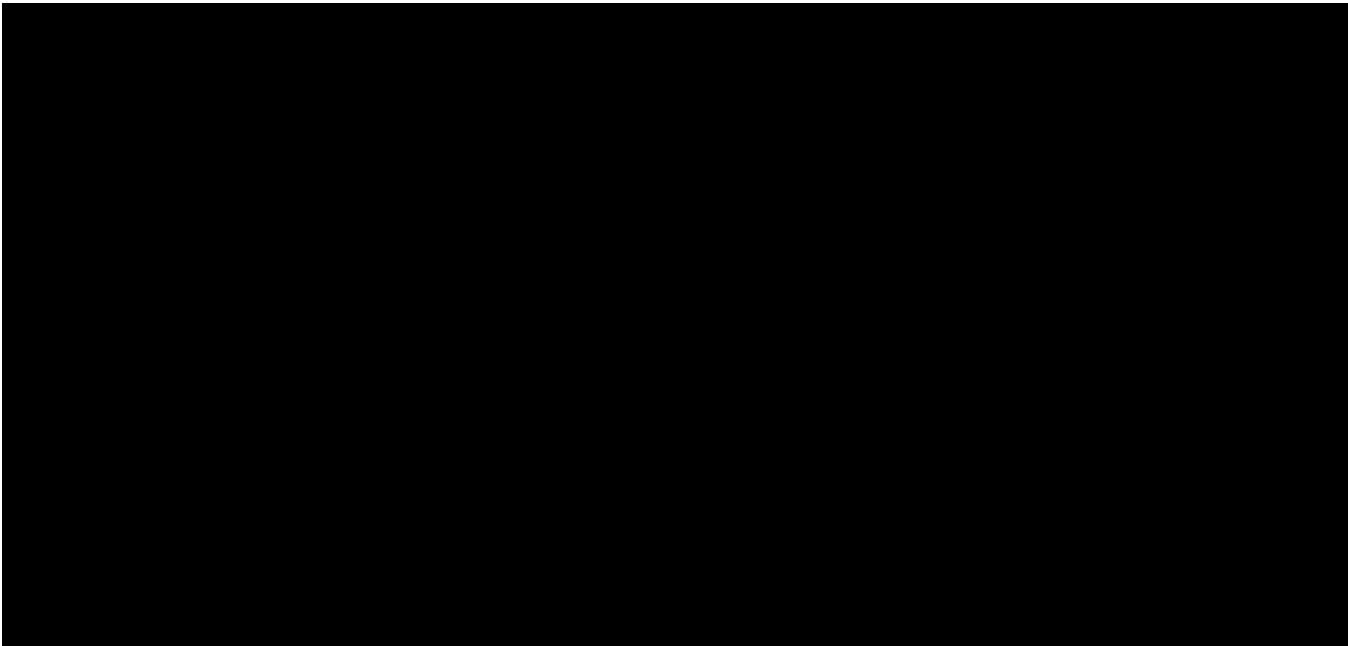




16 I am going to show you some of the State aid
17 documents from around this time but in due course but
18 you can see within Government there is a concern that
19 this is a major sticking point. Again they have a
20 problem that the Commission is concerned about
21 over-compensation in relation to offshore wind.

22 Over the page, page {ROC-E/179/2} we see at





10 That underlines what is at stake here. They do not
11 get State aid clearance, they have to withdraw the
12 Order, if they have already laid it. If they have not
13 laid it they cannot lay it, so it really is fundamental
14 that they obtain this clearance.

15 What you do not see in this document is any
16 suggestion that the Government might alter the proposal
17 to award fewer than two ROCs for offshore wind. You
18 will recall in the 2009 document there was a suggestion
19 that the co-firing, they could reduce the proposed
20 banding to meet the Commission's concerns. You do not
21 see that in this document in relation to offshore wind.

22 In my submission, that would imply that whilst
23 lowering banding -- a banding proposal -- was always, in
24 theory, a lever that the Government could pull, in this
25 case, Government thought two ROCs was the minimum

1 required for offshore wind. That was what it went for.

2 It opted for the minimum.

3 Just finally on this topic, go, please, to tab 124.


[REDACTED] ROC-E-124/1}. [REDACTED]
[REDACTED]

6 [REDACTED] It is

7 the key points that I focus on.

[REDACTED] ou can see from the [REDACTED]

[REDACTED]



7 There is a recognition there that they need to
8 properly justify any decision to increase a banding in
9 order to get State aid approval.

10 So those are the documents concerning the
11 Government's key objective. I turn, then, to the
12 documents concerning the approach the Government adopted
13 in pursuit of those objectives, and, as I have
14 submitted, the evidence shows, in my submission, that
15 the Government investigated costs and revenues very
16 carefully before reaching its decision to award two
17 ROCs, and that its decision reflected an endeavour to
18 align costs and revenues as closely as practicable, and,
19 frankly, in my submission, it is unsurprising that the
20 Government would take that approach, given its
21 obligations and objectives.

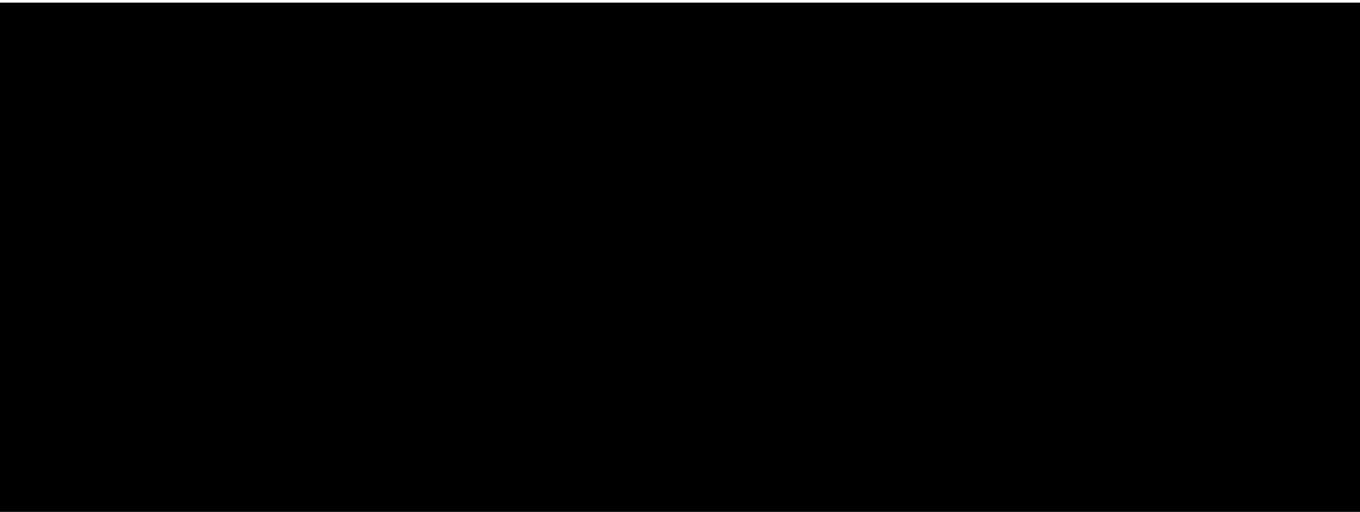
22 Now, Prysmian contends in its Skeleton Argument at
23 paragraph 4 that a consideration of costs was just one
24 factor among many, but that, in my submission, is to
25 diminish the importance of costs in Government's

1 assessment in a way that is impossible to reconcile with
2 the evidence. It is right that the Government was
3 concerned to provide a level of support that would
4 encourage key wind farm projects to go ahead, but
5 identifying the right level of support depends on an
6 assessment of costs. The two are not somehow distinct.

7 In essence, balancing the different factors required
8 Government to provide a level of support that was high
9 enough to meet the needs of wind farm developers, but no
10 higher than it needed to be to encourage them to
11 proceed.

12 The first document under this heading is the [REDACTED]
13 report which is at tab 112. This is a key document in
14 the case. {ROC-E/112/1}. You will be taken to it a
15 number of times over the course of the hearing so I do
16 not want to dwell on it for too long at this stage, but
17 if we could look, please, at page {ROC-E/112/3}, and if

[REDACTED] we could zoom in, please, [REDACTED]



[REDACTED]

3 It is a trite proposition, Government is unlikely to
[REDACTED] have commissioned [REDACTED]

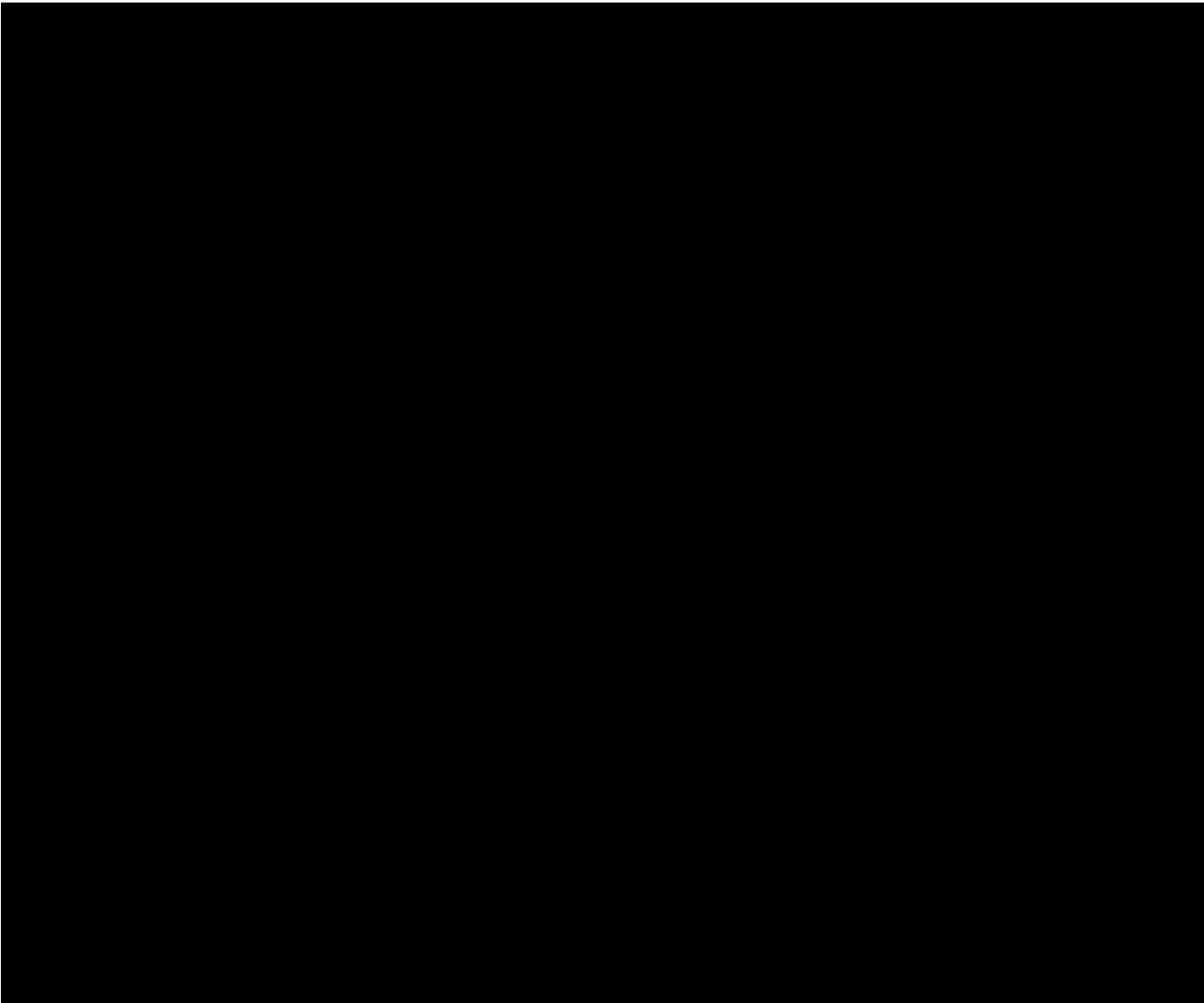
[REDACTED]

8 [REDACTED] I invite you
9 only to scan it at this stage, and it just shows you the
10 level of detail involved in EY's analysis.

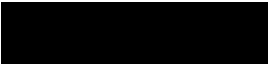

11 Then conclusions:

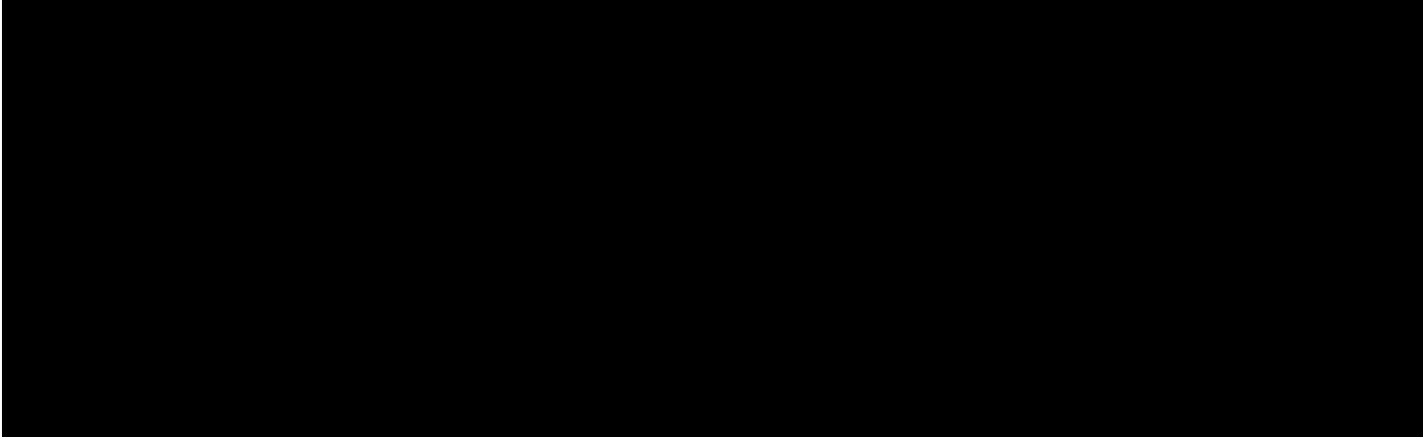
[REDACTED]

22 Then you will see a series of bullet points
23 explaining -- or summarising -- EY's reasoning. I
24 invite you to look at the sixth bullet point which
[REDACTED] begins with the words [REDACTED]



18 If we could go next, please, to page {ROC-E/112/18}?

 So this is section 4. This is 



[REDACTED]

5 THE CHAIRMAN: Sorry, just cost of capital, is that the
6 return to the investors?

7 MR LASK: Yes. Well, to the developers, yes. That is the
8 return.

[REDACTED] So the base case, [REDACTED]
[REDACTED]

11 [REDACTED] {ROC-E/112/19}.

12 Again, if we could zoom in please, you will see in the
[REDACTED]

23 This diagram is obviously high level. There is lots
24 more going on under the bonnet. Some of it is set out
25 in EY's confidential annex which I will not take you to

1 at this stage, but it is at Bundle E, tab 104.

2 What we do not have is access to EY's underlying
3 model, so the experts have been having to do their best
4 to interpret what EY was doing, how it was reaching some
5 of these conclusions.

6 THE CHAIRMAN: And you do not have that access -- why?

7 Because EY would not give it, or they were not asked?

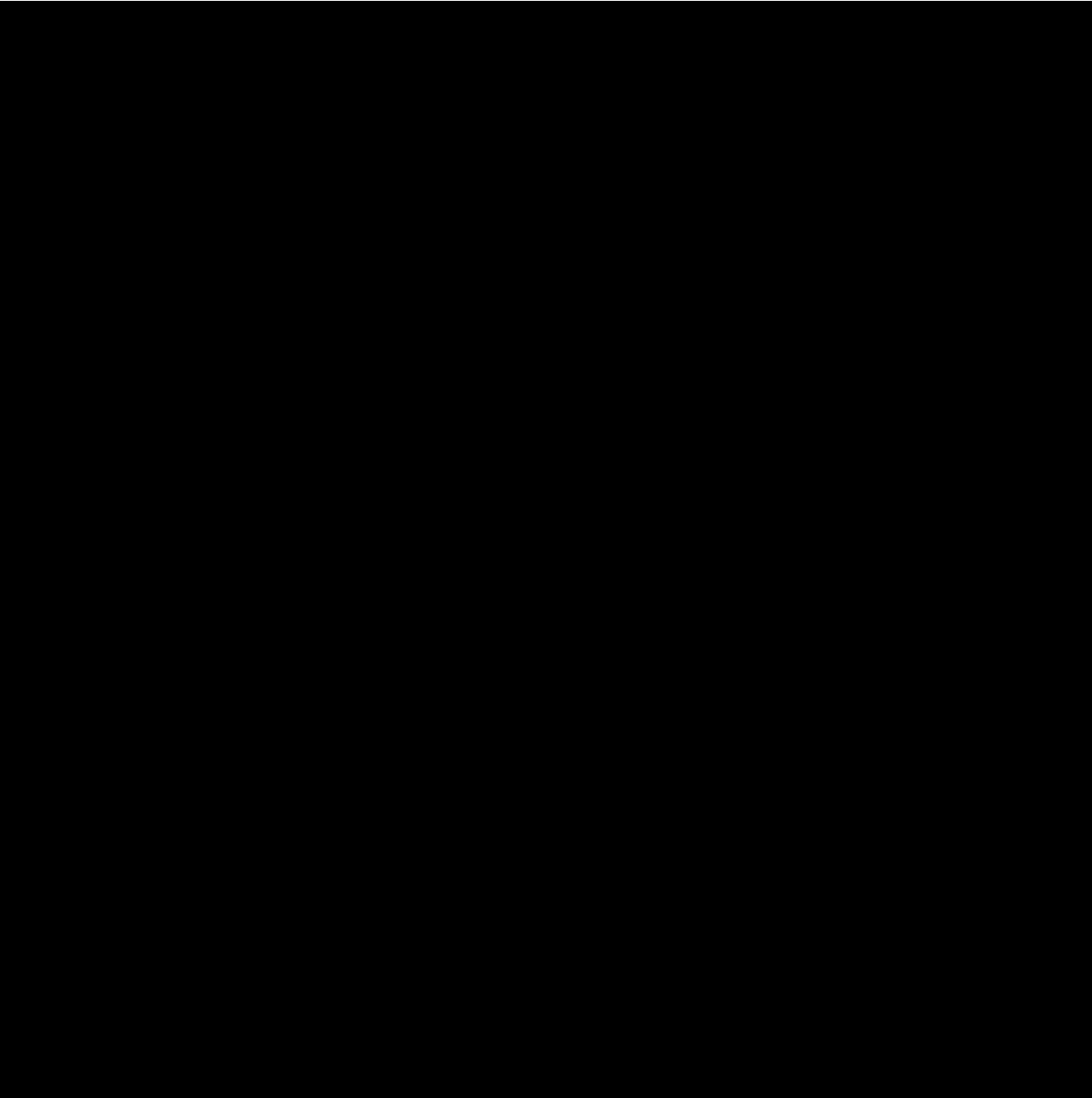
8 MR LASK: I will have to take instructions on that. Let me
9 see if there is an answer immediately available.

10 (Pause)

11 We did ask. I understand that they -- well, they
12 could not find it.

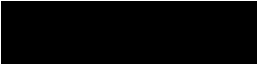
13 If we could go, please, to page {ROC-E/112/20}, this

[REDACTED] is [REDACTED]
[REDACTED]

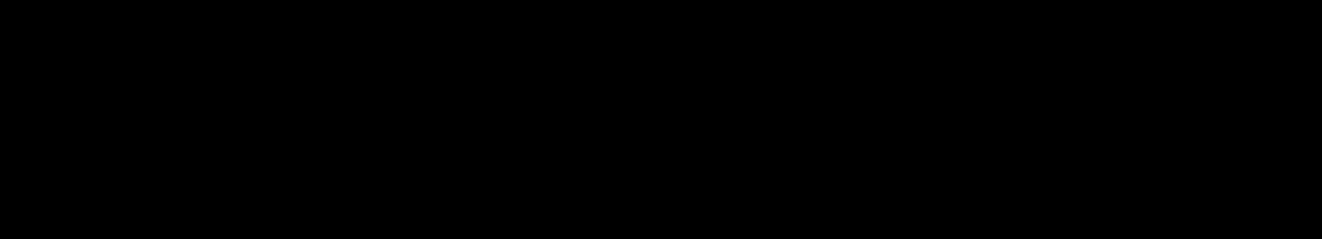



21

On page {ROC-E/112/22} and 23, if we look at 22

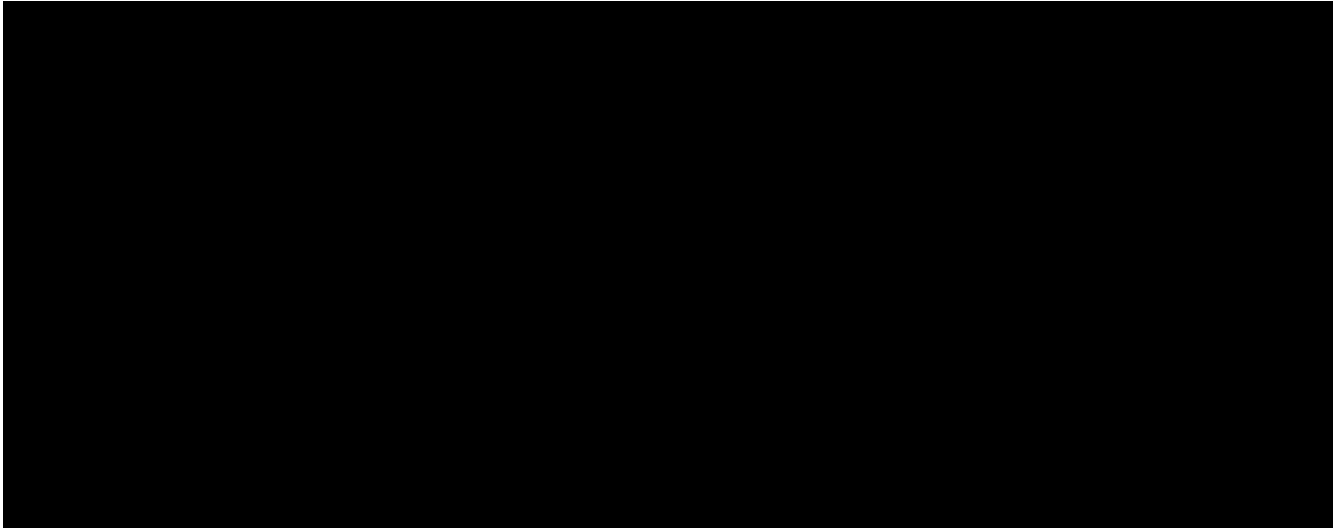


first, we see at the bottom of that page,

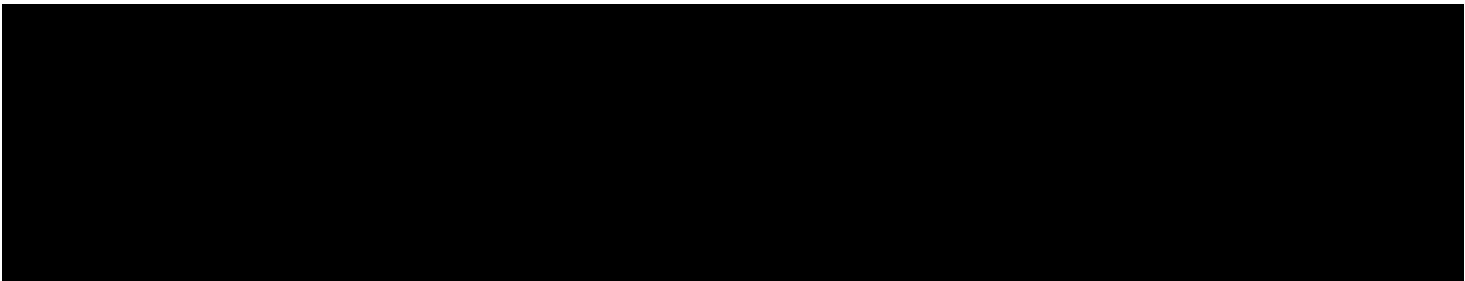


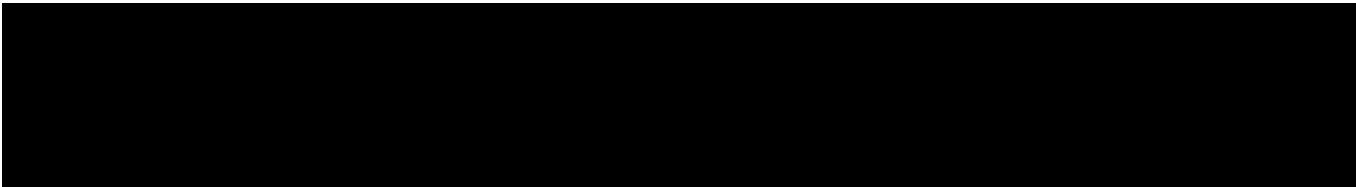


5 If we go over the page to page {ROC-E/112/23} you
6 see at the very top EY's statement:

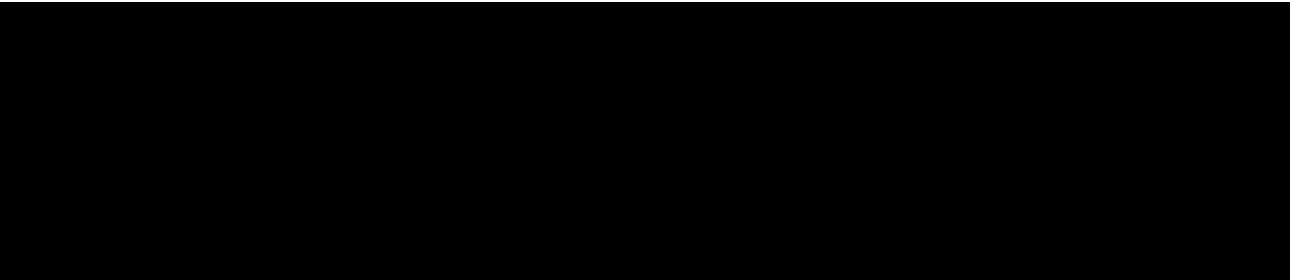


15 It is notable, because, as I will show you, there is
16 a measure of agreement between the experts that in the
17 counterfactual without a 26 per cent overcharge, EY's
18 base case cost estimate would have been around £4 lower.
19 The experts' estimates differ, but on average -- and
20 those differences will obviously be explored in
21 cross-examination -- but on average it is around £4.





3 Now, Government was not concerned -- sorry -- not
4 content to rely solely on the EY report. Instead, it
5 carried out further investigations in order to test
6 whether an increase to two ROCs was really necessary.
7 Firstly, it commissioned the Renewables Advisory Board
8 to review and report on EY's analysis, and that board,
9 RAB, was an independent non-departmental public body,
10 and its role in this case was to advise the Government
11 on whether the evidence presented by EY was sound,
12 whether it was based on sound assumptions and analysis,



17 Secondly, the Government held further discussions
18 with developers, with the express aim of ensuring that
19 two ROCs was both necessary and sufficient, and you may
20 recall when we looked at the ministerial submission of
21 11 March, ministers were being advised to have meetings
22 with developers to ensure that two ROCs was necessary
23 and sufficient.

24 In my submission, these further investigations make
25 plain that Government was determined to ensure that any

1 change to the banding for offshore wind was firmly
2 grounded in robust costs evidence. Of course, it also
3 carried out the public consultation to which most
4 respondents said that two ROCs was about the right
5 level.

6 Next, I want to show you some of the evidence -- we
7 have looked at EY's analysis briefly -- I would like to
8 show you some of the evidence we have of the analysis
9 underpinning Government's ultimate decision, because it
10 shows that whilst Government recognised that there were
11 limitations arising from uncertainty in the estimates,
12 it shows that it did endeavour to set support at a level
13 which aligned costs and revenues as closely as
14 practicable.

15 If we could go firstly, please, to {ROC-E/130/1}?

[REDACTED]

17 We believe that this -- so, there are a number of
18 different versions of [REDACTED] in the
19 disclosure. We believe this is the first one that was
20 sent to the Commission, and we believe that it is dated
21 [REDACTED]. [REDACTED] are important
[REDACTED] because they show the [REDACTED]
[REDACTED]

25 If we go firstly, please, to page {ROC-E/130/7} of

1 this document, and if we could zoom in, please, on the
2 second half of the page, you see just above the tables:

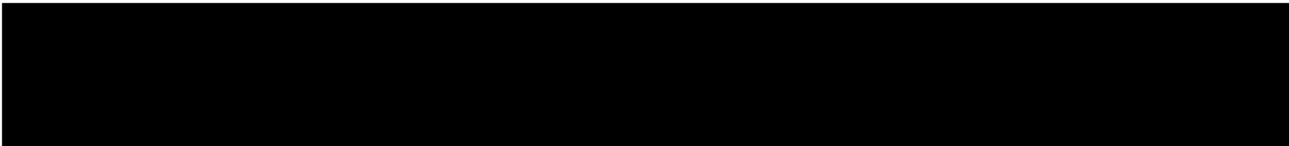


6 Then you see the tables that follow. I invite you

o note that the

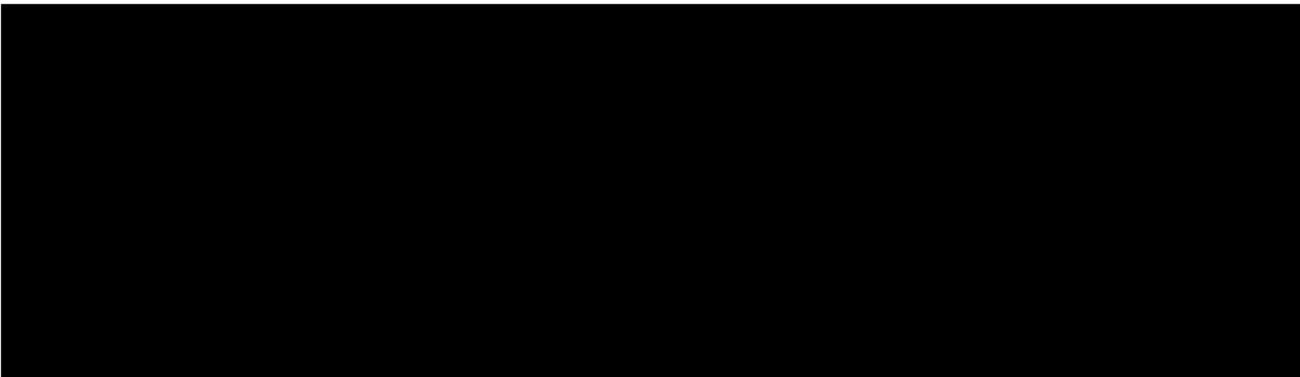


16 Continue over the page {ROC-E/130/8}. You will see



19 Then if we scroll down this page we

20 see the text:



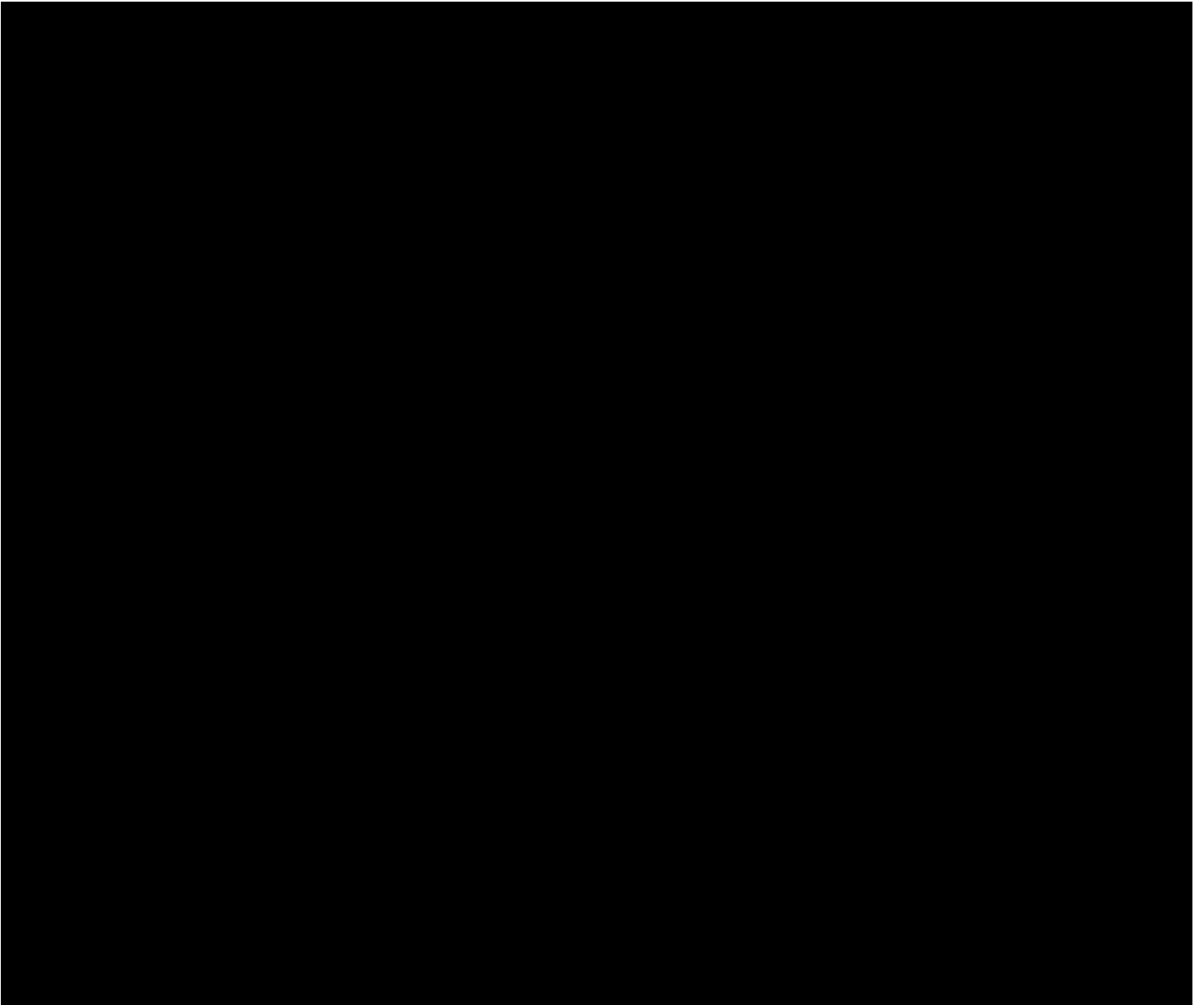
[REDACTED]

2 Just pausing there, 1.5 was the current level under
3 the 2009 Order, two ROCs was what was being proposed.
4 1.75 is there because at this stage there is a proposal
5 to reduce banding after two years to 1.75 ROCs, and that
6 is why the Government is setting out some figures for
7 1.75. It did not -- it ultimately did not adopt that
8 course because there was a regular review coming up
9 anyway, so it decided to wait for that review rather
10 than decide now to reduce banding.

11 You then have the updated figures, and if we go over
12 the page, because it is the 2010 figures that are

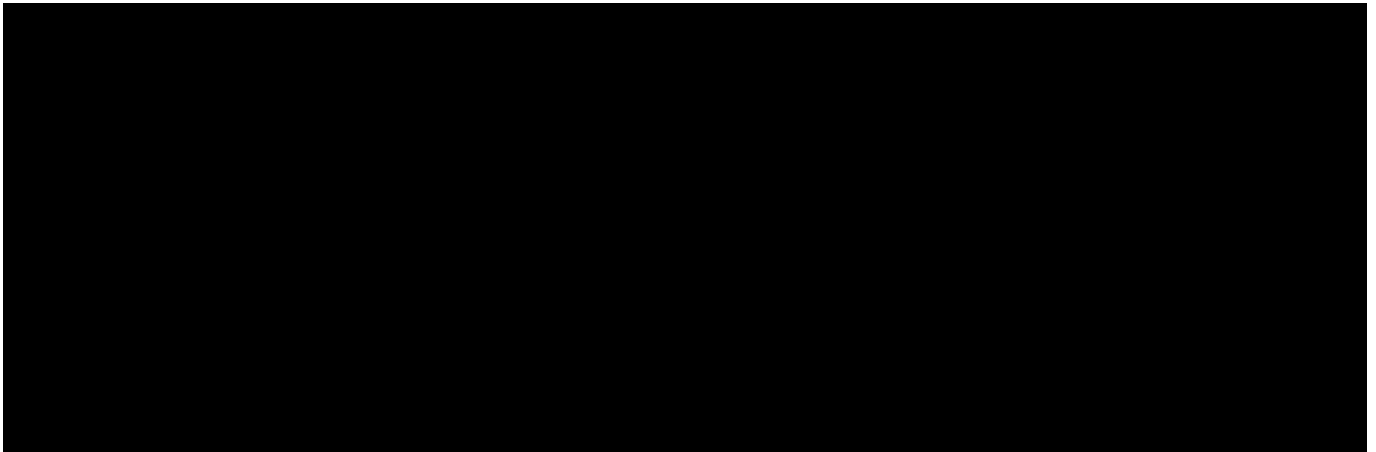
[REDACTED] important {ROC-E/130/9}, and what we see here is [REDACTED]

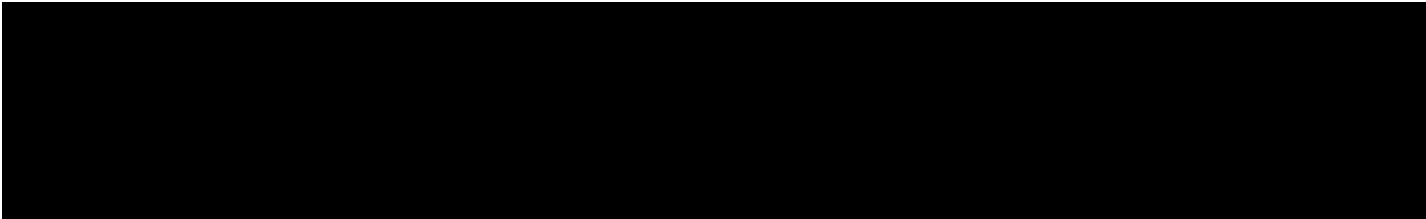
[REDACTED]



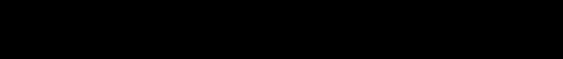
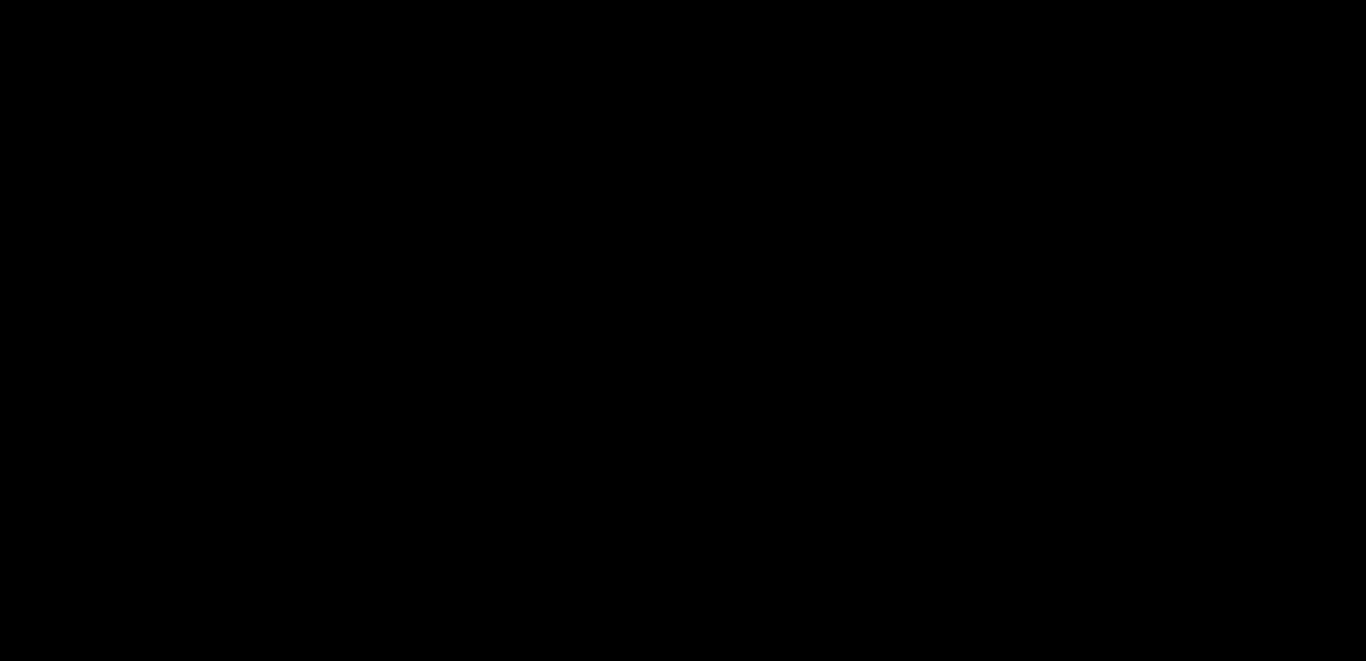
19

The other key point that you see is that there is a

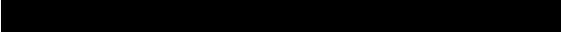
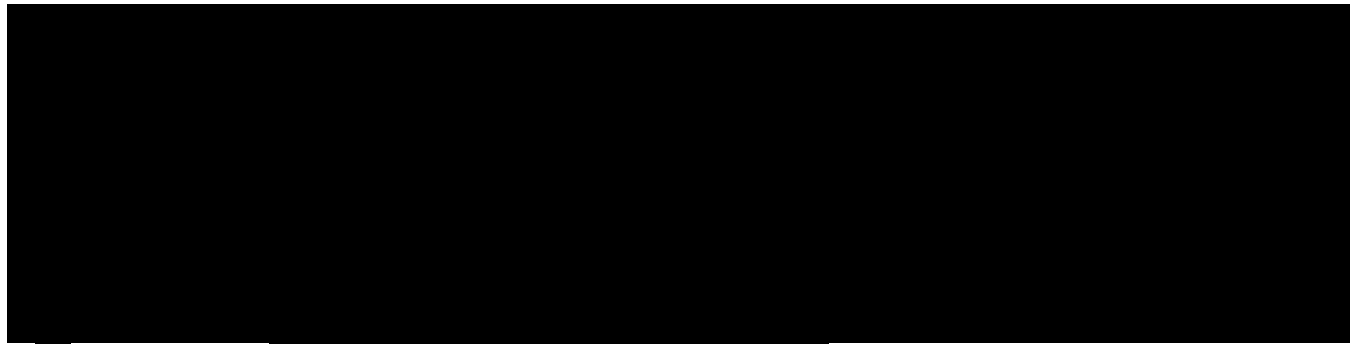




4 Over the page on page 10 {ROC-E/130/10}, we see
5 under the underlined subheading:



What follows is a



please, at tab 140.



{ROC-E/140/1}. Firstly, page 1, question 4. ■



[REDACTED]

4 Then the Government gives quite a long answer. I
5 would just like to show you one passage from that on
6 page 2, please.

7 I am conscious that we will need a break. I can
8 probably get to the end of what I am doing now in about
9 five minutes, if that is ...

10 THE CHAIRMAN: Well, let us have a break in five minutes.

11 MR LASK: Thank you. Yes. So, halfway down this page you
[REDACTED] will see the paragraph beginning [REDACTED]

[REDACTED]

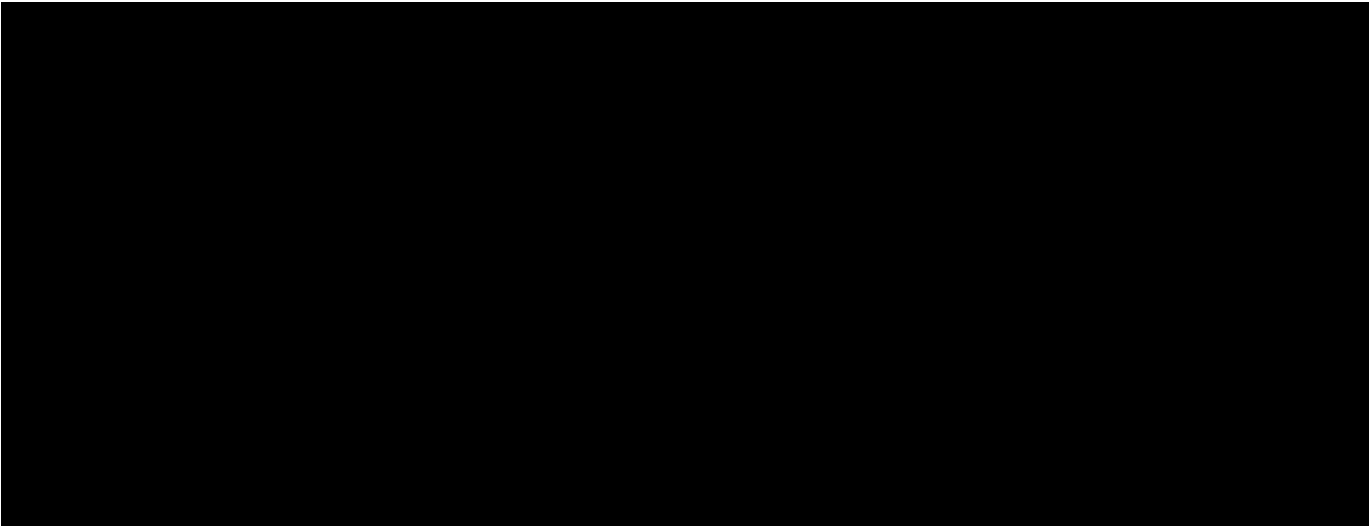
18 Those are all the statutory factors that we saw in
19 section 32(d) so the Government is explaining that it
20 has to balance all of these factors, and the last
21 sentence of this paragraph:

[REDACTED]

25 The Government there is emphasising its reliance on

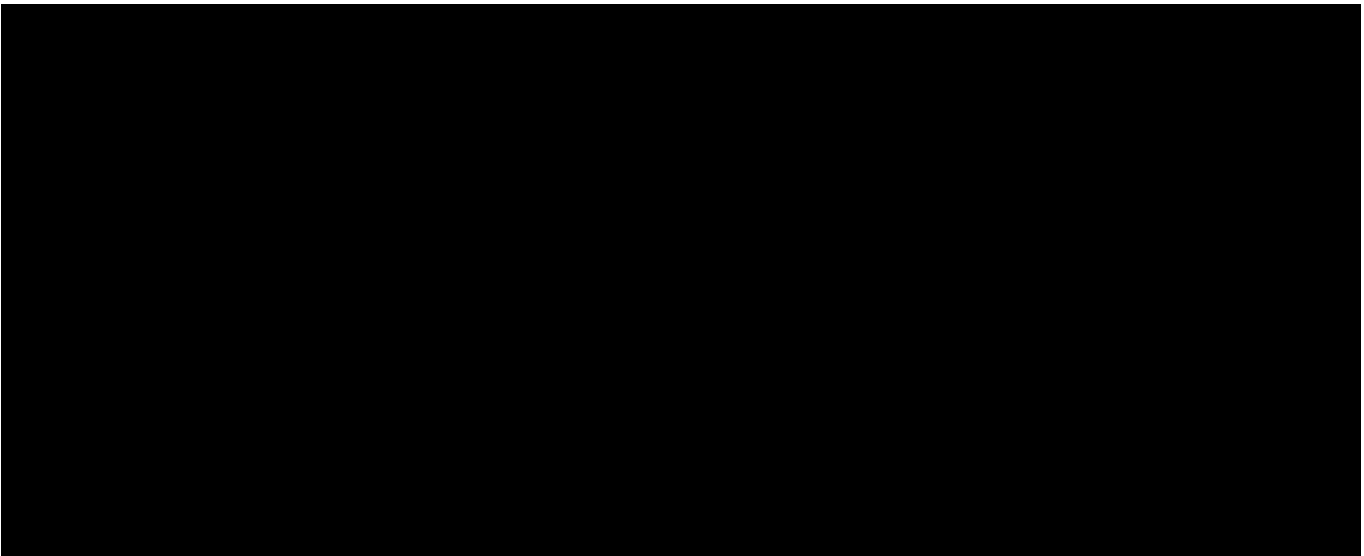
1 cost evidence and its desire to avoid over-compensation
2 and high costs to consumers.

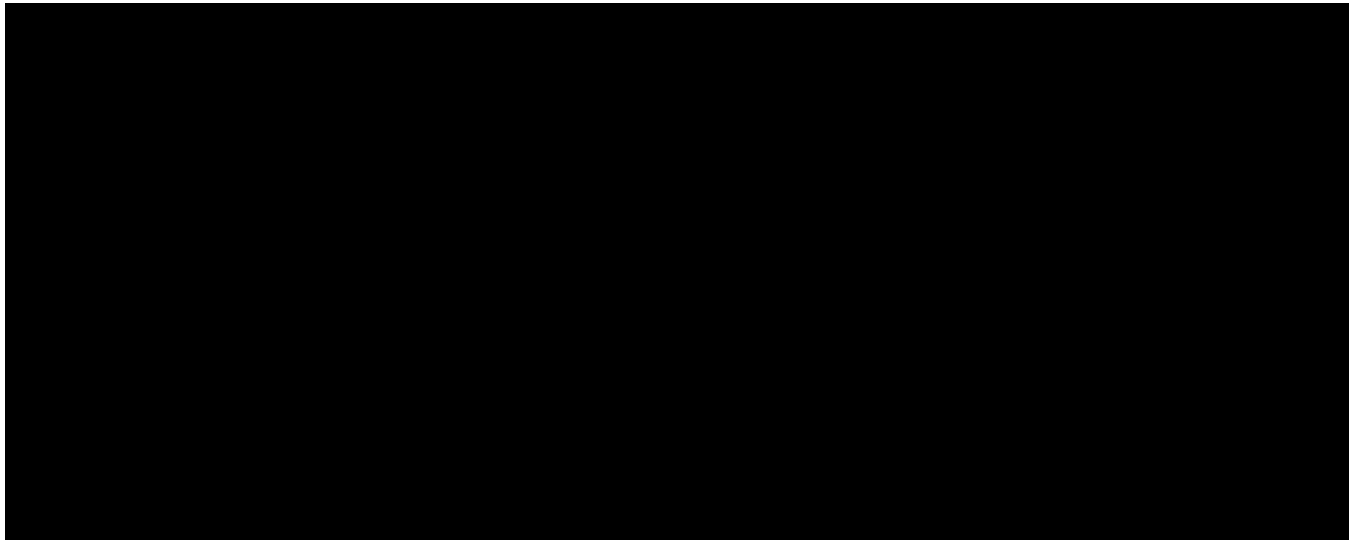
3 Then Question 11 on page 5, this is where the
4 Commission really zeros in on the margin we saw in the
5 notification, the margin between costs and revenue, and
6 you will see the Question 11:



15 If I could invite you, please, to read the second
16 paragraph of the Government's answer? (Pause)

17 That shows, in my submission, a number of things.





9 [REDACTED] That is a core
10 justification offered by Government.

11 Just to sum up before we break, the following points
12 can be drawn from the evidence on the Government's
13 approach in the factual scenario. Five points.

14 First, Government investigated the costs of offshore
15 wind and the level of support required to cover those
16 costs very carefully.

17 Second, Government endeavoured to align costs and
18 revenue to the best of its ability within the
19 constraints arising from the uncertainty in the data,
20 and it did that not least because it had to in order to
21 avoid over-compensation.

22 Third, there was a measure of precision in the
23 Government's analysis. It did not simply rely on a
24 comparison of broad cost and revenue ranges as set out
25 in the 2009 tables, but it focused on central estimates.

1 Fourth, Government set banding so as to provide this
2 margin between costs and revenue. It did that to
3 account for the uncertainty in the data and to ensure
4 that crucial wind farm projects went ahead.

5 Fifth, that margin, which was £5, 3.47 per cent, was
6 a major sticking point in Government's efforts to obtain
7 State aid clearance. That is how the Government
8 described it. A major sticking point. It nearly led to
9 clearance being withheld. As I will illustrate after
10 the break, that risk would have been even greater in the
11 counterfactual.

12 If that is a suitable time?

13 THE CHAIRMAN: Thank you very much. Let us break there
14 then, please, and let us come back at five to by that
15 clock.

16 (11.50 am)

17 (A break was taken)

18 (11.55 am)

19 THE CHAIRMAN: Yes, Mr Lask?

20 MR LASK: Thank you. I am moving now to my fourth heading,
21 the position in the counterfactual.

22 We now know, of course, that the 2010 decision was
23 taken in the shadow of a very serious Cartel -- a Cartel
24 that persisted for some ten years and covered the whole
25 of the EEA and involved restrictions of competition that

1 were described by the Commission as among the most
2 serious infringements of Article 101.

3 Question 2 requires the Tribunal to assume that the
4 Cartel caused a 26 per cent overcharge on relevant
5 products. It asks whether, absent that overcharge,
6 Government would have awarded fewer ROCs.

7 Now, the starting point for the counterfactual
8 analysis is that Government would have been comparing
9 lower costs to the same revenues. In other words, the
10 base case cost estimate provided by EY would have been
11 lower, but the revenue generated by a number of ROCs
12 would have been the same. That is the starting point
13 for the counterfactual analysis.

14 Further, the appropriate question is not whether
15 Government would have noticed the difference in costs,
16 or whether it would have considered the difference large
17 enough to warrant a different decision. The
18 counterfactual is simply one in which the Government is
19 faced with different cost evidence, and as a result the
20 level of subsidy required by wind farms lower. I
21 propose to address three sub-topics.

22 Firstly, the extent to which costs would have been
23 lower in the counterfactual; secondly, the implications
24 of this for Government's analysis, and, thirdly, what
25 Government would have decided, on our case, in the

1 counterfactual.

2 Firstly, the extent of the cost difference.

3 If we could go, please, to Druce 5 which is in
4 Volume D at tab 2? I would like to go to page 13 of
5 that report, please. {ROC-D/2/13}. This is a table --
6 this is Mr Druce's reply report on the ROC issues. In
7 this table he sets out the respective findings on a
8 number of key matters by the experts, and it enables you
9 to see a comparison of their calculations and estimates.

10 The first entry that I draw attention to is row 1.E,
11 cable costs as a percentage of total costs. The first
12 thing one sees is that whilst the precise estimates
13 differ, it is common ground that cable costs were in the
14 range of 9-12 per cent of total wind farm costs.

15 There is one caveat to that, which is in the
16 penultimate column for Ms Hesmondhalgh where you see the
17 figure 4.6. That is excluding installation costs, and
18 as the Tribunal may recall, this trial proceeds on the
19 assumption that installation costs are included. I ask
20 you to ignore the 4.6 figure for present purposes.

21 In my submission, this shows that cable costs are,
22 on any view, a substantial cost item. It would not be
23 in the least bit surprising for 26 per cent change in
24 the cost if a substantial cost item made a difference.

25 I would note that London Array's Skeleton describes

1 cable costs as a tiny proportion of overall wind farm
2 costs. That is paragraph 11.5 of London Array's
3 Skeleton, but in my submission this table shows that
4 that is wrong.

5 Next, row 2.C. This shows the experts' respective
6 cost elevation estimates. In other words, it shows how
7 much lower total costs would have been in the
8 counterfactual. Again, I invite you to ignore
9 Ms Hesmondhalgh's 1.72 figure for present purposes,
10 because that assumes that installation costs are
11 excluded.

12 In respect of Mr Druce's column, his figure of 6.42
13 is based on the costs of the three key wind farms whose
14 requirements appear to have driven the Government's
15 decision to award two ROCs, but it is common ground
16 between the experts that it is also relevant to look at
17 how EY's cost estimate would have changed in the
18 counterfactual, and so Mr Druce has also calculated a
19 cost elevation estimate for that purpose, and his
20 estimate is £4.30, and for your note, that is in the
21 joint expert memo, proposition 58, Bundle D, tab 11,
22 page 98.

23 So, when one is looking at how EY's base case cost
24 estimate would have changed in the counterfactual, there
25 is a degree of convergence in the experts' estimates.

1 There is a difference of about £1 between
2 Ms Hesmondhalgh's estimate of £3.53 in the final column
3 and Ms~ Shamsi's estimate of £4.49 in her column.

4 Now, the differences are explained by methodological
5 differences which will no doubt be explored in
6 cross-examination, but for present purposes I take a
7 simple average of the experts' estimates, and it comes
8 out, if my maths are correct, at £4.14. That is why I
9 said earlier it was around £4.

10 In my submission on any view that is a material
11 difference, a material difference in costs, particularly
12 when set against the margin provided for in the
13 Government's decision, and the concern that that caused.
14 You will recall that margin was £5 or 3.47 per cent of
15 costs. Here we are talking about a scenario in which
16 costs are £4.14 lower.

17 The Tribunal will recall that EY advised that a £3-4
18 reduction in costs meant that 0.1 fewer ROCs were
19 required. There is a similar effect estimated by the
20 experts, and you will see that in row 2.D. Row 2.D is
21 the corresponding reduction in ROCs based on the cost
22 elevation estimates in row 2.C. You will see that where
23 you have cost elevation estimates of 3-4, £3-4, the
24 corresponding ROC reduction is around 0.1. 0.1 ROCs.

25 So it follows that EY's analysis and advice on the

1 number of ROCs required would have been different in the
2 counterfactual. Its base case cost estimate would have
3 been lower by a material amount. Its recommended
4 banding range, which was directly linked to costs, would
5 necessarily have fallen too, and this shows that it
6 would have fallen by around 0.1 ROCs, assuming a cost
7 elevation, or a cost reduction estimate, of around
8 £4.14.

9 To be clear, 0.1 ROCs is not a small number.
10 Government's projections imply that a 0.1 increase in
11 banding would increase the costs of the RO regime by
12 between £500 and £700 million. That is, of course, a
13 cost that would ultimately be borne by electricity bill
14 payers.

15 You will recall that Treasury was concerned about
16 the overall consumer cost of 2.5 to 3.5 billion. 500 to
17 700 million is a significant portion of that. That
18 reflects the fact that 0.1, 0.1 ROCs, is 20 per cent of
19 the 0.5 increase that was under consideration. It is a
20 sizeable chunk.

21 My second subheading: the implications of this for
22 the Government's analysis.

23 If we could turn, please, to our Skeleton Argument
24 which is in file AB, tab 2? {ROC-AB/2/1}. Page
25 {ROC-AB/2/25}, please. You will see at paragraph 74 we

1 have set out the experts' cost elevation figures which
2 we have just seen in the table in Druce 5, and then at
3 75:

4 "EY would therefore have obtained a base case LCOE
5 estimate that was lower by around £4/MWh, compared to
6 its base case LCOE estimate of £144/MWh in the factual
7 ... Government would still have calculated revenues at
8 £...149/MWh for support set at 2.0 ROCs..."

9 It is helpful to have these figures open in front of
10 you because the Tribunal will recall that Government's
11 core justification for awarding two ROCs when it was put
12 under pressure by the Commission on this point, was that
13 the revenue generated by two ROCs, 149, was only
14 marginally above costs of £144, whereas the revenue
15 generated by 1.75 ROCs, £138, was some way below.

16 Now, in the counterfactual, the position would have
17 been very different because costs are now at around
18 £140, and since the revenue analysis hasn't changed,
19 what this means is that costs are now very close to the
20 revenue generated by 1.75 ROCs, and they are some
21 distance from the revenue generated by two ROCs.

22 To look at it another way, the margin between costs
23 and revenue generated by two ROCs, that margin that was
24 causing concern, would have been significantly larger in
25 the counterfactual. It would have been -- you know, if

1 the Government had set support at two ROCs, that margin
2 would have been £9 per megawatt hour rather than £5. It
3 would have been 6.43 per cent rather than 3.47 per cent.
4 It is important to have in mind the Government's
5 obligations and objectives here. It was obliged to
6 avoid over-compensation, and it was anxious to minimise
7 the impact on consumer bills. The Class
8 Representative's case is that against that background it
9 is inconceivable that Government, acting reasonably, and
10 in line with its obligations, would or could have
11 maintained a decision to award two ROCs.

12 I want to make four points, if I may, by way of
13 elaboration.

14 First, revenue at two ROCs would no longer have been
15 marginally above cost. In fact, it would have been much
16 closer to revenue at 1.75 ROCs. Consequently, awarding
17 two ROCs would have entailed a significant gap between
18 cost and revenue, one that was almost twice as large as
19 it was in the factual. So, the core justification that
20 the Government relied on in the factual to get State aid
21 clearance would not have been available to it.

22 Second, an award of two ROCs could no longer have
23 been justified on the grounds of uncertainty. As we
24 have seen, the Government was obviously aware of the
25 uncertainty in the data, and it accounted for that

1 uncertainty by basing its analysis on a comparison of
2 the central estimates, and by allowing for a margin
3 between cost and revenue.

4 In the counterfactual, both the central cost
5 estimate and the entire range in which it sits comes
6 down. It reduces by an amount reflecting the
7 overcharge, but the degree of uncertainty in the data
8 does not change. There is no greater uncertainty, so
9 there is no reason why the Government would have chosen
10 or considered it appropriate to provide a larger margin
11 in the counterfactual.

12 As I have alluded to, there is a basic fallacy in
13 the other parties' submissions, and it is an assumption
14 that in the name of uncertainty Government would have
15 given even more benefit to developers in the
16 counterfactual by tolerating a significantly larger
17 margin between cost and revenue.

18 In my submission that is wholly unrealistic, and
19 unevidenced.

20 Now, the Government's key objective, as we have
21 seen, was multifaceted, reflecting the statutory factors
22 that it had to take into account. In my submission, the
23 Government's decision on two ROCs reflected a careful
24 calibration between the different goals. As I have
25 said, our case is simply that in a counterfactual

1 without a 26 per cent overcharge, the calibration that
2 the Government sought would have been essentially the
3 same, but since costs would have been lower, that same
4 calibration would have resulted in Government awarding
5 proportionately fewer ROCs.

6 Thirdly, an award of two ROCs could no longer have
7 been justified as it was in the factual by reference to
8 the particular needs of the key wind farms that
9 Government was focused on. Now, the evidence shows us
10 that those wind farms told Government they needed two
11 ROCs, and for your note, there were some meeting notes
12 at tab 102 of Bundle E which I will show you in due
13 course, but the developers told Government in the
14 factual that they needed two ROCs.

15 Now, there is no evidence before the Tribunal as to
16 how those wind farms calculated their ROC requirements,
17 how they got from costs to ROCs. One might think that
18 is a notable omission, given that one of the wind farms
19 is here, is a party to these proceedings, but that is
20 where we are. We do not have the evidence.

21 What we do have is the cost data that they provided
22 to Government, and using that data, Mr Druce has
23 estimated that those key wind farms would have needed
24 0.15 fewer ROCs in the counterfactual. They would have
25 needed 1.85 rather than 2, so their needs would have

1 been closer to 1.75 ROCs than 2 ROCs.

2 Now, the other experts have estimated slightly lower
3 cost elevation estimates for those key wind farms, but
4 actually the impact on the number of ROCs required is
5 small. So, for example, on the estimates produced by
6 Ms Shamsi and Dr Moselle, these key wind farms would
7 have needed between 0.12 and 0.13 fewer ROCs rather than
8 0.15.

9 Again -- and to look at it another way -- the
10 Government's decision allowed a £5, 3.47 per cent margin
11 above the costs of a nominal wind farm, because that was
12 the sort of wind farm that it was looking at, in order
13 to allow for the needs of these more expensive wind
14 farms, but there is no reason why it should have allowed
15 a larger margin for that purpose in the counterfactual.

16 As we have seen, it was already struggling to
17 justify the margin in the factual, given the need to
18 avoid over-compensation, and in the counterfactual that
19 would have been even harder.

20 Then my fourth point is that a decision to award two
21 ROCs in the counterfactual would have imposed
22 unnecessary and unjustified additional costs on
23 consumers. We have explained in our Skeleton, an award
24 of 0.15 ROCs over and above what was needed amounted to
25 a hand-out -- would have amounted to a hand-out -- of

1 between 0.75 and 1.05 billion in unnecessary revenue to
2 generators. This hand-out would have ultimately been
3 funded by electricity bill payers in circumstances where
4 Government was committed to minimising the impact on
5 consumers, in my submission it is not remotely realistic
6 to suggest that Government would have proceeded in this
7 way.

8 So, what would Government have done instead? It is
9 my third subheading.

10 Recall that in the factual, Government set banding
11 at the very bottom of the range recommended by EY. In
12 the counterfactual, that floor would have been lower, by
13 between 0.1 and 0.15 ROCs. In those circumstances the
14 Government would have had the ability, and every
15 incentive, to award fewer ROCs.

16 Now, the most likely level at which it would have
17 come out in the counterfactual is matter on which the
18 Tribunal will be hearing from the experts, but by way of
19 example, 1.9 ROCs would generate, on the Government's
20 revenue analysis, around £145 per megawatt hour. Around
21 that. That is comfortably above the counterfactual
22 costs of a nominal wind farm, because taking a simple
23 average of the experts' estimates, those counterfactual
24 costs of the nominal wind farm would be around £140.
25 So, 1.9 ROCs would provide the same sort of margin as in

1 the factual -- £5, I think it would be 3.57 per cent.
2 It would provide a level of support that was equally as
3 sufficient to enable the key projects to go ahead, and
4 for the avoidance of doubt, this would not have involved
[REDACTED] any change in policy by Government. [REDACTED]

[REDACTED]

11 But there was no magic in 0.25. The Government
12 framed its options in 0.25 increments because, as I
13 said, 1.5 was the status quo, and 1.75 was part of an
14 original proposal to step down banding after two years,
15 but the Government decided, based on all the evidence,
16 that two ROCs was necessary and sufficient. That was
17 the critical reason for its decision to award two ROCs.
18 It wasn't simply rounding-up. It concluded that two
19 ROCs was necessary.

20 So, in the factual, it did not need to decide
21 whether a more granular increment might be appropriate,
22 but in the counterfactual, the position would have been
23 different, because, as I have submitted, costs --
24 £140 -- would have been very close to revenue at 1.75
25 ROCs -- £138 -- and far below revenue at two ROCs --

1 £149.

2 So, the Government would have faced a choice between
3 three options. Option 1, use an increment of 0.1 ROCs.
4 Option 2, round down to 1.75. Option 3, round-up to two
5 ROCs. In my submission, option 1 is obviously the most
6 likely. There was no firm policy of banding in
7 increments of 0.25 -- still less any obligation to do
8 so.

9 On the contrary, the evidence shows that
10 Government's practice was to set banding at 0.1
11 increments where justified on the evidence. If I could
12 show you, please, what we say about this in our
13 Skeleton -- file AB, tab 2 at page 28 {ROC-AB/2/28} --
14 if we could zoom in, please, on paragraph 87, we say:

15 "In the factual case, the Government's analysis ...
16 focused on intervals of 0.25 ROCs/MWh. This was not,
17 however, the result of any fixed policy. The evidence
18 shows that the Government's practice was to set banding
19 at 0.1 ROC/MWh increments and would in practice do so
20 where this was justified on the evidence..."

21 Then we have set out some of the evidence:

22 "(1) As Mr McNeal notes, there was 'a strong
23 preference within DECC for the setting of the ROC
24 banding levels at round numbers (meaning no more than a
25 single decimal point, e.g. both 1.9 and 2 were possible,

1 but not 1.93)'"

2 The second point is that:

3 "(2) The Government set banding at increments of 0.1
4 ROCs/MWh in 2013" and costs came down.

5 Third point is:

6 "This also appears to have been within the
7 Government's tolerance for specificity in the lead up
8 to..." the 2009 Order.

9 "How Fractional is a ROC?":

10 "It seems sensible to limit the fraction of ROCs
11 awarded to two decimal places. Further decimalisation is
12 unlikely to provide any more deployment and would make
13 the scheme look more complicated".

14 And in 2009 both the Government and its advisors,
15 Oxera, did consider banding options at granularities of
16 0.1 albeit ultimately they opted for 1.5.

17 The finally the fourth point:

18 ""EY itself presented its banding in 0.1 increments
19 in the key EC report".

20 So setting banding in 0.1 increments in the
21 counterfactual would not have involved any change in
22 policy.

23 Now, the alternative, if the Tribunal finds that
24 Government was absolutely determined to use 0.25
25 increments, the alternative is that it would have

1 awarded 1.75 ROCs. That is its second option. That
2 would have been much closer to counterfactual costs than
3 two ROCs.

4 Now, it is right that it would have been slightly
5 below costs, but if the Government is determined to use
6 0.25 increments, which we do not say it was, or would
7 have been, but if it would have been, then something has
8 to give, and 1.75 ROCs in that scenario is the lesser of
9 two evils, because it is much, much closer to costs.

10 Option 3 that the Government would simply have
11 rounded all the way up to two ROCs, is, in my
12 submission, clearly the least likely. It is implausible
13 that Government would have both rigidly applied a 0.25
14 practice and rounded-up to two ROCs where this would
15 have given wind farms more than they needed, and imposed
16 an unjustified burden on bill payers.

17 That is all I wanted to say at this stage on
18 Question 2. I turn to my fifth heading, which is
19 Question 3, and minimum cost elevation.

20 Question 3, of course, only arises if the Tribunal
21 answers "yes" to Question 2. It turns on the same sorts
22 of arguments as Question 2, so I am going to take this
23 more shortly. Mr Druce has provided an analysis of the
24 minimum cost elevation under Question 3, and he puts
25 forward two possible scenarios. His preferred scenario,

1 and Ms~ Spottiswoode's primary case, is what he calls
2 "scenario 2". This applies if, under Question 2, the
3 Tribunal agrees that absent a 26 per cent overcharge,
4 the Government would have used 0.1 increments and set
5 banding at 1.9 ROCs, and the question then becomes: what
6 is the minimum cost reduction that would have led to an
7 award of 1.9 ROCs. The answer given by Mr Druce is any
8 figure above £2.20, because that is the point at which
9 the margin between cost and revenue at two ROCs becomes
10 excessive and can no longer be justified, having regard
11 to the Government's objectives and obligations. We have
12 given an illustrative example of this in our Skeleton at
13 paragraph 97 {ROC-AB/2/31}.

14 As I say, Mr Druce's case is any figure above £2.20,
15 and for illustrative purposes we have taken a cost
16 elevation of £2.50, paragraph 97(1), which leads to
17 counterfactual costs of £141.5, and we say at
18 subparagraph 2:

19 "The revenue generated by two ROCs ..."

20 Which is £149:

21 " ... would in those circumstances be excessive".

22 It would, in this illustrative example, provide a margin
23 over costs of £7.50 which was a larger margin than was
24 provided in the factual and more than even the most
25 expensive wind farms would require. On the other hand

1 1.9 ROCs would generate £144.6/MWh so it would still
2 provide revenue above cost and it would still provide a
3 generous margin of £3.10 to account for the needs of the
4 more expensive wind farms.

5 Just over the page to complete the point:

6 "The Government would have no good reason to award
7 2.0 ROCs/MWh in those circumstances. It would risk
8 overcompensation and the imposition of unnecessary costs
9 on consumers. 1.9 ROCs/MWh would be the obvious choice."

10 So that is scenario 2, and that is our primary case
11 under Question 3.

12 Scenario 1 applies if, under Question 2, the
13 Tribunal concludes that absent a 26 per cent overcharge,
14 Government would still have used 0.25 increments and set
15 banding at 1.75.

16 Again, the question is, well, what is the minimum
17 cost reduction that would have led Government to award
18 1.75? Mr Druce's answer is £1, because in this scenario
19 the Government is simply opting for the level of support
20 that is closest to costs, and in this scenario a £1
21 reduction in the counterfactual tips the balance to 1.75
22 ROCs.

23 In fairness, Mr Druce considers this scenario less
24 likely because it implies an overly-mechanical rounding
25 approach by Government.

1 To be clear, and I hesitate -- I do not want to get
2 too far into the weeds at this stage -- but to be clear
3 the Tribunal could decide under Question 2 the
4 Government would have awarded 1.75 ROCs in the
5 counterfactual and find that the minimum cost reduction
6 that would have led to that decision is higher than £1,
7 but that is, as I say, getting into the weeds.

8 That brings me to my sixth and final heading, and
9 really just to sum up our answers to the ROC Questions.

10 Firstly, as regards the appropriate value of
11 commerce for the purposes of Question 1, we say it is
12 relevant to consider both the wider set of wind farms
13 that informed EY's cost estimate, and the narrower set
14 whose needs ultimately determined the Government's
15 banding decision, and the respective figures are
16 reproduced at paragraph 7 of our Skeleton. The answer
17 to Question 2 is "yes", the Government would have been
18 compelled for all the reasons I have given, to award
19 fewer ROCs in the counterfactual because it could not
20 have justified an increase to two ROCs on the evidence
21 that would have been before it. The answer to Question
22 3, as I have just said, is any cost elevation above
23 £2.20, if the Tribunal agrees with us that the
24 Government would have used 0.1 increments, or £1 if the
25 Tribunal believed that the Government would only have

1 been prepared to use 0.25 increments.

2 If I may just have a moment? (Pause).

3 Unless I can assist the Tribunal. Those are my
4 Opening Submissions for Ms Spottiswoode.

5 THE CHAIRMAN: Thank you very much, Mr Lask.

6 MR LASK: Thank you.

7 Submissions by MS DAVIES

8 MS DAVIES: There's an agreement amongst the aligned parties
9 that I am going to go next, if I could just move my ...
10 thank you.

11 I was proposing to structure my submissions by,
12 firstly, making some introductory comments in relation
13 to the primary case being advanced by the Class
14 Representative as it now appears to be, as there has
15 been some very significant shifting in the Class
16 Representative's case by reference to what their expert
17 has, in fact, said, and it is important that the
18 Tribunal understands that what the core case is and what
19 we say the core response to it is before I get to the
20 documents.

21 I was then proposing to open to the Tribunal various
22 additional key documents relating to the Government's
23 decision in addition to those already addressed by my
24 learned friend, as well as drawing out various points
25 from some of the documents he has taken the Tribunal to.

1 The Tribunal will understand as I do that our submission
2 is that we have had a selective approach to the
3 documents from my learned friend this morning, and what
4 he has shown the Tribunal does not reflect the full
5 array of the Government's decision-making.

6 I am planning to focus my submissions on that, as my
7 learned friend did, rather than an analysis of the
8 expert evidence, as we agree with my learned friends
9 that the answers to the preliminary issues largely turn
10 on the Tribunal's assessments of the documents before
11 it, rather than the views of the experts as to those
12 documents.

13 Finally, I was then going to return to highlighting
14 certain important shifts in the Class Representative's
15 case, and finally, conclude by pulling together the
16 various strands and summarising our position on the
17 primary case.

18 Now, as the Tribunal, I hope, will have appreciated,
19 in the submission of all the aligned parties, ultimately
20 the questions raised by these preliminary issues can be
21 boiled down to the simple question whether the Class
22 Representative has proved, and it is for the Class
23 Representative to prove, on the balance of probabilities
24 that the Government would have reduced the banding level
25 for offshore wind to below two ROCs per megawatt hour

1 under the 2010 Order. That is Question 2.

2 If it is answered in the way the aligned parties
3 submit it should be, neither Question 1 nor Question 3
4 matter.

5 Now, in relation to Question 2, there are, in fact,
6 three alternatives postulated by the Class
7 Representative's expert. The first is that applying the
8 rounding practice which Mr Druce himself recognised the
9 Government was actually adopting at the time of the 2010
10 Order of rounding to the nearest 0.25 ROC per megawatt
11 hour, the Government would have reduced the banding
12 level to 1.75 ROC per megawatt hour. That is his
13 Scenario 1.

14 He did present in the alternative a "possibility" in
15 his reports -- it has now become a "likelihood" in the
16 joint memo -- that the Government would have adopted a
17 different rounding practice of rounding to the nearest
18 0.1 ROCs, and hence have reduced the banding level to
19 1.8 or 1.9, and at the time of his reports, 1.8 was said
20 to be the most likely.

21 Now, of those various alternatives, it is clear from
22 my learned friend's opening that the Class
23 Representative is really now focusing her case on the
24 suggestion that absent the Cartel, the Government would
25 have got to 1.9 ROCs per megawatt hour, rather than

1 anything lower. That is said expressly by my learned
2 friend to be his primary case, although they do not
3 appear to have formally abandoned the other
4 alternatives, and it will, therefore, be necessary to
5 explore them in cross-examination, but we submit that
6 that shift in focus has undoubtedly resulted from an
7 appreciation on the Class Representative's part that
8 notwithstanding her expert evidence there are various
9 insurmountable difficulties with the higher alternative
10 cases, and equally in our submission, that belated
11 refocusing of the case on a move to a banding level of
12 1.9 ROCs faces equal insurmountable difficulties.

13 The short reason for that is that it assumes a
14 degree of precision in the banding decision process
15 which is just unreal, particularly when set against a
16 proper understanding of the factual context, and, in
17 particular, the Government's thinking, in which the
18 decision would have been taken.

19 Now, my learned friend himself asserts at paragraph
20 80 of his opening that there is no reason to think that
21 in the counterfactual the Government would have been
22 less precise in its approach than it was in the actual,
23 but the reality is that in the actual, the Government
24 clearly recognised that there were very considerable --
25 there was a very considerable degree of uncertainty

1 about the estimates of future cost and revenue, and it
2 was at pains to emphasise to the European Commission
3 that it did not have a high degree of confidence in the
4 central estimates on which my learned friend's case
5 essentially relies, and, indeed, that those central
6 estimates should not be treated as the most likely
7 pinpoint values, and I will show the Tribunal where that
8 was said in a passage of one of the documents which my
9 learned friend did not go to.

10 Now, it is important to note in that context that
11 even if one undertakes the precise mathematical exercise
12 that my learned friend presented this morning, one would
13 still have been left with costs which were within the
14 ranges that the Government was actually looking at in
15 the actual. So, the move by 1.9 ROCs, the £4, does not
16 take the ranges outside of what the Government was
17 looking at in the actual, and it is those ranges that it
18 emphasised in its final submission to the European
19 Commission which I will also show the Tribunal which my
20 learned friend did not go to, as being important.

21 Now, all of that, in our submission, is effectively
22 ignored by the Class Representative's case which,
23 instead, treats the central cost and revenue estimates
24 in the actual and only those central estimates as the
25 linchpin by reference to which the Government was

1 acting.

2 So, it is said, if mathematically with a reduced
3 cost base there would have been a slightly higher margin
4 between the central estimate of revenues and cost, so,
5 it is said, the result must be that in the
6 counterfactual a lower banding rate would have been set,
7 but in our submission that precise and purely
8 mathematical approach wholly fails to recognise the
9 realities of the multifaceted exercise the Government
10 was, in fact, undertaking, and that is why I am
11 proposing to take the Tribunal to various documents
12 demonstrating those matters shortly.

13 In our submission, the evidence clearly demonstrates
14 that even assuming, as we must for the purposes of these
15 preliminary issues, the maximum possible level of
16 overcharge, the amount by which the Cartel is alleged to
17 have inflated the perceived costs of developing a wind
18 farm is just not sufficient to be likely to have had any
19 impact on the Government's decision as to the
20 appropriate banding level.

21 In relation to that, it now appears to be common
22 ground with the Class Representative, that even making
23 that favourable assumption, so 26 per cent overcharge on
24 all categories of relevant products which, as the
25 Tribunal knows, is very much in dispute, but for another

1 day, but even making that assumption, stripping out the
2 increased costs on those assumptions resulting from the
3 Cartel would have led Ernst & Young to calculate a
4 central LCOE estimate that was only £4 lower than the
5 central LCOE estimate it, in fact, calculated. That is
6 assuming, for present purposes of the arguments, that
7 that is what Ernst & Young would have done, and I will
8 come back to that in a minute.

9 A reduction of £4 is a reduction of only around 3
10 per cent of the total costs, the total LCOE estimate,
11 and as the Tribunal has heard, it is mathematically
12 equivalent to a little under 0.1 ROC.

13 That means that the Class Representative's case has
14 necessarily had to refocus on the proposition that a
15 reduction of that amount would, firstly, have been
16 sufficient to lead the Government to change the approach
17 it was actually adopting in relation to banding
18 increments which, as I say, is using banding increments
19 of 0.25 ROCs, as I shall demonstrate shortly, and
20 instead have used -- decided to use banding increments
21 of 0.1 ROCs, and then, secondly, need it to settle on
22 the 1.9 ROC level.

23 Now, I am, of course, aware that my learned friend,
24 and he repeated it this morning, suggests that the
25 evidence shows that the Government's practice was not to

1 set banding levels of 0.25 ROCs, and he took the
2 Tribunal specifically to paragraph 87 of his Skeleton
3 which, of course, I am going to address, but in short
4 our submission in relation to that is insofar as it is
5 being suggested that the Government had a practice in
6 2010 of adopting banding increments of 0.1, that is
7 obviously incorrect. The evidence I will show the
8 Tribunal, none of which is addressed in paragraph 87 of
9 my learned friend's Skeleton, comprehensively
10 demonstrates otherwise, in our submission.

11 What the Class Representative's case in relation to
12 1.9 ROCs essentially boils down to is that it would have
13 led to a slightly higher margin -- sorry -- two ROCs in
14 the counterfactual would have led to a slightly higher
15 margin than the Government contemplated in the actual,
16 and, therefore, the Government would have had to act,
17 but our submission, it is clear from the documents that
18 the Government was not acting so as to deliver any
19 specific margin at all. Indeed, there was no magic in
20 the specific level of the margin allowed. Rather, it
21 was the product of the fact that the Government was
22 utilising banding increments of 0.25 ROCs for reasons
23 that it explained to the European Commission, including
24 concerns about administrative complexity, increasing
25 administrative costs, and, crucially, uncertainty about

1 the figures, and because the Government wanted to ensure
2 that the banding level was set at a level that was above
3 the central estimate of costs to ensure sufficient wind
4 farm development was incentivised, it rounded up. That
5 is what led to the margin. It was not a mathematical
6 exercise to say "okay, the degree of uncertainty somehow
7 correlates to a margin of 3.47 per cent and that is
8 okay". It was not that sort of exercise at all.

9 I will show the Tribunal that in the previous
10 Renewals Obligation Order, 2009 which of course was
11 adopted at the time that the Government was actually
12 thinking about increasing the banding for offshore wind
13 in 2010, a wide variety of margins were approved,
14 including many which were far greater than maintaining a
15 margin than the two ROC banding level would have
16 produced in the counterfactual.

17 Now, all of that is before one even gets to the
18 further assumptions which we submit are necessary for
19 the Class Representative's case, albeit nowhere
20 acknowledged by my learned friends, that the
21 Government's clearly-stated concerns about the increased
22 administrative complexity and costs of using banding
23 increments lower than 0.25 ROCs would have also fallen
24 away. We submit that is unrealistic.

25 Importantly, the Class Representative's position

1 also fails to grapple with the position of a number of
2 other parties who it is clear from the documents made
3 important contributions to the Government's
4 decision-making, and the decision to set the level at
5 two ROCs.

6 The first such group is the wind farm developers.
7 It is clear from the documents that in late 2008, and
8 into early 2009, a number of wind farm developers were
9 lobbying the Government for more support. It is equally
10 clear that each of [REDACTED] and
11 [REDACTED] were independently asking for two ROCs.
12 They were asking for the banding level to be increased
13 to two ROCs. That was the next band up under the 2009
14 Renewals Obligation Order, so 1.5 was set for offshore
15 wind, and it was grouped with other technologies -- I
16 will show the Tribunal shortly -- but the next band up
17 that was used in that Order was 2. That is what these
18 developers were independently lobbying the Government
19 for. They were doing so, notwithstanding that they had
20 very different cost profiles. The cost profile of any
21 individual wind farm varies by reference to a whole
22 range of factors, including the distance offshore, the
23 number of turbines and so on and so forth, and so those
24 wind farms had very different cost factors, but they
25 were all asking independently for the support level to

1 be increased to 2.

2 Importantly, the Class Representative accepts, and
3 my learned friend repeated it this morning, that she has
4 no evidence to demonstrate that any of the wind farms
5 would have requested less than two ROCs per megawatt
6 hour, and indeed, we say it is incredible to think that
7 they would have asked for some smaller increment in
8 circumstances in which two ROCs was the next band up
9 under the Renewable Obligations Order, the Government
10 having decided deliberately in relation to the 2009
11 Renewable Order, to band technologies into five groups.

12 Now, my learned friend said this morning that on
13 Mr Druce's calculations the key wind farms that he
14 identifies, so the three, only needed 1.85 ROCs rather
15 than 2 ROCs, but, in fact, and we will address this in
16 cross-examination, Mr Druce's calculations, and the
17 calculations of my expert, show that on the cost
18 submissions that they were putting to the Government,
19 they needed significantly above 2 ROCs, whether in the
20 factual or counterfactual. The average levelised cost
21 for those three wind farms, whether in the factual or
22 the counterfactual, is well above 2. They are the most
23 expensive wind farms, so the furthest offshore, and they
24 definitely, therefore, on their own cost submissions,
25 were suggesting they needed more than 2.

1 So, in our submission, the starting point for any
2 analysis of what the Government would have done in the
3 counterfactual must be that it would still be faced with
4 demands by various wind farm developers for an increase
5 in the ROC banding to 2.

6 Now, of course we acknowledge that the Government
7 then undertook an exercise, and I am going to come on to
8 the exercise, of assessing the cost evidence. That
9 exercise predominantly involved the exercise that Ernst
10 & Young undertook, but it is important to understand in
11 relation to the Ernst & Young exercise, and to give the
12 headline of where I am going to go, the Ernst & Young
13 exercise was, as my learned friend showed you this
14 morning, the base case that they needed was 2.5, but it
15 was asked by the Government, because the Government knew
16 that wind farm developers were only asking for 2,
17 whether 2 was justifiable, and it is against that
18 context, and I will show the Tribunal, that Ernst &
19 Young produced their range of 2-2.5. In our submission
20 in the counterfactual, if you start from the
21 proposition, as we must, because there is no evidence to
22 suggest otherwise, that the developers would still have
23 been asking for 2, Ernst & Young's base case would still
24 have been well above 2, even if you take 0.1 off it, it
25 is still well above 2. The same question would have

1 been asked by the Government, well, the developers have
2 said they need 2, is that justifiable, and the Ernst &
3 Young answer would have been the same -- yes, if you
4 make some more favourable assumptions than our base case
5 in terms of revenue and possibly cost, you can get to 2.

6 So, one of the central tenets of my learned friend's
7 submissions, as developed today, which is in the
8 counterfactual, Ernst & Young would have come up with a
9 different answer, they would have come up with a
10 different range, fails, in our submission, to recognise
11 the reality of the exercise that was being undertaken by
12 Ernst & Young.

13 In that context it is also important to note that it
14 is not just the developers of the three specific wind
15 farms who were suggesting that two ROCs would be needed,
16 that was also the view of the Renewable Advisory Board,
17 based on its own experience, and the view of the
18 numerous respondents to the Government's consultation
19 who said that the amount 2 was broadly right.

20 So, if you set the decision-making, and I am going
21 to shortly turn to the chronology, in the right context,
22 in our submission it gets to the conclusion that the
23 Government would have maintained its banding practice of
24 setting ROCs at increments of 0.25. There was no magic
25 in the margin and because the level of revenue at £149

1 is the next banding up to produce revenue above the
2 costs then the answer would have been the same.

3 So against that background, if I can turn to -- just
4 to summarise -- that was to summarise what our position
5 is in relation to this new primary case, or refocused
6 primary case, I should say, and if I can turn to the
7 relevant factual context, and I am planning to address
8 that chronologically, because, in our submission, it is
9 important to do so in order to understand properly the
10 context in which the decision would have fallen to be
11 taken.

12 Starting with the nature of the ROC scheme, the
13 Tribunal will now be familiar with it, and my learned
14 friend showed the Tribunal one diagram in Mr Druce's
15 expert report, but for the Tribunal's note, just to
16 flag, that there is a more detailed Ofgem diagram to be
17 found in Dr Moselle's third report at page 21, which is
18 in ROC-D, tab 7, at page 21.

19 I just wanted to draw out a few points about the
20 operation of the scheme. The first is that each
21 qualifying wind farm would obtain an entitlement to be
22 awarded ROCs each year for 20 years from the date of its
23 accreditation, and the level of that entitlement is
24 dictated by the Government banding decision at the time
25 of accreditation. So, although they changed banding,

1 that does not change the position for any given wind
2 farm.

3 The second is that when the renewables obligation
4 scheme was first introduced in 2002, each megawatt per
5 hour of renewable electricity, regardless of the
6 generation method, received 1 ROC, so the scheme was
7 technologically neutral, and that necessarily meant,
8 with Commission approval, that some technologies were
9 receiving more than they need whilst others were not
10 receiving enough.

11 Now, the banding mechanism was introduced with the
12 renewables obligation order of 2009, and that broke the
13 one-for-one link by allocating different technologies to
14 five different bands, depending on their state of
15 development.

16 THE CHAIRMAN: Sorry, you is a that some -- under the 2002
17 regime some are not getting enough. I think another way
18 of saying that is they are getting a lower subsidised
19 return than others. They are still viable wind farms,
20 presumably, otherwise people would not --

21 MS DAVIES: It was across all renewable technologies.

22 THE CHAIRMAN: Sorry, it is still a viable economic
23 proposition, in other words people would not do it.

24 MS DAVIES: Well, precisely, and that was the problem,
25 because it did not lead to some renewable technologies

1 being developed because, actually, the one ROC was not
2 enough.

3 So, that then led into a different approach being
4 taken in 2009, breaking the one-for-one link, but
5 importantly not allocating specific bands to specific
6 technologies, rather allocating different technologies
7 to five different bands, depending on their state of
8 development.

9 So, offshore wind was grouped alongside dedicated
10 biomass and co-firing of energy crops, and they were all
11 allocated 1.5 ROCs per megawatt hour. The next band up,
12 as I have mentioned, was 2 ROC, and that was awarded to
13 technologies such as wave, tidal stream, advanced
14 gasification, solar panels and so on, and there were
15 also bands of 0.25 and 0.5 applied to other, more mature
16 technologies which demonstrates, in our submission, that
17 the minimum banding increment being applied in the 2009
18 ROO, 2009 Obligations Order was 0.25.

19 In adopting that approach of allocating different
20 technologies into five separate groups, it is important
21 to recognise that the Government specifically rejected
22 the option of setting bands for each separate
23 technology. It explained why in the consultation
24 document published in May 2007 ahead of the 2009 Order,
25 which we have at {ROC-E/17/19}. At paragraph 2.27, if I

1 could just ask the Tribunal to read that paragraph?

2 (Pause)

3 THE CHAIRMAN: Can you remind me what date this is?

4 MS DAVIES: This is May 2007. As I said, it had also
5 specifically been looking at separate bands for each
6 different type of technology, and it rejects that in
7 this consultation, in essence, for the reasons
8 summarised here in paragraph 2.27.

9 THE CHAIRMAN: Yes.

10 MS DAVIES: We, of course, emphasise in particular the last
 sentence, and that makes clear that

19 So, whilst my learned friends in paragraph 87 of
20 their Skeleton in relation to banding increments of 0.1,
21 and it was a point my learned friend repeated this
22 morning, seek to rely upon the fact that the Government
23 and its advisers at the time of the Obligations Order of
24 2009, considered banding options at granularities of 0.1
25 ROCs. Importantly, that was only in the context of the

1 option of setting bands for each separate technology.
2 In our submission, what is more relevant for the
3 question that the Tribunal needs to consider, is that
4 that approach was rejected under the Renewals Obligation
5 Order of 2009 for the reasons summarised in paragraph
6 2.27 of the consultation document, and so the fact that
7 prior to Renewals Obligation Order 2009 when considering
8 an option of specific bands for each different
9 technology, the Government considered banding levels
10 with -- a granularity of less than 0.25 just does not
11 assist. It was rejected and it was rejected because the
12 Government recognised the considerable degrees of
13 uncertainty in relation to the predictions of revenue
14 and costs, and thought it was more appropriate to group
15 technologies together.

16 In relation to that it is also apparent in our
17 submission, unsurprisingly, given the explanation that I
18 have just referred to, that there was no specific margin
19 of revenues over cost that was being pursued by the
20 Government in relation to the Renewals Obligation Order
21 of 2009, and nor, indeed, was one particular margin
22 acceptable to the Commission.

23 If we could go to the State aid approval decision
24 for the Renewables Obligation Order 2009 which is at
25 {ROC-E/80/7}, a document my learned friend did go to

1 briefly this morning but I want to show the Tribunal a
2 different part of it. Actually, could we go to page
3 {ROC-E/80/14}? The Tribunal can see there in Table 5,
4 a table summarising the predicted costs per technology
5 and banded level support under the preferred banding
6 scenario, and one can see there the five different
7 groupings of technology on the left-hand side with the
8 different levels of ROC banding awarded to them, and
9 then if we look in the next two columns, what you see --
10 three columns -- what you see are ranges of predicted
11 costs, and so if we take the 1.5 ROCs, for example, you
12 see you have ranges for offshore wind of 92 to 140 but
13 the range for dedicated biomass is 77 to 114, so ranges
14 that are around the sort of -- one could say -- sort of
15 level in the sense that they overlap in the middle,
16 but -- or overlap somewhere, anyway. It is not actually
17 in the middle, but the lower points and the top points
18 are very different, and if one looks at the two ROCs
19 banding group which had seven different technologies in
20 it, one can see a whole range of predicted costs as
21 well, and all of that is to be compared to the level of
22 revenue that the Government was contemplating would be
23 produced by the banding levels it was adopted which one
24 can see from -- turning back to Table 4 on page 13, if
25 one looks at the 1.5 ROCs for 2010, they were predicting

1 revenue of 110 to 115, so towards the top end of the
2 costs proposed for dedicated biomass, for example, but
3 at 2 they were looking at 122 to 136, and I am going
4 to -- after the break because it probably makes sense to
5 do it at that point -- just hand up some tables to the
6 Tribunal showing what these figures implied the margins
7 were that the Commission was looking at in relation to
8 the different technologies in the 2009 Renewals
9 Obligation Order, but to give the headline point before
10 we break, the positive margins range from 6 to 35 per
11 cent.

12 THE CHAIRMAN: Thank you. Shall we break there, then? We
13 will come back at 2 o'clock.

14 (12.59 pm)

15 (Luncheon adjournment)

16 (2.00 pm)

17 MS DAVIES: When we broke, we were looking at the approach
18 insofar as one can deduce it from what happened in
19 relation to the Renewable Obligations Order of 2009,
20 which was, of course, the immediate precursor to 2010,
21 and I said I was going to show you what the margins were
22 that were implied in the various banding levels that the
23 Government allowed. We have put on the desk a document
24 which is, in fact, three tables. Just to explain what
25 this is, first of all, and then I will explain what we

1 say can be deduced from it, Table 1 is a table setting
2 out a comparison of the Government's initial cost and
3 revenue estimates for projects commencing in 2010 by
4 reference to the different technologies that they were
5 looking at for the 2009 Order, and you can see that you
6 have the name of the technology on the left, the banding
7 that was settled upon in relation to the 2009 Order,
8 then the ranges, together with central points or
9 medians, and that is explained in the footnote, and then
10 there is a comparison of the absolute margin between the
11 revenue and the LCOE estimate, using the point figures
12 for comparison purposes, although the Tribunal will
13 appreciate we don't accept that the point figures were
14 mathematically driving the Government's analysis, but
15 just -- because this is the exercise my learned friend
16 presses on the Tribunal, we have done this in order to
17 give the comparison to the Tribunal, and then you see
18 that is then calculated as a relative margin which is
19 how much the absolute margin exceeds the pinpoint cost
20 LCOE estimate.

21 The first of these tables is the Government's
22 internal analysis of the 20 November 2008, and you can
23 see at that point for offshore wind, the Government were
24 contemplating the banding would produce a margin of 21
25 per cent, with a range of other margins -- for onshore

1 wind, 9 per cent, ranging up to 43 per cent for
2 hydroelectric. There are some technologies at the
3 bottom which have negative margins, and that is
4 explained by the Government in the consultation document
5 that I went to before lunch. Essentially, they were not
6 trying to encourage those technologies at this time
7 because they were regarded as too expensive, too
8 immature, too expensive, and so they were not going to
9 set the ROC banding at a level to enable those costs to
10 be recovered, and for the Tribunal's note, that is in
11 paragraph 2. -- sorry, I have lost the reference. I
12 will come back to it in a second -- but that is why they
13 are negative.

14 What the next table is, is the estimates as actually
15 submitted to the European Commission on 24
16 November 2008. Same exercise. You again see a wide
17 range of implied margins from the differences between
18 the pinpoint estimates. By this stage, offshore wind
19 had gone to a negative margin because the backdrop was
20 that the costs of offshore wind were being perceived by
21 November 2008 to be increasing against the exercise that
22 Ernst & Young had done in 2007, which is why there was a
23 need for the 2010 Order, but for those -- but what one
24 can see from this is that the Government was still
25 contemplating, for many technologies, significantly more

1 positive margins up to 34, 35 per cent, if one looks at
2 landfill, gas and co-firing of biomass.

3 The last document is the equivalent analysis by
4 reference to the figures that are actually in the State
5 aid approval decision which we were looking at just
6 before lunch. That is dated 11 February 2009. This
7 table, therefore, effectively sets out the implied
8 margins that the Commission, in 2009, was prepared to
9 approve in relation to the 2009 Order, and you can again
10 see that the implied margins, if one looks simply at the
11 central pinpoint figure, range from 6 to 35 per cent in
12 terms of positive margins. Professor, Professor
13 Neuberger?

14 PROFESSOR ANTHONY NEUBERGER: Just for clarification, do you
15 know whether the ranges that you see are ranges because
16 of different assumptions or because you are talking
17 about, as it were, with wind farms, whether they are
18 more -- further away or nearer? What I am trying to say
19 is, is this just an uncertainty about cost, or is this a
20 range of technologies, or is it both, or don't you know?

21 MS DAVIES: Well, we can pin the figures in the first table
22 back to the Ernst & Young 2007 analysis, and that shows
23 it was similar uncertainties to the ones that Ernst &
24 Young were concerned with in relation to 2009, which
25 were uncertainties as to what the revenues would be,

1 because it is all dependent on a future curve as to
2 wholesale electricity prices -- how much the shortfall
3 is that needs to be plugged, for example --
4 uncertainties as to the level of generation, what was
5 the power output going to be. In fact, between 2007 and
6 2009, Ernst & Young increased their assumption in
7 relation to that to 38 per cent, as my learned friend
8 showed you. Uncertainties as to how future costs would
9 develop, because you are looking at costs -- obviously,
10 Cap Ex is going to be incurred right at the beginning of
11 the project, but they were looking at operating costs as
12 well, which would change over the 20-year period of
13 assumed life of a wind farm, and other costs relating to
14 the regulatory regime.

15 So, Ernst & Young -- I will be corrected if I am
16 wrong -- but my understanding is in 2007 Ernst & Young
17 did a similar exercise, they were trying to look at a
18 generic wind farm. They were not looking at how much
19 would this specific wind farm need to be developed.
20 They were trying to get a sort of more levelised cost,
21 in fact, for a generic wind farm, an average cost, but
22 the uncertainties related to those sorts of factors
23 which, as I will show the Tribunal because I am going to
24 go to the Ernst & Young report in a little bit more
25 detail than my learned friend, were the uncertainties

1 that Ernst & Young had in mind, very much in mind, in
2 2009 also.

3 PROFESSOR ANTHONY NEUBERGER: Thank you.

4 THE CHAIRMAN: Thank you for these. Would you be kind
5 enough to ensure that they are uploaded to Opus as well?

6 MS DAVIES: We will indeed.

7 Now, as the Tribunal heard this morning, the Class
8 Representative places heavy reliance in the context of
9 the 2010 Order on the fact that in the actual, the
10 margin between the central estimates of costs and
11 revenues was £5 in absolute terms, or 3.47 per cent in
12 percentage terms, and we submit that these tables
13 demonstrate that whichever set of figures is taken in
14 the context of the 2009 Order, there were very
15 significant variations in the margins being afforded to
16 different technologies, and also that although my
17 learned friend claims that in the counterfactual a
18 margin of 6.43 per cent for offshore wind would have
19 been indefensible in the context of the 2010 Order, that
20 clearly was not the case for other technologies in
21 February 2009, looking, in particular, at Table 3.
22 There are a number of technologies where the European
23 Commission was prepared to approve ROC banding levels
24 which produce margins considerably in excess of 6.43 per
25 cent.

1 Now, two factors that are important to emphasise in
2 that context, is that, of course, the Government had
3 exactly the same statutory objectives in relation to the
4 2009 Order as it did in relation to 2010, and European
5 Commission in both 2009 and 2010 was equally concerned
6 to ensure that the ROC banding scheme did not lead to a
7 State aid to apply the very same guidelines that my
8 learned friend took the Tribunal to this morning to
9 ensure that there was not over-compensation in the
10 aggregate, but the reason that one sees different
11 implied margins here, and this being acceptable to both
12 the Government and the European Commission, comes back
13 to the point that I made at the outset, which was there
14 was a lack of certainty as to the future costs and the
15 future revenues. There was no high degree of confidence
16 in the accuracies, and what they were doing was trying
17 to get them in the sort of -- that sort of order, but it
18 wasn't the mathematical -- the exercise of mathematical
19 precision which the Class Representative's case
20 necessarily requires the Tribunal to accept, between the
21 central points of the two estimates.

22 If we go back to the State aid approval decision,
23 which we looked at just before lunch in {ROC-E/80/16},
24 what one sees in paragraph 66 is the European Commission
25 stating in terms that they understand how difficult it

1 might be to establish precise forecasts of production
2 costs and revenue streams for all renewable technologies
3 eligible, and that the in-depth studies helped to model
4 the most accurate forecast, but they also recognise the
5 choice of the UK authorities to set bands which
6 delivered revenues close to the mid-point of the ranges
7 for each technology in order to avoid over-subsidy.

8 We have seen from the table that I showed, Table 3,
9 what "close" means in that context. It is clear that
10 there was significant leeway evident by the differing
11 implied margins. None of this exercise, which provides
12 the immediate context for the 2010 Order, was an
13 exercise that involved any degree of precise matching to
14 central estimates. Indeed, my learned friends
15 themselves quote a letter at {ROC-E/76.1/1} in their
16 Skeleton at paragraph 39. They quote from the final
17 paragraph on page 2 in which the Government explained to
18 the European Commission in February 2009 that:

19 "Our banding regime is set to match the costs within
20 the range for which we have evidence".

21 They were not seeking to match the costs to specific
22 pinpoint figures. They were seeking to ensure that the
23 subsidy that was provided matched the cost to the range,
24 and that is how they were seeking to avoid
25 over-compensation, not the precise mathematical exercise

1 which my learned friend seeks to urge on the Tribunal.

2 THE CHAIRMAN: So it must follow from that -- I mean, I
3 understand, of course, that you stress the lack of
4 precision and the lack of information that the
5 Government has when it makes its banding decision, but
6 from the way that you explain it, it then would seem to
7 follow that if the Government "gets it wrong", does not
8 match the number of ROCs to the true level of expenses,
9 then the possibility comes that these projects are
10 economically unviable, because it has not given enough
11 of a subsidy.

12 MS DAVIES: Well, it was always trying to ensure that -- and
13 it is a point I am going to come to -- it was always
14 trying to ensure that the level of subsidy that it was
15 offering was sufficiently high within the range, so
16 above the -- a central median point. It was always
17 trying to do that, for precisely that purpose, save in
18 relation to those technologies where it expressly
19 recognised they are not mature enough yet, we're not
20 going to -- we are not going to encourage those
21 technologies, because an important part of the context
22 is, whilst the United Kingdom had targets it had to meet
23 set at a European level, those were targets in relation
24 to generation by any renewable technology, so 15 per
25 cent -- at the relevant time, 15 per cent of generation

1 had to be from renewable technologies. The European
2 target did not dictate a specific target for specific
3 types of renewable technology, and so the Government had
4 a degree of leeway. Certainly one can see this in
5 relation to the 2009 Order, when it had a range of
6 different renewable technologies, potential ones being
7 out there. Obviously some established, some less mature
8 and some very immature, to look at the very immature and
9 say, well, it is more economically efficient to
10 encourage this type of renewable technology than the
11 more expensive ones, and so we are going to set the ROC
12 banding level at a point that will encourage that group,
13 and if the others can bring their costs down by
14 developing the technology and make it economically
15 viable, all well and good, but we are not going to just
16 give the higher level because that is what wave or solar
17 panels require at this stage.

18 THE CHAIRMAN: Okay. Thank you.

19 MS DAVIES: Now, as my learned friend explained this
20 morning, the 2009 Order was made on 24 March 2009, and
21 it came into force on 1 April 2009, so just a few months
22 after the State aid approval, but it is clear from the
23 documents that by the time the 2009 Order was made, so
24 by March 2009, the Government had already received
25 representations from industry that 1.5 ROCs would not

1 suffice for offshore wind, and that at least 2 ROCs
2 would be needed.

3 Not only had it received those representations, but
4 it had commissioned the Ernst & Young report, and,
5 indeed, had become aware that the Ernst & Young analysis
6 was suggesting a level -- a base case analysis was
7 suggesting a level of 2.5 ROCs was required, albeit that
8 for some projects two ROCs might suffice.

9 Now, the Government couldn't simply amend the 2009
10 Order because that had gone through the extensive
11 consultation process which culminated in the
12 consultation document I took the Tribunal to this
13 morning, and it had also gone through the State aid
14 notification process, so the mechanism for getting to a
15 higher ROC banding level for offshore wind was an
16 immediate review under Regulation 33.3 of the 2009 Order
17 which is the provision that allows for exceptional early
18 review in various circumstances, including significant
19 changes in costs.

20 Now, because that exercise is then focused on
21 offshore wind only, inevitably my learned friend focuses
22 simply on offshore wind and specific banding increments
23 for offshore wind, but we submit it is important to set
24 the 2010 exercise in the context of the approach the
25 Government had decided upon, only the previous year,

1 i.e. 2009, of grouping technologies together in bands
2 and coming up with five banding increments, for the
3 reasons that are summarised in paragraph 227 of the
4 consultation report, but including reducing
5 administrative complexity, because they did not have
6 confidence in precision of the figures, and they were
7 reducing complexity by having five separate bands,
8 whereas my learned friend's case necessarily assumes
9 that having gone through that exercise in 2009, when it
10 comes to 2010 the Government would have decided to
11 create a separate band for offshore wind alone, and they
12 would have decided to create -- his primary case
13 assumes -- that they would have decided to create a
14 sixth technology, comprising offshore wind only, which
15 alone was getting a banding increment of 0.1, so getting
16 a band of 1.9 ROCs. That is the first part of the
17 story, in our submission, as to why the approach is
18 unrealistic, because the Government was not approaching
19 matters in that way in our submission in 2009 and 2010.
20 It had, for policy reasons, as explained, taken the
21 view, "we are grouping the technologies together", and
22 it is against that background, wholly unsurprising, as I
23 am going to come on to show the Tribunal, that when it
24 is looking at where can it take offshore wind up to,
25 given the representations it was getting, everyone was

1 looking at the next banding level up, i.e. two ROCs.
2 That was the next banding level up under the 2009 Order.

3 In terms of the statutory considerations to be taken
4 into account by the minister, my learned friend took you
5 to section 32D(4) of the Electricity Act 1989. He
6 emphasised certain of the factors, but we would also
7 emphasise -- and I should say we do not detract from
8 those factors. Of course the Government had to consider
9 cost. It had to consider income. It had to consider
10 impact on consumers, but all of those factors need to be
11 assessed by the Tribunal in the context of what the
12 Government was also recognising, which was that they did
13 not have a high degree of confidence in the accuracy of
14 any of these figures, and we would also emphasise the
15 final factor in the statutory list, which is
16 consideration of the contribution attainment of any
17 target relating to renewables generation.

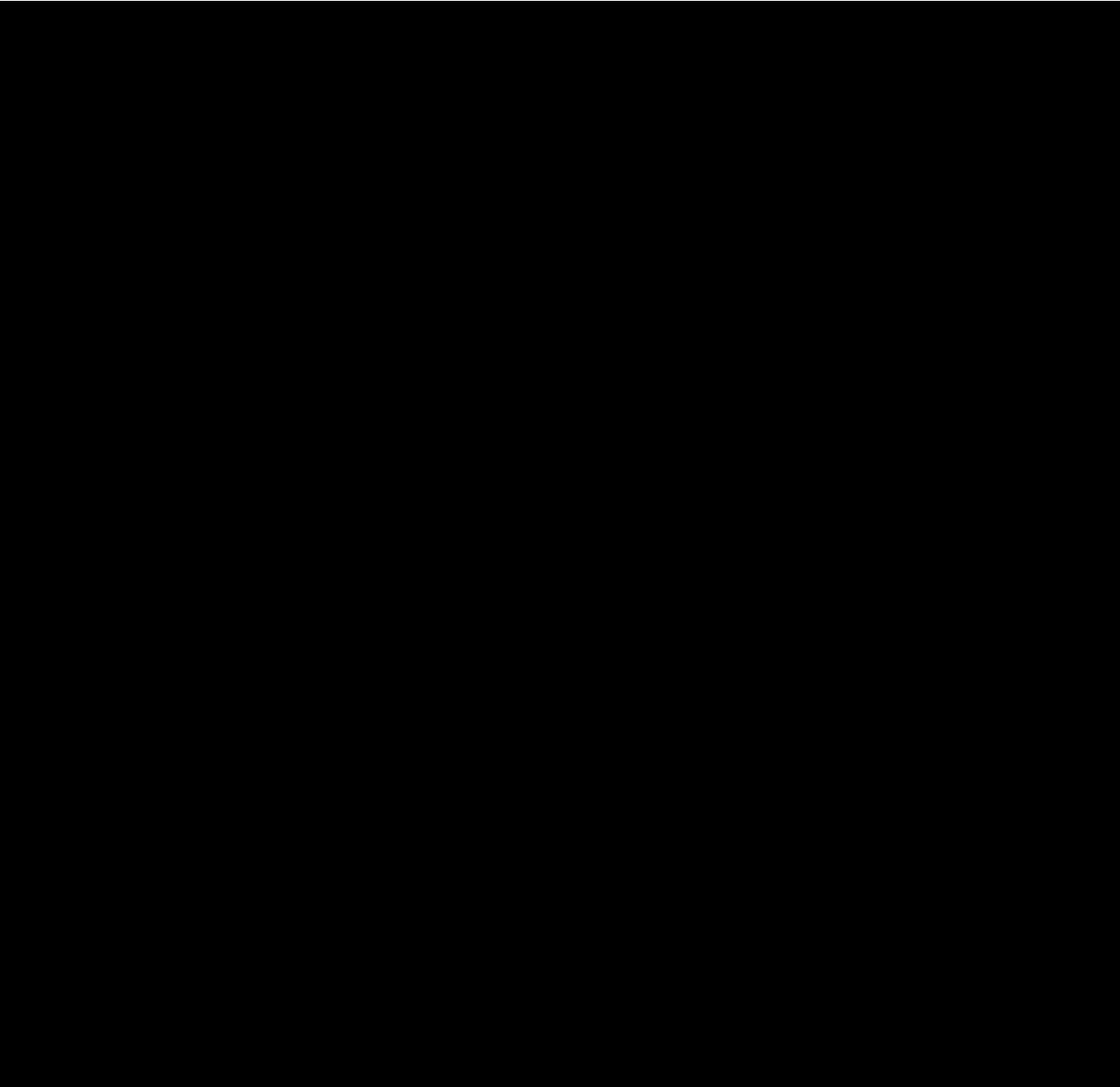
18 As I have said a moment ago, offshore wind did not
19 have a specific target, but we recognise it was --
20 offshore wind was regarded by the Government as
21 important to achieving overall target of 15 per cent by
22 2020, and the Government was, therefore, by reason of
23 the 2010 Order, seeking to ensure that it set the
24 banding level at a sufficiently high level to encourage
25 sufficient investment in offshore wind, and the reason I

1 emphasise that is -- just to digress for a moment --
2 Mr Druce's case of 1.75 or 1.8 ROCs, those two
3 alternatives, both depend on the Government choosing to
4 set the subsidy at a level below even the Ernst & Young
5 centralised -- revised centralised levelised cost. So,
6 to get to either of those, you have to assume that,
7 contrary to what it was doing anywhere else, the
8 Government would have rounded down because the figures,
9 just mathematically, are closer, and that is one of the
10 key reasons why we say that both those alternatives are
11 fundamentally unsound.

12 Turning, then, to what the developers were saying in
13 late 2008, early 2009 which, as I submitted this
14 morning, is an important part of the context, because --
15 for the reasons I submitted this morning -- the Tribunal
16 should be approaching these issues on the assumption
17 that they would have been asking for the same amount,
18 given that it is common ground that there is no evidence
19 to suggest otherwise, I just wanted to show the Tribunal

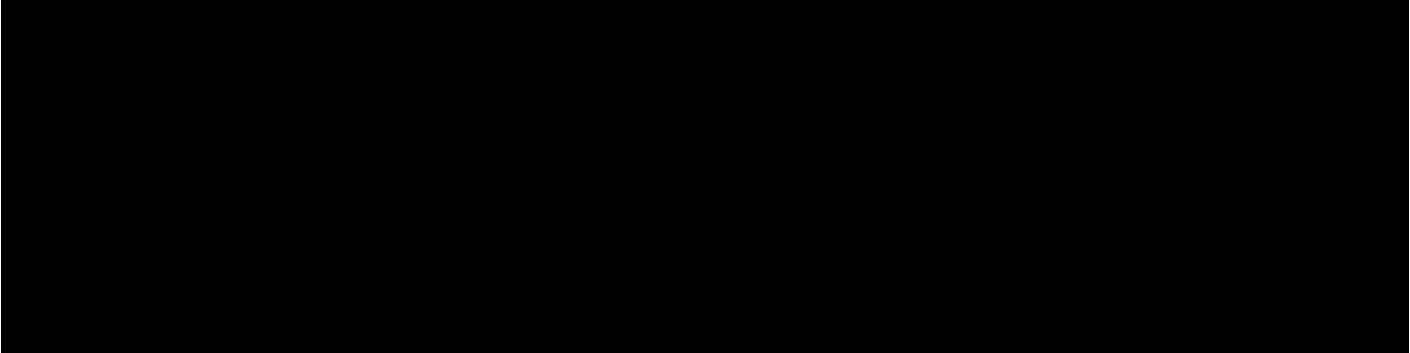
 two documents. The first is an [REDACTED]
 [REDACTED]
 [REDACTED], which is at {ROC-E/84/2}. This seems to

23 be an [REDACTED]. About
24 halfway down the page the Tribunal can see under the
 [REDACTED]



20

Then at the bottom:



[REDACTED]

2 So you have already, by the beginning of 2009, a
3 number of significant developers of wind farms. They
4 were involved in a number of wind farms, not just London
5 Array, raising concerns as to the viability of the
6 banding level being set under the 2009 Order. That is
7 then reflected, if we go forward to tab 92 {ROC-E/92/1},
[REDACTED] in the [REDACTED]

[REDACTED]


21 Now, what is clear from that is that the developers
22 were not -- they were saying "our costs have risen", but
23 in asking for two ROCs per megawatt hour, they were not
24 presenting the Government with a precise analysis
25 saying "this is our levelised cost, this is why we need

1 two ROCs per megawatt hour". Instead they were just
2 referring in general terms to increases in costs and,
3 "we need two ROCs per megawatt hour" which we submit is
4 unsurprising given that that was the next band up in the
5 2009 Order, and it must also be recognised that each of
6 these wind farms, and we will see it in the evidence,
7 had different cost profiles. They did not have the same
8 levelised cost for each of those wind farms. This is
9 not a mathematical exercise by these wind farms in
10 coming up with the 2 figure, whereby they are
11 saying "this is our cost, this is the revenue that you
12 are going to get, and we need, therefore, this", it is
13 actually just a reflection of the fact that the way the
14 scheme had been set up by the Government for the reasons
15 it considered and explained in 2009, it was using -- it
16 was grouping technologies together, and so the offshore
17 wind developers were saying "we need to be in the
18 next-highest band", effectively.

19 Having had those approaches, DECC issued an ITT on
20 23 December 2008 for a study in the costs and financial
21 support of offshore wind. We do not have the ITT but we
22 do have Ernst & Young's response, which is dated 9
23 January 2009, and it is, in our submission, an important
24 document. It is at {ROC-E/53/1}. Go to page
25 {ROC-E/53/2}. You can just see, this is they are

1 responding to the ITT of 23 December.

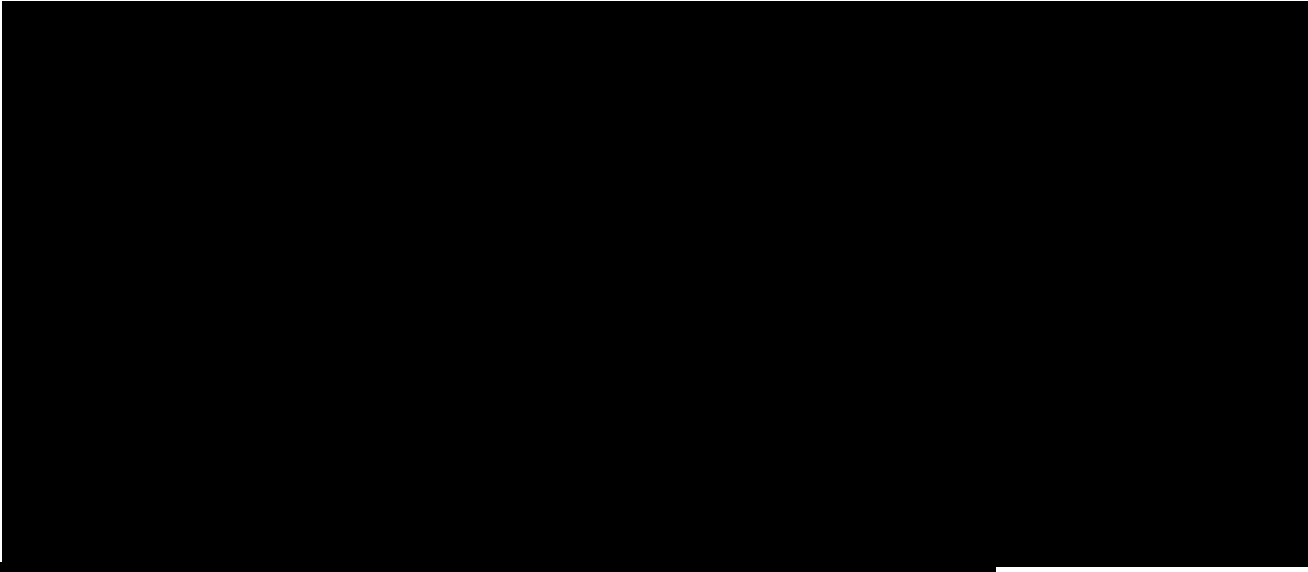
2 If we then go on to page {ROC-E/53/5}, under the



8 Now, I emphasise that because it is apparent as we
9 go through the documents that DECC were very, very
10 closely involved in the production of the Ernst & Young
11 report, and in agreeing the methodology, and, in
12 particular, in agreeing the methodology looking at, as
13 we will see, six wind farms, not just the three that my
14 learned friend's expert focuses on, and nor, indeed, do
15 Ernst & Young even produce a sensitivity just looking at
16 those three wind farms. They look -- whenever they are
17 doing their sensitivities, and I am going to come to the
18 sensitivities, they are looking at it by reference to
19 the group of six wind farms that we can see from the
20 documents they were concerned with.

21 The deed -- if we turn on to page 8 {ROC-E/53/8},

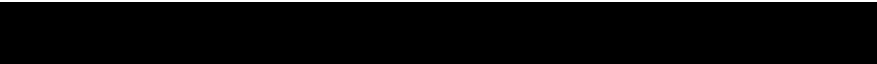
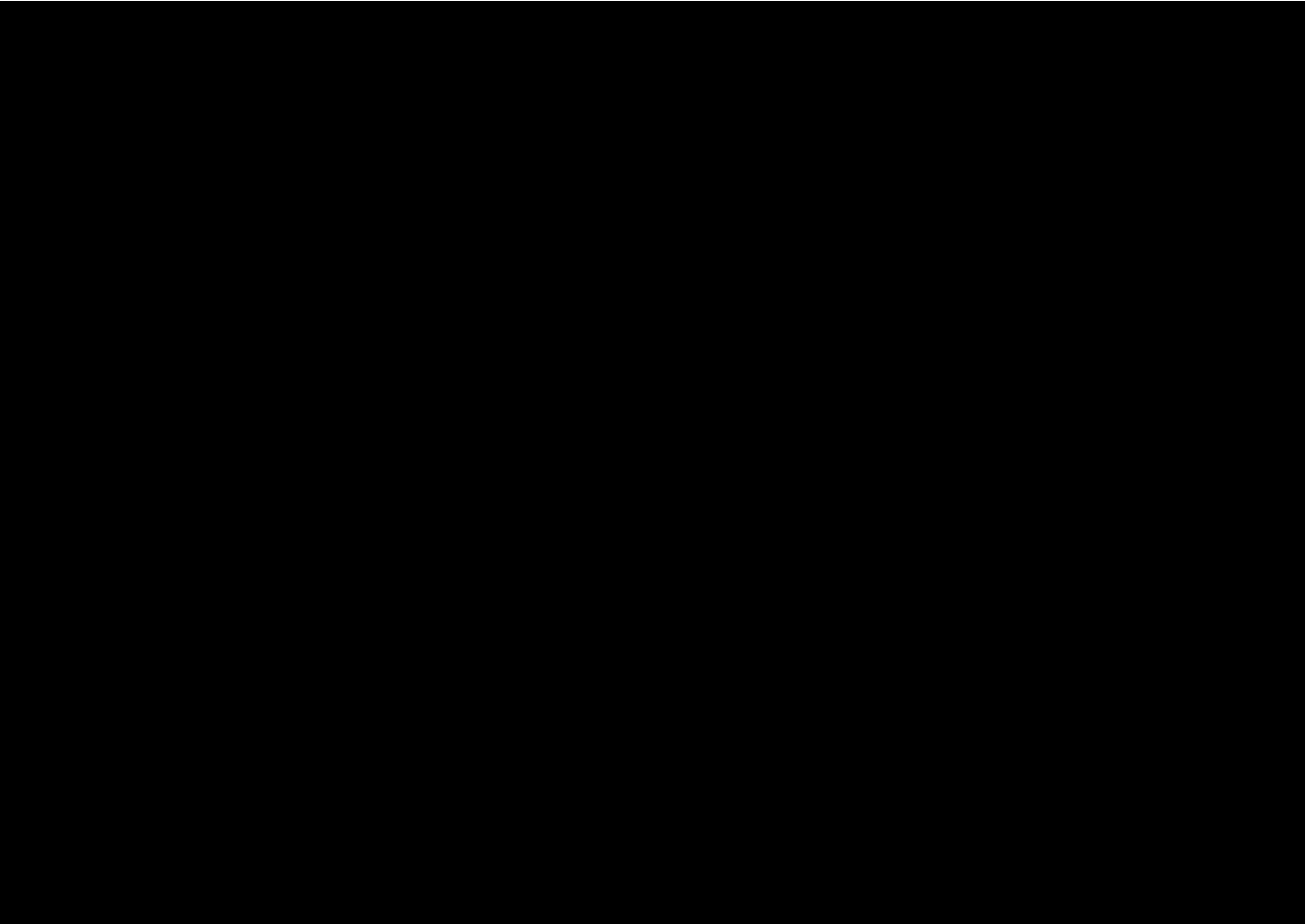




{ROC-E/53/12}

10

was :



Again, no doubt

1 because two ROCs was, at the time, the highest banding
2 level that the Government had contemplated under the
3 2009 Order for any renewable technology.

4 We do not have documentary evidence which
5 demonstrates whether or not the developers themselves
6 had actually suggested two ROCs prior to January 2009.
7 The earliest document which suggests the two ROC figure
8 being stated by the developers is February 2009, but, in
9 any event, in our submission it is entirely unsurprising
10 that the Government wanted to understand the impact of
11 an increase to two ROCs because they had just completed,
12 in December 2008, the consultation for the 2009 Order,
13 and two ROCs was both the next band up from the 1.5 ROC
14 band used for the group of technologies including
15 offshore wind, and also the highest band that was being
16 used under that Order.

17 Now, the Ernst & Young report is dated 27
18 April 2009. It is in {ROC-E/112/1}. My learned friend
19 went to some parts of it this morning but there are some
20 other parts that I would like to highlight to the
21 Tribunal. Before I do so, I would just reiterate the
22 point that I made a moment ago, which is: it is clear

from the documents that although this is dated [REDACTED]

[REDACTED]

[REDACTED]

5 Turning, then, to the report, if we could start at

[REDACTED] page {ROC-E/112/3}? Under the heading "[REDACTED]

[REDACTED]

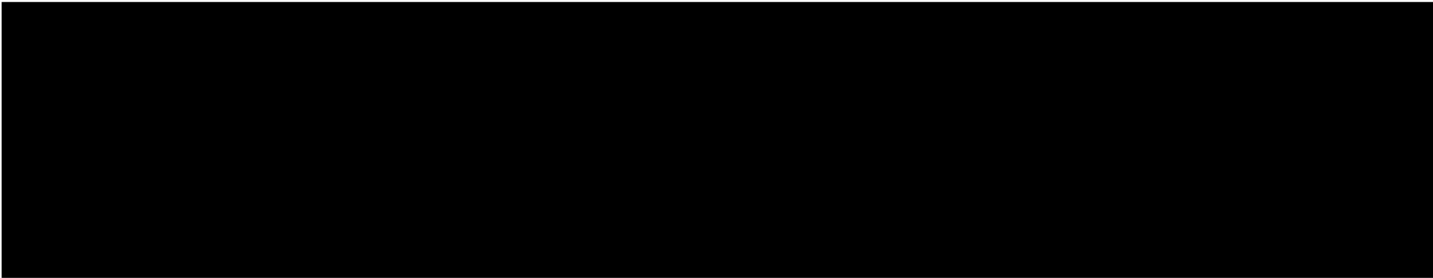
[REDACTED], and as
11 the Tribunal knows from what my learned friend said this

[REDACTED] morning, and as the next bullet demonstrates, what [REDACTED]

[REDACTED]

[REDACTED] It did not just do that
19 by reference to the three more expensive wind farms
20 which my learned friend's expert describes as "the
21 benchmark wind farms".

22 Now, my learned friend, if we turn over the page
23 {ROC-E/112/4} emphasised the paragraph in the middle of
24 that page in which Ernst & Young, in the last sentence,
25 said that:



5 We submit that conclusion needs to be read against

[redacted] the fact that, firstly, it is clear that [redacted]

[redacted]

6 [redacted] which my learned friend showed you, specifically

9 the section headed [redacted] and on

10 the basis of the cost and power assumptions that feed

[redacted] into the base case, [redacted]

[redacted]

[redacted]

[redacted]

15 For the second point, it is that it is actually

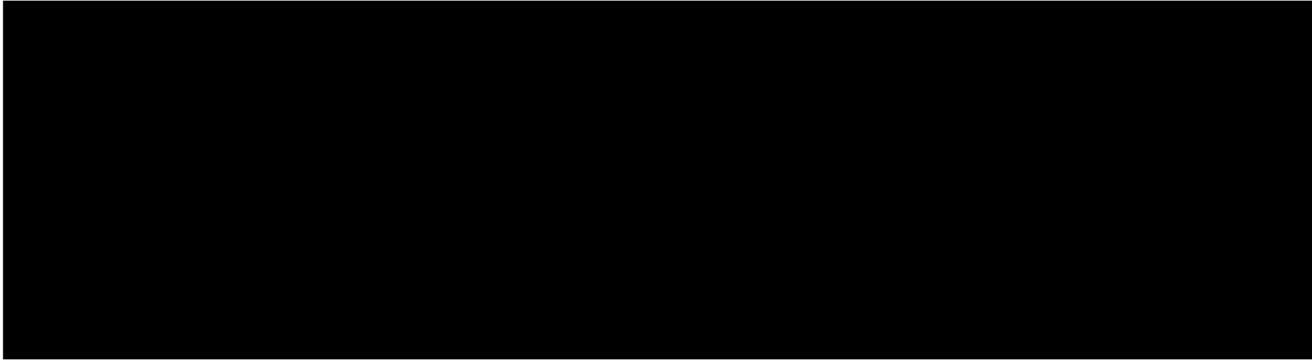
[redacted] clear from the documents that the reference to [redacted]

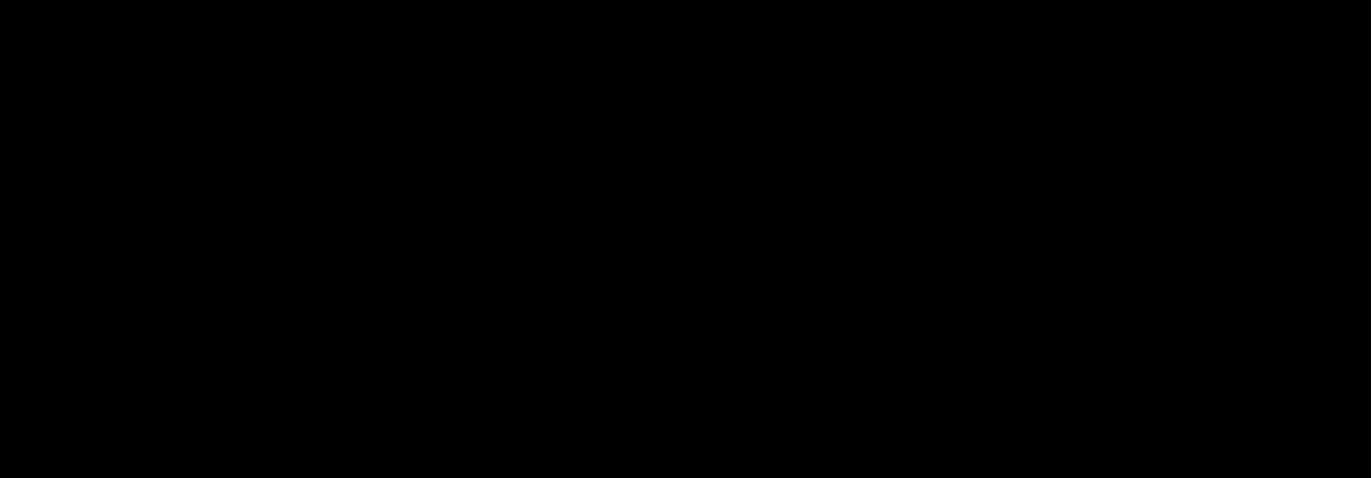
[redacted]


16 [redacted] So, if we could turn to

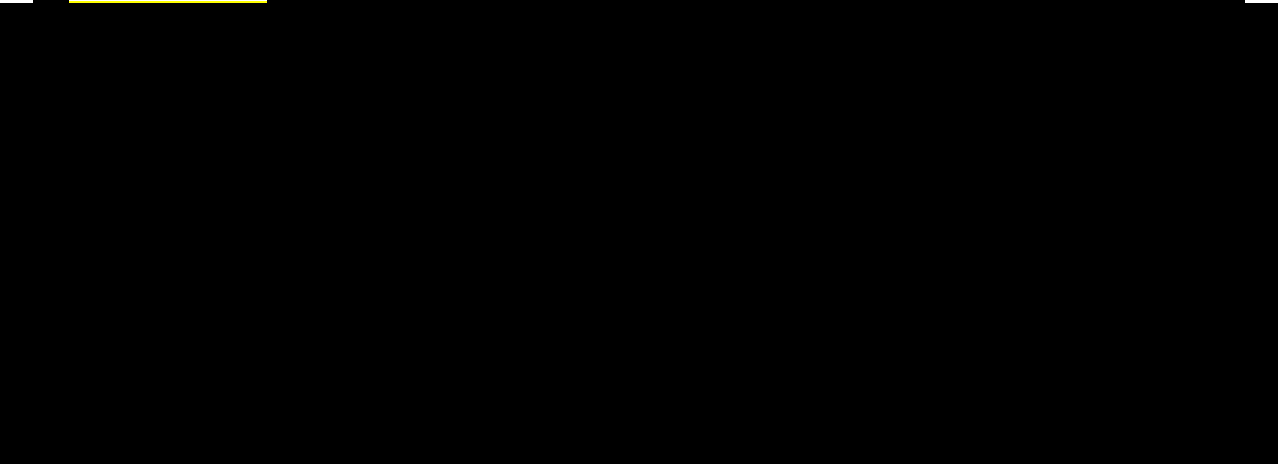
19 {ROC-E/105/1}, we should have, at the bottom, an email

[redacted] from [redacted]





8 That is the sentence that then finds its way into
9 the summary back at page {ROC-E/112/4} that we were just
 looking at. We submit that that request from 

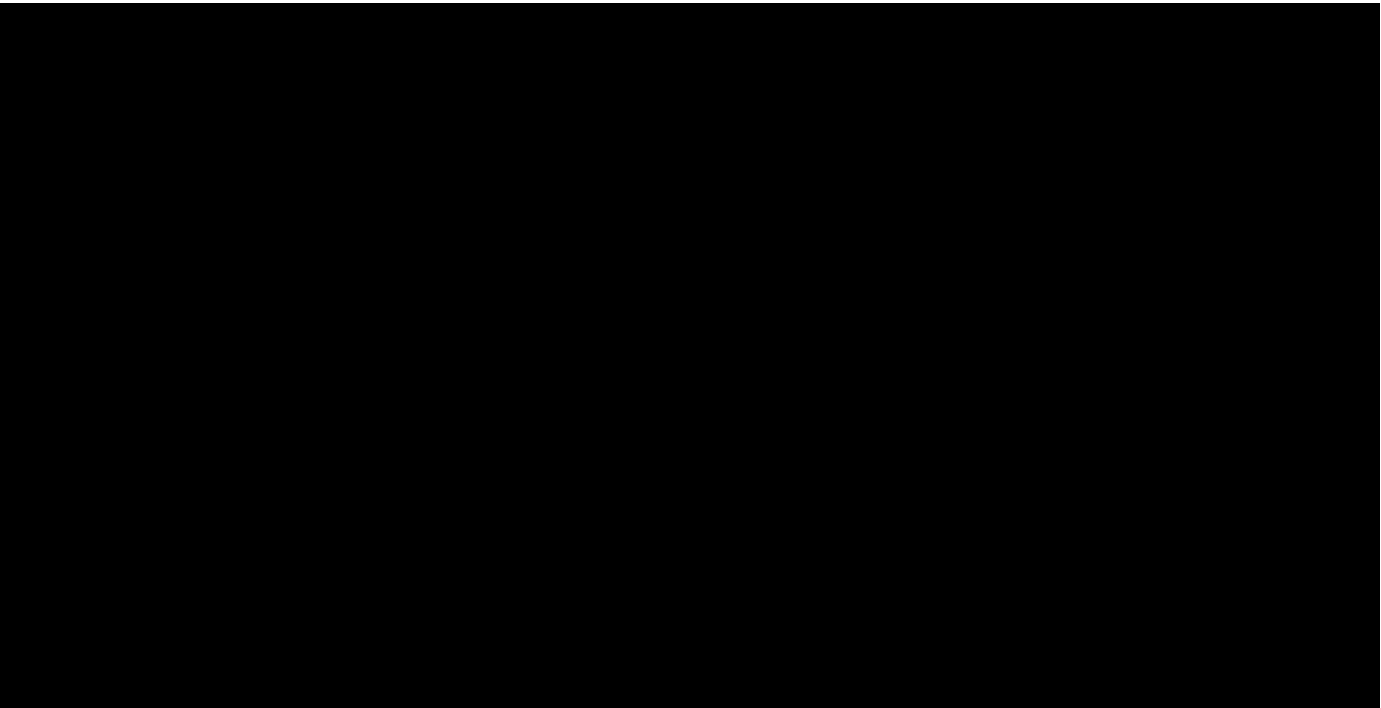


18 Turning back to the report, the last bullet on page
19 4, which my learned friend briefly referred to but did
20 not take the Tribunal through, is addressing the
21 specific question that we have seen that Ernst & Young
22 was asked to address as to the impact to two ROCs
23 against the backdrop of the request from various
24 developers, and what you see here is that this is not
25 the central analysis of Ernst & Young at all, it is them

1 running some sensitivity analyses against their central
2 analysis, and concluding that a two ROC per megawatt
3 banding might satisfy some investors on certain projects
4 where various factors are in place. One, load factor is
5 higher, so there is more electricity being generated,
6 assumptions are taken in regards to introducing the OFTO
7 regime, that was a regime that was going to give more
8 income to generators, potentially, than the Ernst &
9 Young figures had assumed, capital and operating costs
10 are lower, more optimistic assumptions are taken for
11 forward power, so that is the future wholesale
12 electricity prices, and lower hurdle rates, so that is
13 the Internal Rate of Return.

14 All of that is consistent with the fact that costs
15 vary significantly from one wind farm to the next, and
16 the inherent uncertainty in calculating the LCOE in
17 light of multiple factors that are themselves uncertain.

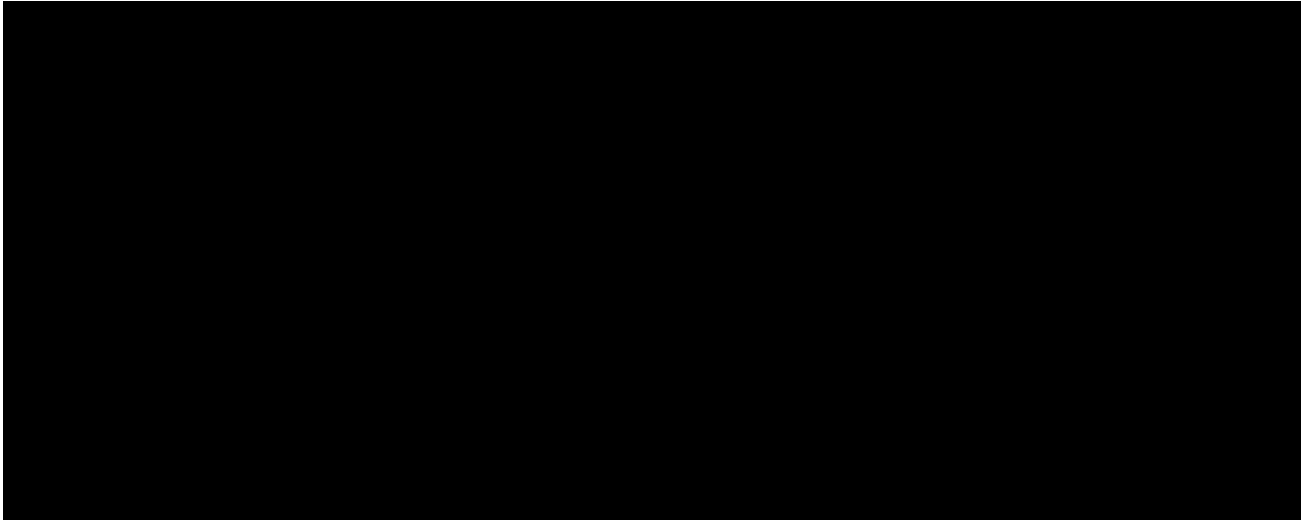
On the next page, page 5,



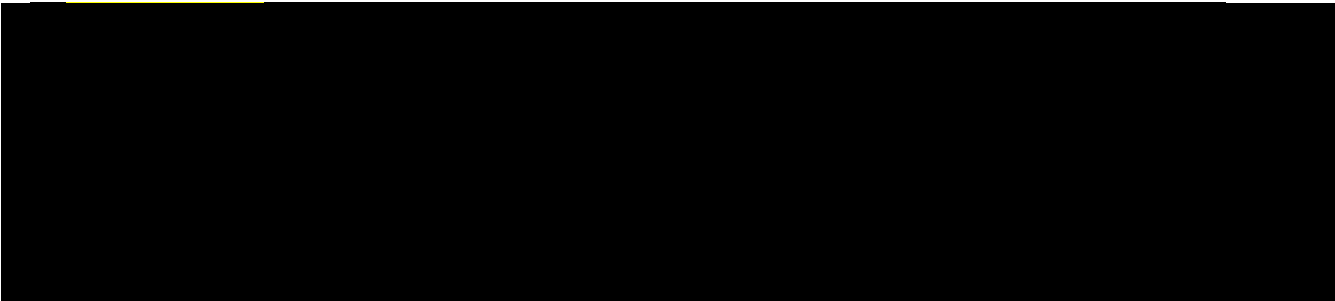
11

Turning on through the report, just to flag a few

other points briefly, in



My learned friend then took you to

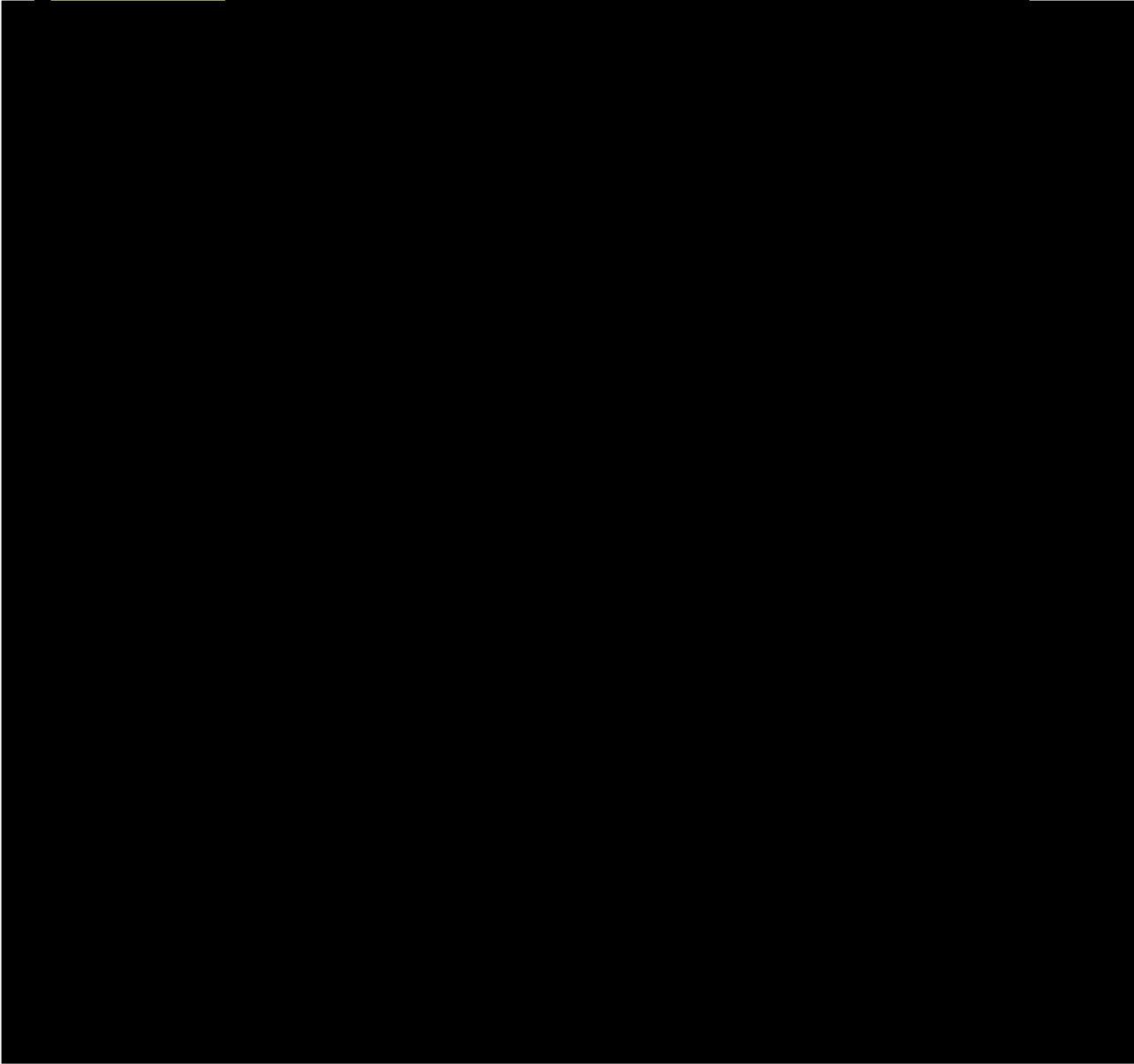




█ [redacted], and if the Tribunal

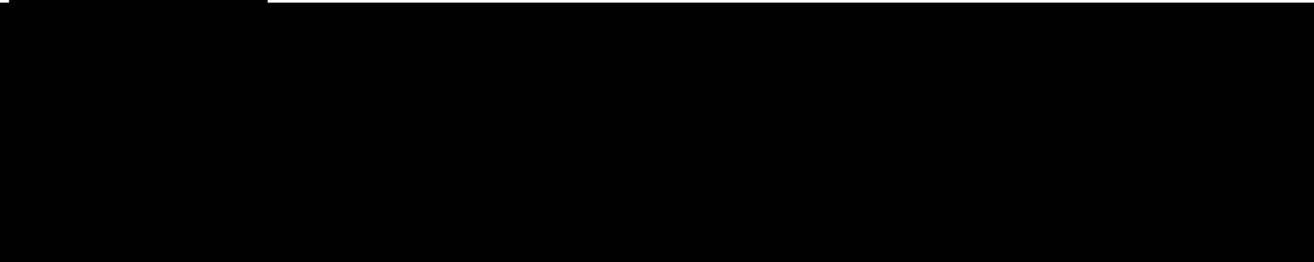
6 looks at page 22, we see there in the middle of that

[redacted] paragraph [redacted]



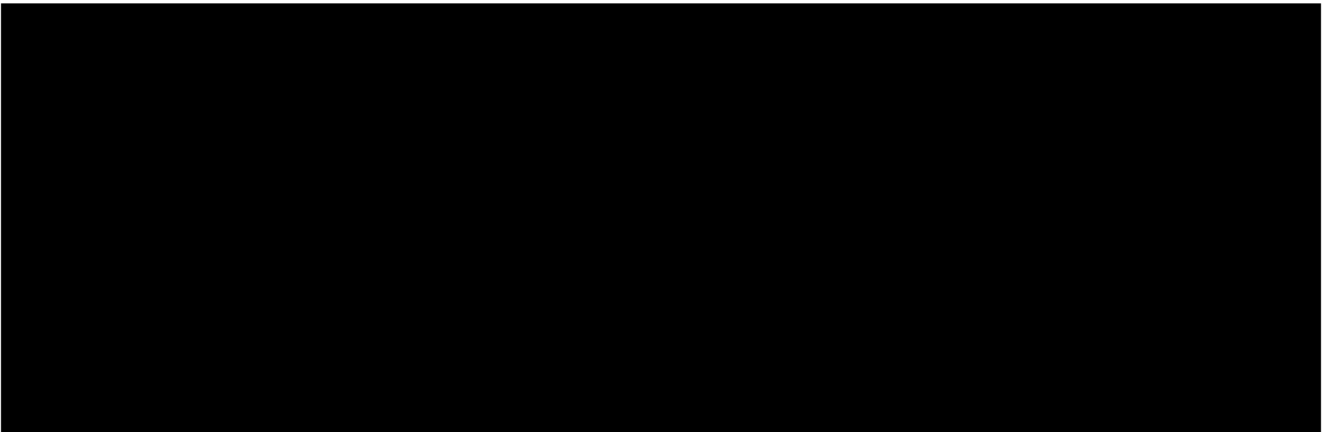


█ [REDACTED] It is in
9 {ROC-E/104/1}. We start at the contents on page 3. The
10 Tribunal can see that the annex is, in fact, divided up
[REDACTED] into sections according to [REDACTED]



[REDACTED] starting at
17 page 61, and if we turn over to page 62, {ROC-E/104/62}

[REDACTED] what one sees there is [REDACTED]



[REDACTED]

3 Those are the factors that, as we have just seen,
4 were all considered in the sensitivities presented in
5 the Ernst & Young report.

[REDACTED] Again, what this is reflecting is [REDACTED]

[REDACTED]

11 THE CHAIRMAN: So when they get -- your theory, or your
12 approach to the EY report is, I think, to say that when

[REDACTED]

21 MS DAVIES: Yes. I agree with all of that, save that Ernst
22 & Young had detailed cost information from a number of
23 wind farms. If we turn on to page {ROC-E/104/65} I can
24 explain this slightly more clearly.

25 The box on the right-hand side, the sort of

[REDACTED] highlighted box, the Tribunal will see has got [REDACTED]

[REDACTED] As the Tribunal can see, there are [REDACTED]
[REDACTED]

11 The experts for the aligned parties have utilised the
12 material that was provided to DECC to correlate the four
13 green boxes to wind farms providing data to DECC. They
14 include the three most expensive wind farms that
15 Mr Druce looks at and one other, and my learned friend
16 Mr Singla's expert has done an additional exercise to
17 correlate the two grey dots by reference to publicly
18 available documents to two other wind farms.

19 THE CHAIRMAN: So one of the experts thinks that -- I think
20 she can identify the two grey dots, and they are thought
21 to be specific wind farms rather -- this is not EY's
22 proprietary data, these two dots. These, we think --

23 MS DAVIES: It is EY's proprietary data relating to specific
24 wind farms, but what she has done is looked at
25 publicly-available data by reference -- but relating to

1 wind farms, and correlated the -- sought to correlate --
2 the timing and also the -- a level of cost.

3 THE CHAIRMAN: I see. So, that really does join the dots.
4 Because I did not quite understand the link between the
5 proprietary data and the two wind farms, but you have
6 explained that now. There has been an attempt to
7 reverse-engineer the proprietary data into specific wind
8 farms.

9 MS DAVIES: What we have got through the DESNZ disclosure
10 are the cost submissions that were made in relation to
11 the four green dots. We do not have the Ernst & Young
12 proprietary data for obvious reasons, because presumably
13 that was not provided to the Government, so she has
14 necessarily had to look at publicly-available data in
15 relation to wind farms coming on-stream and say, well,
16 looking at the wind farms coming on-stream, I think it
17 is these two. Now, she is the only one who has done
18 that, but all of the experts for the aligned parties are
19 agreed as to which of the four, and in response to the
20 point you put to me, sir, what this demonstrates is they
21 did have detailed cost information from -- which they
22 used in relation to six wind farms. What they did not
23 have was the other side of the equation. What they did
24 not have were what the wind farm's own view as to the
25 required rate of return in order to generate the

1 investment was. They did not have the wind farm's own
2 view as to what the future power curve was going to look
3 like, so what was the extent of the shortfall that
4 needed to be filled by the subsidy. They did not have
5 the wind farm's own views as to their likely export
6 percentages, so what amount of wind were they actually
7 going to generate. Those were the things that Ernst &
8 Young had to make assumptions in relation to, and
effectively what you see through this process is

14 THE CHAIRMAN: So, for example, give a lower rate of return
15 to the equity --
16 MS DAVIES: Yes.
17 THE CHAIRMAN: -- or estimate higher electricity generation.
18 MS DAVIES: Yes. Exactly. Exactly. The reason I have
19 spent a bit of time labouring all that is that even if
20 you take at its mathematical highest my learned friend's
21 case, which is that the Ernst & Young levelised base
22 case will have been reduced to 140, you still get Ernst
23 & Young recommending a figure that is above 2. In fact,
24 it becomes 2.4, even if you assume that is what would
25 have happened, and what it would still, in our

1 submission, have then been doing is saying, well, our
2 base case is 2.4, but we know that industry is asking
3 for two, and as I said at the outset, that does not
4 change in the counterfactual on the basis of the
5 evidence before the Tribunal, so we are also going to
6 assess whether or not that two makes sense, and yes,
7 there are these other -- you can make these other
8 assumptions that are more favourable than our base case,
9 it does not matter which one it is for these purposes,
10 two could make sense.

11 So we do submit that one of the tenets underlying my
12 learned friend's case which is with a reduced levelised
13 cost of £4, the Ernst & Young report would have been
14 recommending banding of only 1.9, represents a
15 misunderstanding in our submission of what Ernst & Young
16 were being asked to do and were doing, and the context
17 in which all of this arose, and that is why we submit
18 that when you actually look at all this in the round,
19 what you would have found is, actually, an answer which
20 was still above two, and a base case of 2.4 at most.

21 Now, it is common ground between the experts that
22 there is no evidence that the Government performed its
23 own levelised cost analysis in addition to that carried
24 out by Ernst & Young. That is paragraph 30, or, sorry,
25 proposition 30 of the joint memorandum,

1 {ROC-D-IC/11/51}, indeed, as we will see, there is no
2 reference to any other analysis of costs other than the
3 Ernst & Young estimate in any of the subsequent
4 documents. So, whilst my learned friends assert, for
5 example, at paragraph 7 of their written Opening, that
6 the Government took into account both Ernst & Young's
7 estimates and cost information relating specifically to
8 what they describe as the three key projects, insofar as
9 that is seeking to suggest something over and above the
10 Ernst & Young estimates, it is not clear to us what that
11 is meant to be a reference to. There is nowhere in this
12 document a separate analysis of the levelised cost for
13 the three wind farms that my learned friend's expert,
14 Mr Druce, suggests were key.

15 We looked a little while ago at the 20 February
16 ministerial submission. The next one in time is the one
17 that my learned friend went to this morning at
18 {ROC-E/99/1} of 11 March 2009. We agree with my learned
19 friend that this is an important document. It is, in
20 fact, the most clear record we have of the Government's
21 decision-making ahead of the issue of the consultation,
22 but there are a few points I wanted to emphasise in
23 addition to the points that my learned friend took you
24 to, in particular, if we could go to paragraph 11 on
25 page 3, {ROC-E/99/3}, my learned friend drew attention

1 to the levelised cost figures in the first bullet, but
2 we would also just emphasise the sentence -- the
3 penultimate sentence before that:

[REDACTED]

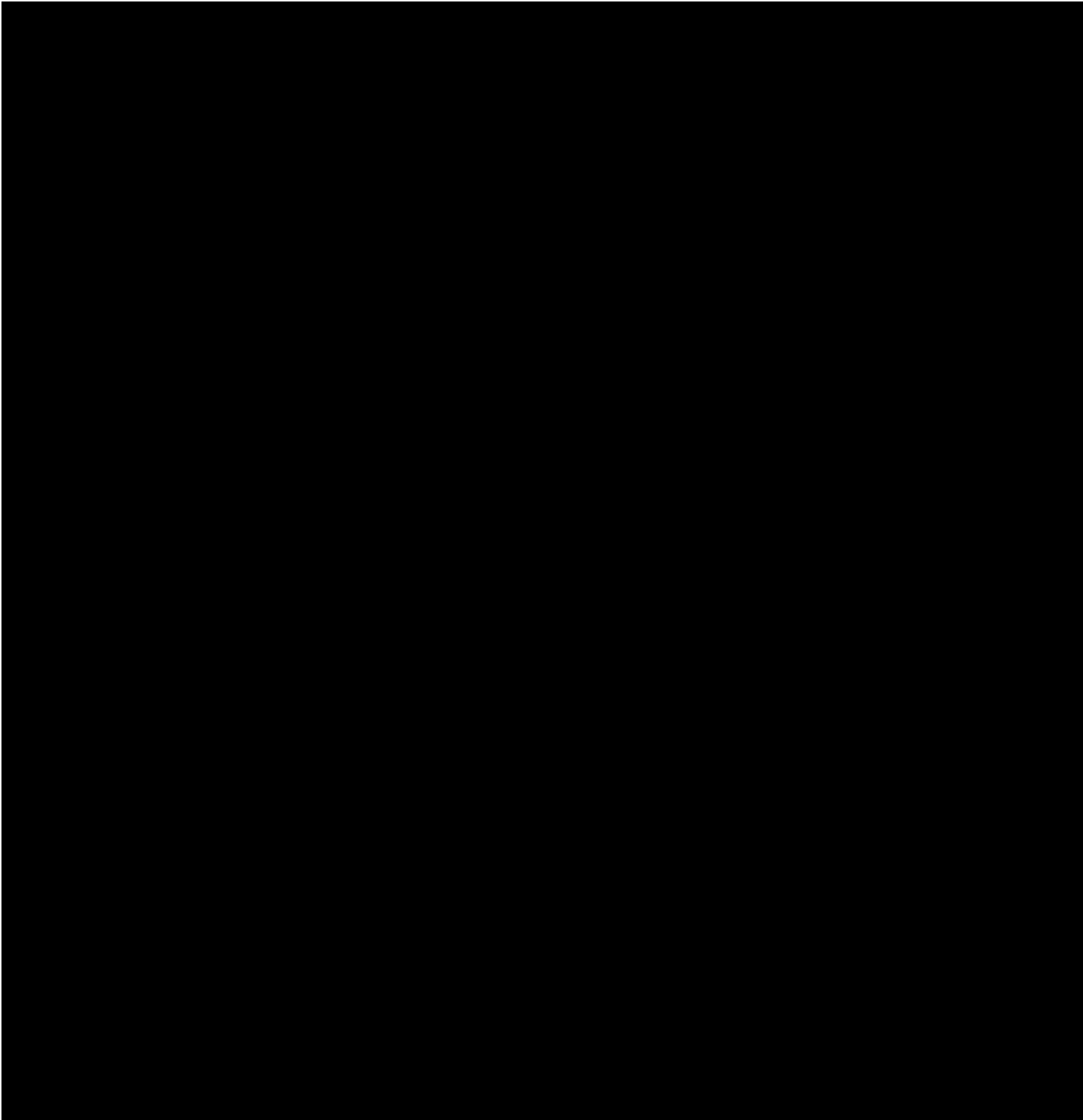
7 That is, of course, consistent with the point I was
8 making earlier, that they were looking to set it at a
9 level above what they thought the base case costs were
10 because they did not want to -- because they needed to
11 incentivise the development of offshore wind, and then
12 if we could look at paragraph 18 on page {ROC-E/99/5},
13 question is not a paragraph, I think, that my learned
14 friend took the Tribunal to this morning, having
15 concluded that there is a case for investigating options
16 for additional support to offshore wind, they refer to

[REDACTED] the fact that [REDACTED]

[REDACTED]

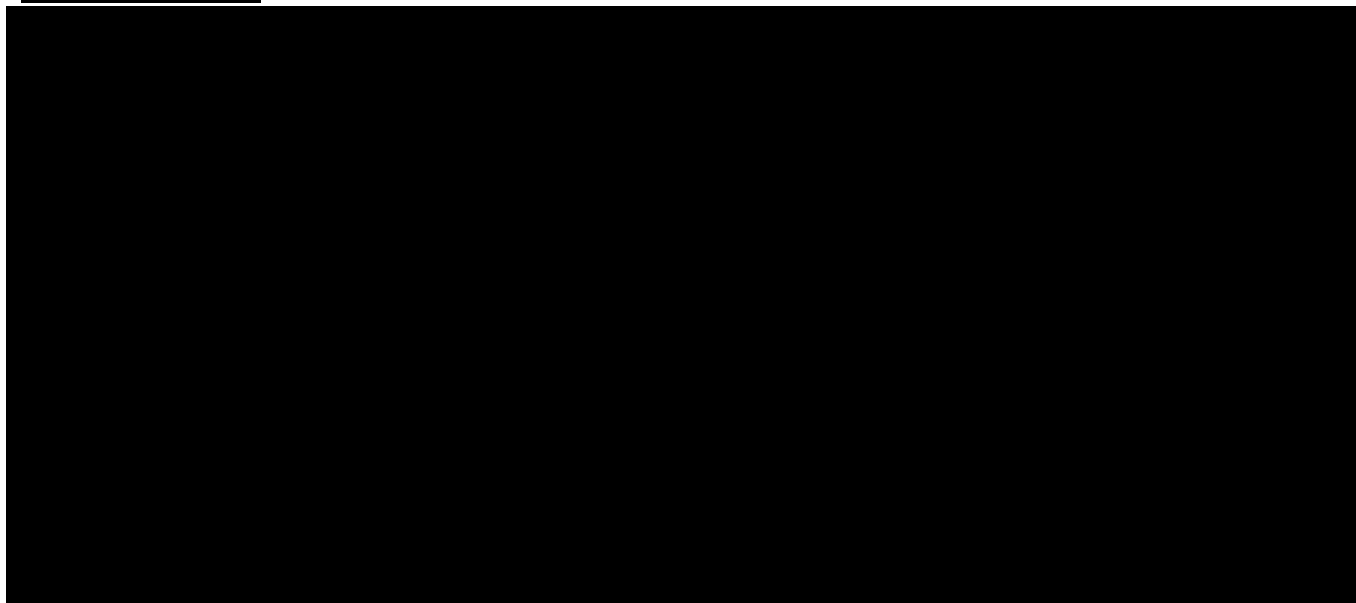
[REDACTED], and then what you see is them summarising
[REDACTED] the findings of [REDACTED]

[REDACTED]

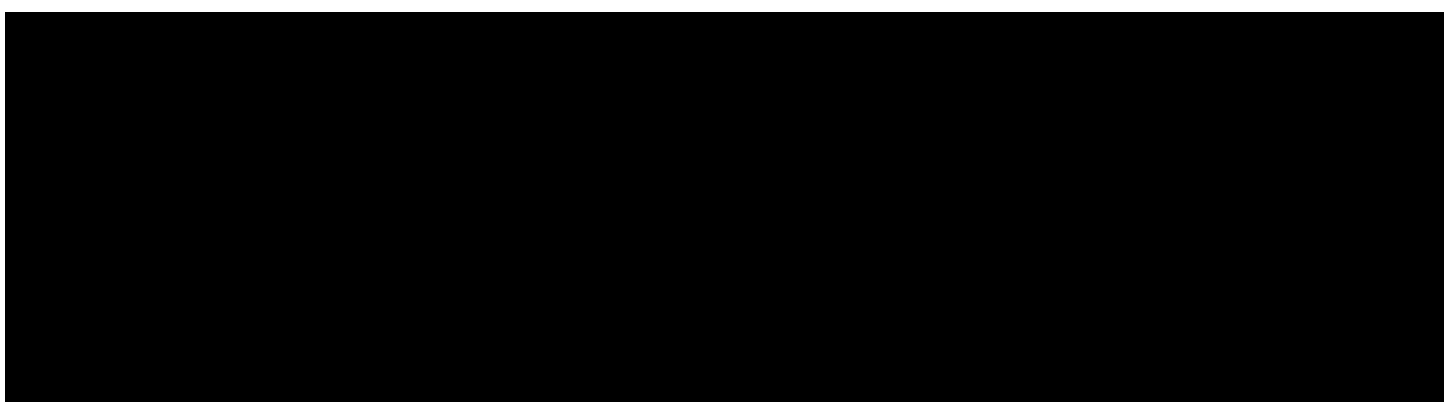


23 So those are indications where the Government had
24 information itself which was more favourable as regards
25 the revenues that would be generated, aside from the ROC

1 regime, than were underpinning the Ernst & Young base
2 case, and so if we turn over the page on paragraph 19
[redacted] {ROC-E/99/6}, that the basis on which [redacted]



13 Now, just whilst we are on this document, if I could
14 just pick up one other point in relation to paragraph 29
15 on the next page at page {ROC-E/99/7}, what is also
16 significant to note is that at this time, so this is
17 [redacted]



[redacted], we see in
[redacted] paragraph 29, so they then suggested an [redacted]

[REDACTED]

6 There was not material available, suggesting that a

[REDACTED] drop in costs equivalent to [REDACTED]

[REDACTED]

[REDACTED], and


13 then finally, my learned friend highlighted paragraph 31

[REDACTED] as indicating that it was recognised that [REDACTED]

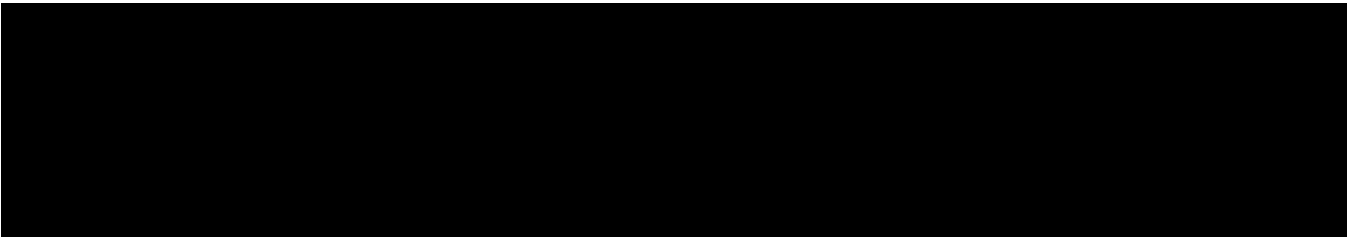
[REDACTED]

[REDACTED], but importantly in our

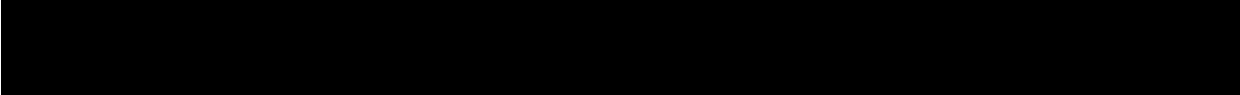
17 submission in light of the emphasis that my learned
18 friend puts on the State aid notification process, there
19 is no suggestion in this document of any concern from a
20 State aid perspective that would undermine what was
21 being proposed, or any suggestion that to justify the
22 proposal to the Commission, DECC would need to come up
23 with some sort of magic margin or a margin that was less
24 than 5 per cent or anything like that, and we say that
25 is all unsurprising because by this stage, March 2009,

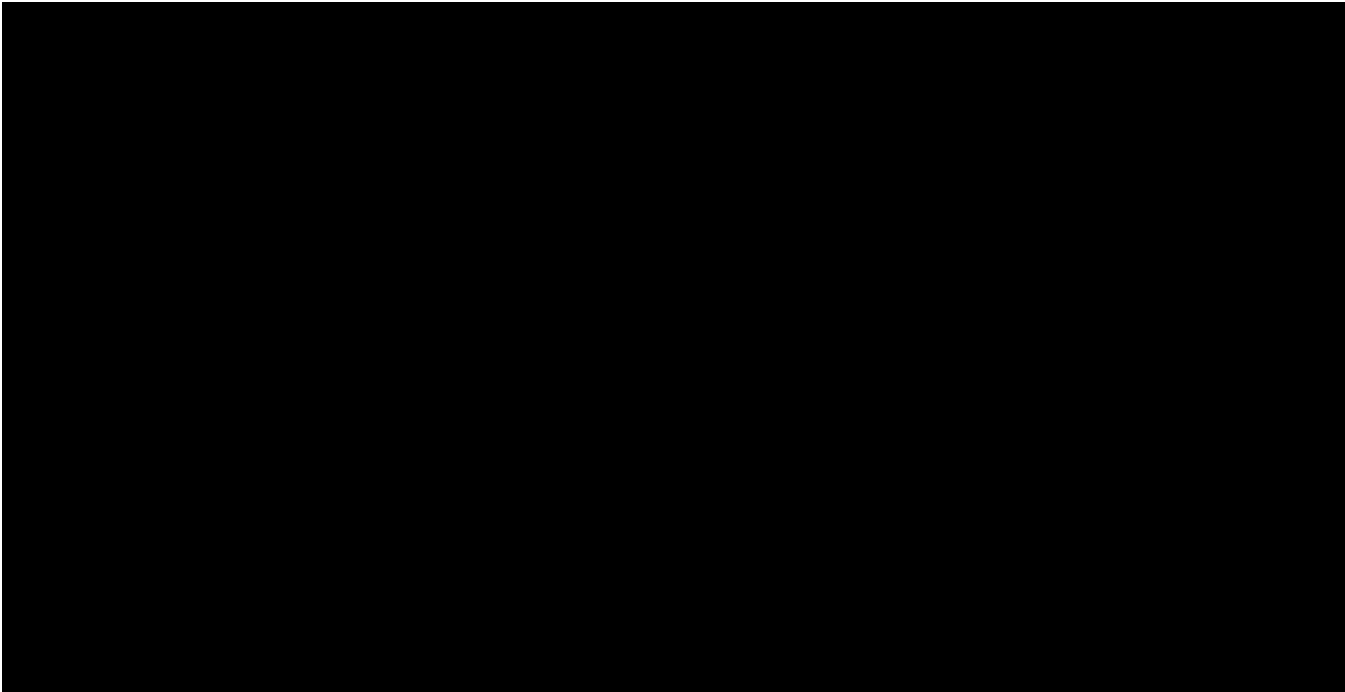



10 That then subsequently changed to the date of
11 accreditation, and that meant an even wider range of
12 wind farms were thought to be potential beneficiaries of
13 the policy, a point I just flag again because of
14 Mr Druce's approach and my learned friend's approach of
15 saying this was all focused on three key wind farms. It
16 was not. It was a broader approach. That is why Ernst
17 & Young looked at generic costs, a range of costs.

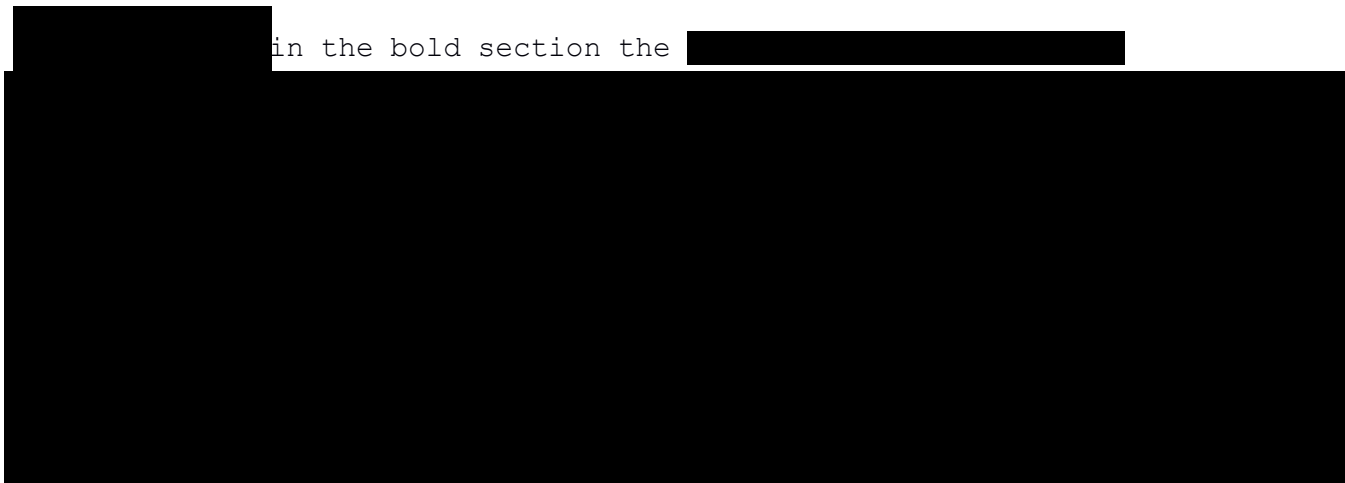


That happened. We have covered that at
22 paragraph 28 of our Skeleton, but it is important to
23 note that the contact was not just limited to the three
hat Mr Druce highlights,

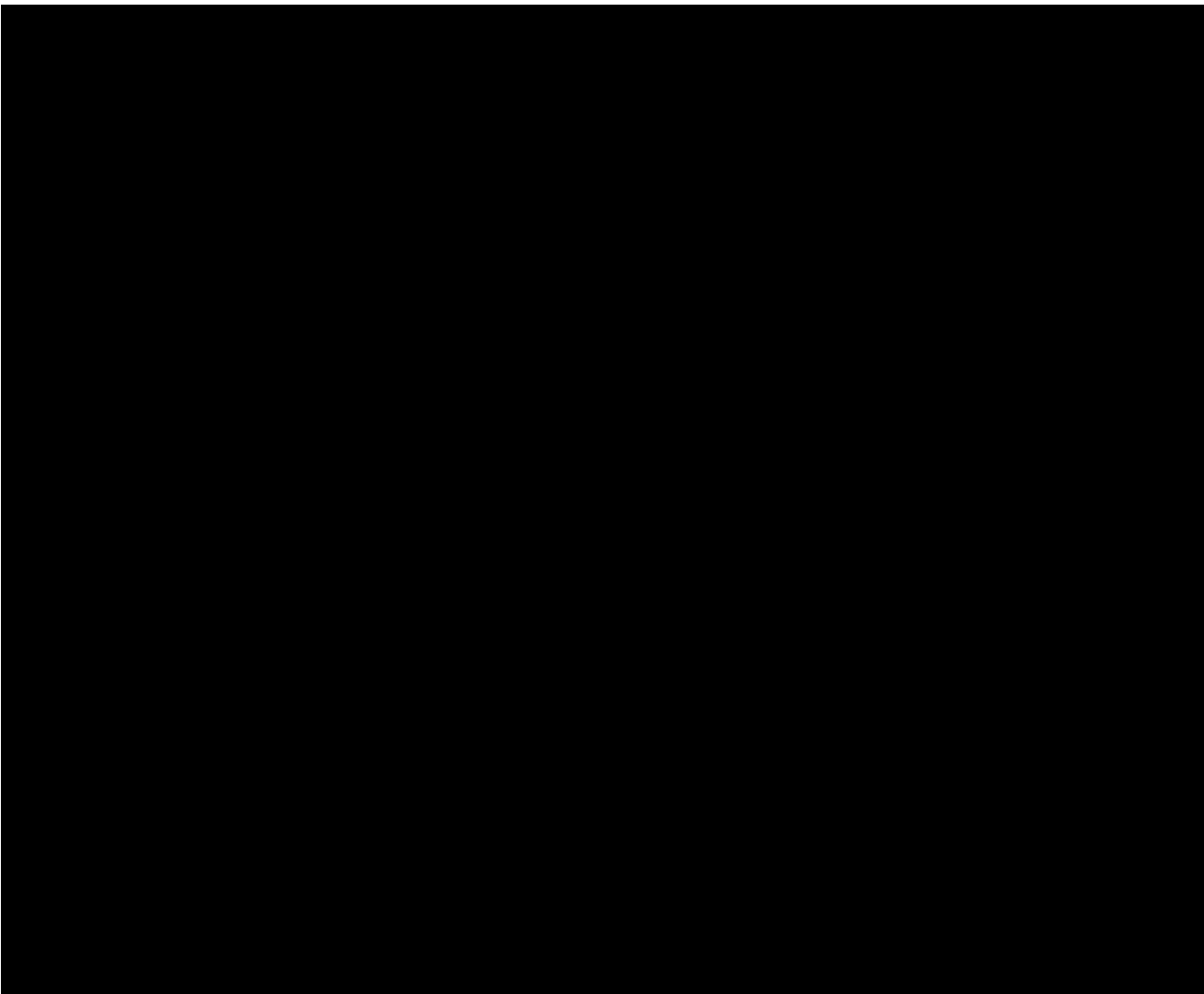




11 My learned friend referred to the fact that the
12 Government analysis was considered by the Renewables
13 Advisory Board. That report had to be published as part
14 of the consultation, and if I just quickly show the
15 Tribunal a couple of paragraphs in that, it is at
16 {ROC-E/122/1}. Sorry, that is the wrong reference.
17 {ROC-E/128/1}. The Tribunal sees at the top of the page
in the bold section the 



25 We can see at paragraph 1.9 on page {ROC-E/128/3}

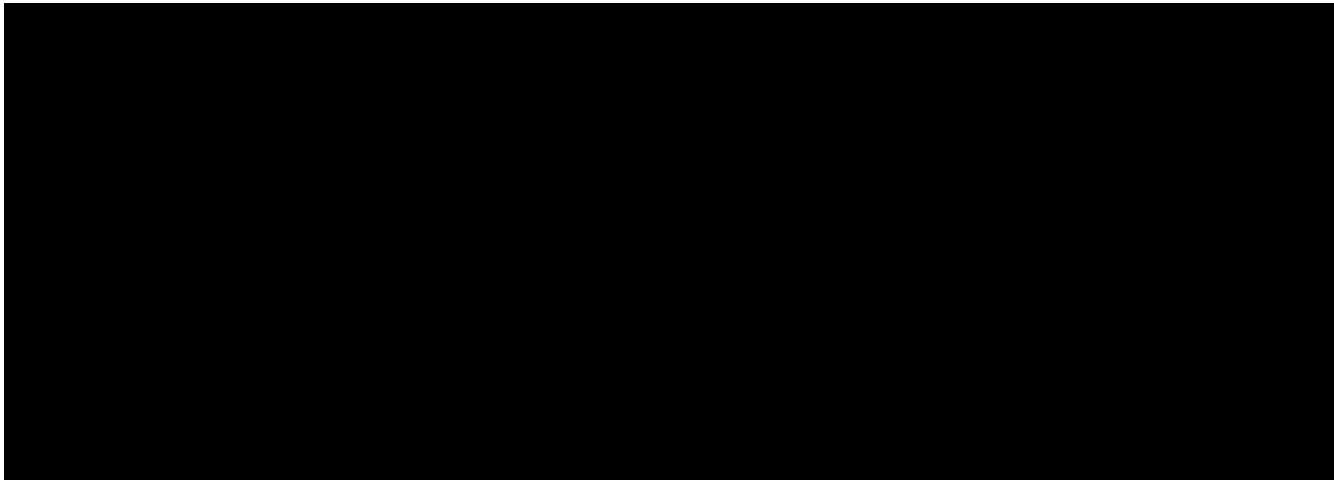


It

17

is not saying that is overstated, and that 2.17 on page

{ROC-E/128/7}, they noted that

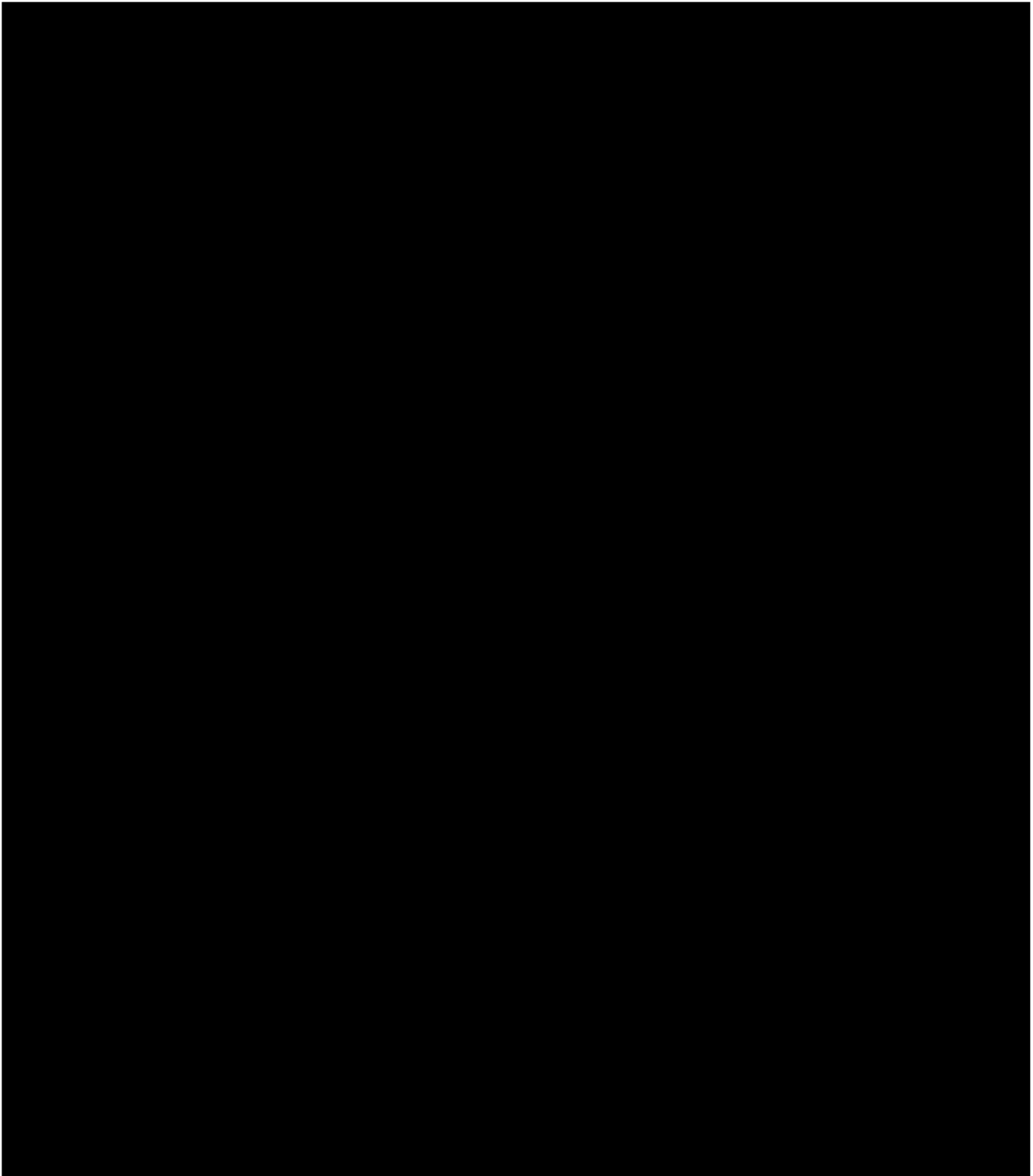


1 [REDACTED] and
2 so they believe there is a considerable uncertainty over
3 the past of future costs, so that is where they are
4 saying you do not have the material to support the step
5 down to 1.75, we do not have that material, as they
6 conclude in 2.15, and then importantly over the page at
7 paragraph 3.3 {ROC-E/128/8}:

13 In our submission, set in the context which I have
14 sought to explain, there is absolutely no basis for
15 concluding that that recommendation from the Renewable
16 Advisory Board would have been different in the
17 counterfactual which is an important part of the
18 statutory process.

19 What then followed was the consultation process that
20 we have summarised in paragraphs 33 to 35 of our
21 Skeleton. The only factors -- just to draw out of the
22 consultation process -- is -- we can see for present
23 purposes, is from the Government's response to the
24 consultation dated 1 December 2009 at {ROC-E/135/1}. If
25 we start at page {ROC-E/135/9}, just to show the

1 Tribunal the wide range of responses that were received
[REDACTED] in this consultation process, [REDACTED]



[REDACTED]

2 1.9, which is what my learned friend's primary case
3 is, is broadly equivalent to 2. 1.9 is roughly
4 equivalent to 2. So, is 2.1, but the point is, in our
5 submission, the outcome of this consultation would have
6 been precisely the same as well. 2 was thought to be
7 about the right level.

8 PROFESSOR ANTHONY NEUBERGER: Can I just check I have got
9 something right because as you told the story I get the
10 impression that costs rise and you realise that the
11 level previously was inadequate but there seems to be a
12 general broad acceptance accepting the vagueness of the
13 figures and imprecision of the figures, that the basic
14 objective is to keep the level of support roughly in
15 line with the perceived level of costs. Is that correct
16 inference from the story you have been telling?

17 MS DAVIES: I would certainly accept that one of the
18 considerations the Government had in mind was the cost
19 to consumer and for that reason it did not positively
20 want to over-compensate a developer, and the reason I
21 put it this way in answer to your questions, it all
22 depends by what you mean by "roughly", because if
23 "roughly" means a percentage that is within the range of
24 the costs and bearing in mind the inherent
25 uncertainties, and bearing in mind, as I am going to

1 shortly show the Tribunal, the Government clearly were,
2 at this point, wedded to -- or using banding
3 granularities of 0.25 for other reasons, if "roughly"
4 means whatever that -- the banding level above the
5 revenue is that gets that level of cost covered, yes, as
6 opposed to the next banding level up.

7 PROFESSOR ANTHONY NEUBERGER: I am thinking of it in
8 comparison with other renewables where they seem to be
9 saying, look, it is too expensive, we're not trying to
10 match that. From what you are saying, and the things
11 you've pointed us to, you seem to get a picture with
12 everybody involved seeming to accept that the important
13 thing is that to meet the renewables obligation the
14 offshore wind has got an important -- very important
15 role to play and that as the costs of offshore wind have
16 grown rapidly, therefore more or less -- not
17 precisely -- you can't measure everything exactly and
18 you have an overall system -- but broadly speaking the
19 level of renewables support ought to match the level of
20 costs --

21 MS DAVIES: Broadly speaking the level of renewable support
22 ought to be sufficient to enable offshore wind projects
23 to be developed which is why they needed to check with
24 the developers that two was going to be enough against
25 the context of Ernst & Young's base case actually being

1 higher, so it is not matching -- I slightly quibble with
2 the word "matching". They were seeking -- of course one
3 of the considerations was a desire not to
4 over-compensate, and that is something that the European
5 Commission was also looking at, and we are about to come
6 to, perhaps after the break, the full extent of the
7 exchanges in relation to the margin which is quite
8 important, and are, in some senses, the most important
9 documents the Tribunal needs to look at, but what they
10 were -- but what, equally, was in play was a recognition
11 that offshore wind was important to meeting the
12 renewables targets, and they therefore had to ensure
13 that the level was set at a sufficient level to
14 incentivise investment, but they did not want to
15 overcompensate, because obviously they could have gone
16 for the Ernst & Young base case of 2.5. They could have
17 gone all the way up there but they equally knew that the
18 developers were saying, well, two might suffice, right
19 from the outset of the process, as I have shown you, and
20 so giving 2.5 on the basis of what Ernst & Young had
21 said would be an obvious potential for overcompensation,
22 hence checking whether you can sensibly understand how
23 two works, so that you can be confident that you are
24 going to get sufficient levels of development on the
25 basis of two which they then checked with the wind farm

1 developers as well.

2 Would that be a convenient moment?

3 THE CHAIRMAN: Yes. We will come back at just before twenty
4 five past.

5 (3.19 pm)

6 (A break was taken)

7 (3.27 pm)

8 THE CHAIRMAN: Yes, Ms Davies?

9 MS DAVIES: When we broke, we had just been looking at some
10 passages in response to the consultation dated 1
11 December 2009 and the other point just to note about
12 that document is that it is the document in which the
13 Government indicated that it has changed its position on
14 eligibility and moved to the date of accreditation, not
15 the date of the turbine contract, and as we highlight in
16 the final sentence of our Skeleton at paragraph 35, in
17 light of those new criteria more wind farms stood to
18 gain from the change to the two ROC banding level. It
19 is at least 12 or possibly 15. There is a list in the
20 document at {ROC-E/134/6} which was produced around the
21 same time, for the Tribunal's note.

22 The next topic I then wanted to turn to was the
23 European Commission's scrutiny of the proposals.

24 [REDACTED] Now, my learned friend took you to the [REDACTED]
25 [REDACTED] at {ROC-E/130} from [REDACTED], and that

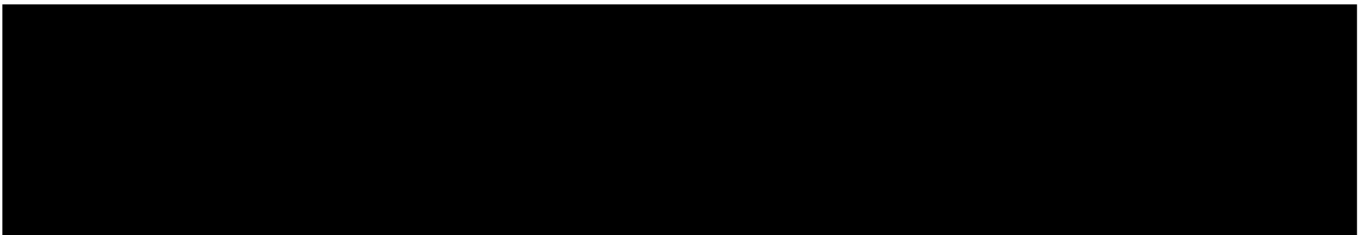
1 is the version that the experts refer to in proposition
[REDACTED] 70 of the joint memorandum, [REDACTED]



16 So I was proposing to go to the December document
17 rather than the October document, but I will summarise
18 the changes to the notification because some of them are
19 of relevance in light of the points that my learned
20 friend makes.

21 Before I do that though, I should just recognise

[REDACTED] that although the [REDACTED]



[REDACTED] and, in particular, if we look at

[REDACTED] {ROC-E/136/1}, at page 3, [REDACTED]

[REDACTED]

15 That led to some exchanges, including, if we turn

[REDACTED] back to page 1, an [REDACTED]

[REDACTED]

23 So, what he is indicating there is you shouldn't

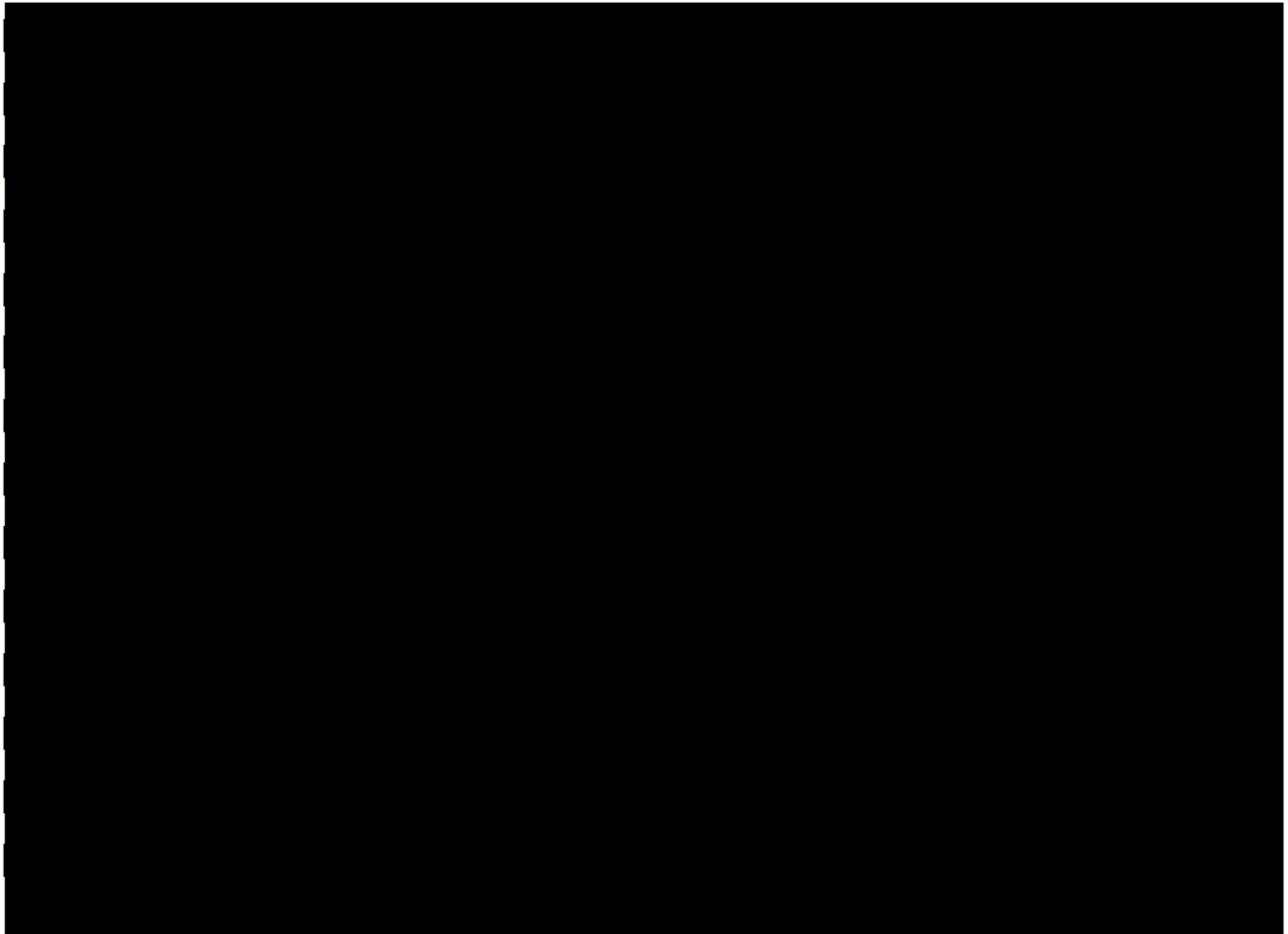
24 just look at the specific pinpoint figures, and as we

25 will see that is what the Government ultimately says to

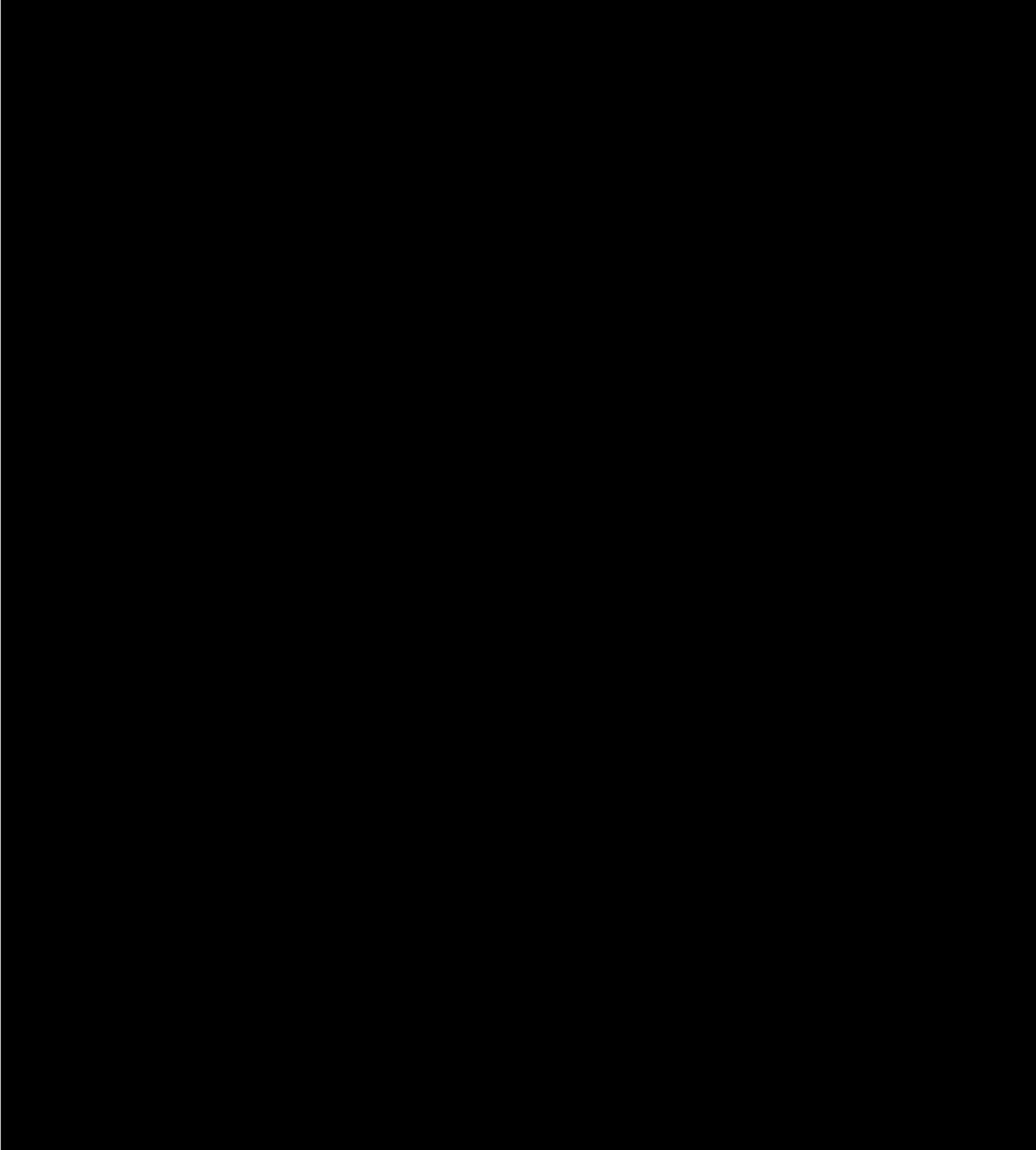
1 uncertainty in the exercise the Government was
2 conducting, and the email I have just shown the
3 Tribunal.

4 It also included further commentary on the basis for
5 the revenue projections and a list of the annexes in the
6 annex of the wind farms that it was thought would
7 benefit, so if we go to that document at {ROC-E/138/1},
[REDACTED] the section relating to the [REDACTED]

9 [REDACTED] starts at page {ROC-E/138/6}. The
10 Tribunal immediately sees in the second paragraph
[REDACTED] reliance on [REDACTED]



1 12 {ROC-E/138/12}, which is new commentary compared to
2 the [REDACTED], it is explained that:



1

3

[REDACTED]

[REDACTED]

All of that, in our submission, shows, unsurprisingly, given that the Government's goal was clearly to seek to invest -- incentivise investment in offshore wind, that the Government was concerned to set the banding level at a level which would be anticipated to produce revenues exceeding the central estimate of costs, so coming back to the point that was put to me earlier. They wanted to ensure that enough investment would be forthcoming.

12

My learned friend showed you in the [REDACTED] the passages of the document relating to [REDACTED] which are replicated in this document starting at page 14 and, in particular, at page 16 in [REDACTED] and then at annex -- page 18 [REDACTED] and following, we have [REDACTED]

19

[REDACTED]

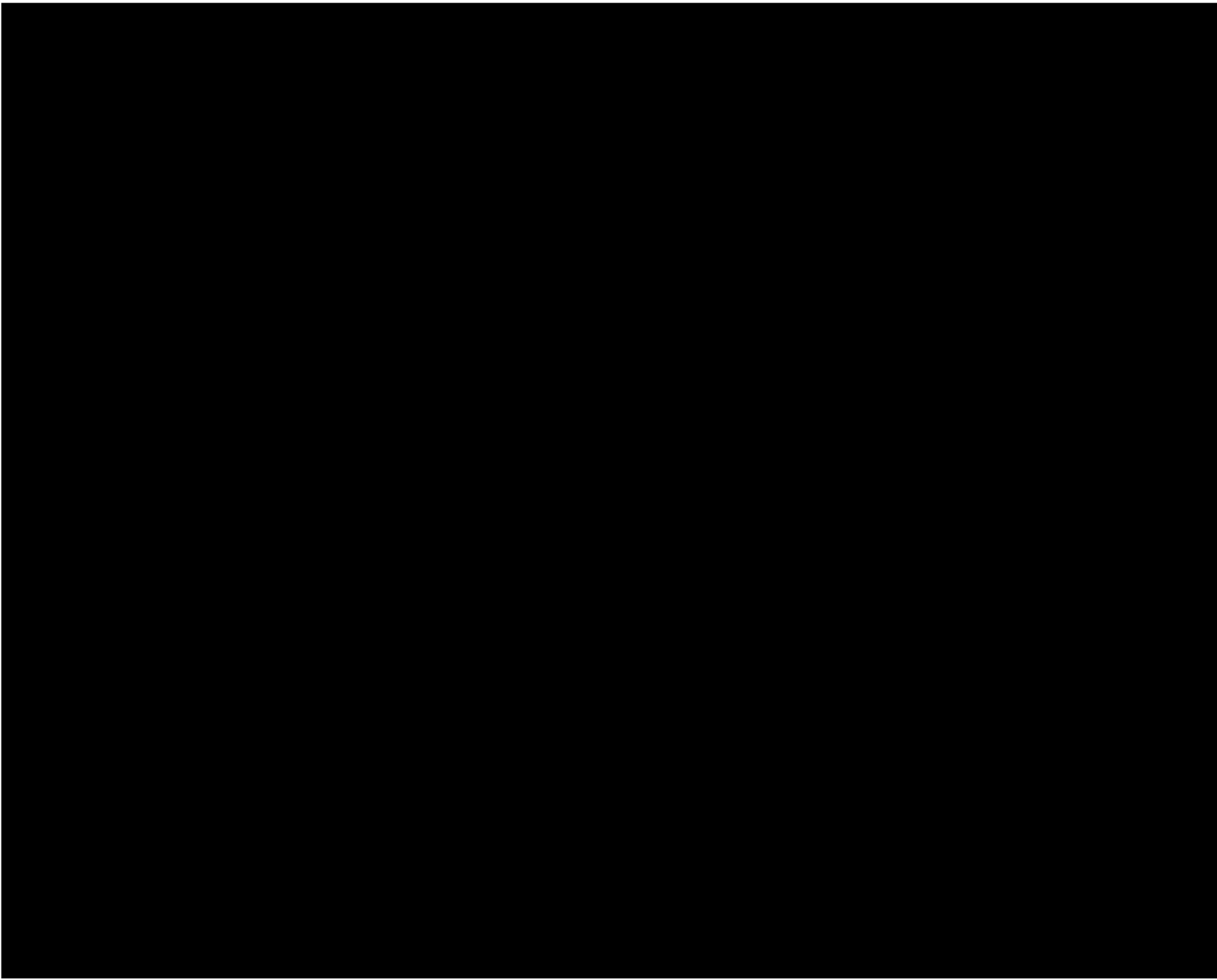
{ROC-E/138/18}.

20

Now, as my learned friend explained, following this, it is clear that the European Commission raised a number of questions, and my learned friend took you to some of the answers to the questions that the Government then drafted, but in our submissions it is important to look at the full range of the answers that the Government

25

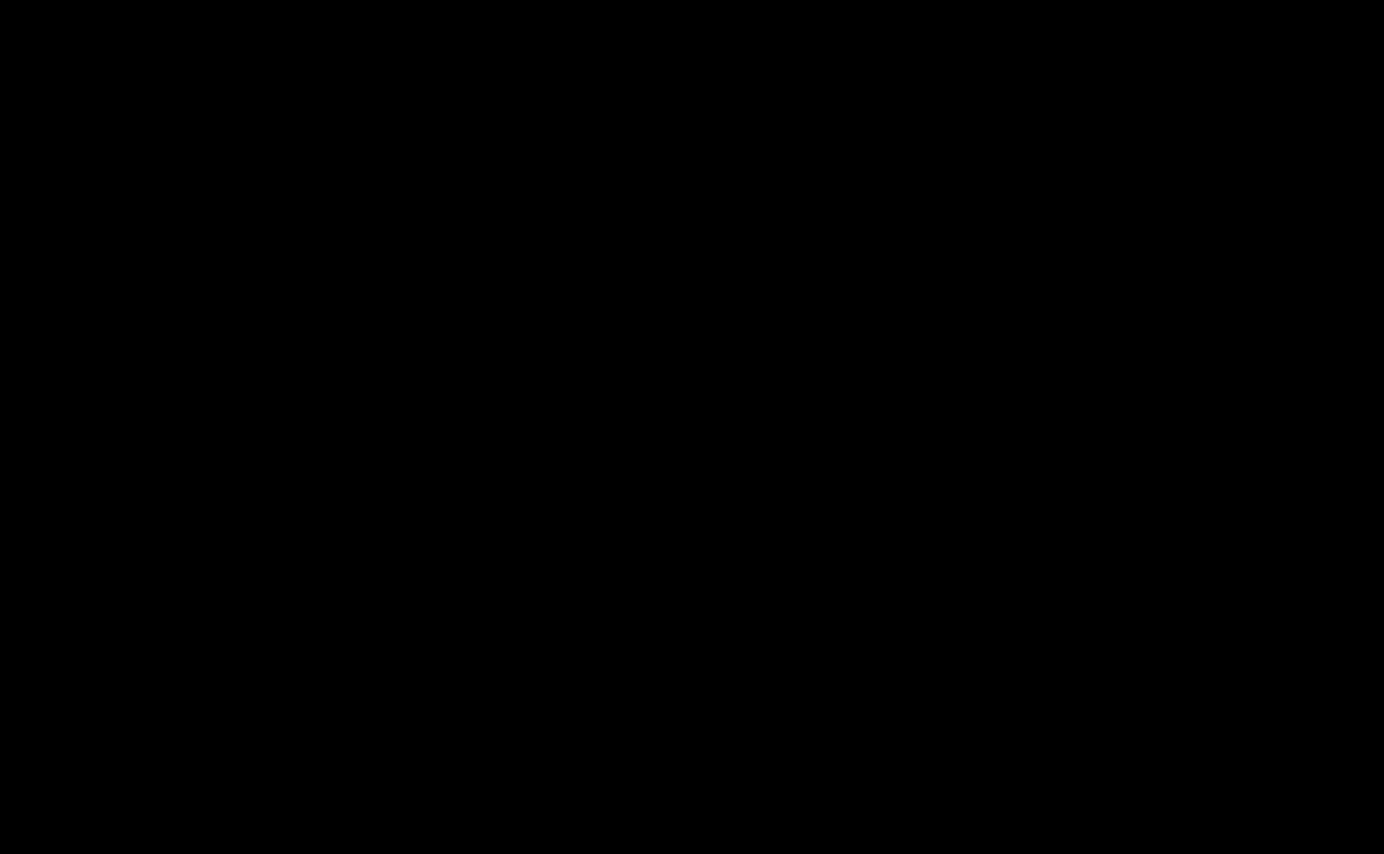
1 produced, and if I could start with the document my
2 learned friend went to, which is at {ROC-E/140/1}. This
[REDACTED] is a [REDACTED]
[REDACTED] and if we start at page {ROC-E/140/3}, the
5 response to question 6:

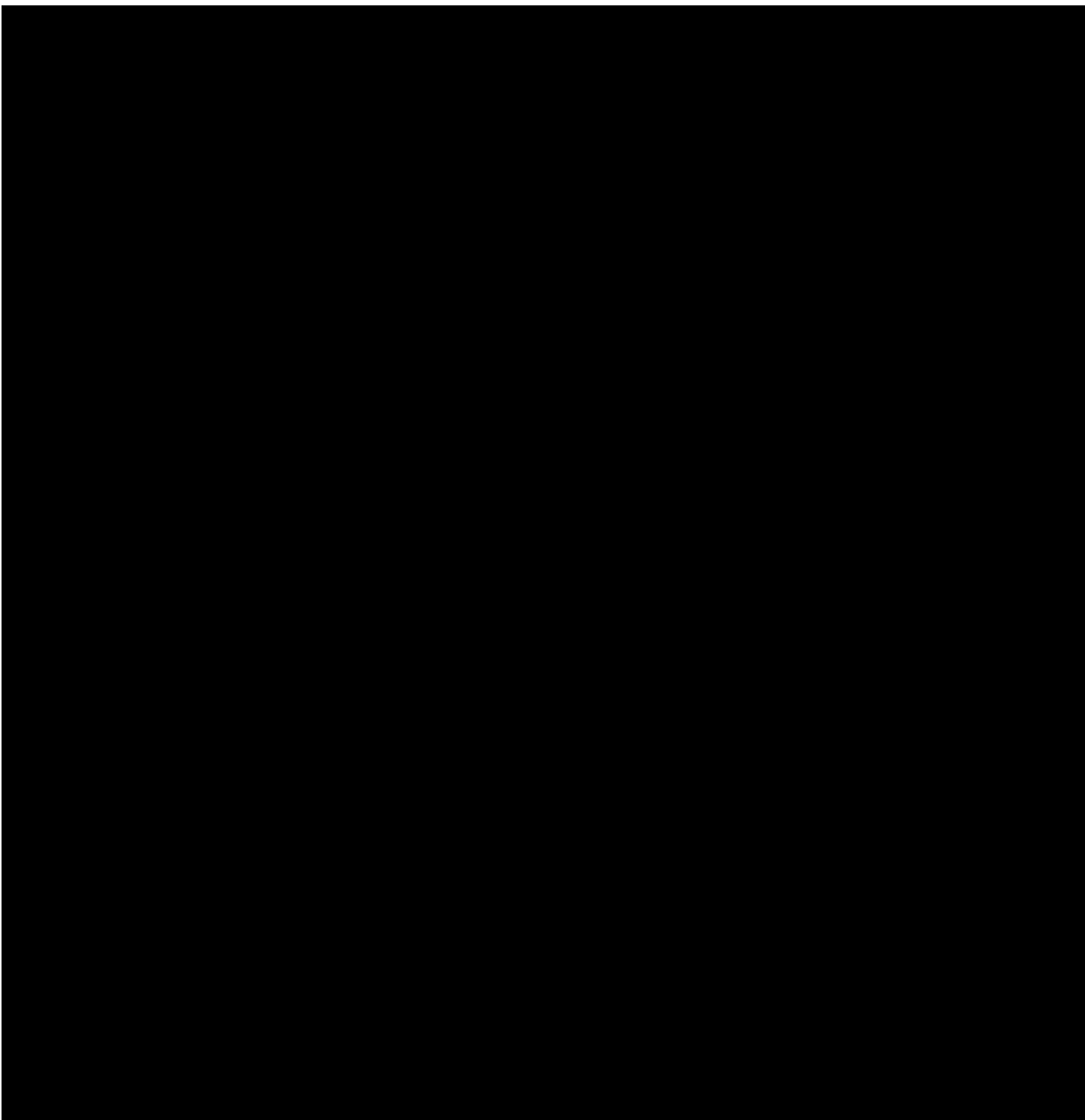


21 Now, that sentence is in square brackets. We do not
22 have the final version of the Q&A, so we do not know
23 whether or not those words were actually provided to the
24 European Commission, but what this does demonstrate is
25 the importance in the Government's mind to the

1 generators having said that 2.0 ROCs were needed for the
2 projects under threat to proceed, along with the other
3 factors we consider when setting band levels, including,
4 picking up the point that Professor Neuberger raised
5 with me just before the break, limiting the cost to
6 consumers by avoiding over-compensation.

7 So, this is a multifaceted decision, competing
8 factors one way or the other, but they are bringing to
9 bear, but they include that the Government has got
10 slightly more optimistic views about certain of the
11 revenues, but also that the wind generators were saying
12 2.0 ROCs were needed, and then in 7, the Commission
13 asks:





■ [REDACTED] It is subject to a
23 very high degree of uncertainty, and insofar as our
24 original October document, just referring to that
25 document -- to that figure -- suggested that we had some

1 sort of degree of confidence in it, that was

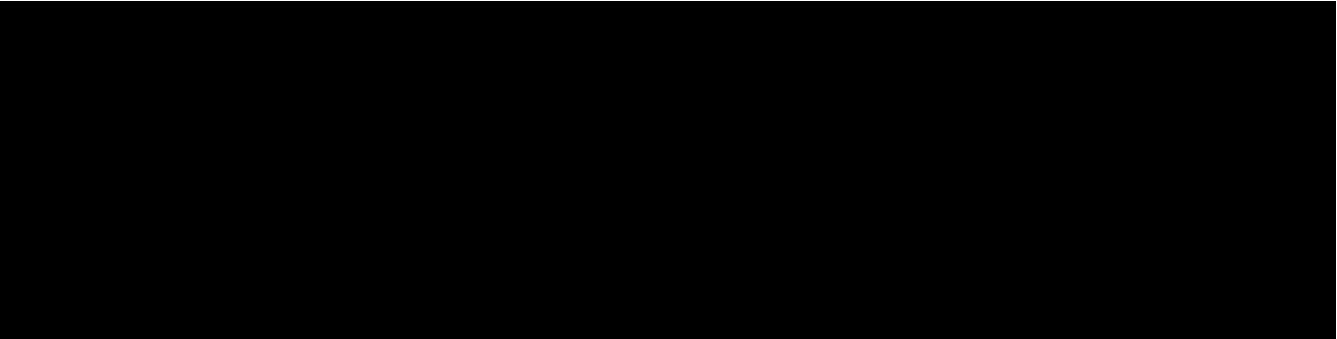
unintentional. That is what they are saying.

7 That uncertainty is then what feeds into the answer
8 to Question 11 which my learned friend did take you to,
9 where the European Commission is expressly asking about
10 the difference between -- about the central revenue
11 figure and the central levelised cost figure, and the
12 first answer that the Government give in the second
13 paragraph is uncertainty:

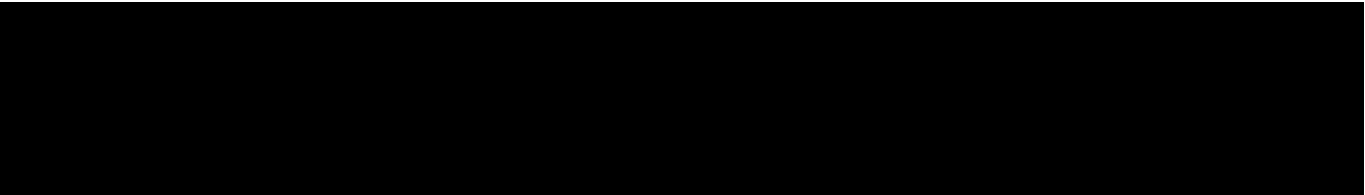
15 That is a reference back to Question 7, the answer
16 to Question 7:

20 These are not pinpoint estimates. This is not a
21 purely mathematical exercise where you are looking at
22 what the difference is between those two and
23 saying "that gives a margin of 3.47 per cent, that seems
24 okay and that is what we're going to allow".

25 Our calculations, and they go on:



6 Just stopping there, that is another indication that
7 the Government was looked at this in banding increments
8 of 0.25. It was comparing what the two positions were
9 between 2 and 1.75. It did not address 1.9 at all, and
10 then importantly:



14 Again, another indication that in the actual the
15 Government was looking at this in term of banding
16 increments of 0.25 for reasons that it specifically
17 identified in terms of increasing administration costs
18 and increasing complexity, and my learned friend's case
19 of a move to 1.9, therefore, as I said at the outset,
20 necessarily assumes that in the counterfactual the
21 Government would have been persuaded that its concerns
22 about increases in administration costs or increases in
23 complexity no longer led to the conclusion that you
24 should have banding increments of only a quarter of a
25 ROC.

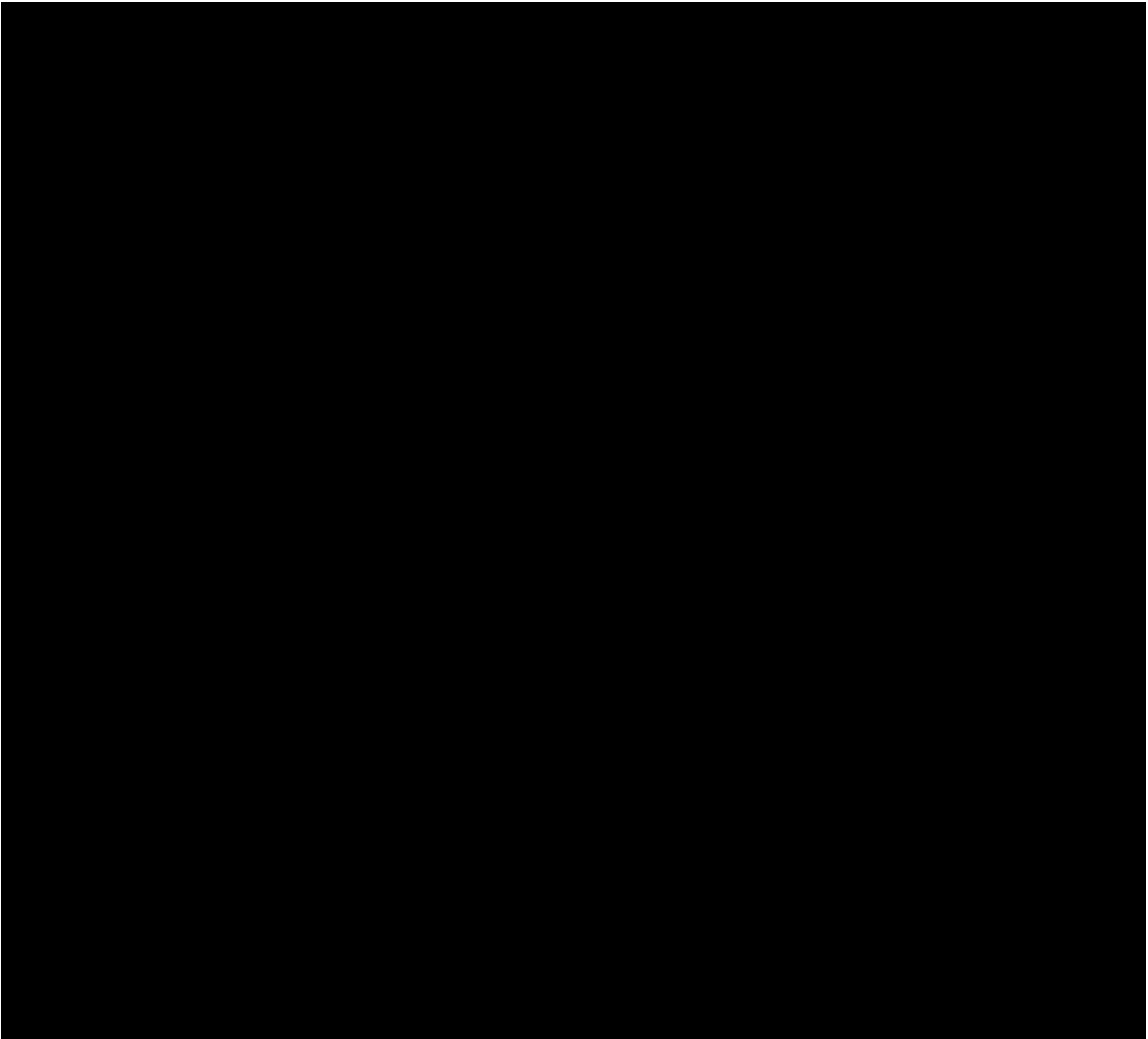
1 THE CHAIRMAN: Do we have some indication what these
2 increased administration costs would be? Because
3 from -- I am sure it is an entirely untutored
4 perception -- if you had a new band at 1.9 you just have
5 to multiply megawatt hours by 1.9. It is not more
6 difficult than multiplying by 2 or 1.75. Do we have any
7 clue in the evidence as to what these extra costs would
8 be?

9 MS DAVIES: My learned friends for the Class Representative
10 have not adduced any evidence from the Government at
11 all. They are simply implying from documents that the
12 Government would have adopted a different approach. The
13 Tribunal is going to hear from Mr McNeal who is being
14 called by my learned friend Mr West, but he was not
15 involved in the 2009 or 2010 Renewal Obligations orders.
16 He was only involved in the later one in 2013. It may
17 be that he could explain this more. What is important
18 for my purposes is you have a clear indication from the
19 Government that it was concerned about those two factors
20 and we have nothing to indicate why those factors would
21 have fallen away in the counterfactual.

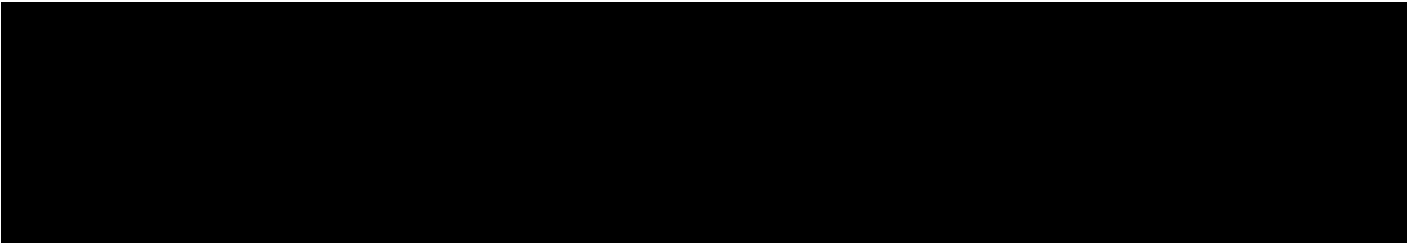
22 Now, the Commission's response to this, initial
23 response to this, we can see from the next tab at tab

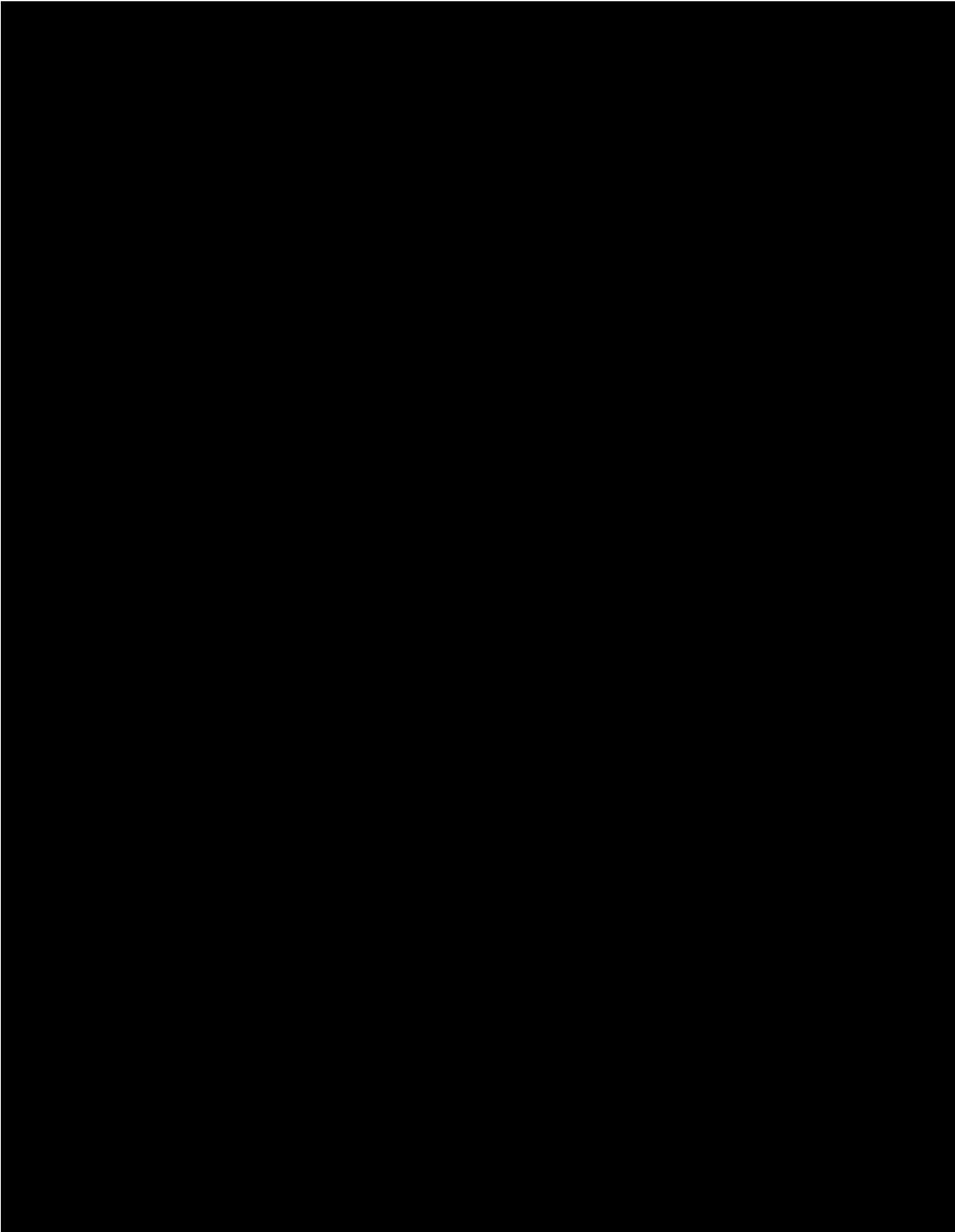
140.2, page 2, [REDACTED]

[REDACTED]



20 [REDACTED] If we look at the additional
21 text in red we can see that what the Government is
22 saying is that:





1 So to come back to the point that Professor
2 Neuberger was asking me about matching, what this
3 demonstrates very clearly is that the Government were
4 not seeking exactly to match, they were utilising
5 banding levels and ensuring that the level of the
6 banding level was above what they thought the costs were
7 that needed to incentivise investment, and they
8 expressly refute the suggestion of moving to more
9 precise banding levels, in other words reducing the
10 levels of increments from 0.25 which is what they were
11 using, for two reasons. The first is indicating an
12 overly high degree of confidence in the accuracy of the
13 cost and revenue forecasts. The second comes back to
14 administration costs. Both of those factors would have
15 been equally applicable in the counterfactual as they
16 were in the factual. It is telling, in our submission,
17 that this document is not mentioned by my learned friend
18 in his Opening Submissions, whether written or orally.
19 It is an important document. It shows exactly what the
20 Government was thinking. It shows that they were using
21 banding increments of 0.25 for specific reasons which
22 they explained to the Commission, which -- the reasons
23 which would not change in the counterfactual, and which
24 the Commission accepted. I say "which the Commission
25 accepted" because we know that clearance was given on 30

1 March 2010, and the State aid approval decision, just to
2 finish on the documents, is at tab 143, and what's
3 perhaps interesting to note about that at page 3,
[REDACTED] paragraph 9, [REDACTED]

[REDACTED]
[REDACTED] {ROC-E/143/3},
[REDACTED]

15 Now, the final very brief topic to touch on the
16 facts before I draw all the various strands together is
17 the Renewables Obligation Order of 2013 which, as the
18 Tribunal has seen, is an Obligations Order in which the
19 Government did use banding increments of 1.9 -- sorry of
20 0.1, so they moved from the 0.25 granularity to the 0.1
21 granularity, and that is something that my learned
22 friend seeks to rely on. It is the fourth point in his
23 paragraph 87 of his Skeleton to say the Government had a
24 banding practice of 0.1 ROCs, but the key point to note
25 about 2013 is that the renewals -- that Renewables

1 Obligation Order was a decision that was made in
2 different and specific circumstances, in particular in
3 2011, the levy control framework was adopted which
4 specifically required consideration of cost, and is,
5 indeed, one of the points that Mr McNeal in his evidence
6 highlights as being relevant to his involvement in the
7 renewals obligation regime post 2010, and the second
8 point by way of context that is important to recognise
9 is by the time you get to 2013, what the government was
10 trying to do was to wean the industry off the additional
11 support that had been provided. It was always, as we
12 have seen, expected to only be temporary in the sense of
13 the higher ROC level being there for a short period of
14 time, so when it comes to the Renewables Obligation
15 Order in 2013, it is trying to reduce it consistently
16 with what it has previously contemplated. It realises
17 it cannot go down to 1.75 because that produces revenues
18 that are below the relevant estimates of levelised cost,
19 so if it is trying to reduce the support, the only thing
20 that is available to it to do is to adopt granularity
21 of -- a more precise granularity, to use the
22 Government's language, or banding increments of 0.1, and
23 that is the context, and we do, therefore, submit that
24 you cannot jump from what happened three years later in
25 a very different context to conclude that in 2010, the

1 Government would have changed the practice, which it is
2 clear from the documents in particular the answers to
3 the State aid questionnaires, the question was adopting
4 of adopting banding increments of 0.25.

5 The next topic I wanted to address is just to
6 highlight so that the Tribunal has them in mind before
7 we start the evidence, various changes in the Class
8 Representative's position since the outset of these
9 proceedings, and the reason I say that is not all of it
10 has yet been formally abandoned, so it is going to be
11 necessary to explore some of it with Mr Druce, but it is
12 important that before we get to that evidence, the
13 Tribunal has in mind how it fits into the picture, if
14 I can put it that way.

15 The first point is that having previously claimed
16 that the 2009 Renewables Obligation Order planning level
17 for offshore wind would also have been lower but for the
18 Cartel at the time of exchange of the first round of
19 expert evidence, and indeed through two further reports
20 of Mr Druce, the Class Representative finally saw sense
21 when we had -- the exchange of reply expert evidence
22 following the fourth reports of Mr Druce and the third
23 report of Mr Moselle, and abandoned any claim based on
24 the 2009 Renewables Obligation Order, and we submit that
25 in light of the documents I took the Tribunal through

1 earlier, it is apparent why the Class Representative was
2 right to do so. There clearly was no close cost
3 reflection in the grouping of different technologies
4 into bands under the Renewables Order 2009, but we also
5 submit that that abandonment very much reflects the
6 Class Representative's approach in respect of the ROC
7 Issues more generally, namely that she has consistently
8 been compelled to narrow her position in light of the
9 evidence, and we say the whole of the analysis of her
10 expert, Mr Druce, falls like a house of cards because it
11 does not have the necessary factual foundation, and that
12 belatedly appears to have largely been recognised by my
13 learned friends.

14 Little emphasis is placed, whether in my learned
15 friend's written opening or his oral submissions this
16 morning, on Mr Druce's expert views, and, in fact, there
17 is very much in my learned friend's written opening
18 which is inconsistent with Mr Druce's expert views,
19 although, as I have mentioned, as none of the topics
20 have been formally abandoned, it seems it will be
21 necessary to explore much of this with Mr Druce in his
22 cross-examination, but I do just want to emphasise by
23 way of opening certain key respects in which the Class
24 Representative appears to have recognised the
25 difficulties with what Mr Druce is saying.

1 The first, which is at paragraph 7 of my learned
2 friend's Skeleton, is the submission that there is no
3 single right answer to Question 1, so that is the value
4 of commerce. That is despite Mr Druce having identified
5 that the value of commerce of the three most expensive
6 wind farms used for the purposes of the Ernst & Young
7 analysis is the basis on which -- is the relevant value
8 of commerce on the basis that those costs, so he says,
9 determined the 2010 Renewables Obligation Order. That
10 is his response to issue 46 in the joint memo.

11 The next point is that the Class Representative now
12 appears to accept that four of the six benchmark wind
13 farms considered by Ernst & Young can be identified.
14 Those are the four green ones, whereas Mr Druce, in his
15 evidence, says the other experts are speculating about
16 the identity of those four wind farms.

17 Third, for the purposes of Question 2 at paragraph
18 78 of my learned friend's Skeleton there is an
19 acceptance which I have already emphasised that there is
20 no evidence to suggest that the developers would have
21 asked for less in the counterfactual, less than 2 ROCs,
22 whereas for the first time in the joint memorandum
23 Mr Druce sought to suggest something different. That is
24 issue 63.

25 Then turning to cost elevations, also relevant to

1 Question 2, as the Tribunal has heard, the Class
2 Representative puts her case on the basis that in the
3 counterfactual the Ernst & Young LCOE estimate would
4 have been lower by around £4, and my learned friend in
5 explaining that this morning referred to Mr Druce having
6 got that figure in the joint memo. It is true he does
7 get that figure in the joint memo, but his first two
8 reports are suggesting a cost elevation of £6.4 based on
9 his analysis of the three most expensive benchmark wind
10 farms, and they only get to that point in the joint memo
11 because he has realised that there is a major problem
12 with what he has done, in that he has taken his
13 methodology for Question 2, involves him taking away his
14 cost elevation from the three most expensive benchmark
15 wind farms from Ernst & Young's levelised cost which
16 clearly related to six, so the two are not comparable.

17 Then finally in relation to Question 2, the Class
18 Representative has only managed the briefest of
19 references to what was Mr Druce's option 1, so, first
20 option, namely a counterfactual band of 1.75 ROCs, all
21 of which then leaves the much narrower option 2 case
22 that I highlighted at the outset and in summary terms
23 sought to address, but in relation to which I would like
24 to just draw the strands together by way of conclusion.

25 The case that in the counterfactual the Government

1 would have moved to a banding level of 1.9 ROCs is
2 essentially built on two interlinked building blocks.
3 The first is that the Government's objective was to
4 subsidise offshore wind no more than necessary to
5 support the extra capacity considered vital to the UK's
6 renewable energy targets, and the second is that,
7 therefore, in the counterfactual, the increased daylight
8 between the central cost revenue -- cost estimate -- and
9 the central revenue estimate would have caused the
10 Government to change its approach to the banding
11 increments. Those are the two essential tenets, and in
12 our submission there are three key reasons why that case
13 just does not work.

14 The first is that there is -- there was, in fact, no
15 magic in the level of the margin allowed for all the
16 reasons that I have explained. It was the product of
17 applying the next highest banding increment, and
18 precisely the same in our submission would have happened
19 in the counterfactual.

20 In that respect, the cost of the three most
21 expensive wind farms are a bit of a red herring for the
22 reason that it is clear on whether one takes Mr Druce's
23 calculations of the levelised costs of those three most
24 expensive wind farms, or my expert's calculations of
25 them, on the basis of the cost data they were submitting

1 to the Government, even in the counterfactual they would
2 have needed more than 2.0 ROCs which led the
3 government -- it is what led the Government to conclude
4 that, actually, they must have been making different
5 assumptions about revenue. They must have been assuming
6 higher levels of power generation or higher levels of
7 revenue from OFTO. It is not the case that the
8 difference in the cost elevation puts those three higher
9 cost wind farms into a bracket where less than 2.0 ROCs
10 on their costs, using the Ernst & Young base case, would
11 have been sufficient. It would not. The first point.

12 The second point is that once it is accepted that
13 the developers would still have been asking for 2.0 ROCs
14 per megawatt hour, it must follow in our submission that
15 in the counterfactual the Government would still have
16 asked Ernst & Young to conduct the exact same exercise
17 and, in particular, to consider whether 2.0 ROCs was
18 justifiable, as I have shown you the Government did.
19 Ernst & Young would obviously have concluded that 2.0
20 ROCs were justifiable because on any view their base
21 case would still have been significantly higher, and as
22 I have already mentioned there is no reason to think
23 that RAB's conclusion, or the response to the
24 consultation process would have been any different, and
25 against that independent corroboration of the

1 reasonableness of what the developers were asking for,
2 we say it is fanciful to suggest the Government would
3 have chosen to award the developers less than they were
4 asking, which is the premise underlying my learned
5 friend's case. No evidence they would have been
6 anything other than 2 requested, offshore wind was very
7 important to meeting the renewable targets, yet somehow
8 or other we would have got to them being awarded less
9 than they were asking for, and the final point, and
10 these all add together to the same conclusion, is that
11 the Government was clearly in the actual, that the
12 reason it was using increments of 0.25 ROCs was the
13 uncertainty inherent in the exercise and the desire not
14 to increase administration costs or complexity, all of
15 which would have been precisely the same in the
16 counterfactual.

17 So, to bring it altogether, even with a greater
18 margin in the counterfactual, the essential
19 justification to the Commission would have been the
20 same. It is an uncertain exercise, incapable of
21 mathematical precision, and the level of subsidy is
22 supported by independent corroboration by Ernst & Young
23 and the Renewables Advisory Board. It is what the
24 industry is seeking, and in any event this is a
25 time-limited injunction to achieve our renewables target

1 which we reviewed later in 2010. All of those factors
2 were acceptable to the Commission in the actual, and
3 would have been acceptable in the counterfactual,
4 especially in light of what the Commission approved in
5 2009.

6 That, in summary, is our case. None of that, in
7 fact, is particularly affected by the expert evidence
8 debate that we are going to have over the next two or
9 three days, but because the expert evidence has been
10 adduced by the Class Representative, we have to address
11 it. I am afraid that is what we are going to do, but
12 the key facts that are essential to the Tribunal's
13 analysis of this are the fact one can discern from the
14 documents relating to the Government's thinking, and
15 where that leads us in respect of the ROC questions,
16 Question 1, we invite the Tribunal to accept the
17 estimate Dr Moselle has provided, not Mr Druce's
18 estimate based on three benchmark wind farms, although
19 we do say for the reasons I have sought to explain it
20 really does not matter. Question 2, the answer is no,
21 for all the reasons I have given. Therefore, Question 3
22 does not arise. I am not going to waste time now
23 developing our case orally in relation to Question 3,
24 but I should flag that there are a number of issues with
25 the analysis in my learned friend's Skeleton at

1 paragraph 97 which he took you through which we will
2 address in due course, and some of which will have to be
3 explored with Mr Druce, but we certainly do not accept
4 that analysis as any more sound than the analysis which
5 leads to their proposed answer to Question 2.

6 Unless I can assist the Tribunal further those are
7 our submissions by way of opening.

8 THE CHAIRMAN: So when I think about the cross-examination
9 of the experts that is going to start tomorrow and is
10 scheduled to go on for two-and-a-half days. It sounds
11 like from what you are saying, without giving too much
12 of a sneak preview of your cross-examination, that you
13 do not really think that the case that has been -- as it
14 is currently now being developed -- the experts have
15 that much to say about it.

16 MS DAVIES: Well, can I take that in stages? As I have
17 mentioned a few times, the Class Representative has not
18 formally abandoned the cases of 1.75 or 1.8. Those are
19 based on Mr Druce's analysis, and one therefore does
20 need to address them. When one gets to the case of 1.9
21 there is less mathematical, if I can put it that way,
22 disagreement between the experts, and it actually boils
23 down to an assessment of what the Government would have
24 been likely to do in relation to which Mr Druce is no
25 better able to reach a conclusion -- in fact should not

1 be reaching a conclusion, that is an issue for the
2 Tribunal.

3 THE CHAIRMAN: So are you proposing to cross-examine on 1.9
4 points as well as 1.75 points?

5 MS DAVIES: Only to -- without giving too much away -- only
6 to -- I was not proposing to debate with Mr Druce what
7 the correct interpretation of documents are at all.
8 There are certain points that one needs to draw out just
9 so that the Tribunal can understand the basis of what he
10 is saying in relation to it and why we take issue with
11 it.

12 THE CHAIRMAN: Yes. Okay.

13 MS DAVIES: But I am certainly not proposing --

14 THE CHAIRMAN: Okay. I suppose that was the real driver of
15 the question. What I think we would be keen to avoid is
16 experts with particular expertise being cross-examined
17 on the meaning of documents or how Government might be
18 expected to make decisions.

19 MS DAVIES: Absolutely, certainly from my perspective I was
20 absolutely not proposing to do that because that is not
21 going to assist the Tribunal at all.

22 MR LASK: Sir, I am sorry to interrupt but it may be
23 necessary to lay down a bit of a marker on my own
24 proposed approach.

25 The difficulty we're faced with is that we have

1 reams of expert evidence from the other parties that
2 does engage with the documents and does opine on what
3 they mean and what the Government would have done in the
4 counterfactual, and so whilst Ms Davies may well be
5 right to say that ultimately little may turn on the
6 maths, the analysis carried out by the experts, we are
7 in a position where the experts have provided opinions
8 on what the Government was doing and what it would have
9 done in the counterfactual, and we are in a position
10 where we feel we do need to challenge that.

11 THE CHAIRMAN: Right.

12 MS DAVIES: Mr Druce has -- this all started with Mr Druce.

13 Mr Druce is the one who started by expressing opinions.

14 I am not suggesting that I am not going to be drawing
15 out in the cross-examination the basis for the
16 assumptions he is making as to what the Government would
17 have been likely to do or not, so that the Tribunal can
18 make sure we are all clear what he is assuming in order
19 to express the views that he is -- and in certain cases
20 challenging some of those assumptions, but what I was
21 not proposing to do, and I do not believe it is going to
22 be beneficial to anyone to do, is to debate the
23 interpretation of documents with him. That is a
24 different exercise.

25 THE CHAIRMAN: Yes. Well, I mean, it seems -- I think I --

1 speaking entirely personally I would like to minimise
2 the extent to which experts are cross-examined on
3 matters outside their expertise. I would not regard
4 that as a controversial statement. Equally, I suppose I
5 am conscious that here we are at trial, two-and-a-half
6 days has been allocated to cross-examination of the
7 experts, people have planned their cross-examination,
8 and it is a little bit at the risk of being unfair for
9 us to hand down strictures now that cut across a
10 cross-examination that has been planned. I am not
11 proposing, I think, to say much more than that.

12 As always, time is limited and I hope that the
13 matters can be explored with the experts with economy,
14 but ultimately the Tribunal has allocated two-and-a-half
15 days for cross-examination of the expert. I am not, I
16 suppose, proposing to shut that down or change that now.
17 That would be moving the goalposts at the last minute.

18 MR LASK: Just to add to the point, as you will see,

19 I think, during the cross-examination, it can sometimes
20 be difficult to draw a solid line between what is -- and
21 in a non-technical factual document, and a document,
22 particularly the EY report, for example, that does
23 contain bits on which the experts legitimately opine.

24 THE CHAIRMAN: Very well.

25 MR LASK: Sir, while I am on my feet may I raise just one

1 point of correction in relation to a submission -- well,
2 a reference by Ms Davies to our Skeleton Argument, and
3 it goes to quite a prominent theme in her submissions
4 which is, well, what would developers have done? What
5 would they have requested in the counterfactual? Just
6 to be absolutely clear, we certainly do not accept the
7 submission that they would necessarily have still asked
8 for 2.0 ROCs in the counterfactual, but, more
9 specifically, Ms Davies referred to paragraph 78 of our
10 Skeleton Argument where she said we accept that there is
11 no evidence that they would have requested fewer ROCs in
12 the counterfactual. It would be helpful to look at
13 paragraph 78 just to be clear what we do and do not say
14 in that passage. It is at {ROC-AB/2/26}. We say, in
15 the middle of the paragraph:

16 "Since no disclosure has been provided by any of the
17 wind farms, there is no direct evidence with which to
18 assess whether they would have requested fewer than 2
19 ROCs".

20 That is important because whilst there may be no
21 direct evidence, we do say that there is evidence from
22 which inferences may be drawn as to what they would or
23 would not have done in the counterfactual.

24 THE CHAIRMAN: Okay, so you are going to be inviting the
25 Tribunal in your closing submissions to -- us to draw

1 the inference they would have asked for fewer?

2 MR LASK: Yes. Absolutely, yes.

3 MS DAVIES: I apologise to my learned friend, that is not
4 apparent from his Skeleton anywhere. Of course the
5 burden of proof rests on my learned friend, and if he is
6 going to be suggesting that that is to be inferred from
7 anything it would be helpful for him to explain on what
8 basis that is going to be inferred so that we can deal
9 with it during the course of the trial.

10 THE CHAIRMAN: Presumably it is pleaded somewhere, is it?

11 MR LASK: I will have to check whether it is pleaded, but
12 what we would be inviting is inferences to be drawn on
13 the basis of the evidence that is before the Tribunal.
14 I am not sure what is being --

15 MS DAVIES: What evidence?

16 THE CHAIRMAN: Sorry, let us hear one at a time please. Are
17 you finished, Mr Lask? You were explaining what the
18 inference -- what, in big picture terms you were going
19 to be inviting the Tribunal to conclude.

20 MR LASK: The inference we will be inviting the Tribunal to
21 draw, based on the evidence that is before the Tribunal,
22 is that it is at least possible that in the
23 counterfactual the developers who were in communication
24 with the Government would have requested fewer than 2.0
25 ROCs.

1 MS DAVIES: Well, I reiterate. If that is a case that is
2 being advanced which is not advanced in the Skeleton, we
3 need to understand on what evidence it is said that that
4 is an inference that is open to the Tribunal which has
5 not been explained. To the contrary, we have the
6 concession in paragraph 78. Of course "possible" is not
7 enough, I would also emphasise.

8 THE CHAIRMAN: That is a point for closing.

9 MS DAVIES: That is a point for closing but just so that we
10 do not have ships passing in the night in the closings
11 it would be very useful to know on what basis it is
12 going to be -- the Tribunal is going to be invited to
13 infer, if it is going to be invited to infer, that the
14 developers would have asked for something other than
15 two.

16 THE CHAIRMAN: Well, can I suggest that we leave it this
17 way: given that there has been -- and I don't think it
18 is anyone's fault -- there has been a misunderstanding
19 of what was being conceded in the Skeleton and what was
20 not. Given, Mr Lask, that you have explained that you
21 are going to be inviting the Tribunal to draw the
22 inference, perhaps you would be kind enough just to
23 explain -- your team explain to the aligned parties the
24 broad outlines of what that inference is, and the broad
25 outlines of the factual evidence on which it is based.

1 That, at least, enables them to understand what is going
2 to be said so that they can appropriately prepare for
3 cross-examination.

4 If it is suggested that -- if a pleading point is
5 going to be taken or something like that, then that will
6 happen, or that will not happen, but perhaps you would
7 just be kind enough to explain yourself, your position,
8 a bit more to the aligned parties, and we can take it
9 from there.

10 MR LASK: Yes. We can do that.

11 THE CHAIRMAN: Does that deal with that?

12 MS DAVIES: Yes. Thank you, sir.

13 MR SINGLA: Moving on to the Nexans position, you will be
14 very pleased to hear that I do not intend to make any
15 oral Opening Submissions because we gratefully adopt
16 everything that Ms Davies has said on behalf of
17 Prysmian, and once more our expert is essentially
18 aligned with Dr Moselle. There are one or two
19 differences in terms of their approaches to the
20 calculations which perhaps we will see in the evidence
21 or I can sweep up in closings, and the only point I had
22 been intending to address you on was the identification
23 of the two additional wind farms but that was obviously
24 dealt with in the exchanges between yourself and Ms
25 Davies, so I will just pick up anything in closings.

1 THE CHAIRMAN: Thank you, Mr Singla.

2 Submissions by MR WEST

3 MR WEST: I have one or two brief points, just on Mr Lask's
4 position on paragraph 78, obviously we hear what he has
5 to say. The full sentence, of course, refers to the
6 fact that there is no direct evidence since no
7 disclosure has been provided by any of the wind farms,
8 but, of course, the reason no disclosure has been
9 provided by any of the wind farms is that Mr Lask's
10 client has not sought disclosure from any of the wind
11 farms, and so it is perhaps not surprising that there is
12 not any --

13 MR LASK: I am so sorry that is simply not correct. We can
14 address that, but it is factually wrong.

15 MR WEST: I am not aware of any application having been
16 made.

17 Then just on the question of duplication, I did
18 raise at the PTR the possibility not only of duplication
19 but triplication in this case because you have heard in
20 my submission the majority of the arguments and seen the
21 majority of the relevant documents today. Not only are
22 we going to be going through that again in
23 cross-examination, so it appears at least, to some
24 extent, but then also in closing submissions. I find it
25 a little bit difficult to see how much more there is to

1 say about many of these points in closing submissions.
2 Obviously we have not heard from Mr McNeal so there may
3 be additional points there but I do still reiterate my
4 point that there is a risk of repetition at the various
5 stages of this case, but there we are, in a sense.

6 THE CHAIRMAN: You might be right. Do you invite us to do
7 anything about the possibility? It seems that -- too
8 late to do anything about it now.

9 MR WEST: (Inaudible) and perhaps we do not need quite as
10 long in oral closings at the end as has been allowed,
11 but again, there we are in a sense.

12 Could I just briefly address one or two points on
13 the substance? I obviously will not repeat anything that
14 anyone else has said. On the question of whether Ernst
15 & Young's figure would come out in the counterfactual,
16 it might just be useful to look at one diagram that
17 Ms Shamsi has put together, which is at Bundle D, tab 4,
18 page 36. {ROC-D/4/36}.

19 This is based on one of the tables in Ernst &
20 Young's report, and you will see at the far right we
21 have the recommendation of 2.5 ROCs corresponding to the
22 £144 per megawatt hour. That is the far right column,
23 and then they had various sensitivities leading up to
24 that with lower rates of return, and Ms Shamsi in green
25 has indicated where Mr Druce's counterfactual ROC award

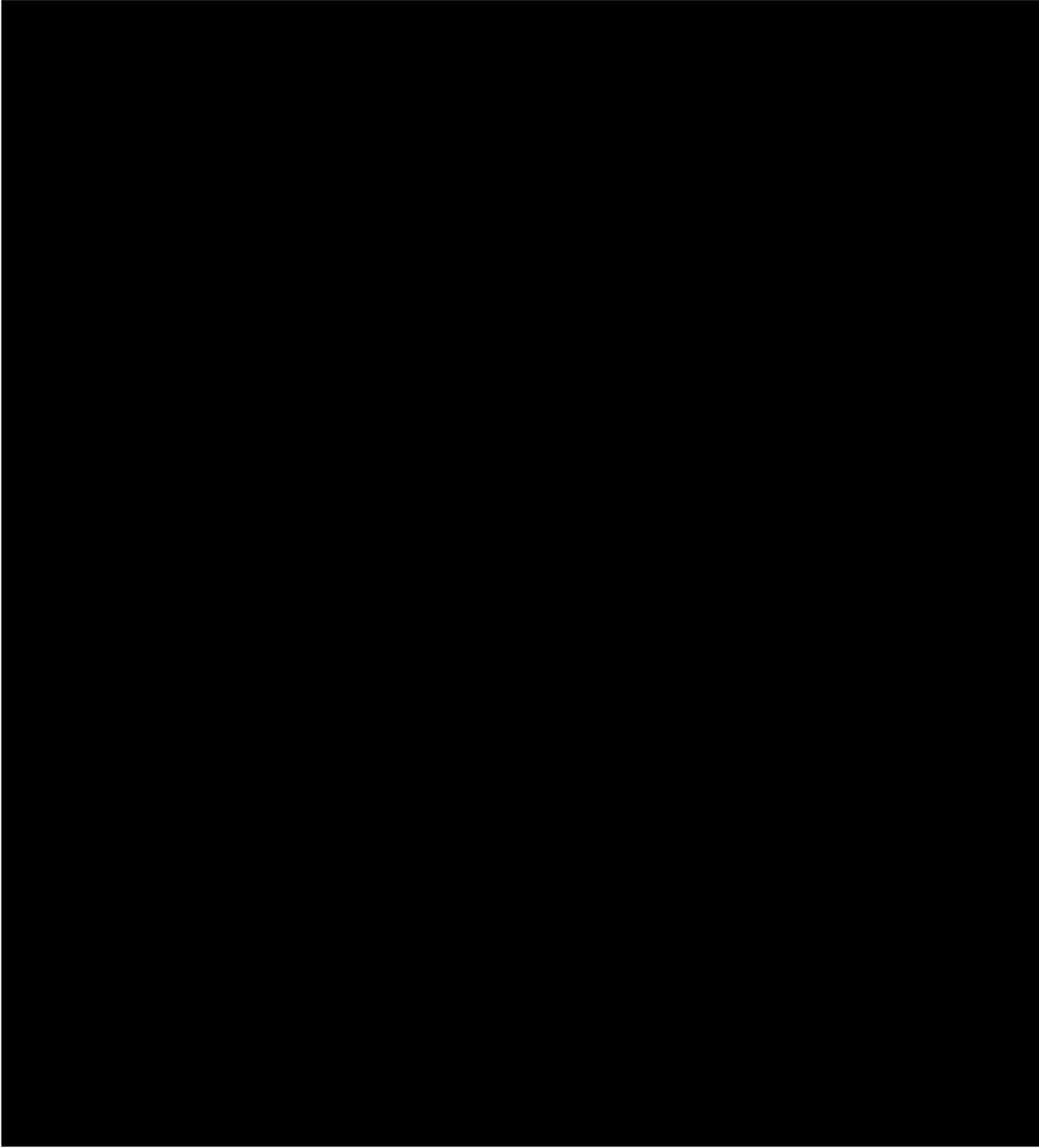
1 sits in this table, and as we can see it sits there
2 between 2.3 and 2.35 ROCs, so in my submission that is a
3 useful illustration of where we come out in the
4 counterfactual as to what EY's recommendation would have
5 been, and there is, perhaps, something a little bit
6 unusual in this case about how matters proceeded. One
7 would anticipate that industry would seek a figure from
8 Government, that Government would go off and investigate
9 the costs and discover that although some increase was
10 justified, not as much as industry had asked for, but in
11 this case one finds that the facts are perhaps the other
12 way around to how one might have expected, because what
13 the Government finds when it investigates the increased
14 costs is that they are actually more than the industry
15 was asking for, and that is why we have this peculiar
16 position that when you look at the costs there is a
17 disconnect between the costs found by E&Y in the event
18 award made by the Government, because industry was
19 actually asking for less than it might have done, and my
20 friend's, Mr Lask's case, might be a more compelling one
21 if the facts had been the way around that one might
22 expect them to be.

████████████████████ Then just looking at the briefly at the ██████████

24 ██████████ at E 130 {ROC-E/130/1}, this is really the vast
25 majority, if not the totality of Mr Lask's case. It is

1 in the table at page 9 of tab 130. My friend suggested

[REDACTED] in his submissions that the [REDACTED]



25

We can see -- I do not think you have yet seen

1 this -- if we look in the Ernst & Young report, that is
2 at tab 112, page 13, there is a table dealing with

[REDACTED] {ROC-E/112/13} dealing with [REDACTED]
[REDACTED]

3 [REDACTED], page 21 of the
4 [REDACTED]
5 tab {ROC-E/112/21}, Table 2, it is marked, at the bottom
6 of the page. The Tribunal will see that the categories
7 of the page. The Tribunal will see that the categories
8 [REDACTED] f revenue here, [REDACTED]
[REDACTED]

9 [REDACTED] I am not quite sure why there is a different
10 [REDACTED]
11 colour, but in any case it is the same category, and
12 [REDACTED]
13 indeed it is the same figures.

[REDACTED] If one looks at the [REDACTED]
[REDACTED]

[REDACTED] One then looks at [REDACTED]
[REDACTED]

[REDACTED]

2 One cannot carry through exactly the ROC recycle

[REDACTED] figures because, if you look under [REDACTED]

[REDACTED]

[REDACTED] What we do

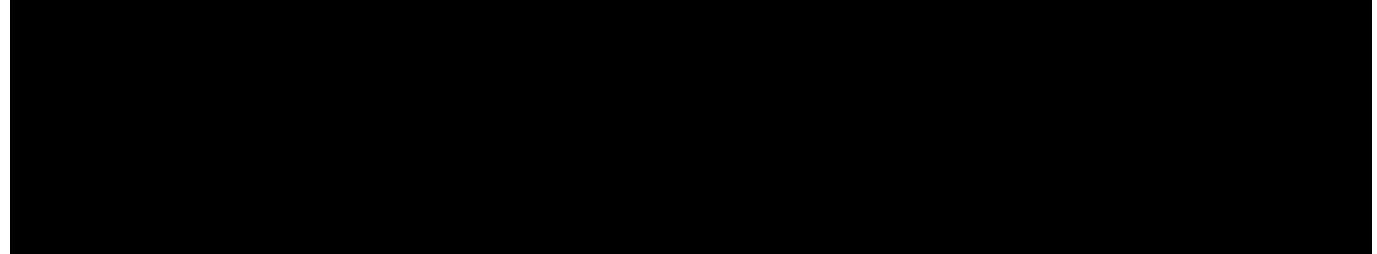
6 not have is the curve by which that gradually reduces,
7 so we cannot exactly calculate the ROC recycle value,
8 although we can calculate the ROC buy out value. Again,
9 one simply takes the 35.76 in this table, multiplies it
10 by the 92.5, and then you multiply that by either 1.5,
11 1.75, 2 ROCs and we get the figure in the table.

12 So it is -- with the exception of the line showing
13 how the ROC buy out price is said to reduce, one can
14 effectively directly translate these figures into these
15 figures.

16 So it is just not right to say that this is some
17 separate analysis by the Government, and so it simply
18 does not enable my friend to get to a different
19 destination than the Ernst & Young report itself.

20 My friend Ms Davies made the point that there is no
21 magic in the margins. There is a margin simply because
22 there is a minimum increment of 1.25, and the revenues
23 do not exactly match the costs, and as long as you are
24 rounding down, as it were, the award is lower than the
25 equivalent figure for costs -- sorry -- the revenue

1 figure is higher than the figure for costs there will be
2 a margin of some kind, and this, in my submission, is
3 precisely the point that the Government was making at E
4 141. {ROC-E/141/1}. The text in red that my friend
5 took you to which says at the bottom:



10 So as long as they do not exactly match there will
11 be a margin and that is why one has a margin, not
12 because the Government was specifically creating or
13 allowing a margin, and indeed my friend explains that
14 the return to capital, the return on investment to the
15 developers, is included as part of the costs already.
16 That is the (Inaudible) and then finally my friend Mr
17 Lask said that Mr McNeal supports the use of a 0.1
18 increment in the award of ROC's. We will hear from
19 Mr McNeal tomorrow but Mr McNeal wasn't working for the
20 department at the time of the 2010 ROC obligation Order
21 when that was being put together and implemented, so he
22 is referring to a later point in time, and we know that
23 0.1 ROCs was used in 2013, so in my submission it is
24 important to clarify that Mr McNeal was talking about a
25 different time period when he refers to increments in

I N D E X

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