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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

1

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Wednesday, 4 June 2025

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Housekeeping

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(10.30 am)

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THE CHAIRMAN: Some of you are joining us livestream on our

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website so I will start with the usual warning. An

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official recording is being made and an authorised

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transcript will be produced, but it is strictly

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prohibited for anyone else to make an unauthorised

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recording, whether audio or visual, of the proceedings,

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and breach of that provision is punishable as contempt

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of court. Sorry, I singularly failed to log in while

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I was saying that. (Pause)

14

Yes, Mr Lask?

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Submissions by MR LASK

16

MR LASK: Good morning.

17

I propose to structure my closing submissions under

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the following six headings: first, industry requests;

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second, EY's analysis; third, the Government's approach

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in the factual; fourth, what the Government would have

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done in the counterfactual, fifth, a response to the

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aligned parties' key arguments to the extent not already

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covered above, and sixth, Question 3, the minimum cost

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elevation.

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I do not propose to repeat the points I made in

1 opening on relevant context. The Tribunal will recall I
2 made five key points and our understanding is that none
3 of those are seriously disputed. So, turning to the
4 first heading, industry requests: the cases advanced by
5 the aligned parties now rely heavily on the requests for
6 two ROCs that Government received from certain
7 developers. It is said that those requests would
8 inevitably have been the same in the counterfactual and
9 that this is fatal to the Class Representative's case.
10 That is, in my submission, a strikingly ambitious
11 argument which does not withstand scrutiny on the
12 evidence.

13 First, and most importantly, developers' requests
14 did not determine EY's analysis or the Government's
15 decision. Whilst they were taken into account,
16 Government investigated for itself whether two ROCs
17 could be justified, and reached a decision based on the
18 evidence. It would obviously have done the same in the
19 counterfactual. Second, the preponderance of the
20 evidence indicates that developers would have requested
21 fewer than two ROCs in the counterfactual. It does not
22 establish that those requests would have been the same,
23 but in any event my first point is a complete answer
24 because the requests did not determine the decision or
25 the analysis in any event. Accordingly, the developer

1 requests do not bear anything like the weight that the
2 aligned parties seek to place on them, and I will
3 elaborate on each of those two main points in turn.

4 First, the requests were not determinative.

5 As I say, the essential submission now made against
6 me is that the developers would have inevitably
7 requested two ROCs in the counterfactual, and that even
8 if the Government was otherwise minded to award less, it
9 would ultimately have acceded to that request. That
10 submission is incompatible with the evidence because the
11 evidence shows that at every turn the Government applied
12 its independent judgment to the issue before it, based
13 on all the evidence, and, in particular, EY's objective
14 analysis and the Government's own objective assessments.
15 That is wholly surprising -- wholly unsurprising, in my
16 submission, because any other approach would have been
17 very difficult to reconcile with its duties.

18 Now, while industry requests were taken into
19 account, they were not determinative and did not carry
20 the same weight as the objective analysis carried out by
21 EY and the Government. I make five key points.

22 First, Government commissioned EY to provide an
23 in-depth, expert study into the costs of offshore wind,
24 and the level of financial support required. It then
25 asked RAB, the Renewables Advisory Board, to critically

1 assess EY's work. It plainly would not have done this
2 if it had intended simply to rubberstamp industry's
3 requests. There has been no suggestion from the aligned
4 parties that this was some sort of window dressing
5 exercise by the Government -- rightly so. It was this
6 independent analysis that the Government primarily
7 relied on, as shown by the emphasis given to it
8 throughout the documents that evidence the Government's
9 reasoning. That is my first point.

10 Second, when assessing the evidence, Government
11 applied a significant measure of scepticism both in
12 respect of what developers were telling it, and even in
13 respect of some of EY's assumptions. It then made its
14 own findings as to the revenues that would be generated
15 at different ROC levels, so the Government was quite
16 rightly applying its independent judgment on the
17 evidence before it.

18 Thirdly, Government was perfectly ready to refuse
19 requests where it considered them to be excessive, and
20 the Tribunal may recall the [REDACTED] example where
21 they requested 2.5 ROCs and were given short shrift by
22 the Government.

23 Fourth, there was also pressure going the other way
[REDACTED] from certain developers. For example, [REDACTED]
[REDACTED]

1 [REDACTED] at
2 ROC-E/101.2.

3 Fifth, all of this is entirely consistent with
4 Mr McNeal's evidence. Mr McNeal explained that
5 Government was alive to the possibility of gaming and
6 exaggeration by developers and that it could not and
7 would not take the information provided by developers at
8 face value. I will come to the EY report and the State
9 aid documents later, but there are a few pieces of
10 evidence I want to show you at this stage which I will
11 do in chronological order.

12 If we could start, please, with {ROC-E/99/1} which
13 is a [REDACTED]. I took you
14 to this in opening in order to show you what the
15 Government's key objectives were. I want to show you
16 some different passages now.

17 Ms Davies agreed in her opening that this was an
18 important document as it was clear evidence of the
19 Government's decision-making before its consultation,
20 and if we could look, firstly, please, at page 2
21 {ROC-E/99/2} you will see paragraph 9 at the bottom, and
22 this is setting out the background to the issue.

[REDACTED] Paragraph 9 explains that [REDACTED]
[REDACTED]

25 [REDACTED], and then at the end of this paragraph:



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So there is no suggestion there that the developers have said, well, it is two ROCs or nothing. They suggested two ROCs, and they acknowledged there may be other ways of addressing the problem. If we look next, please, at paragraph 11 {ROC-E/99/3}, here officials are

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That is the headline figure that the officials are relying on, and that is the headline figure that is the basis for their advice to ministers.

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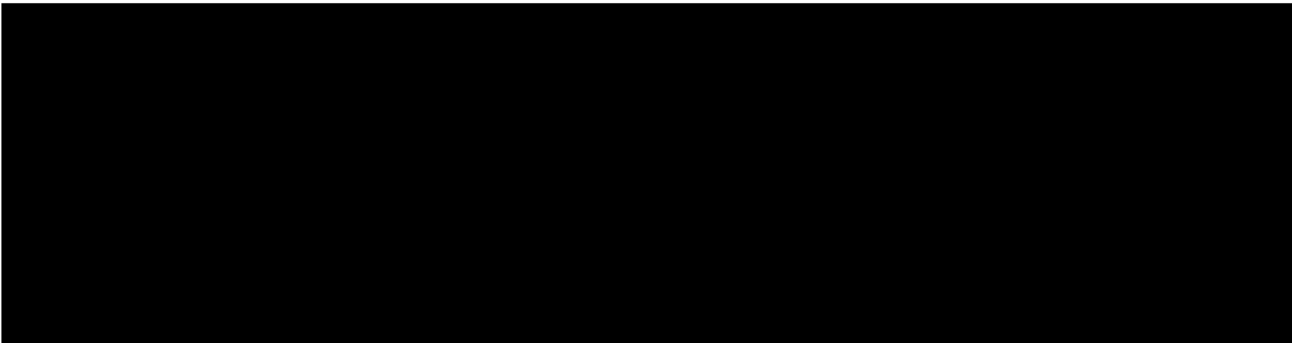
Next, page {ROC-E/99/5}, please, paragraph 18. This

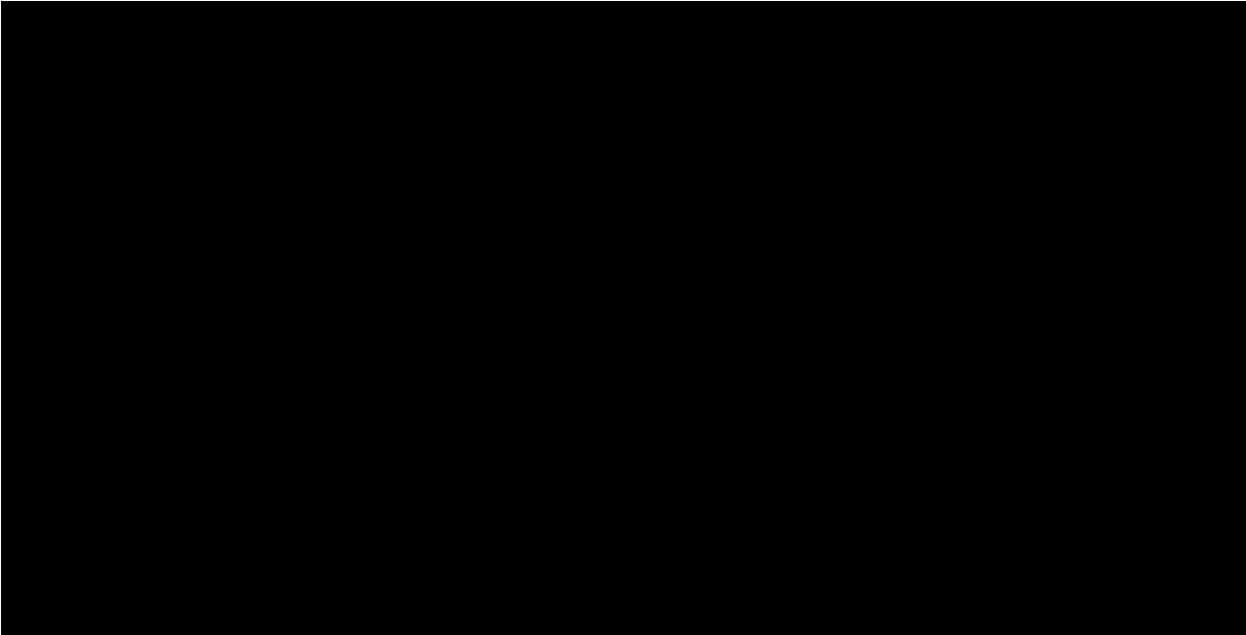
19

is an important passage. It is discussing

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and it begins:






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12

Just pausing there, EY has identified a requirement for 2.5 based on a 12 per cent hurdle rate, and even though  have said theirs is 12.5, the Government is looking at the level of support that would only meet a hurdle rate of 10 per cent, so it is focusing on the lower range of these sensitivities. It is not simply accepting what the developers say about their required hurdle rates.

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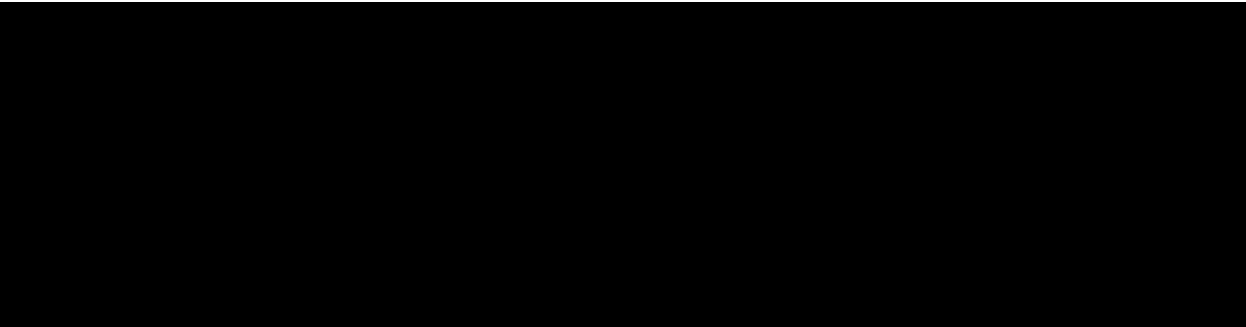
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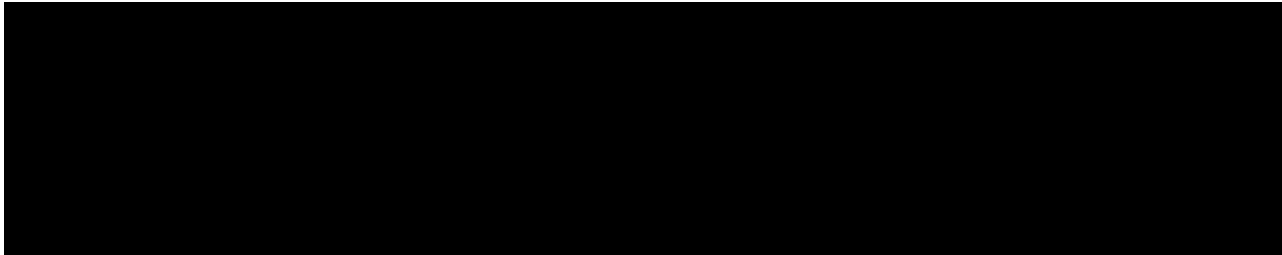
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Bullet point three:



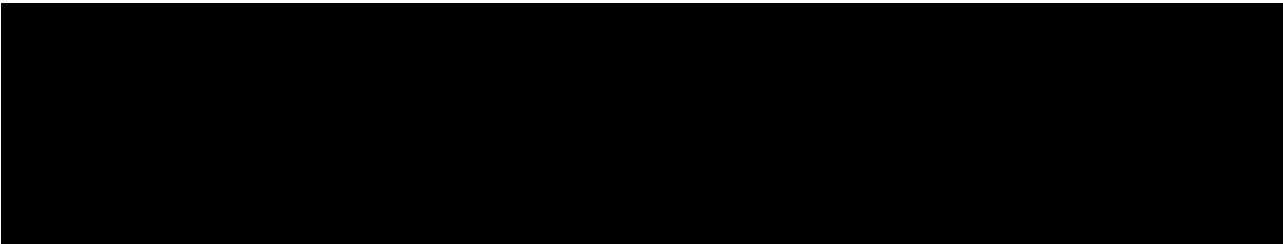


4 So that is higher than [REDACTED]:

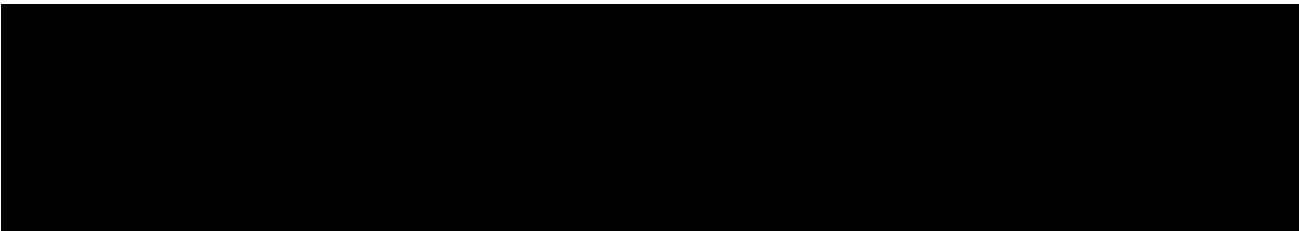


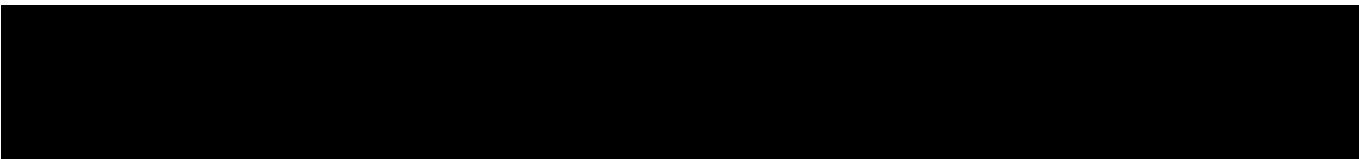
9 So this recognises that the developers may have
10 understated their expected output. The Government is
11 treating what they say with some scepticism. That is
12 important because if output is understated, then the
13 costs and the ROC requirements, are overstated. This is
14 the Government treating what developers are saying with
15 a proper degree of scepticism.

16 Bullet four is more of the same:

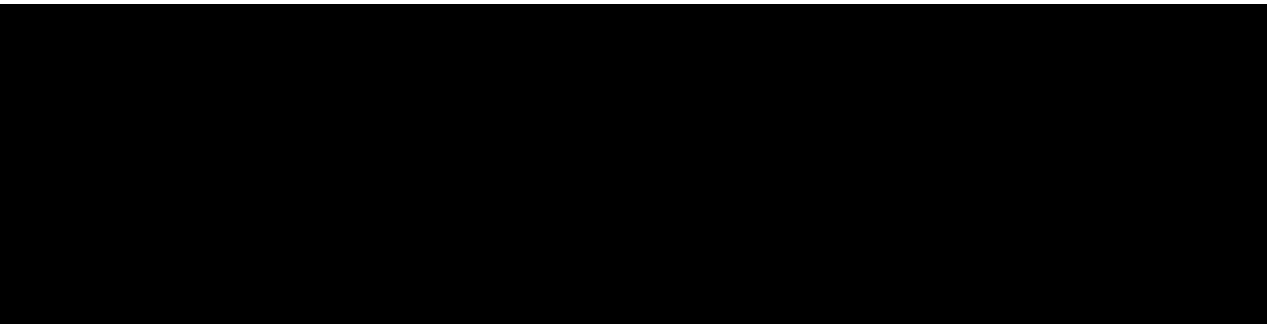


21 Then it explains why, and then towards the end of
22 the paragraph:





3 So the department is taking a different view, and a
4 more optimistic view than developers on the impact of
5 the OFTO regime. They are saying it is going to be
6 neutral, the developers are. The department say no,
7 actually, we think it is going to be a cost saving, and
8 the magnitude of that cost saving could be up to 0.25
9 ROCs. So, not only is it willing to disagree with
10 developers, but it is willing to disagree with them to a
11 significant extent. Then just over the page, page
12 {ROC-E/99/6}. Paragraph 19:



18 So the Government is looking to set support as low
19 as reasonably possible based on the evidence. That is
20 two ROCs. Even though EY's base case is 2.5, it is
21 looking to set the award at the minimum level necessary.

22 We also see, and I will not take you through it, but
23 we also see throughout this document a real concern
24 about the impact on consumers, and an overarching need
25 to ensure that the Government awards only what is

1 necessary, and just for your note, that is paragraphs
2 3(b), 4(e), 24 to 25, 39 and 42.

3 Now, in the counterfactual, in my submission, DECC,
4 the department, would have been looking to take an
5 equally aggressive view on revenues and key assumptions
6 regardless of whether developers have requested two ROCs
7 or something less. As in the factual, it would have
8 been focusing in the same way on EY's more optimistic
9 sensitivities. But, as I will show you, EY's more
10 optimistic sensitivity in the counterfactual would have
11 indicated a need for fewer ROCs. In some cases 1.9
12 rather than 2.

13 Just before leaving this document, it is said in
14 Prysmian's closing at paragraph 50 that there is no
15 suggestion in this document of any concern from a State
16 aid perspective, but that is unsurprising, in my
17 submission, because this is several months before the
18 State aid process kicks off.

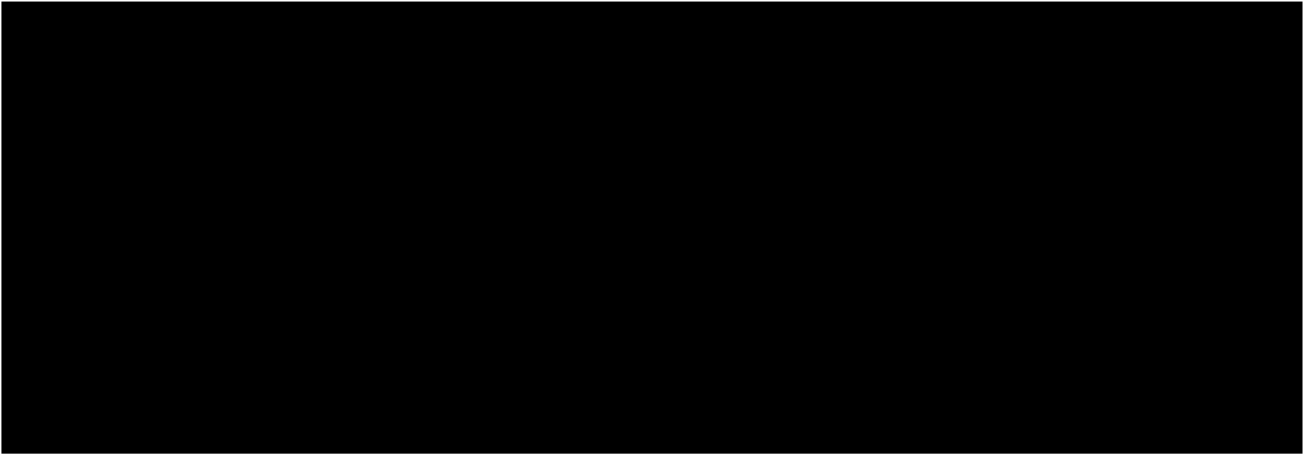
19 The next document I would like to show you is at
[REDACTED] {ROC-E/106/1}. This is the [REDACTED]

[REDACTED] If we just begin about halfway down the
22 page, please, zoom in on that where it says [REDACTED]

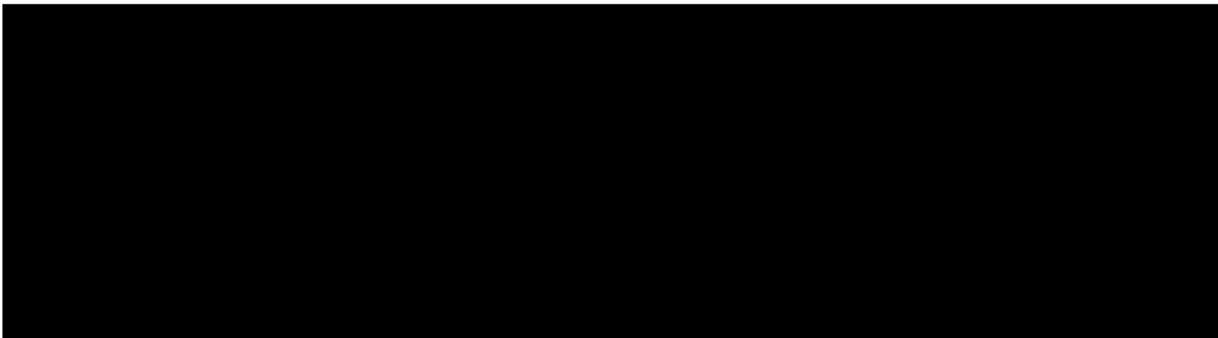
1 First bullet point:



8 Then the third bullet point, second paragraph:



16 Right at the bottom of this email:



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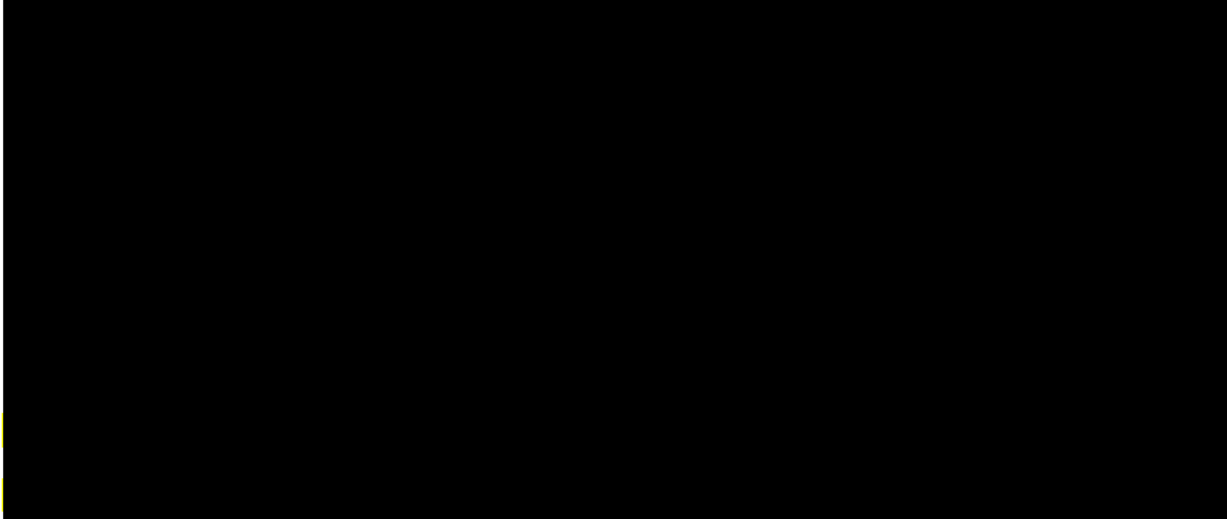


23 So again, the Government is applying scepticism to
24 what it is being told on some of the matters that go
25 towards making up cost estimates and ROC requirement

1 estimates.

2 Then at the top of this page, we see a reply from


3 Chris Barton:



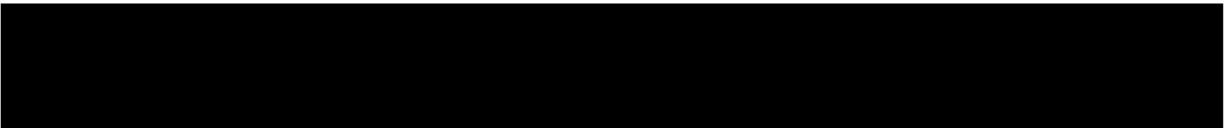
12 So this shows, in my submission, that the Government
13 is not going to base its decision on its -- on developer
14 requests. It is going to base its decision on its own
15 review of the evidence. Just while I am here, I will
16 not take you to it but there is another document at
17 ROC-E/96, in which Government was told by another
18 developer, [REDACTED] that more than
19 two ROCs would be required, possibly even three, but
20 there's no suggestion in the evidence that the
21 Government ever considered going that high.

22 Next document, please, is at {ROC-E/117/1}. This is
23 a [REDACTED], and if we go,
24 please, to page {ROC-E/117/3}:

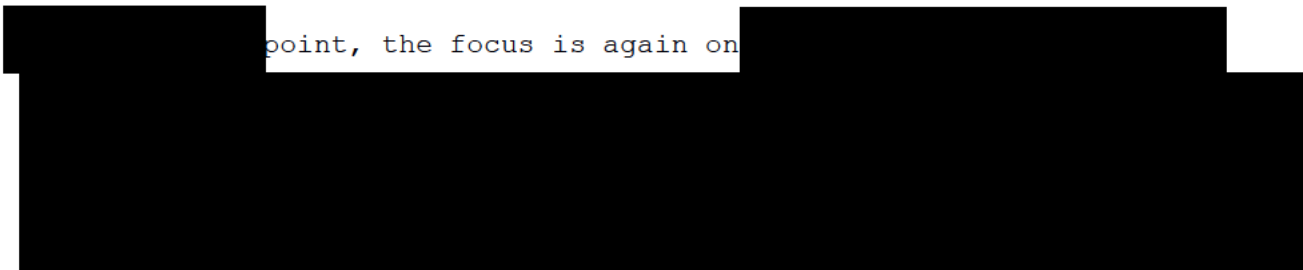




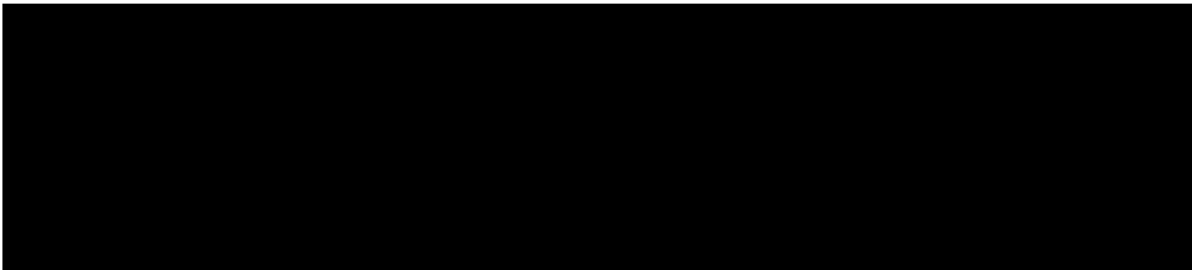
4 Over the page, page {ROC-E/117/4}:



7 Just making the rather obvious point that Government
8 was not accepting these claims at face value. Following
9 page, page {ROC-E/117/5}, you see in the third bullet
point, the focus is again on



14 Page {ROC-E/117/6}. Second bullet point:



19 Then we do not need to look at it now, but for your
20 note, pages 7 to 15 go through the statutory factors
21 that the Government was obliged to consider and
22 discussed some points in relation to those.

23 I would like to go next, please, to the transcript
24 from Day 2. It is page 22. {Day2/22:1}. This was
25 Mr McNeal's evidence. If you could scroll down a bit

1 please? That is the bottom of the page. So at line 12
2 I am asking Mr McNeal about paragraph 31(b) of his
3 statement, and then you see at line 19 a quote from his
4 witness statement:

5 "As civil servants we could not simply take at face
6 value the information that was provided by a developer.
7 We had to critically analyse it and test it based on our
8 knowledge of the market and the factors that could have
9 influenced the accuracy of those costs/cost forecasts
10 submitted for the project in question".

11 Then over the page, please {Day2/23:1} I say --
12 well, sorry, can we go back to the previous page? At
13 the bottom, having quoted from his evidence, I say at
14 line 25:

15 "It must follow from that that if, for example, the
16 developers said they required X number of ROCs, the
17 department would critically analyse those requests and
18 reach its own view on what was required; yes?"

19 Mr McNeal says:

20 "Yes, within the context of the macro curve,
21 absolutely, and to give an example from this period this
22 which we are discussing, my understanding, having now
23 seen some of the document, is that [REDACTED] at that
24 time was asking in its meetings with officials for 2.5
25 ROCs. [REDACTED] got built at 2 ROCs, is my

1 recollection, and I apologise if it was less than two
2 ROCs, but the broad point is we -- you know, there are
3 examples, we were alive to the possibility of gaining.
4 That is the best way of putting it".

5 I say:

6 "The transcript says 'gaining'".

7 Mr McNeal corrects it and says:

8 "Gaming". Alive to the possibility of gaming".

9 Then he says at line 19:

10 "In other words, that someone was exaggerating".

11 So that is the Government's approach to developer
12 requests. You will note what he said about [REDACTED]
13 still going ahead, even though they did not get 2.5 ROCs
14 which suggests that even if a developer asks for X
15 number of ROCs, it may well go ahead at less, which does
16 undermine the submission made against me that developers
17 would have insisted on two ROCs in the counterfactual.

18 So, to conclude, in my submission it is implausible
19 that if Government had concluded on the evidence that
20 the right level was 1.9, it would then have awarded two
21 ROCs anyway, simply because that is what the developer
22 has asked for. So, Prysmian is wrong in its closing
23 submissions to contend that my case requires us to
24 establish that the developers would say have been
25 willing to accept 1.9 ROCs. This was Government's

1 decision, not the developers'. Government would have
2 investigated the matter for itself, and reached an
3 independent view based on all the evidence just as it
4 did in the factual. As I will come to show you, the
5 evidence that it obtained in the counterfactual would
6 have indicated that two ROCs was simply excessive.

7 So, turning to my second point under this heading,
8 it is my submission that the developers would, for what
9 it is worth, they would have requested fewer ROCs in the
10 counterfactual, and the Tribunal will recall we handed
11 up a note overnight on Day 1 explaining the point.
12 There are four points that I emphasise. First, the
13 developers who requested two ROCs justified those
14 requests by reference to their costs and provided
15 detailed cost data to DECC in support of their requests.
16 They would obviously have appreciated that the data
17 would be scrutinised, as it was -- scrutinised
18 carefully -- and that if they pitched their requests too
19 high, this would have emerged from the Government's

assessment. For your note, the

22 -- are in the bundle at ROC-E/94 -- we do not need
23 to go to these -- ROC-E/94, 88, 71, 82 and 73. You can
24 see the detail of the information that has been
25 provided.

[REDACTED] There were also [REDACTED]

2 [REDACTED]. If we go,

[REDACTED] please, to {ROC-E/91/1}, this is a [REDACTED]

5 [REDACTED]. If we look at the

6 second paragraph, they made the point that:

[REDACTED]

11 [REDACTED] so they are

12 particularising the cost increases, and if we scroll

13 down, please, you see the large paragraph beginning

[REDACTED]

[REDACTED] You will recall that the [REDACTED]

20 [REDACTED] and then suggesting,

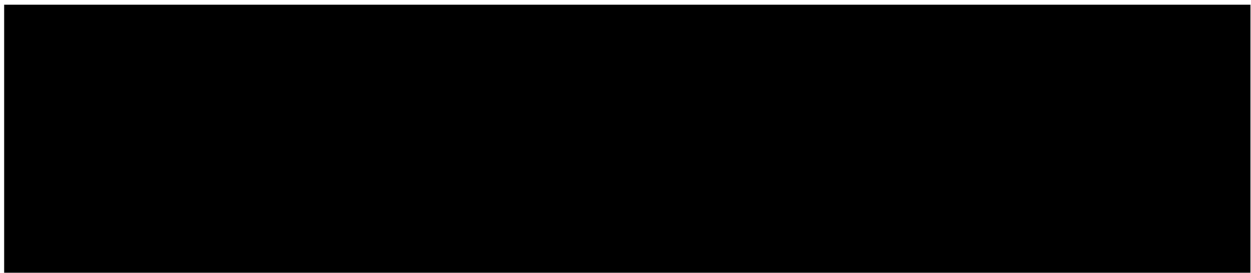
21 actually, that 10 per cent might be enough, and would be

22 acceptable to the board, but without would be 10 per

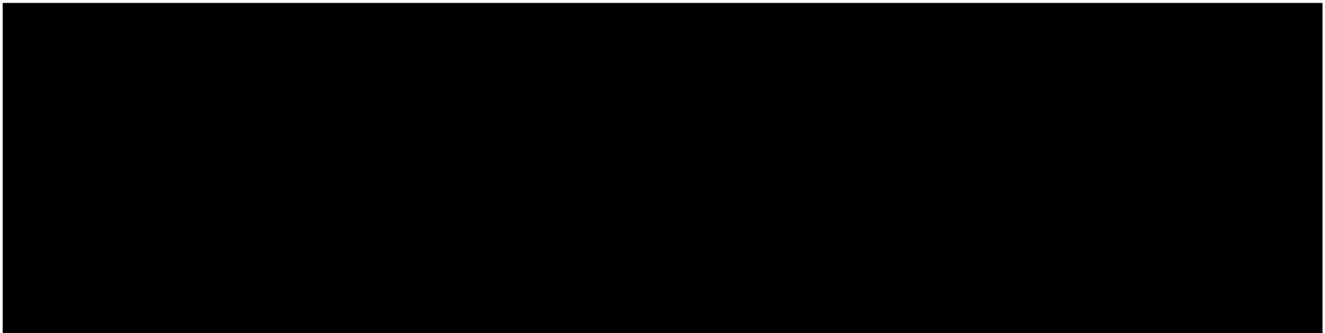
23 cent IRR over 20 years. This would not be acceptable to

24 their board. Their original IRR was 10.5 per cent. At

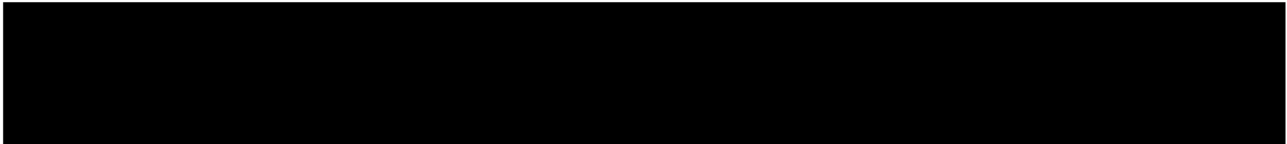
25 the end of this paragraph:



5 So, that is on order. When pushed they said they
6 had been looking at options for reducing their cost of
7 capital, eg financing through EIB, and there is a
8 reference there to some other possible solutions. A
9 slightly more off-the-wall solution is to encourage
10 turbine manufacturers such as Siemens, and then over the
11 page:



17 The Government is highlighting this concern on
18 over-compensation to [redacted] know that
19 that is an issue, they know it is going to be closely
20 scrutinised, and then on this page, we see, three
21 paragraphs up from the bottom:



24 Then penultimate sentence:





5 So, again, that is a really important passage
6 because it shows that the Government is sceptical about
7 what it is being told because it has to be. It is not
8 simply taking this all at face value. What do you say
9 they would have asked for?

10 In the counterfactual? We say that most developers
11 would have asked for 1.9 because the cost reduction -- I
12 am going to come on to this -- but the cost reduction is
13 equivalent to 0.1 ROCs. That is based on the
14 modelling -- well, it is based on the work the experts
15 have done in this case, drawing on the modelling of EY,
16 and drawing on the Government's own revenue analysis.
17 It all comes to about 0.1 ROCs. That is a lot. That is
18 20 per cent of the increase they were asking for. It is
19 not a small amount.

20 PROFESSOR ANTHONY NEUBERGER: What do you say about the
21 criticism that there is no evidence from the developers
22 as to what they would have done in the counterfactual?

23 MR LASK: The procedural criticism?

24 ANDREW LENON KC: Yes.

25 MR LASK: I am going to come on to process and I will spend

1 some time on it if it is of interest to the Tribunal.

2 I probably do not need to take you to it, but there

3 is another set of [REDACTED] at {ROC-E/102/1} where

[REDACTED] the [REDACTED]
[REDACTED]

6 [REDACTED] It

7 all goes to the same point.

8 So, I said I had four points. My second one, and
9 this is really coming on to what you, sir, were just
10 putting to me, it is common ground that these
11 developers' costs would have been lower in the
12 counterfactual, and while we do not have direct evidence
13 as to how developers converted their costs into ROCs, we
14 do have expert modelling which indicates that these wind
15 farms would have required at least 0.1 fewer ROCs than
16 the counterfactual. Just taking Dr Moselle's
17 calculations, he calculated that the average costs of
18 these wind farms would have been £5.10 lower in the
19 counterfactual. That was the lowest cost elevation
20 produced by any of the experts for these three wind
21 farms. That is the lower bound. He accepted in
22 cross-examination that this would equate to 1.89 ROCs in
23 the counterfactual. So that is where they would have
24 been looking, the developers, in the counterfactual.
25 That is what they would have needed. If they needed two

1 ROCs in the factual, it is slightly below 1.9 in the
2 counterfactual.

3 Thirdly, it can be inferred that the developers were
4 taking a reasonably realistic approach to their ROC
5 requirements, notwithstanding the scepticism the
6 Government applied, because whilst they requested two
7 ROCs, EY's report indicated that they might have
8 requested more. EY came out at 2.5 which, in my
9 submission, suggests that the developers were conscious
10 that they had to properly justify these requests and
11 pitch them at a realistic level.

12 Fourth, as I have just said, 0.1 ROCs was not small.
13 Not a small number in the context of these requests. It
14 was a full 20 per cent of the increase they were seeking
15 in the factual. The 0.5 increase they sought was
16 equivalent on the Government's revenue analysis to £22
17 per megawatt hour, a cost reduction of around £4.20 is
18 around 20 per cent of £22, so it is not at all
19 surprising that a cost reduction of around 20 per cent
20 should result in them seeking 20 per cent fewer ROCs.
21 So, just to sum up, in circumstances where the
22 developers' requests were grounded in the cost evidence,
23 where they knew this was being carefully scrutinised,
24 where the level of subsidy required to meet their costs
25 would have been substantially lower in the

1 counterfactual and where the evidence indicates they
2 took a realistic approach to their requirements we say
3 it is far more likely than not that they would have
4 requested fewer ROCs in the counterfactual.

5 So, just on process, as you just put it to me, sir,
6 there is no evidence, direct evidence, on how the
7 developers converted their costs into ROCs for the
8 purposes of their requests, but we do have expert
9 modelling which I say serves as a good approximation,
10 and the aligned parties, particularly London Array in
11 their closing, invoke this lack of evidence in an effort
12 to defeat the Class Representative's case and London
13 Array even seek to take a pleading point which, in my
14 submission is quite remarkable, because London Array is
15 one of the very wind farms that requested two ROCs in
16 2009 and it was London Array's own expert, Ms Shamsi,
17 who raised this issue in her first report, and that is
18 Shamsi 1, section 4B.2 at {ROC-D/3/71}, so for London
19 Array to suggest that they were not aware of the issue
20 is obviously unsustainable.

21 For what it is worth, we do not have a claim against
22 London Array so there is obviously no pleading between
23 us and London Array, but following Ms Shamsi's report,
24 the issue was subsequently ventilated in the Joint
25 Expert Memorandum at paragraph 3.4 and proposition 63,

1 and if London Array or anyone wished to take a point on
2 it, a pleading point, that was the time to do it, and
3 they did not because they no doubt appreciated it would
4 have been pointless. We were perfectly entitled to
5 proceed on the basis that those issues that were raised
6 in the expert process were in play.

7 Now, Ms Shamsi admitted in cross-examination that
8 she did not ask her clients for relevant evidence on
9 this, despite the fact that she regarded it as a crucial
10 factor, and as we say in our written closing, that does
11 reflect a remarkable lack of curiosity on Ms Shamsi's
12 part. We have not heard from London Array whether they
13 ever checked to see if this information was available.
14 You will see in our written closings that we did make
15 disclosure requests, and what London Array say is, well,
16 you did not formulate your disclosure requests
17 correctly, but what they have not said is whether they
18 ever looked for it themselves, given that it was their
19 expert who raised this point.

20 THE CHAIRMAN: Sorry, just so I understand your position on
21 the pleading point, I mean, of course, lots of facts are
22 in lots of parties' knowledge, but the function of the
23 pleadings, obviously is to enable the parties to know
24 which of those facts need to be deployed in evidence at
25 the trial, so -- and I think what you are emphasising is

1 that the point is ventilated in the expert reports, and
2 I think what you are saying, but tell me if I have got
3 this wrong, is that if London Array, or indeed any of
4 the other aligned parties, thought that an issue being
5 ventilated in the expert reports was not up for
6 discussion because it was not pleaded, that was the time
7 to do it.

8 MR LASK: Precisely.

9 THE CHAIRMAN: I think, therefore, that involves an
10 acceptance, for better or worse, that it is not pleaded.

11 MR LASK: It is not pleaded -- the pleadings are very high
12 level, and, you know, there is a slightly, you know,
13 unusual procedural history to this case, the way in
14 which the two proceedings have been joined together for
15 the purposes of this preliminary issue trial, but no,
16 the pleadings do not deal with this issue, and as I say
17 we do not have a pleading against, or from, London Array
18 because we are not involved in litigation with them.

19 Ultimately we are where we are, and we have not
20 invited the Tribunal to make adverse inferences against
21 London Array on the basis of the gaps in its evidence,
22 and, of course, the reason is because it would be
23 pointless because there are three other parties against
24 whom those adverse inferences would not apply, so we are
25 where we are, but ultimately, in my submission, we say

1 there is ample evidence available for the Tribunal to
2 find that developers would have requested fewer ROCs in
3 the counterfactual, and as I said at the outset, more
4 importantly it does not ultimately determine anything
5 because EY and the Government produced their own
6 analysis, and the Government's decision was based on
7 objective evidence, not on the developer requests.

8 Just before leaving this part, in their closing
9 submissions, Prysmian give five reasons in support of
10 their argument that the developer requests would have
11 been the same in the counterfactual. Firstly, they say
12 developers would simply have sought the highest level of
13 support they thought possible, and two ROCs was the next
14 band up, but as I have just said, the evidence shows
15 that they did not seek the highest level possible
16 because EY thought that -- not even the highest level --
17 EY thought the base case was 2.5, and moreover there is
18 no evidence that developers requested two ROCs simply
19 because it was the next band up.

20 Second point that is made is that multiple
21 developers sought two ROCs despite having different cost
22 profiles. In response to that, not all developers
23 sought two ROCs. At least one was content with 1.5, and
24 another thought they needed 2.5, but in any event, the
25 submission is flawed because it rests entirely on the

1 experts' cost estimates for these three benchmark wind
2 farms, and those estimates differ considerably depending
3 on which assumptions are adopted. I do not need to take
4 you to it, but for your note, Moselle 3, Table 7 at
5 {ROC-D/9/50} sets out his and Mr Druce's -- well, maybe
6 we should go to it. It is at {ROC-D/9/50}. (inaudible
7 speech).

8 The point made by Prysmian is that, well, these
9 three wind farms had very different cost profiles but
10 they all requested two, so they must simply have been
11 requesting the next band up, but what one sees from this
12 table, if you take -- and I am only interested at
13 present in the actual columns -- you will see Mr Druce's
14 calculations, the actual columns, he has [REDACTED]
15 [REDACTED] with quite similar cost profiles. London Array is
16 lower but [REDACTED] with quite similar.

17 Then if you look at Dr Moselle's calculations
18 heading "my calculations", he has got it the other way
19 around. He has got London Array and [REDACTED] having
20 quite similar cost profiles and Lincs being a fair bit
21 lower. So, you see it all depends -- the reason for
22 those different estimates is they have applied different
23 assumptions. We do not have the levelised cost
24 estimates that the wind farms themselves calculated, but
25 it is, of course, entirely possible, based on these

1 estimates, that, in fact, all three had similar
2 levelised cost estimates, and that is why they all
3 requested two ROCs. That is the second point raised by
4 Prysmian. The third point is that the cost elevation
5 was a very small percentage of overall wind farm costs,
6 but that goes nowhere, in my submission, because it is
7 common ground that it was equivalent to 0.1 ROCs, see
8 Prysmian's closing, paragraph 94.

9 The fourth point is that developers were embarking
10 on an uncertain exercise, but again, the answer is the
11 same. 0.1 ROCs is not small in the context of their
12 requests. It is a full 20 per cent of the increase they
13 sought in the factual, and uncertainty does not mean
14 they are not going to do their best to come to the best
15 estimates they can of what they need.

16 Fifthly, Prysmian say two major wind farms would
17 have had higher costs in the counterfactual than the
18 costs of a wind farm which asked for two ROCs in the
19 factual, but in my submission that comes at the point
20 from the wrong direction. The starting point is that
21 they asked for two ROCs in the factual, so the key
22 question is how much lower their costs would have been
23 in the counterfactual and what this would have equated
24 to in ROC terms. As I say, in ROC terms it is 0.1.

25 Nexans, in their closing at paragraph 35, refer to

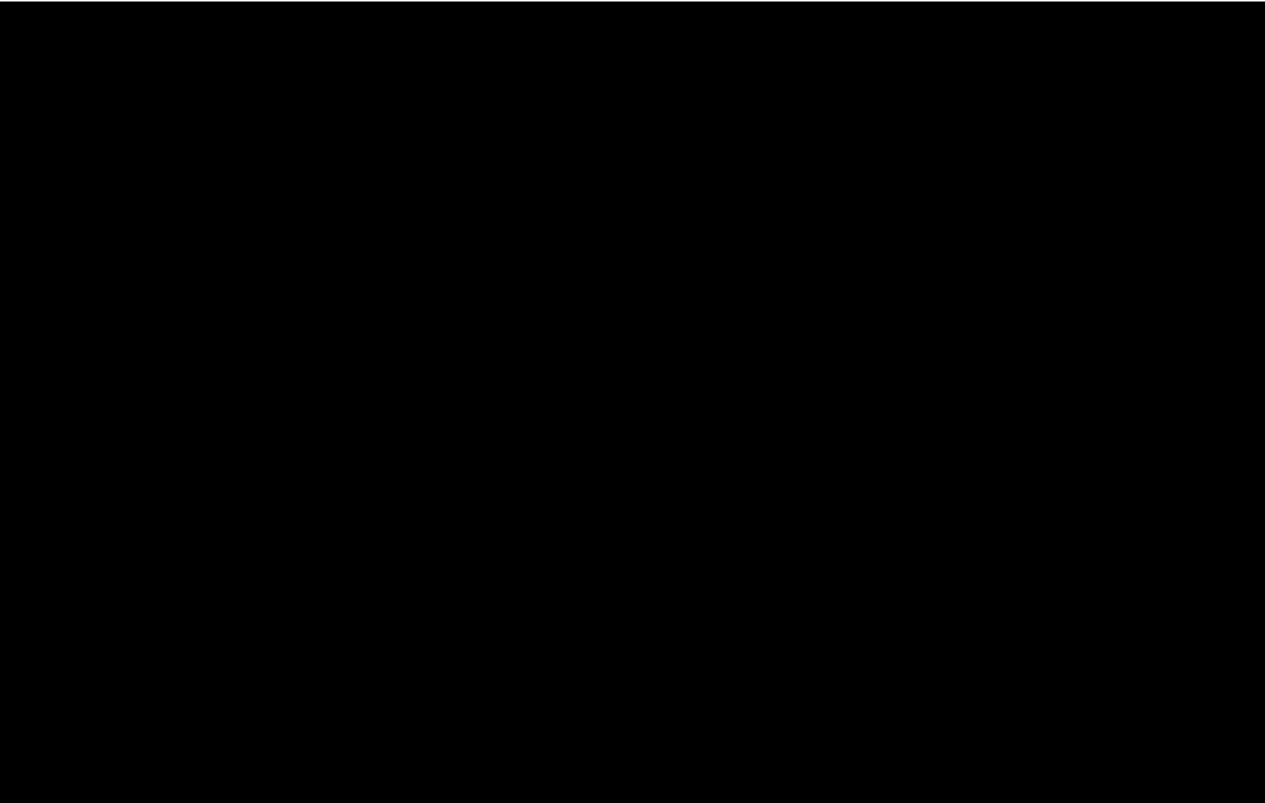
1 Ms Hesmondhalgh's evidence on negotiations, and they say
2 that Ms Hesmondhalgh explained that developers might see
3 10-15 per cent CAPEX changes when they are finalising
4 their negotiation, so it is unrealistic to suggest the
5 cost difference implied by the assumed overcharge would
6 cause them to ask for fewer ROCs, but in my submission
7 the comparison is inapt because the change in costs
8 between the factual and the counterfactual is not
9 directly observed by developers. They simply face a
10 different set of costs. So, how developers might react
11 to an observed change in costs when finalising
12 negotiations uninformative.

13 In any event, whether a particular CAPEX change
14 affects negotiations is a factual issue, not an expert
15 one, and there is no factual evidence to support what
16 Ms Hesmondhalgh said.

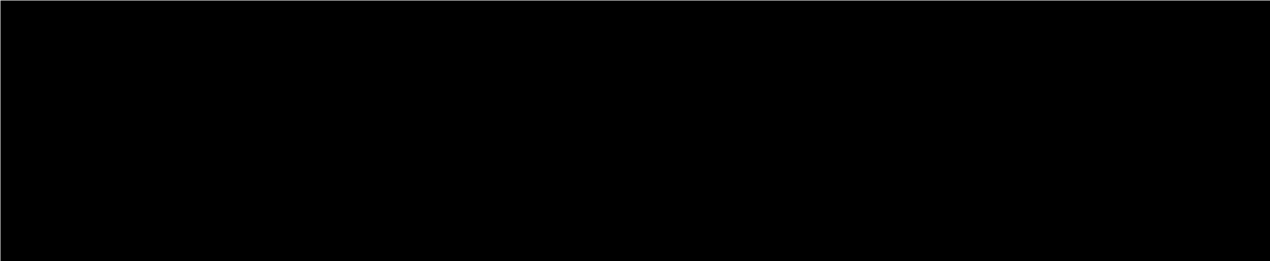
17 The next issue I would like to deal with is this: in
18 her opening, Ms Davies relied on EY's response to the
19 invitation to tender the Government issued, and a
20 particular passage in that document. It is certainly
21 right that Government asked EY to investigate the impact
22 that two ROCs would have, which is unsurprising when
23 that is what the developers had been requesting but it
24 would be quite wrong, in my submission, to suggest that
25 Government was somehow prompting EY to find a case for

1 two ROCs. It is not supported by the evidence. In my
2 submission, it would have been a frankly irresponsible
3 way for Government to proceed.

4 If we could go, please, to the [REDACTED] at
5 {ROC-E/53/1}, page {ROC-E/53/5}, please, zoom in on 1.1,
6 we see here:



19 Then you see (a):

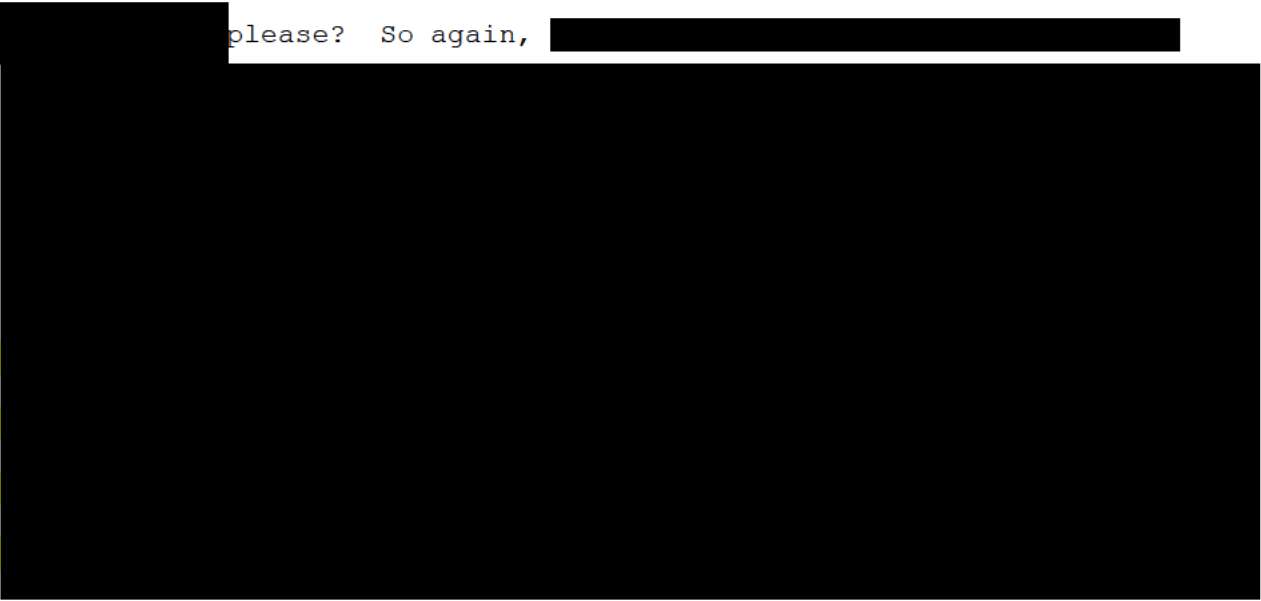


24 Scroll down, please, to (b), so these are the
25 Government's key objectives, or sorry, detailed

1 objectives. Perhaps you could just scan (b). You will
2 see no reference there to two ROCs.

3 Then if we go next to page {ROC-E/53/9}, if you
4 could just scroll up so we can see both (c) and (d),

please? So again, [REDACTED]



14 So, what Government is asking for, in my submission,
15 is a bottom-up, objective and evidence-based analysis of
16 costs and revenues in order to understand whether an
17 increase in banding is justified and if so at what
18 level.

19 If we scroll down on this page, please, we see the
20 delivery methodology, and what we have now in the boxes
21 is seven key questions, and I am not going to take you
22 through them one-by-one, but it is only when you get to
23 the last one on page {ROC-E/53/12}, this is the one
24 Ms Davies relied on, it is only when you get to the last
25 one that you see a request that [REDACTED] address what impact

1 banding at two ROCs would have.

2 So, the request for two ROCs that developers have
3 made is not at all prominent in the invitation to tender
4 and in my submission there is no basis at all for saying
5 that the Government was somehow prompting EY to find a
6 case for two ROCs.

7 In Prysmian's closing at paragraph 32 they say there
8 is no evidence of any other increase being contemplated
9 at that time, but that is unsurprising because the EY
10 analysis had not yet been conducted. Of course, when it
11 was, it showed a range of possible banding levels. I
12 will show you that the inputs used by EY reflected the
13 evidence provided by Government, or, sorry, provided to
14 Government by industry. They were not selected so as to
15 reverse-engineer a finding of two ROCs.

16 If we could go next, please, to {ROC-E/105/1}? I am
17 jumping ahead in time but it is relevant to the same
18 point. Again, Ms Davies relied on this document in

19 [REDACTED] opening. This is an [REDACTED]
20 [REDACTED], and

21 the passage that Ms Davies relied on is at the bottom of
[REDACTED] this page. [REDACTED]
[REDACTED]

3

You can see:

10 And as I understand it, Prysmian rely on this to
11 argue that the bottom of EY's recommended range in the
12 final report was the result of a prompt by Government.
13 The implication, I think, is that if developers had
14 still requested two ROCs in the counterfactual, the
15 lower bound of EY's recommendation would have been the
16 same, and I am going to come on to the EY report but
17 I can deal with this point quite quickly because the
18 short answer is we do not have the draft on which this
19 is commenting, so we do not know what the original text
20 was. It is therefore quite difficult to draw
21 conclusions as to the import of this drafting change.

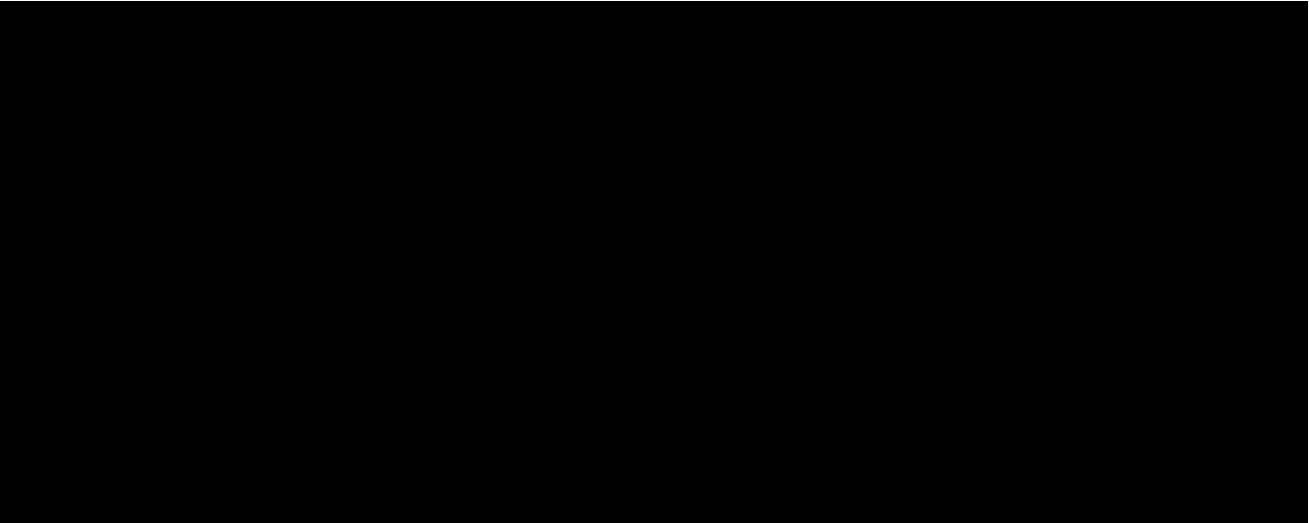
22 I do submit, however, that Government is most
23 unlikely to have suggested that EY express a range of
24 2-2.5 ROCs in its conclusions unless that was justified
25 by EY's underlying analysis in the main body of the

1 report, and EY is most unlikely to have accepted such a
2 suggestion.

3 Now, London Array in their closing at paragraphs 35
4 and 39, they say, well, this document breaks the chain
5 of causation. It destroys the Class Representative's
6 case, because they say it shows that whilst the wind
7 farm's CAPEX fed into EY's recommendation, it did not
8 feed into Government's final decision because that
9 decision was based simply on developer requests. That
10 is an obviously bad point, in my submission, not least
11 because the wind farm CAPEX led to EY's levelised cost
12 estimate and the Government's decision was based in part
13 on that levelised cost estimate. Government did not
14 simply accept the wind farm requests.

15 Of course, London Array's argument implies that
16 whatever EY's analysis had shown, whatever it had shown,
17 Government would have placed definitive weight on
18 industry requests, but that would have been flatly
19 incompatible with the Government's obligations, and it
20 is flatly incompatible with the evidence.

21 Just to finish this point, if we go, please, to
22 {ROC-E/107/1}, this is the day after the email we have
23 just looked at, so this is the submission that then goes
24 to ministers with the final draft of the EY report, and
25 paragraph 6 says:



9 So again, a point I have made a number of times, the
10 focus here is on the base case cost estimate.

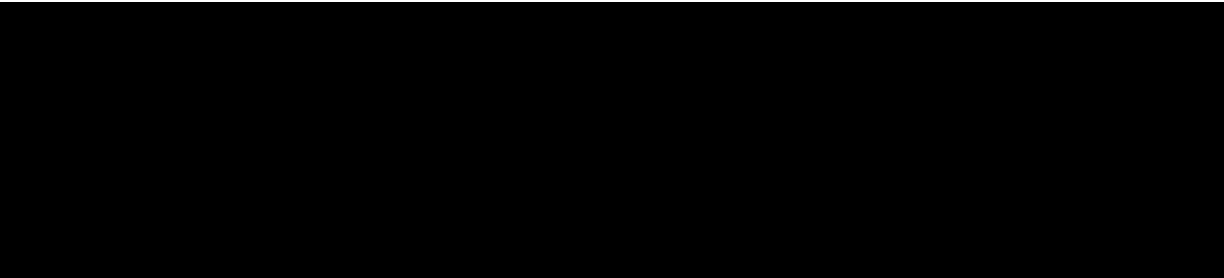
11 Over the page at paragraph 7 --


12 THE CHAIRMAN: Sorry, just -- I mean, I understand, of
13 course, you focus on £144, the base case estimate --
14 does, in your submission, EY's report as distinct from
15 explanations of the report later on in the State aid
16 analysis, does EY's report itself contain a range within
17 which this £144 figure falls, or does --

18 MR LASK: Its sensitivities contain cost ranges, yes. I am
19 going to come on to show you them. Yes.

20 THE CHAIRMAN: Okay.

21 MR LASK: Paragraph 7 {ROC-E/107/2}:





2 So that is a reference, and as I say we are going to
3 come on to look at the sensitivities, but that is a
4 reference to the hurdle rate sensitivity in Figure 11 of
5 EY's report which shows a 2% ROC level on one
6 sensitivity, and what this suggests in my submission is
7 that when in that email Government was asking EY to
8 reflect in its conclusion the 2-2.5 range, all it was
9 asking it to do was reflect the analysis that was in the
10 underlying report. It was not saying "we want two in
11 there" because that is what the developers are seeking.

12 I want to turn, now, to the EY analysis.

13 THE CHAIRMAN: Just before we -- and we are moving on to a
14 different topic -- just so that I have got clear in my
15 mind, and I am listening now for the right things in the
16 oral closings -- is it right that 1.75 ROCs is no longer
17 being pursued?

18 MR LASK: It is not right. No. It is not our primary case
19 but we certainly do not abandon it because, of course,
20 our primary case is that there was no aversion to
21 banding in 0.1 increments, and that in the
22 counterfactual that would have been the obvious choice,
23 but it is said against me that the Government would
24 never have used 0.1 increments because it was only ever
25 going to use 0.25 increments, to which I say, is my

1 alternative case, well, in that case, it would have set
2 banding at 1.75.

3 THE CHAIRMAN: And I am not going to take you out of your
4 course, but just so you know, am I -- a question that I
5 do have that you do not have to answer now is this: is
6 1.75 sustainable only if, on the analysis of Mr Druce,
7 that the overcharge is £6.4?

8 MR LASK: No.

9 THE CHAIRMAN: It is not. Okay.

10 MR LASK: I will give you my headline answer. Even if one
11 assumes that the cost elevation is only around £4, that
12 gets you in the counterfactual to around £140 per
13 megawatt hour and that is very close to the revenue
14 generated at 1.75 ROCs, and what we say is that if you
15 are in a world where the Government is only willing to
16 use 0.25 increments, it is because you accept the
17 submission that, well, it is all very uncertain, and
18 that these really, really broad ranges -- and that is
19 what the Government was thinking about -- but in those
20 circumstances, a small difference between the costs of
21 £140 and revenue at 1.75 ROCs which is about, I think,
22 £138, that is not an important difference on that
23 premise.

24 THE CHAIRMAN: Okay. Thank you.

MR LASK: So, I am now on the -- my second main topic, [REDACTED]

1 [REDACTED] It is common
2 ground that this is a key piece of evidence. Of course,
3 the Government did not accept, as we know it did not
4 accept EY's findings in their entirety, but the report
5 was nevertheless an important part of the evidence base
6 on which Government based its decision, and there are
7 four key points that I wish to emphasise.

8 First, EY's cost estimates would have been lower in
9 the counterfactual, both in its base case and in its
10 sensitivities; second, EY's findings as to the level of
11 banding required by the wind farms would also have been
12 lower in the counterfactual, both in its base case and
13 in its sensitivities, because those findings depended on
14 the cost estimates; third, it follows that one of the
15 most important pieces of evidence relied on by
16 Government would have indicated that on certain
17 assumptions the level of support below two ROCs would be
18 sufficient. Government was focused, as we will see,
19 Government was focused on the more optimistic
20 assumptions in EY's sensitivities; fourth, Government,
21 in any event, took a more aggressive view than EY as to
22 the revenues that could be generated at different ROC
23 levels. So, for example, whereas EY's base case
24 indicated a need for 2.5 ROCs, Government ultimately
25 concluded that more revenue could be generated with

1 fewer ROCs.

2 Now, we believe there's at least a measure of common
3 ground on these points. Certainly Prysmian agree that
4 on EY's methodology a levelised cost which was £4 lower
5 in the counterfactual would have translated into a
6 decrease in support of approximately 0.1 ROCs. That is
7 Prysmian's closing, paragraph 96.

8 So, turning to the EY report at page 9, please,
9 {ROC-E/112/9} -- I am so sorry, page 18. It is Figure 9
10 I would like to look at {ROC-E/112/18}. Figure 9, this
[REDACTED] is [REDACTED]

12 [REDACTED] It is common ground
13 that this would have been lower in the counterfactual.
14 We have explained in our written closings why we say
15 Ms Hesmondhalgh's cost estimate is unreliable. That is
16 paragraph 117 of our closing. It follows on our case
17 that this cost estimate would have been lower by around
18 £4.30, and that is just is simple average of the
19 remaining experts' estimates, but if you want to include
20 all four, it is about -- it is £4.14. It does not make
21 a huge difference overall.

22 THE CHAIRMAN: I am going to ask all the parties the same
23 question about this figure, because, obviously, we have
24 got a range -- £3.70, £4.30 -- from your perspective do
25 you think that we need to do anything other than work

1 with £4? Do you think we need to resolve the
2 disagreement between the experts as to whether it is
3 £3.70 or £4.30, or are you content for us to work with
4 £4?

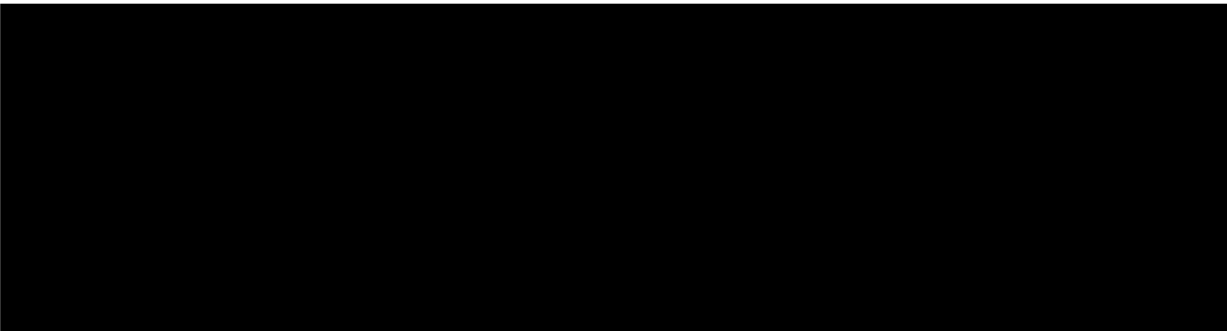
5 MR LASK: Even if you include all of the experts' estimates
6 your average is £4.14 so that is where we would put it
7 as a simple average of the experts' estimates. I am not
8 aware that any of the other parties' submissions require
9 me to pin my case on £4.14. As far as I am concerned,
10 £4 would be sufficient because everyone seems to accept
11 that it is equivalent to 0.1 ROCs.

12 THE CHAIRMAN: I think that answers my follow-up question,
13 which was: from the perspective of your case, do you
14 think any aspect of your case is affected, whether it is
15 £4.30 or £3.70 or £4 with that level of granularity?

16 MR LASK: I do not think it is, no. I think £4 is
17 sufficient.

18 THE CHAIRMAN: Thank you.

19 MR LASK: My submissions are based on it being slightly
20 above £4 because that is what we say is the correct
21 figure, so you will excuse me if the figures I am
22 quoting to you are slightly different. By way of
23 illustration, on our case, the base case levelised cost
24 in the counterfactual would have been £139.07, but in
25 any event, below £140.



6 ██████████ Since the required banding depends on
7 the level of costs, it must follow, in my submission,
8 that the required level of banding would have been lower
9 in the counterfactual, because the required level of
10 banding was based on the cost calculation.

11 So, on Ms Shamsi's analysis, for example, which
12 approximates EY's modelling, it would have been 2.38
13 ROCs rather than 2.5 in the counterfactual. One sees
14 that from Shamsi 1, Table 3.4 on paragraph 3.33 at
15 {ROC-D/3/58}.

16 Now, as I will come on to, and as I have mentioned
17 already, Government reached a more aggressive view than
18 EY on the revenues that would be generated at a given
19 level of ROCs, and on Government's analysis, as
20 explained by Mr Druce, a support level of 1.89 ROCs
21 would be sufficient to cover £144, never mind 2.5 ROCs.
22 He says 1.89, and that is not seriously challenged. It
23 is in the Joint Expert Memorandum proposition 26, and at
24 Druce 5, footnote 208. He was not cross-examined on
25 that.

1 If you apply that same approach in the
2 counterfactual, where the costs of £144 are now down to
3 just under £140, on Government's analysis the required
4 banding level is 1.79, so that 2.5 figure comes down to
5 1.79 in the Government's view. On EY's analysis it
6 would be 2.34 -- sorry -- 2.38. On Government's view it
7 would be 1.79. For your note, I am going to be coming
8 to this, but for your note we see that in Table 2 in our
9 closing submissions.

10 So that gives you an important flavour of the
11 different picture that would have been in front of
12 Government in the counterfactual.

13 If we turn, please, to page 20, we see Figure 11.
14 {ROC-E/112/20}. This is EY's discount rate sensitivity.
15 It is common ground that it was an important
16 sensitivity, and Ms Shamsi called it EY's main
17 sensitivity in her list of defined terms, page 6 of
18 Shamsi 1. It produces the range of banding levels that
19 EY reflects in its conclusion. I am going to come to
20 its conclusion, but what you see here is you see a total
21 range of 1.5 to 2.9, 1.5 does not appear in the final
22 conclusion because it is the existing level and it has
23 been found that it is insufficient. 2.9 does not
24 appear, presumably because 14 per cent is thought to be
25 an excessive rate of return, so what you see in the

1 final conclusion is a range of 2-2.5. It is the two
2 middle bars in this figure. This is where that comes
3 from.

4 So EY considered this to be an important
5 sensitivity, and Government considered it important too.

As we saw a few moments ago in the [REDACTED]
7 [REDACTED], ROC-E/107 at paragraph 7, it
[REDACTED] was specifically relied upon in its [REDACTED]
[REDACTED] At paragraph 7, where they said, [REDACTED]
[REDACTED]

11 That is this one.

12 PROFESSOR ANTHONY NEUBERGER: I am just getting slightly
13 confused about the numbers because it seemed to me -- am
14 I right in saying that the two ROCs can be justified
15 either in terms of the EY report and a 10 per cent
16 hurdle rate, or, alternatively, using a 12 per cent
17 hurdle rate and the Government's revenue assumptions? I
18 mean, are there two different ways of getting to the two
19 ROCs?

20 MR LASK: At this stage we are only concerned with EY's
21 analysis, and what EY are saying is that if you use a 10
22 per cent rate of return, the costs are £128, and you
23 need two ROCs to cover those costs.

24 PROFESSOR ANTHONY NEUBERGER: Yes.

25 MR LASK: Then they say but if you use a 12 per cent rate of

1 return which is our base case, the costs are £144, and
2 you need 2.5 ROCs. When Government comes to look at the
3 revenue figures, it takes EY's costs figures, but when
4 it comes to look at the revenue, it reaches a different
5 view on the number of ROCs required to meet a certain
6 level of costs. So, on its view -- and this is implied
7 from its analysis -- but as I say the implication, which
8 is contained in Mr Druce's report is not contested, but
9 on the Government's approach you would only need 1.89
10 ROCs to cover costs of £144.

11 So, the Government is, of course, looking at EY's
12 report. It is important evidence, but it has taken a
13 different view on how many ROCs you need to cover a
14 certain level of costs.

15 PROFESSOR ANTHONY NEUBERGER: And that 1.89 is about --
16 sorry -- that is in the counterfactual world?

17 MR LASK: No. That is in the factual world.

18 PROFESSOR ANTHONY NEUBERGER: That is in the factual world
19 and based both on their different revenue assumptions
20 from the central assumption in EY, and on a different
21 discount rate, or the same discount rate?

22 MR LASK: No, the Government does not apply a different
23 discount rate. Frankly, the Government does not provide
24 a very clear explanation as to why it has reached a
25 different view on how many ROCs you need. It talks

1 about certain sensitivities and we will come on to see
2 this in the State aid documents, but on the face of the
3 evidence it is not entirely clear how the Government
4 reaches a different view. What we do know is it does
5 reach a different view, and Mr Druce has calculated the
6 cost/ROC ratio that the Government must have been
7 applying, and it is that cost/ROC ratio that is not
8 contested because everyone agrees that, yes, when you
9 look at what the Government has done here, and you look
10 at its figures, that must have been the approach it was
11 applying.

12 THE CHAIRMAN: Just so I have the point, the Government has
13 got a different toolbox, perhaps, and I think what you
14 are saying to us is that applying the different toolbox
15 to the EY figures in the factual not the counterfactual,
16 would have supported ROCs at 1.89.

17 MR LASK: Yes.

18 THE CHAIRMAN: Thank you.

19 MR LASK: Of course, as we will come on to deal with, the
20 Government doesn't award 1.89 or 1.9 because it knows
21 that there is uncertainty, and it knows that there are
22 these more expensive wind farms that might need more --
23 that is why it awards two -- but as I have said in the
24 counterfactual, the 1.89 is now 1.79. So, it is twice
25 as many ROCs.

1 As I say, this was an important sensitivity. It was
2 relied on in the advice to ministers. Just coming to
3 the Chair's question from a few moments ago, this
4 sensitivity produces the range of cost estimates that
[REDACTED] Government subsequently uses in the [REDACTED]

10 [REDACTED] The first version does not give
11 a range. The second version does when the Commission
12 raises its concerns, and that is the range it gives.
13 That shows, in my submission, that the Government was
14 looking closely at this sensitivity. It is important.

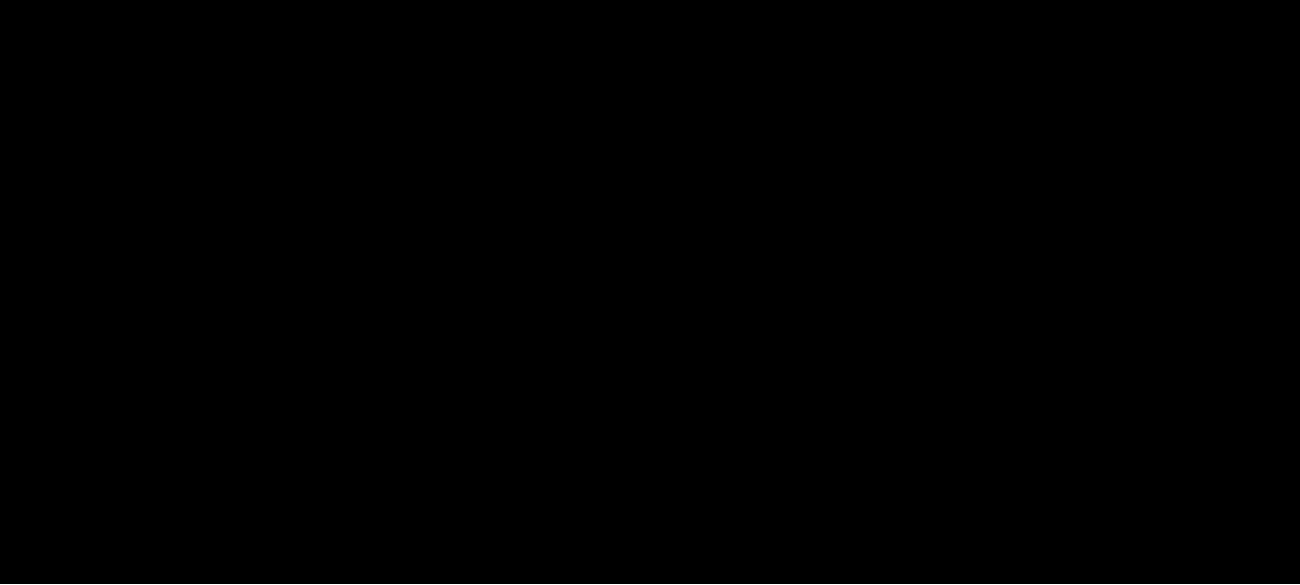
15 Now, pausing there, Ms Shamsi argued in
16 cross-examination that EY was applying sensitivities to
17 match the industry ask of two, and the aligned parties
18 appear to adopt that argument in their closing
19 submissions. As we understand it, the argument is that
20 EY deliberately designed its sensitivities so as to
21 produce results that aligned with industry's request for
22 two ROCs. It would follow on that view -- this is the
23 case against me -- that if industry had still requested
24 two ROCs in the counterfactual, EY's sensitivities would
25 have been adapted so that they still produced results

1 that included two ROCs. So, in Figure 11 it must
2 follow, on the aligned parties' argument, in Figure 11,
3 EY would have used a higher rate of return in the second
4 bar so that total costs still got to £128 in the
5 counterfactual, and the required banding still got to
6 two ROCs, notwithstanding lower CAPEX.

7 In my submission that argument simply is not
8 supported by the evidence, and would call into question
9 the objectivity of EY's analysis. Now, we have
10 addressed this in our closing at paragraphs 119 to 123,
11 but I will just elaborate, if I may. Firstly, if one
12 looks at the -- at EY's own description under the
13 heading, 4.3.1, it says:

17 So in other words, a discount rate is driving the
18 required level of support, not the other way around.

19 Second, if we could go, please, to {ROC-E/104/1},
20 this is the [REDACTED] that Ms Shamsi referred to, and
21 that the aligned parties rely on. If we could go,
22 please, to page {ROC-E/104/62}. This was the passage
23 Ms Shamsi relied on. I think she was taken to it in
[REDACTED] re-examination, but in any event she relied on it. [REDACTED]
[REDACTED]



10 So EY is noting here that whilst its findings
11 suggest 2.5 ROCs, developers said they need two, and it
12 then presents the opinion that that may reflect
13 project-specific factors such as the hurdle rate that is
14 being applied for a particular project and you do see
15 those project-specific factors reflected in the
16 sensitivities. We have just looked at Figure 11. We
17 will look at some of the others. In my submission it
18 is a non sequitur to say that EY then deliberately
19 calibrated its sensitivities to produce cost estimates
20 that aligned with the request for two ROCs. All EY is
21 saying is that the apparent need for two ROCs may
22 reflect the specific assumptions applied by developers.

23 THE CHAIRMAN: Can I make sure -- I am not sure I have
24 understood that. Let me play it back to you to make
25 sure I have.

1 So, EY is recommending 2.5. Industry is asking for
2 two. I had perhaps wrongly thought that the EY report
3 goes on to consider what assumptions would justify
4 industry's request for two, so EY says, well, maybe they
5 are only asking for two because they are assuming a
6 hurdle rate of 10 per cent not 12 per cent.

7 MR LASK: That is what it is saying --

8 THE CHAIRMAN: Right.

9 MR LASK: -- but what it is not doing is picking the hurdle
10 rate to match the request, and that is important,
11 because in the counterfactual, on my submission, it
12 would have still used a 10 per cent hurdle rate as its
13 main sensitivity, and that would have produced a lower
14 ROC level. What the other parties are saying is that,
15 well no, it had this request for two so it was
16 manipulating the rate of return to see how you get to
17 two.

18 THE CHAIRMAN: Sorry, I am not sure I understand the word
19 "manipulating". So suppose we are now in the
20 counterfactual, and suppose the aligned parties are
21 right, and industry is still asking for two. I know that
22 is not accepted, but suppose they are right and they are
23 still asking for two, even in the counterfactual. EY is
24 then still being asked the question: why is industry
25 only asking for two? EY comes back and says, oh well,

1 maybe they are assuming a hurdle rate of -- maybe they
2 would be saying, well, maybe they will be assuming a
3 hurdle rate of 9.75%. Why is that -- why do you
4 characterise that as manipulating?

5 MR LASK: I will use a more neutral word -- selecting.

6 THE CHAIRMAN: Right.

7 MR LASK: The proposition that I resist is that they were --
8 is that they were selecting the hurdle rate to produce
9 the figure of two. My submission, I am going to show you
10 some evidence to support this, my submission is that
11 they select a range of hurdle rates they consider
12 reasonable and one of them produces two ROCs. In the
13 counterfactual they select the same hurdle rates but
14 they do not get to two ROCs in the counterfactual
15 because the costs are lower. Let me elaborate on why I
16 say that.

17 If we go in this document to page {ROC-E/104/74},
18 this is relied on in Prysmian's closing submissions and
19 this is an elaboration, really, of what we have just

20 [REDACTED] seen on the previous page, [REDACTED]
21 [REDACTED] So,

22 what Prysmian say is that the second bar has been
23 selected, so the hurdle rate there has been selected to
24 produce a result of two ROCs. My submission is that
25 mischaracterises what is going on. Read fairly, all EY

1 are saying here is that lobbying for two ROCs implies on
2 EY's modelling that the hurdle rate required may be 10
3 per cent rather than 12 per cent. You see the main
[REDACTED] heading, and then you see the subheading: [REDACTED]
[REDACTED]

6 [REDACTED] In other words, it selects the IRR and estimates
7 the banding required to deliver that rate.

8 Now, the first bar is the exception that proves the
9 rule, because that shows the IRR associated with the
10 existing banding level of 1.5. That is there to show
11 that the existing level is insufficient, insufficient to
12 deliver the developers' hurdle rates. So, the basic
13 submission I make is that this does not mean that 10 per
14 cent as the second bar was selected as a sensitivity to
15 match industry lobbying. It is no coincidence that
16 selecting a 10 per cent sensitivity on EY modelling
17 produces the level of ROCs that industry were seeking
18 because they were working off the same data.

19 In any event, of course, when Government looks at
20 the second bar, it assesses the lower level of ROCs. It
21 assesses, for that second bar, it assesses 1.52 in the
22 factual, and 1.44 in the counterfactual. I will come on
23 to this. I am not suggesting that that is the level
24 Government would have gone for, but it illuminates the
25 evidence that was before them.

1 If we go back to the main report at 112
2 {ROC-E/112/1}, and I am about to reach a natural break
3 point, I am conscious of the time, if we go, please, to
4 page {ROC-E/112/22}, and I am looking at the bottom half
5 of the page, [REDACTED]. Now, if EY
6 had been deliberately selecting its sensitivities to
7 align with the request for two ROCs, one would have
8 expected all of its sensitivities to include two ROCs as
9 one of the results. Figure 14 does not, nor does the
10 next sensitivity on page 23, the OFTO sensitivity. The
11 bottom half of the page again. (Inaudible) if we could
12 zoom in, please, on the bottom half, no sensitivity in
13 Figure 15 that includes a two-ROC result, so these
14 sensitivities do not match industry's requests, so EY
15 was not, in my submission, selecting its sensitivities
16 to produce a result of two ROCs, and if we go back to
17 page {ROC-E/112/20}, Figure 11, please, zoom in on
18 Figure 11, please, it follows, on my submission, that
19 this included a 10 per cent sensitivity not so as to
20 reverse-engineer a result of two ROCs, but because 10
21 per cent was considered a reasonable alternative rate to
22 the base rate of 12. It was considered reasonable
23 because this range of 10-12 per cent was consistent with
24 what developers were telling Government. That evidence
25 was obviously passed on to EY. It must have been. If

1 we look at {ROC-E/84/1}, this is an [REDACTED],
2 if we could zoom in on the top half, please, the top of
[REDACTED] the page, we see from [REDACTED]

[REDACTED] So, one sees there a range of 10-12 per cent. [REDACTED]
[REDACTED]

13 We note that Ms Hesmondhalgh agreed that Figure 11
14 was looking to identify the number of ROCs required to
15 achieve a particular IRR. In other words, the IRR
16 drives the ROC level, not the other way around. The
17 reference for that is Nexans' written closing paragraph
18 33.

19 Similarly, Dr Moselle said that the 2.9 ROC figure
20 in the final bar in Figure 11 -- perhaps we could just
21 have that up again, please, it is {ROC-E/112/20} --
22 Dr Moselle said that the 2.9 ROC figure in the final bar
23 reflected the State aid acceptable limit of 14 per cent
24 IRR. That is Prysmian's closing, paragraph 43. That
25 necessarily implies, in my submission, that, again, the

1 IRR is driving the ROC number. The IRR is selected,
2 that drives the ROC number, not the other way around.

3 So the upshot is that EY's sensitivities did not
4 depend on industry's request for two ROCs, and so even
5 if the request had been the same in the counterfactual,
6 EY would still have used the same sensitivities -- well,
7 it would have used the same sensitivities regardless of
8 what was requested in the counterfactual because it
9 wasn't seeking to match developers' requests. It was
10 seeking to select reasonable alternative assumptions.

11 That might be a convenient moment.

12 THE CHAIRMAN: Let us break there, then, please, and let us
13 come back at five to by that clock.

14 (11.51 am)

15 (A break was taken)

16 (11.58 am)

17 THE CHAIRMAN: Yes, Mr Lask?

18 MR LASK: Please, if we turn back to {ROC-E/112/20}? Figure
19 11 of the EY report. I want to turn now to what this
20 Figure would have looked like in the counterfactual. As
21 I have said, it is common ground that the cost estimate
22 in each scenario would have been lower in the
23 counterfactual, so the grey shaded bars, and since it
24 depended, in part, on the cost estimate, in our
25 submission it follows that the level of support modelled

1 by EY would also have been lower in the counterfactual,
2 and there was a substantial measure of common ground as
3 to how much lower it would have been, assuming it would
4 have been lower. There are some disputes as to whether
5 it would have changed, I am going to come on to that,
6 but assuming it would have been lower there was common
7 ground on the maths.

8 To illustrate, on Dr Moselle's approach, each cost
9 estimate in Figure 11 would be lower by 2.9 per cent,
10 that is Moselle 3, paragraph 5.69, and so the £128
11 figure about the 10 per cent sensitivity would be
12 £124.30. That was accepted during cross-examination at
13 Day 3, pages 116 to 117. Now, there was a discussion
14 between Dr Moselle and myself in cross-examination as to
15 whether the two ROC figure in the 10 per cent
16 sensitivity was the true figure in EY's underlying
17 spreadsheet, or whether it was a product of rounding,
18 but Dr Moselle accepted that if one were to assume
19 either that two ROCs was the true underlying figure or
20 that EY were rounding to the nearest 0.1, then in the
21 counterfactual the level of banding required in this
22 sensitivity would have been 1.9 on EY's modelling. That
23 is -- for your note, that is Day 3, page 119, lines 1 to
24 16 and page 120, lines 13 to 19 and page 124, lines 12
25 to 20.

1 So he accepted that if one were to assume that two
2 ROC was the true underlying figure or that there was
3 rounding to 0.1, then it would be 1.9 in the
4 counterfactual, and in my submission those are the most
5 reasonable assumptions to adopt because -- as we do not
6 know what the underlying figure is, the best we can do,
7 if we are to avoid what Dr Moselle called "terrible
8 speculation", the best we can do in my submission is to
9 take the two ROC figure at face value.

10 Alternatively, if we are to make any assumptions on
11 rounding, Figure 11 itself indicates that EY was
12 rounding to the nearest 0.1. One sees that from the
13 final bar which produced a 2.9 figure.

14 Similarly, Ms Shamsi calculated that the ROC figure
15 in the 10 per cent sensitivity would be 1.9 in the
16 counterfactual, if rounded to one decimal place. Shamsi
17 1, paragraph 3.33. Her calculation of the
18 counterfactual cost figure on the 10 per cent
19 sensitivity was £124.10. That is Shamsi 1, paragraph
20 3.19.

21 Now, Ms Shamsi qualified her agreement to these
22 points -- sorry -- also just for your note, this was
23 dealt with in cross-examination at Day 4, page 42, line
24 13 to page 43, line 32, and page 50, line 15 to page 51,
25 line 1.

1 Ms Shamsi qualified her agreement to these points in
2 cross-examination by saying they were only mechanically
3 correct, and I -- what we take her to have meant is that
4 this was subject to her point about the sensitivities
5 being selected to match industry's request, and that is
6 the point I was dealing with, just before the break.

7 Now, I have explained why we say that is a
8 misinterpretation of what EY were doing, and that is
9 significant because it means that in the counterfactual
10 the particular sensitivity that Government considered
11 important would have showed a lower bound banding level
12 of 1.9 rather than 2. That is even before you get on to
13 Government's more aggressive view on the revenues that
14 can be generated at different ROC levels, because in
15 light of that more aggressive view, not only would the
16 Government have seen lower banding levels in EY's report
17 in the counterfactual, its own revenue analysis would
18 have reduced those levels yet further, and just to
19 illustrate, EY's base case cost estimate in the third
20 bar would have been around £140, we say just below. Its
21 base case required banding would have been 2.4, but on
22 Government's view, as I have said, this is the
23 counterfactual, it would have been 1.79. That is
24 Table 2 of our closing, page 47.

25 Now, in Prysmian's closing they submit that actually

1 EY's base case would have remained 2.5 in the
2 counterfactual, notwithstanding the reduction in costs,
3 and notwithstanding the agreement on the maths from
4 Dr Moselle. They say it would have remained 2.5 in the
5 counterfactual due to EY's rounding, and this is based,
6 again, on the annex which we should pull up at
7 {ROC-E/104/52} and 53. I will do my best. You have to
8 look quite closely at the various bars to understand
9 what Prysmian are saying.

So you have here on page 52 an earlier draft of

12 What Prysmian say is that if you
13 look at the left-hand page you see in the second set of
14 three bars, 2009, you see that EY's provisional base
15 case cost estimate was 150. You see the yellow bar in
16 the second set of three. Then if you compare that to
17 the right-hand page, the second set of bars, 2009, the
18 yellow bar indicates that the banding level on EY's
19 modelling was 2.5, so that is EY's provisional estimate,
20 and what Prysmian point out is that EY's final base case
21 cost estimate was £144, but it still produced a required
22 ROC level of 2.5. Prysmian are saying that the cost
23 estimate came down, but the ROC banding level did not,
24 and, therefore, the 2.5 banding co-efficient must have
25 reflected a significant degree of rounding by EY, and

1 therefore it would not have changed in the
2 counterfactual. That argument is flawed in my
3 submission for these reasons. Firstly, it seems to draw
4 inferences from a highly forensic comparison between the
5 findings in EY's final report and the provisional
6 analysis in this annex, in circumstances where EY did
7 not explain its changes, or its rounding practice. So,
8 the inferences rest very heavily on assumptions as to
9 what EY was doing and thinking. In particular, the
10 argument rests on an assumption that although EY's cost
11 estimate changed following its provisional analysis from
12 £150 to £144, EY's approach to converting cost into ROCs
13 did not change. That is how it still managed to produce
14 a 2.5 figure on costs of £144. It is only by adopting
15 that assumption that Prysmian can say there must have
16 been a large degree of rounding. But actually, if you
17 look at these pages 52 to 53, you will see it is
18 apparent that EY's view as to the relationship between
19 cost and ROC, the ratio, it must have changed because at
20 this stage you see on the first left-hand page, second
21 set of three bars, you will see the dark grey
22 sensitivity has costs of £144, and then on the
23 right-hand page, the corresponding sensitivity has a ROC
24 level of 2.4, so at this stage EY thinks 2.4 ROCs will
25 generate £144 in revenue.

1 Then if we compare that to Figure 11 back in the
[REDACTED] main report {ROC-E/112/20} [REDACTED]
[REDACTED]

4 So, EY's view as to the relationship between cost and
5 ROC or revenue and ROC has -- it seems to have changed.
6 Its ratio has changed.

7 THE CHAIRMAN: Because otherwise in the annex £144 would
8 have equated to 2.5 ROCs not 2.4.

9 MR LASK: Yes, so it has changed.


10 So, the argument that, well, in the counterfactual,
11 you still would have got 2.5 ROCs in the base case in
12 Figure 11, it does not stand up to scrutiny.

13 So, it is not just EY's base case cost that changes.
14 It is its ROC level that changes in the counterfactual.
15 Further, as I have already submitted, on the face of the
16 EY report, the face of the -- the EY report, on its
17 face, suggests that if it was rounding, it was rounding
18 to at least the nearest 0.1, and so we see in Figure 11,
19 we see a 2.9 figure, and the reason I say "at least 0.1"
20 is because if one goes over the page {ROC-E/112/21} to
21 Figure 14 -- sorry, over another page, please
22 {ROC-E/112/22}, you see here it is also rounding to 0.1
23 in Figure 14, similar to Figure 11, and if you go over
24 the page to Figure 15 {ROC-E/112/23}, it is rounding
25 even further. It is rounding to 0.01 by the looks of it

1 in those third and fourth bars.

2 So, insofar as it is rounding, it is rounding to at
3 least 0.1, perhaps even -- to an even higher degree of
4 granularity, whereas Prysmian's argument rests on the
5 assumption that it is taking a much broader rounding
6 practice, and it just does not work on the evidence.

7 As I have said, Dr Moselle accepted that if EY were
8 rounding to the nearest 0.1, then the banding
9 coefficient in the second bar of Figure 11 would have
10 reduced by 0.1, and it follows -- sorry, if we go back
11 to page {ROC-E/112/20} -- and it must follow, in my
12 submission, that the coefficient in the third bar of
13 Figure 11 would also have reduced by 0.1. In other
14 words, to 2.4.



24 [REDACTED]. It would be 1.9. So, as Government
25 goes through this document it is seeing 1.9, 1.9, not

1 two. It is consistently looking at the lower bound of
2 the ranges it is presented with. It is consistently
3 looking at the more optimistic assumptions.

[REDACTED] Figure 14 at the bottom of this page, [REDACTED]
[REDACTED]

8 [REDACTED]. You will
9 recall that on Dr Moselle's approach the costs reduced
10 by 2.9 per cent on each sensitivity, Moselle 3,

[REDACTED] paragraph 5.69. [REDACTED]

[REDACTED]

22 If we go back to the previous page, {ROC-E/112/22}

[REDACTED]

1 Again, as I have emphasised Government then reaches
2 its own view on revenue, and on Government's own revenue
3 approach, the level of support required by those final
4 two bars in the counterfactual would be 1.48 and 1.35.
5 Again, that is Table 2 from our closing, page 47.

Then if we could turn, please, to

10 Whilst a range of alternative
11 means of providing support could be considered, if such
12 support were to be provided through the existing
13 mechanism of the RO, the level of financial support
14 required to provide a reasonable economic return would
15 be between 2 and 2.5 based on the analysis performed.

16 Now, as we have seen, EY's sensitivities actually
17 produced a wider range than that, per Figure 11. It had
18 2.9 in it. Figure 14 had a 1.9 in it, so there was a
19 wider range on the sensitivities, which means this
20 conclusion must reflect the range of sensitivities that
21 EY considered most reasonable. The lower bound figure
22 of two, two ROCs, reflects the 10 per cent sensitivity
23 discount rate sensitivity in Figure 11.

24 As I have shown, that Figure falls to 1.9 in the
25 counterfactual, and so it follows, in my submission,

1 that the lower bound of EY's conclusion would also fall
2 to 1.9, based on the analysis performed. So, again, the
3 Government is seeing a different picture across the
4 piece in the EY analysis.

5 In any event, even if -- even if -- EY's conclusion
6 on the top of page 4, even if that had been the same in
7 the counterfactual, which we do not accept, we say it
8 would be different, it would be 1.9 to 2.4, but even if
9 it had been the same, Government is not going to read
10 the conclusion and then stop. It is obviously going to
11 study the underlying analysis carefully, and it is going
12 to observe a range of lower costs and lower levels of
13 required support.

14 Just for completeness, you may recall Mr McNeal
15 explained in cross-examination that Government would not
16 take, even the technical report at face value, let alone
17 the developer requests, but would do its own work to
18 ensure it made the right trade-offs and protected
19 consumer bills. That is transcript {Day2/18:25} to page
20 20, line 4. That is borne out by the fact that
21 Government then goes on and produces its own set of
22 revenue estimates. That is my second main heading. I
23 want to turn to my third main heading now which is
24 Government's approach in the factual. This concerns
25 Government's assessment and its exchanges with the

1 Commission.

2 As I outlined in opening, the evidence on this
3 demonstrates five key points, firstly, that Government
4 investigated the costs of offshore wind and the level of
5 support required to cover those costs very carefully;
6 second, that it endeavoured to align costs and revenue
7 to the best of its ability within the constraints
8 arising from the uncertainty in the data, and it did so
9 not least because it had to avoid over-compensation;
10 thirdly, there was a measure of precision in the
11 Government's analysis. It did not simply rely on a
12 comparison of broad costs and revenue ranges but focused
13 on central estimates; fourth, the Government's decision
14 allowed for a margin between costs and revenue, and it
15 did so to account for the uncertainty in the data and to
16 ensure that certain key wind farm projects went ahead,
17 and fifthly, that margin, which was £5, 3.47 per cent,
18 was a source of considerable concern for the Commission
19 and a major sticking point in Government's efforts to
20 obtain State aid clearance. That risk would have been
21 even greater in the counterfactual. This approach the
22 Government adopted reflected its key objective, which,
23 as we have said, was to set support at a level that was
24 necessary to ensure that key projects went ahead, while
25 avoiding over-compensation and minimising costs to the

1 consumers.

2 Now, in Prysmian's closing, paragraph 4(a) and
3 paragraph 105, they refer to Government's core or
4 overriding objective being to ensure that sufficient
5 projects proceeded. That is not a fair reflection of
6 the evidence, in my submission. All the evidence I
7 showed you in opening in relation to the Government's
8 key objective, what the documents show is that the need
9 to avoid over-compensation, and minimise cost to
10 consumers, was equally as important.

[REDACTED] I have already shown you the [REDACTED]
12 [REDACTED] --
13 sorry, the [REDACTED] one is at ROC-E/99, the [REDACTED] one is at
14 ROC-E/107. I have shown you the [REDACTED]
15 at ROC-E/117 and I showed you all of those focused on
16 [REDACTED] of £144. I do not need to
[REDACTED] take you to it but one sees the same in the [REDACTED]
18 [REDACTED] at ROC-E/128, paragraph 2.12, the focus
19 is on the base case cost estimate, and that is what [REDACTED]
20 endorses.

21 What this shows is that throughout the documents
22 that precede the [REDACTED], the clear focus of
23 Government is on EY's base case. That is the cost
24 estimate that is consistently cited, not the range.

25 So, turning, then, to the [REDACTED] and

beginning with the

2 at {ROC-E/130/1}, it is common ground that
3 the are important. They are important
4 because they are one of the few contemporaneous
5 evidential records of the Government's decision. All
6 the parties and experts have relied on them.

7 I would like to pick this document up, please, at
8 page {ROC-E/130/6}. We see here the Government
9 explaining its proposal to step down support from two
10 ROCs to -- so it is setting out its proposal for two
11 ROCs and then it says:

19 Then it explains the criteria that would apply for a
20 step down to 1.75. So, it is clearly focused on
21 limiting costs to consumers where it can.

22 THE CHAIRMAN: Am I right that this is the proposal that was
23 ultimately abandoned?

24 MR LASK: It is.

25 THE CHAIRMAN: Yes.

1 MR LASK: But it is notable, because it is submitted by the
2 aligned parties that Government would not have wanted to
3 create a new band for offshore wind, and that is one of
4 the reasons they say it would not have used increments
5 of 0.1 in the counterfactual. It would not have wanted
6 to create a new band and developers were only interested
7 in moving up to the next band, but this shows that the
8 Government was prepared to create a new band for
9 offshore wind. 1.75 would have been a new band, because
10 it was not one of the existing bands under the 2009
11 Order.

12 Now, as you have said, sir, Government ultimately
13 did not adopt the step-down proposal, but that was not
14 because it did not want to adopt a new band. It was
15 because it decided to wait for the next banding review,
16 because the step down would have -- I think this becomes
17 apparent from a later document -- but the step down
18 would have taken effect, I think, in 2013 or 2014 which
19 was when the next review was going to come into -- or
20 the decision based on the next review was going to come
21 into force anyway, so they decided it would be better to
22 wait.

23 Page 7, {ROC-E/130/7} sets out the figures -- bottom
24 of the page -- sets out the figures that had been
25 provided to the Commission for the 2009 notification,

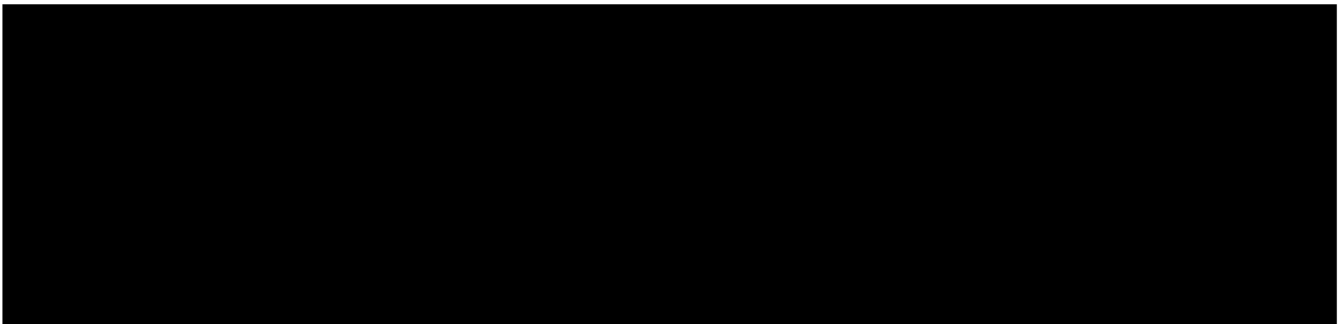
1 and we see in these tables one of the important
2 differences between the 2009 and 2010 processes. What
3 one sees is that the cost and revenue figures in these
4 tables from the 2009 notification are, with one
5 exception, only provided in ranges, and the exception
6 you see here, on this page, the total of £80.36 from
7 2006, that is the revenue, that is the only point
8 estimate we see in these tables.

9 Now, as I say, that is from 2006, so given that that
10 was already in the past when these figures were first
11 provided to the Commission in November 2008, it may be
12 that the Government was able to be more precise, but in
13 any event, if we go over the page {ROC-E/130/8} we see
14 only ranges were used in 2009.

15 Now, I am going to address Prysmian's margins tables
16 which were handed up by Ms Davies on Day 1. I am going
17 to address those in due course but I emphasise at this
18 stage that whilst Ms Davies' tables present central
19 estimates for cost and revenue, and they calculate
20 margins based on those central estimates, those central
21 estimates were not actually provided to the Commission.
22 One sees an example of that, an illustration of that, in
23 this reproduction of the tables that went to the
24 Commission in the 2009 decision.

25 This is significant because it indicates that the

1 2009 process, which involved a whole range of
2 technologies, was more broad brush, but when it came to
3 the 2010 decision for offshore wind specifically,
4 Government compared cost and revenue with a greater
5 measure of precision. One sees that from the updated
6 tables that follow. If we scroll down, please, you will
7 see the explanation:



13 If we go over to the next page, please
14 {ROC-E/130/9}, these are the important figures because
15 they are the 2010 figures, and one sees -- and the
16 Tribunal has seen this document a number of times now,


but what



24 In my submission it is unreal to argue

otherwise.





4 █ This can only be because the Government
5 considered the central estimates were important.

6 So this table indicates that for the purposes of its
7 assessment, Government was focused on a comparison of
8 base case costs and central estimates for revenue. That
9 does imply a degree of precision in the assessment.

10 Now, precision is obviously not binary. It is a
11 spectrum, but there is a degree of precision in what
12 Government is doing, and the Tribunal will note that the
13 central revenue estimate is not simply the mid-point in
14 the range. If you look at the two ROC scenario, £149 is
15 not simply the middle of the range £112 to £170, so it
16 is not simply illustrative, the centre, the mid-point of
17 the range would be £141, for what it is worth, so
18 Government, in my submission, it must have had some
19 degree of confidence in the central estimate in order to
20 be using it. As we will come on to see, the subsequent
21 documents in the State aid series confirm that the
22 highlighting of the central estimates reflected
23 Government's underlying assessment.

24 Why did Government focus on central estimates? In
25 my submission it can only be because it was seeking to

1 align revenue to costs as best it could.

2 Prysman's closing at paragraph 54 says that the use
3 of the £144 point estimate simply results from the fact
4 that EY had not produced a full range for costs, and
5 they base that on the Q&A which I am going to come on
6 to, Question 7, and in my submission that misinterprets
7 what the Government is saying in the Q&A, but in any
8 event it is very hard to reconcile with the aligned
9 parties' view that the ranges are what really mattered
10 to the Government because if they had, one would have
11 expected the Government to have assessed and presented
12 the ranges, not simply relied on a central cost
13 estimate. That is the first point of emphasis.

14 The second one, and it is a point I have made a
15 number of times, the revenue figures are different from
16 EY's, and they reflect Government's own analysis of the
17 revenue that would be generated at a given level of
18 support. We understand this to be common ground based
19 on the joint expert memo proposition 23 at
20 {ROC-D/11/41}. In any event it is clear from a
21 comparison of Government's revenue figures against EY's,
22 because as one sees from the two ROC scenario,
23 Government calculated that two ROCs would provide total
24 revenue of £149, the Tribunal will recall that EY's base
25 case calculated that 2.5 ROCs would be needed to provide

1 total revenue of £144, so the Government believed that
2 more revenue per megawatt hour would be generated by
3 fewer ROCs.

4 It is of course the Government's revenue figures
5 that are the most relevant. It obviously took account
6 of EY's report and EY's report is important for all the
7 reasons I have been giving but it is the Government's
8 revenue figures that are most important when looking at
9 what the Government would have done in the
10 counterfactual because those are obviously the figures
11 that drove its decision.

12 Third point of emphasis, one immediately sees from a
13 comparison of the left-hand column and the two ROC
14 scenario in the right-hand column that there is a margin
15 between costs and the central revenue estimate. That
16 margin is £5 -- 3.47 per cent -- and the importance of
17 this margin is abundantly clear from the evidence that
18 follows which I am going to come on to.

19 Fourth point is the scenarios included in this table
20 are 1.5, 1.75 and two ROCs, but in my submission that is
21 not because Government was only prepared to contemplate
22 banding in 0.25 intervals. The answer is much more
23 simple. 1.5 is there because it is the status quo. 2
24 is there because it is what the Government had decided
25 to award, at least in the first instance, and 1.75 is

1 there because that is what the Government had decided to
2 step down to, or was proposing to step down to after two
3 years.

4 Just for your note, one sees on page 11 of this
5 document an additional explanation of the estimates. I
6 do not need to take you to it.

7 The next relevant document is at {ROC-E/136/1}. I
[REDACTED] am taking this chronologically. This is the [REDACTED]

10 [REDACTED]

11 If one looks at page {ROC-E/136/3}, please, this is an

13 [REDACTED], and there are a number of points. I

14 would like to focus on point 5 and 6, please:

22 Then they want a list of the projects captured, then
23 point 6:

[REDACTED]

2 So immediately we see that the Commission is
3 concerned about over-compensation, and in my submission
4 that can only be because of the margin between cost and
5 revenue because it is highlighted, the £149 figure here,
6 and these concerns are important for the reasons I gave
7 in opening, namely that the Government had to satisfy
8 the Commission that the banding increase would not
9 result in over-compensation as it was to receive State
10 aid approval.

11 As I have said, the Commission's concerns turned
12 into a major sticking point, even though margin in the
13 factual is only £5. Even that turned into a major
14 sticking point. There is no getting away from this for
15 the aligned parties. What Prysmian seek to establish
16 through its margins analysis is that larger margins than
17 this were not a concern in 2009. There are various
18 problems with that submission which I am going to come
19 on to, but the short answer is that whatever the
20 position in 2009, this margin was a concern in 2010, and
21 it could only have been a greater concern in the
22 counterfactual.

[REDACTED] The next document is the second version of the [REDACTED]

24 [REDACTED] at {ROC-E/138/1}, and the Commission's
25 feedback, which we have just seen, results in this

1 amended paper. Turn, please, to page {ROC-E/138/9}. If
2 we could scroll in on the second and third paragraphs,

please, [REDACTED]

[REDACTED]

12 So it is not abandoning that proposal because it
13 does not want to create a new band, is the short point.

[REDACTED] Page {ROC-E/138/10} we see the [REDACTED]

15 [REDACTED], substantively

[REDACTED] unchanged. Page {ROC-E/138/11}, we see the [REDACTED]

[REDACTED]

1 Dr Moselle argued that the range was merely
2 illustrative, again, based on the Q&A which I am going
3 to come on to, but the short point is that, as we will
4 see from the Q&A, Government chose this sensitivity,
5 this cost range -- sorry -- it based its cost range on
6 the Figure 11 sensitivity because that was the only one,
7 the only sensitivity that presented downside cost
8 sensitivities, i.e. where the estimates were higher than
9 the base case.

16 [REDACTED] The fact that it
17 retained the central estimates in the face of pressure
18 from the Commission reinforces the conclusion that they
19 were important for the purposes of the Government's
20 assessment. It was not running away from the central
21 estimates.

22 At page {ROC-E/138/12} --

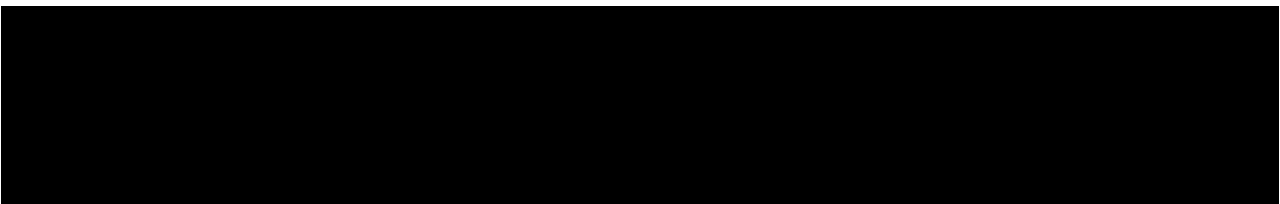
23 THE CHAIRMAN: I mean, an alternative characterisation might
24 be that the difference between £144 and £149 has raised
25 the Commission's eyebrows. We saw that from the

1 questions. If they had just gone back without the £144
2 figure, the Commission might have thought that
3 potentially odd. I mean, I just want to explore with
4 you whether that is a --

5 MR LASK: I am going to come on to the evidence, actually,
6 some evidence where the Commission is almost encouraging
7 the Government to emphasise the uncertainty, so I am not
8 sure the Commission would have thought that because the
9 Commission is to say, look, we get the uncertainty, and
10 we think you need to do more, you know, to justify the
11 margin, so actually, I think if the Government had
12 really wanted to shut this point down, if it felt able
13 to, it could have said, look, we have given you central
14 estimates, but actually there is a whole heap of
15 uncertainty, and what we are really concerned about is
16 the range, if that is what it had been concerned about,
17 but it was not concerned about that. It was concerned
18 about the central estimates. That is why it retained
19 them.

20 Page {ROC-E/138/12}. We see a new narrative
21 explanation from the Government underneath the tables.

22 First paragraph:



[REDACTED]

2 So that is explaining that the main figure, main
3 figure in the revenue estimates, is the Government's
4 central estimate, and then you see the second sentence
5 refers to Ernst & Young's finding of 2.5 ROCs being
6 required to meet the 12 per cent rate of return. Third
7 sentence:

[REDACTED]

15 So that is explaining that the Government prefers
16 more optimistic assumptions. Then --
17 PROFESSOR ANTHONY NEUBERGER: Sorry, I have a problem with
18 understanding this text and I do not know if you can
19 cast any light on it. The range for total revenue does
20 not seem to be based on Ernst & Young, as I think you
21 established they are based on the Government's own
22 figures, and the cost figures that the Government is
23 providing seem to rely on the load factors that Ernst &
24 Young were using. I just have problems in
25 understanding. Maybe you can -- I mean, it is not for

1 you to explain why the Government writes this, but I was
2 just wondering if you can cast any light. It just
3 puzzles me when I read it.

4 MR LASK: I will do my best, sir. Taking the first point on
5 the -- I think your point was that the revenue ranges do
6 not reflect EY. I am just checking the -- that you --
7 I think that is right. I think that is right. We can
8 certainly check that over the break, but if that is
9 right I do not know why. I can only suggest that it is
10 because the Government has done its own work on revenue,
11 and that is the range it has come up with.

12 With the costs, you are right, sir, to point out
13 that the factors the Government is referring to in that
14 paragraph below the tables, OFTO and load factor, they
15 go to the cost estimate not the revenue estimate, and so
16 you are right to point out that although the Government
17 is saying, well, we are preferring more optimistic
18 assumptions than EY, the Government is still relying on
19 EY's base case cost estimate, and so in my submission
20 what the Government is doing, and I am inferring this,
21 is it is relying on these more optimistic assumptions as
22 providing broad support for its decision to award fewer
23 ROCs than EY, rather than as altering the specific
24 estimates that it relied upon, and it may have helped
25 reassure the Government that two ROCs was sufficient,

1 even for the more expensive wind farms, notwithstanding
2 their higher costs.

3 THE CHAIRMAN: I think you were saying that load factors had
4 something to do with costs in that exchange with
5 Professor Neuberger but I thought load factors were
6 about revenue. I thought load factors were about how
7 much electricity you generate and what percentage of the
8 day your turbines are spinning.

9 MR LASK: That is, of course, right, and the more -- yes.

10 Let us go back to the EY report at {ROC-E/112/1} where
11 they look at load factors. It is Figure 14.

{ROC-E/112/22}. [REDACTED]

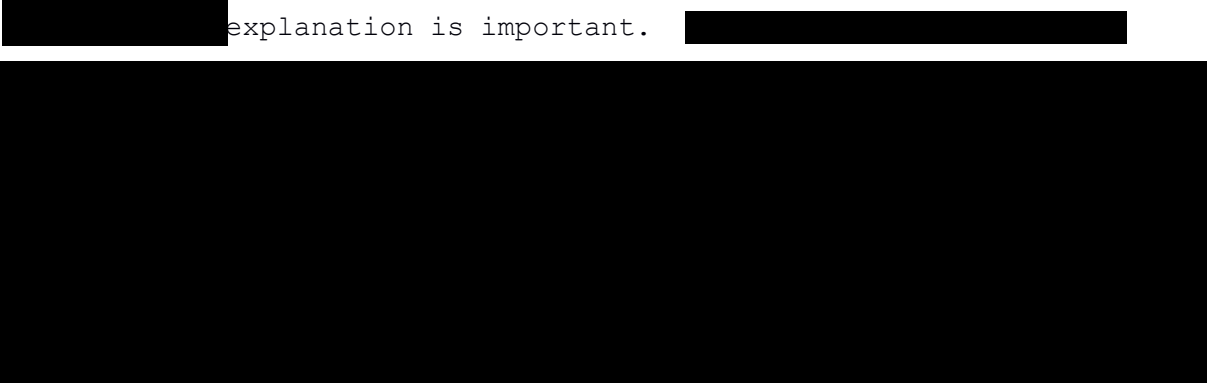
16 THE CHAIRMAN: Yes. So, I think the point that you are
17 making, I see your point that Professor Neuberger has
18 just sort of highlighted to me is that because what we
19 are looking at here is the cost per megawatt hour, and
20 because load factors affect megawatt hours, they affect
21 that measure. Yes. Thank you.

22 MR LASK: Of course, despite referring to those
23 sensitivities, the Government still relies on the
24 central cost estimate from EY.

25 The second paragraph of the -- sorry, we are back in

1 {ROC-E/138/12} -- the second paragraph of the

explanation is important.



8 Just pausing there, that confirms in my submission,
9 that the Government is still relying on the central
10 estimates, notwithstanding the Commission's concerns.
11 It shows that Government has compared those central
12 estimates in an effort to align revenue to cost to the
13 best of its ability. It shows that the Government has
14 considered the difference between the two -- the
15 margin -- and has justified it on, at this stage at
16 least, on two bases, one that the central revenue is
17 only marginally higher than base case cost, and second,
18 that both numbers are subject to considerable
19 uncertainty. So, the Government has applied its mind to
20 the margin, and it has decided that it is appropriate
21 and it has provided its reasons to the Commission.

22 Now, in Prysmian's closing, paragraph 89(a), they
23 say that the Class Representative's case rests on a
24 single sentence in Question 11 of the Q&A, and that that
25 sentence simply describes a mathematical relationship

1 between the estimates.

2 The first point is wrong. The relationship between
3 the central estimates and the margin arising from that
4 relationship was referred to by Government repeatedly in
5 the State aid papers. We see it here. We see it later
6 on in Question 11 and we see it later on in the amended
7 Question 8.

8 The second point that Prysman make unfairly
9 downplays a significant part of the Government's
10 reasoning. The evidence of the Government's reasoning
11 is limited, so these passages that explain it are
12 important. In this passage, and those that follow in
13 the Q&A, the Government is addressing the Commission's
14 key concern and explaining why it thinks the margin is
15 justified. Of course, in the counterfactual, it would
16 have been equally necessary for it to apply its mind to
17 the margin.

18 The second and third -- sorry, the second paragraph,
19 the third sentence -- we think the cost and revenue
20 figures cited here are typos, and I understood from
21 Ms Davies' Opening Submissions that they also think that
22 these are typos, because you will see here that the
23 central revenue estimate at 1.75 ROCs is said to be
24 £127, but we saw in the first version of the paper it
25 was £138, and indeed we see on the previous page of this

1 document that £127 is the centralised -- central revenue
2 estimate for 1.5 ROCs, so it cannot be the central
3 revenue estimate for both 1.5 and 1.75. Then the cost
4 figure at the end of that passage, £146, must be a typo
5 because we have just seen, in the same paragraph, that
6 £144 is being given as the central figure -- sorry --
7 the base case cost estimate.

8 Now, there is a hint in London Array's closing
9 submission, paragraph 32, that the State aid papers
10 represent ex post facto justification for a decision
11 that Government has already taken, but there is no
12 evidence to support that, and in the absence of such
13 evidence it would be quite wrong, in my submission, to
14 doubt the integrity of the Government's explanation. At
15 some point in the process Government produced its £149
16 central revenue estimate and would, at that point, have
17 observed the margin. Acting responsibly it must have
18 considered whether and how that margin can be justified.
19 It is common ground that the base case cost estimate
20 would fall in the counterfactual but the revenue figures
21 would stay the same. I will come back to this.

22 Now, this still -- this further explanation still
23 [REDACTED] did not allay the Commission's concerns, [REDACTED]
24 [REDACTED], and this is at
25 {ROC-E/140/2}. If we zoom in to the middle of the page,

1 please, the explanation -- well, the paragraph beginning
2 [REDACTED] I only show you this to highlight
3 the last sentence where the Government says:

[REDACTED]

7 It underlines the importance of these factors in the
8 Government's assessment, in my submission, and then if
[REDACTED] we go to page {ROC-E/140/3}, section 4, [REDACTED]

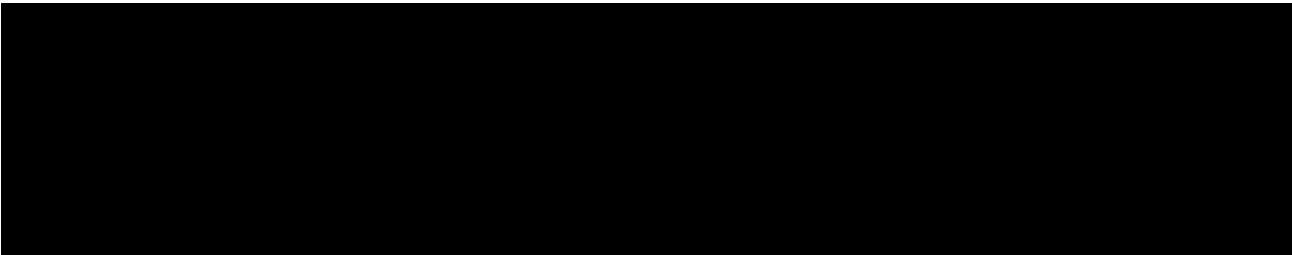
[REDACTED]

19 Question 6:

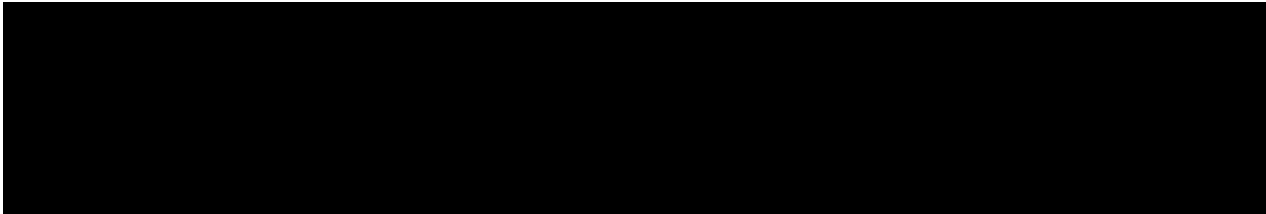
[REDACTED]

24 So the Government is probing the differences between
25 the Government's assessment and EY's, and in its answer

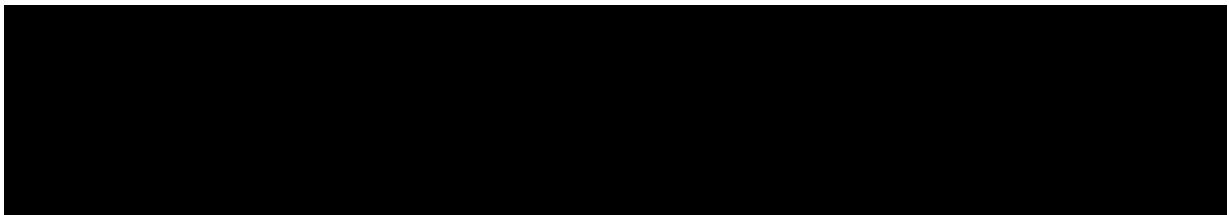
1 the Government explains why it prefers a more aggressive
2 approach on OFTO and the load factor, and you will see
3 it highlights that as a result of different assumptions
4 on the load factor, required banding could fall by up to
5 0.6 ROCs. It says "they", namely EY:



10 That is notable in my submission. It shows that the
11 Government is not only thinking in 0.25 increments.
12 Further, you see, just moving on through the paragraph:



16 Then in square brackets:



20 I do not know why that is in square brackets. It
21 might be because the Government considered that factor
22 less important than the other factors or because it had
23 doubts as to the weight that could properly be applied
24 to it, but in any event in referring to the factors that
25 it did take into account, Government emphasises at the

1 end of this passage the need to limit the costs to
2 consumers by avoiding over-compensation, so again it
3 underlines the importance of those factors to the
4 Government's assessment.

7 [REDACTED] The aligned parties place significant reliance
8 on the Government's answer which is quite a long one.
9 It continues over the page. I entirely accept that the
10 Government, in its answer, highlights the uncertainty in
11 the estimates, but I highlight three points: firstly,
12 simply comparing ranges can make it difficult to be
13 confident that the true revenue figure is sufficient to
14 cover the true cost figure without over-compensating,
15 and in my submission that is no doubt why the Government
16 relied on central estimates in 2010, because it was all
17 about seeking a better alignment between cost and
18 revenue; secondly, we will see from -- well, we can see
19 from this answer, if I could just read it:

[REDACTED]

3 [REDACTED] etc.

[REDACTED] Then it says [REDACTED]

[REDACTED]

8 [REDACTED] which was

[REDACTED] Figure 11, [REDACTED]

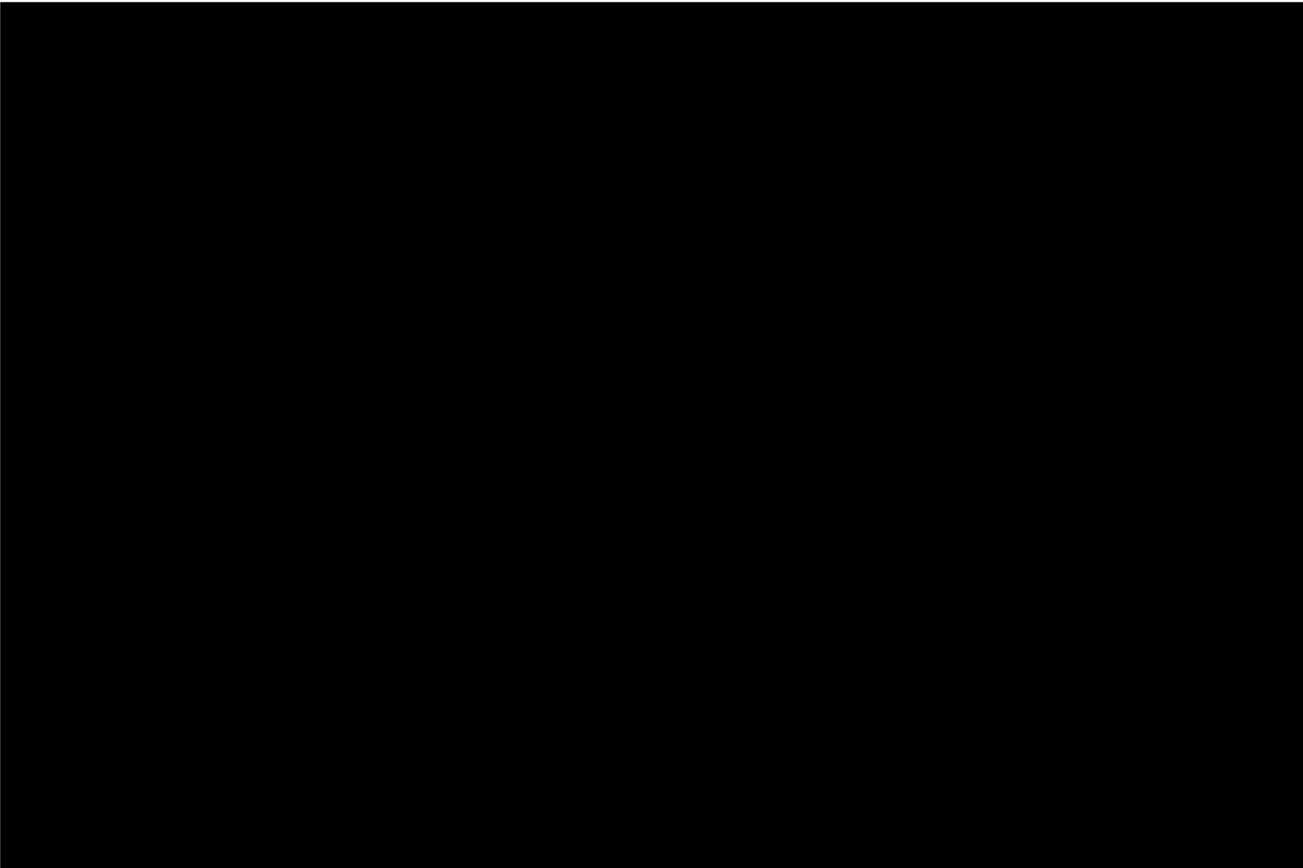
[REDACTED]

20 So the Government is emphasising uncertainty, and I
21 do not seek to run away from that, but whilst it
22 accepted, or acknowledged that there was uncertainty, in
23 my submission the Government must still have had some
24 confidence, some confidence in the central estimates,
25 firstly to have relied on them in the first place, and,

1 secondly, to have retained them in the face of this
2 Commission pressure. Thirdly, it is important to
3 understand how the Government accounted for the
4 uncertainty, and it did so by allowing for a margin
5 between central estimates, as we will see from Question
6 11.

7 Now, as I said previously, the sentence beginning

8 [REDACTED]
9 [REDACTED] is relied on by Prysmian. They say,
10 well, that is why the Government only presented the £144
11 point estimate in the first version of the paper because
12 it was not a range that it was happy to rely on, but in
13 my submission what the Government is saying here is that
14 if it had been happy with the range, it would have
15 presented that as well, not that it would have relied on
16 it instead, and omitted the central cost figure because
17 it says at the end of that sentence, that because, apart
18 from the cost of capital sensitivity the report only
19 detailed upside sensitivities, only the base case
20 levelised cost was presented, so if it had been more
21 comfortable with the ranges it would have provided those
22 as well. It was not, so it only provided the base case
23 but in any event it would still have provided the base
24 case because that is what it was relying on.



14 THE CHAIRMAN: We will break there then. Thank you very

15 much. We will come back at 2 o'clock.

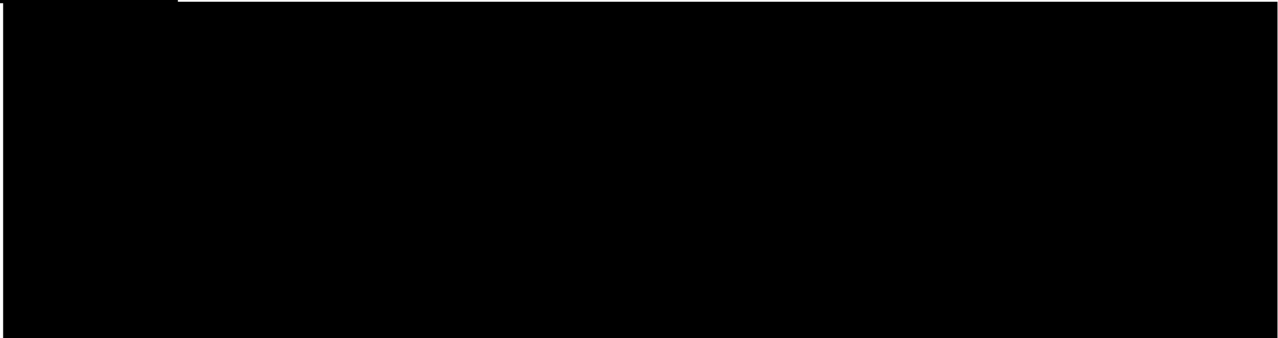
16 (1.00 pm)

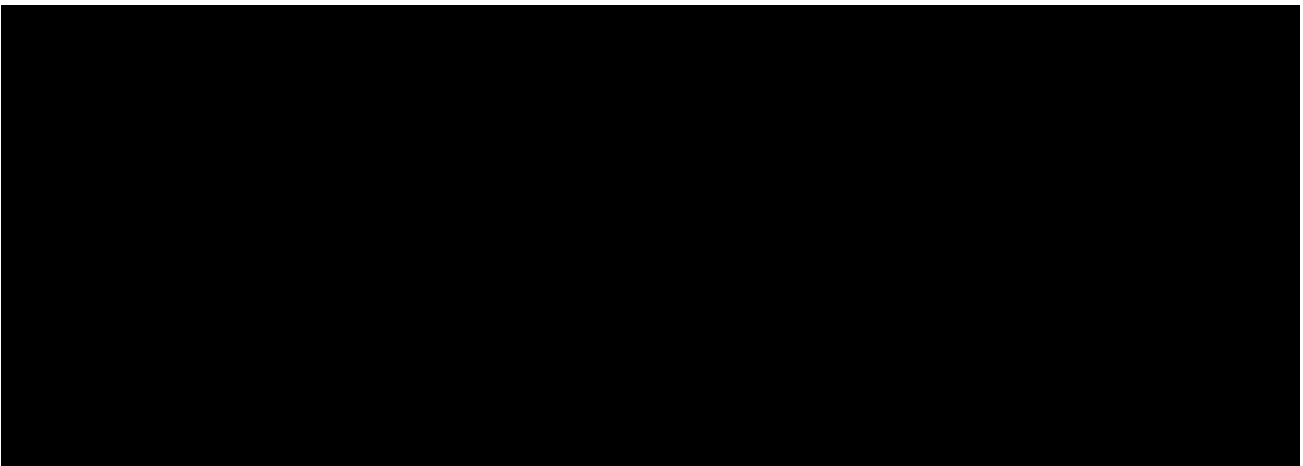
17 (Luncheon adjournment)

18 (2.01 pm)

19 THE CHAIRMAN: Yes, Mr Lask?

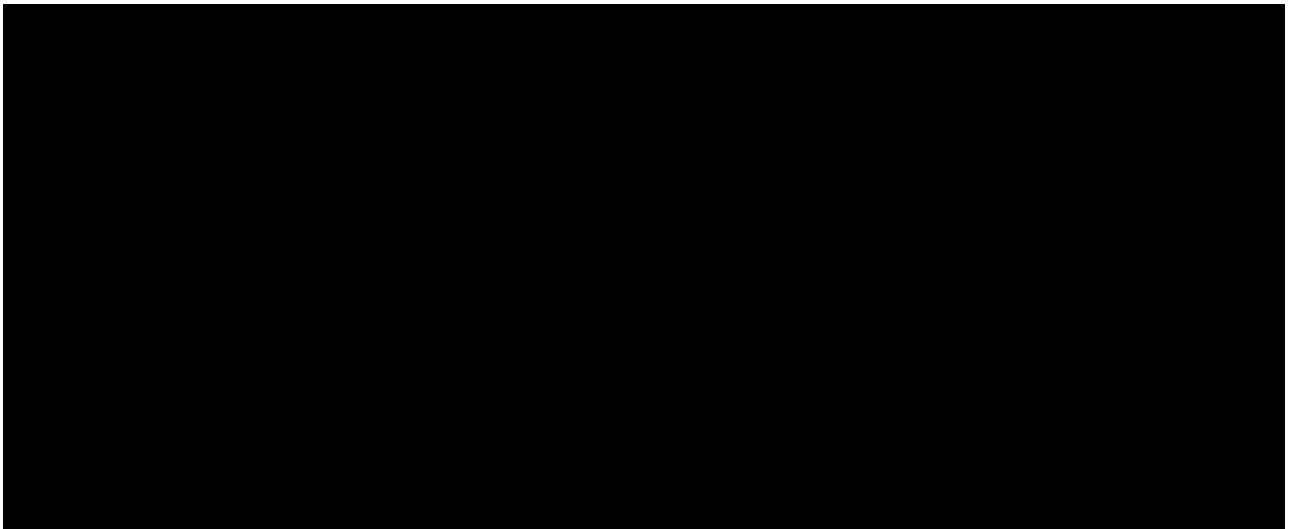
MR LASK: Thank you





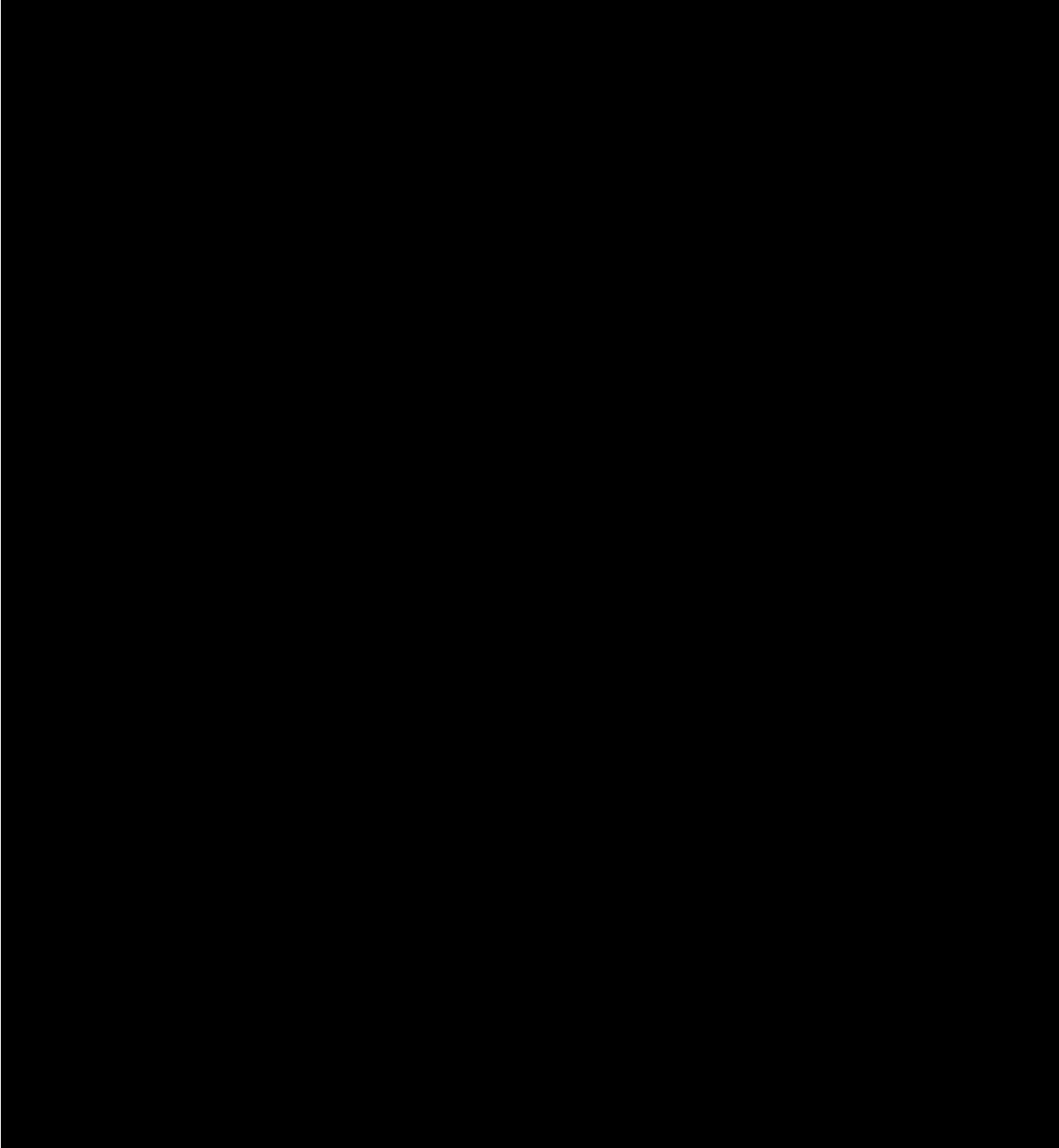
8 So what we see is that the Commission is really
9 pressing the Government on the margin between central
10 cost and central revenue, emphasising that it -- the
11 levelised cost already includes a 12 per cent rate of
12 return.

13 Then we see the Government's response. It is the
14 second paragraph that I focus on, and both sides of the
15 room rely on this paragraph. It says:



24 So just pausing there, the Government is saying that
25 it has carried out some calculations by reference to the

1 central cost estimate, and the central revenue estimate,
2 and that is what those calculations have shown. It
3 continues:



25 So this answer shows, in my submission, a number of

1 things. Firstly, it reiterates that the Government's
2 decision has involved a comparison of the central
3 estimates. That is why the Government refers again to
4 its calculations of where the base case cost estimate
5 sits in relation to central revenue at two ROCs, and
6 central revenue at 1.75 ROCs. Yes, it is emphasising
7 the uncertainty in the estimates, and the ranges, but it
8 is still referring to the central estimates, and it is
saying that

11 Second, it shows that the Government has thought
12 about the margin between the central estimate, and it
13 has considered whether that margin can be justified, and
14 it is that margin that it is being pressed on by the
15 Commission. This answer shows that the Government has
16 concluded that the margin can be justified because of
17 the uncertainty in the estimates, and because of the
18 need to ensure, or to allow, certain key projects to
19 proceed. That is why, when pressed by the Commission to
20 justify the difference between £144 and £149, the
21 Government is referring to uncertainty, and it is
22 referring to two ROCs being the right level to allow
23 crucial projects to proceed. So, those are the bases on
24 which it justifies that margin.

25 Now, pausing there, Government had to account for

1 the uncertainty somehow, and there was no suggestion
2 that it did so by any other means -- so in my submission
3 this margin is the Government's solution to the
4 challenges proposed -- the challenges posed by
5 uncertainty.

6 THE CHAIRMAN: So you characterise the margin as a buffer
7 that the Government has built in to deal with
8 uncertainty.

9 MR LASK: To deal with uncertainty, and to reflect the more
10 expensive wind farms that are crucial for the
11 Government's renewable targets, so it says in the answer
12 two ROCs was felt to be the right level to allow the
13 projects to proceed that are thought crucial to
14 maintaining confidence in the UK's offshore wind sector.

15 THE CHAIRMAN: So you characterise it as a buffer, a margin,
16 an allowance -- the Government's way of dealing with the
17 uncertainty that you have described to us.

18 MR LASK: Yes.

19 THE CHAIRMAN: It seems to me that a dividing line between
20 you and the ROC aligned parties is whereas you
21 characterise it as something the Government has built in
22 as a buffer, they characterise it as an inevitable
23 consequence of uncertainty, sort of a margin like this
24 arises because of the uncertainty, not as a response to
25 the uncertainty. Is that a fair characterisation of the

1 debate?

2 MR LASK: That is certainly a fair characterisation of my
3 position. I will leave it to the other parties to say
4 whether it fairly reflects their position, but
5 importantly, in my submission, it makes no substantive
6 difference which of those positions is correct, because
7 either way the Government has recognised the margin is
8 there, and has thought about whether it can be
9 justified, and it has decided that it can be justified,
10 and it has given its reasons. It had to satisfy itself,
11 having observed the margin it had to satisfy itself that
12 it can be justified, and what we have seen is the
13 reasons it concluded it was justified were uncertainty,
14 and the needs of the more expensive crucial wind farms,
15 and the reason that is the key point is because there is
16 no reason in my submission why, in the counterfactual,
17 the Government would have concluded that a bigger margin
18 could be justified. Those reasons that it relies on for
19 justifying this margin would not have enabled it to
20 justify a bigger margin.

21 Third thing, we see from the Government's answer is
22 that a core justification that it gives to the
23 Commission is that revenue at two ROCs is closer to base
24 case costs than revenue at 1.75 ROCs. That is why it
25 says that revenue at two ROCs was marginally above base

1 case costs, but revenue at 1.75 is some way below.
2 Again, that is important because that position is
3 fundamentally different in the counterfactual, as I will
4 come on to show you.

5 As we have seen, part of the answer at Question 11
6 is the Government saying banding levels more precise
7 than intervals of a quarter of a ROC might increase RO
8 administration costs and increase complexity. The
9 aligned parties place great emphasis on this, but in my
10 submission it does not bear the meaning or weight that
11 they need it to and there are two points. First the
12 statement is vague and it is equivocal. It is vague
13 because there is no explanation of what is meant by
14 "admin costs", or "added complexity" and nor is there
15 any indication of the magnitude of any increase in those
16 factors, and none of the witnesses were able to cast
17 light on this.

18 Now, in their closings, the aligned parties suggest
19 that the department may have been concerned that
20 creating a new band for offshore wind would have
21 required changes to Ofgem's IT systems, and you can see
22 that, for example, in Prysmian's closing at paragraphs
23 50 and 59 and they rely, for that, on the Government's
24 consultation for the 2009 decision, but in my submission
25 the 2009 process is a very different one. The

1 Government is considering, among other options, 14
2 individual bands which is going to be much more
3 complicated and may well increase IT costs, but just
4 standing back, there is no mention of IT costs in any of
5 the documents concerning the 2010 process, and in the
6 context of increased costs to consumers of 2.5 billion
7 to 3.5 billion, the idea that a possible increase in
8 admin costs arising from changes to Ofgem's IT systems
9 would have been a significant factor is unrealistic.

10 I said it was vague and equivocal. It is equivocal
11 because it says that more precise banding levels might
12 increase costs and complexity, and that does not suggest
13 that this is something to which a great deal of thought
14 has been given.

15 THE CHAIRMAN: I mean, it seems reasonable to conclude that
16 there would have been some increase in costs because if
17 you have a system that has 1.9 ROCs then some computer
18 somewhere needs to churn out multiplying a figure not by
19 1.5 or 2 but by 1.9. I mean, there is going to be some
20 costs, one assumes.

21 MR LASK: There may be some, but --

22 THE CHAIRMAN: I mean, a point you emphasise, I think, is
23 that this is a big project. Can't move the needle that
24 much.

25 MR LASK: Exactly. In the context of an overall cost impact

1 on consumers of 2.5 to 3.5 billion, it is minimal.

2 Also, of course, as we know, the Government was
3 looking at a step down to a new band of 1.75 as part of
4 its original proposal, and there was no concern
5 expressed about the additional IT costs or, indeed, any
6 additional admin costs that that would create.

7 The second point is that the Government did not need
8 to investigate this possibility further because, as it
9 says in the same passage, two ROCs was felt to be the
10 right level. That was the central thrust of the
11 Government's answer, and it reflected the fact that the
12 evidence from EY indicated that at least two ROCs were
13 needed, so in the factual Government did not feel that
14 it could go below two ROCs.

15 Since the evidence indicated that two ROCs were
16 needed, the Government did not, in the factual, have to
17 decide whether something between 2 and 1.75 might be
18 appropriate. It just did not arise, so the reference to
19 banding levels more precise in my submission is belt and
20 braces. Notably, what the Government does not say is,
21 well, we think the right level is somewhere between 1.75
22 and 2, but more granular intervals might increase costs.
23 It simply says 2 is the right level, and if it had
24 thought the right level was somewhere between 1.75 and 2
25 but was relying on this point to justify a higher award,

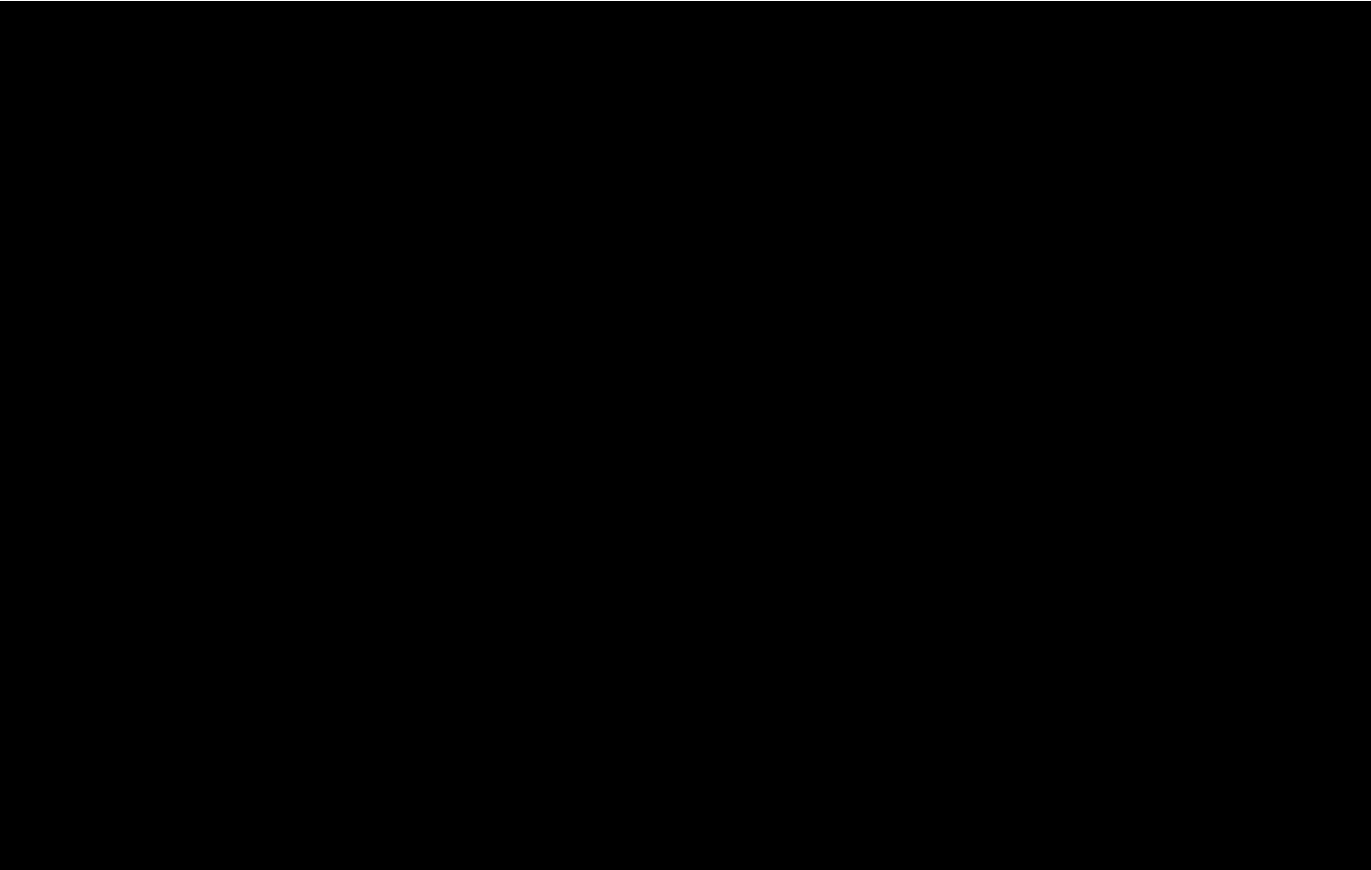
1 and thus increased costs to consumers, in my submission
2 it would have had to think this through a lot more
3 carefully.

4 As I will come on to show you in a moment, the
5 Government elaborated on what it meant by this in
6 Question 8. In its closing at paragraph 58(a), Prysmian
7 say, well, if Government had not been rejecting 0.1 it
8 could have set banding at 1.9 in the factual, and that
9 is wrong, in my submission. Government did not set
10 banding at 1.9 in the factual because, as it says here,
11 it considered 2 to be the right level.

12 Before leaving this document I would just emphasise
13 again that what the Q&A shows clearly is that the margin
14 buffer was a serious concern for the Commission.
15 Because it was a serious concern for the Commission it
16 was also a serious concern for Government. Prysmian's
17 margins analysis cannot alter that.

18 The gravity of the Commission's concern is
19 underlined by the fact that Government's answers here to
20 the Q&A still did not satisfy the Commission. Still was
21 not good enough. We see that from the document at

{ROC-E/140.2/2}.

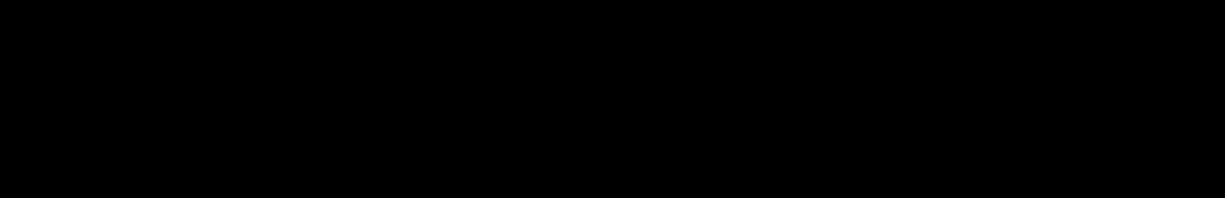


14 And one can see how seriously this was being taken
15 within Government, if one looks at {ROC-E/179/1}.

[Redacted] Paragraph 1, [Redacted]

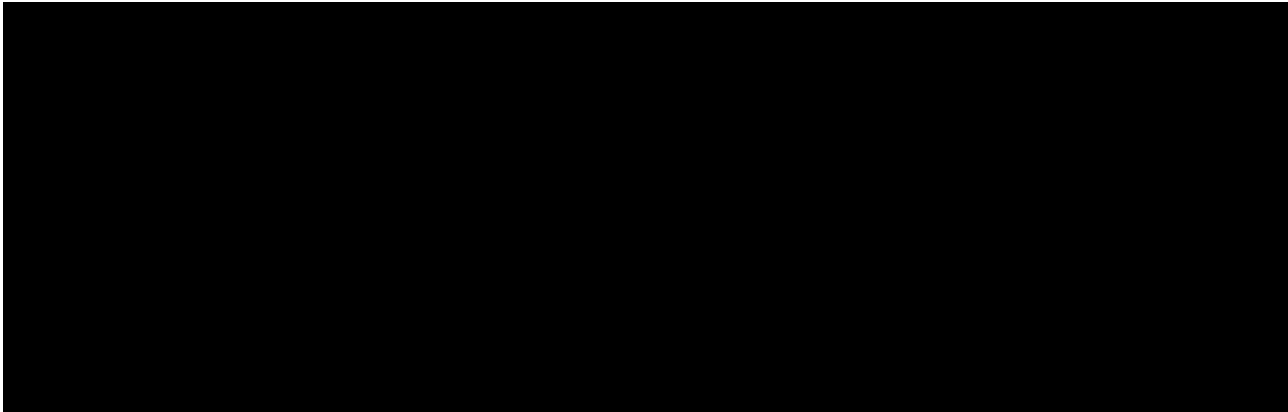
17 [Redacted] -- sorry, we understand

[Redacted] that this document is dated [Redacted]

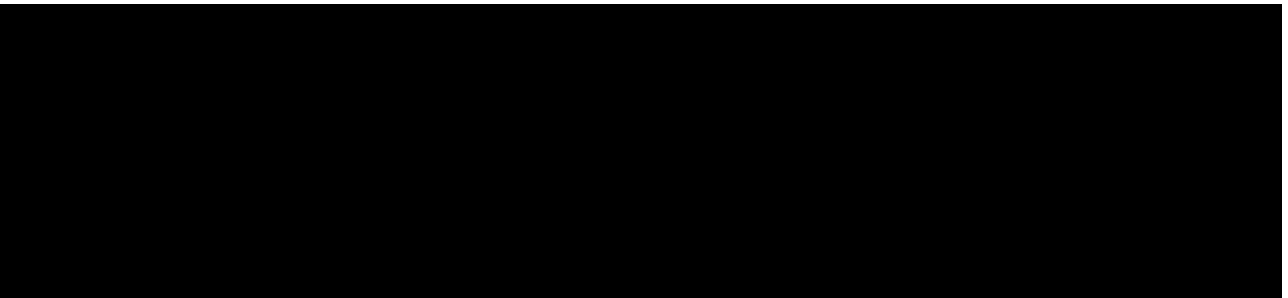


22 Paragraph 4:

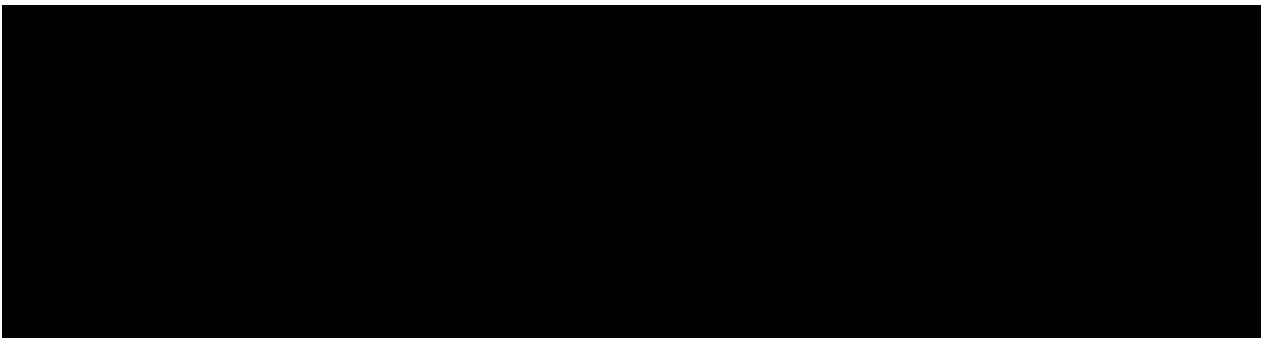




7 Then we see at paragraph 9:

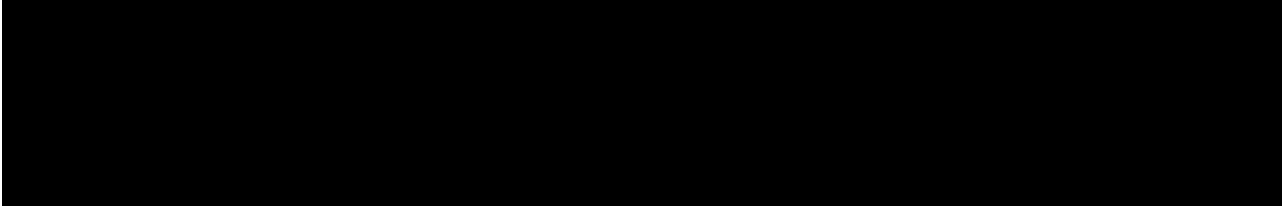


12 Now, NKT in their closing submissions say that,
13 well, all the Government is really concerned about here
14 is that they would not receive clearance in time, and
15 there are two responses to that: first, as we see at
16 paragraph 9, even that is considered serious by the
17 Government, missing the deadline, and the second answer
18 is paragraph 13:

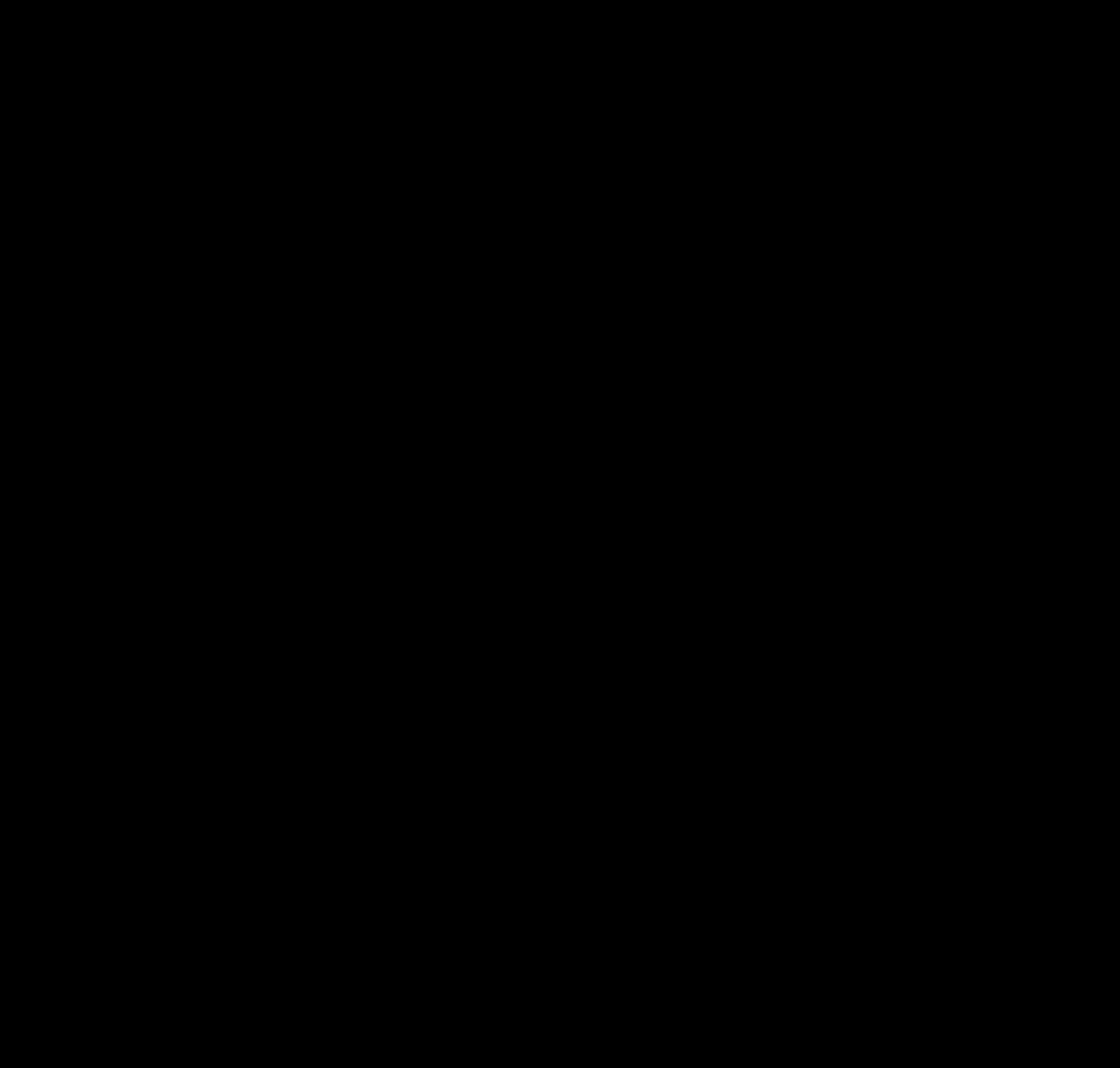


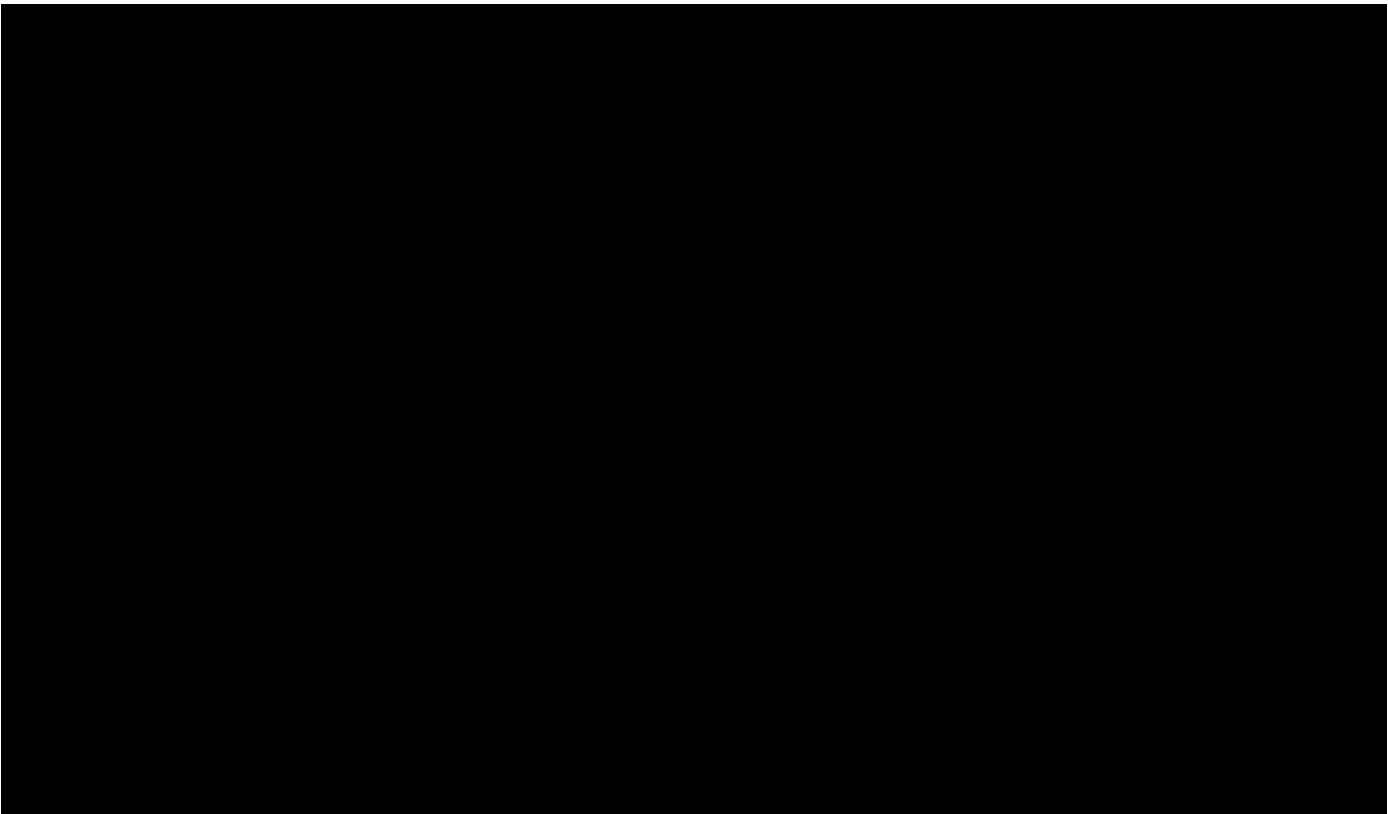
24 So the concern is not only about time, the concern
25 is that clearance may not be granted at all. You see

1 again at the bottom of this page the table of risks and
2 benefits in the final column, second bullet point:



Then if we go to {ROC-E/141/1}, [redacted]





13 So three points. First, the Government says the
14 banding level has been chosen to allow at central
15 assumptions/expected values enough projects to proceed
16 to maintain the necessary momentum. In my submission
17 that clearly underlines the Government's reliance on the
18 central estimates. That is exactly what the Government
19 is saying here, and coming back to a question I was
20 asked before the break, if, in fact, the Government had
21 based its assessment simply on ranges, it would not have
22 said this. It says quite clearly that it has been
23 chosen to allow central assumptions/expected values.
24 That is the basis for the Government's decision.

25 Second, the Government says much more precise

1 numbers would be needed to exactly match costs and
2 revenues, and we know the central cost estimate was
3 £144. No one has suggested that 1.9 would have been
4 regarded as a much more precise number, or that it would
5 have exactly matched costs of £144. In the joint memo,
6 the joint expert memo, Dr Moselle agreed with Mr Druce
7 that if the Government had been seeking to set banding
8 mechanically so as to precisely match revenues to costs,
9 the necessary banding level would be 1.89 ROCs. That is
10 the joint memo, proposition 26 at {ROC-D-IC/11/45}.
11 Similarly in cross-examination Ms Hesmondhalgh should
12 read that an exact match would require a number between
13 1.8 and 1.9, see Nexans' closing paragraph 34, so that
14 is banding to at least two decimal places, which, as
15 Mr McNeal says, Government did not like.

16 So Government is not necessarily rejecting 0.1
17 intervals here.

18 Now, in cross-examination, Dr Moselle made the point
19 that even two decimal places would not be an exact match
20 because you can always go to more decimal places, but he
21 did accept that Government's answer to Question 8 was
22 not excluding 0.1 increments. That is transcript
23 {Day3/163:13} to page 164, line 24.

24 THE CHAIRMAN: I mean, in a sense, it does not really matter
25 whether the expert accepts that in cross-examination.

1 MR LASK: I accept that, but for what it is worth, and it is
2 consistent with my submission.

3 Third, third point, timing is really tight by this
4 stage. We saw that from the contingency planning memo.
5 Officials have been encouraged by the Commission to
6 emphasise the uncertainty and they are doing what they
7 can to justify the decision, but to infer from this
8 answer that Government would never have used more
9 granular increments in the counterfactual is to confer
10 more weight on it than it can reasonably bear.

11 Now, that is the last piece of evidence I wanted to
12 show you as regards the Government's reasoning. I want
13 to turn now to my fourth main heading to show you what
14 the Government would have done in the counterfactual.

15 Could we turn, please, to AB7, page 3? This is our
16 closing submissions. {ROC-AB/7/3}. Obviously the
17 counterfactual assessment requires the Tribunal to place
18 the Government -- to place itself, sorry -- in the
19 Government's shoes, and to ask itself, well, what would
20 the Government have done? The starting point for the
21 assessment is that a number of important points are
22 common ground, at least as we understand it. I will be
23 corrected if I am wrong in the replies, but as we
24 understand it, these six points are common ground:
25 firstly, the headline cost estimate from EY on which

1 Government relied would have been around £4 lower, so
2 around £140. We have said just below £140. Second,
3 Government's analysis as to the revenue that would be
4 generated at different levels of support would have been
5 the same. Thirdly, Government would -- sorry -- thirdly
6 costs would, therefore, have been much closer to revenue
7 at 1.75 ROCs, i.e. £138, than revenue at two ROCs, £149.
8 Fourthly, a cost reduction of around £4 equates to
9 around 0.1 ROCs. That is 20 per cent of the 0.5
10 increase contained in the 2010 decision. Fifthly,
11 Government could, therefore, have provided essentially
12 the same margin between cost and revenue from the
13 counterfactual by increasing support to 1.9 ROCs rather
14 than two. Sixthly, 1.9 ROCs was the first step down
15 level at which Government set support for offshore wind
16 in the face of cost reductions in 2013.

17 It is also common ground that Government's decision
18 essentially struck a balance between, on the one hand,
19 the desire to encourage certain wind farm projects to go
20 ahead, and on the other the need to avoid
21 over-compensation and minimise costs to consumers. Our
22 case in a nutshell is that Government would have sought
23 to strike the same sort of balance in the counterfactual
24 as it did in the factual, and since it would have been
25 able to do that by awarding 1.9 ROCs, that is the option

1 it would most likely have chosen. I want to develop
2 that point by showing you what the key cost and revenue
3 evidence that the Government considered would have
4 looked like in the counterfactual. Could we go, please,
5 to page {ROC-AB/7/50}? Zoom in for now, please, on
6 Table 3.

7 What we have sought to do in this table is set out
8 the revenue that Government expected developers to
9 receive, or would have expected developers to receive at
10 different ROC levels. Just numbering from the top --
11 sorry, we should have numbered the rows -- just

numbering them from the top, [REDACTED]

15 [REDACTED]. Those were the figures on which
16 Government based its assessment in my submission.

17 The other rows are calculated based on the cost/ROC
18 ratio implied by Government's approach. That is
19 explained at Druce 5, footnote 208, which is
20 {ROC-D/2/115}.

21 Mr Druce followed a similar approach to Ms Shamsi in
22 her Table 3.4 at {ROC-D/3/58}. The difference is that
23 Ms Shamsi was calculating the cost/ROC ratio implied by
24 EY's analysis, Mr Druce was calculating the ratio
25 implied by Government's analysis.

1 Now, the two shaded rows, five and six, indicate the
2 cost estimate that would have been before Government in
3 the counterfactual, and the number of ROCs required to
4 cover those costs on Government's analysis. One sees
5 there on Ms Shamsi's case the required support level
6 would have been 1.78 ROCs, and on Mr Moselle's case it
7 would have been 1.79. One immediately sees the
8 disparity between the cost estimate that would have been
9 before Government in the counterfactual, those shaded
10 rows, and the revenue that two ROCs would have provided.
11 One has to leap from around £139.5, £139.8, one has to
12 leap from that to £149, two rows above. That gap is
13 £9.20 on Dr Moselle's case, which is an 84 per cent
14 increase compared to the margin in the factual, and it
15 is £9.50 on Ms Shamsi's case, so even larger. So, that
16 is the evidential position facing Government in the
17 counterfactual, in addition to the submissions I made on
18 the EY report and how that would look in the
19 counterfactual.

20 The question is, well, how does the Government react
21 to this? In my submission, it is overwhelmingly likely
22 that it increases banding to something less than two,
23 most probably 1.9. I rely on four reasons for that.
24 First, as I have submitted, the Government was relying
25 and basing its assessment on central estimates. These

1 were the ones that were highlighted in the State aid
2 tables and consistently referred to throughout the
3 documents. It is unreal to suggest that Government did
4 not, in fact, compare central cost and revenue estimates
5 at different ROC levels. It would imply that the
6 explanations given to the Commission were simply dreamt
7 up ex post in order to get State aid clearance.

8 Second, the counterfactual cost evidence before
9 Government, according to this table, on its face
10 suggests a ROC level of 1.78 or 1.79 as compared to the
11 status quo at the bottom of the table, 1.5.

12 So, Government can immediately see that an increase
13 all the way to two is excessive, even if that is what
14 industry are still requesting, because it is over 0.2
15 ROCs more than is needed. What is needed, on its face,
16 is 1.78, 1.79. So, going up to two is excessive. Bear
17 in mind that Government already thinks that the costs to
18 consumers are large -- 2.5 billion to 3.5 billion if the
19 increase is 0.5 -- and it already thinks that developers
20 may have understated their expected input. We saw that
21 in the March 2009 submission. Given that the costs to
22 consumers of a 0.5 ROC increase are 2.5 to 3.5 billion,
23 an award of 0.2 ROCs more than is needed will impose
24 excess costs of 1 billion to 1.4 billion on consumers,
25 so taking that leap from the shaded rows up to two is

1 going to cost consumers between 1 and 1.4 billion. In
2 my submission, that will be difficult if not impossible
3 to justify for the Government.

4 So, third, having seen that two ROCs is excessive,
5 Government will inevitably ask itself whether something
6 less than two ROCs may be sufficient. It is duty-bound
7 to do so. Again, Government can immediately see that
8 costs, the shaded rows, are very close to revenue at
9 1.75 ROCs, so the row immediately below the shaded rows.
10 They are still above revenue at 1.75, but not by much.

11 Now, Government knows that there is uncertainty in
12 the estimates, but that could mean that costs are
13 overstated and revenue is understated. The aligned
14 parties assume it is the other way around, but the
15 evidence just does not support that. So, uncertainty
16 can cut both ways. In any event, the Government may
17 think, well, given the uncertainty -- it may think,
18 given the uncertainty, 1.75 might be enough because
19 these estimates can be uncertain in either direction.

20 Fourth, on the other hand, the Government knows that
21 the key wind farms that it wants to secure are further
22 from shore and more expensive, so it is possible that it
23 wants to provide revenue that is above the central cost
24 estimate of a nominal wind farm, and that is where the
25 margin comes back in. That is where there is a

1 potential justification for moving up the table rather
2 than down. So, how much of a margin is needed?

3 Now, as Ms Davies submitted in opening, the
4 documents do not suggest the Government was aiming for a
5 magic margin, so the best evidence in my submission, the
6 best evidence of the margin the Government would have
7 considered appropriate in the counterfactual is the one
8 that it applied in the factual. That is the best
9 evidence. Even that margin became a major sticking
10 point with the Commission, and it is unrealistic, in my
11 submission, to suppose that the Government would have
12 opted for a margin that was almost twice the size in the
13 counterfactual.

14 We know that the margin in the factual was £5 --
15 3.47 per cent. If one adds that to Ms Shamsi's
16 counterfactual costs of £139.50, one gets £144.50, so
17 £144.50 is what the Government would have been aiming
18 for if it was taking the same approach in the
19 counterfactual.

20 Now, the results differ a bit if you use other cost
21 elevations, but not by much. It is always between £144
22 and £145. So, just taking £144.50, one can see from
23 this table, looking at the row immediately above the
24 shaded rows, that to provide revenue of £144.50 is going
25 to require something a little over 1.89 ROCs. If we go

1 in the same document to page 54, {ROC-AB/7/54}, we see
2 in the fourth row from the top -- again, this is the
3 Government's revenue analysis -- that 1.9 ROCs equates
4 to £144.50.

5 Just to be clear, Table 4 is showing the revenue
6 generated by different ROC levels and the margins in the
7 factual and the shaded rows illustrate a range of
8 options the Government may have considered in the
9 counterfactual but the upshot is that Government could
10 have allowed essentially the same margin in the
11 counterfactual with 1.9 ROCs.

12 Now, the aligned parties say the Government was not
13 looking at a margin with this level of granularity, it
14 was simply rounding up, but in my submission that does
15 not alter the analysis. If we go back to page
16 {ROC-AB/7/50}, Table 3, if the Government was simply
17 rounding up in the factual on a broad brush basis, then
18 it was rounding up by about 0.1 ROCs. You see that by
19 comparing the -- row four, immediately above the shaded
20 rows, to the one above. If it was rounding up on a
21 broad brush basis it was rounding up by a bit over 0.1
22 ROCs.

23 To round-up to two ROCs in the counterfactual would
24 involve it rounding up by 0.2 ROCs, the point I made
25 earlier, when you compare rows five and six with row

1 three. It is rounding up by double the number of ROCs.
2 It follows -- so it follows that even if government
3 wanted to round-up on a broad brush basis in the
4 counterfactual, the natural end point would be 1.9 ROCs,
5 as it was similar to the rounding-up it did in the
6 factual, because that is rounding-up by 0.1.

7 So, standing back, whichever way one looks at it in
8 my submission, 1.9 ROCs is presenting itself to
9 Government as the obvious choice in the counterfactual.
10 Firstly, given the cost data before it, 1.9 is
11 sufficient to meet its objectives. It exceeds the costs
12 of EY's nominal wind farm and provides a generous buffer
13 to account for uncertainty and the needs of the more
14 expensive wind farms, so Government is perfectly able to
15 award 1.9, and, second, Government has every incentive
16 to award 1.9, because this level of support enables it
17 to ensure that the cost impact on consumers is no higher
18 than it needs to be, and it minimises the risk of State
19 aid approval being refused. The Tribunal will recall
20 that in the factual, looking at the EY report,
21 Government set banding at the lowest level that could
22 reasonably be justified on the evidence. We say that in
23 the counterfactual it would have done the same, but that
24 evidence would have indicated that the lowest level that
25 could reasonably be used was 1.9.

1 What the Government cannot do in the counterfactual
2 is justify two ROCs on the same basis that it did in the
3 factual, because, as we see from Table 3, costs are not
4 closer to revenue at two than revenue at 1.75. The
5 position is precisely the opposite.

6 So, in all the circumstances in my submission it is
7 overwhelmingly likely that Government would have awarded
8 1.9 ROCs rather than two in the counterfactual.

9 Now, in Prysmian's closing at paragraph 90 they say
10 that:

11 "Our case rests on establishing that in the
12 counterfactual, firstly DECC would have required central
13 estimates to closely match; secondly that it would no
14 longer have been concerned about uncertainty, and
15 thirdly that it would no longer have been concerned
16 about admin cost and complexity".

17 Now, as to each of those, the first one is wrong.
18 We say government would have adopted the same degree of
19 alignment as in the factual. It would not have sought
20 or adopted a more closely -- a closer match. The second
21 point on uncertainty is also wrong, and I am going to
22 come to this next, but in short, uncertainty would have
23 been no greater in the counterfactual. Everyone accepts
24 that. So, Government would have accounted for it in the
25 same way and to the same extent. Thirdly, in response

1 to the third point, the evidence does not suggest that
2 admin costs carried material weight in Government's
3 assessment in the factual. In my submission it cannot
4 seriously be suggested that they would have outweighed
5 the need to avoid over-compensation and excessive costs
6 on consumers in the counterfactual.

7 I want to turn now, please, to my fifth main heading
8 which is the key counter arguments relied on by the
9 aligned parties insofar as not already addressed. So,
10 in particular, I am concerned now with the reasons why
11 the aligned parties say that Government would not have
12 chosen the obvious option of 1.9 ROCs in the
13 counterfactual. We have addressed these in the
14 appropriate places throughout our written closings, but
15 we have sought to summarise the five key points that are
16 put against us on page 35 of the closing submissions, In
17 paragraphs 102 to 103. {ROC-AB/7/35}.

18 102 we have sought to summarise the five key points.
19 The first is that Government based its decision only on
20 broad ranges, not central estimates. Second, is that in
21 any event there was such uncertainty that a doubling of
22 the margin would have made no difference. The third is
23 that a doubling of the margin would not have been a
24 concern because larger margins were tolerated for
25 different technologies in the 2009 Order. The fourth is

1 that Government would only ever have set support in
2 increments of 0.25, and the fifth is that developers
3 would still have requested two ROCs in the
4 counterfactual regardless of the reduction in costs. I
5 have already addressed the first and last of those, and
6 that leaves uncertainty, increments and Prysmian's
7 margin tables which I will address in turn.

8 So, uncertainty. I have touched on this already, so
9 I can deal with it quite quickly. In short, we say
10 uncertainty is a red herring, and there are three
11 points. First, as we have seen, Government recognised
12 that there was uncertainty in the estimates, and
13 accounted for it by allowing a margin between EY's base
14 case cost estimate and Government's own central revenue
15 estimate, or rounding up to two ROCs, if one wants to
16 describe it in that way. It makes no difference in
17 substance. That was Government's solution to the
18 challenge posed by uncertainty. It is, however, common
19 ground that the level of uncertainty would have been the
20 same in the counterfactual. We see that in London
21 Array's closing at paragraph 20.

22 So in my submission there is no reason why
23 Government would have chosen to provide for a larger
24 margin in the counterfactual, or would have rounded up
25 to a greater extent on grounds of uncertainty.

1 Second, fallacy in the aligned parties' submissions
2 is an assumption that in the counterfactual Government
3 would have chosen to provide a relatively more generous
4 award on account of uncertainty. That is a necessary
5 implication of the argument, that although costs would
6 have fallen, the award would have stayed the same. As I
7 have said, uncertainty cuts both ways. It can mean
8 estimates are overstated, it can mean they are
9 understated. There is no reason to think that in the
10 counterfactual Government would have erred to a
11 relatively greater extent on the side of
12 over-compensation. It was just as likely to have erred
13 the other way. That is why we say the most likely
14 outcome is that Government would have accounted for
15 uncertainty by striking the same balance in the
16 counterfactual.

17 We have quoted in our closing, paragraph 150 on page
18 52, Dr Moselle's evidence, if we could just scroll up,
19 please. Could we scroll down? Sorry. It is the end of
20 paragraph 1. I had been putting to Dr Moselle that the
21 Government would have -- if Government had still awarded
22 two ROCs in the counterfactual it would have given more
23 weight (Inaudible) did not agree with the precise
24 proposition, and what he said, Government could either
25 have set a lower banding which achieved the same thing,

1 that you needed to, or you can keep the same banding and
2 more you would do more to encourage the supply chain.
3 Maybe you would bring on some more wind farms than you
4 would otherwise. In my submission, in substance that
5 recognises that awarding two ROCs in the counterfactual
6 would have involved striking a different balance.

7 Thirdly, it is clear on the evidence that
8 uncertainty would not have been a barrier to the
9 Government awarding 1.9 ROCs in the counterfactual. If
10 we go, please, to the transcript for {Day2/17:1} at line
11 21 I say:

12 "It would be fair to say, would it not, that given
13 the stakes involved which, as you say, were rising,
14 Government would take a conscientious and evidence-based
15 approach to its decision-making; yes?"

16 Mr McNeal says:

17 "Of course, but the evidence was deeply uncertain
18 and variable, and, as I say elsewhere in the statement,
19 that made the task of balancing the trade-offs
20 incredibly difficult".

21 Now, Mr McNeal is referring there to the 2013
22 process where we know Government ultimately awarded 1.9
23 ROCs, and so it awarded 1.9 ROCs in 2013, despite the
24 evidence being deeply uncertain, and similarly
25 Dr Moselle agreed that it would probably be a bit too

1 strong to say that uncertainty would have prevented
2 Government from using 0.1 ROCs in the counterfactual.
3 That is {day3/167:2} to 25, so uncertainty is no answer,
4 in my submission, to the proposition that Government
5 would have awarded 1.9 ROCs in the counterfactual.
6 Turning, then, to increments, the argument against me is
7 that in the counterfactual the Government would only
8 ever have been willing to set support in increments of
9 0.25. That argument essentially rests on two short
10 passages in the State aid Q&A. I have already explained
11 why those passages do not bear the weight that the
12 aligned parties seek to place on them. The first one
13 was vague and equivocal, and the second one did not
14 reject 0.1 increments. I have also explained why the
15 scenarios presented in the State aid paper are 1.5, 1.75
16 and 2. The result is that there is nothing in the
17 evidence to suggest that the Government had any aversion
18 to banding in 0.1 increments, and nothing to suggest
19 that it would have refused to use those increments in
20 the counterfactual. On the contrary, the evidence
21 indicates the Government was prepared to contemplate and
22 use 0.1 increments where this was justified on the
23 evidence, and for the reasons I have given, it would
24 have been justified on the evidence in the
25 counterfactual, and I make three points by way of

1 elaboration.

2 Firstly, it is apparent on the evidence that
3 Government was prepared to consider 0.1 increments
4 during the 2009 process. Ultimately it decided to group
5 technologies into five bands with 0.25 increments, but
6 there is no evidence, and Dr Moselle confirmed that he
7 was not suggesting that this decision was due to any
8 aversion to smaller increments, and that is
9 {day3/158:10} to 15. Indeed, what we see is that right
10 at the end of the process for the 2009 Order, officials
11 canvassed the possibility of more granular increments
12 than 0.25 in response to Commission concerns about
13 over-compensation. I will just show you two documents
14 that go to these points, if I may.

 [REDACTED] The first is at {ROC-E/12/1}. This is a [REDACTED]

[REDACTED]

23 [REDACTED] It says at the top:

[REDACTED]

[REDACTED]

2 You see that the three-band scenario in the
3 penultimate column has offshore wind and a number of
4 other technologies in a band that would be granted 1.6
5 ROCs/MWh.

6 Now, Ms Davies said in her opening that 0.1
7 increments were only considered in 2009 as part of
8 technology-specific bands which was rejected, but this
9 shows that 0.1 increments were also considered in
10 scenarios that grouped technologies together, but in any
11 event the 2010 decision was obviously specific to
12 offshore wind, so even if it were right that 0.1
13 increments would only be contemplated on a
14 technology-specific basis, that would apply to the 2010
15 decision.

[REDACTED] The second document is at {ROC-E/49/1}. [REDACTED]

[REDACTED]

19 [REDACTED] in bold, this is now
20 the major risk faced by the project, this being limited
21 time as they have not received State aid approval, and
22 it says that:

[REDACTED]

1
2
3

[REDACTED]

and we then see mitigation options.

Over the page on page 2 {ROC-E/49/2}, the heading 3,

[REDACTED]

24
25

Dr Moselle agreed with me in cross-examination that
the reference to one-third meant one-third of a ROC per

1 megawatt hour. Just for your note, at paragraph 165 of
2 our closing on page 57 there is a word missing between
3 the two one-thirds, and the word should be "meant", but
4 the point is that one-third here equates to 0.3 ROCs per
5 megawatt hour. This is the Government internally
6 seeking to formulate possible responses to the
7 Commission's concerns on over-compensation, and one
8 possible response that it is contemplating is reducing
9 banding in 0.1 increments, or to a level that would be a
10 0.1 increment.

11 In their closings, Prysmian say:

12 "The Government would have chosen 0.25 if
13 necessary", so that is the quarter ROC, but there is no
14 basis for that in the evidence and in any event it
15 misses the point. The point is that the Government was
16 quick to consider 0.1 increments as an option. There was
17 no particular aversion to them.

18 Secondly, the 2013 decision demonstrates very
19 clearly Government's willingness to set banding in 0.1
20 increments where justified on the evidence. If we could
21 look, please, at Moselle 3 {ROC-D/7/52}, paragraph 5.55,
22 that explains there banding for offshore wind was set to
23 decrease from two in 2014/2015, 1.9 and 1.8, and if we
24 look at this a bit more closely, if we go to the Order
25 which is at {ROC-E/152/1}, page 35 {ROC-E/152/35}, there

1 is a table, Part 2A, banding level. These are
2 expressed, let me make sure I get this right, these are
3 expressed in megawatt hours per ROC.

4 THE CHAIRMAN: So the inverse.

5 MR LASK: Exactly.

6 THE CHAIRMAN: So one over --

7 MR LASK: Exactly. I am going to tell you what they
8 translate to and if anybody thinks I have that wrong
9 they will no doubt correct me. I am not going to go
10 through every row. Third row from the top, building
11 mounted solar PV, I understand that ten over seventeen
12 equates to 1.7. I know it should not be complicated but
13 it just shows my maths allergy.

14 Then over the page, page {ROC-E/152/36}, seven rows
15 from the top, we see "high range co-firing overnight",
16 that is 0.9, hydroelectric 0.7, three rows further down,
17 mid-range co-firing, six, offshore wind, you see it
18 remains at two for the first two columns, and then it
19 goes down to 1.9. Onshore wind, nine. No aversion
20 whatsoever using 0.1 increments where the evidence
21 justifies it.

22 THE CHAIRMAN: Is 0.1 as granular as it gets? I suppose I
23 am conscious that if we do get to Question 3 we are
24 asked to decide where the tipping point would occur,
25 what level of overcharge would move the needle or number

1 of ROCs issued, and I suppose that if we get to that
2 stage that invites an assessment of how granular ROCs
3 would be, so in theory, if -- any number of decimal
4 places were okay, £1 of overcharge would move the
5 needle. Do you say 0.1 is as granular as it gets from
6 your perspective?

7 MR LASK: That is the extent of our case. We do not say it
8 would go any more granular than that.

9 Now, of course there were factual differences in
10 2013 and the aligned parties have referred to the Levy
11 Control Framework, but of course there would have been
12 factual differences in the counterfactual for 2010. The
13 2013 decision nevertheless remains important because it
14 shows that 0.1 increments are part of the Government's
15 toolbox. It provides an informative, natural experiment
16 as to Government's willingness to use those increments.

17 Now, in Prysmian's closing they say -- well, another
18 reason 2013 was different is because the UK was seeking
19 to incentivise cost reductions, so it was seeking to
20 incentivise cost reductions rather than responding to
21 them, but actually Government was also responding to
22 actual and anticipated cost reductions, and one sees
23 that firstly from Mr McNeal's evidence which is at
24 {ROC-C/1/12}. If we could zoom in on paragraph 36,
25 please? For example, the banding for offshore wind was

1 lowered to 1.9 because of two factors at play at that
2 point. The first one was that the technology was more
3 advanced than it had previously been, there was more
4 learning and innovation, and developers did not need as
5 much return as they did previously to get projects
6 built. So, in other words, costs were falling.

7 Then just for your note the consultation document in
8 October 2011 at paragraph 4.8 refers, or states, that as
9 deployment increases, costs are expected to fall. That
10 is at {ROC-E/148/34}. So, this was not simply a case in
11 2013 of the Government seeking to drive cost reductions,
12 it is also responding to actual and anticipated cost
13 reductions.

14 London Array say in their closing at paragraph 23,
15 the 2013 decision is irrelevant because it concerned a
16 reduction in costs since the 2010 Order, whereas the
17 counterfactual would still have involved an increase in
18 costs since the 2009 Order, and so Government would not
19 have needed a new more granular band for offshore wind,
20 and if I could just take that in stages, London Array
21 would have to accept, in my submission, that if costs
22 had increased since the 2009 Order but remained at a
23 level below revenue at 1.75, it is possible that
24 Government would have awarded 1.75. It is clear from
25 the State aid documents that 1.75 was an option under

1 consideration. It must, therefore, London Array must,
2 therefore, accept that Government would have been
3 prepared to introduce a new band for offshore wind, even
4 though costs had increased rather than fallen since the
5 previous Order. It follows that the submission must be
6 that Government was only willing to use more granular
7 bands than 0.25 when costs were reducing as compared to
8 the previous Order rather than increasing, but in my
9 submission, if that is what is being said, there is no
10 logical basis for it, because it would mean that when
11 increasing costs to consumers by banding up, Government
12 was prepared to be more broad brush with its banding and
13 only use 0.25 increments, and that it is only when
14 lowering costs to consumers by banding down that
15 Government was willing to be more careful, more precise,
16 about its increments. In my submission that would be a
17 very strange way for Government to act, and there is no
18 evidential support for it.

19 My third point on increments is that all of this is
20 consistent with Mr McNeal's evidence. If we could go,
21 please, to our Skeleton Argument at {ROC-AB/2/28}?
22 Paragraph 87. This is where we were setting out the
23 evidence that we relied on for saying the Government
24 would have used 0.1 increments, and we say at
25 subparagraph (1):

1 "As Mr McNeal notes there was a strong preference
2 within DECC for the setting of the ROC banding levels at
3 round numbers (meaning no more than a single decimal
4 point, eg both 1.9 and 2 were possible, but not 1.93)".

5 So in my submission that evidence could not be
6 clearer, but the aligned parties now say that this
7 preference only applied to the 2013 process, but in my
8 submission that is not a tenable interpretation of the
9 evidence.

10 Had the use of 0.1 increments in 2013 reflected a
11 new preference on DECC's part, Mr McNeal would have
12 known about this because it would have been an important
13 change -- it had an important role in the department --
14 and in those circumstances he would have been expected
15 to mention it in his evidence. It is quite clear from
16 our Skeleton Argument that we are relying on this point.
17 So, if Mr McNeal or London Array's legal team thought we
18 had misunderstood it, they would surely have brought
19 that to light, and the Tribunal will recall that
20 Mr McNeal updated his evidence in a few respects when he
21 first took the stand.

22 In fact, there was no suggestion from Mr McNeal in
23 either his witness statement or his oral evidence that
24 DECC's preference for a single decimal place involved a
25 change of approach as compared to 2010. Where there were

1 changes in approach Mr McNeal dealt with this in his
2 evidence, see, for example, paragraphs 20, 21 and 27.
3 Finally, a willingness to consider single decimal places
4 is also apparent from the evidence I have shown you on
5 the 2009 process, and in my submission it would be
6 surprising if DECC had, in the short time between 2009
7 and 2013, developed an aversion to single decimal places
8 but then dropped it again. One would expect it to be
9 documented or at least apparent to Mr McNeal, so in all
10 the circumstances, the only reasonable interpretation of
11 Mr McNeal's evidence is that DECC's preference for
12 single decimal places was not introduced as new after
13 Mr McNeal joined, and I ought to say there is also a
14 fairness point here because, as we can see, we relied on
15 this part of Mr McNeal's evidence both in the Skeleton
16 and in my oral Opening Submissions, and if London Array
17 or any of the aligned parties thought we had
18 misunderstood it, it was incumbent on them to raise this
19 before he gave evidence so that it could be explored
20 with him in cross-examination. In my submission it is
21 quite wrong for them to stay silent and then shout
22 "gotcha" when we rely on it in closing.

23 The aligned parties have to say, to sustain their
24 case on increments, they have to say that even if, in
25 the counterfactual, Government had concluded that the

1 right level of support was fractionally above 1.75, 1.75
2 ROCs, it would nevertheless have awarded two because
3 1.75 would be too low, and Government was unwilling to
4 contemplate anything in between. That argument is
5 unsustainable in the light of the evidence I have
6 referred to. Indeed, it is implausible in my submission
7 that the Government would have adopted such an
8 inflexible approach, particularly given the impact on
9 consumers. It was not obliged to use 0.25 increments,
10 and the evidence does not suggest that IT costs were a
11 weighty consideration.

12 If the right level of support in the counterfactual
13 were fractionally above 1.75, but Government
14 nevertheless awarded two ROCs, then almost half of the
15 overall increase from 1.5 would be unnecessary. Half
16 the overall increase equates to between £1.25 and £1.75
17 billion in additional costs to consumers, so that is the
18 effect of the aligned parties' argument.

19 It may be a little early for a break but I am about
20 to come on to a new topic so I am happy to take a break
21 if you --

22 THE CHAIRMAN: Let us break there, then. We will come back
23 at quarter past.

24 (3.09 pm)

25 (A break was taken)

1 (3.19 pm)

2 THE CHAIRMAN: Yes, Mr Lask?

3 MR LASK: Thank you. I want to turn now to Prysmian's
4 margins analysis. This refers to the tables that my
5 learned friend Ms Davies produced with -- on Day 1. The
6 aligned parties rely on these Tables to argue that
7 Government and the Commission tolerated large margins
8 between cost and revenue in the 2009 decision, and they
9 then argue that by logical extension a margin of some £9
10 in the 2010 decision would not have been a concern.
11 That is the argument that is -- that I face, as I
12 understand it. That line of argument is, in my
13 submission, misconceived, and I have four points. The
14 first and most obvious point is that the contemporaneous
15 evidence for the 2010 decision, the actual decision in
16 issue, makes plain that the £5 margin was, indeed, a
17 source of considerable concern. As we have seen from
18 the evidence it was the subject of intense scrutiny by
19 the Commission, and was described as major sticking
20 point in Government's efforts to secure State aid
21 clearance. It stands to reason that a margin of almost
22 twice the size in the counterfactual would have been an
23 even greater concern. It is unreal to suggest
24 otherwise.

25 The 2009 evidence cannot alter the position. The

1 best evidence of how Government and the Commission would
2 have reacted in the counterfactual for 2010 is the
3 contemporaneous evidence of how they reacted in the
4 factual in 2010. Indeed, if the Commission had been
5 relaxed about the extent of the margin in 2010, it would
6 have cleared the proposal without persistent questioning
7 about over-compensation. In my submission, that ought
8 to be a complete answer to the argument, but if I need
9 to go further, and I have my second, third and fourth
10 points. My second point is that when one actually looks
11 at the evidence of 2009, one immediately sees that the
12 approach and assessment for that decision were very
13 different to 2010.

14 Most notably, support levels were being set for a
15 whole range of technologies across a number of bands,
16 whereas, as we know, in 2010, Government was solely
17 concerned with the level of support for offshore wind.
18 What this meant is that the focus for the Commission and
19 the Government in 2009 was whether there would be
20 over-compensation in aggregate across technologies and
21 over time. That is significant because it means that
22 even if the banding might appear to over-compensate one
23 technology, this could be counter balanced by
24 under-compensation on another technology. That simply
25 was not an option in 2010.

1 To make this point good, I would like to show you,
2 firstly, the 2009 State aid decision which is at
3 {ROC-E/80/1}. Start, please, on page {ROC-E/80/6}.
4 Paragraph 23. The Commission is here outlining the UK's
5 position on each of the four points from paragraph 110
6 of the guidelines, and you will see the second indent:

7 "Support does not in the aggregate result in
8 overcompensation for renewable energy".

9 This is the UK's position:

10 "Some technologies have been banded down; others
11 will not receive the full support they would need with
12 respect to their extra costs (eg photovoltaic would
13 require 15 ROCs/MWh to be fully compensated according to
14 the UK). On the whole, banding is based on cost
15 analysis performed by Ernst&Young0".

16 So, the Government is not seeking to match the needs
17 for all technologies. Some are going to end up being
18 under-compensated, and it follows in my submission that
19 there can be a counterbalancing between any that are
20 over-compensated, and if we go, then, to page
21 {ROC-E/80/12}, paragraph 49, we see a development of the
22 same point:

23 "Following the modelling work and consultation of
24 the proposals UK Government chose a scenario where
25 technologies were grouped in five bands. This was

1 chosen for a number of reasons, the chief one being that
2 of simplicity and to limit the maximum level of support.
3 In this respect the UK decided not to seek to match the
4 needs of all the technologies ..."

5 And then we see another reference to photovoltaic
6 stations and 15 ROCs because the aim of the RO is to
7 bring forward those technologies which are commercially
8 deployable and incentivise those which are near to
9 commercial deployment.

10 Then if we go to page {ROC-E/80/16}, please, this is
11 part of the Commission's assessment of
12 over-compensation, and you see the subheading
13 "appreciation of the Commission on the absence of
14 overcompensation in aggregate". Then paragraph 69 at
15 the bottom, I would like to pick it up in the last
16 sentence. This is a discussion about the revenue
17 available, or that will be generated under the scheme,
18 and the Commission says:

19 "As the benefits from redistribution of the buyout
20 fund will be passed on from the suppliers to the
21 generators in accordance with the PPA usually signed
22 between suppliers and generators, overcompensation to
23 electricity generators cannot immediately be ruled out".

24 Then paragraph 70 {ROC-E/80/17}:

25 "Since the amount of the buyout fund that suppliers

1 and generators would receive depends on the amount of
2 renewable electricity supplied, and since the supply
3 targets and buyout price are growing from year-to-year
4 until the 2020 target is reached, it can be assumed that
5 this will act as a strong stimulus to develop additional
6 generating capacity and therefore secure a greater share
7 of the buyout fund, decreasing the value of the ROCs and
8 in overall acting against overcompensation for single
9 generating stations".

10 So, whereas in the previous paragraph there was the
11 -- the Commission acknowledged that there would be
12 over-compensation in the first instance, then it is
13 suggesting in paragraph 70 that that ought to correct
14 itself over time.

15 Paragraph 71:

16 "The Commission takes into account the need of the
17 UK to build additional capacity for renewable
18 electricity in order to meet its targets. The
19 Commission also notes that the UK authorities ensured
20 that they will regularly review the costs of the
21 technology in order to ensure that technologies are not
22 overcompensated. The Commission notes as well that
23 despite the banding mechanism some technologies would
24 still require higher support as would result from the
25 current bands capped at 2 ROCs per MWh".

1 So some are being under-compensated:

2 "It can be assumed that this commitments and the
3 design of the scheme itself, in particular the aim of UK
4 authorities to match the mid-point of the predicted
5 revenues for each technology will prevent
6 overcompensation in the aggregate, this being seen in a
7 double sense. Firstly, the system will prevent
8 overcompensation in the aggregate of the different
9 producers and different technologies. Secondly, while
10 the system may overcompensate producers in the
11 beginning, the market mechanism and the adjustments made
12 in accordance with the commitments made by the UK will
13 prevent in the aggregate of the duration of the scheme
14 overcompensation. The Commission considers the
15 abovementioned undertakings to be an important element
16 of its assessment".

17 I will come back to what is said there about
18 matching the mid-point for certain technologies, but the
19 important point for present purposes is that there is
20 clearly a degree of trading-off between technologies,
21 and that ultimately the Commission was satisfied that
22 the system would prevent over-compensation in aggregate
23 across the technologies and over time.

24 Now, I accept that to prevent over-compensation in
25 aggregate across technologies it is necessary to conduct

1 some analysis of the position as regards particular
2 technologies, but in my submission the assessment is
3 bound to be more broad brush and there is bound to be a
4 less granular focus on specific margins between point
5 estimates for individual technologies, and one indeed
6 sees this from the decision itself, and from the
7 underlying materials that the Government provided to the
8 Commission. In particular, as I mentioned earlier,
9 Government did not even provide the Commission with
10 central estimates for costs and revenues, let alone
11 invite it to consider a margin between the two.

12 If we go, please, to {ROC-E/201/1}, if we flick on
13 to the first page, please, perhaps if we could present
14 the first two pages alongside each other -- oh, sorry,
15 yes, pages 2 and 3. {ROC-E/201/2}. I am not going to
16 go through this document page-by-page but these are the

[Redacted]

18 [Redacted] which
[Redacted] is at {ROC-E/45/10} is where it is referred to. [Redacted]

[Redacted]

1 Then if we go, please, to Prysmian's tables
2 {ROC-AB/12/5}, this is Table 3 which is the table
3 that -- and what is important is that the central
4 estimates in this table were never provided to the
5 Commission, and in some cases Prysmian's team has had to
6 work out the central estimates for itself, putting
7 together various different bits and pieces of
8 information, and the margins that we see in the final
9 two columns are an entirely new calculation carried out
10 by Prysmian's team. They do not appear in the
11 underlying Government material, let alone the material
12 sent to the Commission.

13 This is not controversial because this is explained
14 in these tables. Prysmian have not sought to hide that.
15 I am not revealing anything new. One sees it on pages 4
16 and 6 of this document, and one sees from the various
17 explanations that there are also various other
18 calculations that have been carried out, but all this is
19 important because it demonstrates, in my submission,
20 that the Government and the Commission were simply not
21 focusing on specific margins between point estimates as
22 they were in 2010.

23 Standing back, Table 3 proves too much because it
24 invites the Tribunal to accept both that the Government
25 and Commission were focused on these specific margins

1 between point estimates for individual technologies, and
2 that they were perfectly comfortable with margins of up
3 to 34 per cent. Both propositions cannot be right
4 because it would imply that the Commission was
5 deliberately allowing over-compensation, despite the
6 State aid rules. That is implausible, in my submission.
7 It is also impossible to reconcile with the Commission's
8 evident concerns about the margin in 2010, so the only
9 plausible explanation is that these were very different
10 exercises.

11 My third point is this: the reason that the
12 Government would have been less concerned about margins
13 for individual technologies is that it expected the new
14 banding system to result on average in the award of one
15 ROC per megawatt hour of electricity generated across
16 the piece. In other words, while some technologies
17 would receive more than one ROC, and other -- sorry --
18 some would receive less than one ROC, others would
19 receive more, this would average out at one ROC per
20 megawatt hour, the same level of support that was
21 already being provided under the existing order. We see
22 this -- I will just read it out from the Government's
23 consultation response in December 2008 which is at
24 {ROC-E/50/13}:

25 "The Government has carried out modelling work

1 which anticipates that when averaged across the period
2 up to the next review of the banding regime in 2013, 1
3 MWh of renewable electricity will receive 1 ROC".

4 Accordingly, it followed from that, Government also
5 expected the new banding system would not entail any
6 significant increase in consumer costs, and if I could
7 show you, please, the explanatory memorandum for the
8 2009 Order, which is at {ROC-E/31/5}, one sees at the
9 bottom, paragraph 10.5:

10 "The Renewables Obligation will also have an impact
11 on consumers, as costs to licensed suppliers are
12 expected to be passed on. Modelling indicates this
13 should not be a significant increase on those costs
14 expected under the existing Renewables Obligation
15 order -- but that the amount of renewable electricity
16 generated should be significantly greater".

17 So, it is unsurprising, in my submission, that there
18 was less focus on margins for individual technologies,
19 because it was not expected to lead to any significant
20 increase in consumer costs, whereas in 2010 the increase
21 in costs for consumers was a major consideration, as
22 shown by the evidence.

23 My fourth point is that even if one were to accept
24 that Prysmian's margins tables were informative, there
25 is more to them than meets the eye. If we could please

1 go back to the State aid decision at {ROC-E/80/13}, at
2 the bottom of this page, please, paragraph 57:

3 "In proposing a banding regime, the UK aimed for a
4 level of support towards the middle of the range of
5 costs (for projects beginning in 2010) for those key
6 technologies which were expected to deliver substantial
7 volumes up to 2015."

8 Then recall that despite this, it did not present
9 those central estimates, but the first thing is that
10 this suggests, in my submission, the sort of broad brush
11 exercise that I submitted was being taken, but in any
12 event, what this indicates is that the focus of the
13 exercise is on those technologies that were expected to
14 deliver the most generation. That is what is being said
15 in 57, and one can see which technologies those were by
16 looking at page 11 of this document, Figure 2.

17 {ROC-E/80/11}. You see there, along the -- you have
18 along the vertical axis, you have "output", and then you
19 see these different bands for different technologies,
20 and then the colour-coded key at the side. What one
21 sees is that the technologies that the Government was
22 apparently focused on for wave and tidal, offshore wind,
23 onshore wind, landfill and co-firing. Those were the
24 specific ones. You've got "other" at the bottom.

25 So these were the technologies for which the

1 Government had been comparing the level of support to
2 costs, and looking more closely at each of these
3 technologies reveals why there would not have been a
4 concern around margins between point estimates, even if
5 that is what was being looked at, and if we start,
6 please, by going back to Prysmian's Table 3 at
7 {ROC-AB/12/5}, you see firstly towards the bottom of the
8 page you can see offshore wind. I am going through the
9 key technologies that the Government was focused on.
10 Offshore wind, final two columns, negative margin. That
11 would not have been a concern, even under this approach.
12 The same applies to -- wave and tidal, if we go over the
13 page {ROC-AB/12/5}, wave and tidal at the bottom, both
14 at negative margins, so that is three of the six key
15 technologies accounted for, and then if we look at --
16 back on the previous page, page {ROC-AB/12/5}, we see
17 there are two types of co-firing in Table 3. In the
18 fourth row down there is co-firing with CHP. I
19 understand that "CHP" means "combined heat and power"
20 system, but you see that co-firing has a negative
21 margin. That is not going to be a concern, and then the
22 second row, we see co-firing of non-energy crops, and
23 according to this table that produces an absolute margin
24 of £19 for a relative margin of 35 per cent, but then if
25 we go back to the decision, the State aid decision,

1 {ROC-E/80/19}, paragraph 81, second sentence:

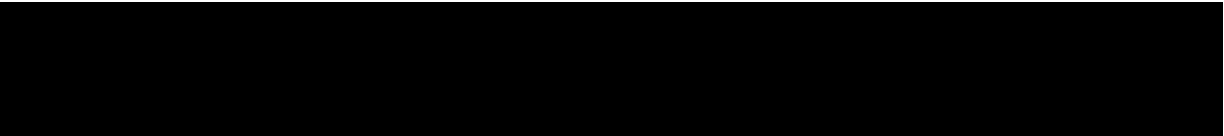
2 "Co-firing in the UK is performed in
3 long-established, coal-fired generating stations where
4 the investment was made before the RO was introduced.
5 The great majority of the incumbent installations are
6 currently depreciated and therefore face only operating
7 costs i.e. ongoing fuel purchase. Therefore the support
8 has been reduced to 0.5 ROC which has been calculated as
9 just sufficient to cover the operating costs of such
10 plants".

11 The reason that I say the co-firing referred to in
12 paragraph 81 is the same co-firing as in the second row
13 of Prysmian's Table 3 is because that is the one that
14 has been put in the 0.5 band.

15 The fact that the Commission says support has been
16 set -- has been calculated as just sufficient to cover
17 the operating costs, and operating costs are the only
18 costs being incurred, would suggest a margin much
19 smaller than the one implied by Table 3.

20 Back to Table 3 {ROC-AB/12/5}. Landfill gas at the
[REDACTED] top takes a margin of £17 or 34 per cent. [REDACTED]

[REDACTED]



3 So basing the cost revenue comparison on the
4 mid-point of the costs range, which is what Table 3
5 does, would be misleading in my submission. It is not
6 what the Government did, or the Commission. For what it
7 is worth, if one compares the central revenue figure
8 from Table 3 which is 65 against the top of the cost
9 range here, 63, the implied margin is only £2. Then
10 that leaves only onshore wind, if we go back to the
11 Table 3 at {ROC-AB/12/5}, onshore wind, you see there
12 just at the bottom of the page, absolute margin of 13,
13 relative margin of 17 per cent, but there are two points
14 in response to this. Firstly, that the State aid
15 decision, paragraph 71 which we were looking at, that
16 refers to mid-points (Inaudible) whereas Table 3 is
17 basing its implied margins on central estimates, and
18 they are not always the same thing.

19 Calculating the implied margins based on mid-points
20 reduces those margins. So, for onshore wind, the
21 mid-point of the cost range is 80, and the mid-point of
22 the revenue range is 88. That produces an absolute
23 margin of £8 not £13.

24 The second point is that the cost figures for
25 onshore wind in Table 3 conceal a greater complexity, in

1 particular -- and one sees a reference to this on page 6
2 of the tables {ROC-AB/12/6}, under (Inaudible).

3 The central cost estimate hydro electric is the
4 average of two central estimates of hydro electric
5 scales same applies for onshore wind using the central
6 estimates for small and large scale.

7 If one goes to -- so what Table 3 has done is
8 averaged -- it has taken an average of the costs for the
9 different types of onshore wind. If one goes to the
10 underlying figures which are at {ROC-E/200/1},
11 (Inaudible) categories for onshore wind, and the central
12 cost estimates for those categories cover (Inaudible)
13 range, range from £65 per megawatt hour (Inaudible) high
14 wind, £90 (Inaudible) 47. So, by taking a simple
15 average as Table 3 does, one assumes that the
16 appropriate level of support and the risk of
17 over-compensation should be assessed by reference to the
18 needs of a hypothetical average wind farm that is
19 neither large nor small, neither low wind or high wind,
20 but there is no reason why the Government should have
21 wanted or needed to do that. If Government had been
22 seeking to set a support at a lower level to match
23 Prysmian's hypothetical average wind farm, that would
24 not have been sufficient to meet the needs of the more
25 expensive types of onshore wind, namely small low wind.

1 In fact, one sees that the central revenue estimate of
2 90 matched the central cost estimate for small low wind
3 of 90.

4 That feeds into the point about the assessment of
5 overcompensation being an aggregate exercise between the
6 different technologies over time.

7 It goes to show, in my submission, that even leaving
8 aside all of the other points, Table 3 really does not
9 do what Prysmian wants it to.

10 I am going to turn, now, to Question 3, minimum cost
11 elevation. Question 3 only arises if the Tribunal
12 agrees with us that Government would have awarded fewer
13 ROCs in the counterfactual, either 1.9 or 1.75. We have
14 addressed the minimum cost elevation under both
15 scenarios, but for present purposes I assume we are in a
16 1.9 ROC scenario because that is our primary case.

17 In this scenario, it is taken as read that the
18 Government would have used 0.1 increments in the
19 counterfactual, and that, in my submission, necessarily
20 implies that the Government would have been taking a
21 more precise approach than the aligned parties have been
22 prepared to admit. We say that in those circumstances a
23 change in costs of any more than half the value of a 0.1
24 increment would have caused the Government to look at
25 the next banding increment down, and the value of -- the

1 experts have agreed that mathematically 0.1 ROCs was
2 worth £4.40, and it follows that half the value of a 0.1
3 ROC increment was £2.20. That is why we say the answer
4 to Question 3 is anything above £2.20. We have provided
5 an illustrative example at paragraph 177 of our closing
6 based on a cost elevation of £2.50, and it may help to
7 have that open. It is at {ROC-AB/7/64}. It explains
8 there, based on a cost elevation of £2.50, why we say in
9 those circumstances 1.9 ROCs would be the obvious
10 choice.

11 Now, two points are taken against us. First, it is
12 said that this assumes that the Government would be
13 willing to accept a lower margin in the counterfactual
14 than it accepted in the actual, but in my submission
15 that is a bad point for reasons we give at paragraphs
16 178 and 179, namely once you are dealing with smaller
17 cost elevations than that which arises under a 26 per
18 cent overcharge, it is no longer possible for the
19 Government to provide the same margin as in the factual.
20 That is because the cost elevation arising from a 26 per
21 cent overcharge is broadly equivalent to 0.1 ROCs, so
22 taking our example at paragraph 177 {ROC-AB/7/64}, 1.9
23 ROCs -- this is subparagraph (3) -- 1.9 ROCs would
24 provide a margin of £3.10. That is a narrower margin
25 than the margin of £5 in the actual, but then if one

1 looks at subparagraph (2) we see that two ROCs would
2 provide a margin of £7.50. That is a larger margin than
3 the margin in the actual. So, either way, the margin
4 has to change, whatever the Government does, and we say
5 the Government's most likely reaction would be to choose
6 the option under which the margin was closest to the
7 margin in the factual, and that any cost elevation above
8 £2.20, 1.9 ROCs would produce a margin that is closer to
9 the factual margin than two ROCs, and so, for example,
10 as we explain at paragraph 179, in the £2.50 scenario a
11 margin of £3.10 is closer than a margin of £7.50 to the
12 margin in the factual. So, banding-up by a smaller
13 amount in those circumstances would be the most likely
14 outcome, banding-up to 1.9 rather than two.

15 The only alternative is to assume that only a cost
16 reduction equivalent to 0.1 ROCs would suffice, but that
17 would imply that if Government could not provide the
18 same margin in the counterfactual it would always choose
19 to provide a larger one, and there is no reason why, in
20 my submission, the Government should err on the side of
21 generosity to the wind farms. It was seeking to prevent
22 over-compensation and minimise costs to consumers.

23 The Class Representative's case is simply that in
24 the counterfactual, Government would take the approach
25 that was closest to the approach it took in the factual.

1 Second point taken against us is that one cannot be
2 sure that a minimum cost elevation of £2.20 would be
3 sufficient to move the dial. The test, however, is a
4 balance of probabilities, and the starting point is that
5 Government considered two ROCs to be the right level in
6 the factual, so any cost reduction greater than 0.05
7 ROCs would have meant the right level was closer to 1.9
8 than two. In my submission, this would be enough, on the
9 balance of probabilities, to cause Government to set
10 support at the next 0.1 increment down. Since the
11 monetary value of 0.05 ROCs is £2.20, based on the
12 Government's analysis, the minimum cost elevation is
13 anything over £2.20.

14 The other experts did not devote a great deal of
15 attention to Question 3 because, on their cases, it does
16 not arise because they answered, "no" to Question 2.
17 The only substantive positive analysis was Dr Moselle's
18 hypothetical mechanical rule. He accepted in
19 cross-examination that Government did not apply any such
20 rule. As far as we can see, it is not relied on by
21 Prysmian in their closings.

22 Nexans say in their closing at paragraph 38 that Ms
23 Hesmondhalgh estimates that the minimum cost elevation
24 would be 42 per cent if installation costs are included
25 and 87 per cent if they are excluded, and there must be

1 a typo in there because what Ms Hesmondhalgh says at
2 paragraph 78 of her second report is that these are the
3 figures -- these are the overcharge figures that would
4 be required, not the minimum cost elevation, and in the
5 joint expert -- proposition 76 she confirms that her
6 minimum cost elevation is £6. That is {ROC-D/11/126}.

7 (Zoom call frozen)

8 ... On the one hand it criticises Mr Druce for
9 failing to appreciate his duty to the Tribunal, but then
10 it equally criticises him for changing his views when
11 the evidence justified it. Again, Prysmian cannot have
12 it both ways. We have addressed this in our closing at
13 paragraph 13.

14 The short point is that the views Mr Druce is said
15 to have abandoned were presented either before the DECC
16 disclosure or before engagement with the other experts.
17 In my submission, it was entirely appropriate for
18 Mr Druce to revisit his position following those stages
19 in the process. That is what an independent expert
20 should do. It is simply illogical for Prysmian to say
21 that because differences have been narrowed through the
22 expert process there has been a waste of time and cost.
23 The expert process is intended to narrow issues.

24 Next topic: London Array's closing submissions
25 {ROC-AB/11/9}, the Tribunal will see Table 2 which Mr

1 West relies on in relation to ranges and central
2 estimates, and the table includes both the ranges -- the
3 horizontal coloured lines and then that central
4 estimate -- points on the lines. The only point I would
5 make is that this strikingly illustrates just how close
6 the counterfactual cost figure is to central revenue --
7 the central revenue estimate of 1.75 ROCs, because the
8 counterfactual cost figure is the vertical blue dotted
9 line, and you will see the second row up from the bottom
10 is revenue at 1.75 ROCs, and the central revenue
11 estimate is £138 which is highlighted there. You can
12 see just how close the blue dotted line is for revenue
13 at 1.75 ROCs.

14 Mr West says at paragraph 21:

15 "It is noticeable that the counterfactual cost
16 range ..."

17 Which is the blue horizontal line:

18 " ... sits neatly within the revenue range for two
19 ROCs which is the line immediately below it".

20 You will see it also sits neatly within the revenue
21 range for 1.75 ROCs which is the line below that, second
22 line up from the bottom. In my submission, that
23 illustrates why ranges are of limited utility, and why
24 Government relied primarily on central estimates.

25 Next topic, at paragraph 33 of London Array's

1 closing -- page 14 -- {ROC-AB/11/14}, it is said that
2 the cost increases that prompted developers to ask for a
3 ROC increase were unrelated to increases in the price of
4 cables, and it is said that there is no suggestion that
5 the overcharge due to the cartel had increased at this
6 point, as compared to the earlier period since 1999, and
7 this repeats Ms Shamsi's evidence and is, in my
8 submission, similarly misplaced because it must be
9 assumed that wind farm costs were higher as a result of
10 the cartel, and it follows that in the counterfactual
11 the costs which underpinned industry lobbying would have
12 been lower. Mr West says there is no suggestion that
13 the cartel overcharge had increased as at 2008 to '9
14 compared to the earlier period. That is not the
15 relevant comparison. The relevant comparison is between
16 the actual and the counterfactual.

17 In any event, there has not been the disclosure or
18 analysis to assess whether the level of the overcharge
19 changed during the cartel period.

20 Finally, NKT's closing. {ROC-AB/10/1}. Paragraph
21 17, please. {ROC-AB/9/8}. NKT are here addressing the
22 question of acceptable and unacceptable margins, and
23 they say that Mr Druce's analysis implies that a margin
24 of £7 would have been acceptable to Government, so on
25 that basis it is hard to see how £9 would be problematic

1 in the counterfactual, but Mr Druce, and this is
2 {Day3/64:1} to 65, Mr Druce was not offering the opinion
3 that Government would have accepted a margin of £7, he
4 said that if Government felt that a larger margin was
5 needed in the counterfactual, then his £6.40 cost
6 elevation may have resulted in 1.9 ROCs being awarded.
7 That is unsurprising because the question is whether the
8 Government and Commission would have considered the
9 counterfactual margin acceptable, not Mr Druce.

10 In any event it is a non sequitur to say that if a
11 £7 margin would be acceptable, so too would a £9 one.
12 Paragraph 22 on page 9. {ROC-AB/9/10}. It is said here
13 that the developers approached Government. They were
14 reading from a menu, the 2009 Order, and that menu
15 offered 1.5 and two, and since 1.5 was no longer enough,
16 they coalesced around two. That is firstly unevidenced,
17 and, secondly, detached from reality, because it implies
18 that the requests for two ROCs were not based on a
19 genuine estimate of costs and hurdle rates when the
20 developers told the Government they were, and for what
21 it is worth, the intention to step down to 1.75 was made
22 clear by the banding review announcement, so developers
23 responding to the consultation would have known that
24 this was not simply a case of replicating the existing
25 banding, it was a more detailed and bottom-up exercise

1 than that.

2 Unless I can assist the Tribunal, those are my
3 submissions.

4 THE CHAIRMAN: I have got one question for you which is
5 about Question 1, value of commerce. Does -- I don't
6 think anyone really sort of devotes much fire power to
7 this. Do you think Question 1 matters?

8 MR LASK: No, and we have addressed this in our closing
9 submissions. We set out at paragraph 182 what we say
10 the answer is, and this is {ROC-AB/7/65}. Actually,
11 I think it might help more to look at the fuller answer
12 we give in our Skeleton, which is {ROC-AB/2/3} where we
13 say that, well, actually -- well, the difference between
14 the experts is which wind farms they have used to
15 calculate the value of commerce. Actually we say the
16 Government was interested in both metrics, but the
17 reason I agree it does not matter is because the VOCs
18 produced by the other experts, and as I have said,
19 Ms Hesmondhalgh's calculations are an outlier that we do
20 not accept, but subject to that the VOCs produced by the
21 other experts produce a cost elevation that is similar
22 to the cost elevation of £4.30 that Mr Druce says would
23 apply if one is seeking to replicate EY's exercise, and
24 as you have heard my case relies primarily on that cost
25 elevation.

1 THE CHAIRMAN: Yes. So, you do not positively invite us to
2 determine Question 1 in any particular way, except to
3 the extent you invite us, I think, to reject
4 Ms Hesmondhalgh's back-solving of the missing two.

5 MR LASK: Yes.

6 THE CHAIRMAN: You invite us to reject that?

7 MR LASK: I do, and I also accept that if one is trying to
8 ascertain what the key cost evidence before the
9 Government would have looked like in the counterfactual,
10 then it is appropriate to seek to replicate the EY
11 analysis, because that was the key cost figure.

12 PROFESSOR ANTHONY NEUBERGER: I just have one question. The
13 0.25 increment is a fallback. Your primary case is
14 based on 0.1 increments. I was just trying to
15 understand the relationship between the answers to
16 those -- on those two variants to the minimum cost
17 elevation Question 3. Am I right in thinking that you
18 are actually following a somewhat different approach to
19 answering the Question 3 depending on whether there is a
20 0.1 or a 0.25 minimum increment?

21 MR LASK: Well, I am not sure it is very different in
22 substance. As I just submitted, in the 0.1 scenario, my
23 submission is well, you know, your starting point is
24 that the Government thought two ROCs was the right
25 level, so you have to look at the cost elevation that

1 would have caused the Government to tip over to the next
2 level down, which is half of 0.1, and in the 0.25
3 scenario, the answer is effectively -- so the approach
4 is effectively the same, the answer is different.

5 PROFESSOR ANTHONY NEUBERGER: Why is it not 0.125? That is
6 what I am asking.

7 MR LASK: In the scenario where the Government would only
8 have rounded down to 1.75, then the question is -- the
9 starting point is that costs in the factual were at
10 £144, and that was very -- that was closer to 2.0 ROCs
11 than 1.75 ROCs because 1.75 ROCs is -- generates revenue
12 of £138. Two ROCs generates revenue of £149. Costs in
13 the factual were £144. Closer to £149 than £138. On
14 Question 3 we say it only -- because it only takes a £1
15 cost reduction, or just over a £1 cost reduction,
16 I think, to bring costs closer to the revenue at 1.75,
17 that is the minimum cost elevation. That tips you from
18 the upper -- from the two ROC band down to the 1.75 ROC
19 band.

20 PROFESSOR ANTHONY NEUBERGER: That seems a different basis
21 from which you calculate minimum cost elevation in the
22 first case in 0.1 where you are talking about
23 maintaining a five --

24 MR LASK: I accept that. It is different.

25 PROFESSOR ANTHONY NEUBERGER: Thank you.

1 THE CHAIRMAN: I do not think we -- let me just look back
2 through my notes. I think I have asked all the
3 questions I wanted to ask you.

4 Yes. We have asked you all of our questions. Thank
5 you very much.

6 Yes, Ms Davies?

7 Submissions by MS DAVIES

8 MS DAVIES: I am not sure what time you are going to go on
9 to sit until this evening but I can make some
10 introductory comments if that would be useful.

11 THE CHAIRMAN: Yes, I was quite hopeful of finishing during
12 the course of tomorrow so I would like to use the
13 remaining 20 minutes.

14 MS DAVIES: Thank you. Sir, as the Tribunal has heard, in a
15 sense we are finishing where we started with it being
16 clear that -- from my learned friend's submissions --
17 that the Class Representative's real case is that in the
18 counterfactual the Government would have selected a
19 banding level of 1.9 ROC per megawatt hour for offshore
20 wind, and hence it is that case that I am proposing to
21 focus on in closing, although I do, of course, recognise
22 that the Class Representative is still seeking to
23 advance a case of 1.75 ROCs as some sort of fallback,
24 albeit that in our submission it is so unrealistic that
25 it is unsurprising that it was abandoned by Mr Druce in

1 his evidence, and not put to any of the aligned parties'
2 experts, and therefore in our submission it is, in fact,
3 surprising that the Class Representative feels it
4 necessary to try and keep it alive, but I will obviously
5 come to address that later in my submissions, together
6 with the Class Representative's inconsistent cases as to
7 the relevant minimum cost elevation.

8 Now, starting with the Class Representative's main
9 case of 1.9 ROCs, and I wanted to start by just making
10 some comments on the correct framing of the question
11 that the Tribunal needs to determine. In reality, the
12 start and end point of the Class Representative's case
13 is that in the counterfactual the Government would have
14 been seeking to provide the same or at least a very
15 similar margin between the central revenue estimate and
16 the base case levelised cost estimate as it did in the
17 actual, or, as a fallback to that, even if the
18 Government had not been so thinking, it would have been
19 forced by the European Commission to that conclusion as
20 part of the State aid approval process.

21 Now, we submit that that fundamental tenet to the
22 Class Representative's case is also its fundamental
23 fallacy, not least because it looks at things the wrong
24 way round.

25 That is because it is quite clear on the evidence

1 that neither the Government nor the Commission
2 approached the banding review with an intention to set
3 or approve any specific level of margin for offshore
4 wind. Indeed, my learned friend accepted this afternoon
5 that there was no magic margin.

6 Rather, the Government's aim was broader, namely to
7 set the band at a level of support which would enable
8 sufficient offshore wind farms to be constructed over
9 the relevant period to enable it to meet its renewable
10 targets, whilst, of course, also seeking to ensure that
11 costs to consumers were not increased unnecessarily, but
12 in doing that, the Government necessarily had to balance
13 not only its various statutory objectives and the need
14 to obtain State aid clearance, but also the fact that it
15 was making the assessment in relation to issues where
16 there were very significant degrees of uncertainty, and
17 that exercise never was and never could be, therefore,
18 one of simply comparing point estimates and adding some
19 specific margin to account for uncertainty. The
20 uncertainties were much more significant than that.

21 Critically, in approaching the assessment of the
22 counterfactual, it must, of course, be borne in mind
23 that the Government would not have been approaching
24 matters in the way that we have inevitably been
25 approaching matters in this trial. In particular, it

1 would not have been asking itself the question whether a
2 reduction in the base case levelised cost estimate of
3 around £4 per megawatt hour would impact its assessment
4 because in the counterfactual, it would never have had
5 the higher base case levelised cost estimate as a
6 comparator. It would not, therefore, have determined
7 that a margin of £5 per megawatt hour or 3.5 percent in
8 proportionate terms was the appropriate margin to allow.
9 Those figures would not have existed in the
10 counterfactual. Rather, the Government would have been
11 starting from a different point.

12 That is why, in a nutshell, we submit that it cannot
13 be right to suggest that the best evidence of the margin
14 the Government would have allowed in the counterfactual
15 is the margin that it allowed in the actual. Indeed,
16 that could not be the case because the margin that it
17 allowed in the actual was the specific one in the actual
18 where developers had asked for two ROCs, and Ernst &
19 Young had found that that claim was justified and
20 obviously I am going to come on to that.

21 Now, unless one assumes, as my learned friend seeks
22 to for the purposes of his analysis, that in the
23 counterfactual both the developers would have requested
24 less and Ernst & Young would have been recommending
25 less, in the counterfactual by definition the Government

1 is looking at a different pool of evidence to assess the
2 appropriate approach than it would have had in the
3 actual, because it would have, we agree, a different
4 base case levelised cost estimate, but, on the other
5 hand, it would have developers asking for two and an
6 Ernst & Young recommendation. I am going to come to
7 develop all that, but the reason I am making that point
8 at the outset is why we do not agree with the
9 formulation of the Class Representative's suggested
10 central question for the Tribunal as summarised, for
11 example, at paragraph 7 of their written closing
12 submissions, because that is formulated on the premise
13 that the question for the Tribunal is whether the
14 Government would have sought in the counterfactual to
15 provide the same margin as in the factual or whether
16 lower costs would have caused it to alter its
17 assessment. To the contrary, we submit that the real
18 question for this Tribunal is having obtained from Ernst
19 & Young a base case levelised cost estimate of around
20 140 megawatts per hour, and in light of the Government's
21 assessment of all other matters that the Tribunal has to
22 determine in relation to the counterfactual, would the
23 Government have concluded it was appropriate to increase
24 the banding level to two ROCs in accordance with its
25 practice at the time of using minimum banding increments

1 of 0.25 ROCs, and would the Commission have approved
2 that decision, as we submit is clearly the case, or
3 whether, as the Class Representative suggests, in those
4 circumstances it would have decided a more granular and
5 new banding level of 1.9 ROCs should be adopted, because
6 it would have been thought that the central estimate of
7 revenues that were anticipated at two ROCs, namely £149
8 would exceed the base case levelised cost estimate by
9 too great a margin.

10 In our submission, that is an important point in
11 framing the analysis that the Tribunal is required to
12 undertake, because to put it simply, in the
13 counterfactual there never would have been any exercise
14 of seeking to match the costs plus margin to be allowed
15 to the cost-plus margin that were actually allowed in
16 the actual, which is the exercise on which the Class
17 Representative's case, in reality, depends.

18 Therefore, the question for the Tribunal is not,
19 therefore, how in the counterfactual the Government
20 could have acted in the same way and to the same extent
21 as it did in the factual as my learned friend Mr Lask
22 appears to be suggesting, rather the only question is
23 whether the Class Representative has proved on the
24 balance of probabilities that in the counterfactual the
25 centralised estimated revenues at two ROCs would have

1 been perceived by the Government or the Commission to be
2 too far above the base case levelised cost estimate to
3 mean that a different approach needed to be adopted.

4 Now, as to that, there are numerous reasons why it
5 is clear in our submission that neither the Government
6 nor the Commission would have concluded that a different
7 approach was necessary, and why --

8 THE CHAIRMAN: Sorry, before we get into those reasons
9 I think that might be a convenient point to ask the
10 question that I have -- say I am going to ask everyone,
11 whether we should proceed on the basis that the
12 levelised costs would have been £4 lower or £4.30 lower
13 or £4.20 lower. Do we need to decide that debate
14 between the experts?

15 MS DAVIES: I was going to come to that, no. Around £4, as
16 my learned friend Mr Lask indicated, was appropriate for
17 the purpose of his case, is equally appropriate for the
18 purposes of testing the analysis on our case.

19 THE CHAIRMAN: Okay. Thank you.

20 MS DAVIES: And the reason for that is that whichever
21 formulation you take, mathematically it equates to
22 around 0.1 ROCs, and both sides' cases can be perfectly
23 tested on that assumption.

24 THE CHAIRMAN: Thank you.

25 MS DAVIES: In terms of the reasons, I am going to come to

1 them later, but just to summarise by way of
2 introduction, they include the inherent uncertainties in
3 the exercise, and the Government's consequent obvious
4 lack of confidence in the accuracy of the central
5 estimates, the fact that in the counterfactual the
6 developers would still have been asking for two ROCs in
7 our submission, or at the very least that the Class
8 Representative, upon whom the burden lies in this
9 respect, has failed to establish that they would have
10 been asking for a lower amount, the fact that on any
11 view in the counterfactual the Ernst & Young base case
12 would have been supporting an award of two ROCs, and the
13 fact that the Commission itself clearly understood and
14 accepted the impossibility of precision in the exercise,
15 and that it was appropriate for developers potentially
16 to earn returns significantly in excess of the rate of
17 return on capital of 10 per cent which, on the Class
18 Representative's case, is the Ernst & Young analysis in
19 the counterfactual that would have shown the ROC banding
20 level of 1.9 megawatts per hour and have driven the
21 Government's decision-making.

22 Now, I am going to come on to develop all those
23 points and certain others that are relevant to the
24 counterfactual, but what I was -- the structure I was
25 planning to adopt in my submission was, first of all, to

1 address various points relating to the actual, because
2 they inform the debate about the counterfactual, and it
3 is most convenient to do those chronologically in the
4 same way that I did in my Opening Submissions, so that
5 the points do not get lost.

6 I then propose to make a few points about the
7 evidence of Mr McNeal and Mr Druce in light of certain
8 things said by my learned friend, and I will then turn
9 to the heart of the case, namely the counterfactual.
10 The fact I am doing it in that order is not because I do
11 not recognise the heart of the case is the
12 counterfactual, it is simply because the previous points
13 set the context for the counterfactual.

14 So, starting with the actual and specifically
15 starting with the 2009 Renewables Obligation Order, that
16 is an Order which, as the Tribunal has heard, all
17 parties agree provides an important ...

18 (Zoom call frozen)

19 ... a banding level of 1.9 ROCs would have been
20 awarded. There are numerous self-standing reasons which
21 I will come to which demonstrate that an award of two
22 ROCs would have been made, but because my learned
23 friends seek to rely on the distinctions I am planning
24 to address them.

25 So, their core suggestion, as we understand it, is

1 that the assessment that underpinned the 2010 Order was
2 different and involved a greater degree of precision
3 than 2009. I am taking that, for example, from
4 paragraph 15.1 of my learned friend's closing, and it is
5 a point he repeated this afternoon.

6 Now, if, by "different" they simply mean that 2010
7 was focused only on offshore wind whereas the 2009 Order
8 related to a range of different technologies, that is,
9 of course, correct, but it does not mean that the
10 outcome of the 2009 Order automatically becomes
11 irrelevant, not least because what the Government was
12 doing was looking at the level of support that would be
13 provided to offshore wind during the currency of the
14 2009 Order. The 2010 Order, as I have mentioned,
15 amended the 2009 Order, and it put in place just a
16 different banding level for the remainder of the period
17 of the 2009 Order for offshore wind.

18 Now, whatever decision was taken in relation to
19 offshore wind, for the purposes of the 2010 Order,
20 therefore needed to sit alongside the decisions that had
21 been taken in relation to all of the technologies in the
22 2009 Order, and importantly, the statutory objectives
23 and the State aid regime remained a constant, as between
24 the 2009 Order and the 2010 Order.

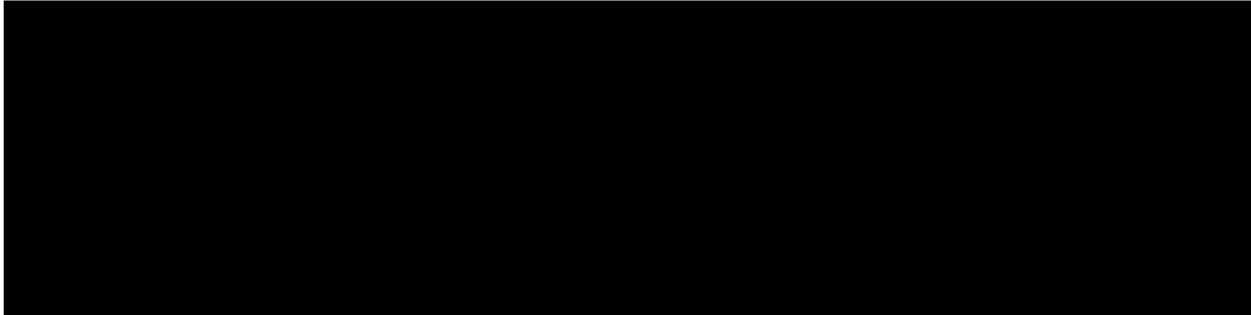
25 So, whilst my learned friends seek to place great

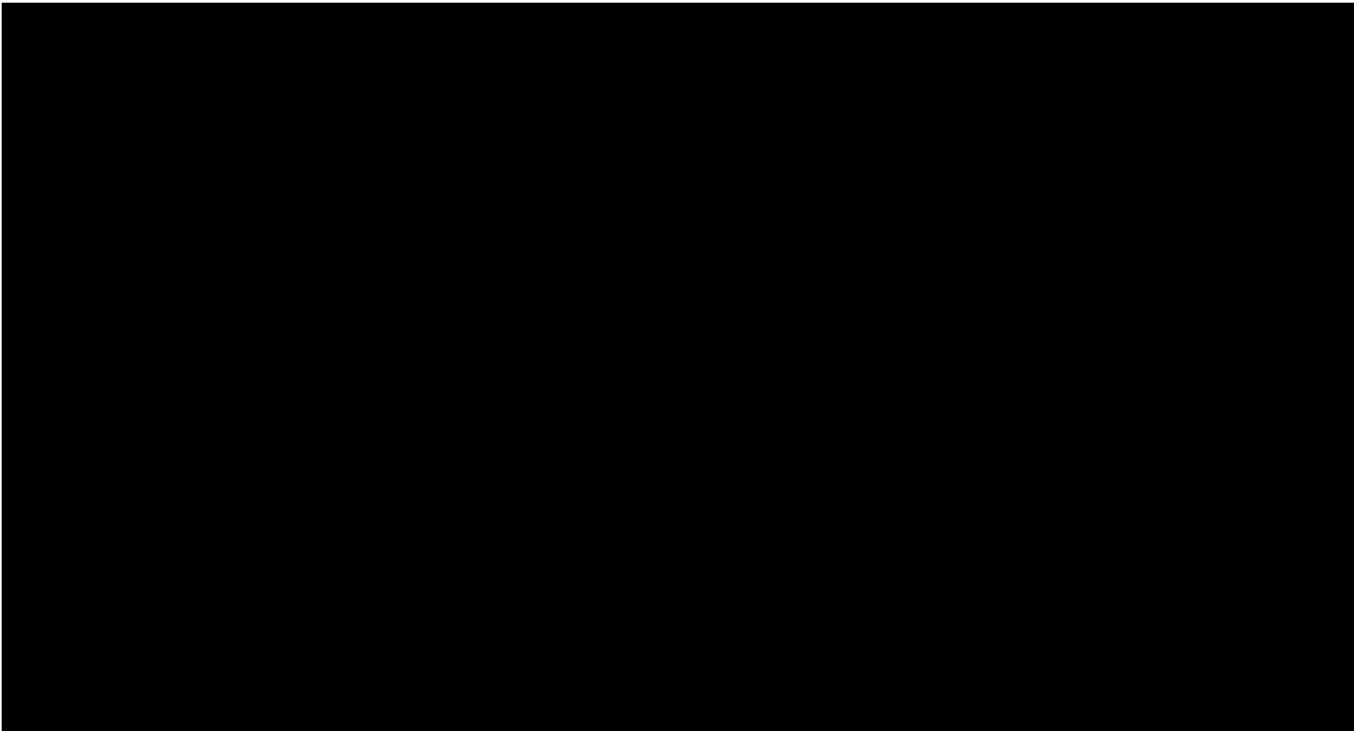
1 emphasis in the context of the 2010 Order on the need
2 for the Government to seek to avoid over-compensation in
3 order to obtain State aid clearance, which they say
4 means ensuring that the revenues afforded to generators
5 under the scheme did not exceed costs plus a reasonable
6 return, the Government was subject, in fact, to
7 precisely the same constraints due to the State aid
8 regime in relation to the 2009 Order as subsequently
9 applied to the 2010 Order.

10 That is the first point.

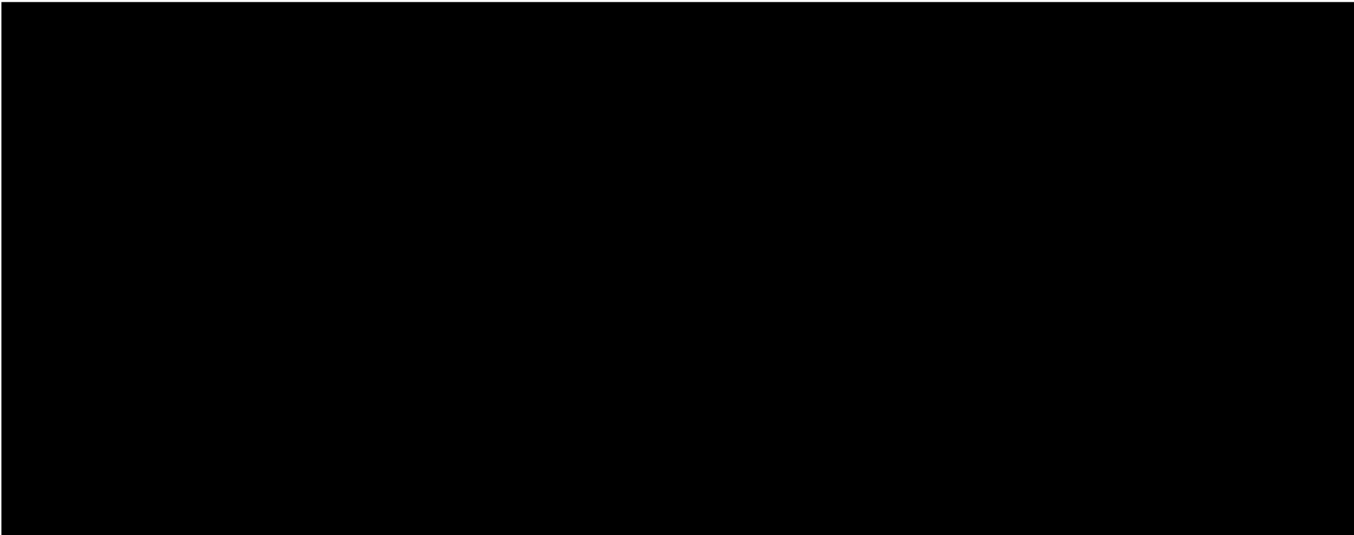
11 Secondly, so far as the precision of the assessment
12 that led to the 2009 Order is concerned, the first point
13 to note is that as the Tribunal has seen, work had, in
14 fact, been undertaken by both [REDACTED] and Oxera
15 which enabled the calculation of a specific ROC banding
16 for each of the different renewable technologies being
17 considered. That was scenario one in the Oxera report.

18 That was the scenario that was rejected by the
19 Government in light, in particular, of the considerable
20 degree of uncertainty over the cost predictions which is
[REDACTED] what it explained in paragraph 2.27 of the [REDACTED]





12 So uncertainty was very much part of the reasoning
13 for rejecting specific banding for each technology, as
14 was, if we turn on to {ROC-E/59/10}, and paragraph 33 of
15 the [REDACTED], the first sentence,



24 So, whilst in relation to the 2009 Order the
25 Government rejected the option of setting separate bands

1 for each technology, it is important to understand that
2 it did not do so due to the absence of an independent
3 assessment of costs. That is apparent not only from the
4 Ernst & Young report itself, but also from the framework
5 of the analysis that the Government publicly stated it
6 was undertaking at the time, and which did not, in fact,
7 change as between the 2009 Order and the 2010 Order,
8 contrary to the impression which, it appears from their
9 written submissions, my learned friends for the Class
10 Representative are seeking to create.

11 I am going to come to the framework which applied
12 throughout but that requires me to go to some documents
13 so this may be a convenient moment?

14 THE CHAIRMAN: We will break there and come back at 10.30
15 tomorrow.

16 (4.31 pm)

17 (The hearing adjourned to 10.30 am on Thursday, 5 June 2025)

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