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IN THE COMPETITION

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

APPEAL
TRIBUNAL

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Tuesday 20th May – Friday 6th June 2025

Before:

The Honourable Mr Justice Richards
Andrew Lenon KC
Anthony Neuberger

(Sitting as a Tribunal in England and Wales)

BETWEEN:

London Array Limited & Others.

Claimants

v

(1) Nexans France SAS
(2) Nexans SA

Defendants

AND BETWEEN:

Clare Mary Joan Spottiswoode CBE

Class Representative

v

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

Defendants

A P P E A R A N C E S

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

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

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

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

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

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Thursday, 5 June 2025

(10.30 am)

Submissions by MS DAVIES (Continued)

THE CHAIRMAN: Good morning.

Now, for the final time -- well, maybe for the final time: some of you are joining us livestream on our website so I will start with the customary warning. An official recording is being made and an authorised transcript will be produced but it is strictly prohibited for anyone else to make an unauthorised recording, whether audio or visual, of the proceedings and breach of that provision is punishable as a contempt of court.

Yes, Ms Davies?

MS DAVIES: Good morning.

When we broke yesterday I was turning to address the approach that the Government indicated it was adopting to assessing changes in banding levels prior to the 2009 Order. Just before I show you that, just to explain why I am spending time on this, it is because part of my learned friend's case is that there was a change in the approach as between the 2009 and 2010 Order which led to more precision in 2010, which we submit is factually incorrect, and so therefore I am just showing you the

1 references to make that good. I will do it as quickly
2 as I can.

[REDACTED] If we could start with the [REDACTED]
[REDACTED]

3 [REDACTED] Actually,
4 [REDACTED]
5 we probably need to start at {ROC-E/4/17}. Paragraph
6
7 2.18, "[REDACTED]". You see here the
8 Government is indicating:

[REDACTED]

12 We turn over the page {ROC-E/4/18} and the bottom
13 two:

[REDACTED]

17 Then particularly:

[REDACTED]

22 Those core principles were then, for the Tribunal's
[REDACTED] note, reiterated to the Commission in the [REDACTED]
24 [REDACTED] -- we do not need to turn it up but the
25 reference is {ROC-E/8/3} -- and finding their way again

[REDACTED] in the next consultation which is [REDACTED]

2 [REDACTED] Again, we do not need to turn it up. It is

3 {ROC-E/17/16}.

[REDACTED] In essence, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

16 that the Order applied to.

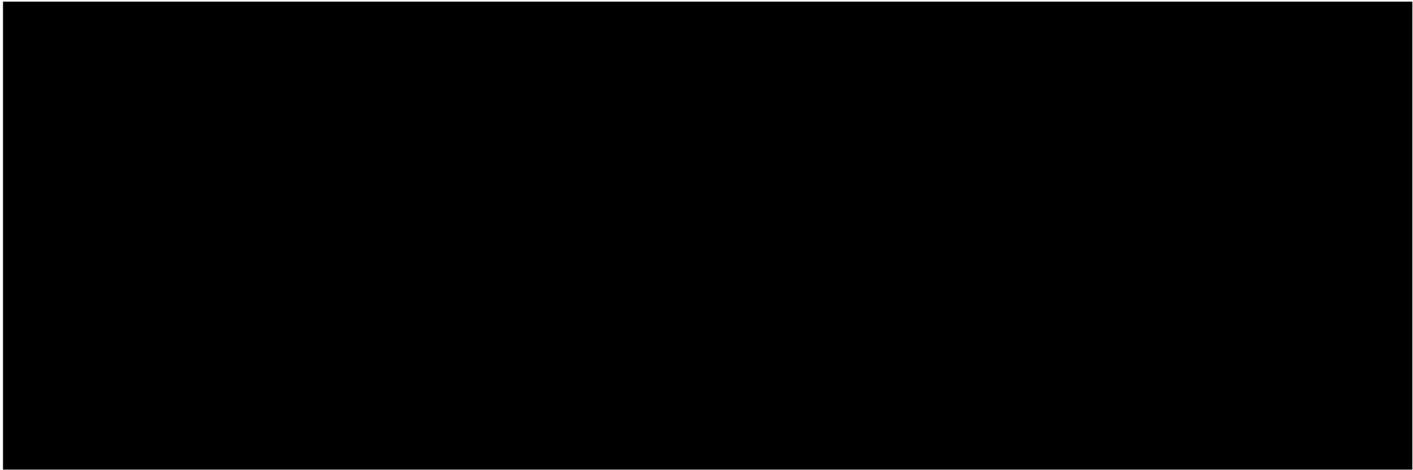
17 I am sure, as the Tribunal looks through the report,

18 they will see {ROC-E/14/60} that Ernst & Young go on to

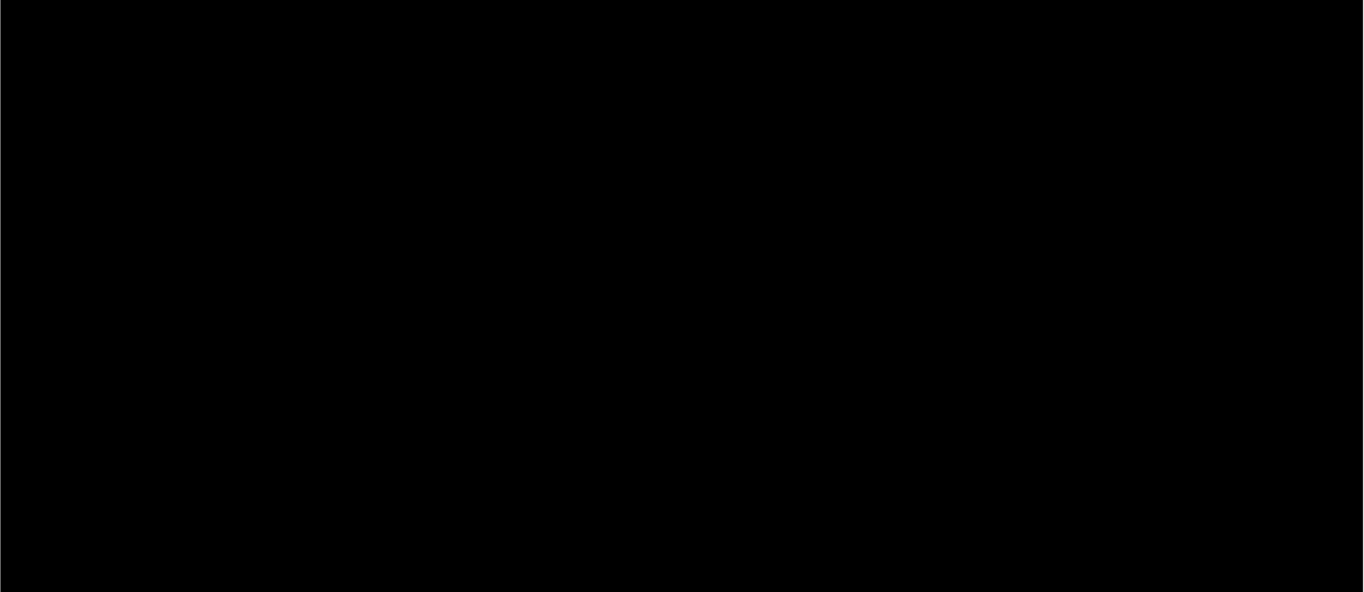
19 explain how they have done that.

20 For example, if we turn up {ROC-E/14/5}, you can see

[REDACTED]



8 So, where there were commercially operational
9 projects it was project cost information that was used.
10 So, for example, so far as offshore wind is
11 concerned, if we turn on to page {ROC-E/14/17} of this
report, [REDACTED]



[REDACTED] Contrary to the suggestion
23 that is made by my learned friends in paragraph 21 of
24 their closing for the Class Representative, it is simply
25 not right, therefore, to describe the 2009 Order as some

1 form of short-term stopgap scanning a period of time
2 until it was envisaged that more data would become
3 available.

4 To the contrary, it was a complete reassessment of
5 the levels of support required across a range of
6 renewable technologies, many of which were mature and in
7 relation to which a considerable body of cost data
8 already existed, as well, of course, as immature
9 technologies where more information would become
10 available over time.

11 Now, offshore wind was in the middle of those two
12 extremes, but it certainly was not a technology where
13 there was only very limited cost data available at the
14 time of the 2009 Order.

15 Nor is there anything in the point that for some
16 reason is being emphasised by my learned friends in
17 paragraph 21 of their closing, namely that the Ernst &
18 Young report was produced on the basis of 2006 data.
19 Right from the outset of the process that led to the
20 2009 Order, the Government anticipated it would not be
21 able to introduce the legislative changes needed until 1
22 April 2009, but it nonetheless decided to go out to
23 industry much earlier with its proposals because it
24 recognised that both the investment and development
25 communities needed to have as much certainty as possible

[REDACTED] over the future regulatory framework. [REDACTED]
[REDACTED]

4 So, it was a deliberate decision by the Government
5 designed to give as much advance notice as possible to
6 do all the modelling work in 2007, notwithstanding that
7 the changes would not be implemented until 2009.

8 Now, it is right that it was also envisaged that
9 there would then be a subsequent review of the 2009
10 banding levels for which it was anticipated that work
11 would commence in 2010, which is a point my learned
12 friends make in paragraph 22 of their closing, but the
13 reason for that anticipated review was not concerns
14 about lack of availability of information as to costs
15 and revenues as at the time of the 2009 Order, rather it
16 was a recognition that there could be changes in the
17 carbon price set under the EU ETS scheme that could
[REDACTED] affect the level of support required. [REDACTED]
[REDACTED]

22 Now, another point that my learned friends appear to
23 be making about this, which comes from paragraph 23 of
24 their closing, is that the Government, so they say, was
25 suggesting to the Commission that a different approach

1 would be adopted for the next review to that which had
2 been adopted in relation to the 2009 Order, but that is
3 also incorrect.

4 If we turn to {ROC-E/50/1}, which is the
5 Government's response to the consultation in relation to
6 the 2009 Order published in December 2008, at paragraph
7 7.1, which is on page 36 {ROC-E/50/36}, the Government
8 is explaining its approach to banding reviews, so that
9 is subsequent banding reviews after the 2009 Order, and
10 indicating that:

11 "As previously proposed, future decisions on changes
12 to bands will be taken by the Secretary of State...
13 based on independent advice. Independent consultants
14 will be appointed to provide advice on future banding
15 levels on similar lines to that conducted prior to the
16 decisions made on the bands to be introduced from 1st
17 April 2009".

18 That, of course, is wholly in line with the fact
19 that the Government had, as I have showed you, from the
20 outset made it clear that one of the key principles it
21 would be applying in band setting would be the use of
22 independent and objective assessments of the commercial
23 position of the renewable technologies in question.

24 So, if we turn to my learned friend's Skeleton --
25 sorry -- Closing Submissions at paragraph 23 and the

1 quote which they suggest is by contrast in relation to
2 future reviews, where they say:

3 "The Government assured the EC that by contrast
4 future reviews would focus on costs for each
5 technology".

6 What it is, in fact, clear the Government was saying
7 was that any future reviews of the banding regime would
8 similarly be based on independent modelling of the cost
9 structures of each technology, which is, in fact, what
10 the Government had told the Commission would happen at
[REDACTED] subsequent reviews in the very [REDACTED]
[REDACTED]

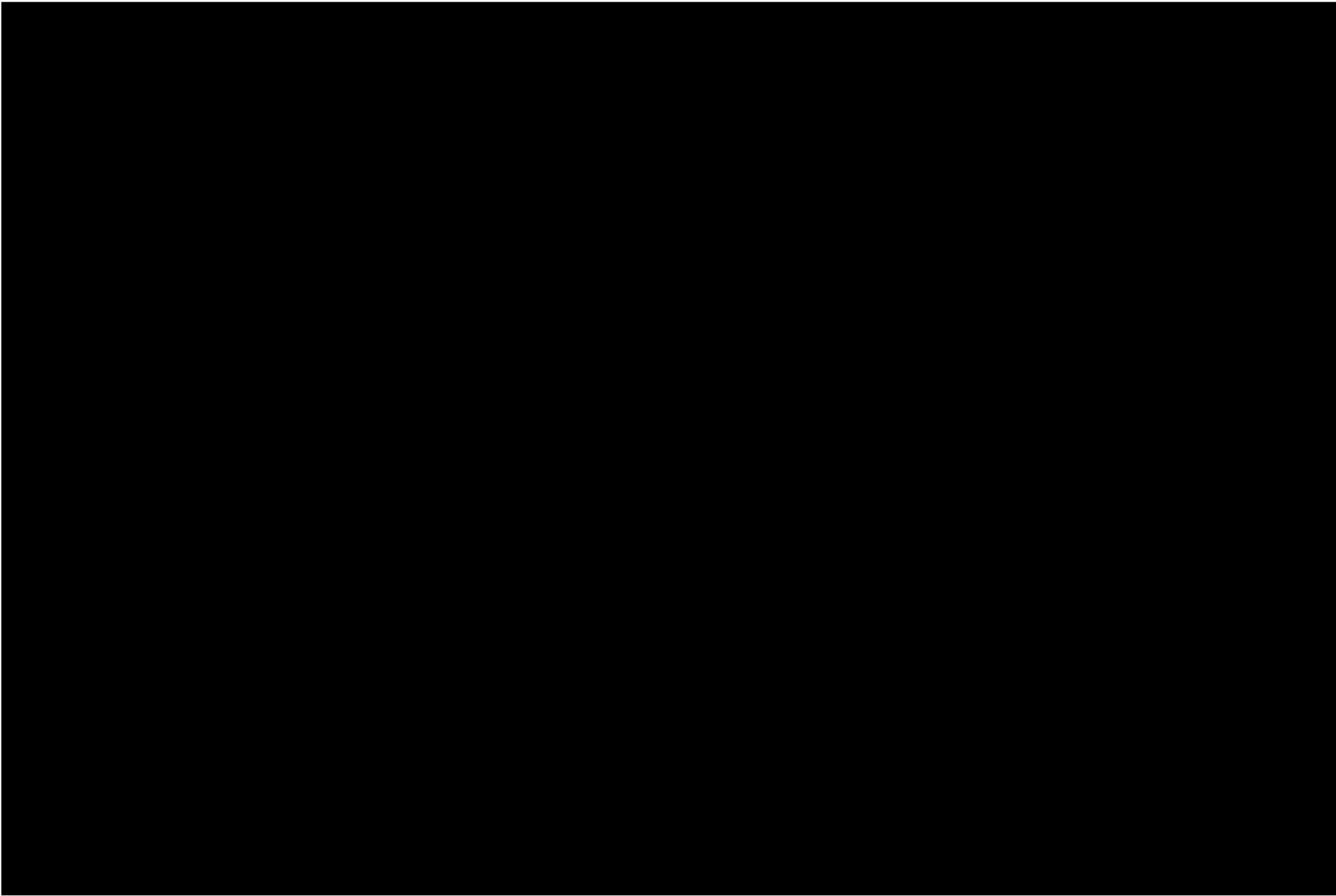
13 It is quite wrong, in our submission, to interpret that
14 sentence as suggesting any change in the approach that
15 would be adopted in the future as compared to the
16 approach adopted in relation to the 2009 Order.

17 THE CHAIRMAN: They are not drawing a contrast, they are
18 saying we will be doing the same thing -- modelling.

19 MS DAVIES: Yes, exactly, the same as we have done before,
20 as we have always said we would be doing when we are
21 setting banding reviews.

22 It is therefore simply not right, with respect to my
23 learned friends that the assessment in relation to
24 offshore wind for the purposes of the 2009 Order --
25 sorry -- the 2010 Order involved any greater degree of

1 precision than that in 2009. To the contrary. The
2 assessment again involved Ernst & Young conducting an
3 analysis of the cost profiles of various wind farms --
4 in fact a smaller number than it had done in 2009 -- for
5 the purpose of producing a levelised cost estimate. The
[REDACTED] only difference was that [REDACTED]



21 PROFESSOR ANTHONY NEUBERGER: Can I just clarify one point?
22 The range in the Ernst & Young review for the 2009
23 banding seems to look at a range of wind farms and get a
24 high and low which depends on the individual
25 circumstances of individual wind farms, whereas -- is

1 that right?

2 MS DAVIES: They produce a high, medium and low case
3 depending on the assumptions that they make, which are
4 not driven by individual wind farms, they are driven by
5 different assumptions.

6 PROFESSOR ANTHONY NEUBERGER: That is true for the 2009 as
7 well as the 2010?

8 MS DAVIES: In 2009 they did not produce -- well, as I am
9 going to show you shortly, in 2009, at the start of
10 their work they were looking at a high, medium and low
11 case.

12 PROFESSOR ANTHONY NEUBERGER: Right.

13 MS DAVIES: But by the time they came to their report for
14 the 2009 position they simply had a central base case,
15 just one, which is the medium case, in fact, and they
16 got rid of the high and the low, and we submit that that
17 is all explicable because obviously they knew that their
18 base case of 2.5 was coming out above the 2 that the
19 three wind farms in particular had asked for, and so
20 there was not the same need in 2010 as there had been in
21 relation to the earlier review to look at what could be
22 described as the downside points that might affect cost
23 ranges, because it is obviously clear, if you have these
24 key wind farms saying "well, we can -- please can we
25 have 2" and Ernst & Young saying "well, our base case is

1 2.5", you do not need to -- there is no prospect of the
2 Government going above 2.5 so you do not need to look at
3 what the range of that uncertainty is. That is the
4 difference between what happened in 2007 and 2009, but
5 it is not a difference that is driven by precision,
6 which is my learned friend's case, it is a difference
7 that is driven by the fact that the backdrop to 2007 --
8 sorry, 2009 -- was you had these requests from three key
9 developers, and I am going to come on in a moment to
10 show how that fed through to the Ernst & Young analysis.

11 Just to finish a few further points in relation to
12 the suggested differences between 2009 and 2010, my
13 learned friends suggest that a further point of
14 distinction between the two Orders was that the request
15 to increase banding for offshore wind in 2010 was
16 estimated to result in a significant increase in
17 consumer costs, whereas they suggest that the 2009 Order
18 was not expected to cause any such increase as compared
19 to the existing regime, and that is a suggestion that is
20 made by my learned friend by reference to the
21 explanatory memorandum to the 2009 Order which is quoted
22 at paragraph 20 of my learned friend's closing, and to
23 which my learned friend took you yesterday.

24 Just to remind the Tribunal, the passage said:

25 "Modelling indicates the cost impact on consumers

1 should not be a significant increase on those costs
2 expected under the existing Renewables Obligation
3 Order".

4 It is important in light of the point that my
5 learned friends are trying to make to understand what
6 "significant" means in this passage. If we turn to the
7 [REDACTED] which is in
8 {ROC-E/59/11}, and paragraphs 37 and 38. This is the

[REDACTED]

19 Then at paragraph 38:


[REDACTED]


[REDACTED] {ROC-E/59/11}.

24 So it is wrong to suggest that the 2009 Order was
25 not anticipated to involve an increase in costs to

1 consumers. It was. £1.7 billion's worth of increase in
2 costs.

3 Precisely the same two points were flagged to the



5  which is at {ROC-E/45/16}. Same paragraph,
6 same wording appear.

7 So, both the Government and the Commission were
8 clearly proceeding in relation to the 2009 Order on the
9 basis that the changes proposed would involve a material
10 increase in costs for the consumer which is, of course,
11 a factor that the Government had to take into account in
12 accordance with the requirements of the Electricity Act.

13 My learned friends are therefore wrong to suggest
14 that the absence of any consumer impact indicates that
15 there was a need for less scrutiny of the levels of
16 support being provided for each individual technology in
17 2009 than there was in 2010 in relation to offshore
18 wind.

19 The third point just to address, in relation to the
20 two exercises, is that my learned friends have sought to
21 suggest that the Government and the Commission were
22 engaged in a different and more broad brush exercise in
23 2009 because of the grouping of different technologies
24 which he submits allowed one technology to be traded off
25 against another and hence to avoid over-compensation in

1 the round.

2 Now, of course it is right that the Government
3 grouped different technologies into five bands for the
4 reasons I referred to yesterday by reference to the
5 consultation documents, but that does not mean that
6 neither the Government nor the Commission were concerned
7 to ensure that on a technology-by-technology basis there
8 was no over-compensation. Indeed, given the material
9 cost to the consumer that the proposal entailed, as I
10 have just shown you, they could not have approached it
11 on that basis, and, in fact, what we see, if we look at
12 the State aid decision which is in {ROC-E/80/1} in
13 paragraphs my learned friend did not go to yesterday
14 when he was making his points about compensation in the
15 aggregate, what we see, if we look first of all at
16 paragraph 46 {ROC-E/80/11}, the Commission noting that
17 the UK authorities aim to ensure that introducing
18 banding does not over-compensate particular technologies
19 or the industry as a whole, so they are looking at it on
20 a technology-by-technology basis.

21 Then if we turn onto paragraph 66 and 67 on page
22 {ROC-E/80/16}, where the Commission says:

23 "The Commission understands how difficult it might
24 be to establish precise forecasts of production costs
25 and revenue streams for all renewable technologies

1 eligible under the scheme for the time period envisaged.
2 The in-depth studies commissioned by the UK authorities
3 to independent consultancies help to model the most
4 accurate forecast of the related data. The Commission
5 also recognises the choice of the UK authorities to set
6 bands which delivered revenues close to the mid-point of
7 the ranges for each technology in order to avoid
8 over-subsidy".

9 So it is equally clear, in our submission, that the
10 Commission was looking at the question of
11 over-compensation on a technology-by-technology basis
12 also. Indeed the Commission had to, as the effect of the
13 State aid approval was that each of the technologies
14 listed in the 2009 Order would be entitled to receive
15 the ROC banding level attributed to the technology in
16 that Order. The way that the UK was saying that it was
17 seeking to ensure there was no over-compensation on a
18 technology-by-technology basis was, as we can see, to
19 set bands which delivered revenues close to the
20 mid-point of the ranges, albeit that the Commission was
21 also recognising the very real difficulties in
22 establishing precise forecasts for either.

23 THE CHAIRMAN: Sorry, so the point there is that you -- it
24 was not open to the Government to say what we lose on
25 the swings we gain on the roundabouts because if they

1 gave State aid to a particular sector, a particular
2 technology, it is still State aid. It is no defence to
3 say "we are clawing it back from another sector". Is
4 that the point?

5 MS DAVIES: Yes. You could not say "I am going to
6 over-subsidise offshore wind because I am
7 under-subsidising wave which will not then get
8 developed", for example. They did, and they clearly did
9 look at it for that reason on a technology-by-technology
10 basis as well, and each of those individual banding
11 levels are then approved and find their way into the
12 2009 Order.

13 I showed the Tribunal in opening what this
14 comparison of mid-point ranges means in practice from
15 the Government's perspective in Table 3, which is the
16 table where we set out the comparison between the
17 central estimates and the mid-point of the revenue
18 ranges, and that is a table we have at {ROC-AB/12/3}. I
19 just wanted to go briefly back to that in light of some
20 of the points made by my learned friends, although I am
21 hoping, if I can, to try getting -- to avoid getting too
22 bogged down in it, and some of the points made by my
23 learned friends were in very minute detail which
24 ultimately, we submit, are not going to assist the
25 Tribunal.

1 If we go back to Table 3, the points that we draw
2 out of this are, firstly, not only is the range of
3 positive margins in absolute terms £2 to £26 per
4 megawatt hour, in percentage terms that is 2 per cent of
5 35 per cent, and it should also be noted that some of
6 the higher positive margins appear amongst mature
7 technologies where the Government was reducing the
8 banding level as against the previous one ROC awarded to
9 all technologies or leaving it at one. Those are
10 technologies where the Government had lots of actual
11 data to work with, and where they could have reduced the
12 banding level still further based on these numbers, if
13 they had been seeking to achieve anything like the
14 degree of precision between the two central estimates
15 that the Class Representative's case suggests the
16 statutory and State aid regime require.

17 Now, my learned friend made a number of points about
18 this table yesterday. The first was to suggest that the
19 table demonstrates that there cannot have been the focus
20 on the particular margins for any technology implied by
21 the proposed banding levels because if there had been
22 these figures would imply that there was deliberate
23 over-compensation for those technologies with materially
24 positive margins contrary to the State aid rules, but
25 that submission, with respect, is one which ignores the

1 other key point being made by the Commission in
2 paragraph 66 of the State aid approval decision, namely
3 its recognition of the difficulties in establishing
4 precise forecasts of production revenues and costs from
5 which it follows that the Commission was recognising
6 that it is not appropriate to focus on the mere
7 comparison of pinpoint figures, which is, in fact, the
8 analysis that is set out in the table, or if I could put
9 it another way, what this demonstrates is that the
10 existence of a materially positive margin between the
11 pinpoint figures does not, of itself, demonstrate that
12 there will be a failure to comply with the State aid
13 rules, which is the premise of my learned friend's
14 suggestion that this is what this table shows on a
15 technology-by-technology basis.

16 To the contrary, we submit that what this
17 demonstrates is that none of this is an exact science,
18 and that when both the Government and Commission were
19 looking in 2009 at levels of support towards the middle
20 of ranges of costs, there was not any requirement that
21 that be done with any degree of precision given the
22 known uncertainties in the estimates involved, let alone
23 anything approaching the degree of precision that the
24 Class Representative's case depends on establishing
25 would have been required under the 2010 Order.

1 Now, the next point made by my learned friend is
2 that this table is premised on a comparison of revenue
3 figures with central cost estimates -- Government
4 central cost estimates -- and those central cost
5 estimates were not made available to the Commission.

6 Now, that is correct so far as the central cost
7 estimates are concerned, although, of course, the
8 Commission had the ranges that are set out in this
9 document, and it was, therefore, able readily to assess
10 to what extent there was a margin between the respective
11 mid-points of those ranges, that being, as I have just
12 shown you, the Commission's understanding of the
13 approach that the UK authorities had chosen to adopt to
14 avoid over-subsidy as explained at paragraph 67 of the
15 approval decision. But in light of the point taken by my
16 learned friends, just so the Tribunal has it we have,
17 therefore, produced a further version of this table --

18 MR LASK: Sorry to rise. We have not seen this, and it was
19 one thing to produce a table on Day 1 of the trial that
20 we had not seen, another thing to produce it on the
21 final or penultimate day that we have not seen, and so
22 we do need to have an opportunity to consider it
23 properly.

24 MS DAVIES: Of course they can have an opportunity. It is
25 literally just setting out the mid-points and the

1 comparison. My learned friends --

2 MR LASK: It ought to have been provided overnight.

3 THE CHAIRMAN: I mean, I think we will look at it.

4 Ms Davies could have just read it out, I suppose, and
5 that would have been --

6 MS DAVIES: I could have worked through each one.

7 THE CHAIRMAN: -- you have a right of reply on it, so ...

8 (Handed)

9 MS DAVIES: Thank you.

10 All this is doing is simply replicating what was in
11 Table 3 but in the final two columns showing the
12 absolute margin between the two mid-points of the ranges
13 and the percentage relative margin between the two
14 mid-points of the ranges, which is an exercise that the
15 Commission itself could clearly have undertaken because
16 it had the ranges.

17 What one can see from this table is that it also
18 demonstrates considerable positive margins between
19 mid-points ranging from £4 to £17 in absolute terms, or
20 3 to 30 per cent in percentage terms. We submit that
21 this, therefore, provides a clear illustration that by
22 referring to delivering revenues close to the mid-point
23 of the cost ranges, neither the Government nor the
24 Commission was approaching matters on the basis that
25 only a minimum margin of around 3 per cent did so.

1 Now, if we look, for example, at co-firing of
2 non-energy crops which is one of the technologies which
3 was relatively mature and where the Government was
4 reducing the banding level to 0.5, we see that comparing
5 the mid-points, there is a positive margin of £17 per
6 megawatt hour or 30 per cent, yet that is the specific
7 technology which the Commission states in paragraph 81
8 of the State aid decision which my learned friend showed
9 you yesterday at {ROC-E/80/19}, in relation to which the
10 Commission states:

11 "It had been calculated at a ROC level of 0.5 ROCs,
12 which was just sufficient to cover the operating costs
13 of such plants".

14 Now, my learned friend said yesterday that the
15 statement in the State aid decision in paragraph 81
16 implied that the Commission was looking at a margin that
17 was smaller than that implied by Table 3, and it is fair
18 to point out that this margin of 30 per cent in Table 4
19 is a little lower than the 35 per cent margin shown in
20 Table 3, but there is nothing elsewhere in the documents
21 to suggest that the Commission was working on any
22 different figures in relation to co-firing than these
23 ranges. So, in our submission there is no basis at all
24 for drawing an inference that it must have had some kind
25 of smaller margin in mind.

1 Now, the final point my learned friend made in
2 relation to the comparisons between point estimates of
3 costs and revenue for 2009 was to suggest that Table 3
4 did not really do what we needed it to do because for
5 those technologies that were highlighted as important in
6 the State aid documents, the implied margin is typically
7 either negative or explicable, so he says. Just while
8 we're looking at the table to briefly answer that,
9 firstly, as I have already submitted, by the 2009 Order
10 the Government was putting in place support for a range
11 of technologies, which support was being approved by the
12 Commission. That was just as true for technologies that
13 were anticipated to deliver smaller volumes than those
14 anticipated to deliver substantial volumes. In each
15 case, as I have shown you, the concern was to avoid
16 over-compensation, and so even for the smaller volume
17 technologies the existence of a positive margin is, in
18 our submission, informative of the impact of uncertainty
19 on the degree of precision that could be applied in any
20 exercise of matching central estimates of revenues to
21 costs.

22 Second, my learned friend was, in fact, incorrect to
23 suggest that for the key technologies the positive
24 margins can be seen either to be negative or explicable.
25 I have already addressed co-firing, for example, which,

1 as the Tribunal will recall, was, in fact, one of the
2 technologies where the Government had a specific concern
3 that the Commission might consider there could be
4 over-compensation at the 0.5 ROC banding level. That

[REDACTED] is, in fact, [REDACTED]
[REDACTED]

5 [REDACTED]. In
6 [REDACTED]. In
7 fact, however, the Commission accepted 0.5 ROCs/MWh.

8
9 Another key technology was onshore wind where, as
10 you can see from this table, the margin between the
11 mid-point estimates is 10 per cent.

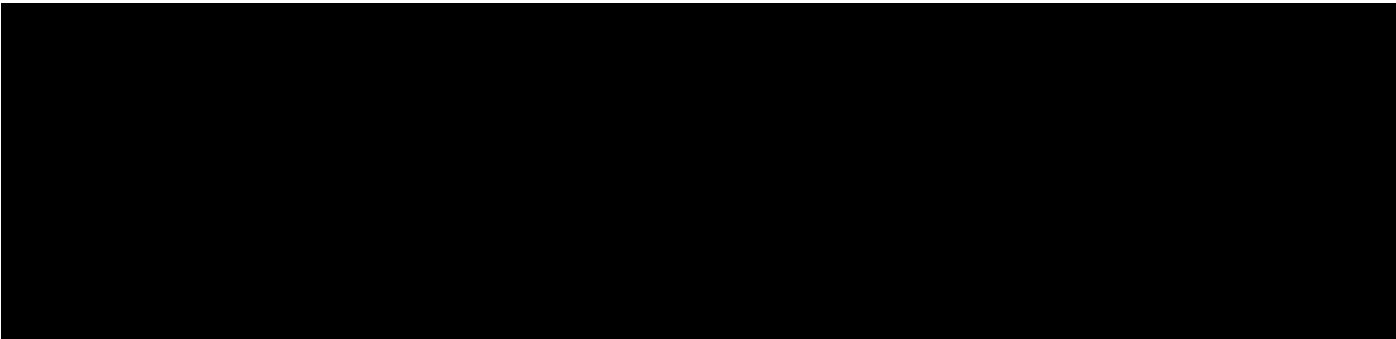
12 Now, my learned friends sought to dismiss that point
13 yesterday on the basis that it was apparent from the
14 document at {ROC-E/200}, you will remember the
15 spreadsheet with the underlying material, that there
16 were four categories of onshore wind farms being
17 considered with different cost profiles. I am not going
18 to take time going to it, but, with respect, that is a
19 red herring because if you actually look at the document

[REDACTED] at {ROC-E/200}, [REDACTED]
[REDACTED]

20 [REDACTED]
21 [REDACTED]
22 [REDACTED]
23 [REDACTED]
24 [REDACTED]
25 [REDACTED] It is impossible to think that

1 small, low wind onshore wind farms formed a key
2 technology for the purposes of the 2009 Order, and so we
3 do submit that onshore wind is a clear case where,
4 despite it being a key technology, there was no
5 requirement for close matching of central cost estimates
6 to central revenue estimates at all.

7 Now, we accept, of course, that there was a negative
8 margin for offshore wind in 2009, but as the Tribunal
9 knows that was because of the recent increases in costs,
10 and the final technology, wave, which my learned friend
11 referred to yesterday, was quite simply not a key
12 technology for the purposes of the 2009 Order because



18 So, bringing all that together, we do submit that
19 the analysis in these tables is of some assistance to
20 the Tribunal's assessment in the case -- I am not saying
21 it is determinative -- but it is, in our submission,
22 illustrative of the fact that due to the very high
23 degree of uncertainty associated with pinpoint
24 estimates, it is not appropriate simply to approach the
25 banding exercise or, for that matter, the State aid

1 approval exercise, on the basis that there needs to be a
2 very close match between the pinpoint estimates for the
3 statutory objectives or the State aid requirements to be
4 met. Equally, it is not right, in our submission, in
5 light of this, to approach it on the basis that a
6 difference of £9 in absolute terms between the central
7 revenue estimate and the central cost estimate at 2.0
8 ROCs in the counterfactual would have set alarm bells
9 ringing either in the Government or the Commission. All
10 of that is, in our submission, consistent with
11 Mr McNeal's evidence to the Tribunal, in particular, if
12 we can pull up the transcript at {Day2/28:1}, where the
13 Tribunal will recall Mr McNeal explaining -- it starts
14 at 27 -- that he would never use the word "precise"
15 about any outcome through the ROC process:

16 "There was -- there simply was not precision. It is
17 not the right word to use. I take the broad point that
18 you are making, but as the paragraph we have just been
19 discussing makes clear, we are developing curves on the
20 back of inherently uncertain data where, you know,
21 things are -- there are so many moving parts, and they
22 are so large ..."

23 Then if we turn on to page 32 where he also
24 emphasised in his answer at lines 20 to 25:

25 "I am also trying to convey to everyone that -- the

1 way in which we thought about it was not based on a
2 precise point. It was based on these curves ..."

3 Now, Mr McNeal was of course explaining the position
4 whilst he was at DECC, so post the 2010 Order which is a
5 point I will come back to, but what this material
6 relating to the 2009 Order demonstrates, in our
7 submission, is that precisely the same approach --
8 analysis -- must have applied within DECC then. They
9 were not focusing on the pinpoint figures, they were
10 looking at it more broadly.

11 Now, I recognise, of course, that a further point my
12 learned friend makes is, well, even if it is right that
13 in 2009 there was no requirement to achieve only a very
14 small margin between central or mid-point estimates due
15 to the inherent uncertainties, the documents show that
16 in 2010 the approach would have been different. That is
17 a point he makes by reference, in particular, to the
18 question and answers in relation to the 2010 State aid
19 approval decision, and I will, very shortly, come back
20 to it in that context, but in short, in our submission,
21 it is a point which wrongly seeks to elevate one aspect
22 of the Government's explanation as to why there was no
23 over-compensation, namely the sentence comparing the
24 1.49 -- sorry -- the £149 revenue to 2.0 ROCs and 1.75
25 ROCs/MWh to being the determinative factor in relation

1 to that issue, but I will come back to develop that
2 point shortly.

3 The final point I wanted to make in relation to the
4 2009 Order is just to pick up one other point in my
5 learned friend's closing, this time at paragraph 19,
6 where, on page 9, they say that it had five bands at
7 what they describe as "tidy intervals" by which I think
8 they mean 0.25 ROC increments, and they seem to be
9 suggesting that doing that in some way made it easier
10 for the Government to achieve a mean average of one ROC
11 per megawatt hour across the technologies, and they cite
12 in support of that suggestion page 5 of the explanatory
13 memorandum at {ROC-E/31/5} which does not make any such
14 point, so far as we can see. Nor does it appear in the
15 impact assessment. Therefore, it is unclear to us on
16 what basis the Class Representative is suggesting that,
17 and, indeed, it is unclear to us how achieving the mean
18 average is more easily brought about by using 0.25
19 increments. The mean average will be a function of the
20 volumes of generation anticipated in each band, plus the
21 banding level provided. Depending on the anticipated
22 volumes, that could just as easily be achieved with
23 different banding intervals, so we do not agree that
24 that is a valid point either.

25 That is all I wanted to say about the 2009 Order,

1 and I am now turning to the 2010 Order, about which the
2 Tribunal has obviously heard much, and I am not going to
3 repeat points already made, but I do need to pick up
4 various points made on behalf of the Class
5 Representative by my learned friend as they are, in our
6 submission, mischaracterisations of the factual position
7 in 2010.

8 For this purpose can I start with the Ernst & Young
9 exercise?

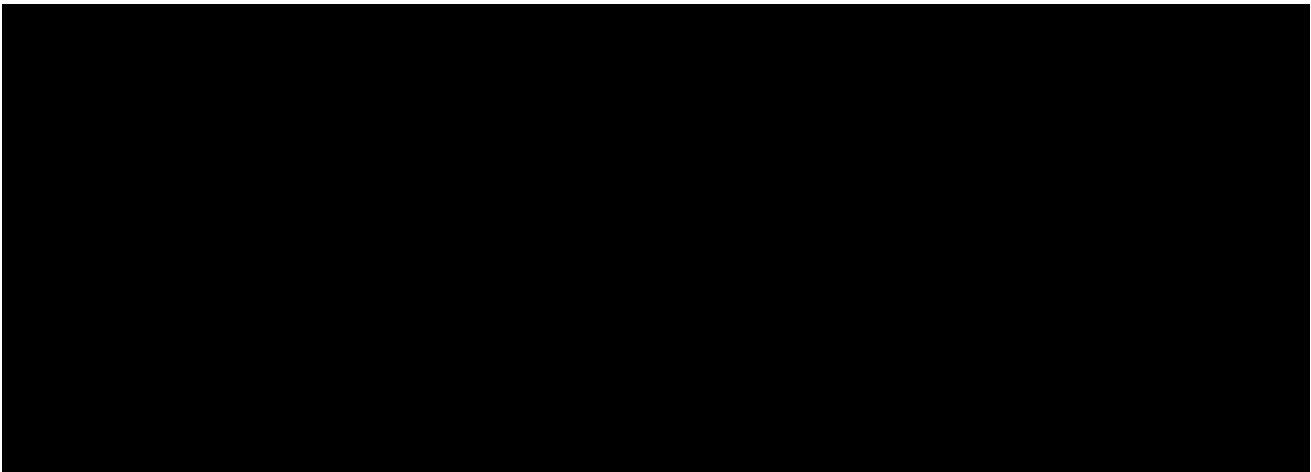
10 My learned friend yesterday in making his
11 submissions in relation to the Ernst & Young report
12 started, the Tribunal will recall, by taking the
13 Tribunal through Ernst & Young's response to the tender
14 at {ROC-E/53/1}. He did so, so far as we could
15 understand it, for the purpose of seeking to demonstrate
16 that Ernst & Young's remit was a broad one, which was
17 not just focused on assessing on whether a ROC banding
18 level of 2.0 ROCs could be justified, but that was
19 addressing a straw man, because we accept, as I in fact
20 showed the Tribunal in opening, that Ernst & Young was
21 engaged in a general assessment of the then current
22 costs and required support for a generic wind farm in
23 January 2009, and that is the exercise that Ernst &
24 Young undertook in producing its base case. But what is
25 nonetheless also important is that when it comes to the

1 delivery methodology that was agreed from the outset of
2 the Ernst & Young exercise for answering the key
3 questions that DECC had posed, the only question that
4 was directed to assessing the impact of a change in the
5 level of ROC banding on offshore wind farm developments
6 was question G. If we could turn back to that at
7 {ROC-E/53/12} -- actually we should possibly start at
8 page {ROC-E/53/10} -- just to remind the Tribunal that
9 this is the section dealing with delivery methodology
10 and they set out a brief outline of our delivery
11 methodology to answering DECC's key questions, so this
12 is the section describing what they are going to do to
13 answer the questions that DECC has posed.

14 If you worked through the boxes in this setting out
15 the different things they are going to do, turning on to
16 page {ROC-E/53/12}, the only one which is assessing the
17 impact of a change in the level of ROC banding on
18 offshore wind farms is G where they specifically, as the
19 Tribunal knows, were considering what impact would
20 further banding up offshore wind to 2.0 ROCs have on
21 internal rates of return, deployment rates and the
22 expected revenues from offshore wind.

23 In light of some of the points that my learned
24 friends make about the Ernst & Young sensitivities, it
25 is important to look at what Ernst & Young are saying in

1 this paragraph, because what they are saying is:



9 So, the exercise that they are saying they are going
10 to undertake is one where they use their model, look at
11 the 2 ROC figure, and then work out what Internal Rate
12 of Return, what revenues are consistent with the 2 ROC
13 banding figure, and that is, in fact, also consistent
14 with the description in the box - what impact would
15 further banding at offshore have on internal rates of
16 returns, deployment rates and the expected revenues.

17 In other words, they are making clear that the
18 output of the analysis is going to be the IRR and
19 expected revenues, because the input is going to be 2.0
20 ROCs, and you are going to see what that then produces.

21 The IRR and expected revenues would not, therefore,
22 be inputs which would be determining the level of ROC
23 banding needed for the purposes of this analysis, rather
24 they would be the outputs which would be determined by
25 using 2.0 ROCs and seeing what it meant for IRR and

1 revenues. This is an important point because as the
2 Tribunal will recall, the two figures in the
3 sensitivities in the Ernst & Young report which my
4 learned friend submits would have shown the 1.9 ROC
5 banding figure are, in the counterfactual, are Figures
6 11 and 13, and they are respectively the ones looking at
7 IRR and revenues. It is those Figures which my learned
8 friend submitted yesterday would have been important to
9 the Government in reading through the document in the
10 counterfactual, and which, so he suggested, would
11 consistently have shown 1.9 as the lower band in the
12 counterfactual that the Government would be looking at,
13 in contrast to the 2.0 that appears in the actual, but
14 that submission is based on a misapprehension as to the
15 nature of the exercise that Ernst & Young were engaged
16 in in relation to both Figures and the two ROC level.

17 There, as this invitation to tender -- response to
18 the invitation to tender makes clear, what they were
19 doing was seeing what the output would be for those two
20 parameters using a 2.0 ROC banding level, not the other
21 way around, and once the misapprehension by my learned
22 friend falls away, there is, in fact, no basis to
23 conclude that in the counterfactual either Figures 11 or
24 13 would have shown the 1.9 ROC/MWh figure. Assuming
25 the developers would have still been asking for 2.0

1 ROCs, that is what would have been shown in those
2 Figures because that is what Ernst & Young were being
3 specifically tasked to do, to work out what the output
4 would be in terms of IRR or revenues at a 2 ROC banding
5 level, and, therefore, this fundamental premise of the
6 Class Representative's case is based on a
7 misapprehension of the Ernst & Young exercise and falls
8 away.

9 I am going to come to a further point in relation to
10 the Ernst & Young exercise to make that good, but just
11 before you leave the response to the invitation to
12 tender I noted a moment ago that this question G is the
13 only question in the delivery methodology section which
14 involves Ernst & Young looking at the effects of any ROC
15 banding level, and that, therefore, demonstrates that
16 unsurprisingly, given the developers' requests, the
17 Government was seeking to get a handle on what a two ROC
18 banding level implied for the economics of a typical
19 wind farm.

20 Now, we are not suggesting by that that Ernst &
21 Young were engaged in assessing some sort of
22 predetermined outcome or that the Government were in
23 some way prompting Ernst & Young to find a case for 2.0
24 ROCs only, nor are we saying that the original requests
25 of the developers were determinative, as, of course, I


1 acknowledge, consistent with the approach that I have
2 just been showing the Tribunal, the Government needed to
3 look for an independent assessment of costs, and that is
4 what it got via the Ernst & Young base case, but the
5 core point is that it is equally clear that the
6 Government was concerned to understand whether the
7 requests that had been made by the wind farms for 2.0
8 ROCs were justified, and for that reason they wanted
9 Ernst & Young to look specifically at what the economics
10 at 2.0 ROCs looked like, and that is perfectly
11 understandable, because it is clear, firstly, that the
12 Government regarded offshore wind as important for the
13 meeting of its renewables targets, and, second, that it
14 knew that wind farms -- the wind farms who had been
15 asking for 2.0 ROCs would be providing a significant
16 amount of offshore wind capacity if they were built.

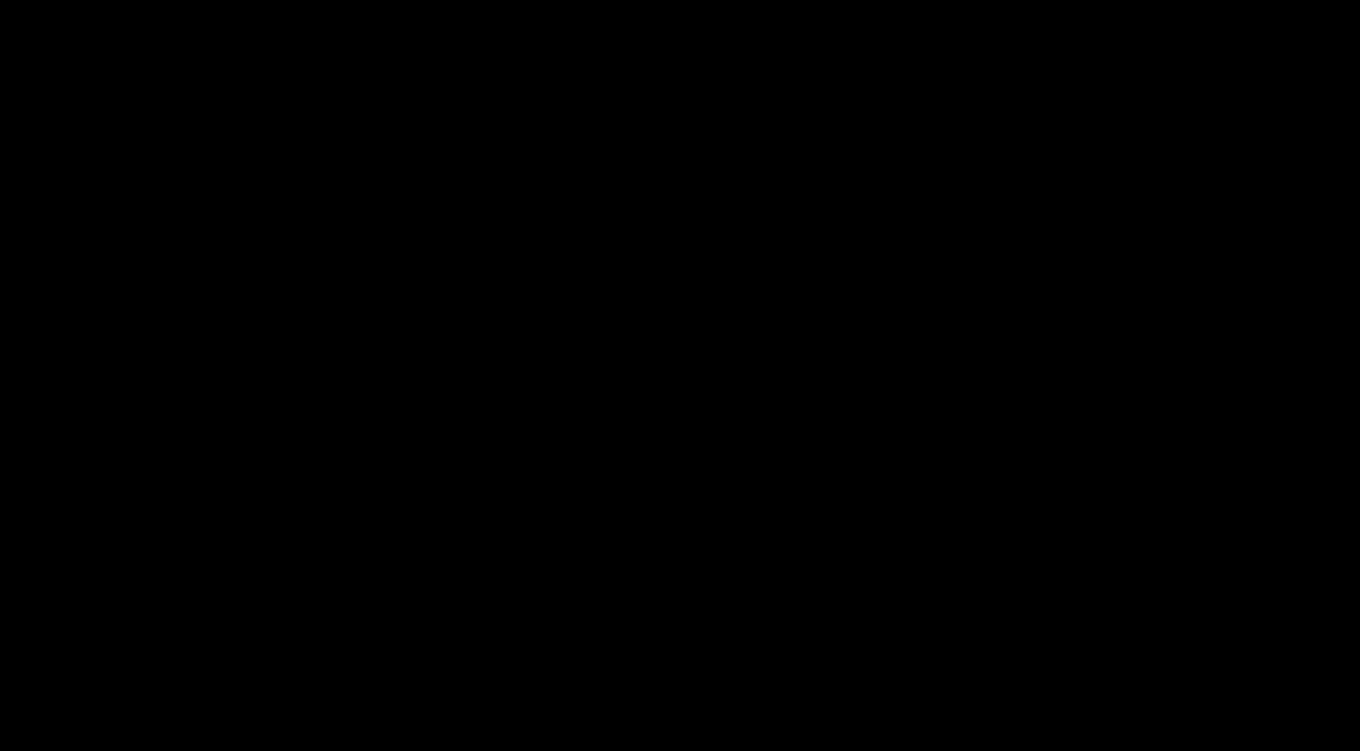
17 Indeed, my learned friends themselves recognise that
18 it is therefore unsurprising that the Government wanted
19 to ensure that Ernst & Young specifically considered the
20 2 ROC banding level being requested, and as we know,
21 Ernst & Young did so and concluded that despite its base
22 case being higher, there were various possible
23 explanations of the developers' lower requests, some of
24 which, namely the possibility of higher power exports or
25 increased revenues from OFTO, the Government then relied

1 on in the context of the State aid process. I will come
2 to that in a moment.

3 If I could, against that background, then, turn to
4 the actual Ernst & Young report which we have at
5 {ROC-E/112/1}, and the sensitivities in particular,
6 starting with Figure 11 at page 20. {ROC-E/112/20}
7 which, in reality, is the core figure in this report for
8 the purposes of my learned friend's case because it is
9 this one, and the sensitivity, which he says is driven
10 by using an IRR of 10 per cent. He says that would have
11 changed in the counterfactual. That is the building
12 block and the only building block for the 1.9 figure
13 subsequently appearing.

14 Now, as I have just explained, it is clear in our
15 submission from the response to the invitation to tender
16 that what Ernst & Young were specifically doing here in
17 the second box was showing what level of IRR would
18 correspond to a two ROC banding level as they had been
19 requested to do by the Government and indicated they
20 would do, and the fact that that is what they were doing
21 is further reinforced by looking more closely at the
22 Ernst & Young confidential annex, and, in particular, at
23 the earlier version of this sensitivity analysis. That
24 is in {ROC-E/104/54}.





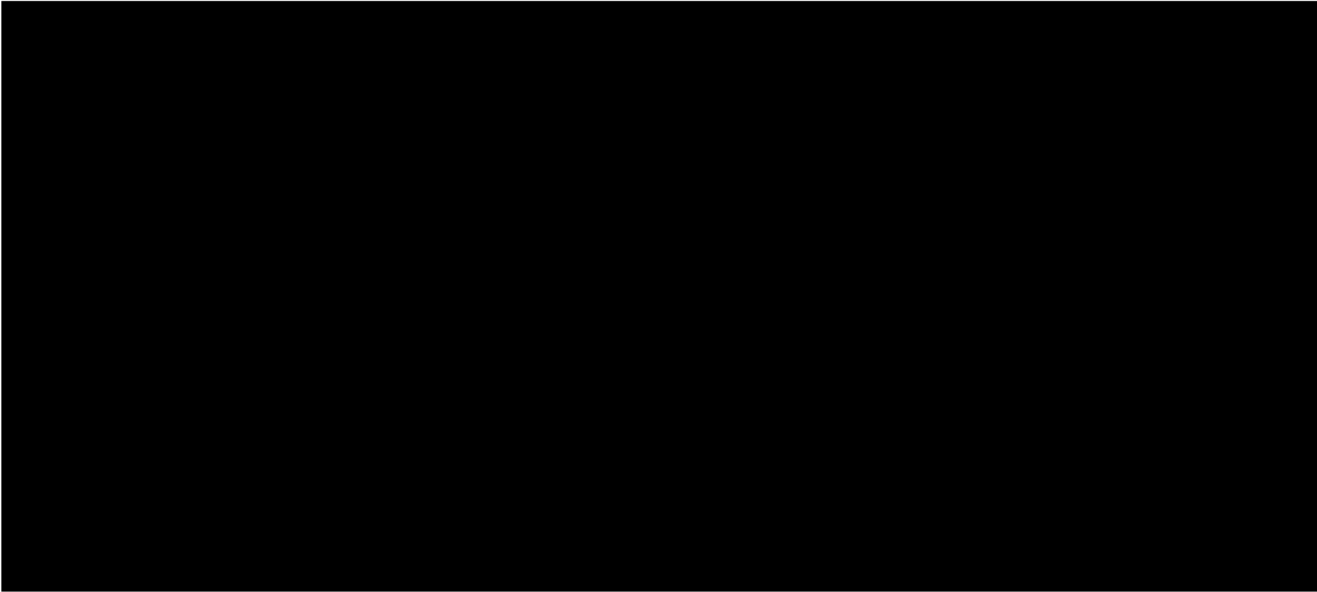
12 We know that at this stage Ernst & Young were using a
13 higher levelised cost figure than in the final report.
14 You have seen the references to that -- my learned
15 friend referred to it yesterday. They had a figure of
16 somewhere near £150 rather than £144. It is therefore
17 understandable that the IRR figure that would be
18 achieved at 2.0 ROCs was lower. If you have got a
19 higher cost you would have a lower Internal Rate of
20 Return.

21 All of that, again, indicates, in our submission,
22 that my learned friends misinterpret Figure 11 when they
23 say that the sensitivity in the second block selects the
24 IRR and then estimates the banding required to deliver
25 that rate. For the two ROC box it is the other way


1 around.

2 Coming back to the Ernst & Young report and turning
3 briefly to the other sensitivities that appeared in it,
4 as there are just a couple of further points to draw
5 out, if we first of all deal with -- turn to

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



[REDACTED] [REDACTED] You see that for that
17 purpose -- sorry -- Ernst & Young give the explanation
18 to that effect below the box in the middle paragraph:

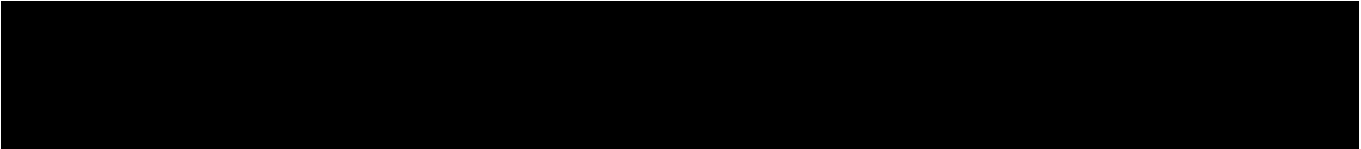


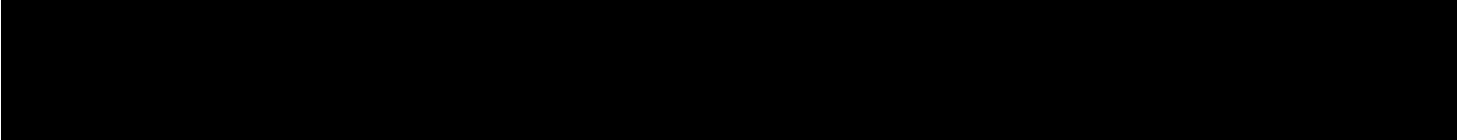
25 Both boxes have got the 2 ROC/MWh figure in it, but

1 in different places depending on what revenue assumption
2 is applied. Again, therefore, we submit that it is wrong
3 to suggest that this sensitivity would have shown a 1.9
4 ROC/MWh figure in the counterfactual, assuming the
5 developers were asking for two would have had the same
6 request and key deliverable in the response to the ITT,
7 and when you come to assess revenues, you have had Ernst
8 & Young again looking at what revenues were needed to
9 get to a ROC banding level of two.

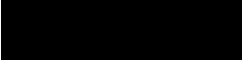

10 Now, turning, then, to the next sensitivity relating
11 to net power exports at the bottom of page 22, my
12 learned friend sought to rely on this figure to
13 undermine the point I have been making on the basis that
14 it does not have the two ROC figure in it as a block,
15 but rather the last two blocks have sensitivities that
16 equate to (Inaudible) and 1.9 ROCs respectively, but
17 there are two points to make in relation to that.

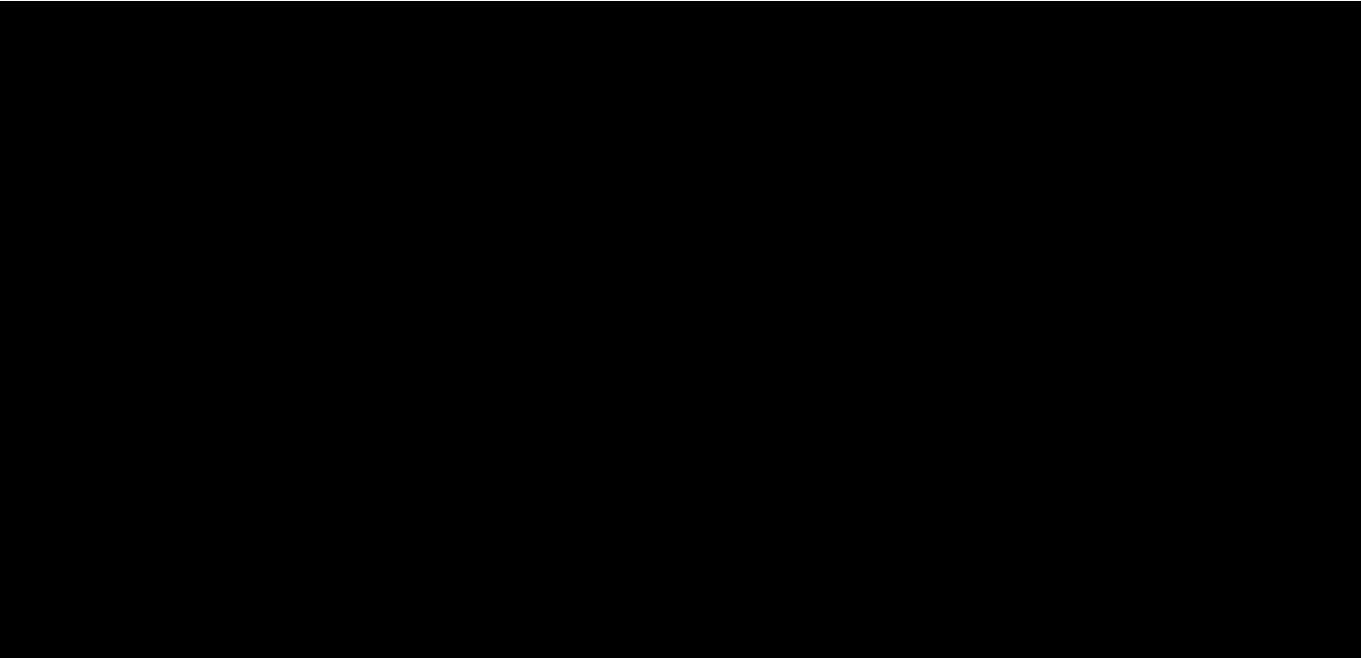
18 First, it is apparent from the description, if we
19 turn on to page {ROC/E/112/23}, that in this case Ernst
20 & Young considered the final two blocks allowed it to
21 assess what level of net exports was implied by a ROC
22 level of two, because the second paragraph on page 23 --
23 they explain:





3 Secondly, of course, the level of power exports at
4 2.0 ROCs was not one of the specific outputs that Ernst
5 & Young had said in response to the invitation to tender
6 its analysis would generate.

7 Whilst we are on this figure, it is of some
8 significance in our submission that the final column on
 this -- 



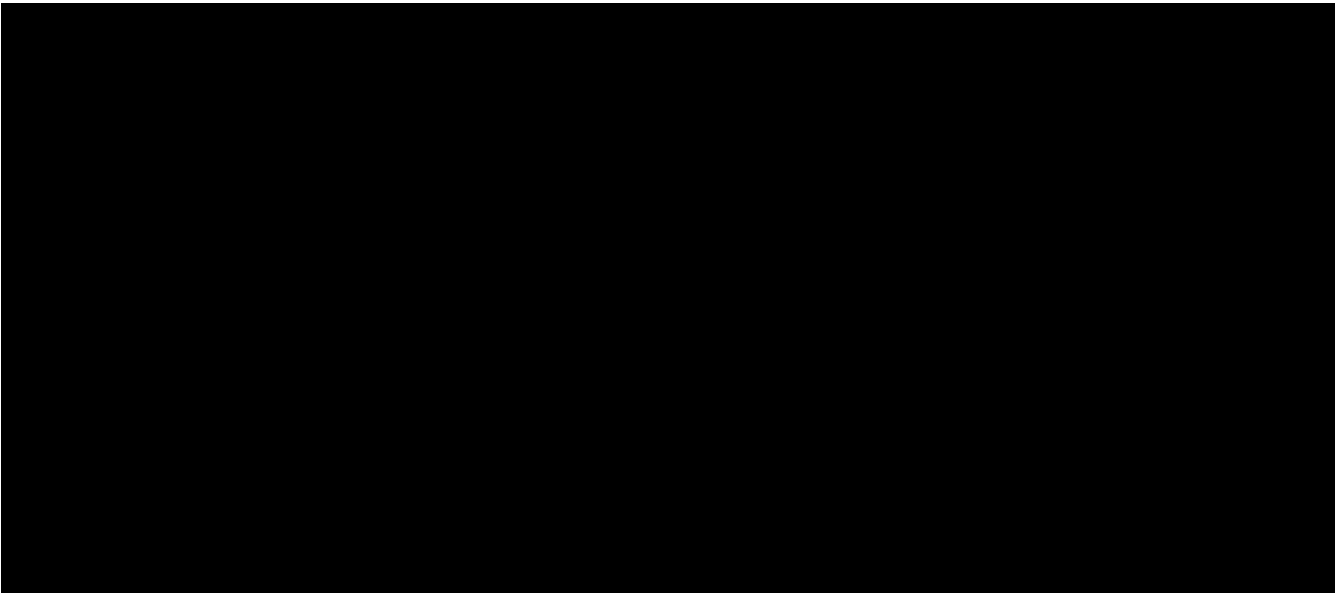
20 So although this was an important sensitivity from
21 the Government's perspective, in the actual, its
22 assessment is not affected by the fact that on one
23 hypothesis there is a ROC banding level lower than 2
24 ROC/MWh. Again, the reason for that is obvious: it has
25 got developers saying "we need two". It is only the

1 most extreme of these assumptions that gets you to 1.9
2 ROC/MWh, and it is, therefore, unsurprising that they
3 settle on a ROC banding level of two.

4 Now, as regards the final figure, the final
5 sensitivity at page 23 that my learned friend relied on,
6 he again sought to gain some support for his analysis on
7 the basis that this does not include a 2 ROC result
8 {ROC-E/112/23}, but that does not detract from any of
9 the points that I have made. The effect of the OFTO
10 regime was not an output Ernst & Young had said its
11 economic analysis of 2.0 ROCs would deliver, and in any
12 event, as all the ROC figures in this table are higher
13 than two, this is not a figure which could, on any view,
14 have shown a ROC banding level of less than two in the
15 counterfactual.

16 Now, the fact that the developers' request was in
17 the actual lower than the Ernst & Young base case is, of
18 course, significant in terms of what inferences are to
19 be drawn as to the Government's decision-making in the
20 actual. My learned friends submit, and this is
21 paragraph 93 of their closing, that given the
22 uncertainties, the Government could have set the banding
23 level in the actual at a much higher level, and go on to
24 suggest that because the Government did not do so, and
25 preferred less conservative assumptions than Ernst &

1 Young, that demonstrates how anxious the Government was
2 to avoid over-compensation, but in circumstances where,
3 at an early stage of the exercise, developers of three
4 significant offshore wind farms had said they wanted an
5 increase to 2 ROC/MWh, it is hardly surprising in our
6 submission that the Government decided that any greater
7 increase could not be justified. That was not the
8 function of a recommendation by Ernst & Young. It was
9 the consequence of what the developers had asked for
10 which the Ernst & Young report showed to be justified.



20 The final point I wanted to pick up in relation to

21 the Ernst & Young report in the actual --

22 THE CHAIRMAN: Sorry, can I just make sure I have understood

23 that last point? You say that the Class Representative

24 is wrong to suggest that the Government is anxious to

25 avoid over-compensation, and you say it is not

1 surprising that because the three key wind farms, or
2 three significant offshore wind farms are asking for 2
3 ROC/MWh, it is hardly surprising that the Government
4 decided that any greater increase could not be
5 justified. Is that not just another way of saying they
6 did not want to over-compensate?

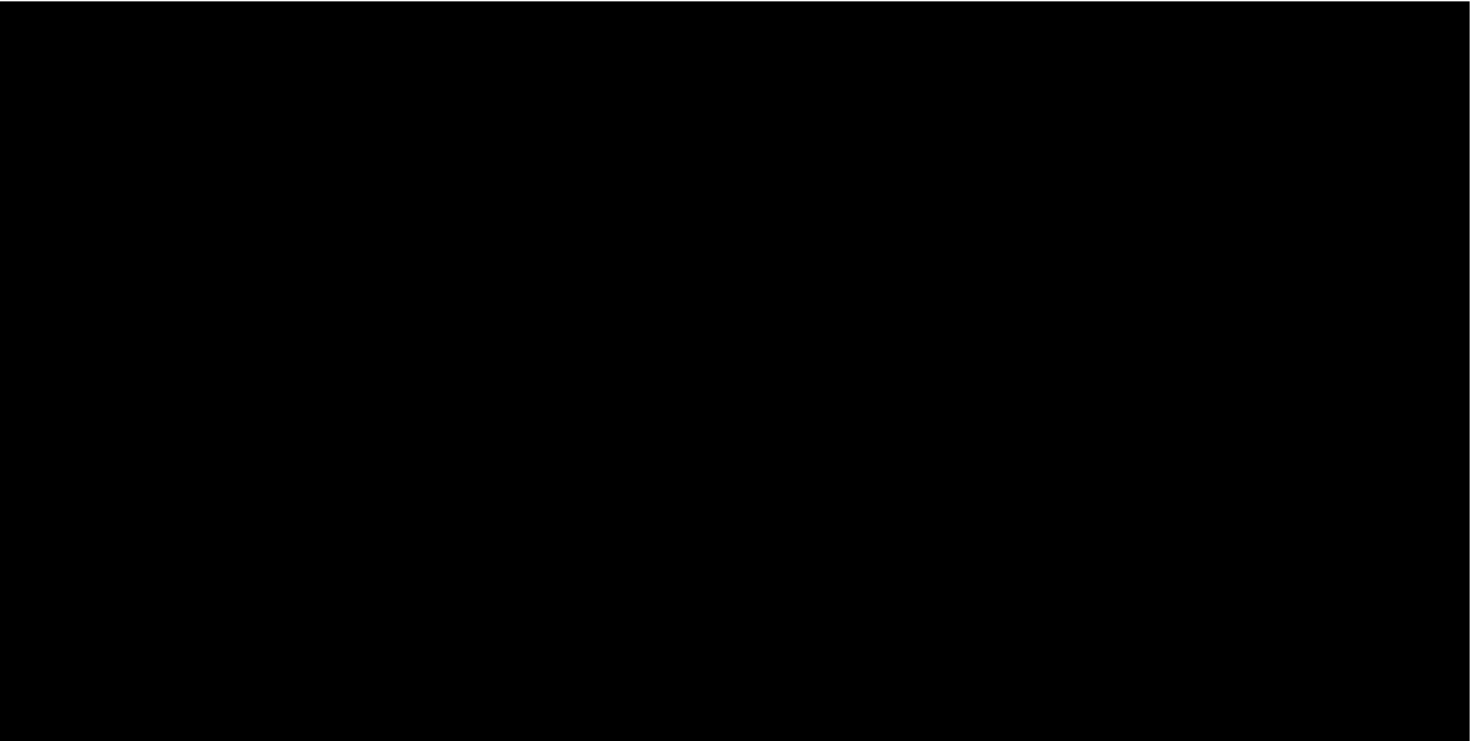
7 MS DAVIES: Well, it depends. My understanding of the way
8 my learned friends put it is that this is said to
9 support their case that there was a very close scrutiny
10 on the relative margin between the central cost estimate
11 and the central base case, and my point is: this is not
12 what this exercise was. It was a broader one. In
13 circumstances where you have got significant wind farms
14 - Mr Druce's words -- "key" -- you understand why I am
15 covering that -- but in any event they were significant
16 - you have three significant wind farms saying, "well,
17 we need 2 ROCs/MWh" in the sort of close scrutiny on the
18 base case levelised cost estimate, just does not really
19 arise in that context so that is the reason I am making
20 the point.

21 THE CHAIRMAN: I see. So, you do not dispute the
22 proposition that the Government did not want to give
23 more ROCs than it felt it "needed to", but you do not
24 accept that from that proposition it follows that there
25 is this attempt to closely match income with expense?

1 MS DAVIES: Exactly. What these documents demonstrate is
2 that in 2010 decision-making was being driven by a range
3 of evidence which included the fact that the key -- the
4 significant wind farm projects were requesting 2
5 ROC/MWh, which the Ernst & Young analysis showed was
6 justified, because, in fact, they came up with costs
7 that were higher.


8 If, in the actual, the Ernst & Young base case had
9 been lower than the two, one would expect there would
10 have been a different analysis, and that is why I am
11 also making the point that we accept that the key --
12 what the class representative describes as the key wind
13 farms' requests were not determinative because, of
14 course, the Government had to assess whether they were
15 justified and that is what it did through the Ernst &
16 Young report, but, in fact, the Ernst & Young report
17 comes up with a higher figure, so, as it were, hey
18 presto, you have the answer. Clearly the 2 ROC/MWh is
19 justified in those circumstances. That is why I say it
20 was not the function of the recommendation from Ernst &
21 Young, it was a function of the comparison of what Ernst
22 & Young were saying the generic farm needed and what
23 they were actually asking for.

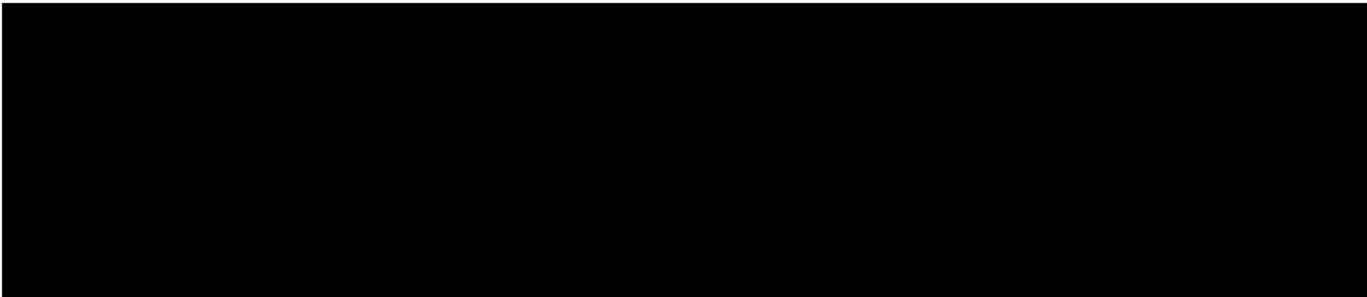
24 Now, the final point I wanted to pick up in relation
25 to the Ernst & Young report in the actual is that my



12 Now, what that shows, if you compare the two
13 documents, is that the second sentence under the heading
14 "██████████" at pages 3 to 4 was headed at the specific
15 request of the Government, and whilst my learned friend
16 said yesterday, "we do not have the draft report which
17 pre-dated the email to allow a comparison", you do not
18 need it because you can actually see from the two
19 documents what happened here, which is they had a draft
20 with conclusions which did not have that second sentence
21 in it, and it got added.


22 Moreover, the email is emphasising, if one goes up
23 in it, to the introduction:






5 Now, again, none of that is surprising because we
6 know what the significant wind farms were asking for in
7 the counter -- in the actual and we know that the
8 Government had asked Ernst & Young specifically to look
9 at whether the two ROC request was justified.

10 Now, that is what I wanted to say in relation to the
11 Ernst & Young analysis in the actual. The second point
12 I wanted to address in relation to the actual is that it
13 is apparent that a core part of my learned friend's
14 suggestion that 2010 was different to 2009, and that in
15 2010 only a small margin between the central revenue
16 estimate and the base cost levelised cost estimate was
17 being countenanced, is that -- is his proposition that
18 in 2010 the Government was focusing on the base case
19 figures, the central case figures, the pinpoint figures
20 and not the range.

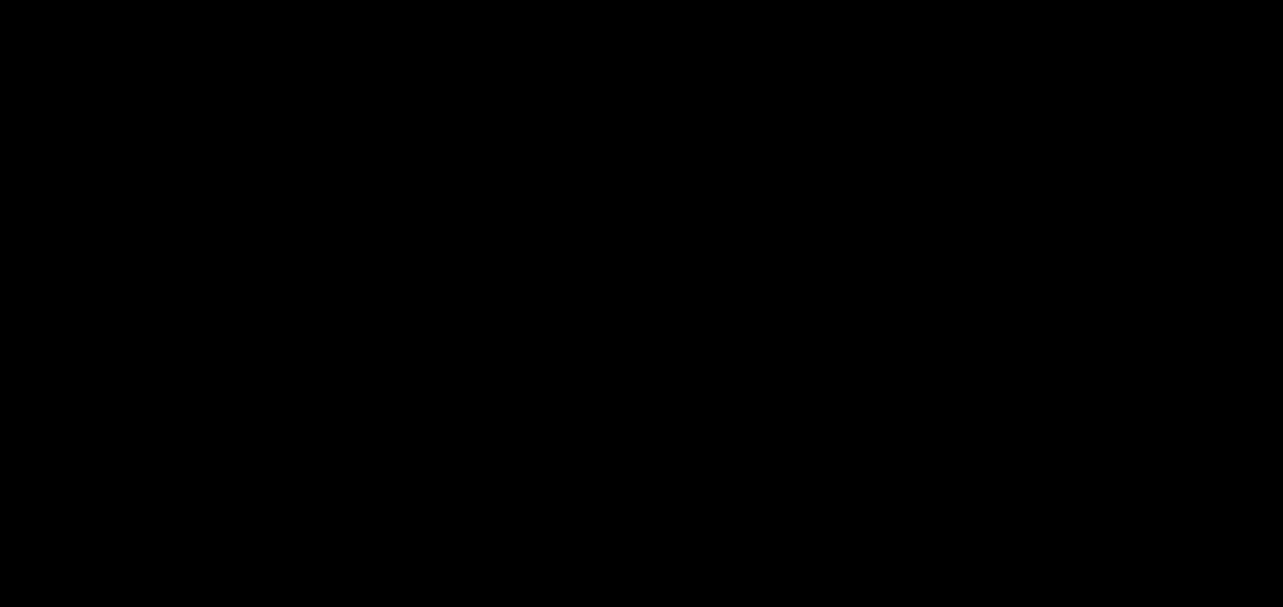
21 Now, that is a proposition that he sought to build
22 up by firstly going to the 

23  That is at
24 {ROC-E/130/6}. The point he made yesterday in relation
25 to that was, well, that shows there was a degree of

precision in what the Government was doing,

12 With respect to my learned friend, in making those
13 submissions he failed to reflect what the Government
14 actually said to the Commission about the central
15 estimate in response to the Q&A. Although he did go to
16 it yesterday, with respect, he was missing the import of
17 what was said.

18 If we go to {ROC-E/140/1}, and, in particular, the



10 So, the Government is, in fact, saying there is not
11 a true pinpoint figure in the context of the
12 projections, and we unintentionally, by using the base
13 case figure, may have implied that that was the case,
14 but that was not what we actually meant, and when my
15 learned friend suggested yesterday that if the
16 Government really had wanted to shut the Commission's
17 interest in the margin between the central revenue and
18 cost estimate down, it could have said, "look, there's a
19 whole heap of uncertainty here which means we are really
20 concerned about the range" but then he said, "but the
21 Government did not say that", he was, with respect, not
22 reflecting the significance of this answer because in
23 our submission, in this passage that is exactly what the
24 Government was saying to the Commission.

25 My learned friend -- it is therefore my learned

1 friend and not us who misinterpret the response to the
2 Q&A.

3 It is important also to note that in this response
4 the Government went on to explain why it had originally
5 provided only the central cost figure, namely that it
6 did not have, from Ernst & Young, a comparable range of
7 cost to the range it had for revenues because the Ernst
8 & Young report had generally only detailed upside
9 sensitivities for reducing the cost estimate, so there
10 would have been a skewed comparison. You would not be
11 comparing like with like.

12 As I have made clear, we submit there is a very
13 obvious reason why the Ernst & Young report had
14 generally only detailed upside sensitivities, because it
15 was produced in the context of the fact that a number of
16 significant developers were seeking support lower than
17 its base case, so there was never any need to consider
18 what the downside sensitivities that might increase the
19 cost estimate would have been. But none of that means
20 that in 2010 there was such a heightened degree of
21 confidence between the central cost estimate and the
22 central revenue figure that meant that the Government's
23 analysis was focused solely on ensuring that there was a
24 very close match between the two. To the contrary, in
25 our submission. In this answer, the Government is

1 clearly saying it is not right to look at that
2 comparison and only that comparison, for two reasons,
3 namely uncertainty and a lack of a proper comparability
4 because we do not have the full range.

5 Whilst I am on this subject of the comparison
6 between the central figures, the absence of a proper
7 range in the Ernst & Young analysis no doubt also
8 explains why the ministerial submissions to which my
9 learned friends also refer in this context only refer to
10 the average LCOE figure of £144. Quite simply, as we
11 have seen, unlike for the 2009 Order, Ernst & Young had
12 not produced a low, medium or high case. It did not
13 need to because its base case was above the level of
14 support that developers had indicated to the Government
15 they were seeking.

16 I am going to come on to further aspects of the
17 Government's response to the Q&A so I just wonder if
18 that might be a convenient moment.

19 THE CHAIRMAN: Yes. Let us break there. Let us come back
20 after about quarter to, please. Thank you.

21 (11.41 am)

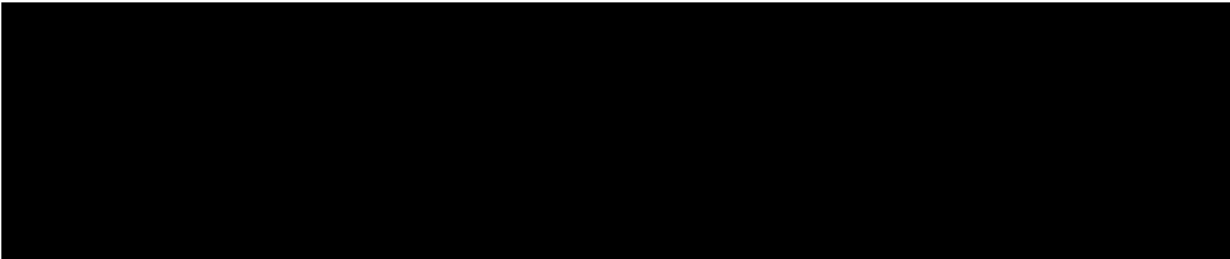
22 (A break was taken)

23 (11.50 am)

24 THE CHAIRMAN: Yes, Ms Davies?

25 MS DAVIES: Looking at the Q&A responses at {ROC-E/140}, as

1 the Tribunal has heard, the high point, really, of my
2 learned friend's case is the sentence in the answer to
3 Question 11, the second sentence in the answer to that
4 at page {ROC-E/140/5} where the Government explain that:



9 [REDACTED] which my learned friend
10 suggests is the core reasoning for the two ROC banding
11 decision. Although just while we are looking at that
12 sentence I would just flag that contrary to the
13 suggestion at both paragraphs 4 and 87 of my learned
14 friend's closing, the answer does not say "only"
15 marginally above, and so to the extent this that wording
16 is in both those paragraphs, which it is, that is my
17 learned friend's addition.

18 The important point to note, however, about that
19 sentence is that it forms only one part of the
20 explanation that was provided to the Commission for the
21 banding decision the entirety of which needs to be taken
22 into account in understanding that decision.

23 Once one takes into account the full explanation
24 that is given, it is, in our submission, clear that on
25 any fair interpretation the Government was not saying

1 that over-compensation has been avoided because our
2 calculation suggests that only the smallest possible
3 margin has been allowed, which is what my learned
4 friend's case is, they were explaining that a range of
5 factors meant that over-compensation had been avoided,
6 and the Commission clearly accepted that. Indeed,
7 importantly, the point figures, the £149 and the £144
8 figures -- do not even appear in the approval letter,
9 and when my learned friend, in paragraph 73 of his
10 closing at page 25 makes the point -- makes the
11 assertion -- that the core reasoning {ROC-AB/7/25} for
12 the two ROC banding decision is in this sentence, it is
13 of some significance perhaps to note that the quote that
14 they set out in paragraph 73 omits the sentence which
15 appears immediately before:

16 "As indicated above the central revenue estimate is
17 in the middle of a large range of uncertainty and
18 financial cost estimate is also in the middle of a large
19 range of uncertainty".

20 The reference to the "indication above" is obviously
21 a reference back to the response to Question 7 which we
22 were looking at just before the break, in which, as we
23 saw, the Government made it clear that the central
24 estimates did not necessarily represent the most likely
25 pinpoint values, as both costs and revenue were subject

1 to a large amount of uncertainty. They were thus making
2 it clear that an assessment of over-compensation which
3 was based on looking solely at the margin between those
4 two figures was, in the Government's view,
5 inappropriate, and it is simply impossible, therefore,
6 in our submission, to interpret the Government as saying
7 to the Commission that the core reason for adopting a
8 banding level of 2 ROCs/MWh was that it was anticipated
9 to produce revenues which were only a couple of
10 percentage points above central cost estimate. The
11 whole exercise was much more imprecise than that.

12 What we submit the second sentence of Question 11 is
13 doing is merely drawing the mathematical comparison
14 between the figures to explain why, as between possible
15 banding levels of 1.75 and 2, the Government had
16 selected the higher level. It is therefore also not
17 possible to draw from that sentence the conclusion that
18 the £5 per megawatt margin between the central revenue
19 and cost estimates was the solution to the challenge
20 posed by uncertainty, which is another key part of my
21 learned friend's case. That is not what it says.

22 In any event, for the reasons I explained at the
23 outset of my submissions yesterday, one cannot just jump
24 from a position which says, well, in the actual the
25 Government allowed a margin of £5, to a conclusion that

1 in the counterfactual, when that figure would never have
2 been calculated, only the same margin would have been
3 acceptable.

4 The response to Question 11 also, of course,
5 demonstrates the point that it is clear from these
6 documents that another part of the Government's
7 reasoning was that for the purposes of the 2010 Order,
8 and consistent with the approach under the 2009 Order,
9 it was only considering banding increments of 0.25 ROCs
10 for the reasons that are explained in the response to
11 Question 11.

12 Now, I need to pick up a number of points in
13 relation to that explanation.

14 There are two points being referred to as the
15 Tribunal knows: possible increase in administration
16 costs and increases in complexity.

17 As regards administration costs, although my learned
18 friend did not repeat this orally, he has suggested in
19 his closing, written closing at paragraph 78, that that
20 can only be a reference to the costs of commissioning
21 further work from Ernst & Young in the few weeks before
22 April 2010, and the Tribunal may recall that was a point
23 that Mr Rothschild put to Ms Hesmondhalgh in her
24 evidence, but there is, however, no evidence at all to
25 support that suggestion which we submit is, in fact,

1 nonsensical. Ernst & Young had already provided the
2 material which enabled the Government to work out what
3 the revenue impact of reducing the ROC banding level by
4 0.1 ROCs would have been. Indeed, my learned friends
5 have, themselves, set out the calculation using the
6 Government's revenue assessments in paragraph 86 of
7 their closing. As they show there, it is a simple
8 matter of comparing the central revenue estimates of
9 1.75 and 2.0 ROCs to work out the cost to ROC ratio, and
10 then a conversion of that to the mathematical equivalent
11 of 0.1 ROCs, £4 per megawatt hour. There are, quite
12 obviously, no real administrative costs associated with
13 that mathematical calculation.

14 It should also be noted that Ernst & Young's
15 response to the invitation to tender which we were
16 looking at earlier -- we do not need to turn it up for
17 these purposes but the reference is at {ROC-E/53/17},
18 page 17 -- indicates that Ernst & Young's total cost
19 estimate for the entirety of its modelling work, was
20 £43,500 plus VAT and expenses, so a very small amount in
21 context.

22 It simply cannot, therefore, have been the case that
23 the Government could have thought that there would be
24 any material cost involved in Ernst & Young conducting
25 further work, even if it had been needed, to support a

1 banding level that used an increment of below 0.25 ROCs,
2 although, as I say for the reasons I have just
3 explained, you did not need any more work from Ernst &
4 Young to do that.

5 Now, orally, perhaps recognising the weakness of the
6 point, my learned friend did not make that point.

7 Instead, he sought to dismiss the relevance of the
8 Government's reference to increased administrative costs
9 and complexity on the basis that the statement was
10 vague, equivocal and gave no indication of the magnitude
11 of the additional costs that the Government might have
12 had in mind, all of which were points designed to
13 support the submission that my learned friend went on to
14 make that this is really belt and braces, and for that
15 reason can be disregarded. But in assessing that
16 submission it is, of course, to be recalled that the UK
17 was a Member State of the EU at the time it submitted
18 this document, with duties of sincere co-operation, so
19 it had to be frank and honest in its dealings with the
20 Commission, and, moreover, obviously could expect that
21 anything it said to the Commission in this context could
22 lead to further questions.

23 The idea, therefore, that this is something which
24 was without any substance and can just be ignored in our
25 submission is plainly inappropriate.

1 Now, of course, we accept we do not have a clear
2 explanation because we do not have any direct evidence
3 from the Government on what the Government meant by
4 "increased administration costs and complexity", but we
5 have drawn together some references which would appear
6 to shed some light on it in paragraphs 14 and 15 of our
7 closing, in the context of similar explanations that
8 were provided by the Government in relation to the 2009
9 Order, and, in particular, it appears from those
10 references which I am not going to go through because
11 they are in those paragraphs, that the Government was
12 concerned that more precise banding levels might lead to
13 more frequent reviews, presumably because, with a more
14 precise figure it would be easier for any given industry
15 participant to say the figure is too high or too low,
16 and also that the more bands there were the more
17 complexity there would be in administering the system.
18 That is not just a point about increased IT costs, but
19 one of broader remit as one can see from the references
20 we have given. It required more forms to be submitted,
21 more work.

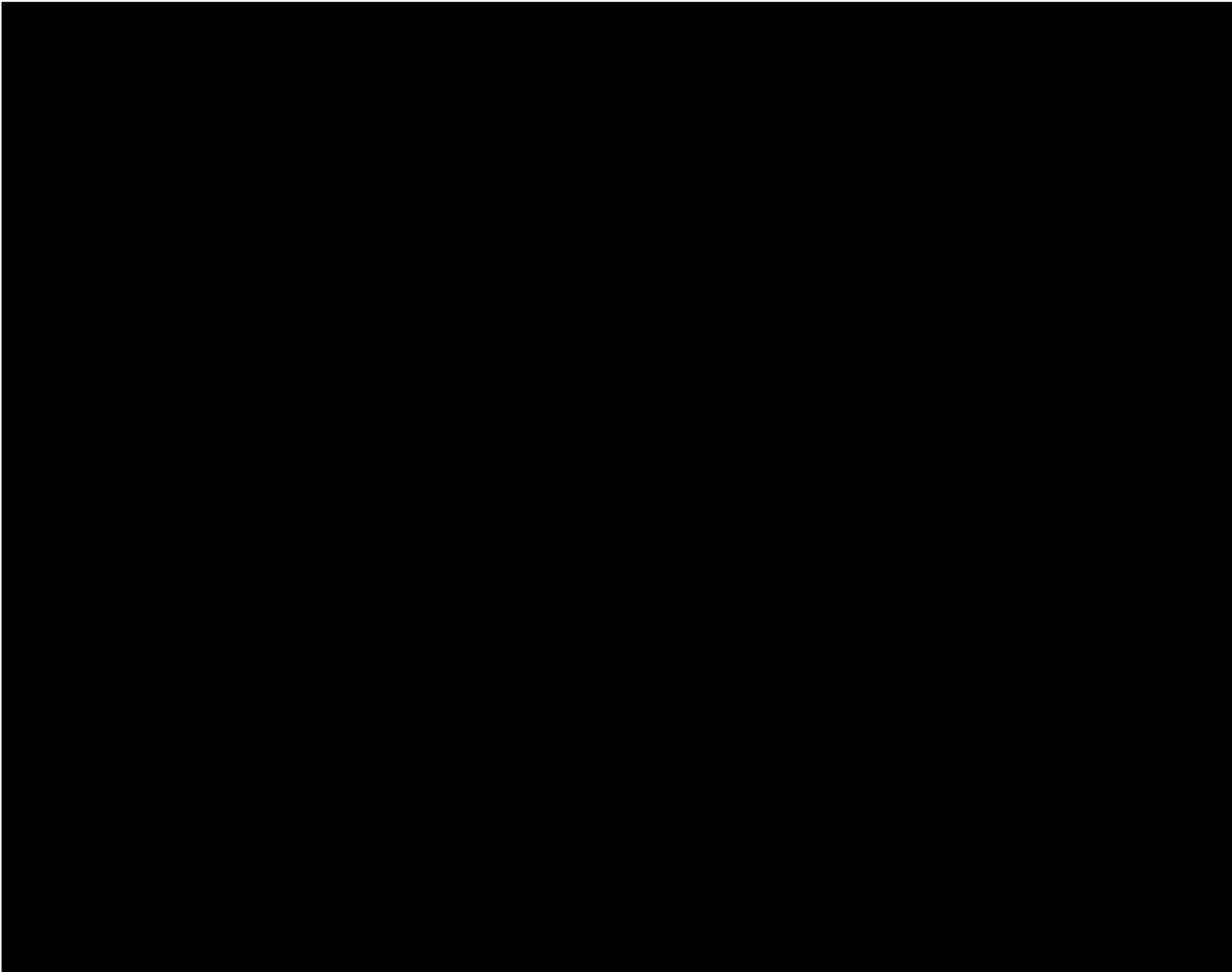
22 Of course, it must be recognised that the
23 introduction of a 1.9 ROC band for offshore wind under
24 the 2010 Order would have involved adding an additional
25 band to the five bands that had been introduced under

1 the 2009 Order. I am not saying that is an
2 insurmountable obstacle -- of course it was not -- and
3 so all my learned friend's references to, oh, well, they
4 might have done it here or they were contemplating doing
5 it there, yes, well, we are not saying they could not
6 have done it, but what one sees from the response to the
7 Q&A is that the Government was saying there are reasons
8 we do not want to do that, and as I said in opening, the
9 key point when it comes to considering the
10 counterfactual is that it is clear from this response
11 and the response at {ROC-E/141/1} that the Government
12 did have a concern that moving to banding levels more
13 precise than intervals of a quarter of a ROC might
14 increase administration costs and increase complexity,
15 and it was providing that reasoning to the Commission as
16 part of its reason for adopting the two ROC banding
17 level. Nothing that the Class Representative has
18 identified demonstrates that those concerns would not
19 have existed equally in the counterfactual.

20 The final point in relation to the actual before I
21 come to the counterfactual is the attitude of the
22 Commission, because, as the Tribunal has heard, the
23 Class Representative seeks to place much emphasis on the
24 Commission's concern to avoid over-compensation, and
25 true it is -- we do not shy from this -- that the

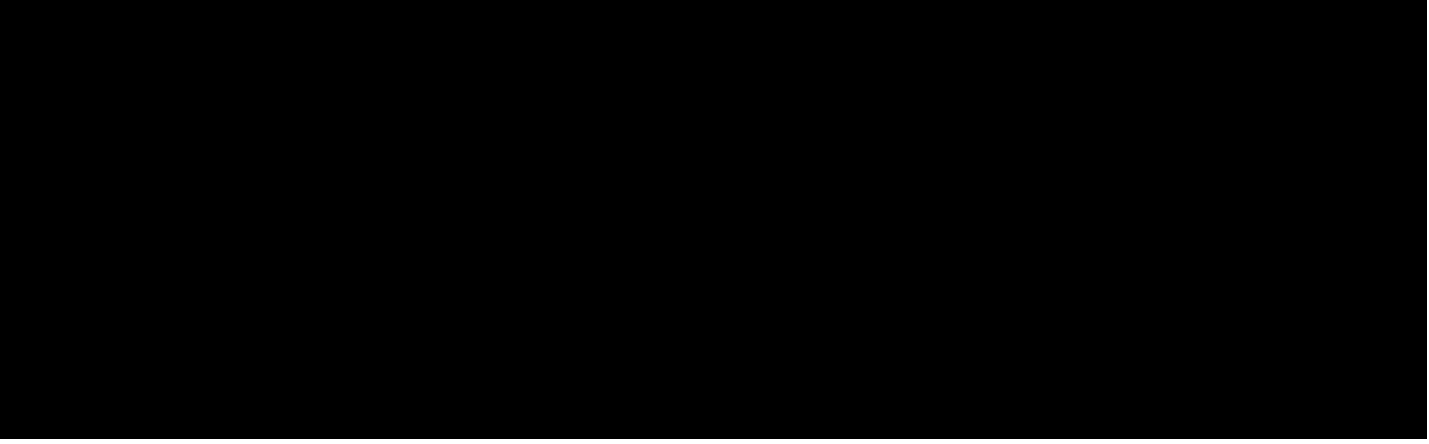
1 Commission was looking at the submissions with that aim
2 in mind, just as it had done in relation to the 2009
3 Order, but equally, clearly, it is also not the case
4 that in 2010 the Commission had in mind that only some
5 kind of very limited margin would be acceptable.

Indeed, it is apparent from the



23 As the Tribunal knows, in the table above, the
24 Commission set out ranges not precise points.

25 In paragraph 11:



8 Of course, the Tribunal will be aware that when it
9 says the 10-14 per cent targeted IRR presented in the
10 table above, that is a reference to the £128 to £160
11 range that came from using those different hurdle rates.

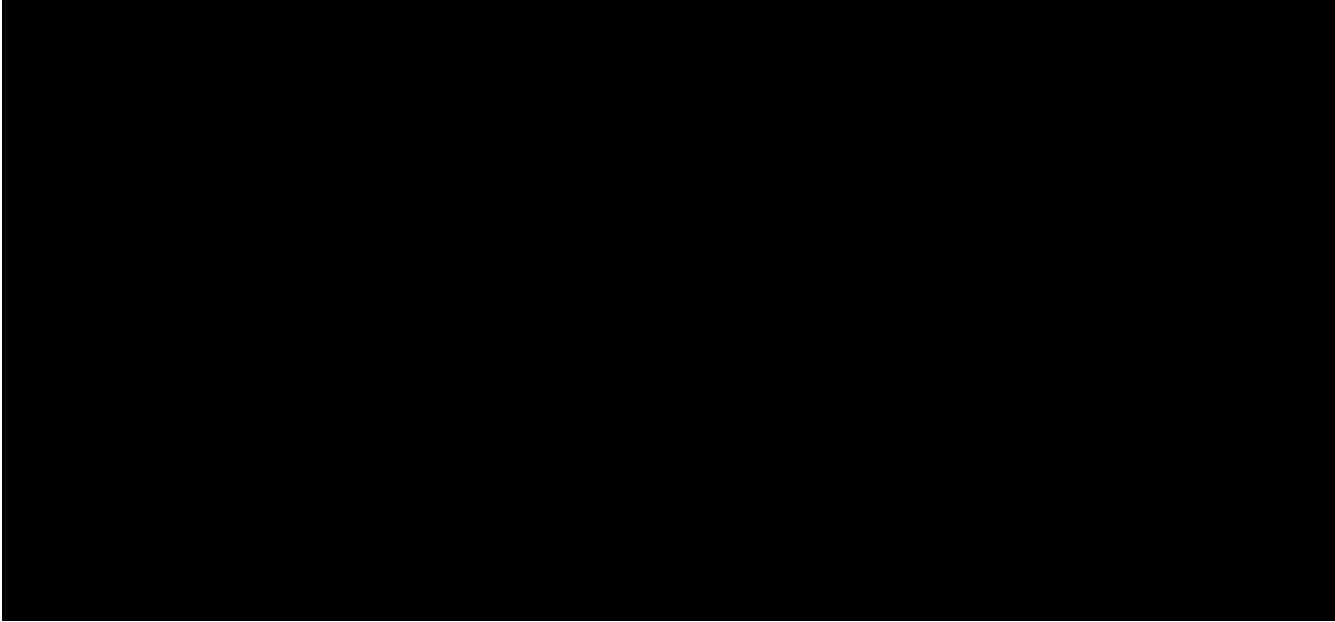
12 An important point to note about this is that it is
13 apparent from the Ernst & Young sensitivity on which my
14 learned friends have focused so much of their attention,
15 that is Figure 11, that on Ernst & Young's calculation,
16 those differing rates of return equated to a difference
17 in the level of support required of 0.9 ROCs. So, from
18 2 ROCs/MWh at 10 per cent to 2.9 ROCs/MWh at 14 per
19 cent -- the Tribunal will remember the figures in the
20 box.

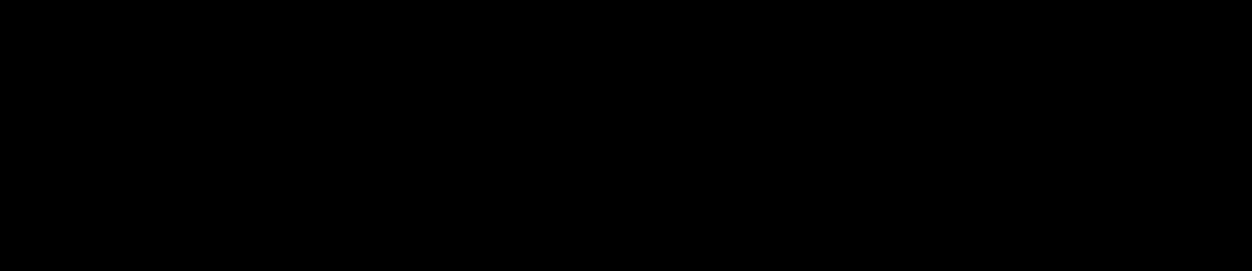
21 In other words, it is clear that the Commission was
22 prepared to countenance levels of support being provided
23 to industry that incorporated a return equating to 0.9
24 ROCs over the minimum amount that it also considered
25 appropriate to stimulate investment, and we submit that

1 the very fact that it is clear that the Commission would
2 have regarded a rate of return of 14 per cent as
3 acceptable demonstrates why my learned friends are not
4 right to suggest, as they do, for example, in paragraph
5 3 of their closing, that the two ROC banding level
6 approved by the Commission incorporated a generous rate
7 of return such that any higher return would not have
8 been acceptable to the Commission.

9 Paragraph 11 of the Commission's State aid decision
10 is making it clear that a higher rate of return would
11 have been acceptable to the Commission because it
12 considers that the 10-14 per cent targeted IRR is
13 appropriate to stimulate investment.

14 Now, the other point I wanted to make in relation to
15 the State aid notification process is that as the
16 Tribunal will recall, my learned friends sought to gain





5 Now, that paragraph of the email in our submission
6 does not, in fact, support my learned friend's case at
7 all. To the contrary, it shows that the Commission was
8 understanding of and accepting of the issues in relation
9 to uncertainty, and was fine overall with the
10 explanations that the Government had given in the Q&A
11 relating to all that, just asking the Government to
12 strengthen that as much as it could, and indeed this is
13 an email which, in our submission, also explains why,
14 when you get to the State aid decision, you do not get
15 the pinpoint figures, you do not get the central
16 estimates, you get the range, because the Commission is
17 understanding the uncertainties inherent in the
18 exercise, it is recognising that it is not appropriate
19 to compare those pinpoint figures, that that is not the
20 core reasoning, and it therefore does not express that
21 in its decision.

22 THE CHAIRMAN: So whereas the Class Representative
23 characterises this email as the Commission still not
24 being satisfied with the responses that have been given
25 to date, you categorise it as saying -- or you

1 characterise it as saying that we are happy with the
2 overall conclusion, let us talk about the precise
3 reasons that get us there.

4 MS DAVIES: Yes. Precisely. Indeed, that is not only shown
5 by him saying "I am fine overall" at the beginning,
6 second sentence, and "which I understand" at the end,
7 but it is also shown by the reference in the next
8 paragraph to the use of the simplified procedure.

9 Now, the simplified procedure is a procedure which
10 can only be used for measures where it is not
11 anticipated that there will be a -- any significant
12 doubt about the compatibility with the treaty. So, if
13 you are contemplating doing that, you are, by
14 definition, contemplating a procedure under which you,
15 the Commission, are happy with what you are being told,
16 so that further reinforces the point that the Chair just
17 put to me.

18 Before I turn specifically to address the
19 counterfactual, I just wanted to pick up a couple of
20 points in relation to the evidence starting with the
21 evidence of Mr McNeal in light of my learned friend's
22 submissions in relation to that. I should perhaps have
23 said before I said that, that that is all I wanted to
24 say about the actual. I am going to deal with any other
25 points in the context of the counterfactual.

1 Now, so far as Mr McNeal is concerned, as the Class
2 Representative rightly accepts in paragraph 11 of their
3 Closing Submissions, that the question of what would
4 have happened in the counterfactual depends precisely on
5 the detail. We agree.

6 That is, indeed, the very reason why my learned
7 friends are wrong to seek to place such reliance on
8 Mr McNeal's comment in his evidence that round numbers
9 mean no more than a single decimal point. It is a point
10 they address at paragraphs 159 to 160 of their closing
11 and my learned friend developed it yesterday.

12 Mr McNeal only joined DECC after the 2010 Order, and
13 he can, therefore, only have been describing DECC's
14 preference after the point of his joinder, but in any
15 event, the documents are clear that in 2010 DECC had a
16 preference for banding increments of 0.25 ROCs/MWh.
17 That is what they were saying in the answers to the
18 questions posed by the Commission as we have just seen.

19 Now, yesterday my learned friend appeared to be
20 suggesting that there was some sort of procedural
21 unfairness in us taking this point, but, with respect,
22 we really do not understand that. The case my learned
23 friend himself put to Mr McNeal in cross-examination was
24 that as he was not there in 2010, he could not comment
25 on the detail. We give the reference at paragraph 67,

1 subparagraph (c) of our closing. I also, in fact, made
2 it clear in opening that our position in relation to
3 Mr McNeal was that he was not involved in the 2009 or
4 2010 Renewable Obligation orders, so he was not able to
5 speak to the passages in the State aid documents
6 relating to the Government's preference for minimum
7 banding increments of 0.25 at that time. The reference
8 is page 149 of the transcript for Day 1, so I simply do
9 not understand what procedural unfairness is suggested
10 to follow from us adopting the same position as my
11 learned friends, namely he could not comment on the
12 detail because he was not there in 2010, and saying he
13 can't comment specifically on the Government's
14 preference for 20 -- minimum banding increments of 0.25
15 in 2010 because he was not there.

16 The third and final point to make in relation to
17 Mr McNeal is that my learned friend mischaracterises his
18 evidence when he suggests in paragraph 11 of his closing
19 that his opinions on the banding levels depended in part
20 on the trading-off that could occur in decisions
21 involving multiple technologies. It is the reason he
22 puts forward to try and distinguish Mr McNeal's
23 explanations about uncertainty so far as 2010 is
24 concerned.

25 Now, I say that is a mischaracterisation because

1 whilst I accept that Mr McNeal accepted that as an
2 additional point, in those passages of the transcript
3 that we looked at earlier, he made clear that the
4 underlying uncertainty remained such that the thinking
5 was not based on a precise point, or, as he put it:
6 "I would never use the word 'precise' about any outcome
7 through the ROC process because there are so many moving
8 parts and they are so large". So you cannot simply set
9 aside his evidence on the basis it was concerned with an
10 Order involving multiple technologies. He was making a
11 much more general point.

12 Turning, then, to Mr Druce, the Tribunal will, of
13 course, have formed its own view as to the quality of
14 Mr Druce's evidence, and I am not, in closing, going to
15 repeat the various points we have made in relation to
16 that from paragraphs 68 to 86 of our closing. They are
17 there for the Tribunal to consider, but it is also
18 important to recognise that the main case that the Class
19 Representative is now advancing is not one which had
20 been advanced by Mr Druce at all through his five expert
21 reports in this case, and therefore it is simply not
22 right for my learned friend to suggest, as he does in
23 his paragraph 13 of his closing, that the Class
24 Representative is standing by the position taken by
25 Mr Druce.

1 Indeed, it was only in the Joint Memorandum that
2 Mr Druce very belatedly recognised the problem with his
3 approach to calculating the cost elevation, based, as it
4 was, on his calculations of the levelised cost for his
5 three key wind farms, a calculation which, as he
6 accepted orally, would not have been likely to be
7 performed in the counterfactual.

8 So, it was only in the Joint Memorandum that
9 Mr Druce finally coalesced around the cost elevation
10 figure of around £4 per megawatt hour - that is the
11 figure which now underpins the Class Representative's
12 main case.

13 Nor is my learned friend right to suggest that our
14 criticisms of the views expressed by Mr Druce in his
15 first three reports in relation to the 2009 Order, which
16 he subsequently accepted he could not maintain, my
17 learned friend is not right to suggest that our
18 criticisms of that are misplaced because those reports
19 were produced in the context of the certification
20 process. To the contrary, the role of an independent
21 expert at the certification stage is particularly
22 important, and that is because it is on the basis of
23 that independent expert evidence that the Tribunal will
24 reach a view (Inaudible) on whether there is a blueprint
25 to trial, but also on significant matters such as the

1 cost benefit of the proposed CPO. They are all part of
2 the important gatekeeper role that the Competition
3 Appeal Tribunal performs at the certification stage, as,
4 in fact, is emphasised in London & South-Eastern Railway
5 Limited v Gutmann at paragraph 61. I am sure the
6 Tribunal is familiar with that. It is in the
7 Authorities Bundle tab 11 at page 92.

8 That gatekeeper role is important to ensure that
9 Defendants are not subject to claims that are not proper
10 ones to proceed. For the reasons we have set out in our
11 written closing, our point is that there were aspects of
12 Mr Druce's evidence which were said to support a
13 significant portion of the monetary value of the claim
14 that should never have been advanced. That is not
15 merely a question of an expert allowing his analysis to
16 evolve as more material became available, but rather of
17 material being available throughout, which should have
18 led an independent expert to appreciate that the case
19 his client wished to advance was always untenable. That
20 is all I am going to say orally in relation to Mr Druce
21 but the Tribunal will understand our position.

22 So, against all of that background, I want to turn
23 to the key question for the Tribunal which is the
24 counterfactual.

25 First of all, if I can identify the three points

1 that we accept are common ground: firstly, even making
2 the assumptions most favourable to the Class
3 Representative for these purposes, the impact on the
4 cartel on the cost of a notional wind farm, the subject
5 of Ernst & Young's base case LCOE is a little less than
6 3 per cent. We understand that to be common ground.
7 That is true whether you take the cost elevation due to
8 the cartel as being around £4 per megawatt hour, which
9 is the figure my learned friend uses in his closing,
10 Dr Moselle's £4.2 per megawatt hour or the figure in the
11 Joint Memorandum provided by Mr Druce of 4.3 megawatts
12 per hour -- pounds per megawatt hour, sorry.

13 That is why the difference between the various
14 experts as to the specific figure does not matter,
15 coming back to the question the Chair asked me
16 yesterday, but what is important to recognise in
17 relation to that, it is just not right to suggest that
18 the impact is substantial, as my learned friends assert
19 in paragraph 5 of their written closing. Even they
20 appear to describe a margin of 3.5 per cent as
21 "marginal", albeit for some reason they suggest that a
22 margin of 6 per cent cannot be so described, but in any
23 event, we are here talking about an increase in cost
24 which is 3 per cent of the levelised base cost.

25 Second point of common ground. My learned friends

1 are right to state in paragraphs 95 and 96 of their
2 closing that it is common ground that in the
3 counterfactual both Ernst & Young's base levelised cost
4 estimate would have been lower, so that is the first
5 point, and, secondly, the revenue estimates would have
6 been the same.

7 It is not right, however, that it is common ground
8 that in the counterfactual all the levelised cost
9 figures presented in the Ernst & Young sensitivities
10 would have been lower. In particular, for the reasons I
11 have already explained, and as we have pointed out in
12 our closing at paragraph 99, it is not in our submission
13 right that the second cost of capital sensitivity in the
14 counterfactual would have been one using a hurdle rate
15 of 10 per cent. Rather, it was the developer's requests
16 for a ROC banding of two that was driving that bar, so
17 if, in the counterfactual, they had still been
18 requesting two, that is equally what the bar would have
19 been showing, with a different hurdle rate and hence a
20 different levelised cost figure.

21 The third point of common ground is that my learned
22 friends are right to say that mathematically a ROC
23 banding level of 1.9 ROCs in the counterfactual would
24 have provided a similar percentage margin between the
25 central revenue estimate and the Ernst & Young base

1 cost -- levelised cost estimate as existed in the
2 actual. We accept that. That is mathematics, but
3 contrary to my learned friend's submissions, it simply
4 does not follow that in the counterfactual the only
5 reasonable course of action available to the Government
6 would have been to act so as to ensure that only that
7 percentage level of margin would be allowed, and now, of
8 course, I am moving away from the common ground, and
9 there are essentially seven reasons why we say that this
10 central tenet of my learned friend's case is wrong.

11 First, as I explained at the outset of my Closing
12 Submissions, neither the absolute margin of £5 nor the
13 percentage margin of 3.47 per cent is one which should
14 ever have been calculated in the counterfactual, so
15 there is quite simply no question of the Government's
16 decision-making being driven by seeking to deliver that
17 specific margin.

18 Second, in the counterfactual the Government would
19 have been faced with similar ranges of uncertainty, even
20 if the top and bottom end of the levelised cost ranges
21 had been moved down in Figure 11 as the Class
22 Representative's case contemplates. That is, in fact,
23 neatly illustrated by the graphs that have been included
24 in my learned friend Mr West's Closing Submissions at
25 pages 8 and 9, and the fact that as he points out, in

1 the counterfactual the central levelised cost estimate
2 would, in fact, be practically in the middle of the
3 revenue range, the mid-point of which is £141 per
4 megawatt hour, and we say that the suggestion that the
5 Government would, in the counterfactual, have observed a
6 striking disparity between the cost and revenue
7 estimates which is at the heart of the Class
8 Representative's case, is misplaced.

9 Third, it is in our submission more likely than not
10 that the developers who had sought an increase to 2.0
11 ROCs in the actual similarly have been asking for an
12 increase to 2.0 ROCs in the counterfactual, and
13 certainly the Class Representative has not met the
14 burden of proof which lies upon her to demonstrate the
15 opposite.

16 We set out the reasons why we submit that is so in
17 paragraphs 93 to 95 of our written closing, and, of
18 course, we do understand the Class Representative
19 submits the opposite, so what I am going to do orally is
20 to address the various reasons raised by the -- by my
21 learned friend for the Class Representative as to why
22 they say the developers would have requested a lower
23 level of subsidy.

24 THE CHAIRMAN: I think you are not, at least -- maybe some
25 of the other aligned parties are -- but you are not, at

1 least, asking us to rule this argument out of bounds on
2 the basis that it was not pleaded?

3 MS DAVIES: No, but I am going to make a point about the
4 procedural issue in light of one of the answers that my
5 learned friend gave yesterday which, with respect, is
6 not open to him and would be completely unfair, given
7 his own expert's evidence so I am going to come to
8 that --

9 THE CHAIRMAN: Okay.

10 MS DAVIES: -- but I am not taking a pleading point. I am
11 not saying you cannot consider this, but I do say in the
12 context in which it has arisen, some of the submissions
13 that are being made really are quite extraordinary.

14 So -- but if I could take it in stages, the first
15 point that my learned friends make is they say, well,
16 the developers justified their requests on the basis of
17 reasonably detailed cost information, and you will
18 recall that yesterday my learned friend went to some of
19 the notes of the various discussions between the
20 Government and the developers in which it is right that
21 they did seek to explain various core cost increases in
22 different categories of their costs, as indicating why
23 the banding level needed to be increased, but
24 importantly, those discussions were at a relatively high
25 level, indicating, for example, by what percentage their

1 turbine costs had gone up or the impact of exchange rate
2 movements. They were not justifying their request to
3 the Government on the basis of a detailed levelised cost
4 calculation, or anything similar to that at all.

5 In fact, as discussed in the course of the evidence,
6 and as Mr Druce accepted, these developers never
7 provided the Government with their levelised cost
8 calculations, or, indeed, all the information that they
9 had that would have enabled the Government to
10 reconstruct the developer's own levelised cost
11 calculations, and we therefore submit that such higher
12 level cost information as the developers were providing
13 to the Government in these meetings to justify their
14 requests -- that turbine costs had gone up by 50 per
15 cent, etc, etc -- would have been the same, or at least
16 broadly the same in the counterfactual, as they were in
17 the actual.

18 Secondly, the only analysis before the Tribunal
19 relating to the detailed cost information that was
20 provided by these developers to DECC as part of the
21 Ernst & Young exercise indicates a number of things.
22 When I say "the only analysis", I mean the analysis of
23 Mr Druce, the Class Representative's own expert, and
24 Dr Moselle's response. We submit -- I am going to come
25 to Table 7 in a moment, but just to explain what we

1 submit in relation to it -- those two analyses indicate
2 these significant wind farms had different cost
3 profiles, and that means, in our submission, that their
4 independent requests for 2.0 ROCs cannot have been
5 triggered by an exercise of specifically matching their
6 own cost profile to the level of each required, because
7 had they sought to do that specifically in the way that
8 my learned friend appears to be contemplating, one would
9 have seen them independently asking for different levels
10 of support.

11 Now, my learned friend sought to dismiss that point
12 yesterday by looking at Table 7 in Dr Moselle's third
13 report, if we pull that up at {ROC-D/9/50} where he made
14 the point that on Mr Druce's analysis, so he said [REDACTED]
15 [REDACTED] have quite similar cost profiles and it is
16 only London Array which is different, whereas on
17 Dr Moselle's analysis it is London Array and [REDACTED] that
18 have quite similar cost profiles and it is [REDACTED] that
19 was very different, saying this is all a feature of
20 assumptions, essentially, so he went on to suggest:

21 "It is entirely possible that all three, in fact,
22 had similar levelised cost estimates".

23 This is where the procedural point comes in, because
24 in our submission, in the absence of any evidence other
25 than the analysis of Mr Druce and Dr Moselle, each of

1 which suggest different cost profiles, that is not a
2 point which is really open to my learned friend. He has
3 had access to the detailed cost information that these
4 three wind farms provided to the Government. His expert
5 has analysed them for the purposes of producing the
6 figures on the left-hand side of this page. If he
7 really was going to say that that detailed cost estimate
8 showed they had similar levelised costs, then he would
9 have needed to present that analysis to support it,
10 whereas, in fact, what we have is his expert presenting
11 analysis suggesting the opposite. That is an important
12 point of process because not only is the assertion that
13 the developers would have asked for a lower level of ROC
14 banding unpleaded, but also as the Tribunal knows there
15 has been no evidence adduced by the Class Representative
16 from any developer to support the contention that they
17 would have asked for a lower amount in the
18 counterfactual, that is now positively being adduced by
19 the Class Representative.

20 Moreover, when we say, well, that suggestion is
21 inconsistent with their own expert's analysis of the
22 cost profile of those benchmark wind farms, the retort
23 comes: well, we do not have the evidence that shows what
24 the wind farms themselves calculated. True it is we do
25 not, but equally in circumstances where the burden of

1 proof lies on my learned friend, it cannot be sufficient
2 for him just to say, well, the expert analysis I have
3 adduced, and I have, might not be reflecting the true
4 position. This is his client's evidence on the
5 left-hand side, and our response, and you cannot get
6 round it by simply saying, well, the developers may have
7 had different figures in mind.

8 The simple fact is that the expert analysis of both
9 Mr Druce and Dr Moselle shows that in the counterfactual
10 a request of 2 ROC/MWh by the significant wind farms
11 would have been justified, because it is above, by a
12 margin of some considerable size, the levelised cost
13 estimate which led the Government to conclude that 2
14 ROC/MWh was appropriate, and there is not the material
15 adduced by my learned friends before the Tribunal to
16 gainsay that analysis. It just does not exist. The
17 only analysis we have is what is in Table 7, and that
18 shows that they could have justified a two ROC figure in
19 the counterfactual.

20 It is to be noted also in this context that when my
21 learned friend said yesterday that on Mr Druce's
22 calculations [REDACTED] had quite similar cost
23 profiles, what he is treating as "similar" are two
24 levelised cost estimates that are, in fact, around £4
25 per megawatt hour different to each other. We see that

1 on the left-hand column of Table 7. In the actual it is
2 about £4, in the counterfactual it has gone up to about
3 £5, so he seems to be suggesting that a cost
4 differential of around £4 to £5 is not of any
5 materiality, but he cannot have it both ways. If a
6 difference of £4 is not of any materiality to mean that
7 these two wind farms do not have different cost profiles
8 on Mr Druce's analysis, that only serves to demonstrate
9 that the cost elevation of around £4 which, on his case,
10 was produced by the cartel, is also not of any
11 materiality when considering what level of support these
12 wind farms would have been seeking in the
13 counterfactual.

14 Now, the third point as regards the developers,
15 which is an obvious matter of fact, is that the requests
16 for 2.0 ROCs were made against the backdrop of what had
17 only just happened in relation to the 2009 Order where
18 the Government had expressly rejected any attempt at
19 spurious accuracy, and settled on bands with minimum
20 increments of 0.25 ROCs and a highest band for the least
21 mature technology of two.

22 My learned friend submits that there is no evidence
23 that the developers' requests were designed to match the
24 existing bands, but in light of the fact that the only
25 analysis that we have indicates that they had not only

1 different cost profiles, but also cost profiles that
2 could have justified a request higher than 2 ROC MWh,
3 there really is no other sensible explanation available
4 for their behaviour, and we submit -- no other sensible
5 explanation available for their behaviour, other than
6 that it was driven by the knowledge of 2.0 ROCs being
7 the highest band that the Government had countenanced
8 under the 2009 Order.

9 We submit it is just unreal against that background
10 to suggest that in the counterfactual the developers
11 would have been asking for 1.9 ROCs.

12 The fourth point in relation to this is that my
13 learned friend sought to put some emphasis on
14 Dr Moselle's calculations seeking to replicate the Ernst
15 & Young methodology suggesting that the average
16 levelised cost of these three wind farms would be
17 reduced by £5 per megawatt hour in the counterfactual.
18 That is the figure at the bottom right-hand corner of
19 this table, but it is important to recognise, as the
20 table demonstrates, that both Mr Druce and Dr Moselle's
21 calculations not only show that the levelised cost
22 estimates were very significantly higher than the Ernst
23 & Young assumed base case in the counter factual, but
24 also the 5.1 figure is itself a simple average, whereas
25 both sets of calculations demonstrate that the impact of

1 the cartel differed between the different wind farms due
2 to their different cost profiles, and, indeed, both of
3 their calculations show that in the counterfactual at
4 least two of the three wind farms would have had cost
5 profiles which were higher than the cost profile of the
6 third wind farm in the actual that led it to ask for 2.0
7 ROCs.

8 Now, we agree with the Class Representative that it
9 can be assumed that the wind farm developers were acting
10 honestly and accurately, but it simply does not follow
11 from that, as my learned friends seem to be suggesting,
12 that in the counterfactual, with the reduction in their
13 cost profiles of around 3 per cent, the wind farms more
14 probably than not would have been requesting fewer ROCs.
15 Indeed, it is obvious that wind farm developers would
16 also be seeking to advance their own commercial
17 interests, and to do so is not in any way contrary to
18 the assumption that they act honestly and accurately,
19 and given that the cost evidence that is before the
20 Tribunal through the expert process demonstrates that
21 they could have sought and justified a ROC banding level
22 of 2 ROC/MWh in the counterfactual, even if the
23 levelised cost estimates were reduced in the way that
24 needs to be contemplated, there is every reason to
25 conclude that they would have done so, particularly in

1 the context of that being the next band up, and the
2 highest band in the 2009 Order.

3 My learned friends sought to address that point
4 yesterday by saying, well, the developer would say have
5 known that if they pitched their request too high, then
6 that would have emerged, but the problem with that
7 submission is, again, that the expert analysis before
8 the Tribunal shows that a request of 2 ROC/MWh would not
9 have been shown to be too high on the basis of the
10 detailed cost information the developers provided.

11 Now, other ways that my learned friends seek to try
12 and escape that conclusion include in their closing at
13 paragraph 114 where they say that Ernst & Young's
14 sensitivities show how important conclusions as to
15 matters such as load factors are to the analysis.

16 Now, as a proposition, that is correct, but it is
17 not one which, in this case, can be relied on by my
18 learned friends to support a case that in the
19 counterfactual these wind farms would have been asking
20 for only 1.9 ROCs. As we have pointed out in our
21 closing at paragraph 82, subparagraph (c), even if one
22 deducts the full £14 per MWh hour difference attributed
23 to using a higher load factor in the Ernst & Young
24 sensitivity, both Mr Druce and Dr Moselle's estimates of
25 these wind farms' levelised costs would have been higher

1 than the Government's central revenue estimate in the
2 counterfactual.

3 Now, the reality is we just do not know for sure how
4 each of these developers independently got to their two
5 ROC figure because the evidence has not been adduced to
6 the Tribunal, and again, I come back here to the burden
7 of proof point. It is for the Class Representative to
8 prove her case.

9 What we do know -- sorry -- because we do not have
10 that evidence adduced by the Class Representative, we
11 are simply not in a position to conclude precisely what
12 assumptions the developers were making that were
13 different to those underpinning the Ernst & Young case,
14 but what we do know is that based on those assumptions
15 they had -- in other words the Ernst & Young cost
16 assumptions -- they had a cost profile that could have
17 justified the same request for 2.0 ROCs in the
18 counterfactual without any dishonesty at all on their
19 part, and we therefore submit that that is the
20 likelihood of what would have happened.

21 As regards the counterfactual, that means that in
22 our submission the Tribunal should be approaching
23 matters on the assumption that the developers' requests
24 would have been the same, or at the very least that the
25 Class Representative has failed to prove the opposite.

1 That leads me to my fourth point about the
2 counterfactual which is that if it is assumed that the
3 developers would have been requesting 2.0 ROCs -- in the
4 counterfactual, it is equally clear that the Government
5 would have also been asking Ernst & Young specifically
6 to consider that figure. Again, it is no doubt right to
7 say the Government would not, in the counterfactual,
8 have simply been taking the developers' request at face
9 value. We do not suggest they would have done, but just
10 as in the actual, when faced with requests from
11 developers for two, the Government specifically asked
12 Ernst & Young to analyse that as an increase in the
13 banding level and see what implications it had for
14 things such as IRR and revenue, we submit there is no
15 basis at all to think anything different would have
16 happened in the counterfactual, and my learned friends
17 therefore cannot get away from the fact that the
18 appropriateness or otherwise of 2.0 ROCs would have been
19 a question specifically posed to Ernst & Young.

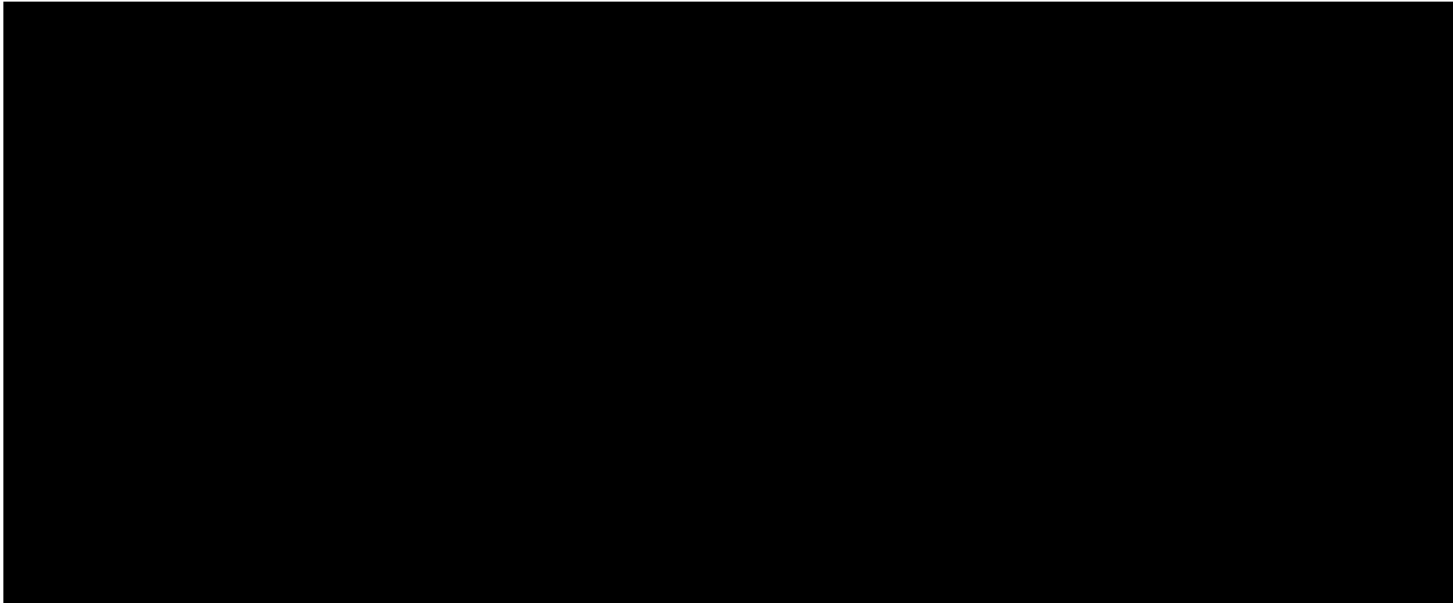
20 That, then, brings me to the Ernst & Young report,
21 and the fifth point about the counterfactual. Here,
22 there are, in essence, two separate questions before the
23 Tribunal. The first is whether, in the counterfactual,
24 the Ernst & Young base case levelised cost figure would
25 have been different, and I have already explained that

1 we accept it would have been around £4 per MWh lower,
2 but the second, and this is critical for the purposes of
3 considering the counterfactual, is what impact, if any,
4 the inclusion of a lower base case levelised cost
5 estimate would have had on the Ernst & Young
6 recommendations. That is where we take very significant
7 issue with my learned friend for the Class
8 Representative's case.

9 The Class Representative's position, as the Tribunal
10 has heard, is that in the counterfactual the lower
11 levelised cost estimates would have led to a lower
12 recommended ROC range and lower sensitivities, and, of
13 course, my learned friend needs the lower sensitivities
14 for there to be any question of the 1.9 ROC figure
15 appearing in additional sensitivities in the Ernst &
16 Young report, and the reason I say that is that even if
17 you otherwise accept my learned friend's logic, given
18 that the base case levelised cost would only have been
19 around £4 per megawatt lower, the Class Representative
20 has to accept that Ernst & Young's base case as to the
21 number of ROCs required would, at best for her, have
22 been 2.4 ROCs in the counterfactual, so the debate is
23 not about the base case at all. The debate is about:
24 would the sensitivities have been altered?

25 Before I come to the sensitivities, just to make

1 clear, however, that as we pointed out in paragraph 97
2 of our closing, there are reasons to think that even the
3 base case would not have been reduced in that way, and
4 that -- to make that good I need to go back to the



14 THE CHAIRMAN: Sorry, I still do not quite have it on the
15 screen.

16 MS DAVIES: I am sorry. 104, page 80. The footnote at the
17 bottom.

18 THE CHAIRMAN: Sorry, I see it now. Yes.

19 MS DAVIES: So the updates mean that the weighted average
20 CAPEX has come down by 0.1 of a million, pre-OFTO. This
21 had the effect of reducing levelised cost in the base
22 case from £149 to £144 per megawatt hour, so what we can
23 see through the Ernst & Young process is that prior to 5
24 March they had a base case levelised cost estimate of
25 £149, post 5 March that comes down to £144.

1 As the Tribunal knows, the Ernst & Young base case
2 recommendation was that £144 equated to a requirement
[REDACTED] for 2.5 ROCs, [REDACTED]

[REDACTED]

9 We submit that that demonstrates that there is not
10 an obvious reduction, a mathematical reduction, going on
11 between -- if the levelised cost base case cost estimate
12 comes down, so does the recommended ROC level.

13 Now, my learned friend yesterday in order to address
14 this point said, well, if you also look at paragraphs 52
[REDACTED] and -- sorry -- [REDACTED]

[REDACTED]

[REDACTED]

10 [REDACTED] So, different
11 ROC conversion rates were being used depending on
12 whether it was the high, medium or low estimate.

13 By the time of their final report Ernst & Young had
14 moved away from using high, medium and low estimates,
15 and were, for 2009, only presenting their medium
16 estimate, and it is that medium estimate that still
17 showed a ROC level of 2.5, notwithstanding that the LCOE
18 estimate had reduced to £144, and that is why we say
19 there clearly was not some sort of inevitable
20 relationship between the base case LCOE and the base
21 case recommended ROC level. To the contrary, it looks
22 as if, in making their recommendation, Ernst & Young
23 were rounding up to the nearest 0.25 banding increment
24 which, in the counterfactual, would still be 2.5 ROCs,
25 but in any event, even assuming, contrary to what I have

1 just said, the base case ROC recommended level had gone
2 down to 2.4 ROCs, that would still, obviously, have been
3 above the 2.0 ROCs which, for the reasons I have already
4 summarised, we submit the developers would have been
5 asking for in the counterfactual. That is no doubt why
6 my learned friends have been driven to say that in the
7 counterfactual the Government would have carefully
8 read -- something emphasised many times yesterday -- the
9 entirety of Ernst & Young's report and taken account of
10 the whole range of modelling figures presented which, on
11 their case, they say, would have included a figure of
12 1.9 at a sensitivity of 10 per cent, a hurdle rate of 10
13 per cent, in Figure 11, and also in Figure 13, but I
14 have already explained why the suggestion that the 1.9
15 ROC figure would have appeared in Figure 11 or, for that
16 matter, Figure 13, is misplaced. It is looking at those
17 sensitivities the wrong way around.

18 The exercise that Ernst & Young would have been
19 engaged in in the counterfactual, just as they were
20 engaged in in the factual, in relation to the two ROC
21 banding level is, as we saw from the response to the
22 tender one of working out -- as outputs -- what the
23 hurdle rate and revenue requirements were, not working
24 other way around.

25 So that fundamental plank of my learned friend's

1 case just does not work, in our submission.

2 In any event, even assuming, contrary to what I have
3 said, that the 1.9 figure had appeared in Figure 11 or
4 13 or both of them, it obviously does not just follow
5 that the Government would have adopted that lower figure
6 as the appropriate banding level. Indeed, as my learned
7 friends appear to be recognising, those figures would,
8 even on that analysis, have only shown 1.9 ROCs by
9 assuming a hurdle rate of 10 per cent, whereas the
10 developers had made clear that a hurdle rate of 10 per
11 cent was too low, and we have set out the various
12 references that make that good in paragraph 27 of our
13 closing. And if we just turn that up, if I could just
14 develop one point that is made in paragraph 27(a)
15 {ROC-AB/10/11} in relation to London Array by reference
16 to the [REDACTED] at {ROC-E/84/1}, if we could pull that up
17 as well, just so there is no misconception as to what
18 the 10-11 per cent range in 27(a) means, in the

[REDACTED] second -- well, the first main paragraph of this [REDACTED]

[REDACTED]

25

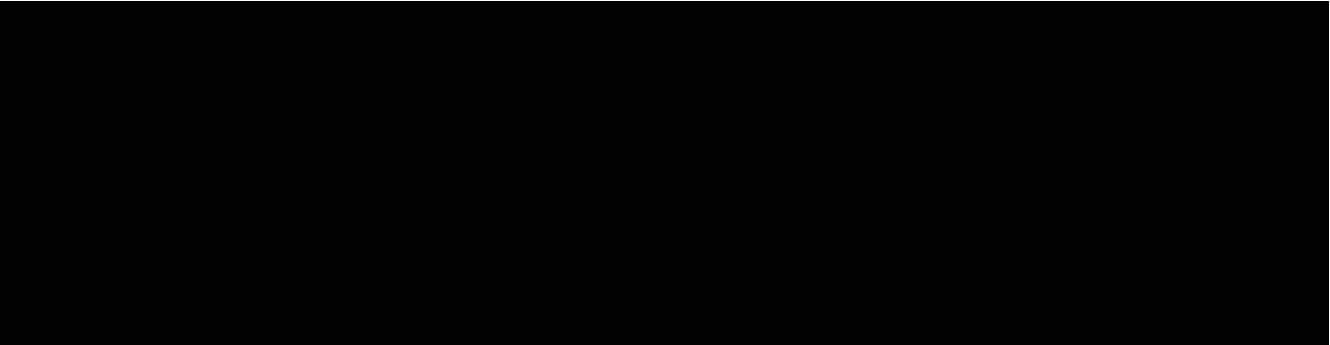
The point in relation to London Array was that there

1 were multiple developers who had different shares in the
2 project, so -- and the reason I am just drawing your
3 attention to that is that it would not be appropriate to
4 approach this on the basis that 10-11 was okay, meaning
5 10% was okay, 10% might have been okay for [REDACTED], but it
6 was not okay for [REDACTED], and so, actually, for London
7 Array to go ahead on that basis you needed to be having
8 a hurdle rate of 11%.

9 The Government -- coming back to our paragraph 27 on
10 page 11 of our closing {ROC-AB/10/11}, [REDACTED] in
11 relation to [REDACTED] had made it very clear that [REDACTED]
12 would not be economic at a 10.5% return. They needed
13 12.5%, and so looking at the significant wind farms, and
14 London Array and [REDACTED] on any view are the two most
15 significant wind farms, it is, in our submission,
16 obvious that the Government would not have settled on a
17 level of ROC support based on a sensitivity assuming an
18 IRR of 10 per cent, because they would have known that
19 those two wind farms would say that hurdle rate is not
20 high enough. It is not economic.

21 THE CHAIRMAN: Do we know -- I know some of these hurdle
22 rates are said to be post-tax, some are said to be
23 pre-tax, are the figures that you are pointing to -- I
24 could not immediately see anything in the email that
25 said whether they were pre-tax or post-tax figures.

1 MS DAVIES: Well, that is right, sir, but if we go back to



7 THE CHAIRMAN: Sorry, just so I have it straight, so EY says
8 2.0 ROCs is the -- so a 10 per cent post-tax produces
9 2.0 ROCs.

10 MS DAVIES: They say 2.0 ROCs delivers at 10 per cent
11 post-tax real discount rate, or assumed --

12 THE CHAIRMAN: Sorry, yes, that is a better way of putting
13 it -- that is your submission as to how it should be
14 put, I understand that.

15 MS DAVIES: Yes.

16 THE CHAIRMAN: But the figure is a post-tax figure that
17 comes out of that, and then we have a look at the DECC
18 figures, London Array looking for, you say, 10-11% but
19 that means 11% because you have got to satisfy all
20 members of the consortium.

21 MS DAVIES: Yes.

22 THE CHAIRMAN: Suppose -- I see. Sorry, I have your point.
23 I see your point.

24 MS DAVIES: I think this is common ground because you will
25 recall that my learned friend was submitting yesterday

1 that the 10 per cent figure was driven by these requests
2 for 10 per cent. That was his position yesterday in
3 relation to these emails, so he was submitting -- this
4 is a like-for-like comparison, and that is why you see
5 that they use 10 per cent because they are assessing
6 what is the outcome at the hurdle rate that the
7 developers are asking for.

8 Now, I submit that is wrong for reasons that I have
9 explained, but I do not think there is room for mismatch
10 between the figures to undermine the point I am making
11 in relation to paragraph 27.

12 The other point to make, if I may just in relation
13 to sensitivities, in relation to the hurdle rates, is
14 that as we have seen, and as my learned friend showed
15 you yesterday, the sensitivities which the Government
16 highlighted to the Commission in the State aid decision
17 as justifying a lower banding level than the Ernst &
18 Young base case were not the 10 per cent hurdle rate
19 sensitivity. They were the sensitivities in relation to
20 load factors and the OFTO, effect of the OFTO regime,
21 and that is unsurprising in circumstances where, as we
22 have seen this morning, we know that the Commission's
23 approach is that hurdle rates of between 10 and 14 per
24 cent are appropriate, so, in other words, the Commission
25 would contemplate a higher level return than a hurdle

1 rate at 10 per cent, and that was, indeed, what they had
2 said in 2009, and they said it again in 2010.

3 So, in assessing my learned friend's submission that
4 when -- even if, contrary to my case, one assumes that
5 this Figure, 11, in the second box, had shown a 1.9
6 figure, and 1.9 had appeared in Figure 13, in the
7 context of a 10 per cent hurdle rate sensitivity, and
8 one asks oneself, well, is that then -- would the
9 Government have been bound or been driven or responsibly
10 or any of the adjectives that my learned friend seeks to
11 apply to it, to have decided that a ROC band of only 1.9
12 was justified, in circumstances where the developers
13 were asking for 2 ROC/MWh, we say clearly not, because
14 the 2 ROC/MWh represents a higher -- slightly higher --
15 hurdle rate, and we know that the European Commission
16 accepted a higher hurdle rate. And I make that point
17 because my learned friend is most definitely seeking to
18 say, well, even if, in the counterfactual, the
19 developers had said 2 ROC/MWh, these sensitivities would
20 mean that the Government, in good conscience, can only
21 recommend 1.9 ROCs/MWh, but the problem with that
22 submission is that these sensitivities are driven by a
23 hurdle rate which is lower than we know the European
24 Commission would have been prepared to accept. You just
25 cannot get to that conclusion even on taking so many

1 ways down the steps of logic of my learned friend.

2 We submit that the total unreality of the Class
3 Representative's suggestion that the Government would
4 have been driven to accept the lowest figure in the cost
5 of capital sensitivity is, in fact, demonstrated by
6 Table 2 of my learned friend's own Closing Submission,
7 if we could turn that up. It is at page 47.
8 {ROC-AB/7/47}.

9 To explain what I understand they have sought to do
10 in this table is that they have sought to convert
11 certain of the sensitivities appearing in the Ernst &
12 Young report to levels of required ROC support by using
13 the Government's assessment of the revenue value of each
14 ROC, and that is what I understand they are explaining
15 in the notes as a matter of mathematics, and that is to
16 the effect that the formulae used have recognised that
17 2.0 ROCs are worth £149 per megawatt hour which matches
18 the Government's central revenue figure at 2.0 ROCs.

19 Now, if we just look at this table on the actual, so
20 the factual, we see that on the Ernst & Young 10 per
21 cent IRR sensitivity, the required level of support is
22 1.52 ROC/MWh, which is obviously way below the 2.0 ROCs
23 that were actually awarded in the actual, and that
24 further demonstrates, in our submission, that it cannot
25 be this sensitivity that was driving the

1 decision-making, and equally there is no reason,
2 therefore, to think that because the one in the
3 counterfactual -- an analysis -- assuming it was in the
4 Ernst & Young report of this sensitivity would get to a
5 figure slightly below 1.5, that would have led to a
6 different outcome in the factual.

7 Just while we are on this table, similarly, in fact,
8 the two load factors also presented in this table
9 likewise show required levels of ROC support in the
10 actual well below 2 ROC/MWh. One sees 1.57 ROC/MWh at 42
11 per cent and 1.47 ROC/MWh, but yet again it was, in
12 fact, 2 ROC/MWh that was awarded, so we submit you
13 really cannot get out of this table any conclusion that
14 in the counterfactual the Government would have adopted
15 a lower banding level because of these sensitivities.

16 Of course, all of that is premised on the basis
17 that -- so the whole of that submission -- is premised
18 on the basis that the Government would have picked one
19 sensitivity amongst all the various figures being
20 presented in the Ernst & Young report, and have run with
21 it, and ignores all the other reasons identified by the
22 Government in the actual for selecting 2 ROC/MWh, namely
23 uncertainties, lack of confidence in central estimates,
24 clear preference for minimum banding increments of 0.25,
25 and so on.

1 "To the contrary, it looks as if, in making their
2 recommendation, Ernst & Young were rounding up to the
3 nearest 0.25 banding increment which, in the
4 counterfactual, would still be 2.0 ROCs".

5 I meant to say "would still be 2.5 ROCs" because
6 obviously the base case was 2.5 ROCs.

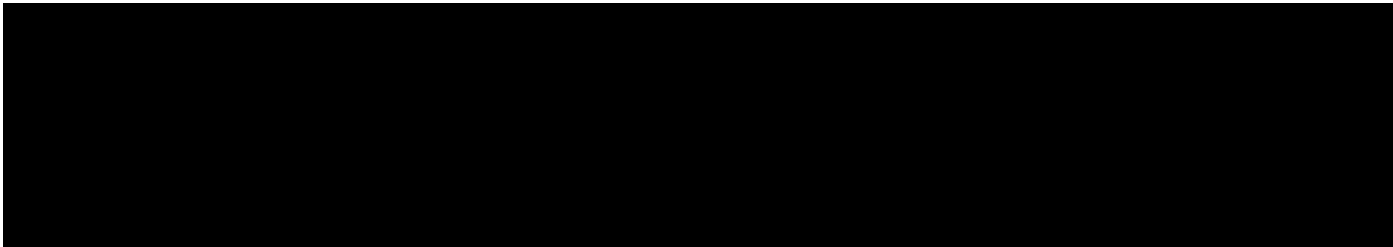
7 THE CHAIRMAN: Yes.

8 MS DAVIES: Right. Coming back to the counterfactual, and
9 the topic I was on just before lunch, which is the
10 Government's response to the Ernst & Young analysis in
11 the counterfactual, and I have explained why we say,
12 actually, the Ernst & Young analysis would not have been
13 different, and I have also explained why, even if the
14 Ernst & Young analysis in relation to the 10 per cent
15 hurdle rate had been different, that would not have led
16 to the Government -- to a different conclusion, and the
17 final point I just wanted to make in that context is
18 that we do not accept the suggestion that is made by my
19 learned friends in paragraph 150 of their closing that
20 accepting that the Government would have awarded 2.0
21 ROCs in the counterfactual in some way involves
22 assuming, as they put it, a complete change in the
23 Government's approach as evidenced by the explanations
24 the Government gave for awarding 2.0 ROCs in the actual.
25 That is a submission which, insofar as we can understand

1 it, is based on my learned friend's premise that the
2 core reasoning for the decision in the actual for 2.0
3 ROCs was the fact that £149 was only marginally above
4 £144, but I have already explained why that is not a
5 fair assessment of the reasons for the decision which
6 were much broader.

7 So, that finishes my fifth point in relation to the
8 counterfactual. I am now moving on to my sixth point,
9 which is: even if, despite everything I have said in
10 relation to the counterfactual so far, the Government
11 had, on the basis of either the 1.9 figure appearing in
12 the sensitivity, or the £9 difference between the
13 central revenue and base case cost estimate, if either
14 of those factors had led the Government in the
15 counterfactual to say, well, okay, the banding level we
16 propose is 1.9 ROCs, then we submit it is clear that it
17 would still have been below the Ernst & Young base
18 case -- first point -- because the lowest that comes
19 down to is 2.4, and, therefore, the Government would
20 have gone back to the wind farm developers to ask them
21 whether it would suffice, and one can see that, in fact,
22 from -- one can see that that would have happened from
[REDACTED] paragraph 4, subparagraph (e) of the [REDACTED]
24 [REDACTED] at {ROC-E/99/1}. It is a paragraph my
25 learned friend went to yesterday. Page {ROC-E/99/2}.

1 The Government was very conscious, at subparagraph (e)
2 on page 4, that:



7 So those meetings with developers would have
8 happened as well in the counterfactual, as they did in
9 the actual, and for the reasons that we summarise in
10 paragraphs 104 to 105 of our closing, and which
11 essentially build on all the points I have already made
12 in relation to the position of the developers, we submit
13 that in that scenario the most likely outcome is that
14 the wind farm developers would have said, "no, we asked
15 for 2 ROC/MWh and that is what we need" and the Ernst &
16 Young report does not undermine that ask. To the
17 contrary, its base case is suggesting an even higher
18 level of support and the 1.9 figure only appears in the
19 sensitivity, which is not realistic because it is
20 supposing a hurdle rate of 10 per cent, which is not
21 enough.

22 Therefore, my learned friend's emphasis on the fact
23 that in the actual DECC required the developers to show
24 that 2.0 ROCs was necessary, does not enable him to jump
25 to a conclusion that in the counterfactual the

1 developers would not have been able to do so. In fact,
2 as I made clear, the analysis of both in Druce and
3 Dr Moselle shows clearly that in the counterfactuals the
4 developers could, honestly, have presented material to
5 the Government showing that 2.0 ROCs was necessary.

6 The seventh point on the counterfactual, which is
7 actually my penultimate point -- I think I said I had
8 seven points at the beginning but I, in fact, have
9 eight, so my seventh point on the counterfactual relates
10 to the renewals advisory body report. My learned
11 friends simply assert in paragraph 133 of their closing
12 that in the counterfactual 2.0 ROCs would no longer have
13 been deemed broadly the right level by RAB as it had
14 been in the factual. They do not provide any
15 explanation for that, but for all the reasons that I
16 have already developed, we submit there is no basis for
17 that conclusion.

18 Indeed, the very fact that the Renewables Advisory
19 Board was itself describing two as "broadly" the right
20 level shows that that body was not approaching the
21 assessment with the degree of mathematical precision
22 that the Class Representative's case is dependent on,
23 and for the similar reasons why I have said -- we submit
24 that the developer's positions would have been the same,
25 we submit the Renewable Advisory Board's position would

1 have been the same.

2 The eighth and final point in the counterfactual is
3 the State aid position.

4 Now, my learned friends suggest firstly that in the
5 counterfactual the Government would not have presented a
6 2 ROC/MWh option because of the size of the margin
7 between the central revenue and the cost estimates, and
8 I have already addressed, in effect, why that is, in our
9 submission, wrong. In one sense that is where, also,
10 the analysis in relation to 2009 comes in, because, as I
11 submitted this morning, a margin of £9 just does not
12 ring alarm bells in the way that my learned friend's
13 case depends upon, but in any event when you build in
14 all the other factors in the counterfactual, we submit
15 that that is wrong.

16 My learned friends have a fallback position in
17 relation to the State aid position, which is that they
18 say even if the Government had presented the two ROC
19 option as part of the State aid notification, of course,
20 by this stage, having gone through the consultation
21 process and everything that they did in the actual
22 before they made the State aid notification, what he
23 says is that, well, then there would have been greater
24 pressure from the Commission which would have led to a
25 decision to choose a smaller increase.

1 Now, just to break that down, that is a proposition
2 that involves the Tribunal accepting that in the
3 counterfactual the Commission would have rejected a
4 submission from the UK saying, firstly, "we have had an
5 independent assessment of costs undertaken which is
6 indicating a base case level of support of 2.4";
7 secondly, "various developers of offshore wind farms are
8 telling us that they need 2.0 ROCs to proceed with their
9 projects"; thirdly, "there are very significant degrees
10 of uncertainty in all of this which means we do not have
11 confidence in the central estimates", and, fourthly,
12 "there are reasons why we prefer the minimum banding
13 increments of 0.25 ROCs and so we have selected 2.0
14 ROCs", and then, just add to that, fifthly, "the Ernst &
15 Young analysis showing the 1.9 figure as a sensitivity
16 is on the basis of a 10 per cent hurdle rate, whereas
17 you, Commission, in your previous practice, have shown
18 us that you would accept higher hurdle rates".

19 In our submission, it is totally unrealistic to
20 suggest that in that context, which, for the reasons I
21 have developed, has to be assumed for this purpose, the
22 Commission would have said, "no, you must reduce to
23 1.9". So therefore we submit in the counterfactual the
24 same position as in the actual would have prevailed and
25 a banding level of 2.0 ROCs would have been awarded, and

1 therefore our answer to the ROC Question 2 is, "no".

2 That is everything I wanted to say in relation to
3 the main case advanced by my learned friend. I now need
4 to turn in relation to Question 2 to address the
5 fallback case which is, well, the 1.75. I can do that
6 briefly, because we submit that is wholly unrealistic,
7 and there are two essential reasons for that.

8 The first is that it would involve the Government in
9 the counterfactual selecting a banding level, the
10 central revenue estimate for which would be below the
11 base case levelised cost, so doing the marginal
12 comparison that my learned friend suggests is so
13 important, you would have a negative margin, and in
14 those circumstances the risks to bringing on sufficient
15 capacity would be obvious and fundamental, and given how
16 important that clearly was as part of the balancing
17 exercise, it is obvious in our submission that it would
18 just never have been countenanced by the Government.

19 The second reason that reinforces the first is that
20 even my learned friends do not suggest that in the
21 counterfactual the developers would have been requesting
22 support as low as 1.75 ROCs. His case is that it is
23 most likely that they would have asked for 1.9, and the
24 cost reduction due to the cartel on the relevant
25 assumptions is 0.1, and that is how he gets to 1.9.

1 There is no suggestion whatsoever that it is in any
2 sense likely that the developers would have gone down to
3 1.75 ROCs.

4 So, the counterfactual case assessing whether the
5 Government would have awarded 1.75 ROCs must necessarily
6 therefore also assume that in the counterfactual the
7 Government would have been only willing to increase the
8 ROC banding level to an amount which was 0.15 ROCs below
9 the amount the developers were seeking. That is the
10 difference between 1.9 and 1.75, obviously, and,
11 moreover, that the Government would have been doing that
12 in circumstances where the Ernst & Young report would be
13 demonstrating that their claim of 1.9 ROCs was
14 justified, because even on the high point of my learned
15 friend's case, the figures in the Ernst & Young report
16 come down to 1.9, and in our submission that is just so
17 unrealistic that it can, and should be readily
18 dismissed. And, indeed, it is to be noted that even my
19 learned friend's expert, Mr Druce, did not seriously try
20 and maintain the 1.75 figure once he had appreciated
21 that the cost elevation figure he had originally
22 calculated of £6.4 per megawatt was overstated. We give
23 all the relevant references to those aspects of
24 Mr Druce's evidence in paragraphs 72 to 74 of our
25 written closing. I do not need to go to them, but the

1 Tribunal will recall the evidence. That is all I need
2 to say about the fallback 1.75 case.

3 That brings me to -- and that is, therefore,
4 everything I need to say in relation to Question 2. On
5 either of my learned friend's alternatives neither work
6 and the answer is, "no".

7 That then brings me to the minimum cost elevation
8 which of course I am addressing without prejudice to
9 everything that I have said before, and Question 3,
10 because this is an issue that only arises if the
11 Tribunal has rejected our case in relation to Question
12 2, and has determined that in the counterfactual with
13 the cost elevation of around £4 per megawatt hour, it is
14 more likely than not that a reduced banding level would
15 have been awarded.

16 Now, in getting to that conclusion the Tribunal
17 would presumably have to have accepted my learned
18 friend's case that the best evidence of the allowance
19 that the Government was prepared to make in the
20 counterfactual is the allowance it was prepared to make
21 in the actual. In other words, his case that the reason
22 that we know that the Government in the counterfactual
23 would only have awarded 1.9 is because we should see --
24 we can see that in the actual they were only prepared to
25 allow this margin above the base case cost, and no more

1 than that would have been countenanced in the
2 counterfactual.

3 Now, on that premise, and if that is the basis, and
4 it is the only real basis that is advanced, as to
5 getting to -- the answer to Question 2 being "yes", the
6 minimum cost elevation cannot be an amount which reduces
7 the margin that was actually contemplated by the
8 Government as being permissible in the actual. The
9 whole premise of my learned friend's case is that that
10 margin was there to account for certainty, it was
11 regarded as appropriate, and in the counterfactual
12 therefore it must equally be regarded as appropriate,
13 and if one starts from assumed revenue of £144.6 per
14 megawatt hour, which is the figure for revenue at 1.9
15 ROCs, what one would be looking to see in terms of
16 calculating the minimum cost elevation is, therefore,
17 what would the counterfactual levelised cost estimate
18 have to be to deliver the same margin, on the logic of
19 my learned friend's case. If that is being assessed in
20 monetary terms, the answer is £4.4, because that is the
21 amount that if it is deducted from the base case
22 levelised cost in the actual of £144, would, in the
23 counterfactual, still leave a monetary margin of £5 per
24 megawatt hour between the revenue and the levelised cost
25 figure.

1 If, however, it is being assessed in percentage
2 terms, the answer is £4.25, because that is the amount
3 by which the base case levelised cost of £144 needs to
4 be reduced in order mathematically for there to be a
5 margin of 3.47 per cent preserved between the revenue
6 and the cost estimates. We can supply the Tribunal with
7 the maths on that if need be, but the problem with my
8 learned friend's suggestion that the minimum cost
9 elevation is £2.2 is that it does not operate so as to
10 deliver the same or even a similar margin as the
11 Government accepted in the actual. Indeed, even the
12 £2.5 figure, which is the one my learned friend uses in
13 paragraphs 177 and 179 of his closing to which he took
14 you yesterday, that only produces a margin of 2.19 per
15 cent, so his minimum cost elevation assumes, contrary
16 to, actually, the case that has led to the right answer
17 on his case in relation to Question 2, is that in the
18 counterfactual the Government would have been prepared
19 to award a lower margin, and we submit there is simply
20 no basis to getting to that answer on the logic of my
21 learned friend's case, which is the case that we have to
22 assume for the purposes of getting to the minimum cost
23 elevation.

24 THE CHAIRMAN: Sorry, just to understand that, a point that
25 you made in your submissions is, of course, this margin

1 has never, ever been calculated before.

2 MS DAVIES: Yes.

3 THE CHAIRMAN: So when you say in the counterfactual the
4 Government would have wanted to preserve the same 5 per
5 cent margin, is there a danger that you are adopting a
6 somewhat --

7 MS DAVIES: No, because I am presenting all this in the
8 alternative to my case. This only arises if the
9 Tribunal has accepted the Class Representative's case
10 that in the counterfactual the Government would have
11 been acting in a way which did not allow a margin
12 greater than was seen in the actual.

13 THE CHAIRMAN: Right. I see. So, the Government has never
14 calculated this figure, but the logic of a case that
15 leads to a successful conclusion for the Class
16 Representative on Question 2 is that that £5 margin was
17 the maximum --

18 MS DAVIES: That is the maximum that the Government would
19 have been prepared to countenance, and that, they then
20 say, is the reason why you get to 1.9 rather than 2
21 ROC/MWh, because at 2 ROC/MWh it would have been too
22 high.

23 THE CHAIRMAN: Okay.

24 MS DAVIES: I am presenting all of this without prejudice.

25 We say none of this arises, of course, but if you are in

1 this territory and you are doing it on the basis that,
2 actually, the actual tells you what is the most that the
3 Government would have been prepared to accept, then you
4 have got to consistently apply the same logic to working
5 out what the minimum cost elevation is, whereas the
6 problem with my learned friend's minimum cost elevation
7 is he does not do that.

8 THE CHAIRMAN: You say he changes horses in midstream,
9 effectively.

10 MS DAVIES: Exactly, because he jumps down and says, well,
11 actually, on his figures, well, they were said 2.19.
12 That just does not work.

13 I explored this with Mr Druce in his evidence, and
14 he accepted, in fact, that he could not have confidence
15 that a minimum cost elevation of £2.2 would have been
16 sufficient for essentially this reason, because it leads
17 to a smaller margin, and we give all the references to
18 that in paragraph 86 of our closing.

19 THE CHAIRMAN: Yes. It is not really within Mr Druce's
20 expertise, really, is it.

21 MS DAVIES: No, but I am -- the problem is the £2.2 has come
22 from Mr Druce.

23 THE CHAIRMAN: Yes.

24 MS DAVIES: That is the only place it has come from, and
25 because if you recall he did this sort of rather odd

1 exercise of rounding from 0.5s and so on and so forth
2 and that is how he got to £2.2, which is why I do also
3 draw attention to the fact that in cross-examination he
4 could not say that -- with confidence -- that that was
5 the figure that applied.

6 PROFESSOR ANTHONY NEUBERGER: Can I just clarify one other
7 point?

8 MS DAVIES: Yes, of course.

9 PROFESSOR ANTHONY NEUBERGER: This is all -- I understand
10 again it is a reserved case, but this is all based on
11 the assumption that the minimum ROC movement was 0.1 of
12 a ROC.

13 MS DAVIES: Yes. I was about to come to the 1.75. Yes.

14 PROFESSOR ANTHONY NEUBERGER: Okay. Fine.

15 MS DAVIES: So that is on my learned friend's primary case,
16 that the most likely outcome in the counterfactual is
17 that the Government would have gone to 1.9 ROCs/MWh.

18 THE CHAIRMAN: I think perhaps Professor Neuberger was
19 asking a slightly different question. When we were
20 asking about Question 3, I think it was a point I raised
21 with Mr Lask. If we do come to Question 3, in asking
22 what the minimum cost elevation would be, we have to
23 have in mind how granular the Government would be
24 prepared to go in terms of ROC -- awarding of ROCs. Mr
25 Lask said that from his perspective, 0.1 is as granular

1 as it gets. Is that your perspective as well?

2 MS DAVIES: Well, I think we have to take it in stages. You
3 are looking at the minimum cost elevation -- if you get
4 this far you are looking at the minimum cost elevation
5 in one of two scenarios. The first scenario, my learned
6 friend's primary case, is that the Government would have
7 been prepared to move to 0.1 granularity, and therefore
8 you then have to look at the minimum cost elevation in
9 terms of what would it have needed to be to move it by
10 0.1, and that is his primary case, because that is how
11 he gets to 1.9.

12 If, contrary to that, the Tribunal does not accept
13 that case but accepts his fallback case which is the
14 Government would have still been applying 0.25 ROC
15 minimum granularity, but because the revenue figure
16 would have been -- sorry -- the cost figure would have
17 been closer to -- even though below the revenue, the
18 1.75 figure, they would have gone for 1.75 ROCs, then
19 when you are looking at the minimum cost elevation you
20 have to be looking at it in terms of minimum granularity
21 of 0.25 ROCs, because it is that that would have
22 switched it to 1.75, and what you are trying to work out
23 is what is the minimum amount I have to take off the
24 base case levelised cost to bring it to a level that
25 means it is close enough to the 1.75 that the Government

1 would have actually gone to 1.75, and that is why, in
2 fact, we say in the unlikely event that the Tribunal
3 were to accept that fallback case, the minimum cost
4 elevation figure goes up, and I addressed that with
5 Mr Druce in cross-examination. The references are at
6 paragraph 86 of our closing, but because you need a
7 bigger reduction in the costs to get the cost figure
8 down to a level that would be below the revenue figure
9 with a margin, it is somewhere between £10 or £11.

10 THE CHAIRMAN: So, just so I have this right, we only get to
11 Question 3 if the Class Representative wins on Question
12 2. There are two ways she can win on Question 2.
13 Either the case on 1.9 or the case on 1.75. If she wins
14 on the case on 1.9, then I think you agree, 0.1 is as
15 granular as it gets.

16 MS DAVIES: Yes.

17 THE CHAIRMAN: If she wins on 1.75 then you say 0.25 is as
18 granular as it gets.

19 MS DAVIES: 0.25, but in that counterfactual you still must
20 assume that the Government would have been prepared to
21 allow a margin above the cost for the reasons that my
22 learned friend's case is advancing, so you actually need
23 a bigger minimum cost elevation. As I say, it is
24 somewhere between £10 and £11 to get the levelised cost
25 figure down to a sufficient position.

1 So, those are our answers in relation to Question 3,
2 should the Tribunal get there. I then need to deal with
3 Question 1, and particularly the Chairman's question,
4 whether it is necessary for the Tribunal to answer that.

5 There, I am afraid, we do take a different view to
6 my learned friend, if the Tribunal is against us on the
7 second question. If you find enough over on the second
8 question you do not need to answer either Question 1 or
9 Question 3, but if you are against us on the second
10 question then I am afraid we do submit you do need to
11 provide an answer to Question 1 for this reason: the
12 whole point of having a determination of the value of
13 commerce is so that in the eventuality that the ROC
14 causal route survives this hearing -- in other words an
15 answer in the Class Representative's favour on Question
16 2 -- at the trial in the CPO the Tribunal will be able
17 to apply any overcharge that is calculated in relation
18 to benchmark wind farms to the value of commerce to
19 reach a view as to whether the ROC case is, in fact,
20 made out, because, as you know, at the moment we are
21 operating on an assumption that there was an overcharge
22 of 26 per cent on all relevant products, and
23 installation costs, and it is that assumption which gets
24 to the cost elevation of £4.4 -- around £4 -- that we
25 are all accepting, applies, and that is a figure that

1 has been calculated by the various experts by looking at
2 the value of commerce for the benchmark wind farms,
3 working out what percentage of that is relevant to the
4 cartelised products and getting to that figure, so I am
5 afraid you do need -- if you are going to find against
6 us in relation to Question 2 so that going forward to
7 the trial the ROC issue in relation to the 2010 Order
8 remains live. At the trial we will be assessing what is
9 the level of overcharge that is -- should be plugged
10 into these figures to work out whether the cost -- the
11 minimum cost elevation has been met or not, ie your
12 Question 3, the answer to Question 3, and that means
13 that the value of commerce figures remain important.
14 That is why Question 1 was put into the ROC issue Order
15 in the first place. It is important in that context
16 that the value of commerce figures are split so that
17 they -- installation costs are separated out because, as
18 the Tribunal knows, there are different arguments in
19 relation to installation costs, and we submit that the
20 Tribunal should prefer Dr Moselle's analysis of it.
21 Mr Druce's analysis, as you will recall, was based on
22 his three key benchmark wind farms, but it is now clear
23 in light of all the evidence and effectively common
24 ground, that that is not the exercise that Ernst & Young
25 were engaged in. They were looking at six. Dr Moselle

1 just want to deal with what couple of points made by Mr
2 Lask specifically about the evidence of Dr Hesmondhalgh.

3 The first, sir, you will recall Mr Lask said
4 yesterday, and for your reference it is page 153 of the
5 transcript, but in response to a question from you, he
6 confirmed that they do invite you to reject
7 Dr Hesmondhalgh's evidence about the two wind farms, and
8 I just want to unpack that point so that the Tribunal
9 understands exactly where that point comes in.

10 The starting point is Dr Hesmondhalgh always, so
11 from the very beginning of this exercise, she always
12 used, for the purposes of the VOC calculations, the
13 £3.2 million per megawatt figure that EY used, and she
14 has been consistent throughout the proceedings in using
15 that number, and that number, as you will recall, was
16 EY's number based on the six wind farms.

17 The two wind farms out of the six therefore never
18 affected any of her calculations. The reason the
19 identification was relevant and important at the outset
20 was because there was a dispute between the experts --
21 Mr Druce had departed from the EY analysis and he
22 started by using a much higher CAPEX figure than the
23 £3.2 million. In fact, he never actually expressly
24 stated what figure he was using, and in
25 Dr Hesmondhalgh's second report at paragraph 22 she

1 explains that she has arrived at what that figure would
2 be. She puts it at either 396 or £5, but that is, in a
3 sense, neither here nor there.

4 THE CHAIRMAN: And he uses a higher figure than £3.2 million
5 which he derives as the cost of the three key or
6 significant wind farms or however you choose to call
7 them.

8 MR SINGLA: Correct, whereas Dr Hesmondhalgh always used the
9 EY number, and so the dispute between the experts was
10 whether it was appropriate -- Mr Druce, you will recall,
11 was accusing the other experts of having speculated and
12 said that it was improper to use the £3.2 million
13 because we did not know which of the six wind farms, and
14 so on, and what Dr Hesmondhalgh was saying that it is
15 plainly wrong to accuse us of speculation because not
16 only do we know which are the four, but she can work out
17 which are the two, and those were [REDACTED] and
18 Ormonde.

19 Now, we have dealt, in our closings, with Mr Druce's
20 oral evidence when he confirmed, in fact, what he meant
21 by accusing the others of speculation, and so on, but in
22 any event things have moved on, because the Class
23 Representative now puts its case on the basis that it
24 is, in fact, correct to use the EY analysis as the
25 starting point. So, in a sense, this point no longer

1 matters, but you can understand why it did matter to
2 begin with.

3 To the extent the Tribunal does want to reach a view
4 on this, we submit that Dr Hesmondhalgh is plainly right
5 as regards the identification of the two out of the six.
6 She has tracked that through and I will not take up time
7 now but she has explained in her reports how she has
8 arrived at the £3.2 million figure, and the best that
9 Mr Druce could say in relation to that exercise in the
10 Joint Memorandum, is he says: I do not accept it because
11 she has arrived at £3.3 million rather than £3.2
12 million, so it is all speculative, and, in fact, in the
13 joint memo, she has actually adjusted her figures and
14 arrives at £3.2 million, so we say to the extent any of
15 this matters which it actually does not, but she is
16 plainly right, and therefore if Mr Lask is asking you to
17 make a finding on this we say, on the balance of
18 probabilities, that she is likely to have alighted upon
19 the correct two.

20 THE CHAIRMAN: But from your perspective, given that, as you
21 characterise it, matters have moved on, you do not
22 positively invite us to conclude that Dr Hesmondhalgh
23 has identified the "missing" two wind farms correctly?

24 MR SINGLA: You do not need to, but I do take issue with the
25 idea that you should expressly reject what she has done.

1 There is just no foundation. What Mr Lask said
2 yesterday misses the point that (a) it does not matter
3 and that (b) he actually has no material to counter what
4 she has done. It was not even put to her that her
5 identification of those two was wrong, so we really
6 would ask the Tribunal not to make a specific finding
7 against her.

8 The next point relates to cost elevation, and you
9 have heard Mr Lask say yesterday the Class
10 Representative is content for you to proceed on the
11 basis of £4, and you heard Ms Davies said that Prysmian
12 agree with that, and we also agree with that. So, from
13 our perspective you can proceed and test -- I think as
14 Ms Davies put it -- you can test either side's analysis
15 by reference to £4, but here we do take issue with the
16 suggestion in the Class Representative's written
17 closing, paragraph 117, they say that you should reject
18 Dr Hesmondhalgh -- she comes up with a figure of £3.70.
19 They describe her as an outlier and they say there is a
20 fundamental flaw in her analysis and I just want to say
21 something about that, because the reason she is at £3.70
22 is she has done a slightly different exercise to the
23 other experts.

24 So if one just takes Dr Moselle, he has looked at
25 the cost elevation on the basis of the four wind farms

1 and he arrives at £4.20. I think you know Dr Shamsi has
2 done something slightly different, but if one just looks
3 at what Dr Moselle has done, he has taken the four wind
4 farms and he arrives at a £4.20 cost elevation figure.
5 The reason Dr Hesmondhalgh has arrived at a slightly
6 different figure is because in addition to using the
7 four she has also used two additional wind farms, and to
8 be clear, that is not the same set of six as EY looked
9 at. It is just a point of detail there. What she has
10 done is she has taken the four, but because we do not
11 have the data for [REDACTED], she has
12 substituted in [REDACTED].
13 That is why she arrives at a slightly lower figure, but,
14 with respect, the key point here is not that she is in
15 some way an outlier, it is, in fact, that the problem
16 here is that it is the Class Representative's case that
17 has shifted quite materially on this point, and the
18 original outlier was Mr Druce, because we have
19 Dr Moselle with his £4.20. We have Dr Hesmondhalgh with
20 her £3.70 and Dr Shamsi with £4.50. That is where the
21 aligned parties' experts were at. It was Mr Druce who
22 was the outlier because he was running his analysis
23 based on his three wind farms that led to a cost
24 elevation of £6.42, and that was the figure that he was
25 relying upon all the way through to the Joint

1 Memorandum. In the Joint Memorandum you will recall
2 that he then says: well, I can see the sense of actually
3 using the EY analysis, but he is still at the Joint
4 Memorandum stage riding both horses -- £6.42, and then
5 his £4 figure -- so it is very important to understand
6 in my respectful submission, it was only actually only
7 when the Class Representative produced its written
8 opening for this trial, paragraph 74 to 75, they sort of
9 blithely say, well, it is common ground between the
10 experts because it is £4, and it is actually quite
11 important for the Tribunal to understand, insofar as it
12 is being suggested that Dr Hesmondhalgh is the outlier;
13 with respect, it is actually Mr Druce who went
14 completely off piste and then adjusted his position, but
15 we are content, as Ms Davies said, as Prysmian are, we
16 are content for you to proceed on the basis of £4, but
17 that history is material.

18 Then the final point I just wanted to deal with very
19 briefly is there is a particular criticism of
20 Dr Hesmondhalgh at footnote 94 of the Class
21 Representative's submissions where they say she was
22 "flummoxed" at a question Mr Rothschild put on
23 administration costs, and, with respect, that is wishful
24 thinking, and I do not want to take up time, but if I
25 just refer you to pages 117 to 119 of the Day 4

1 transcript, she very reasonably and in my submission
2 completely professionally said she was unwilling to
3 speculate as to what those administration costs were,
4 and, indeed, the way the question was put, Mr Rothschild
5 was only saying it was a possibility that the costs were
6 due to EY's additional costs, so Ms Davies has addressed
7 you on the substance of that point, but I just wanted to
8 deal with the criticism of Dr Hesmondhalgh.

9 Unless I can assist further, we are in very much the
10 same positions as the Prysmian parties.

11 THE CHAIRMAN: As I look at my notes on your written closing
12 I see you have answered the question that I had for you,
13 which was on the two missing wind farms, and
14 Dr Hesmondhalgh's calculation, so thank you very much.
15 I do not have any questions.

16 Mr West?

17 Submissions by MR WEST

18 MR WEST: Could I also begin with the question of the
19 assumption of a £4 reduction and the need for the
20 Tribunal to determine the value of commerce, and just
21 introduce one further element here which is Question 4?
22 Question 4, we can remind ourselves of it at bundle G,
23 tab 3, page 9 {ROC-G/3/9}, you see it is a question that
24 only arises in the London Array proceedings, and it
25 invites the Tribunal to apply, as it were, the

1 overcharge it has found in London Array to the minimum
2 cost elevation and see if the latter is met in order to
3 determine the question whether there would have been a
4 different ROC purely for the purposes of the London
5 Array proceedings.

6 Now, Question 4 may, of course, never arise. It
7 only arises if the Tribunal answers "yes" to Question 2,
8 and if the Tribunal answers "yes" to Question 2 but says
9 the Class Representative needs the full 26 per cent, the
10 full £4 reduction in the counterfactual, then again
11 Question 4, whilst it arises that the answer is clear
12 because, of course, London Array does not allege the 26
13 per cent overcharge or anything like it, but if Question
14 3 arises and the Tribunal holds that something
15 significantly less than £4 is sufficient to lead to a
16 different counterfactual ROC banding, then we are in the
17 territory of Question 4, and the difficulty here is that
18 the Tribunal has not really heard any submissions, for
19 example, about which of the three aligned parties' value
20 of commerce is to be preferred, or whether it should be
21 £4 or £4.40. It may be quite unlikely to make a
22 difference but I cannot say definitely, standing here
23 now, that it will not make a difference, and I do not
24 want to find that I have agreed to £4 only to find later
25 that if it was £4.40 we would have won Question 4.

1 What the Tribunal has ruled in relation to Question
2 4 in the PTR Order, if we can look at this, it is
3 {ROC-G/10.1/9}, I believe -- sorry, that is the wrong
4 page. Paragraph 9? {ROC-G/10.1/3}. Yes. So, Question
5 4 is the same as issue 6 on the List of Issues for the
6 London Array trial, and it says that the respective
7 experts shall seek to agree the answer to this if it
8 arises, following the hand down of the Tribunal's
9 judgment, and if they cannot agree each expert shall
10 submit a short further paper setting out its views on
11 the same. What I was going to propose is that in the
12 event any of the parties -- certainly the parties to the
13 London Array have anything further to say about this,
14 besides the level of the cost elevation or the value of
15 commerce, if it matters, that that be addressed in the
16 context of those submissions, and I entirely take
17 Ms Davies' point that this also applies, if it arises,
18 in the Spottiswoode proceedings, and this could perhaps
19 be extended to them as well. As I say, it is perhaps
20 unlikely to arise, but if it does arise, given that it
21 has not been the subject of submissions to date, it
22 could perhaps be dealt with in that way.

23 Could I then address briefly the position of
24 Ms Shamsi which I feel I should address just out of
25 fairness, given the criticism that was made of her by my

1 learned friend Mr Lask? She is alleged to today have
2 shown a remarkable lack of curiosity in failing to ask
3 her clients about their underlying reasoning by which
4 they decided to request 2.0 ROCs back in 2008/2009.
5 That is transcript Day 5, page 23, line 12.

6 Now, the phrase "lack of curiosity" comes from the
7 Trucks case which is -- I do not suggest we look it up
8 but it is in authorities tab 25. My submission is that
9 the facts in that case are in no way analogous to what
10 we have here. The issue in that case was overcharge, or
11 the principal issue, there were also pass-on issues.
12 Clearly that was a pleaded issue, and disclosure had
13 been given on it. The position of the Defendant's
14 expert, Professor Neven, if that is how you say it, was
15 that there was no overcharge, even on a G to G basis,
16 that is an industry-wide basis, by reason of the cartel.
17 Professor Neven's clients were, of course, the
18 cartelists. They had already been found to be
19 cartelists in the Commission's Trucks decision. That
20 gave rise to a conundrum, which is this: why had the
21 Defendants run enormous risks in participating in an
22 unlawful cartel for many years if, which was the
23 Defendant's expert's evidence, they had not benefited
24 from it in any way.

25 The obvious question to which his evidence gave rise

1 is: why had your clients done it, then? That is at
2 paragraphs 305 to 307 of the judgment, page 128. The
3 term "lack of curiosity" appears in paragraph 254 where
4 Professor Neven is accused of a lack of curiosity in
5 failing to have asked his clients, well, why did you do
6 this for fourteen years if you stood to gain no benefit
7 from it at all?

8 That was, of course, directly relevant to the
9 credibility of Professor Neven's evidence, because
10 absent some other explanation for having been in the
11 cartel for a decade or longer, the obvious explanation
12 was that they had made some money from being in the
13 cartel, in other words that there was an overcharge.
14 None of that has anything at all in common with this
15 case.

16 Ms Shamsi's evidence on this point, Shamsi 1,
17 paragraph 4.35, Bundle D, tab 3, page 73, was based on
18 her reading of the DESNZ disclosure and based on those
19 documents she pointed out that the reasons industry had
20 given to DECC at the time as to why they needed an
21 increase in support were unrelated to the cartel
22 {ROC-D/3/73} because they related to matters like
23 increased turbine costs, increased foundation costs,
24 adverse Forex movements and so on.

25 In my submission she was perfectly entitled to make

1 that observation based on those documents. There was no
2 equivalence at all to the question of, well, why did
3 they do it then. What they did was to request an
4 increase in subsidy, and the reasons are set out in the
5 communications with DECC.

6 There was no reason for Ms Shamsi to go beyond that,
7 and to make further investigations of her own client,
8 because that story stands up on its own. There was no
9 question in this case of Ms Shamsi being called upon to
10 provide a motive for wrongdoing. Ms Shamsi's clients
11 are wholly innocent -- London Array is not a cartel.
12 London Array is the victim of the cartel. It has
13 committed no wrong, calling for any explanation of any
14 kind at all. Furthermore, as my friend now accepts, the
15 allegation that the wind farms would have sought fewer
16 ROCs in the counterfactual was never pleaded in this
17 case, and Ms Shamsi was not, therefore, on notice that
18 it was a point she ought to have been investigating with
19 her clients beyond the DESNZ documents which had been
20 disclosed.

21 The importance of industry's requests appeared from
22 the DESNZ disclosure which was first provided, I
23 believe, in August 2024. If, having seen those
24 documents, the Class Representative thought it was
25 important to go behind those documents and seek

1 disclosure of the wind farm's internal thinking, then
2 she could, of course, have sought disclosure on that
3 point then, but no such request was ever made. So, what
4 we have here, in my submission, is the Class
5 Representative accusing Ms Shamsi of a lack of curiosity
6 and failing to have made proper investigative steps,
7 whereas, in fact, the party who has displayed an obvious
8 lack of curiosity about all of this is the Class
9 Representative herself, so those criticisms are rejected
10 entirely.

11 Although they do not actually go anywhere anyway,
12 they would only potentially be relevant if my friend was
13 seeking an adverse inference against Ms Shamsi or my
14 clients for failing to put relevant material before the
15 Tribunal. That is hopeless because it was not pleaded,
16 but my friend accepted yesterday he is seeking no such
17 inference, it would not help him because it does not
18 apply to the other aligned parties who are the only
19 other parties to Ms Spottiswoode's claim.

20 That leaves him with saying that an inference can be
21 drawn based on the evidence the Tribunal has seen that
22 2.0 ROCs -- less than 2.0 ROCs were being sought by
23 industry, and my friend Ms Davies has covered that. I do
24 not have anything to add to that, save, perhaps, to
25 clarify what my pleading point is if I have one. I do

1 not say that it is not open to my friend to argue for
2 such an inference, based on the pleadings. He is
3 entitled to do that, although there is nothing in it,
4 but I do say that having failed to plead it he cannot
5 criticise my client or my client's expert for failing to
6 make further investigations into it.

7 That is Ms Shamsi.

8 Could I just address very briefly the numbers? In
9 particular the number of £3 billion which my friend
10 mentioned several times yesterday as being the cost of
11 the increase in support under the ROC's Order of 2010,
12 and that is, indeed, the figure which appears in the
13 contemporaneous documents, but that is an aggregate
14 figure, and it is important in my submission to put it
15 into context. In the first place, that figure would be
16 borne over a period of 20 years, which is the duration
17 of the ROC Order, so that brings it down on a per annum
18 basis, by my calculation, to something like
19 £150 million. It is spread across all UK
20 electricity-paying households, which I understand on the
21 Class Representative's case there are about 30 million,
22 so that brings it down to £5 per annum per household.
23 That figure relates to the whole of the 0.5 for ROC
24 whereas my friend's case is now focused on 0.1 of a ROC
25 which brings it down to £1 per annum per household, so

1 it is a very large figure looked at in aggregate, but it
2 is important for the Tribunal to realise that that
3 figure would be split between a large number of
4 households over a period of very many years, and, of
5 course, we say that by reason of the prevailing
6 uncertainty, even that increase of £1 must be put in the
7 context that depending on how costs and revenues in fact
8 transpired, the figure could have been a pound or two
9 higher anyway or a pound or two lower.

10 Can I just briefly address the position of
11 Mr McNeal?

12 My friend said yesterday that he had made clear in
13 opening that it was his position that Mr McNeal's
14 evidence about 0.1 increments applied also to the period
15 prior to Mr McNeal joining the department, and he said
16 as a matter of fairness to him, if that was disputed
17 then I should have made my position on that clear before
18 Mr McNeal gave his evidence.

19 Could I ask the Tribunal to look at {Day1/177:11}?

20 "Finally my friend Mr Lask said that Mr McNeal
21 supports the use of a 0.1 increment in the award of
22 ROCs. We will hear from Mr McNeal tomorrow but
23 Mr McNeal was not working for the department at the time
24 of the 2010 ROC obligation Order when that was being put
25 together and implemented, so he is referring to a later

1 point in time, and we know that 0.1 ROCs was used in
2 2013, so in my submission it is important to clarify
3 that Mr McNeal was talking about a different time period
4 when he refers to those increments".

5 I made it perfectly clear to Mr Lask prior to
6 Mr McNeal giving his evidence, and Mr Lask chose not to
7 cross-examine Mr McNeal about it.

8 In any event, the position is clear, I say, in
9 relation to the 2010 ROC Order from the documents, and
10 those, of course, were documents which Mr McNeal had not
11 seen when he gave his witness statement. If we look at
12 that in {ROC-C/1/2} at paragraph 7 he says:

13 "I have not referred (nor been referred) to any
14 documents (by Hausfeld or otherwise) for the purpose of
15 providing the evidence set out in this witness
16 statement".

17 That, of course, is in accordance with the current
18 practice under the Tribunal's Practice Direction
19 concerning trial witness statements, so that was given
20 in ignorance of the contents of the documents on the
21 point that we have been looking at in detail during the
22 course of this trial.

23 Those were all the submissions I was proposing to
24 make.

25 THE CHAIRMAN: No questions for you. Thank you very much,

1 Mr West.

2 Submissions by MR CARRALL-GREEN

3 MR CARRALL-GREEN: Sirs, NKT also adopts everything that has
4 been said on behalf of Prysmian and that includes, sir,
5 your question about the £4 and whether the precise cost
6 elevation makes a difference, whether or not the
7 Tribunal needs to worry about that and also on the value
8 of commerce. I should say that I do not have any expert
9 evidence of my own, and so insofar as there is any
10 remaining debate amongst Nexans and Prysmian on the
11 value of commerce I have to adopt a neutral position on
12 that, but I do not think anything turns on that.

13 So, having adopted everything that has been said on
14 behalf of Prysmian I will just finish with a coda
15 responding to two of the attacks that were made on my
16 written Closing Submissions by Mr Lask yesterday. I
17 maintain my position articulated in oral opening and in
18 written closing that, really, this case is now just
19 about two questions. The first question being about the
20 nature of the exercise, and the second one being about
21 the use of 0.1 increments, and the two attacks on my
22 written submissions were focused on those topics, one
23 each.

24 The first attack was that I was wrong to say that
25 the contingency planning document that the Tribunal will

1 remember -- it is behind tab 179 -- was more focused on
2 the risk of State aid clearance not being granted in
3 time than it was on the risk of State aid clearance not
4 being granted at all, so I had said that it was really
5 about timing, that was the Government's major concern,
6 and the point taken against me is no, there was a real
7 risk that State aid clearance would not be given at all.

8 Now, I have set out in writing my position on the
9 interpretation of that document and the Tribunal will
10 make of it what it will, but there is further context to
11 the risk of State aid clearance not being given that I
12 just wanted to address. In fact, Ms Davies covered it
13 earlier today, and that context comes from the email of
14 Mr Germaine which the Tribunal will also remember of the
15 Commission, where Mr Germaine said that he was broadly
16 happy, or "fine overall", his words, with the State aid
17 notification, and he proposed the use of the simplified
18 procedure. I just wanted to take that point about the
19 simplified procedure to its conclusion. If we could
20 look at the [REDACTED] which is
21 behind tab 143 on page 1 {ROC-E/143/1}, you see there,
22 sirs, that the [REDACTED]

[REDACTED]

[REDACTED] and we have the
25 simplified procedure notice in the Authorities Bundle

1 behind tab 29, and the relevant point {ROC-AUTH/29/5}.
2 You will see there, sirs, that this point applies to the
3 prolongation and/or modification of existing schemes,
4 and if we turn back one page to the paragraph to which
5 point (ix) belongs which is (b), you will see that that
6 falls within the broader heading of "measures
7 corresponding to well-established Commission
8 decision-making practice". Then if we turn back to
9 paragraph (i) of the notice which explains what is going
10 on, on page {ROC-AUTH/29/1}, I am looking at the second
11 sentence beginning on the fourth line:

12 "Certain categories of notified aid are normally
13 approved without raising any doubts as to their
14 compatibility with the common market ..."

15 So the point is that this aid was within that
16 category. So, the notion that there was a serious risk
17 that State aid clearance was not going to be forthcoming
18 has been overstated by the Class Representative.

19 Sir, the second attack that was mounted on my
20 written submissions was against my argument that
21 developers appear to have been driven towards selecting
22 2.0 ROCs per megawatt hour in their requests because
23 there was a pre-existing band at 2.0 ROCs per megawatt
24 hour. Mr Lask called that argument "unevidenced and
25 detached from reality".

1 Now, to recap, the evidence of the requests is that,
2 first of all, there were requests for 2.0 ROC/MWh from
3 [REDACTED]. Second,
4 there was one request for 2.5 ROC/MWh from [REDACTED] and
5 that is the [REDACTED] email, and finally, [REDACTED] said
6 there should be no change, so stick at 1.5 ROC/MWh.

7 So, the evidence is that all seven developers appear
8 to have reached figures rounded to the nearest half ROC,
9 and that five developers asked for 2.0 ROC/MWh, and
10 further, those five asked for the 2.0 ROC/MWh, despite
11 the fact that reasonable assumptions such as those made
12 by EY in its analysis could have justified requests for
13 more, and indeed Mr Lask made a point of this
14 yesterday -- we do not need to turn it up but it is at
15 page 25 of the transcript -- saying that developers had
16 not pitched as high as they could possibly go, so the
17 Tribunal is offered two alternative explanations for
18 this -- NKT's argument, and as I understand it
19 Prysmian's argument as well -- is that various
20 developers coalesced under the figure of 2.0 because it
21 was a pre-existing band under the 2009 Order. They knew
22 that was a band that was available that had been
23 approved previously, and it made sense for them to ask
24 to be notched one level up. The Class Representative's
25 case, on the other hand, is that the developers did

1 their own cost and revenue analyses examining their own
2 financing structures and inputting their own best
3 estimates based on their own data, all of which would
4 have varied from developer to developer, and despite the
5 differences, the Class Representative's case is that
6 they did not reach different conclusions -- one asking
7 for 1.9 ROC/MWh, one asking for 2.1 ROC/MWh and another
8 2.2 ROC/MWh. No. Instead, by some coincidence, they
9 all arrived at exactly the same figure of 2.0 ROC/MWh.
10 The question for the Tribunal is simply which of those
11 accounts is the more plausible. That is all I wanted to
12 say, sirs, unless you have any further questions.

13 THE CHAIRMAN: I will look at my notes on your written
14 closing. (Pause)

15 Yes, Mr Lask?

16 Submissions by MR LASK

17 MR LASK: Sir, I am very happy to start immediately, but --

18 THE CHAIRMAN: Yes, that is fair enough. Shall we come back
19 at ten past to give you ten minutes?

20 MR LASK: Thank you.

21 (3.02 pm)

22 (A break was taken)

23 (3.11 pm)

24 THE CHAIRMAN: Yes, Mr Lask?

25 MR LASK: Good afternoon.

1 I propose to address a number of key evidential
2 points raised by my learned friend Ms Davies this
3 morning and earlier this afternoon. I am obviously not
4 intending to address every point. When I do not deal
5 with a point I invite the Tribunal to assume that I rely
6 on my submissions made yesterday and in writing. I
7 will, of course, seek to minimise repetition.

8 Dealing first with the 2009 Order process which
9 formed the first part of Ms Davies' submissions, the
10 Tribunal will recall my first point from yesterday, my
11 first and most obvious point, which was this: given that
12 the evidence that the £5 margin -- sorry -- given the
13 evidence that a £5 margin was a serious concern in the
14 factual for 2010, the suggestion that larger margins
15 were not such a concern in 2009 simply does not assist.
16 Indeed, my learned friend's essential submission this
17 morning on the 2009 process supports our position on
18 that, because she said ultimately that her Table 3
19 demonstrated that the assessment in 2009 was not an
20 exact science, and did not involve any significant
21 degree of precision. We entirely agree, but what we do
22 not agree with is the following conclusion that
23 Ms Davies seeks to draw, which is that the £9 margin in
24 the counterfactual for 2010 would not have set alarm
25 bells ringing because the alarm bells were not ringing

1 in 2009, and that is simply a non sequitur, in my
2 submission. It is plain on the evidence that a £5
3 margin did set alarm bells ringing in the 2010 factual.
4 Ms Davies did not suggest that we had misinterpreted the
5 evidence on that, and in my submission a £9 margin in
6 the counterfactual would not have stopped those bells
7 from ringing, it would have caused them to ring louder.

8 To be clear, this does not rest on the assumption
9 that Government would have been comparing a £5 margin to
10 a £9 margin in the counterfactual. That is not and has
11 never been our case. Our case is simply that the best
12 evidence of how Government and the Commission would have
13 reacted to a significant margin in a 2010 counterfactual
14 is how they react to the margin in a 2010 factual, and
15 it stands to reason, in my submission, that a larger
16 margin would have been a significant concern.

17 Ms Davies also said that the 2010 process did not
18 involve any greater degree of precision than the 2009
19 process, but in my submission that is flatly
20 contradicted by the fact that the 2010 decision was
21 based on a comparison of central estimates, and an
22 express consideration of the margin between the two,
23 whereas there was no such thing in the 2009 process.

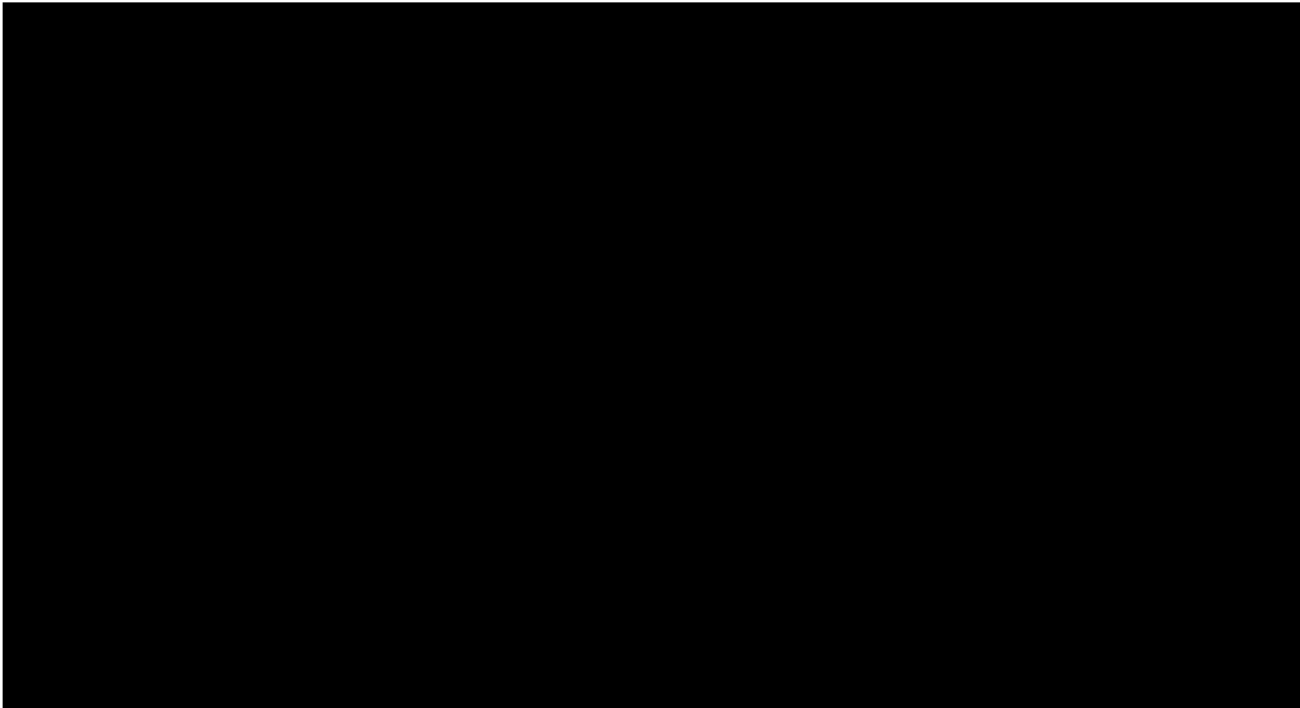
24 Finally on this, Ms Davies submitted that the 2009
25 Order was anticipated to involve an increase to

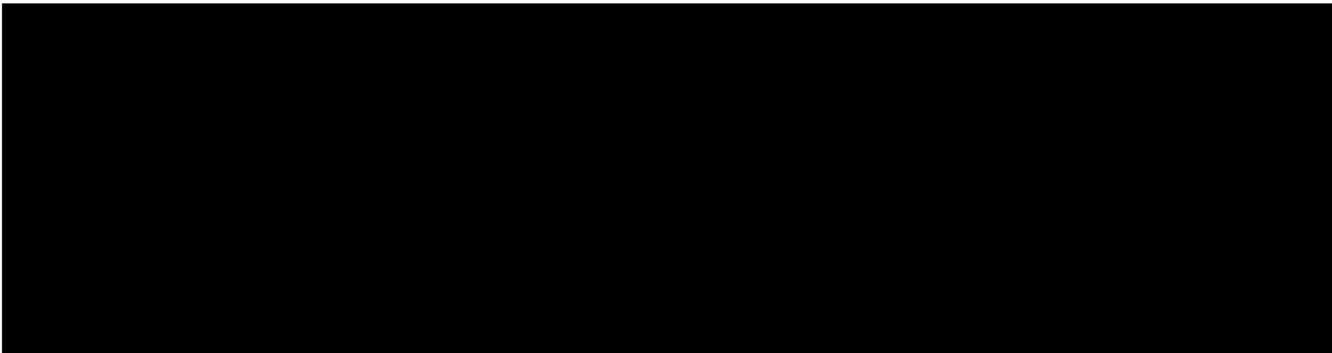
1 consumers, an increase in costs to consumers, of some
2 £1.7 billion, and she referred to paragraph 37 of the
3 document at {ROC-E/59/11}. It should be noted that this
4 was across all technologies, that that was the 2009
5 process. The anticipated increase in 2010 of £2.5 to
6 £3.5 billion was an additional increase on top of the
7 existing £1.7 billion, and it arose solely from a change
8 to the banding level for offshore wind. It is therefore
9 unsurprising that the impact on costs to consumers was a
10 greater concern in 2010. That is one of the reasons why
11 the over-compensation assessment was more granular in
12 2010.

13 Now, just before the break Mr West broke the
14 estimate down on a per annum and per household basis and
15 suggested that it was quite small when looked at from
16 that perspective. That does not get around the point
17 that Government itself considered this cost impact to be
18 an important consideration. The contemporaneous
19 documents are shot through with evidence that Government
20 treated this as a weighty factor in its assessment.

21 I turn next to EY's analysis, and a central plank of
22 my learned friend's submissions from this morning was
23 that the IRR -- the hurdle rate in Figure 11 of EY's
24 report was the output from using 2.0 ROCs, not the
25 input, and her point, her ultimate point, was that once

1 this is accepted there is no basis for concluding that
2 Figure 11 or Figure 13 would have shown a 1.9 result in
3 the counterfactual, assuming that the developers were
4 still asking for 2 ROC/MWh in the counterfactual, but
5 the flaw in that submission is that it entirely ignores
6 what EY itself says about the sensitivity in the final
7 report. Instead, it relies entirely on the -- on one
8 passage in the response that EY gave to the Government's
9 ITT a few months earlier. I would just like to take you
10 back to the final report if I may. It is at
11 {ROC-E/112/3}. Zoom in, please, to the bottom of the
12 page. Sorry, if you could just zoom out just a little
13 bit so that we can see the immediate heading (inaudible
14 speech).






6 THE CHAIRMAN: So, I mean, there is -- you point to perhaps
7 a difference between what was said in the ITT and what
8 they actually did.

9 MR LASK: Yes, and I submit that the latter is obviously
10 more important.

11 THE CHAIRMAN: So, if they did not follow the script, or if
12 they did not follow the ITT in the factual you say they
13 would not have followed it in the counterfactual either.

14 MR LASK: Exactly. Just to make the point good, I would
15 like to show you a couple of passages from this final
16 report. The next one is on page {ROC-E/112/11}.
17 (inaudible speech). It is the same passage (inaudible
18 speech).

19 Then if we go to Figure 11 itself on page 20
20 {ROC-E/112/20} you will see under the subheading



25 Then beneath that, Figure 11:

[REDACTED]

3 Then underneath the Figure, if we scroll down, we
4 see:

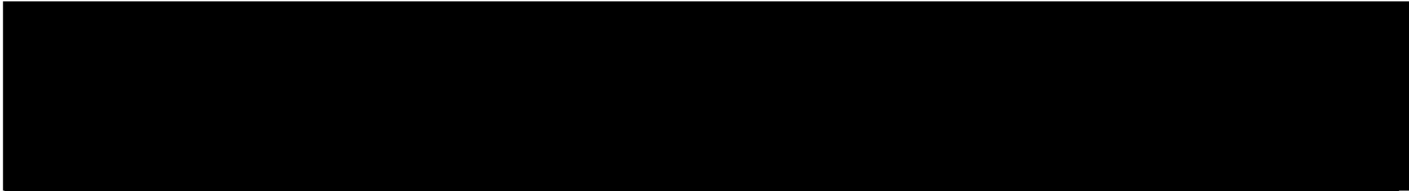
[REDACTED]

9 So that makes very clear, in my submission, what is
10 going on, and Ms Davies did not deal this morning with
11 these parts of EY's report. In making these submissions
12 she relied entirely on the ITT response, but if we could
[REDACTED] even -- sorry, just another point, [REDACTED]

[REDACTED]

23 Then if we go to the [REDACTED] at {ROC-E/53/9},
24 please. I took you to these passages yesterday. This
25 is the section where EY sets out how it is intending to

1 meet DECC's detailed objectives. In (d) at the bottom,
2 if you could zoom in on that:

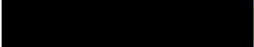



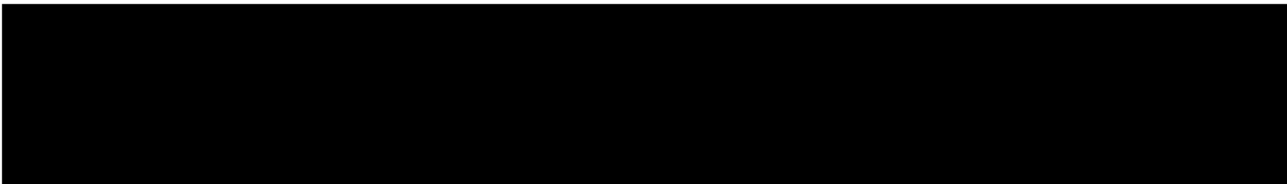
6 That is the same point.

7 Then the passage that Ms Davies relies on is on page
8 12 {ROC-E/53/12} under (g), and she relies particularly
9 on the reference to outputs from our economic analysis,
10 and I accept it is ambiguous, but ultimately what
11 matters is what EY did, not what it said it might do in
12 January 2009.

13 Finally, of course, Figure 14 in the final report
14 would have been lower -- the sensitivities would have
15 been lower -- and Ms Davies said this morning that
16 Figure 11 was the only building block for our case on a
17 lower figure than 2 ROC/MWh appearing in EY's
18 sensitivities. As I submitted yesterday, the final two
19 bars of Figure 14 would have been 2 and 1.8 ROCs/MWh in
20 the counterfactual. The Government would have taken
21 that into account.

22 On this same point, my learned friend also referred

 you to the EY annex at {ROC-E/104/54}. 



1 [REDACTED] If, in fact,
2 the 2.0 ROCs were driving the IRR, then it would say the
3 IRR required to deliver a specified number of ROCs.
4 That is what my learned friend needs it to say, and it
5 does not, either here or in the final report.

6 Just while we are on this document, if we look at
7 page {ROC-E/104/43}, at the [REDACTED], this just
8 further confirms the point. You will see the box in the
9 top half, in the middle, [REDACTED]

[REDACTED]

11 [REDACTED] and then
12 that feeds into the ROC banding calculation, so in my
13 submission the position could not be clearer.

14 If we could then go back to the EY report, please,
15 Figure 14 at {ROC-E/112/22}, and Ms Davies made the
16 point that the final bar, 1.9 ROCs -- well, it says 1.9
17 ROCs in the factual, but the ROC range referred to by
[REDACTED] Government and EY did not include this, [REDACTED]

[REDACTED]

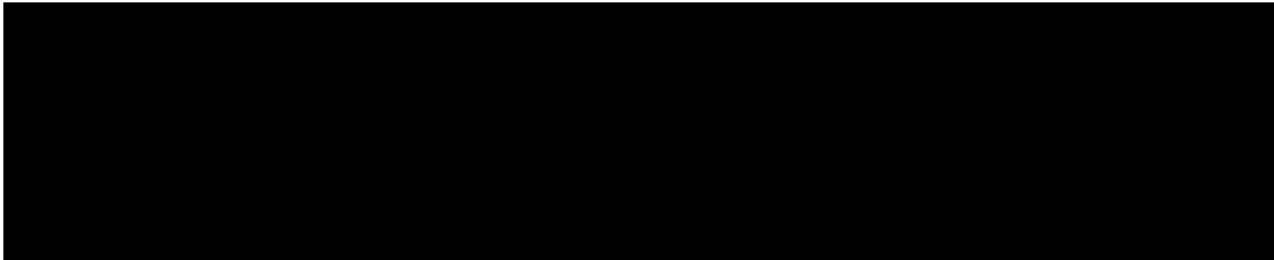
21 [REDACTED] and the obvious inference is that Government
22 considered the 44 per cent load factor in that final bar
23 to be too high, because the cost estimate derived from
24 this sensitivity, £124 in that final bar, fell outside
25 the range, cost range, that the Government relied on in

1 the State aid documents, so it was not including that in
2 its costs range. It did not think £124 was a realistic
3 lower bound for costs. That is why it did not adopt the
4 1.9 ROC level in the factual.

5 Then my learned friend's banding -- sorry --
6 rounding point, Ms Davies said that EY's base case
7 banding level would have been the same in the
8 counterfactual and that there simply was not an obvious
9 mathematical reduction going on, and the primary answer
10 to that is the one I gave yesterday. In short, the
11 reason that costs of both £150 and £144 produced a
12 banding level of 2.5 ROC/MWh as between the provisional
13 annex and final report was because EY's view as to the
14 number of ROCs required to cover a given level of costs
15 changed as between the provisional analysis and the
16 final report, but there is a further reason why my
17 learned friend's argument fails, and it is this: her
18 argument is that the reason 2.5 was offered as the
19 required banding level both for the £150 cost estimate
20 and the £144 cost estimate was due to rounding, and it
21 must follow from that that whatever the true number of
22 ROCs required to cover costs of £150, it was rounded to
23 2.5 ROC/MWh, and whatever the true number of ROCs
24 required to deliver £144 was also rounded to 2.5
25 ROC/MWh, but if both of those are required, it is most

1 unlikely that the true number of ROCs required to cover
2 £140, namely the counterfactual cost, would also round
3 to 2.5, because that would require the Tribunal to
4 accept that a difference of £10 in the cost estimate
5 made no difference to the required banding level on EY's
6 analysis because it was rounding, but that is impossible
7 to reconcile with EY's results, and we have Figure 14
8 open still, and one sees from Figure 14 that at each
9 step -- go from left to right -- at each step a cost
10 difference of between £3 and £4 changes the required
11 banding level by 0.1. See, for example, in the first
12 two bars, costs go down from £144 to £140, and the ROC
13 banding goes down by 0.1. The next -- the bars two and
14 three -- down from £140 to £137, and again it drops by
15 0.1.

16 If we go over the page, EY says this in terms at the
17 top of the page:



22 So it cannot be right that this was simply rounding,
23 because that would be incompatible with the results we
24 actually see in EY's report.

25 Turning, then, to the State aid process, my learned

1 friend submitted that the Government's response to
2 Question 11 was merely drawing the mathematical
3 comparison between the two central estimates and
4 explaining why, as between the 2.0 ROCs Government
5 selected the higher level, but in my submission that is
6 to unfairly underplay the importance of Government's
7 explanation because its answer to Question 11 was
8 seeking to address the Commission's core concern around
9 over-compensation and in particular the margin between
10 £144 and £149 and the answer given explains why
11 Government considered that margin to be appropriate and
12 therefore why it felt able to award 2.0 ROCs, and,
13 moreover, it is consistent with the explanations given
14 by Government in the State aid paper at {ROC-E/138/1}
15 and in the amended question 8 at {ROC-E/140.1}, neither
16 of which my learned friend took you to this morning.

17 The content of the Government explanation is equally
18 important because what Government says there is that
19 revenue at 2 ROC/MWh is marginally above cost, whereas
20 revenue at 1.75 is some way below, and so what the
21 Government is suggesting is that revenue at 2 ROC/MWh is
22 only a little bit of up costs, and in any event, costs
23 are closer to revenue at 2 ROC/MWh than they are to
24 revenue at 1.75, but as I submitted yesterday, that
25 explanation would not have been available to Government

1 in the counterfactual. Government could not have
2 justified its decision on that basis either to itself or
3 to the Commission.

4 Now, my learned friend's case ultimately is that in
5 the counterfactual Government would have observed costs
6 slightly above revenue at 1.75, but nevertheless rounded
7 all the way up to 2 ROC/MWh, simply skipping over an
8 obvious intermediate solution, and the key reasons given
9 for that argument are uncertainty and increments, and
10 I think you have my case on both of those points. And it
11 is notable that Ms Davies did not once explain how that
12 would have been compatible with the concern to minimise
13 consumer costs.

14 Then we get to the State aid decision, and the
15 submission made by my learned friend was that the
16 Commission would have regarded a discount rate of 14 per
17 cent as acceptable, but the problem with that submission
18 is that Government never sought to justify the decision
19 by reference to our higher discount rate. The higher
20 discount rate would imply higher costs. We see that
21 from the Figure 11 where a 14 per cent discount rate
22 leads to costs of £160, but throughout the process
23 Government relied on EY's base case costs of £144, even
24 when pressed by the Commission. That base case was
25 derived from a 12 per cent discount rate. We simply say

1 that the Government would have taken the same approach
2 in the counterfactual. Switched horses to a higher
3 discount rate. It follows that the Government would
4 still have assessed the appropriate ROC level by
5 reference to base case costs of £144, and that is where
6 it would have seen that 2.0 ROCs was excessive.
7 Government obviously did not think 14 per cent was the
8 right level of discount rate, and so it would not have
9 pressed the Commission to accept a ROC support level
10 that could only be justified on the basis of that rate.

11 Turning, then, to the counterfactual, Ms Davies
12 referred to Mr West's Table 2 in his Closing Submissions
13 at which she said showed the counterfactual costs would
14 be nearly in the middle of the revenue range for 2.0
15 ROCs. I think she gave a figure of £141, but that
16 misses the point in my submission because the Government
17 was not looking at mid-points. It was looking at
18 central estimates, and estimates in which it must have
19 had a degree of confidence in order to have relied on
20 them in the first place. As I have submitted, the
21 counterfactual cost would have been very close to the
22 central revenue estimate of 1.75 ROCs.

23 Then developer requests. My learned friend placed
24 significant -- all of my learned friends placed
25 significant emphasis on the developer requests. You

1 have my points on why we say they would have been lower
2 in the counterfactual, but the more important point, as
3 I submitted yesterday, is that Government would not have
4 taken them at face value any more than it did in the
5 factual. Ultimately, the objective evidence would have
6 pointed across the piece to a banding level lower than
7 two, and that is why the Government would have chosen a
8 banding level lower than 2 ROC/MWh.

9 MS DAVIES: We do not accept that developers would have then
10 insisted on 2 ROC/MWh. As I submitted yesterday, there
11 is no suggestion in the evidence that they said it was 2
12 ROC/MWh or nothing, and there is no suggestion in the
13 evidence that they said that wind farms would not have
14 been built for anything less than 2 ROC/MWh, and of
15 course at 1.9 ROC/MWh they would still have been getting
16 80 per cent what they had asked for, but even if they
17 had insisted, it is implausible for all of the reasons I
18 gave yesterday, Government would simply have caved in
19 and awarded something higher than it thought could be
20 justified on the evidence.

21 Then my learned friend said that even if 1.9 ROC/MWh
22 had appeared in the EY report, it does not follow that
23 Government would have adopted it, because it would only
24 have been on a 10 per cent hurdle rate and the
25 developers had said 10 per cent was too low, but the

1 answer is really the same: Government was not simply
2 accepting the hurdle rate put forward by the developers
3 or any of their other assumptions and that is why, for
4 example, in the March 2009 submission it focused on the
5 ROC requirement implied by EY's 10 per cent sensitivity.
6 We saw that in paragraph 18, March 2009 submission.
7 That is why, ultimately, it selected a banding level
8 that was consistent with a 10 per cent hurdle rate, not
9 a higher one.

10 Then Question 3, minimum cost elevation. The only
11 point taken against me by my learned friend is that if
12 we are right on Question 2, the minimum cost elevation
13 under Question 3 cannot be an amount which reduces the
14 margin as compared to the factual, and she said that
15 Mr Druce accepted in cross-examination that he could not
16 be confident on his minimum cost elevation for that
17 reason, but I addressed this yesterday, and as I
18 explained, once you are dealing with smaller cost
19 elevations than those which arise from a 26 per cent
20 overcharge, it is no longer possible for Government to
21 provide the same margin as in the factual.

22 I will give you my £2.50 cost reduction. In that
23 example 1.9 ROCs provides a margin of £3.10 which is
24 narrower than the £5 margin in the actual, but 2.0 ROCs
25 provides a margin of £7.50 which is larger than the

1 margin in the actual, so either way the margin changes,
2 and our submission is that Government's most likely
3 reaction would be to choose the option under which the
4 margin is closest to the margin in the factual, and any
5 cost elevation above £2.20, at any cost elevation above
6 £2.20, 1.9 ROCs produces a margin that is closer to the
7 factual margin than 2.0 ROCs. The only alternative is
8 to assume that only a cost reduction equivalent to 0.1
9 ROCs would suffice, but that would imply that if
10 Government could not provide the same margin in the
11 counterfactual it would always choose to provide a
12 larger one. There's simply no reason for that.

13 PROFESSOR ANTHONY NEUBERGER: I did not hear and the
14 reporter did not hear -- you were talking about a 0.1
15 reduction. Is that right?

16 MR LASK: The point I just made was that the only
17 alternative to my case on Question 3 is to assume that
18 only a cost reduction equivalent to 0.1 would suffice to
19 move the banding down to 1.9.

20 PROFESSOR ANTHONY NEUBERGER: I am with you. That is fine.
21 Thank you.

22 MR LASK: So our simple case is that in the counterfactual
23 Government would take the approach that was closest to
24 the approach it took in the factual. My learned friend
25 offered no answer to this. She simply repeated the

1 point that was put in her Closing Submissions which I
2 answered yesterday. She had no answer to that.

3 Then just finally on Question 2, my learned friend
4 for NKT referred to the simplified procedure, and the
5 statement in the Commission notice that certain
6 categories of aid are normally approved without raising
7 any doubts as to their compatibility. The short answer
8 to that is that doubts were raised in this case about
9 the compatibility of the Government's proposal, even
10 though a simplified procedure was being contemplated,
11 doubts were raised, and it is those doubts that
12 alongside all of the other evidence make it
13 inconceivable, in my submission, that Government would
14 have awarded 2.0 ROCs in the counterfactual.

15 Just briefly on Question 1, VOC, my learned friend
16 invites the Tribunal to resolve Question 1 and to make
17 findings as to VOC. We have no objection to that but we
18 do stand by Mr Druce's calculations on the VOC for
19 individual wind farms. Now, there were differences in
20 methodology between the experts on that, and they are
21 discussed in the Joint Expert Memorandum, proposition 46
22 {ROC-D/11/76}, and Ms Davies is right to say that
23 Dr Moselle was not cross-examined on these, but neither
24 was Mr Druce. He was cross-examined on which wind farm
25 one should include when calculating the cost elevation,

1 but not on the methodology for calculating the VOC of
2 individual wind farms.

3 Unless I can assist the Tribunal further that is
4 what I wanted to say by way of reply.

5 THE CHAIRMAN: Is there anything further you want to say on
6 Question 3 in a world where ROCs are awarded at 1.75
7 rather than 1.9? Does what you have said in relation to
8 ROCs at 1.9 apply in the same way to ROCs at 1.75?

9 MR LASK: Well, I mean, as we discussed yesterday, there is
10 a slight difference in the way in which the minimum cost
11 elevation is calculated between the two scenarios, and
12 there has to be, because the premise for -- the premise
13 changes, you know. For the 1.9 scenario the premise is
14 the Government was prepared to use 0.1 increments, for
15 the 1.75 scenario the premise is that it was only ever
16 willing to use 0.25, which necessarily implies a much
17 more broad brush approach by Government, that it is much
18 more willing, in that scenario, to round-up by a large
19 degree, or, we say, down by a large degree, and the
20 simple point is that in the factual, if you look at the
21 range between 1.75 and 2, the cost range, the costs and
22 the factual were closer to two than they were to 1.75,
23 and our simple point is that the minimum cost elevation
24 in that scenario is a cost elevation that moves those
25 costs in the other direction, that moves them closer to

1 1.75 than two.

2 THE CHAIRMAN: This is the exchange you had with Professor
3 Neuberger. I think Professor Neuberger wanted to
4 understand why it was not just the same logic, 0.125,
5 i.e. half of a 0.25 increment and you then had the
6 exchange with Professor Neuberger, I think, explaining
7 the point you just put to me. I cannot, for the moment,
8 remember the ins and outs of that exchange but I think
9 just confirm to me that what you have just said to me is
10 really replaying the exchange you had with Professor
11 Neuberger yesterday?

12 MR LASK: It ought to be because my position has not
13 changed.

14 THE CHAIRMAN: Right. Okay.

15 MR LASK: Of course, it is explained in our Skeleton, in our
16 written closing and in Druce 4.

17 THE CHAIRMAN: Okay.

18 We do not have any further questions for you, so I
19 am looking around, I am not seeing any, so I think it
20 just falls to me to say the following things. First of
21 all, we are going to reserve our decision so you will
22 hear from us in due course. Secondly, to thank all the
23 advocates and, indeed, the teams sitting behind them for
24 some very careful and thoughtful submissions that have
25 given us much to think about which we will now think

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