IN THE COMPETITION APPEAL TRIBUNAL

Case No. 1099/1/2/08

Victoria House,
Bloomsbury Place,
London WC1A 2EB

28th January 2009

Before:

VIVIEN ROSE
(Chairman)
PROFESSOR PAUL STONEMAN
DAVID SUMMERS

Sitting as a Tribunal in England and Wales

BETWEEN:

NATIONAL GRID PLC Appellant

- v -

THE GAS AND ELECTRICITY MARKETS AUTHORITY Respondent

supported by

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

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HEARING (DAY 10)

APPEARANCES

Mr Jon Turner QC, Mr Josh Holmes, Mr Meredith Pickford and Miss Laura Elizabeth John (instructed by Pinsent Masons LLP) appeared for the Appellant.

Ms Monica Carss-Frisk QC, Mr Brian Kennelly and Mr Tristan Jones (instructed by Ofgem) appeared for the Respondent.

Mr Christopher Vajda QC and Miss Kassie Smith (instructed by Hill Hofstetter LLP) appeared on behalf of Siemens Plc.

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

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

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THE CHAIRMAN: Good morning, ladies and gentlemen. Miss Carss-Frisk?

MISS CARSS-FRISK: Good morning. We have prepared a closing written submission that the Tribunal should have copies of. Unfortunately, we are still somewhat short of the requisite number for everyone to have a copy - they are being brought over as we speak. Perhaps they can just be handed out to everyone as and when they arrive. We hope that it will be helpful for you to have it in written form.

THE CHAIRMAN: Thank you very much.

MISS CARSS-FRISK: During the course of the hearing, happily, the issues have narrowed considerably, as it seems to us, in the sense that National Grid have, of course, accepted that 'the Legacy MSAs and related new and replacement MSA have a foreclosing effect, albeit not as we know it', as Mr. Turner would put it. In addition, as we understand it, if we get to a finding of abuse then there is no longer any dispute about Grid's negligence and our entitlement to impose a penalty. So, the central issue that remains then, as we see it, is the question of whether we are concerned with normal competition - competition on the merits. We say the MSAs cannot be regarded as representing normal competition. They are not a proportionate way for Grid to seek to recover their sunk costs. We say there clearly were other, less restrictive ways of seeking to do that - either through a no-PRC counterfactual (P&M terms would be one such), or, of course, through an age-related counterfactual.

Now, Grid's only response to this, as we understand it, is to say, "It was all fine. It was normal competition because all we have here is provision for payment completion creates perfectly efficient replacement incentives by analogy with ownership and that cannot be foreclosing", they say, which is a high claim in our submission. 'Cannot be foreclosing.' We say that is simply not right. We do not accept the analogy. Of course, I will come on to that. We say it is simply not right to say, even if the analogy were to hold, that that is the end, as it were, of any competition law inquiry in this area. It cannot be right when you bear in mind that Article 82 is, after all, about looking after the process of competition.

So, on the facts as set out in the Decision, and as they have emerged through the hearing, we say it is clear that these contracts are abusive, are foreclosing in the unlawful sense. That is even before you factor in the special responsibility that Grid had, and has. Once you factor that into the equation, it becomes even more apparent in our submission that we are concerned with an abuse.

So much by way of preliminary. If we look then at the first stage of the analysis - market definition - here again the sub-issues have narrowed somewhat. As I think I said in opening, we do not understand there to be any issue on the geographic market, and so far as supply

side substitution is concerned, well, the parties have dealt with it in their written submissions, but it has not really featured - certainly not in Grid's oral submissions - very much. So, I propose to leave that to one side for today. I will focus exclusively on what we see as the key point here about how you define the relevant product market, and in particular whether the Authority was entitled to say that new and replacement meters provided very good demand side substitutes for Legacy meters.

You will recall the definitional debate as to what we mean by 'Legacy meters' and 'new and replacement meters'. We kicked off with Grid saying that its Legacy meters are any meters installed before a certain date (1st January, 2004). Then it was modified somewhat to be 'installed at the date when the MSAs were actually signed' (whenever that was). Then I think we had a third version in opening that said, "Well, whenever a meter is installed, it becomes a Legacy meter". But, where we understand it all to have settled at the end of the day is on the definition that says, "Legacy meter - if it's been installed at the time when the MSAs were signed". I certainly understood Dr. Williams to be confirming that that was the basis on which he worked in his analysis. So, we adopt that definition.

Now, as you have seen, the Authority's decision on this area - market definition - was based in particular on the two factors: demand side substitutability and competitive constraint. But, that is not to say, of course, that the authority did not note Grid's argument that there were different competitive conditions that applied to Legacy meters. That was clearly noted at the relevant paragraph in the Decision - para. 3.14. But, the argument was then rejected in view of these two particular factors - demand side substitution and competitive constraint. We say the Authority was absolutely within its rights to reject that argument by Grid, particularly when you bear in mind that the law on guidance here recognises the primacy of demand side substitution as a criterion for market definition. We do not need to go to it again, but you will recall the Commission's market definition notice - para. 13 - which stresses that point, saying,

> "From an economic point of view, for the definition of the market, demand substitutability constitutes the most immediate and effective disciplinary force on the suppliers of a given product, in particular in relation to their pricing decisions".

Dr. Williams, rightly in our submission, accepted in his oral evidence that this certainly was a primary consideration.

Now, there is not, either, any dispute that if you look at the circumstances as they actually were at the time when the Legacy MSAs were entered into, new and replacement meters did

provide good demand side substitutes for Legacy meters. That was accepted by Dr. Williams in his oral evidence, and he also acknowledged - as indeed did Grid in their opening submissions - that new and replacement meters provided a competitive constraint on Legacy meters.

So, the only basis then on which the idea of demand side substitution was disputed was in Dr. Williams' evidence (in his first report and also orally) that one should leave to one side the actual position and imagine what might have happened in, as he would have it, a competitive market where he said, "Grid would have had in place long-term contracts which provided for payment completion", and in those circumstances he would have it that there would not be any demand side substitution (paras. 19(a) and (b) of his first report). Explaining why one should ignore the reality of the situation, he said in his oral evidence that it was necessary to consider what would have been the position under normal competition, which was effectively the Cellophane Fallacy. That is certainly what he said at first, I remember, in answer to madam chairman's question, although I think later on, in answer to me, he said, "Well, it wasn't really the Cellophane Fallacy". But, that is what he said initially.

Now, we say that if that is the underlying idea here, it does not really fit the facts of this case. Of course, we accept there may be situations - Cellophane Fallacy being such a case - where it is appropriate to regard with caution the circumstances as they actually are at the relevant time. But, it by no means follows that you always have to, as it were, adjust and imagine a different scenario. It all depends. It depends, in our submission, on certainly whether you are in a situation that is analogous to the true Cellophane Fallacy-type case, and, frankly, also on whether it is sensible and meaningful to do so.

So, our two main points about why Dr. Williams is wrong here, as I say, is that this is not a case where the underlying concern behind the Cellophane Fallacy principle applies. That is the first point. Secondly, Dr. Williams' analysis does not give rise to a meaningful market definition.

Now, as to the underlying concern in relation to the Cellophane Fallacy, as we understand it, that is really where an undertaking with putative market power has already raised its prices above the competitive level, and so that if you applied the snip test then it may well be that there would be switching and demand side substitution, and in such a case it may be sensible to say, "No, let's not let the dominant undertaking get away with that and to have a market definition in a sense will help it". We have set out some references to that. I know the principle will be very familiar to you. There is no need to go to it, but just for your

reference, OFT market definition, para.5.5, and also *Aberdeen Journals (No.2)*. It may be worth just glancing at that. That is actually included in a separate slimmish authorities volume that I am afraid I am going to have to trouble you with. I think the copies have just arrived. (Same handed) *Aberdeen Journal* should be the first tab of that bundle, and it is para.276 on p.82.

> "To put the matter in more formal terms, in our view, when determining whether an undertaking has a dominant position 'in a market' for the purposes of s.18(1) of the 1998 Act, the 'market' to be taking into consideration is the market that would exist in normal competitive conditions, disregarding any distortive effects that the conduct of that dominant firm has itself created. If it were otherwise, there would always be a risk that the dominant firm could escape the Chapter II prohibition by artificially manipulating its prices so to create the appearance of a separate market when in normal circumstances no such separation would exist. Indeed, that seems to us to be largely what has occurred in the present case."

So that encapsulates, in our submission, what the Cellophane Fallacy is all about. Here, of course, Dr. Williams has not argued that we are concerned with the distortive effects of Grid having managed to raise its prices in an artificial way. Rather he is saying, ignore the fact that you are in a situation where Grid is coming out of a statutory monopoly that is in the process of liberalising, with the implication that but for the statutory monopoly Grid would have been able to, and would have, put in place a long term contract with payment completion. So very different from the classic Cellophane situation.

In any event, as I said earlier, in our submission, it just is not helpful to look at the situation in the way Dr. Williams would have it. The effect of what he says is really to confine the relevant market to Legacy Meters only, and of course that would be a market where, by definition, there is no competition because each Legacy meter is put on the wall at X address, it does not compete with another Legacy meter at another address. Of course, in a sense, that would actually serve to emphasise Grid's dominance within that narrower market. In our submission, the Authority was clearly entitled to say it is more meaningful and more helpful here to look at a broader market where you include new and replacement meters that do, after all, in reality – or did at the relevant time, and still do – provide a competitive constraint on Legacy meters.

Dr. Williams, himself, indeed referred to his views here as a slightly paradoxical view, and we set out of course all these references in the document. Just quoting from what he said, I think it is para.16 of your written document, he said:

> "There is a slight dilemma here, which is that on the one hand I am saying that, in a sense, they are not in the same market, but on the other hand it is absolutely my view that the threat of new and replacement is exercising a significant disciplinary role on them. So, I think that may hope to go to explain, in a sense, why there is this potentially slightly paradoxical view."

Of course, the issue that has troubled the Authority is precisely the extent to which the Legacy MSAs inhibit further competition from new and replacement meters. In considering that issue we would say fairly plainly the Authority, and indeed the Tribunal, will be more assisted by a market definition that does actually include these new and replacement meters as well. If you do not do that, it seems to us, you are really not using a definition that serves the whole purpose of market definition being, and here we have put in some quotes again from the Commission's market definition notice being "to serve the objective of providing a tool to identify and define the boundaries of competition between firms". We have quoted this in para.17. It would be contrary to the "main purpose of market definition", which is "to identify in a systematic way the competitive contracts that the undertakings involved face", that is:

> "To identify those actual competitors of the undertakings involved that are capable of constraining those undertakings' behaviour and of preventing them from behaving independently of effective competitive pressure."

We do say that it is truly paradoxical to be criticised by Grid for actually adopting a market definition that, in a sense, if it were a true Cellophane Fallacy situation, would be more favourable to them because it lets in the substitutes of the new and replacement meters. Of course, the only reason that Grid wants to have the split of two markets is so that it can, in a sense, ignore what it would call the Legacy meter market and the focus on the separate new and replacement meter market to say, "Ah, well, if you look at that market actually there is plenty of competition and we are not dominant" – simply looking at market shares.

In relation to that aspect briefly and entering into, as it were, their territory here and going with that split for a moment, you will recall, of course, the market shares set out in para.263 of the notice of appeal at p.248 of bundle 1, which we have looked at, I think, a few times. I do not think there is any dispute that if one looks at that chart one ends up with Grid, and one includes UMS with Grid, having a market share of over 60 per cent. Of course, here there is some dispute as to whether UMS can be or should be included with Grid, and we will come on to that in a moment. Just to refer you to how Grid is actually seeking to use the two separate markets, one sees that at p.248.

Another aspect we would say of the artificiality of Grid's approach ultimately is this reference to how each meter would be in a market of its own, or in a world of its own. Dr. Williams said, "That might be a surprising result, but so what", in a sense. We say whether surprising or not, yes, it is surprising, but the real point is that it simply does not help again for our purposes to define a market in that way.

In any event, of course, even going with Dr. Williams' analysis here that you have to imagine a long term contract with payment completion we say that there is no proper basis for making that assumption that he makes, that that is what would have happened in normal competition if you do think that you do have to somehow adjust and not look at the reality in early 2004. You cannot just assume that Grid would not, for example, have chosen in a competitive market, to compete on price, perhaps to stay with the P&M terms with the price cap, or providing for up front payment, various methods of seeking to recover their costs, as Professor Grout has set out in his report. Here one needs to recall that of course Grid has aid in its skeleton arguments and in oral submissions, and in its evidence, that the P&M terms really would be, they would say I think, the most realistic alternative if the Legacy MSAs are not on the table. That must strongly support the view that that may indeed be what would have represented normal competition if we adjust at all.

Finally, so far as Dr. Williams' analysis is concerned here he says that if you imagine there was a long term contract with payment completion then there would be no demand side substitution at all for new and replacement meters. We say that assumption does not hold either because certainly if you look at the Legacy MSA as an example of a contract with payment completion as he would see it, there is clearly some demand side substitution from new and replacement meters. So even on his hypothesis you still do not get to where he would be, which is these two separate markets. So for all those reasons we would invite you to reject Grid's arguments on market definition.

So far as dominance is concerned then, there is nothing in the evidence that has emerged before you to undermine our case that Grid was dominant in the market as we have defined it, based on the three key elements that we have identified. First, the very large market share, secondly, the existence of barriers to entry and expansion by the CMOs; and thirdly the lack of sufficient countervailing buyer power. We note the position still remains so far as we can see that Grid has not actually engaged with us on dominance in relation to the bigger market that we have defined, but be that as it may that is background at this stage.

In relation to market share, of course there is nothing at all to suggest there is any dispute about that, you have seen market share as at 2004 and 2007 set out in the decision table 4 at

p.55 of CB1, so Grid had a share of 97 per cent as at January 2004 and at January 2007 it was still 89 per cent. Of course we appreciate that that is not determinative for dominance, but nevertheless we would say highly indicative and important for the analysis.

Here I would just remind you of what the Tribunal said in *Genzyme* which you have at A3 tab 58 about how a very high market share when it carries on for a period of time becomes a particularly strong indicator of dominance. That is para. 225 on p.1872:

> "In most circumstances in the Tribunal's view, a market share of 90% or above, which has continued throughout the period of infringement and is likely to continue for several years, will be sufficient, depending on the circumstances, to infer the existence of dominance."

We do not need to say that it is sufficient but, as I mentioned, we do say it is a strong indicator in this case. As I have said, even if you look at the new and replacement situation as a separate market, one still sees from the table market share of above 60 per cent for Grid. That is where we get to the issue about UMS as part of the overall National Grid undertaking. Grid says it is illegitimate to treat UMS in that way and we have set our reference to authority why we disagree. There was nothing in the evidence that emerged before you that in any way undermined what we had said about UMS counting as part of the Grid undertaking for these purposes. On the contrary, all of what we had previously said was strongly supported by the evidence, and this is particularly Mr. Shoesmith of course. First, you have his original witness statement para.5, and then also his second witness statement and in his oral evidence he said he regarded himself as in the position of an executive chairman of both companies. He was a full-time employee with executive powers in relation to both entities, strategy was a shared activity, the Management Committee for each of the businesses that would have the budget for both businesses and, as Chairman, he said he was responsible for setting the strategy and, indeed, directing UMS and Grid in different directions, he said. He also mentioned that for a period of time UMS had actually shared Grid's workforce. So really, it could not be much clearer than that, we would say, that they ought to be treated as one unit.

Of course, as mentioned in opening Grid certainly linked the Legacy MSA deal to the UMS contract. There is really not any dispute by that and, in particular Mr. Avery in his evidence effectively accepted that, quoting from what he said on day 4:

> "We assessed that there was certainly a significant risk that if we didn't sign the MSA we wouldn't be able to proceed as we wished with the UMS deal, whether that would have meant that the deal didn't happen at all or whether it would have

meant that it happened, but that the terms were over-discussed or that the start date was delayed, we can't be sure."

- very clear on that point.

THE CHAIRMAN: Is that from his written evidence?

MISS CARSS-FRISK: That is from Day 4, p.17, lines 24 to 28, and it is para.28 of our document, where we have actually quoted that

MR. TURNER: Madam, just to say none of us have this document, it is becoming increasingly difficult to operate without it.

MISS CARSS-FRISK: I am glad to say that we now appear to have lots and lots of copies to hand out. (Document handed to the parties)

Turning then to the second key factor in favour of Grid's dominance, barriers to entry and expansion, again there was no evidence offered by Grid to undermine the fundamental notion set out, of course in the decision that this is a market where entry and expansion is difficult, it is the market where economies of scale and density are important, and there are real logistical difficulties, as we have seen, to rapid expansion in this market. Certainly Grid has expressly accepted (notice of appeal para. 288) that it enjoys advantages of economies of scale in this case.

Dr. Williams accepted that there were indeed logistical constraints on entry. He accepted that, in his first report (paras 43 and 50) and also in his oral evidence, but interestingly what he said on day 7, p.50 was that he was under the impression that 'the key barrier to entry alleged in this market is the MSA'. Of course, that is, with great respect to him, completely irrelevant because we need to look at the barriers to entry at the time just before the time when the MSA was entered into. So, that, with respect, we would say really did not assist. Other than that, Dr. Williams really did not deal specifically with this question of barriers to entry.

As for countervailing buyer power - the third key factor - we have already emphasised that, yes, certainly, we accept British Gas had some such countervailing power, but, of course, the question is whether that was sufficient to actually negate Grid's power so that it was unable to exercise substantial market power, or, to put it more legally, *Hoffmann-La Roche* said that it was unable to behave to an appreciable extent independently of its customers, etc. We say that applying those concepts here, there is no doubt at all that Grid was able to exercise substantial market power, and to behave to an appreciable extent independently. Looking at the evidence of Mr. Avery and Mr. Shoesmith, they both accepted, in effect, with some frills, that eight years was the fastest realistic replacement programme that

certainly British Gas had in mind (Mr. Avery, on Day 4, p.1; Mr. Shoesmith on Day 5, p.3; also, in fact, Mr. Avery's witness statement at para. 30; Mr. Shoesmith's statement at para. 20). They also both accepted, in effect, that the five year programme that was threatened by British Gas was not realistic; was a bluff, and, indeed, a bluff that had been called by Grid. As you remember, it was actually shown by a particular meeting note, I think, of 1st July. Of course, Mr. Avery said expressly in his witness statement at para. 32,

> "Whilst we were telling Grid that we would exchange their meters in five to seven years, we did not in practice intend to do that".

So, really, it could not be much clearer than that. So, not surprisingly, you may think, both Mr. Avery and Mr. Shoesmith accepted that, of course, British Gas would have to rent a large number of meters from National Grid for a number of years. That gives, we would suggest, the obvious advantage to Grid that it can offer a discount of rental over this huge installed Legacy base that it has, involving a very great deal of advantage and power to it. Mr. Avery really accepted this. He put it in this way (Day 4, p.5, lines 18 to 26; our para. 34):

> "The big difference between, and the big attraction for British Gas of the MSAs over an accelerated meter exchange programme - actually there were two attractions. One was they avoided all the hassle of embarking on an accelerated meter exchange programme which would have been challenging to manage, but the big benefit of the MSAs for British Gas and indeed its consumers, its customers, was that it brought forward the benefits which would not otherwise be achievable for a number of years".

So, it was able to leverage that very large base of installed meters that it had to offer what was obviously an attractive deal at the time to British Gas. The Legacy MSAs, we accept, did involve, on the face of it, lower rentals than the P&M terms, but not crucially, we would say, lower rentals compared, of course, to the CMOs. There is no dispute about that - that the rentals in the MSAs were higher than those offered by the CMOs. That was expressly confirmed by Mr. Avery in his oral evidence (Day 4, p.2). Mr. Shoesmith also did not dispute that fact, although he did say, perhaps somewhat surprisingly, that they did not know what the CMOs' prices were at the time of negotiating the MSAs. He said (Day 5, p.5), "--although we produced our own estimates of what we thought they could be". Later on in his evidence he did accept he had some awareness of the UMS prices and, indeed, appeared to recall some detail about CMO prices at that stage. But, be that as it may, a key point is that there was that difference.

Grid's argument here is that the prices being offered by the CMOs should not be seen as representing the competitive level, but rather in P&M terms the price cap represents that level.. So, Dr. Williams would say, "Well, as the prices in the Legacy MSAs were lower than the P&M terms, Grid couldn't set its prices above the competitive level, and so could not be dominant". He described that as his 'core conclusion' in his second report at para. 78. Here we would say there are two main problems with that analysis. The first is that it wrongly proceeds on the basis that being able to set a price above the competitive level is the only test for dominance -- the only indicator of that. The second problem is that it impermissibly invites you to take into account that at the time when the MSAs were negotiated, Grid was subject to regulation.. This is contrary to the modified Greenfield approach that, madam chairman, I know you mentioned in argument. We also say it ignores, yet again, the reality of the situation when the MSAs were negotiated.

As to the first of these errors, there is no dispute - or can be no real dispute, we would suggest, that an ability set price above the competitive level is not the only indicator of dominance. We have cited for good measure, in para. 38 of our document, the OFT guidance on abuse, and, indeed, the Commission's discussion paper on Article 82. There is probably no need to go to those. I hope you will find that they do bear that out.

As to the second error, as I have indicated, we say that Grid really cannot argue that because they were regulated, and the regulated price was not abusive, they cannot have been dominant - yet, that is really what they say if you look at para. 38 of Dr. Williams' second report. The reason this is contrary to what has been described as 'the modified Greenfield approach' is that that approach distinguishes between regulatory constraints that it is relevant to take into account when you assess dominance or significant market power, and those regulatory constraints that are not relevant. Here, we would say this constraint, or the price cap that was part of the regulatory environment is clearly on the modified Greenfield approach the sort of constraint that should not be taken into account.

The Tribunal will recall, I know, that both madam chairman and Professor Stoneman were involved in the H3G and Ofcom cases where this was dealt with (and I suspect probably quite a large number of other people in this room also). We would take you to the first of those Decisions - the 2005 Decision in your new authorities' bundle at Tab 3. I think that is one that Professor Stoneman is particularly familiar with. The relevant passage is at paras. 97 and 98 on p.49 of the report. At para. 97 there is reference to the relevant Commission Decision. The Tribunal says,

"The Commission rejected the former approach. At para. 22 of its Decision the Commission dealt with the 'strict Greenfield' approach and stated,

> 'In economic terms, it is not appropriate to exclude regulatory obligations that exist independently of a SMP finding on the market under consideration, but that can have an impact on the SMP finding on the markets under consideration. From a methodological viewpoint obligations flowing from existing regulation, other than the specific regulation imposed on the basis of SMP status in the analysed market, must be taken into consideration when assessing the ability of an undertaking to behave independently of its competitors and customers on that market.

The emphasised words brings out a distinction. It was appropriate to take into account the existence of the regulatory interconnection obligation on DTAG, but not the effect of regulation on the very parties whose market power was under consideration.

98. This point is said to be developed in para.23 of the Decision:

> 'The purpose of a greenfield approach is indeed to avoid circularity in the market analysis By avoiding that when, as a result of existing regulation a market is found to be effectively competitive, which could result in withdrawing that regulation, the market may return to a situation when there is no longer effective competition. In other words, any greenfield approach must ensure that absence of SMP is only found and regulation only rolled back where markets have become sustainably competitive, and not where the absence of SMP is precisely the result of the regulation in place'.

In other words, a potentially regulated person cannot claim that it does not have SMP because regulation has procured a situation in which it no longer has it. So long as it is regulation which is bringing about competitive outcomes, the markets are not competitive independently of that regulation. It follows that the potentially regulated person cannot say that it does not have SMP because the threat of regulation means it does not have the necessary power. That would be circular and illogical. Ofcom relied on this reasoning."

As do we then to say, of course, that the price cap in the P&M terms is precisely the kind of regulation that prevents SMP in a sense, and that is why one has to ignore it for our purposes.

THE CHAIRMAN: Is it a necessary trigger for imposing the price cap that National Grid is dominant in the market?

MISS CARSS-FRISK: That certainly appears to have been the reality of the situation where we were concerned with this regulated market, so certainly we would say that the scheme of regulation with the price cap falls fairly and squarely into the category of regulation that is dealt with in this approach.

THE CHAIRMAN: It might be helpful in due course, Miss Carss-Frisk, if you can point us to the statutory provision under which the price cap was set.

MISS CARSS-FRISK: Yes. Rather than doing it on the hoof may I come back with the precise chapter and verse?

THE CHAIRMAN: Yes.

MISS CARSS-FRISK: This approach then, the modified greenfield approach, was confirmed in the subsequent decision of this Tribunal in *Hutchison 3G UK Ltd. v. Ofcom* [2008] CAT 11, which is tab 2 of the new authorities bundle. Here the relevant paragraph is 96, p.41, where the Tribunal describes this approach as follows:

> "This is because of the application of what is called the 'modified greenfield approach'. The modified greenfield approach is a way of distinguishing between those regulatory constraints existing in a market which ought to be taken into account when assessing market power under the Framework Directive and those which should be ignored. The application of the modified greenfield approach in a situation where the regulator is considering whether SMP exists has been approved both by the European Commission in its monitoring of the decisions of NRAs under the CRF and by this Tribunal in the *H3G (1)* judgment."

So relying on those two authorities, two decisions of this Tribunal, then we say you cannot take into account that Grid was regulated by the price cap. It is of some significance here that Dr. Williams, when asked about this by madam Chairman, did say that he was not familiar with this approach, and so obviously had not factored that into his analysis (day 7, p.69).

Nor is there, we say, any permissible basis for assuming that the price cap represents the competitive level. Dr. Williams' argument again was that absent regulation there would have been a long term contract that Grid would have entered into, I think he suggested in 2002, when the latest relevant price control was imposed. He said at that point a long term contract would have been made, therefore you are thrown back to that point in time to look

at the competitive price, and what would that have been? He says, there really was not anything else, so in effect you are thrown back at the price cap as set out in the P&M terms. Again, we do say there is no good reason why one should be thrown back in this way to what would hypothetically possibly have been the situation absent regulation. One ought to look at the relevant time, which is what is the competitive level when the relevant contractual terms are set – i.e. the Legacy MSAs. That is, in our submission, the only meaningful comparison here. Dr. Williams did accept in his oral evidence that, and I quote, "when assessing the issue at question, you obviously have to compare the prices actually set with some meaningful benchmark". We would say, with respect to him, he was not able to say why, at the time when the Legacy agreements were entered into, that was not a meaningful benchmark, as we say it was. Once more, in any event, we would say he fell into the error of assuming that, if you ignored regulation, assumed a competitive market, you would have had the kind of long term contract that he assumes.

Nor is there then, looking at the further step in his analysis, any proper basis for saying, even if there had been a long term contract you then somehow get to the price cap being at that earlier stage of the competitive level. This is where one needs to remember that of course the price cap was set to some extent taking into account the risk of stranding that Grid has always been so concerned about. It is set to prevent, of course, recovery of excessive profits but, as I say, taking into account or providing an element of compensation for stranding. That is Mr. Smith's evidence, just for your reference, paras.43 to 46 in WS3, of course not challenged. This was an aspect that Dr. Williams said he had not thought deeply about.

So we would say on that basis we were entitled to look at the CMO prices as at early 2004 as providing a relevant benchmark. We appreciate that there can be complexity as to exactly how one defines the competitive level, but however you define it we would say the CMO prices did provide a meaningful benchmark here, and a more meaningful one, as I have said, than the P&M terms.

As for the point that Dr. Williams also featured in a major way that Grid was in an inherently weak position because it had sunk its costs in Legacy meters, that of course was an argument that the Authority noted in its Decision at para.3.76 that analysing all the evidence in the round, rightly in our submission rejected that.

Dr. Williams effectively said that Grid was in a situation where it could be held up by the gas suppliers because of their ability to switch out the meters. He did acknowledge though that Professor Grout was right in principle to say that actually where an incumbent has sunk

its costs that may put it in a strong position because it will compete so aggressively on price and that may actually deter new entrants, or certainly hinder them or mean that they will seek particular protection in order to enter. That would be so particularly where there are already inherent barriers to entry and expansion in the particular market.

Having accepted that argument by Professor Grout in principle, of course Dr. Williams then said that that just does not hold if you are in a situation where the new entrant is able to negotiate a contract first before it sinks its costs. So that was the debate between them.

We would say, having heard both of them, the fact is that Dr. Williams was not able to persuasively explain why it should be the case that someone might not be deterred simply by knowing that there is an incumbent that will compete extremely aggressively. Professor Grout was very clear in his evidence that this was absolutely standard analysis and also made sense. I am not suggesting that Professor Grout said "This makes sense". I, with respect, say it makes sense and what he said was absolutely clear and could not, in our submission, be impeached. And, one should note here that Dr. Williams himself, when he looked at his second report, para.73 he did say: "Professor Grout's analysis as to the impact of sunk costs does shed light on the question of what outcome we might expect to observe." It was likely, he said, that Grid will actually supply because they have sunk their cost and will basically out compete any entrant there because they have got the sunk and potentially stranded costs. So to that extent there is some convergence there between him and Professor Grout.

As I have said, alternatively, Professor Grout said that it may be that a new entrant will not be deterred completely but the sunk costs phenomenon will affect the terms on which they are prepared to enter. They might seek to impose higher prices, or seek greater protection in terms of exit charges or something of that nature. The principle of that, that a new entrant would seek some sort of contractual protection was not disputed by Dr. Williams, but he just said they would be likely to do that in any event, it is not really to do with sunk costs.

In our submission what he did not really tackle satisfactorily in his analysis was the relativity issue, i.e. would a new entrant be more likely to seek greater protection because it knows that here is an incumbent with all these sunk costs, etc. So again, in our submission, if you take all the evidence in the round, Professor Grout was absolutely clear and correct on this issue too.

Of course, as to again whether there was any sense in which Grid was held up here, that of course would depend, as Dr. Williams would accept, on whether there are any realistic outside options for the gas suppliers. Here, as Dr. Williams accepted as I said, we know

there were a great deal of logistical constraint on what the gas suppliers could do by way of seeking outside options, i.e. the CMOs. That is further supported again by the fact Grid was able to set its prices in the MSAs above what the CMOs were offering. Certainly Dr. Williams was prepared to accept that in those circumstances the hold up problem (if any) would be less severe, and we would say no hold up problem at all.

Further, for a moment, as to this question of outside options, which was a matter that Dr. Williams did refer to in his report, he accepted that, as it were, the limits on outside options would clearly restrict any countervailing buyer power. He accepted that such power was at least partially offset by the logistical constraints on replacement, and that is his first report, paras. 54 and 67. That at least to some extent, we would say, recognises the reality of the situation here which was that Grid plainly was a must deal partner for British Gas and the other suppliers, certainly for considerable period of time, and for a very considerable number of their meters. That is not affected by the fact that, yes, the P&M terms were available at the time as an alternative to the Legacy MSA, Grid was still a must deal partner, and as I said was able to use all those meters that it had to give that big across the board deal to British Gas which it evidently found attractive but which then resulted in these long term contracts with a severely exclusionary effect. Of course, one theme that runs through Grid's submissions is that the gas suppliers wanted this. Well at one stage – I better not go too far into this there was, of course, an Article 81 investigation but that was then dropped. Be that as it may, we do say strongly whether or not the gas suppliers did find this deal attractive, and they evidently did, is neither nor there as far as the analysis of abuse is concerned.

Finally on this topic, Dr. Williams, we would say, has over played the idea that Grid was unable, even under the MSAs. to recover all its sunk costs. That may have been so, but that cannot suffice to neutralise the evident strength in the market of grid. That then completes what we would say about market power at this stage. I say "at this stage", it probably is the final stage so far as we are concerned.

Moving on to abuse. Again, there is a substantial measure of common ground between the parties, as I have said in particular in relation to there being foreclosure, albeit not as we know it, as Mr. Turner said. So the real debate is then: are we concerned here with an example of normal competition, competition on the merits? Looking briefly back at what we mean by "normal competition" we touched on this in opening but we do say it is of some significance particularly as Grid has said so strongly our defence is payment

completion, results: inefficiency – end of story. Can that really be the end of the story? No, we say.

First, we would remind you of the Commission discussion paper again, and it is para. 54 at A5, tab 74, p.3209 and it is the final line on that page at para.54, the sentence beginning:

> "Furthermore, the purpose of Article 82 is not to protect competitors from dominant firms' genuine competition based on factors such as higher quality, novel products, opportune innovation, or otherwise better performance, but to ensure that these competitors are also able to expand in or enter the market and compete therein on the merits without facing competition conditions which are distorted or impaired by the dominant firm".

So, emphasising those factors as indication of competition on the merits. Then, if I may, a new reference in *Faul & Nikpay*, EC Law of Competition, which is A5, Tab 82, p.3766, para. 4.155:

> "In order to distinguish competition on the merits from exclusionary abuses, it is essential to analyse whether the practice in question may be justified by any reason other than the mere aim to exclude competitors. If the practice reduces the costs of the dominant undertaking or otherwise increases its efficiency, it will normally be considered as an example of normal competition, even if it contributes to the elimination of competitors not able to match this increase in performance. If, on the other hand, a practice leads to the exclusion of competitors without increasing the efficiency of the dominant undertaking at all, it is much more likely that such a practice would e considered as an abuse within the meaning of Article 82".

So, quite a strong statement that you are looking for improved efficiency, increase in performance, in a sense, on the part of the dominant undertaking. We would say that Grid has not sought to point to any such thing in this case.

In addition, of course, we do point to the special responsibility of the dominant undertaking. You have seen the *Van Den Bergh* authority. There is no need to go back to it. As I recall, Mr. Vajda helpfully pointed out in his opening submissions that the facts of the case are quite helpful in terms of stressing really two things, or showing two things: one is the fact that something may be a standard practice in a particular market does not mean that it will be acceptable normal competition for a dominant undertaking to engage in that behaviour; secondly, the fact that something has been freely agreed in bilateral bargaining involving the dominant undertaking again by no means suggests that there is not an abuse.

As for the relevant benchmarks, the counterfactuals, I will have to look at those in some detail in due course, but setting out our basic stall on this again, it is important that we say that these counterfactuals no PRC or age-related are examples of what would, or might, have happened, which is somewhat different from saying, "We are mounting a positive case". In fact, it is very different from saying, "We are mounting a positive case that this one should have happened", or, "That one should have happened" and either, or both, of them are not abusive. I am not resiling for a moment from what I have said about us accepting that the counterfactuals, including the age-related one, would not be abusive. That is the point of them in a sense. But, as I say, that is not the same as setting out to prove that these are what would, and should have happened, or, indeed, that they would have been preferred if you had some sort of comparison between the Legacy MSAs and the other arrangements. It is very important that you do not have that straight comparison. When you look at the counterfactual you have to assume that the objectionable arrangement, as we see it, the Legacy MSA, is out of the equation altogether.

As to foreclosure, then, here I am afraid I will need to look quite a lot in due course at the evidence, particularly of Dr. Williams. However, in general terms, as I have said more than once, you have the acceptance of the Legacy MSA being essentially of a foreclosing nature at least in layman's terms. Then it is said that it cannot be foreclosing in a legal sense because of this ownership analogy.

Here, we do come back to the point we made at the outset that even if that analogy worked - and we say it does not - it would not be an answer here because Article 82 is concerned with protecting the competitive process. It is not about, as it were, leaping to what might -- Let us even assume it would be in some sense an efficient outcome -- That, we would say, with respect to Grid, is not an answer. That is not what Article 82 is essentially about. That is quite neatly encapsulated in what Advocate-General Kokott said in the British Airways case. We have quoted that and it may be sufficient to take it from our written document. If you wanted to look at it in the bundles, it is A5, Tab 76. It should be para. 64 of our document. The Advocate-General said,

> "The starting point here must be the protective purpose of Article 82 EC. The provision forms part of a system designed to protect competition within the internal market from distortions. Accordingly, Article 82 EC, like the other competition rules of the Treaty, is not designed only or primarily to protect the immediate interests of individual competitors or consumers, but to protect the structure of the market and thus competition as such (as an institution), which has

> already been weakened by the presence of the dominant undertaking on the market. In this way, consumers are also indirectly protected. Because where competition as such is damaged, disadvantages for consumers are also to be feared".

It is right that Grid have pointed to no legal authority for this rather extreme proposition that if they are right on the ownership analogy - if they are - no matter how long-term, no matter how foreclosing in any ordinary sense of that expression, they would say, "That's fine". That was what Dr. Williams said in terms, "That's fine. It can't be anti-competitive". That really does seem to, in a sense, remove this whole area from the sphere of Article 82 which seems to us a startling proposition.

This argument really does pay scant attention to what we say is the essence of competition on the merits, as I have said, referring you to the Commission's discussion paper a moment ago, and *Faul & Nikpay*, looking at factors such as better performance, lower prices, greater efficiency -- I should stress greater efficiency and better performance.

Looking then at the evidence of Dr. Williams - and we deal with this starting at para. 67 of the document - first of all by way of preliminary - and it is important background here to this argument - he said on Day 7, p.21 that he did not accept that there are 'positive externalities of entry' in his Legacy meter market, as he would see it. So, he did not accept that there should be entry and competition in relation to Legacy meters at all under any circumstances in this case. So, he did not accept that there was any basis for opening this market to competition in the first place. Even where 'positive externalities of entry' were assumed, he did not accept that this should effect Grid's behaviour in any way (Day 7, p.21). He also did not accept, or he denied indeed, that Grid had any special responsibility not to allow its conduct to impair genuine undistorted competition.

What he said about foreclosure we have tried to summarise in para.70 of the document. I will not take you to all of it, but most importantly perhaps the first passage, which is from his second report, para.106:

> "To the extent that the Legacy MSA establishes payment completion … the replacement incentives it provides are equivalent to those of a straight sale of a meter. Those incentives are socially efficient. It would in my view be misguided to brand a contract that provides socially efficient incentives and promotes desirable market outcomes as inconsistent with 'normal competition'."

Then one can probably go to the fourth of those entries:

> "the parties negotiated a better contract that removed the inefficiency … and moved us from a world where there were excess inefficient replacement incentives to perfect incentives" (emphasis added) [Day 7]"

Then entry number 6:

> "For these purposes, the length of the rental agreement or the level of the PRC makes no difference since, as Dr. Williams stated, 'ownership lasts until the thing is dead'."

Entry number 7:

> "Dr. Williams bases his analysis on its application to an individual meter: 'The analysis I have provided shows that the MSA does not distort incentives, but, in a sense, one has done that at a level of an individual meter'."

He then, you may recall, essentially left the question as to what would be the case in relation to aggregates such as we have under the Legacy MSA to Mr. Matthew. Then finally here:

> "Since I am saying that, given the cost conditions, etc. of the market, I do not actually think replacement would take place under any scenario then in fact if you think there is foreclosure you have probably got it wrong."

That is by way of summary of what he said. We have, of course, made various points in the annex to our skeleton to respond to the essential analysis. I am not going to go back over all of those, but perhaps just remind you of some of the features we have highlighted there. In particular of course this analysis assumes a payment completion contract – that is the whole starting point. He does not take account, we would say, that in relation to rental as opposed to ownership, you may have the possibility of improved service as you go along with the rental contract, which may affect your replacement incentives, and which may not apply in relation to ownership.

Then you have the distinguishing feature that of course with ownership you have incurred your capital cost at the beginning. You pay your money, you get your meter, whereas with rental there is this ongoing relationship where the price may indeed change in the course of that relationship as you go along.

Looking at what Dr. Williams said in his oral evidence and factoring in also now Grid's note that was handed up yesterday, briefly what we say is this: the first point is that the argument really assumes that the contract is going to terminate at the same time as the meter gives up the ghost, at the same time as the end of the life of the meter. That is our first sort of sub-heading in this document here.

THE CHAIRMAN: Sorry, could you explain that a bit more? What is assuming that?

MISS CARSS-FRISK: It is not making an allowance for the fact that end of the contractual period, as in under the Legacy MSAs 18 years, there may actually be further value in the meter because the meter may carry on functioning perfectly well beyond the contractual period. That is the essential point. That is an assumption that Dr. Williams' analysis makes, and it is also replicated as an assumption in Grid's recent note. It is referred to in footnote 7 and para.19 of that note.

The first problem then with the ownership analogy is the fact that, as Grid would probably accept and certainly Mr. Way would be very happy to accept, Legacy meters can operate accurately beyond 18 years. So at that stage the owner obviously has the asset, has the full benefit of the meter, but the renter not so. The renter is left at that stage in a position where, yes, he or it may be able to carry on renting the meter further against payment, but there clearly is the difference that the renter, as I said, simply does not have free access to that value, that benefit, that is there.

That is the basic point in terms of destroying the perfect analogy that Grid would set up between ownership and rental.

The second main point relates to the alleged equivalence of incentives between ownership and rental. We do dispute that the incentives are the same, or even particularly similar, specifically if you look at the nature of the Legacy MSAs in this case. We would start off with the point which I think was a point made Professor Stoneman at one stage about, well, in rental, if you are at age 17 or year 17 in the contract and it comes to an end at year 18 you may well say, "I am going to wait another year before I replace, I am going to have to pay rental for that further year. If I replace now I am going to have to pay a PRC of some sort, but I am going to actually hang on in there until the end of the contract when I do not have to pay a PRC". That is a different situation from the straightforward one where you have simply bought the meter, and there it is and there is no question of an exit charge or rental carrying on, you simply do not have the same kind of choice.

Nor in any broader sense, we say, can it be said that the Legacy MSAs create appropriate replacement incentives. Take a simple example. You might end up under the Legacy MSAs actually paying a PRC even for a faulty meter being replaced, if you have exceeded the glide path. I know that factually everyone has worked on the basis that the suppliers are going to be able to fit in their faulty non-discretionary policy meters into their 980,000 allowance, but that might not be so and so, testing what sort of agreement we have here and the incentives it gives rise to, it is legitimate to look at that sort of possibility. Of course,

that PRC then could be £57, would be payable regardless of the age of the individual meter. That is another fundamental point, another fundamental distinction, that in truth Dr. Williams' analysis focuses on individual meters, as he actually makes clear in appendix D to his second report. The analysis does not work – I will elaborate on that a little in a moment – when you are concerned with an agreement that has nothing to do actually with individual meters such as this one.

I was going to give another example of how the PRCs in the Legacy MSA artificially raise the cost of additional meter replacement, and this is by requiring at the same time, as we have seen, that you in a sense buy the right to replace more meters in the future. Just to make that good it probably would help to go to Mr. Keyworth's witness statement at para.154.

THE CHAIRMAN: Yes, before we go to that, Miss Carss-Frisk, we will take a break for five minutes.

(Short break)

THE CHAIRMAN: Yes, you were about to take us to Mr. Keyworth's statement?

MISS CARSS-FRISK: Yes, that is WS4, tab 8, p.2110, and it is the reference at the top of p.2111 to:

> "NG has described the payment of the PRC as involving the purchase of the right to replace more meters for "free" in future years (NoA paragraph 556). Even if one were to fully accept this "option" description, the implication of this in relation to this stylised example would be that the purchase of this option – which relates to replacement levels for the next 19 years – was effectively a requirement in situations where a PRC becomes payable. The fact would remain that the necessary cost implications of exceeding the glidepath allowance in year 1 substantially greater under the averaged as against the age-related contract (as above, £10 per meter under the age-related approach as against £100 per meter under the averaged approach)."

So it is again in our submission just an example of the PRCs in the Legacy MSA we would say artificially raising the cost of additional meter replacement. But looking more generally at Grid's recent note on ownership incentives we have some comments to make about the basics of the scheme as set out there, specifically looking at para. 5 of the note:

"… the volume of past replacements has no effect on the per-meter exit charges within each regime [free glidepath allowance/BLRs/PRCs]."

But that statement really does not accurately reflect how the BLR payments or the take or pay zone works. Of course, it is right that the per-meter charge that will be paid for a single year will not depend on past replacements etc. But the key point of course is that the period of time over which you may end up paying these rentals even when you do not have a meter will depend on the volume of past replacements, and you will need to factor in what is likely to happen in the future, in order to work out how much you will actually end up paying, i.e. to work out when you may be able to get on to the glidepath if you are in this zone. That is, of course, something that is set out in the Decision at paras. 4.63 and 4.64 and annex 3, and in Mr. Keyworth's statement table 4. I do not understand there to be any dispute about it, but it just struck us as odd and wrong to see this sentence in para.5 of the note. That key aspect of the exit charges in the MSAs really seems to be ignored in the note.

Looking para. 17 of the note then and the business of incentives, Grid says:

> "The BLR just recovers the rental payment committed to, and so from the point of view of the gas supplier, the value of the rental saving, and the value of the BLRs 'cancel out'. The incentives faced are the same as those under ownership."

Fundamentally, here we would say, and this is the simplest way I can put it, that really does not take account of what you actually get here, and what you actually have to pay. Under the Legacy MSAs you get the right to use meters equivalent to the glidepath, but it is not specified, as I said, in relation to particular meters, so again looking at below line rentals, or the take or pay zone as I have said, the key point is that what you pay will depend on what you have done in the past by way of replacement, and whether you are able to, or the extent to which you are able to say this is what is likely to happen in the future, so those are the things you have to factor into working out what your payments will actually be in the BLR, or take or pay zone.

On that basis we say it is quite artificial and wrong to describe the incentives as being precisely the same as in relation to an owner who has bought a particular meter for a particular price, this is a different kind of set up altogether in what Dr. Williams described as the giant payment completion scheme.

The same fundamental point really applies to PRCs, if we move away from the below line rentals. Again, Grid says what you pay to get out will equal what you would have to pay if you carried on staying with the contract, and therefore you have the same incentives as for ownership, but again that ignores completely the complexity of the situation under the Legacy MSAs, where, first of all, whether you pay a PRC at all will depend again on the

level of past replacements of meter, and then the level of the PRC is not determined by reference to a particular meter as we know, but by reference to the number of meter years outstanding. So again, I do not want to repeat myself but a long way away from the essential analysis of the individual meter that we would say was really at the heart of Dr. Williams' analysis.

So far as the foreclosing effect of the MSAs is concerned, and looking now at the actual effect, how far did it go, that is something that we deal with starting at p.32 of the document.

We say that the MSAs have had an actual serious foreclosing effect, although of course we do not have to show that, it is sufficient that the agreements are capable of having that effect. Grid's answer, as I have said, again we come back to this one more time, is the reference to the so-called "perfect incentives" under ownership which are said to apply here too. It is instructive, we would say, to look at what both of Grid's experts said very frankly in the context of their ownership analogy, but still said very frankly, about the effects in real life of these agreements. Here we have focused on Mr. Matthew first of all, and what he had to say on day 8, p.7 to 8. He was asked here about the incentives to adopt a 17 year replacement strategy as opposed to an 18 year one, and he said;

> "So in terms of their overall decision, every time they are replacing National Grid's more quickly, it's not just that these numbers go up, it's that they're also having to pay rentals on those new CMO meters.
>
> I think, in a sense, this is illustrating what you call the double payments, effectively the more meters you replace more quickly, you still have to pay for the ones that are there, so their unit price is going up, and obviously you have to pay for the new ones. So it's pretty unlikely that that's going to look like a very good strategy to replace those meters much quicker than the glide path, I would guess, if you did the full analysis."

In response to a question from you, madam chairman, Mr. Matthew also said that whether the MSAs allowed for any replacement, and thus PRCs at all made no difference to his argument on foreclosure.

Then of course he was asked about that table that was prepared in response to a request by Professor Stoneman, comparing the annual rental charges under the Legacy deal to the P&M contracts, and looking at replacement scenarios from one to 18 years. That shows, in our submission, powerful incentives not to replace very much earlier than 14 years.

Looking at Mr. Matthew's evidence, and particularly in answer to questions from the Tribunal, we would say overall the inference to be drawn is that he entirely accepted that the Legacy MSA strongly discourages any replacement beyond the glidepath. Of course, that is precisely what we have said in the Decision, but it was in a sense refreshing to hear that confirmed by one of Grid's own experts. Of course, there is no dispute about the fundamental mechanics of the glidepath in the sense that what you get to replace by way of additional replacement depends very much on what replacements you have to make - the non-discretionary ones - running at around 850,000 per year, and leaving very little margin for genuine additional switching.

According to Mr. Matthew, as I have suggested, the Legacy MSA could have allowed for no replacement at all, and still would not have been described as foreclosing. In fact, Dr. Williams went even further. We have set out the references. He said that the PRC could be one billion and that the term of the Legacy MSA could be one hundred years and still not foreclosing - although he did accept, I suppose, for the one billion that there could be an excessive pricing issue.

However, as I think I said earlier, talking in these sorts of terms we are really almost saying that competition law just should not come into this area at all -- or, Article 82 should not come in here. That plainly is not correct.

Looking at the replacement scenarios that are specifically dealt with in our Decision, one of the criticisms that has been made is that they are not realistic. That is what is being said. You will remember that para. 4.73 of the Decision is referring to the scenario of replacing 50 percent more than the free allowance, and then 65 percent more. We have dealt with this, as you may recall, in some detail, both in our skeleton and, in particular, in our supplementary submissions at CB2, Tab 9. There is probably no need to turn them up now, but what we would say, first of all, is: How can Grid say that these scenarios are unrealistic when they themselves have posed the idea that British Gas could realistically have switched out all the meters in five years. Now, I am using this for the sake of argument. We, of course, do not accept that that was realistic - and nor did British Gas, or anyone, for that matter. But, Grid are saying, "This was realistic. See their skeleton at para. 28(a)". That would involve replacing about 4 million meters every year for five years. Well, how can they then criticise our proposed posited scenarios as unrealistic when they involve replacing 1.5 million meters every year for three years (that is the 50 percent scenario) or about 1.65 million for three years (that is the 65 percent scenario).

So, a clear contradiction there.

However, in summary, forgetting the forensic point, as you see from the supplementary submissions, we have sought to take account of Grid's criticisms on all of this, and where we get to - the best view we can offer - is --I am not sure if I can say this out loud because the percentages do actually seem to be in red square brackets in the supplementary submissions in CB2 -- I have to say, I am not sure quite why, but there it is -- So, I am not saying the percentages, but they are set out, I believe, at para. 114 of the document. What we say is that if you compare those to what is set out in the Decision there is no doubt at all that the replacement scenarios considered there were realistic and reasonable compared to the initial volumes offered to the CMOs.

However, there is, of course, a different aspect to this. It is important, we would say, to keep them separate in one's mind. One aspect is what would the CMOs and British Gas have wanted to do, and what happened to that? Or, in a sense, what would have been a realistic scenario, looking at what was initially promised? That is one question. The slightly separate question is: What actually happened? What actual effect do we get in relation to the promised volumes?

Looking at that second question, that is dealt with in paras. 4.103 to 4.110 in the Decision - we say the actual foreclosing effect. The interveners have made slightly different points here. We are content to stand by what we have said in our Decision, but, of course, you will hear the interveners on what they say.

Looking at the evidence before you then, Mr. Avery, importantly, accepted in his oral evidence that there was a clear link between the financial impact of the Legacy MSAs and the reductions in volumes given to the CMOs because it was cheaper to cut those volumes than to pay the Take or Pay charges, or below-line rentals.

So far as the particular separate CMOs are concerned, I will try to summarise the position as follows: taking CML first, in the Decision the Authority said that in March 2003 British Gas told CML that it would get about 15 percent less by way of volume than it had previously expected (see para. 4.104 of the Decision). That figure has not been challenged by Grid so far as we can see. Indeed, Mr. Turner accepted that (Day 3),

> "CML's volumes ended up as being lower to a significant extent than the ITT amounts".

The point that may be being made - although it is not entirely clear - is one about causation in that what Grid have said in their separate note on the impact on the CMOs is that,

> "The MSAs were no more than one among many factors which resulted in a reduction of the volumes which had been contemplated in the ITT".

But, then, it was also clarified by counsel for Grid that although the extent of causative effect of the MSAs would be in dispute, it probably was not necessary for you to decide it. So, we are not entirely sure where that leads us. But, wherever we are as to what is disputed, we say as a matter of law it is absolutely clear that we do not have to show that the MSAs were the only cause, or even the predominant cause of the CMO volumes going down. All you need to show is a causal link. That is plainly established on the undisputed evidence. Now, we have found some authority for that proposition which is *O'Donoghue & Padilla* at Tab 4 of the new authorities bundle, at p.216. Starting at the top of p.216 there is a reference to 'statements' which we do not have, but which I do not think we need to have.

> "These statements have led a number of commentators to argue that there is no need for a causal link between the dominance and the abuse.
>
> Saying that causation is generally irrelevant under Article 82EC, however, goes too far. While there are undoubtedly some statements by the Community courts which might suggest that causation is not a central issue in abuse cases, many more clearly suggest that it is. In *Tetra Pak II*, the Court of Justice held that Article 82EC 'presupposes a link between the dominant position and the alleged abusive conduct;, although the court was, exceptionally, prepared to accept that an abuse could be carried out in a non-dominant market that was very closely related to the dominant market. Similarly, in *Continental Can*, Advocate General Roemer stated that the wording of Article 82EC 'with its expression 'abuse ... of a dominant position within the Common Market,' appears to hint that its application can be considered only if the position on the market is used as an instrument and is used in an objectionable manner; these criteria are therefore essential prerequisites of application of the law".

Of course, this is concerned particularly with the question of a causal link between the dominance and the abuse. We fasten on the reference to the *Tetrapak* case and the "pre-supposes a link" reference. We would say that the same notion of causation surely applies, to the extent that it applies at all, throughout the Article 82 analysis.

If one approaches the matter that way there can be no doubt at all that the MSAs were one of the causes in relation to the volume reduction for CML. Of course, CML and Siemens' opening note sets out the evidence in some detail. The critical point is really what Mr. Avery accepted in cross-examination about that. He talked, you will remember, about the mismatch between the Legacy MSA and CMO volumes ----

I am so sorry, I am just realising that I was about, I think, to refer to something that was actually said in Camera. I am not entirely sure why. It is set out at para.120 of the document. That is the relevant quote from Mr. Avery.

In the light of this it has occurred to us that we should have actually made it clear in writing in our document that it really is restricted to the confidentiality ring, and I apologise for the fact that we did not do that. I hope it can be so taken.

Moving on then, still on CML, to complete the picture, as was noted in the Decision, in May 2006 there was a further reduction in volume, or at any rate British Gas then informs CML that it would reduce to a point below the 100 per cent benchmark. That was actually given to us in a s.26 response from CML. The linkage, the crucial causal link, is very clearly set out in the undisputed evidence of Mr. Hoskin. That is actually para.22, and it may be useful just to look at that briefly. It is WS4, tab 10, para.22. What you have there, and I will not read out all of it, is the detailed chronology that sets out exactly what happened. Having drawn that to your attention there may be others who will want to make more of that, but just for your reference you have all the detail there.

Moving on then to Meter Fit, here you will perhaps recall the Decision says at para.4.106 that in May 2004 British Gas became nervous about the contract volumes and then sought to tighten the maximum replacement caps. This is indeed set out in the unchallenged evidence of Mr. King – WS5, tab 17, but we have quoted the relevant passage:

> "British Gas were still committed to provide the contract volumes under the CMO Agreements but were so concerned about potential over-performance (because the Legacy MSA imposed penalties on British Gas for CMO over-performance) that they introduced a material breach concept within a clause limiting gas meter exchange volumes in the renegotiated contract in 2004."

So far as UMS/OnStream is concerned, the position ----

THE CHAIRMAN: Just going back to Meter Fit for a moment, do you rely not only on the replacement caps that were referred to in the Decision, but also on the renegotiation of the overall volumes over the five years?

MISS CARSS-FRISK: Madam, we have taken the view, rightly or wrongly, that we will stand by what we say in our Decision, which is restricted to what I have just mentioned. We appreciate, of course, that those acting for Meter Fit would go further and we have no complaint of course about that, and that may find its way into your findings, but strictly speaking we are saying we are content to defend what we have said in the Decision.

So far as UMS/OnStream is concerned, as I think I began to say, the position is very clear. In October 2004 British Gas was effectively looking at three options as to how to deal with UMS. They decided that the option they had to go for was to restrict the UMS volumes to 60 per cent of the originally contracted volumes (see paras.4.107-4.108 of our Decision). Grid has not actually disputed that. You get it very clearly from Mr. Avery's evidence to you as well. Before I went further I was reminded that that also apparently was said in Camera, so can I just direct the Tribunal to the passage that we have quoted from his evidence at para.124 of the document.

Just to complete the picture you then have the unchallenged evidence of Mr. Lewis at WS5, tab 11, para.41, where he says:

> "Under the Meter Fit and OnStream contracts, British Gas was exposed to compensation payments for Meter Fit and OnStream underperformance and the opportunity was taken to renegotiate those contracts and where possible amend the volumes so as better to align British Gas' position with the Legacy contract. The Meter Fit renegotiation, with which I was involved, commenced in December 2003 and concluded in June 2004. Meter Fit was unwilling to reduce volumes. I recall that Paul King, the Meter Fit General Manager, agreed to some rephrasing of annual volumes, although he would not agree to any reductions in the overall level over the contract period. I was also involved in the OnStream renegotiation, where the opportunity was taken to reduce their five year contract volumes by forty percent, removing almost 1.3 million gas credit and prepayment meters from those contracts."

So in the light of all that very material actual impact on CMOs with the MSAs plainly a cause, and we would say a highly significant cause, probably in truth the predominant one but we do not need to go that far.

As for the effect of the maintenance bundle, that was something that we did look at I think briefly in opening, perhaps I can just remind you of where I think the dispute still lies, I am not sure. The issue arose, you will recall, as to the extent to which the authority had actually looked at the impact of maintenance on the glidepath when Grid comes in and replaces a meter on a maintenance visit and how that then reduces the glidepath allowance. You may remember Mr. Turner said that really was not dealt with in the Decision, and he quoted various paragraphs of the Decision – 4.4(b), 4.21, 4.81 – 4.85 and said the only relevant reasoning there. But that is not right and I do recall that I gave you some references earlier, in opening, to the relevant passages and we have now actually set them

out here, and we have highlighted the relevant passages, so I would hope in the light of all of those that it really would not be disputed after all that this was a feature of the decision. I know that the point has been raised: "Was it not the case that British Gas could simply direct the CMOs to go in and just replace a meter? So does this really matter?" to which hone answer, certainly, is: "Yes, it does", because if you look at the Decision, particularly para.4.82 that we have actually quoted, then of course one sees that Grid did replace some 84,000 Legacy PPMs in the first year of the contract on maintenance visits. So it does matter.

Coming back then to the question of smart metering.

THE CHAIRMAN: That is PPMs, is it?

MISS CARSS-FRISK: Yes, that was a reference to PPMs, yes.

THE CHAIRMAN: Does that arise in areas where British Gas has got a CMO in place?

MISS CARSS-FRISK: I will have to see if I can obtain information as to exactly where. Madam, may I see what I can find on that, I do not know the answer offhand.

MR. VAJDA: I think it is common ground the answer is "yes".

MR. TURNER: Yes, British Gas has CMOs throughout its areas. Its market share is obviously lower than the total gas supply.

THE CHAIRMAN: So is there something in the contracts between British Gas and the CMOs, because I thought that they were exclusive for the first five years, but is there a carve out then for meters which are replaced by National Grid on maintenance visits, so that is not a breach of the exclusivity. How does that work?

MR. TURNER: It is not a breach of the contract for National Grid on the maintenance visit to replace a meter with one of its own, no.

THE CHAIRMAN: It is not a breach of British Gas's contracts with the CMOs?

MR. TURNER: That is right.

THE CHAIRMAN: Thank you.

MISS CARSS-FRISK: Obviously that must be right and makes sense, what Mr. Turner said, I still wanted to check it. If it is accepted, then perhaps that is sufficient.

Moving on to smart metering, you have had a note from National Grid about that, you have had a note from us too, and I am afraid what we have done is actually incorporate that note into our closing submissions. We thought that might be more convenient. I know I touched on it in opening but perhaps going back on it a little bit as it is important, and elaborating to some extent.

The first point is the idea of the dynamic benefits of competition. I do know I mentioned it before but it is so significant. As was set out in the decision, para. 4.123 and footnote 331, this is exemplified by a statement in *Albion Water* and I may have taken you to it before, I am afraid I do not remember, but if I can just give you the relevant quote:

> "To these concepts there is also to be added the idea of competition leading to 'dynamic efficiency'. This concept sees competition as taking the form of, and leading to, innovation in products and processes as part of the continual pursuit of customers' business. – what Professor Armstrong called 'the long run benefits of competition'. A closely related idea is that competition itself contains its own dynamic, the results of which cannot always be foreseen. According to this approach, the dynamism of the competitive process itself tends over time towards lower costs, lower prices and more innovation."

That is para. 663 of *Albion Water*. We will have to see what is going to be said tomorrow, but certainly so far in this case it is not a point that Grid, in our submission, have sought to tackle, and I think Mr. Turner (day 2) talked about the mantra of the dynamic benefits that would be brought in a somewhat dismissive way. We say that is not merited, it is actually a very important aspect of the benefits of competition. But looking then at the position as at the time when the MSAs were entered into, as we have said before, it is important not to be caught up in simply considering what the suppliers' views were at the time. We know that there were divergent views, we have to accept that – no uniform view – but it is not the be all and end all of the analysis, and it is particularly not so if you bear in mind that there are these two separate questions, one being the potential effect of the MSAs on, in a sense, the dynamism of competition – the overall effect, the stifling effect on innovation at all, and on the incentives for innovation – there is that issue on the one hand and then there is the rather separate question for the suppliers, and this is what they really focused on, well what will be the effect of the MSAs on our ability to actually roll out such smart metering or technological advances as are available. The point I am trying to make is the suppliers, from what we have seen, do not appear to have considered this broader question of: If we all sign up to these agreements, will it actually have a stifling effect on innovation more broadly?

THE CHAIRMAN: There is evidence in the papers as to what gas meters everybody provides in this market what brands of gas meter are provided by the different CMOs, and there is some dispute over whether one person's is better than another person's, but that has not featured in the past 10 days of this hearing. Is your point based on that?

MISS CARSS-FRISK: No, it is not based on that, it is a more general point that the suppliers, as in a sense perhaps one might expect, were really focusing on the immediate situation of: if we sign up to these deals, how will it affect us in relation to our ability to put in smart meters, as it were, on the assumption that they will or may be there. But looking very much at that direct impact, how will it affect us in being able to put those meters in but not looking at the broader, and we would suggest very important question, of: Will there actually be any innovation? Will there be any smart meters, if we all sign up to these agreements. It is that broader question of will this have a stifling effect on innovation that we would suggest the suppliers were not particularly focusing on. It again just highlights the importance of that.

PROFESSOR STONEMAN: Can I just ask you a question of fact on that? Is the development and manufacture of gas meters, a national or an international activity?

MISS CARSS-FRISK: That is international, sir.

PROFESSOR STONEMAN: So, the story you want to tell is with respect to the incentives of changes in the British market -- the impact of changes in the British market on the international incentives to develop smarter meters.

MISS CARSS-FRISK: International and domestic, sir, yes. That is right.

We have set out, as you have seen, a number of references to what the suppliers actually did think at the time. I would not ask you to go to Scottish Power and Npower at this stage. British Gas, of course, is particularly important, and so we maybe should focus on that just for a moment. Here Grid relies on Mr. Avery's report, of course, that following extensive trials they concluded that the case for AMR was not compelling. That is in witness statement. But, again, linking to the point I just made, that is very much looking at the development of AMR as it was at that time, and not making any assessment, it would appear, as to what might happen in the future absent the MSAs.

One should also note that what Mr. Avery says - again in his witness statement - is,

> "Similarly, under the existing regulated arrangements it is likely that Ofgem would allow Transco to recover their additional costs of replacing fit for purpose meters through the price formula".

Well, that assumption, again, was wrong and suggests that the analysis was flawed.

Lastly on British Gas, you will recall that reference to someone within British Gas called Robin - I think Robin Beesley - having expressed quite a strong view about how the Legacy deal had painfully damaged the case for AMR. Well, we know Mr. Avery said that was not his view, but be that as it may, the view is actually recorded by Grid as being 'a view'

expressed by someone in British Gas. So, we must be allowed to attach some importance at least to that.

Moving on then to reasons for the lack of progress in Smart metering, as certainly Grid would have it, it may be useful for you to actually have Grid's note on this to hand. (After a pause): National Grid Note On: Smart Metering and the MSAs. There is a sub-heading 2 on p.4: Reasons for Lack of Progress in Smart Metering. If you go to para. 2.6 Grid are saying that really the only factor that has changed since the Decision is the government's greater appetite for introducing smart meters. That is what they say in the final sentence of para. 2.6 on p.6.

> "The only factor which has changed, (subsequently to the Decision), is that there is now a political appetite for mandating universal smart metering, based on reasons of public policy".

The first point we make here is that that completely ignore the evidence of Mr. Stephen Smith which I think I actually took you to last time round (WS3, Tab 7) where he refers to three particular developments. Just to summarise, there have been some technological advances, renewed interest from suppliers and interest from consumers in, effectively, better metering to have more efficient control of energy. That has not been challenged. I do not want to perhaps go into the cross-examination, etc. It probably does not arise here. All we say is that this is not a situation where any other witness who was challenged gave that evidence. It was only Mr. Smith. He was not challenged. What he says is factual, based on his experience - considerable experience - and position in relation to these sorts of issues. So, we say, not having been challenged that is evidence that the Tribunal very much ought to take into account. So, it shows it is not as simple as saying, "The only development is the government's current appetite for smart meters".

Grid then refers to a good deal of evidence as to more recent attitudes, as it were, in their note. I am not going to try to respond to all of it, but I would like to come back to a theme you do see in many of these documents - that there is a concern about the impact of the Legacy MSAs. Now, I remember when I mentioned this before that there was an issue about stranding and, "What does stranding and stranded assets really mean here?" I think all I can say is that looking at the documents it does appear that that concept is used in a very non-technical way to refer essentially to the costs of exchanging or replacing these meters - which, of course, would involve the costs that would be incurred under the Legacy MSAs.

So, the first reference to that which I would like to take you to is British Gas making a presentation to Ofgem, which you have mentioned in National Grid's note at para. 2.3.2 on p.5. They talk about structural issues. They say, at the beginning of para. 2.3,

> "The evidence suggests that the most significant factors affecting the take-up of smart metering are related to the basic economics of, and the structural issues arising in, the competitive metering market".

Then at para. 2.3.2 they refer to that British Gas presentation, and they list various issues. The third bullet point, of course, says,

> "Concerns regarding the risk of asset stranding".

If one looks at what they meant by that one gets some clarification from the document itself - SD4, Tab 137. At the first page, p.2038, one sees these are slides for that presentation. Ofgem seminar - 2nd March, 2006. If you go to p.2042 you have the heading 'Barriers to implementation need to be removed - main issues are stranded assets and visual inspections'. About the middle of the page,

> "Additionally for an accelerated approach. Deal with stranded cost of replacing basic meters with many years of useful life left (and consequences of 'lumpy investments')".

We would suggest that that is a pretty clear reference then to a concern precisely about the cost that would arise, of course majorly, under the Legacy MSAs where their meters majorly sit.

THE CHAIRMAN: Presumably the thrust of this is British Gas saying to Ofgem, "Look, if you think it's a good idea for there to be smart meters rolled out all across the country, then we are not prepared to pay for it. There will have to be a regulatory intervention in order to sort out the relationships that there are between the parties in relation to the existing ----"

MISS CARSS-FRISK: That may be possibly what they are saying, madam. On any view that then includes a concern, as I have suggested, about precisely what we have identified as the problem here - the very major switching costs. So, it is really recognising that, and, I would suggest, recognising therefore the chilling or stifling effect more globally of these agreements and their switching costs in this area.

You get that concern very much referred to also in the government's consultation paper which I believe we did look at in opening. Just for your reference that was SD5, tab 155, where it was specifically pointed out that one drawback of mandating the introduction of smart metering over a ten year period was that, and I now quote from para.10.24 of that paper:

> "It may lead to significant asset stranding if suppliers chose to replace meters on a geographic, not meter age, basis … There could be additional stranding costs because of the terms of Legacy contracts."

I know I took you to that before.

Then you have the Energy Retail Association very much referring to the same kind of theme. You have what they have to say at SD5, tab 156, p.4999. This is the Energy Retail Association's response to the Government's consultation, October 2007, and about the middle of p.4999 they say:

> "Any roll-out option that installs smart meters before existing meters are due for replacement will result in asset stranding for the existing Legacy meters. Stranding has a different impact on customers, suppliers and metering agents, therefore it is a key element to a smart metering solution and it is important to deliver a mechanism to ensure fairness amongst participants."

I would venture to suggest that again that reference to "asset stranding for the Legacy meters" includes certainly a reference to the costs that would be involved if they had to replace those meters.

Finally, if you look at British Gas's response to this consultation, again the economic cost of stranding is strongly highlighted. It is tab 167 in the same bundle, p.5392. Here one looks at what they say in the top half of the page, second paragraph, and one reads that in conjunction with footnote 3. They say:

> "We recognise the Government's ambition to cut carbon emissions by rolling out smart meters to all domestic and small business customers over a ten year period. Unfortunately, the analysis by Frontier Economics demonstrates that there is no supplier-led business case for a universal roll out of smart meters, either at replacement or on an accelerated basis (Table 1). This is because there is still a significant gap between the level of supplier benefits and the cost of smart meters and their installation."

In the table you have the reference to incremental costs, and then you go down to footnote 3:

> "Note that incremental costs include, where appropriate, the economic cost of stranding. The distribution impact of this cost will be discussed later in the document."

I hope avoiding an technicality, we would say that fairly clearly would include these costs of dealing with the Legacy meters under the Legacy MSAs.

THE CHAIRMAN: If the Government decides that it wants in the next ten years to replace every gas meter with a smart meter, there will clearly need to be some interesting discussions between them and National Grid about what is going to happen to the Legacy MSAs.

MISS CARSS-FRISK: There may be – of course there may be – but the point still remains good but the cost ----

THE CHAIRMAN: This is a hurdle that would have to be overcome.

MISS CARSS-FRISK: The cost of doing it is clearly perceived as a significant hurdle, and one comes back to the notion that it is extremely likely that the existence of the hurdle will have had that stifling effect that I have mentioned.

Madam, that brings me to the end of what I was going to say smart meters. Maybe I could just mention where we got to on the origins of the price cap. We have not quite got to the bottom of it, but what I can refer you to is what it says in the final price control proposals at SD1, tab 9, p.558. It is para.1.1 on p.558.

> "Transco's network constitutes an effective monopoly for the transportation of gas to a large majority of consumers in Great Britain. In order to protect consumers from the potential abuse of monopoly power Transco's licensed business is subject to controls on the prices it can charge and the quality of service it must provide. The existing Transco price controls are due for revision from 1 April 2002."

So that assists one in relation to the clear purpose behind the price control. What we would like to do, if we may, is to dig a little further to provide you with the origins, which are in the Gas Act and then translate it into the licence, but we believe that the precisely relevant provisions in the Gas Act are not actually in the bundle. So perhaps we could dig that out overnight and perhaps provide it tomorrow morning.

THE CHAIRMAN: That would be very helpful, thank you. Shall we break for the short adjournment now?

MISS CARSS-FRISK: If that were convenient to the Tribunal.

THE CHAIRMAN: We will resume at two o'clock.

(Adjourned for a short time)

THE CHAIRMAN: Yes.

MISS CARSS-FRISK: A couple of points I would like to pick up from this morning, if I may. We were asked about smart meters and to what extent it was an international business and just by way of clarification the actual meters, yes, but related communications and billing systems not so much, that is a largely domestic area, so just to clarify that.

Then I wanted to pick up para. 69 of our note, because it has been pointed out to me that in fairness our reference to Dr. Williams having denied that Grid has any special responsibility should probably read "in effect denied", I would not want it to ----

THE CHAIRMAN: Well I think the point that he was making was that if there were positive externalities which ought to be taken advantage of by opening up the market to competition, that was not a responsibility of National Grid to ensure that happened by some kind of self-denying ordinance tempering its own competitive edge in order to encourage people to come in, that that was a regulatory matter. I think that is what that was.

MISS CARSS-FRISK: Maybe, certainly the way we have read it, and I would suggest consistently with that he was not acknowledging and, in effect, denying that Grid might actually have a responsibility therefore to temper its behaviour that might possibly otherwise be legitimate – we would say not, but if it were it might have that special responsibility – but I did want to clarify that so it does not seem we are overstating it. Similarly, if I may, in relation to para.109 where, at the end of that paragraph, we refer to the table that was produced in the course of the hearing comparing P&M rentals to the Legacy MSA and we have said at the end of that paragraph:

> "This discloses powerful incentives not to replace substantial proportions of the Legacy meter population earlier than 14 years."

We were just concerned that of course that should not be taken as us somehow putting forward some sort of new case on incentives here. What we are saying is really very, very simple. The table clearly shows considerable differences in rentals between Legacy MSA and the P&M terms, and the incentive point of course really arises on the basis of the glidepath mechanism for all the reasons we have given in the Decision. I just wanted to clarify that.

Moving on then in our submissions to "The counterfactuals" which I have said are no more and no less than a useful tool to decide whether something has a legally foreclosing effect. As you know, we have put forward the "no PRC counterfactual" as one alternative, which links to Grid's apparent own preference for the P&M terms as a counterfactual, and then of course also the age related counterfactual. In relation to that, i.e. the age related counterfactual Grid has challenged the link that we have set up between age and value of meters, and here is where we need to look at Professor Grout and Mr. Way's evidence. You will remember Professor Grout says in para. 23 of his report that there is an increased risk of failure as meters get older. If one looks at Mr .Way's statement, particularly para. 8, it in fact says the same thing in that it says: "… there is, of course, some increased risk of

mechanical failure as the age of a meter increases." That is para. 8 in terms, although it is right to say that he was not keen to accept the almost identical proposition that older meters tend to be less accurate than younger ones; but really, we say, going on his own statement that proposition is there. Of course, what he did accept in his oral evidence was that if you looked at his figure 1 in his statement one did see a clear correlation between age and inaccuracy, or lower accuracy, and one gets the same thing – I am not suggesting we should go to it now – but if one looks at a letter that Grid has sent on 5th November 2008 (SD5, tab 165) where they provide a bit more detail as to the data that underlie that figure in Mr. Way's statement. What one gets, and I do not think this is disputed and, as I say, the thrust of it was accepted by Mr. Way, is that for meters installed before 1996 you have an inaccuracy of 7.2 per cent going up to 15 per cent, whereas if you look at the younger meters it ranges between 1.6 and 5.1 per cent.

Now, Mr. Way of course said this relates to one particular type of meter, but he also made clear that 60 per cent of Grid's meters are in fact of this particular type. He did not provide any divergent information for the rest, the 40 per cent. So we would say the evidence you have there, including in his figure, in particular in his figure 1 really provides the best evidence to go on, as well as his paragraph 8 to say, "yes", there is a correlation between age and accuracy. When he was asked about why Grid had had a 20 year replacement policy in the past he was not really able to assist on that, nor was he frankly able to assist on the undoubted fact that in the MSAs there is a provision for higher PRCs if you replace a disproportionate number of younger meters, clearly suggesting that Grid also considers there is a relationship between age and value.

THE CHAIRMAN: Well that might just be because not many rental payments have been made on those meters yet, so that the net present value of the future payments is much higher for a younger meter regardless of its condition.

MISS CARSS-FRISK: It ought not to matter on Grid's scheme of things; they have made the point of saying: "Well, it does not matter to us whether we get PRCs or whether we get rentals, that does not matter at all because we are always going to get effectively the same thing in any event." So on that basis it would seem that actually they ought not to be concerned, and therefore there should be, or is likely to be some extraneous consideration that feeds into their desire, as it would appear, to maintain a stock of younger meters.

At any rate, certainly Mr. Way, when asked about it, did not offer any divergent explanation.

Lastly on his evidence, you may recall that he had suggested in his statement that Professor Grout was really saying you should ignore the condition of the meter, it does not matter whether or not it is faulty just go on age, in effect. It was put to him that simply is not what Professor Grout says (see his para. 27). I think it is fair to say that Mr. Way was very, very reluctant to accept the basic fact of what was in Professor Grout's statement, but I think he ended up saying: "Exactly how Professor Grout sees this working I have no idea." We would say looking at that and looking at Professor Grout's statement there really is no doubt, and can be no doubt that he says what he says. He is clearly not suggesting that age should be the over-arching criterion instead of looking at whether a meter is faulty.

One also has Professor Grout's oral evidence that ought to be factored into the analysis which we have set out in, I think, para. 163 of our note. If I may, I will just invite the Tribunal to read that for yourselves at this point. (Pause whilst read):

THE CHAIRMAN: What we did not get from either Professor Grout or Mr. Way is whether when meters start becoming inaccurate they over-measure the gas or under-measure the gas.

MISS CARSS-FRISK: No. That is quite true. It is plus/minus 2 percent or 3 percent, but, yes -- Quite. That, I would suggest, does not affect the basic analysis, although I entirely agree that we did not get that.

So, Professor Grout then in his oral evidence is emphasising basically the notion of quality depreciating over age.

Moving on then to the rather murky business of Grid's new policy in terms of non-discretionary replacements -- Looking at Mr. Way's statement it is right to say that it did not appear that there was, as yet, any such new policy having been implemented. He then said in his oral evidence, you may recall, which surprised certainly us, that actually this new policy had come in in May 2007, which was particularly surprising given the correspondence between Ofgem and National Grid shortly before the Decision was issued. We are looking particularly at January and February 2008. That clearly proceeded on the basis that this was something that was being proposed but had not yet been implemented. We have set out in our document details of the correspondence in para. 165. I think all I would say is that the picture that emerges is this picture of, well, we are talking about something being proposed, but it does not go further than that. You will recall there was an issue as to Ofgem being concerned about the legality -- or, the lawful basis for such a new policy.

In re-examination Mr. Way did seem to say that actually the policy had been implemented in 2007 strangely ----

THE CHAIRMAN: I thought where we got to with that was that we were talking about two different things when we were referring to the policy. There was the replacement of the actual standard which was still a proposal and had not yet been implemented, but then there was some change that National Grid had made to its decisions as to what meters to put into the pool for policy replacements which reflected the possible future move to that new standard ----

MISS CARSS-FRISK: -- but which would not yet have affected the actual number of policy meters required to be replaced.

THE CHAIRMAN: No. That is a third thing. The expansion of the pool of policy meters, I thought, was something different again.

MISS CARSS-FRISK: It may be that only National Grid then can finally settle what they say the position was. This is what we had understood ultimately from the re-examination, but I am grateful if it were to be the case that we are wrong about that and that it was not actually being suggested that **the** policy or **a** policy that would affect the actual number of policy meters required to be replaced had been implemented. All I was going to say is that if that was the evidence at the end of the day, then it is very, very surprising that we have not then had anything from Grid to say, "Yes, look here! This is the number of meters that we required to be replaced in 2008", for example, to make good that point. Now, it may be because we have not had that that may support the view ----

THE CHAIRMAN: This goes to the question of whether the assumption that there would be 850,000 meter replacements ----

MISS CARSS-FRISK: Non-discretionary replacements going forward.

THE CHAIRMAN: -- going forward, and therefore it would take you five years to get back on to the glidepath which would have incurred BLR.

MISS CARSS-FRISK: Yes. Exactly. It goes to that point. Of course, our fundamental point is that if you evaluate the Legacy MSAs from the standpoint of the supplier at the time when you enter into them, well, you do not know what is going to happen, and you then look at the three years that follow, and what you get is roughly - and that is not disputed - the level of 850,000 per year, which then is a reasonable basis on which to go forward as to what is going to happen in the future. We would say that if Grid is then going to say, "No. No. No. Something [perhaps not dramatically] has changed which is of real importance", it behoves them to put forward clear evidence to that effect as to what has actually happened in that particular respect. That we certainly do not have as in we do not have anything from Grid,

saying, “Yes. We have implemented a new policy and this is how it has, in fact, affected the non-discretionary replacements”.

So, I think what we are really saying at the end of the day is that we are inviting you to take Mr. Way’s evidence on this with a fairly large pinch of salt. As I say, the key point, ultimately, is about the suppliers’ expectations earlier on in the chronology.

Looking then briefly at Mr. Matthew’s evidence again, we have a few comments to make about that. There are, really, four main points. The first one is that he, of course, confirmed in his evidence that his testimony really cannot go beyond the matter of contract structure. He was very clear that all his worked examples were about structure. So, if our counterfactual is not purely about comparing structure, which it is not, then he effectively accepted he could not really say anything in relation to that. One sees that he took a pretty narrow view of structure. What he said really was that you had to, as it were, separate out volume, revenue, value (as in value to suppliers), and, as it were, if you neutralise all of those then you get to, on his view, what are really the structural differences. However, none of that is actually then very relevant. In fact, with great respect to him, it is not relevant at all given that that is not the comparison that we have carried out.

There is another point just linked to what I have just said, which is this point about revenue neutrality and the idea that Grid has put forward that there has to be such a thing in the counterfactual. That is really about the counterfactual having the same minimum guaranteed revenue. I wanted to just highlight Mr. Keyworth’s point about that, where he said, “Well, actually, of course, there is only one contract here that has a notion of guaranteed minimum revenue, which is the Legacy MSAs” because the age-related counterfactual, as he put it, is conditional in terms of minimum revenue that is conditional on meters remaining fit for purpose.

THE CHAIRMAN: Is that because all policy meter replacements are free and do not affect the number of other non-discretionary ----

MISS CARSS-FRISK: Precisely, madam, that is exactly the point.

The second main point we would make about Mr. Matthew’s evidence is that, of course, he does not look specifically at the switching costs which is what we say is important. He looks at total replacement costs and he has contrived various scenarios and stylised examples whereby, as you have seen, you get to the same bottom line, but involving no less than ten assumptions, as he sets out in paras.37 to 39 of his first report, and in particular the assumption – and here I quote from para.39(a) of the first report:

> "… that each individual meter will be rented for a specified amount of time … without drawing a distinction between the reasons why it is replaced when that time period has elapsed."

That, of course, is not a safe assumption to make. As you know, Mr. Keyworth has drawn a crucial distinction between replacements that you cannot avoid and those that are discretionary. That simply does not come into Mr. Matthew's analysis.

Thirdly, one should note that Mr. Matthew actually agrees with Ofgem's analysis on these additional replacement costs, once you accept that there are these 850,000 meters that are non-discretionary replacements. That is looking at his second report, para.119-120. That is of some significance, as I say, setting out the essential agreement on that.

However, this is where there was some disagreement because Mr. Matthew then put forward this idea that you could perhaps bring forward non-discretionary replacements. You will remember the point put to him, well, there is no provision for that in the Legacy MSA contract, and he accepted that that was so in his oral evidence. He accepted that this had not happened in practice so far as he knew and really the only evidence that it could happen was that Grid had said somehow, somewhere in the course of these proceedings, but there was no suggestion that this had been told to the gas suppliers as being how the contract could or would be operated. We would say, no basis for suggesting that the gas suppliers should do anything other than evaluate their contractual rights based on the documents.

The fourth point we wanted to make on Mr. Matthew's evidence is again really just highlighting the number of assumptions that he has to make for his various worked examples. You will recall perhaps the particular stylised model that was put to Mr. Keyworth in cross-examination which involved, among other things, an age related model in which there would be 130,000 meters of each age. Needless to say, in a sense, that is a pretty artificial and contrived model, we would say, that achieves precisely what it sets out to achieve because it is geared to do that.

So much for Mr. Matthew's evidence. Looking then, in a sense, more broadly at what has been suggested about the realism of the age related counterfactual, and bearing in mind particularly the points that seemed to emerge in the cross-examination of Mr. Keyworth, we discerned three main points here. First, it was suggested that our counterfactual really cherry-picked the best bits out of the CMO and new and replacement contracts and ignored elements that did not suit us; secondly, that the CMO contracts in any event did not actually envisage like for like or dumb for dumb replacements; and thirdly, that no supplier would

have signed up to an age related contract because under such a scheme they would have to pay for customer requested exchanges or CREs.

Taking each of those three points in turn: as to cherry picking of course the Authority has never suggested that an age related counterfactual should be or is a carbon copy of any one particular contract that is out there in the market. What we have to show, as Professor Grout put it, is that the kind of contract we have envisaged is "plausible" or "feasible, consistently with normal competition". That means that it is perfectly legitimate to look at the kind of features that you might expect in an alternative scenario dealing specifically with Grid's Legacy meters. That means, for example, that whereas one sees that the CMO contracts have got this exclusive initial five year period, that is not necessarily appropriate, and we have thought not appropriate, for the age related counterfactual, which of course does not involve actually purchasing meters now, but involves dealing with Grid's Legacy stock of meters. As Mr. Keyworth put it in his evidence, and here I quote from p.56 of the transcript:

> "The National Grid contract is clearly more akin, if you like, to the secondary period of the CMO contract where the question is, 'Might a third party replace the meter?'".

Then the second point, which is, well, what do these CMO contracts actually allow? Do they allow like for like exchanges which sort of sailed up as an issue when, I think it is fair to say, it had been anticipated that there was common ground on this, but in any event, so far as the UMS contract is concerned we do believe it remains entirely common ground that that contract does expressly permit such like for like exchanges.

So far as the other CMOs are concerned, you will recall from the letter that we have looked at – there is no need to turn it up now, but CR3, tab 191 – that British Gas certainly understands that like for like exchanges would be permitted in relation to each of those CMOs. That view, as we understand it, is also shared entirely by Meter Fit, and you will of course have seen a note that they put in the other day about this.

Where there appears to be some doubt is in relation to CML. In relation to that, well, as Mr. Keyworth explained, they actually had the smallest relevant volumes here, so, as it were, in proportion to the others are not as significant. There is scope for debate about the arrangements in relation to them, but we say, even allowing that it may be that their contract does not allow for this, it does not alter the relevance of the counterfactual that we have adopted.

THE CHAIRMAN: It would be rather strange to have a contract which provides for a PRC if the reason for replacement is a technological upgrade, but for no PRC being completely free to swap meters after the five year exclusivity period.

MISS CARSS-FRISK: As I understand it, the debate is actually as to whether swapping out is permitted, not so much as to whether it is swapping out with a PRC or not, but whether it is permitted.

THE CHAIRMAN: Yes, but are you saying in UMS it is permitted ----

MISS CARSS-FRISK: Yes, with an age related PRC.

THE CHAIRMAN: I see.

MISS CARSS-FRISK: The only issue, as it were, so far as we can make out is in relation to the CML contract. As I say, debate could be had, but now is probably not the time as to how one construes those provisions but we say we have a very clear example with UMS, which does mirror our age related counterfactual on this, and Meter Fit also agrees that they have similar provisions in the secondary period, and on that basis we are content to say there may be an issue in relation to CML but it does not actually affect the counterfactual. I am reminded just to be clear where deal with this in our note if you look at para.182, where it refers to the clause in the UMS contract, 11(y)(i) it should actually be clause 10(y)(i), and then if you go to para.185, the CML contract, where we refer in the third line from the bottom to "11(y)(i) it should be "11(x)" in fact.

Moving on then to the third point about the realism of our age related counterfactual, the idea, the suggestion as we understood it, that no supplier would have signed up to this because you would have to pay for CRE exchanges, and looking here at para.186 there is one minor correction to be made: in the first sentence one should cross out the word "only" at the end of that sentence: "As Mr. Keyworth made clear, free CRE replacements appear in the NG Legacy MSA ." That is, of course, not "appear" as in various provisions that says that these are free, this is a reference to how they can fit within the glidepath allowance. The reason we took out the word "only", is that in the P&M terms there is also a reference to CRE exchanges being free if they are carried out by a CMO, albeit if they are not carried out by Grid itself.

THE CHAIRMAN: Their "free" must have some different meaning from the meaning in which you are using it in the first sentence. In the first P&M terms there are no payment ----

MISS CARSS-FRISK: There is no glidepath.

THE CHAIRMAN: There is no glidepath, there are no charges so it cannot be "free" of the charges?

MISS CARSS-FRISK: There are charges in fact, I understand, under the P&M contract if Grid undertakes a CRE replacement then there is a transaction charge, but that does not apply if this replacement is done by a CMO.

THE CHAIRMAN: Well the CMO might impose a transaction charge.

MISS CARSS-FRISK: Ah yes, that is a different point, yes, but not by Grid. One needs to be clear that the first sentence of para. 186 clearly only refers to "free" as in under the glidepath, which of course means with bad luck it may not be free, if you have actually exceeded the glidepath. All we really say about this is, in relation to the suggestion: Why should any supplier have wanted to make a deal where these provisions apply, that you do have to pay for CRE exchanges, we say that this is entirely realistic given what is actually there in the market at the moment, as far as the CMO contracts are concerned, and that of course is all we have to show, that it is realistic this could happen absent the MSAs completely.

Can I just briefly add something that is not in our document. Just looking more broadly at the realism of the age related counterfactual, where the suggestion has been: it would be complicated and there would be these transaction costs if you had such an arrangement. There are really four points on that. First, which I know you have – it is not a comparison between the MSA and the age related, that is important because Grid seems to come back to this time and time again: "Oh, but the suppliers preferred the Legacy MSA."

Secondly, we have no actual evidence of transaction costs, we have references to things that would need to be done, and suggestions it might be a bit complicated etc., but there is no actual evidence of those costs.

Thirdly, it is clear that the information as to age is there, Mr. Turner took you to that on the first day, I think; it may have taken a little while to dig it out, but it is there.

Fourthly, if you look, and I know I mentioned this in opening, if you look at the statement of Mr. Spence for Grid, which we have not of course challenged, you will see there that he explains how one can actually get good access rates and improve the ability to get to certain meters with a bit of effort in terms of contact with the consumer, that kind of thing.

THE CHAIRMAN: What about the point that I think it was Professor Grout made, that if the transaction cost arises because Grid did not have the information, and the reason why it did not have the information might be because it did not need the information at the time that it was a monopolist?

MISS CARSS-FRISK: I am grateful that you reminded me of that; absolutely, madam. That is entirely a fair point that it could be in the interest of a monopolist not to have the information ----

THE CHAIRMAN: Well one would not have to put it quite like that.

MISS CARSS-FRISK: I think that is pretty much how ----

THE CHAIRMAN: That was how Professor Grout put it.

MISS CARSS-FRISK: -- how he put it, but I am sure I should have picked up on the way you put it, madam, instead. If there is, as it were, a relationship between the dominance of the undertaking not having needed perhaps to acquire that information and it then not being there then, yes, we would say it really does not behove the dominant undertaking to then set that up as a cost which would somehow entitle it to use a more foreclosing arrangement, than one that would otherwise be a sensible alternative.

THE CHAIRMAN: Yes, I suppose that the information National Grid had to gather about its business was rather dependent on how Ofgem went about regulating it and setting its prices; if that information did not feed in in any way to the regulatory process then they might not collect it.

MISS CARSS-FRISK: That may have been one reason why not to do it, although of course one should not in any way then infer that this is somehow related, as it were, to what Ofgem has or has not done, or that the outcome would be different if it so happened that Ofgem had not required this. At the end of the day it would really go back, as it seems to us, to Grid's essential monopoly position, that is what it would all be about, and so all one would say is, not in any pejorative sense necessarily, but one would say if they do not have the information because of their monopoly broadly speaking, then they cannot rely on that in this context.

I was going to move on to objective justification very briefly because as it seems to us on the evidence that you have heard, things have not really moved on from where they were in opening. Grid, as you k now, has relied essentially on the same factors that they rely on to say normal competition, not prima facie abusive. So, it is the points about payment completion and efficiency which I have sought to address. Then there is perhaps the additional point about, in a sense, being entitled to recover their sunk costs - they might say, "No, that is not our argument". But, the effect would appear to be that. We, of course, say, "No. Seeking to recover your sunk costs cannot amount to an objective justification for something that is otherwise abusive".

So far as benefits to the suppliers are concerned, I know you have our point that that is, frankly, irrelevant here (see, for example, Hoffmann-La Roche). However, there is the point that was particularly highlighted by Professor Grout as to transfer of risk in the Legacy MSAs compared to the P&M terms, and how one must therefore be at least careful in saying, "Well, there was a big reduction in price". That is Professor Ground at Day 8, p.69, which I would invite you to read perhaps to yourselves. It is para. 192 of our document. (Pause whilst read):

Moving on then to the question of penalty, I know I invited you to look at the particularly relevant authority, *Napp*, on this in opening. So far as the facts are concerned, well, as Mr. Turner has indicated, all other things being equal, if we are concerned with unlawful abuse, then he really does not dispute, as I understand it, negligence, and the entitlement to impose the penalty. In fact, it would appear that Grid might have been intentional here - looking at the legal test - but we stand by the Decision limiting itself to the finding of negligence.

As for the alleged involvement of Ofgem leading up to the MSAs -- I have taken you to the key points, I think, already in opening. However, as you can see, we have set out at some length various relevant factual points, particularly relating to Mrs. Frerk's evidence about all that. What I would do in the time available is simply pick up what seemed to us to be the really key points on this. As we know, Grid has made clear that it is not relying on this as creating a legitimate expectation. So, it only goes to mitigation. The absolutely key point I know you have is that whatever discussions there were in 2002 were entirely in the regulatory context, and not in the Competition Act context, and with Ofgem making it clear on several occasions that Competition Act concerns were really for grid.

Specifically looking at the regulatory context, it is important to remember Mrs. Frerk's evidence about what would have happened if there had been a network code modification or a proposal for that. She explained that (on Day 6, p.62) about how it is quite an involved process where one would have had Grid putting forward a modification proposal, and that would then have started a process through which industry more generally would have looked at it and commented on it, and then reported to Ofgem, and then Ofgem would at that point would then have taken a decision looking at a set of criteria set out in the code and of course applying its own statutory obligations.

THE CHAIRMAN: Those statutory obligations, I seem to remember, include a sort of promoting competition -- Do those statutory objectives apply to Ofgem's role as a Competition Act enforcer, or only to its regulatory functions?

MISS CARSS-FRISK: So far as I understand, and I will be corrected if I am wrong, they do not. They are entirely separate. Can I make it absolutely clear on that? We say there is no question of any other possibly broader regulatory duties deriving from the Gas Act coming into this decision. This is fairly and squarely only a Competition Act decision. They are separate regimes. What Ofgem has done is purely to apply the Competition Act.

The reason I mention the involved process in relation to network code modification is that there was a suggestion in cross-examining Mrs. Frerk that this was sort of all about regulatory judgment. Well, in a sense, yes, but that is very much an over-simplification. So, it is important just to see that even the conversations which were purely in the regulatory context were, as it were, at an early stage in that if anything more had happened there would have been this very involved process which supports the idea that it really was not reasonable for Ofgem to take any comfort out of the conversations that were had at that time - but, of course, in particular, not in relation to the Competition Act.

Then the last thing really to remind you of here is the reference that was made in cross-examining Mrs. Frerk to a brief note, you may recall, that she prepared for a meeting between the Chairman of Ofgem and National Grid. It is her witness statement at para. 48 which we deal with in para. 217 of the document. This is where, you will remember, there was a sort of internal debate involving Eileen Marshall, who was Ofgem's Managing Director of Competition and Trading Arrangements. She may expressed, you may recall, the very clear view that premature replacement was in no way inefficient if the new meters were cheaper than those which they replaced. Mrs. Frerk, when she was pressed about that, rightly stressed that she had formed her own view but very much from a lay perspective, whereas Miss Marshall was a greater authority on these matters.

Finally on this question of whether Ofgem at any stage provided any guidance as to the ages at which it was thought appropriate to replace meters -- I am sure you have the answer - it is, no, there is no evidence that there actually was such guidance beyond, as it were, supposition from Mr. Avery and Mr. James to a certain extent. But, both of those individuals accepted that they had no direct knowledge of any such guidance from Ofgem. Of course, particularly importantly, you have the information provided by British Gas saying, in terms, "No, there was no guidance about this from Ofgem" (WS1, Tab 3, p.857, attached to Mr. James' statement). So, very clearly set out by British Gas that Mr. James, insofar as he understood something different, was mistaken.

So, in the light of that unequivocal statement from British Gas, Grid really would have to put forward some very strong direct evidence to the contrary, which they have not done. So, just closing off that particular point ----

THE CHAIRMAN: The guidance about meter age is a slightly different point from the point that does seem to crop up in the correspondence, which is the point about Ofgem's concerns that there should not be too many meters taken out. Is that the Eileen Marshall point about the efficiency or the inefficiency of ----

MISS CARSS-FRISK: It is certainly a part of the Eileen Marshall point. Mrs. Frerk, you may remember, said that to the extent that there was reference to premature replacement it was about undue replacement, and a particular concern that there might be very quick switching out before RGMA and all the relevant systems were actually in place. To the extent that Mrs. Frerk said, "Well, concern about replacing working meters, that was very much in the Eileen Marshall context where Eileen Marshall, the competition law expert, said, no, effectively, if you replace meters for cheaper meters or whatever, that is a perfectly efficient outcome" – I am paraphrasing.

THE CHAIRMAN: Can we just go to the penalties section in the Decision?

MISS CARSS-FRISK: Yes, p.127.

THE CHAIRMAN: I am not sure whether any of these figures are confidential or not, the figures in para.6.60 or 6.61.

MISS CARSS-FRISK: I do not understand that there is any controversy about the basic figures, no.

THE CHAIRMAN: Just so that I understand how this amount was arrived at, you took the relevant percentage that is mentioned in 6.60 as the starting point?

MISS CARSS-FRISK: Yes, 4 per cent.

THE CHAIRMAN: Yes, 4 per cent, and that was Ofgem's assessment of the seriousness of the abuse relative to a maximum of 10 per cent?

MISS CARSS-FRISK: Yes, that is right, applying the five step approach set out in 6.57.

THE CHAIRMAN: Then you multiply that by the turnover in the relevant product market.

MISS CARSS-FRISK: Yes.

THE CHAIRMAN: I see, there was a multiplication because of the number of years – is that right?

MISS CARSS-FRISK: Yes, which is the second step where again, looking at the five step approach at 6.57, adjustment for duration. So at the end of 6.61 one sees the appropriate multiplier, which is 4.

THE CHAIRMAN: There was no deterrence adjustment and no aggravating or mitigating factors?

MISS CARSS-FRISK: That is right, exactly. That is 6.62 to 6.65.

THE CHAIRMAN: Then in 6.64 you deal with potential. That was what concerned me, that you say here that National Grid did not seek formal guidance from the Authority on the MSAs, which was available to National Grid at the time. Mrs. Frerk was very clear that they did not regard it as their job to give any such guidance. In fact, the whole thrust of her evidence was that once you moved away from it being a network code modification they were very hands off as regards expressing any opinion.

MISS CARSS-FRISK: What is important here, of course, is that we are talking about a different kind of dialogue. Within the dialogue that concerned a network modification process, Mrs. Frerk absolutely was clear that no guidance was being given and indeed no guidance was being sought under the Competition Act. It is a different matter if someone actually says, "Wearing your Competition Act hat, we would please like some guidance on this". The point is that that never happened, so what you had was discussions in a very different context where Mrs. Frerk says, in effect, or Ofgem says, "It is for you to consider the Competition Act issues". It is a different matter if National Grid had then come forward and said, "We are now concerned about the Competition Act issues outside the regulatory context and we would like some guidance from you, Ofgem, as competition authority". One has to say that Grid were very much put on notice that there were potential issues. That is what they were being told and it really then would have behoved them, as it were, to come back with a request specifically for that kind of guidance, i.e. under the Competition Act.

I am reminded that that would have gone to a different person who would have been, as it were, a Competition Act person, rather than Mrs. Frerk and her colleagues who were specifically looking at the regulatory context.

THE CHAIRMAN: Yes, thank you.

MISS CARSS-FRISK: Unless I can assist further then those are our submissions.

THE CHAIRMAN: You have not said anything about this regulatory asset value, sunk costs issue. Is that included in your document?

MISS CARSS-FRISK: It is not included in the document. It is dealt with in the skeleton argument. All I would say as to that is really that at the end of the day I think everyone agrees that various factors can go into the calculation of RAV. Where it is left, I think, is

that it is not accepted by Mr. Smith, who, as we know, has not been challenged, that the RAV necessarily represents Grid's sunk costs, but that is probably where it rests.

THE CHAIRMAN: Thank you very much, Miss Carss-Frisk. Mr. Vajda, do we have time for a five minute break at this point, do you think?

MR. VAJDA: Absolutely, that sounds a wonderful idea.

THE CHAIRMAN: We will come back just after three o'clock.

(Short break)

MR. VAJDA: Members of the Tribunal, we have prepared what is headed "Joint Closing Submissions". I am well aware that I am limited in time, and I am going to finish by 4 o'clock, this is a 52 page document but it is divided really into two parts. The first part deals with a number of legal/factual issues, which I will spend a bit of time on. The second part, which is 25 to the end is really dealing with evidence on foreclosure, that I am going to spend very little time on. I have one or two extra references to put in, things like that, but effectively that is just there to assist the Tribunal, and so I am planning to get through this by 4 o'clock.

Starting off with dominance, we all know the importance of market definition and why it is important, which is that it is a tool to assess market power. Moving to para.2, the point that we make here, of course we all know what the definition of "dominance" is in the European Court – to act to an appreciable extent independently of its competitors, customers and ultimately of its consumers. I am not saying that we ignore the customer's but obviously in an exclusionary case it is important to focus on competitors.

Going on then, we make the point in para. 4 that in carrying out a market definition in an abuse case it was important to look at the facts as they are, what we call the "real world analysis" and not as they might or should be. We say it is only by carrying out a real world analysis is one able to determine whether a particular undertaking has in the real world, or the real market, power or not. The fact that there may have been abnormalities in the market is not a reason for carrying out a real world analysis.

Really, the big issue as far as market definition is concerned, is whether Legacy and new and replacement meters are in the same market. We mention at para.6 certain points about the evidence of Dr. Williams – I am not going to read them out orally, the Tribunal will make of them what they will.

Moving on to para.7, we say the position is as follows: Dr. Williams accepts, as he must, that as a matter of fact new and replacement meters are substitutable for Legacy meters. However, he says this is irrelevant, since such substitution is artificial, that it would not

occur in a market where there is normal competition because NG would have had payment completion provisions that would have prevented such substitution.

We say, with the greatest respect to Dr. Williams, it is his analysis that is flawed, and it is flawed because he ignores the real world and looks at the world as it ought to have been. We say that is not permissible. It completely ignores the reality of the situation and would completely fail in being the necessary tool to examine National Grid's market power as it was during the period from 2002 when the MSAs were being negotiated.

In this context I would just like to pick up *Aberdeen Journals* that Miss Carss-Frisk took the Tribunal to this morning, to make a few observations about the approach of the Tribunal in that case. I am limited in time so I hope the Tribunal will accept from me my description of effectively the issue in *Aberdeen Journals*. The relevant paragraph is at 276, but it comes under the section at p.77: "Criticism of the Director's approach to economic evidence".

This was a case which the Tribunal may or may not remember was about predatory pricing, and predatory pricing I should say by Aberdeen Journals. One of the issues in the case was whether there was any switching between some of the newspapers in the market and the free newspaper that was effectively being predatory priced.

One of the arguments of Aberdeen Journals, which we see recorded at para. 257, which is p.77, we see at (v) – this is one of their criticisms of the Director's case: "absence of any evidence about switching even when a disparity between prices in the Evening Express and the free newspapers were at their maximum extent." So they say that is a strong indication, No switching therefore products are in a different market.

As we know, that argument was rejected not unsurprisingly by the Tribunal at p.82, "not a particularly attractive argument to run because the argument that was being run was: we can put the newspapers that we sell at a predatory price in a different market and that was the argument that was rejected.

As we understand the rejection it was effectively because of the Cellophane Fallacy at 276, because what happened is that the prices were artificially low, that was the predatory price. It was, if you like, a Cellophane Fallacy in reverse. Now, there is absolutely no read-across to this case because here there is evidence of switching. There is evidence that the Tribunal have seen of switching between Legacy and new and replacement meters. We know from Dr. Williams' evidence that this is not a Cellophane Fallacy case. The point that I made to Dr. Williams in cross-examination, when I gave the example of the state aid -- What happens, the point of that, is that you do not ignore Undertaking C in market definition simply because Undertaking C's products may be being state-aided. You look at the market

as it is, and that is the way that we say the Tribunal should approach the issue of market definition.

In view of the time I am going to pass over paras. 8 to 11, which, in a sense, are second-order points on market definition.

I am now going to move to market power, economic strength, and dominance. We have used the different terms because 'economic strength' is in fact the language used by the European Court. 'Dominance' is the word that we see in the Treaty and in Chapter II. 'Market power' are the words that one sees, for example, in the OFT guidelines. Now, as counsel for Ofgem pointed out, the assessment of dominance in the Decision was what I might call a classic dominance assessment. They looked at three factors: market share, barriers to entry, and countervailing buyer power. Such an analysis is, we say, absolutely bang in line with the summary of the position in *Bellamy & Child*, and the case law of the Community courts and the relevant guidance of the Commission. By the 'guidance of the Commission', there I am referring to the DG Comp discussion paper of 2005, which purports to represent the legal position.

We say, moving on first of all to the first factor, which is market share - and again we support Ofgem on this - that there is no suggestion, on the basis that the relevant market is correct, that the market share figures are wrong. We make a comment that is self-explanatory about Dr. Williams thought on market share at para. 14.

At para. 15 we say that the attack that is made on the Decision's conclusions on barriers to entry and expansion is a no evidence attack. Again, it seems to me it is of minor importance. The Tribunal is well able to make its mind up on that. We say that that attack fails.

That is important because effectively National Grid have put most of their eggs in the countervailing buyer basket power. This is important in terms of analysis because we will see - and we see that from the quote at para. 14 from *Van Den Bergh*,

> "It is settled case law that very large market shares are in themselves, and save in exceptional circumstances, evidence of the existence of a dominant position".

So, the way it is done is that there is a presumption of dominance. So, you are going to have to find something pretty extraordinary to rebut that presumption. We say that there is nothing pretty extraordinary to do that.

There are two points that have really been made on this. First, the countervailing buyer power point and, secondly, the price cap point, if I can put it like that. I deal with those in turn. Going to p.6 of the script, the countervailing buyer point is effectively Dr. Williams' hold-up problem. Nobody disputes that there is a hold-up problem in economic theory.

The question is: Is there a hold-up problem on the facts of this case? The point that I put to Dr. Williams in cross-examination - and the point that I am making in these submissions - is that Dr. Williams' analysis was hypothetical. For example, we say at the bottom of para. 19,

> "He proceeded, for example, on the hypothesis that the average age of the installed base was ten years and that the whole of the installed base could be replaced within five to eight years".

We then make a comment at para. 20 about whether it was wise for him to make a hypothesis that the average age was ten years. Then we make some observations on whether he was right so far as his time-frame was concerned. This is a point that you, madam chairman, raised with, I think, Mr. Avery or Mr. Shoesmith in terms of the tenders - what was the timescale envisaged? We had very helpful evidence from Mr. James on that. (I am now moving to p.7) He pointed out that the timescale in the tenders was effectively a fourteen to fifteen year timescale. He said, if you look, for instance at Siemens CML, the tenders for five years envisaged the removal of about one-third of the base.

Then we refer there to the evidence of Mr. Shoesmith. We make the point at the end of para. 21 that there is no evidence that we are aware of that BG actually asked any of the CMOs for pricing or operational plans for a roll-out other than that contemplated by the original ITT.

We then make, if you like, the teething problem difficulty - the point at para. 22. We therefore say that on a fair reading of the evidence before the Tribunal the threat of an accelerated meter switching programme was a negotiating ploy and that these are hard-headed businessmen - British Gas negotiating for its shareholders; Transco negotiating for their -- These are the sort of points that you make in negotiations.

Then we make a point at the top of p.8 - a point that, in a sense, I made in opening but which is an important point -- It is important to remember that the very fact that there is hard bargaining between commercially-minded businessmen is not inconsistent with dominance. Even Dr. Williams accepted that. The point is that dominance does not mean no competition - it means reduced competition. The Tribunal recall that in opening I took the Tribunal to the DG Comp working paper on the meeting competition defence to make the point that merely because you meet competition it does not mean that there is no dominance - it means there is a defence to an abuse. I have added in a reference to British Airways in the CFI, which effectively makes exactly that point. Again, I am not going to go to it because of time.

What is also relevant to countervailing buyer power is whether or not National Grid was a must-deal partner, and there can be no dispute that it plainly was a must-deal partner.

So, we say that the countervailing buyer power point is not such an exceptional circumstance to rebut the clear presumption of dominance from the market share figures.

I come to the pricing points. These are really, if you like, Dr. Williams' points. The argument runs, "Well, because you have to price at or below the price cap there can be no market power". First, we say that it is a fundamental flaw to assert that there can be no dominance without the ability to charge excess prices or prices above competitive levels. With respect to Dr. Williams, that almost falls into the schoolboy error class because he is very familiar with this case law. One of the cases that he in fact cited in his appendix was *Michelin* (p.9). Both *Michelin* and *British Airways*, both of which are exclusionary cases) assert it was not a necessary finding of dominance for the Commission to prove that either Michelin or British Airways were able to price above the competitive level. I accept, of course, the ability to price above the competitive level may be a relevant factor, but it is not a *sine qua non*. That is the critical point.

I made the point in opening that the Commission's observations at para. 19 of the enforcement guidance document in 2008, where it referred to this factor, cannot have the effect of overruling or modifying the approach of the Community courts. It is trite law that the law is made in Luxembourg and not by the Commission in Brussels, and is certainly not an enforcement guidance notice. I will come back to the significance of it being a enforcement guidance notice when we look at the question of foreclosure.

The second point on why this price cap is thoroughly bad is because it is important to distinguish between the price cap and the competitive price. We saw this morning the Ofgem document on this. The price cap which was set in 2002 – in other words, before there was competition on the market – in the context of a regulatory review is intended to be a reasonable price for the regulated company, the regulated monopoly, to charge bearing in mind its own historic costs. It is not intended to be, and does not equate to, a competitive price. We, with the greatest pleasure, endorse what Professor Stoneman gave as a definition of competitive price at day 8, see footnote 62.

So we say that this is another reason why Dr. Williams was in serious error in asserting that the price cap serves as a relevant benchmark – those were his words – or because they were below the price cap they precluded the exercise of market power.

The third point, moving to the top of p.10, is that the price cap does not constrain in a relevant manner National Grid's market power. This is an exclusionary not an exploitive

case. If Ofgem had brought an excessive pricing case against National Grid and National Grid said, "Actually this was the regulated price", one can quite see that that might be relevant. Here what we are concerned with, as I have indicated, is NG's market power vis-à-vis its CMO competitors. Whether or not National Grid could charge the gas suppliers excessive prices is of little, we say, assistance in determining its market power vis-à-vis its competitors.

We also draw the Tribunal's attention to footnote 46 – we say by analogy because one has obviously got to be careful that cases are not always on all fours. A similar point was run in the *Napp* case because *Napp* was a company that was subject to an overall profitability under the PPRS. So it was clearly regulated. The Tribunal said that there is no, if you like, nexus between that and what we are looking at on the facts of this case.

Finally then on dominance, we would say that there are two features that have emerged clearly during the evidence, which we fully accept are not in the Decision, but which we say reinforce the clear view that there is dominance: first of all, British Gas's inability to persuade National Grid to unbundle maintenance. I will deal with that in more detail in due course when I come to the maintenance aspect of the abuse. We have heard quite a lot of evidence on that. Secondly, that National Grid was able to persuade most of the gas suppliers to commit to the Legacy MSAs at a price above the competitive price, and that was, of course, and as the Tribunal observed, largely because the size of the installed base was such that were able to offer cumulative upfront cash savings. As we know, the Decision records that a cheque was written out for £13.5 million by National Grid to British Gas at the beginning of 2004.

That, madam, takes me to abuse, p.11. There is, as my friend, Miss Carss-Frisk observed now a narrowing in a sense of the issues here. As we see it, the real issue here is not whether the Legacy meters hindered the CMOs' access to the market and there is a bit of a debate about that which I will come to later, but whether such hindrance amounts to abuse or, to use Mr. Turner's language, anti-competitive foreclosure. The theme that runs through Grid's argument, if you like, is that there is good and bad foreclosure like there is good or bad cholesterol. He has not put it quite like that, but effectively you have got to distinguish between the good and the bad.

We, therefore, seek to deal with this, or we have already dealt with this, in our written submissions and this is now under section B, "When is foreclosure an abuse?" I do not propose to develop 34 to 36 because those are effectively a summary of what the Tribunal will already have seen in the written pleadings. What I do want to focus on is the *British*

Airways case. When one is looking at this area, *British Airways* is the key. It is the European court, it is recent, it is March 2007. That is, in a sense, the most important case. I am going to go to that, and perhaps we can pick it up, first of all, in the ECJ, which is at A5, flag 84. We say in our text – this is the bottom of p.12 – that it is particularly important because a number of arguments run by National Grid are the same as those rejected by the ECJ. We go on to say that in particular the ECJ rejected BA's argument that there could be no foreclosure abuse without there being a prejudice to consumers. Can we just close off that point first. Can we go to 3798:

> "The third plea, alleging an error of law in that the Court of First Instance did not examine whether BA's conduct involved a 'prejudice [to] consumers' within the meaning of subparagraph (b) of the second paragraph of Article 82 EC"

While I am making these points, the Tribunal will, of course, have in mind Mr. Turner's submission that this would be extremely odd, to find an abuse without there being a prejudice to consumers. That was the argument that British Airways ran, but unsuccessfully. Could I just ask the Tribunal to read to itself para.103, that is the argument that British Airways put forward. Then what the court says, and it is really 106 and 107, and particularly 107:

> "The Court of First Instance was therefore entitled, with committing any error of law, not to examine whether BA's conduct had caused prejudice to consumers within the meaning of subparagraph (b) … but to examine … whether the bonus schemes at issue had a restrictive effect on competition and to conclude that the existence of such an effect had been demonstrated by the Commission in the contested decision."

Of course, the relevant consumers in the present case, the consumers that Mr. Turner has in mind, are the gas suppliers. They are, if you like, National Grid's consumers.

THE CHAIRMAN: You are not really saying that you do not have to show prejudice to consumers at all, but just you do not have to show it directly. You can show it by damage to the competitive process?

MR. VAJDA: Yes, and what is important here, and we will come back to it when we go to look at the 2008 enforcement document, you will recall, madam Chairman, and the other members of the Tribunal may, that *British Airways* was, if I can put it neutrally, a controversial decision. There has been a lot of discussion as to how Article 82 should move forward. It is not in the gift of the Commission to change the law. The law is as has been set in *British Airways*, so what the Commission has done, perhaps quite cleverly or sensibly,

is to say, "This is how we are going to, ourselves, enforce Article 82", and what they have said in those guidelines – that is the passage that Mr. Turner took you to – is that we are not going to be taking a foreclosure case unless there is prejudice to consumers. That is effectively, if you like, a sub-text saying we are not going to go quite as far as the *British Airways* case, but the point is what is required for Article 82 and we very much endorse the point that Ofgem made this morning, which you need to look at the competitive structure, which is the point made at 106, but it is wrong to think that you cannot have foreclosure unless you can show a clear effect on the consumer, and that is what British Airways sought to argue and, indeed, they were very similar arguments to the ones Mr. Turner is putting forward. They are saying: "This is far too broad for Article 82 can catch everything; there must be some way that you can restrain it". The argument, what they thought was the magic bullet was to say: "Let us limit it to where you have prejudice to consumers, and the court would not buy that, so that is important. In fact if I could ask the Tribunal to amend the reference at footnote 59 which is slightly inaccurate. 41, 46, 59 should go out, and if you could replace 106 with 103, because it is 103 to 107, and the point that I have made about the Commission's enforcement priorities is really the point there in the footnote.

The other point that is important in this context is that the argument that British Airways was running was that its discount scheme was a legitimate form of competition and you will see the parallel to the way Mr. Turner is putting his case here. In that respect could I ask the Tribunal to go back into para. 40, which is at 3792. If I could just ask the Tribunal to read to itself 41 to 46. (After a pause) You will see there at para. 41 that BA is relying on the concept of normal competition. They say at 43 that it was inevitable there would be foreclosure because these bonus schemes were attractive, and then we see at 45 that this was merely, as they put it, a form of competition on the price. Then at 46, importantly:

> "… in order to distinguish between legitimate competition on price and unlawful anti-competitive or exclusionary conduct, the Court of First Instance should have applied subparagraph (b)".

That is again, if you like, the point that you row back from this wide approach to foreclosure.

That argument, attractive though no doubt it was to those who advanced it, failed and what the court said, there is a long passage but what I hope is the key passage is set out at p.13 of this closing (paras. 67 to 69). What they say – I am not going to read it all out but:

"In order to determine whether the undertaking in a dominant position has abused such a position by applying a system of discounts such as that described in paragraph 65 … the Court has held that it is necessary to consider all the circumstances …"

And that is common ground between all the parties, look at all the facts.

> "… and to investigate whether, in providing an advantage not based on any economic service justifying it, the discount tends to remove or restrict the buyer's freedom to choose his sources of supply, to bar competitors from access to the market …"

Then at 68 effectively it is the conclusion that follows from that: "It follows that …" and then you see the part in bold:

> "… it first has to be determined whether those discounts or bonuses can produce an exclusionary effect."

That is 68, and then we see at 69:

> "It then needs to be examined whether there is an objective economic justification for the discounts and bonuses granted."

So we say that is a two step analysis, and that is the way that we invite, and Ofgem – indeed they did in their Decision – invite the Tribunal to approach this case.

If I could move on, again because I have my eye on the clock, there is a passing reference to *Microsoft*, but could we now put away *British Airways* in the ECJ and look at it in the CFI, this is para. 40. The reason I am taking the Tribunal to the CFI is that when the case was appealed by British Airways from the CFI to the ECJ they did not appeal the dominance finding, they appealed only the abuse finding and they appealed what might be called the foreclosure aspects as well as the objective economic justification aspect. In relation to objective economic justification, the ECJ said "I am very sorry, you are inadmissible, this is all a question of fact." So effectively, if you like, the last word on objective economic justification is the CFI.

What I would ask the Tribunal to do is to pick it up at 1647 and if I could ask the Tribunal to read to itself paras. 246 to 247. What the CFI is saying, as probably the Tribunal know, quantity discounts by dominant undertakings, even though they have foreclosed their market, are permitted and effectively the reason that they are permitted is because they are deemed to reflect gains in efficiency and economies of scale achieved by a dominant undertaking. There is an economically justified consideration.

THE CHAIRMAN: Is it a deeming or do you have to actually show that there is such an efficiency gain in order to justify even a ----

MR. VAJDA: Well they say "… are thus deemed …" and those are the words that the court uses there.

If we then go, and because of time I do not think we can look at this in great detail, but if I can just go to 1649, at 279 to 286 the CFI reject if you like the economic defence put forward by British Airways and the punch line is that they find at 284:

> "To that extent, BA's performance reward schemes cannot be regarded as constituting the consideration for efficiency gains or cost savings resulting from the sale of BA tickets."

I would ask this Tribunal at leisure to read the passage we refer to in our closing. Could I now ask the Tribunal to put away British Airways and go, I am afraid, back to A5 to the Commission DG Comp Working Paper. It is important to bear in mind the chronology here, *British Airways* was decided in the CFI in December 2003, and the DG Comp Working Paper, as we say at para. 41, was published in December 2005. We went to this in opening but I would like to take the Tribunal to p.3218. I took the Tribunal to the "Meeting Competition" defence, but I did not take them to the "Efficiency" defence. This is effectively the defence that British Airways sought to run but failed in their case. Again, because of time, if I could ask the Tribunal to read para. 84 to 92 at its leisure. However, for present purposes, can we focus on para. 85 - efficiencies that are realised or likely to be realised? You will see that amongst the matters that can come in here we see, in the last sentence,

> "Such claim may for instance concern the protection of client-specific investments made by the dominant company".

That is, if you like, a stranded cost argument. Now, the significance of that is that this comes in as a defence. It is not said here, "Well, if you've got this sort of argument, this is normal competition. This is coming in as an efficiency defence". It is important to see how the Commission, in the light of *British Airways* and the case law applies this. We say that where a dominant undertaking is running a protection of client-specific investment argument, that is effectively a justification argument - it is not an argument to say that there is no foreclosure. That is important in terms of the analysis that the Tribunal need to go through.

So, if we go back to the text, and if we go to the top of p.15, we say that the following propositions can be derived from the case law. I am not going to read them out because of time. However, I would just like to add a little rider into (c) which is where we say that you do not need to compare it to a hypothetical benchmark or comparator. What we say in the

present case is that the counterfactual, in the sense that that is being put, is that you simply look at the position before the conduct in question - the pre-MSA position. We say that the burden is on the dominant undertaking to defend conduct that has a foreclosure effect. There is no burden on a competition authority to put forward an alternative strategy that the dominant undertaking could have adopted when considering the conduct in question.

Now, one final point on foreclosure.

It is often said, rightly to some extent, that competition law looks to substance, not form. There is obviously force in that. But, that is not an overriding argument. We say that form is also of some importance. If I can just give the references to the Tribunal without going to them -- In the DG Comp working paper the reference that I rely on for making the point about form is at para. 58 (A5, 74, 3210). We would also rely on the *Distrigas* case which the Decision itself cites (para. 419 of the Decision). We say it is well-established that long-term contracts are a recognised form of foreclosure. This is important in this sense, madam chairman: that there has been a lot of argument in this case as to whether or not these rental agreements are economically equivalent to a sale. Now, we do not accept for one moment that they are economically equivalent to a sale. Indeed, I gratefully adopt everything that my friend said this morning. But, let us assume that we are wrong on that. It does not mean that these long-term contracts are not abusive. If I give an example, you might say that an export ban and a reduction in supplies to somebody who knows exporting has the same economic effect, but the law looks at it differently. That is because just as in that law, and competition law, you have to take account of form to some extent. So, we say that it is no good to say, "Well, this is equivalent to sale". It is not. We say it is not economical, and in any event it is a very different form. That is a factor that the Tribunal should bear well in mind.

Turning to the payment completion justification -- I hope the Tribunal can see why we put it into the justification pigeon-hole. We have set out what Grid's argument is. We say at para. 47 that this argument gets them nowhere because it does not preclude the MSAs having a relevant foreclosing effect. It is flatly contrary to para. 85 of the DG Comp paper which I showed you where you see that this is a defence. It is not saying that there is no foreclosure in the first place.

We then make a number of points on whether there is, if you like, justification on the facts. We say that there are not. The point - and again, here, perhaps I could ask the Tribunal to add in - is that we have seen from para. 85 of the DG Comp paper that what one is looking at is client-specific unrecovered costs. That is an additional hurdle that we say Grid has not satisfied.

Now, I think I can move over paras. 50 and 51. Paragraph 52 is a point which Professor Stoneman put to Mr. Turner. We say that this is a very important point - that even after eighteen years gas suppliers will have to continue paying for the meter unless they change. We then make a point in response to Dr. Williams' justification. What I want to do, because of the time, is perhaps go to para. 57, also because, madam chairman, you asked my friend, Miss Carss-Frisk a question about the RAV. Now, as we understand it, the nearest that Grid comes to justifying the eighteen year rental stream is that it says it seeks to rely on the RAV. We make the point here - where, if you like, the chief witness on RAV, Mr. Stephen Smith, was not called to be cross-examined, and, as you know, his evidence, not challenged by way of cross-examination - was that the RAV does not reflect National Grid sunk costs, and that is something that we say the Tribunal will bear firmly in mind. Then we make a point at para. 58, p.19, which is a point, in a sense, that arose out of the evidence of Professor Grout - and this is why a dominant undertaking has a special responsibility and you cannot simply say, "Well, they can do what a new entrant can do" - that there is a significant difference between a new entrant who has yet to sink any costs to seek protection by way of completion, because that is effectively pro-competitive and is protection for investment that is to be made - so, plainly pro-competitive - and for a dominant undertaking that has already sunk its costs a long time ago to say, "Well, we should be entitled to the same protection". So, again, one has to be cautious here to say, "Well, actually if the CMOs do it, we can do it".

Now, the next section, D, which has been labelled 'Other Points' are really various other points on both foreclosure and justification that have been raised. I am sure that there are a large number of points which have been raised that we have not dealt with. However, these are points which seem to us to be of some importance. The first point is the price point: How can this be abusive because we have reduced our prices? In a sense, I have already dealt with this. At para. 63 I make the point that there might be force in this argument pre-British Airways, but they lost on the 82(b) point. So, that is what we say on price.

Moving to p.21, we then have a section on Quality and Innovation. That is obviously an important point of competition. It is an important aspect that those sitting behind me wish me to stress because their view is - and there is a bit of disputed evidence - that not only are their meters cheaper, but they are better. I am not asking the Tribunal necessarily to make a finding on that, but quality and innovation plainly are a factor in competition.

We make then, if you like, a purely arithmetical point on smart metering, a point that, in fact, you, madam Chairman, raised this morning on how we take the view that, looking at

Meter Fit's skeleton, where the Government has announced a programme of ten years' smart metering. We say that, as a matter of arithmetic, that could not operate under the glide path.

The next point, which in a sense I have already dealt with in opening, is this efficient replacement argument. We make a number of points. We agree with Professor Stoneman and indeed Ofgem – this is para.72 – that we do not accept that the Legacy MSAs reproduced the incentive structure that one has under ownership. In any event, we say that effectively it is not for National Grid to determine what is efficient or not. British Gas has customers, it is operating in a competitive market. If it thinks customers are going to be cheesed off because it is going to replace a whole lot of meters, that is a fact that it is going to have to weigh in the balance against the advantage to it of having cheaper meters. So really, what we are saying is, consistent with the gas supplier principle ----

THE CHAIRMAN: It is the advantage to its customers as well, if the savings are passed through.

MR. VAJDA: Exactly, the point is that it is really a decision for British Gas to make. That is the point I am making here.

I come then, p.24, to maintenance. Mr. Turner in opening sought to limit this case saying that this case is really about DCMs, there are very few PPMs around, they are only 10 per cent of the market, and maintenance is not an independent abuse – that is quite right – it is only aggravating and it is not very important. He also made the point that in relation to the new and replacement MSAs, how is it that they can be in any way wrong because they have the same features as the CMO contracts and there is nothing in the operative part of the Decision to strike anything down. We have sought – and again in view of the time I am not really going to have an opportunity to read this out, but perhaps I could ask the Tribunal to add one reference in which arose out of the Chairman's question this morning, which is whether there would be a breach of British Gas's CMO agreement because National Grid retained its maintenance. The answer to that so far as CML is concerned is no. Can I give the reference. That is in the CML contract, which is at CT2, flag 6, 1186. It is important that the Tribunal also look at the evidence of Mr. Lewis on this at para.23, which is WS5/11/2476. The point that he makes – and this is of significance when one is assessing Mr. James's evidence that said British Gas had its own reasons for keeping maintenance to itself – is that there had to be amendments made both to the Meter Fit and the UMS contracts. They had to be renegotiated to effectively introduce the carve-out. That was not a problem so far as CML was concerned because, of course, it could be negotiated prospectively. The importance of that is that it fatally undermines the argument of

Mr. James that British Gas had their own independent reason for keeping maintenance to themselves, because in the original contracts they had with Meter Fit and UMS there was not the carve-out that there now is. We say that shows and reinforces the point we say that British Gas's vision was to have one CMO doing everything and consistent so far as PPMs are concerned with the first principle.

That, I think, is all I want to say on maintenance. We say maintenance is very important. I come then, in a sense, to the last section which begins at p.25, and this is the foreclosure evidence in respect of CML. Of course, just putting this in context, as Miss Carss-Frisk said, there really is not, we would say, much of a dispute that there had been volume reductions so far as CML is concerned. Mr. Turner has not perhaps gone the final mile to actually formally admit a causal link, but we say there really cannot be any dispute about that, and we have given the Tribunal loads of references in relation to that.

Just to have the headline, the impact, it is not just on volumes, but there is an impact – I am now focusing on CML – but also maintenance unbundling is important because the point about PCMs is that they are expensive meters and they contribute to the capital expenditure of the business, they contribute to the overheads, and therefore PPMs are very important. In that context, I would ask the Tribunal to, if we go to p.29, add in a time reference that we have left out between para.97 and 98, and this is February 2003 when Mr. Southgate – and I will give the reference in a moment – expressed concern about a PPM reduction. In fact, he was insistent that there should be no reductions for PPM. The reference to that, which has been unchallenged is Lewis at 2479 to 2480.

What happened, if one looks at the chronology, in 2003 there was a reduction in March of DCMs but not PPMs. In other words, Mr. Southgate's wishes, if you like, were fulfilled. If we go over the page to p.30, para.101, we see that between March and October, despite Mr. Southgate's insistence, there was a reduction also in PPMs. That is the figure of X.

We also draw to the Tribunal's attention, although legally it is post-*British Airways* and it is not necessary, at para.102 the fact that of course, because there is a reduction in volumes that led to a increase in price and therefore we say plain consumer detriment.

Moving rapidly on, at p.31 we then summarise the position, first of all, looking at volume reductions. Then at p.32 we deal with what is called the causation issue and there we seek to set out the evidence on that. Then if I could ask the Tribunal to move to p.36, we deal with Mr. James's famous "other factors". We have decided to relegate those points to an annex, but they are there, and we do not accept what he says about other factors. The finding that we are asking the Tribunal to make is the one at the last sentence of 120, that

that was the main, if not the only, explanation for the reduction in CML volumes. We endorse what Miss Carss-Frisk said about the evidence of Mr. Avery on this, and what is very important, and I am sure the Tribunal will bear it in mind, is the contemporary documents, not what people say when they come here. The M1/21 document is important, and also the June 2004 email that Mr. Avery sent to Mr. Clare.

Then p.37, we then turn to maintenance and we say that this had aggravating effects. We see from the Decision, para.123 of our note, that in 2005/06 NG carried out over 500,000 unplanned PPM visits and replaced 85,000 of those meters. That is a significant proportion.

If we then go forward there is, if you like, what I might call – I do not want to be pejorative but one almost might say a "pleading" point. You will recall that Mr. Turner, in opening, said that in fact there is no finding in the Decision that there has been an adverse effect in relation to PPMs. The Tribunal will read the Decision but we say that on a fair reading of the Decision there plainly is such a finding.

If we then go to p.39 we make the point here that British Gas wanted maintenance unbundling as, in fact, did the CMOs, and indeed the fact that I have shown you there was an amendment to the UMS contract and the Meter Fit contract when they realised that they had to let National Grid in, reinforces that point.

We do not accept Mr. James's evidence, which we comment on at paras. 131 and 132. The point that we make at 134 and following – we make a number of points, but if you like the most striking point is that we make this at the end of p.40: that BGT was aware of the prices offered by National Grid and CML Siemens by the end of 2001, and then as we say in 41: "BGT nevertheless continued to seek to persuade National Grid to unbundle maintenance throughout 2002", and you will recall that internal email, rather revealing, from Mr. Avery saying: "Can we up the dispute with National Grid because they are basically blocking us on maintenance?" So British Gas plainly regarded this as of great importance.

Moving on, if I could just ----

THE CHAIRMAN: Well you need to be drawing to a close fairly soon.

MR. VAJDA: Yes, I started at seven minutes past three and I am in my last two or three minutes, but we are getting there, madam. Could I just ask the Tribunal at the bottom of p.42 to delete the passage in brackets. Then if we go to p.43 we say: "Maintenance was an important issue", that really goes to the "significant impact" point, and if madam chairman permits me before I sit down I can just summarise the three points in relation to impact on PPM. One is volume, second is value, and that we deal with at 151 to 152. In relation to

volume I do not have time to do it, but we do ask the Tribunal to see what we say at 147 to 149, and then we have a point, the third aggravating feature is at para. 153 which is access rates and density. This is in relation to replacement meters, because if somebody calls up British Gas to say: "We have a fault", you are going to have easy access to get to that. This is not about doing maintenance work, this is about having easy access when you are doing meters.

I am now going to sit down, unless the Tribunal has any questions for me.

THE CHAIRMAN: Thank you very much, Mr. Vajda. Mr. Randolph?

MR. RANDOLPH: Madam, gentlemen, I am grateful. Four minute past four on a wet Wednesday afternoon is my favourite slot, so that is lucky, and I will be brief. The Tribunal will have noted that we – the Meter Fit team – have taken a very targeted approach. I want to say now that we endorse my learned friend, Mr. Vajda's and indeed Miss Carss-Frisk's approach and submissions, particularly Mr. Vajda's submissions on the law as set out.

There has been an avalanche of paper in this case and we are slightly concerned that our little snowball might have got lost in the general melee. (Laughter). Just for the transcript I will read out very briefly the documents that we have provided so that you know that just after 4 o'clock on Wednesday there will be a statement in the transcript setting out where our documents can be found.

We have:

The statement of intervention at CB2 tab 6.

Paul King's witness statement at WS5 tab 17.

Meter Fit's skeleton argument CB2, tab 18.

Meter Fit's response to National Grid's notes on effects of CMOs and withdrawals of ITTs, that note is dated 19th January and it was handed up on 20th January.

Meter Fit's further note (referred to this morning) on the charging provisions in its contract with ITTs dated 22nd January and handed up on that day.

There will also be some closing submissions which go into details on the evidence that the Tribunal has heard. What I do not particularly want to do is to hand that up and run through that at great speed looking at the Tribunal's bowed heads whilst reading the closing submissions. What I would like to do now in the remaining 25 minutes is to look at some general points that will be in addition to those in the written submissions if that is acceptable.

Just so the Tribunal is aware, and indeed my learned friends are aware, the closing submissions that I will hand out at the end of these oral submissions deal with two issues.

The first is procedural, it is the issue of Mr. King's evidence, which was not the subject of cross-examination and how the Tribunal should deal with that, and then there is the substantive issue, relating to actual foreclosure, drawing together the relevant evidence derived from cross-examination of witnesses and we trust that that will be of assistance to the Tribunal.

In the remaining minutes I would like to stand back, if I may, and make some more general comments with regard to Meter Fit's position in these proceedings. I can start briefly with where we agree with Mr. Turner – two key points. First, that the factual and economic context in cases such as this is critical, it is important. Mr. Turner made that point on the first day, and in his transcript, day 1, p.12, lines 3 to 7. "… critical importance to the factual and economic context", we endorse that and agree with that.

In that context we would contrast Mr. Turner's – what we say – undoubtedly correct position with that of Dr. Williams and his admission that insofar as a part of his evidence was concerned that descended into "unreality".

I would also recall, madam chairman, that in our skeleton argument – it seems a long time ago now – but we set out what we hoped would be useful in terms of a general description of the background and a specific description with regard to Meter Fit and I would hope that that would be of use when the Tribunal is coming to its determination on this appeal.

We would also recall in this context the importance of the specific factual and economic context, the time line. I mentioned this in opening, you have the monopoly position, the slight opening of the market with P&Ms, we come in – Meter Fit – and then you have the MSAs, and it is that time line which we think is of importance. So that is the first point with which we are in agreement with Mr. Turner.

The second point is that the MSAs led to foreclosure in the market, and we have dealt with this. My learned friend, Miss Carss-Frisk has usefully mentioned where this was set out in Mr. Turner's opening and we endorse that strongly. This is the point about foreclosure but not as we know it, so there is foreclosure but Mr. Turner's approach is not obviously that he admits anti-competitive foreclosure, but there has been foreclosure. We say that is important to the Tribunal when it comes to its decision as to whether indeed there was an abuse.

We go further, and once proper weight is given to the factual and economic context and the fact that it is not contested that there was foreclosure, albeit it is not admitted that it was anti-competitive foreclosure, that will impinge massively on the prospects of Grid's appeal.

We say that that is because the factual and economic context of this case demonstrates clearly the anti-competitive effect of Grid's admitted foreclosing behaviour.

It also, and we will come to this in a moment, demonstrates Grid's, with respect, mis-conceived approach to matters such as the relevant market, because that veers away from reality and strays into unreality or the ivory tower. We want to be in the real world, and we submit that that is where the Tribunal should be as well. So, that is the first point.

We also say that Grid's appeal is, in effect, doomed because its attempt to argue that the admitted foreclosure is not bad - and, indeed, on their case they go higher than that: they say it is positively pro-competitive, not just not anti-competitive, but positively pro-competitive -- We say that is wholly misconceived as a matter of law and of fact. In that regard I strongly endorse the submissions made by Mr. Vajda with regard to this issue of normal competition and its relevance in an Article 82 case. No, you have the special responsibility of the dominant company, and that is key.

Insofar as the actual anti-competitive effect of Grid's admitted foreclosing behaviour is concerned, we deal with that more fully in our closing written submissions by reference to the transcript. As I say, we hope that will be of assistance. But, insofar as a short summary is concerned, we would say the following: Meter Fit was the first competitor on to the market. That cannot be disputed. Mr. Paul King's evidence (which was not the subject of cross-examination) demonstrates the anti-competitive effect of Grid's MSAs. His unchallenged evidence (WS5, Tab 17, p.2822) was clear: the re-negotiation of Meter Fit's 2002 agreement, led, amongst other things, to (1) a reduction in the average annual volumes by a factor of some 7 percent; and (2) the imposition of a volume cap. We say that that evidence - not being subject to cross-examination - has been upheld and supported by the evidence before the Tribunal. We place particular reliance - and we have several examples - in the short time available on the evidence from Mr. Avery in cross-examination (Day 4, pp.45 to 46) where, when asked by madam chairman about, "Why did it matter to British Gas how many of the meters in the car park, once they were given, were replaced?", Mr. Avery's first point was, "British Gas did have to ----" I am just going to pause here because the transcript says 'dance'. That is fine - you can dance on a string, but actually I heard 'balance'. We have put it in as 'balance' in our closing written submissions. Obviously, if my learned friend, Mr. Turner, wants to take the point, I do not really mind, but I am sure he has got other points to take. In any event, we would say it is 'balance'. So,

> "British Gas did have to balance the MSA. The volumes we were allowed to exchange under the Legacy MSAs with the numbers that we were contracted to

with the meter operators. That was an important balancing issue for us. If significantly more meters had been exchanged than the number we contracted that would have pushed us into the tolerance bounds which would have increased the costs. Clearly we didn't want that to happen".

So, we say that is very important as evidence coming out of cross-examination, but also very important because it supports Mr. King's approach.

There is also the well-known by now written evidence from British Gas which is at WS1, Tab 2, p.759 in its s.26 response where it made these points, "These glidepath limitations are likely to have significant financial impacts on both BGT and the CMOs. Meter Fit, for example, would like to undertake higher meter replacement volumes which BGT cannot accommodate because of the impact on the Legacy MSA glidepath"

Again, independent documentation - nothing to do with Meter Fit in terms of the authorship - coming out, supporting Mr. King's evidence. We say that is important. We say it is important insofar as it backs up the findings of Ofgem insofar as foreclosure were concerned.

As I said earlier, Mr. Turner's correct approach, we would submit with regard to the importance of reality is to be contrasted with that of Dr. Williams. We just take one example. His conclusion that he was forced to come to that on the basis of his theory and thesis there would be 22 million mini under-the-stair markets, effectively - because if each gas meter is under the stairs, then it would be in a little separate market - only needs to be looked at, we would submit, to be dismissed. You cannot possibly have an individual market for an individual meter. How, for example, would a business price each individual mini under-the-stairs market? We say that is wholly non-sensical, with all due respect to Dr. Williams, and it might play well in the non-real world. But, we are, we submit, strongly in the real world, and so should this Tribunal be.

The difficulty, we would submit, of Grid's approach became increasingly apparent during the course of the trial. This is where the initial approach which was, "Yes, you have got to look at the legal and economic contexts" blurs with unreality. To be internally consistent Mr. Turner was forced to argue for what I have called the 'pumpkin point', for short, which is that an N/R meter becomes a Legacy meter once it is installed, just by magic. I think Grid, in one of their notes, described this as some form of (or maybe not some form) of alchemy. Whether you call it 'alchemy' or 'pumpkin' matters not. We say that that flies in the face of the legal contract - that point was not made at all (that was based on date); it also flies in the face of reality. We would say, in addition, that it also undercuts Grid's approach

to separating markets for two types of meter. I am not personally aware of any case where products in two separate markets transmogrify magically into one another on the occasion of a given event, but there we are.

We say in conclusion on this particular point that where the Tribunal is faced with a convincing argument based on the reality - and particularly based on evidence from players in the market - of a position -- So, when faced with a convincing argument on the one hand, and fanciful conclusions based on theoretical approaches, we respectfully suggest that the Tribunal would be best guided by the former and not the latter.

Going to the second point, which is the issue of why, in effect, Grid's appeal is doomed, this is the attempt to describe the foreclosure which is admitted as being good foreclosure rather than bad foreclosure. This appears to us to be divided into two points. First, what I would describe as penalty clauses, but my learned friend describes as term commitments. He says, "That's fine. They were great. They were what happened in the market". For the transcript one can pick that up at Day 1, p.12, lines 12 - 14 and, further down the same page, lines 22 - 26. We have made submissions on this in opening and in our note on charging provisions. We say that it is wrong in law because this normal competition point is entirely irrelevant, and it is wrong on the facts - certainly insofar as concerns the Meter Fit contractual provisions. I know I did not take the Tribunal through that note - it is detailed; it is complex, and I certainly do not intend to do it now in the next ten minutes - but it does show, we would submit, that far from being similar to the PRC provisions in the MSAs, Meter Fit's payment technology replacement and functionality change payments were age-related. That is the first point. The second point in terms of summary - under Meter Fit's charging structure, charges are not made when faulty meters are replaced by another meter operator during the secondary provision period. Thirdly, Meter Fit's charging structure involved payments which became due only in limited factual circumstances. This is important - limited factual circumstances rather than imposing a general PRC obligation, or potential obligation assuming the glidepath was exceeded whenever any meter was replaced. I have just quoted here from the final concluding paragraph of our note. So, that is important. So, as a matter of law my learned friend is wrong. As a matter of fact he is wrong.

Grid's second point on the good nature of its foreclosure - we have the first point which is that it is what everybody else does - is that it is good for consumers. Now, we have heard from Mr. Vajda that that is a bad point as a matter of law in the light of *British Airways*. But, even if it were to be a good point, which it is not, we say it is wholly misconceived as a

matter of fact. First of all, you have got the admission here, which you did not have in *British Airways*, that there is actual foreclosure, albeit not on Grid's case in an anti-competitive fashion; secondly, this is based on price - consumers are better off because they have got a better price.

Even if, we would say in response to that, and obviously all without prejudice to the *British Airways* argument, the MSA prices were lower than the P&M contracts those lower prices came at a price. They came at a price and a cost to the gas suppliers because, as we have seen, they could not give the CMOs the volumes sought because of the effects of the PRCs, and I just took you to that extract from British Gas. In effect, National Grid was able to leverage its substantial market share in order to ensure that gas suppliers signed up to the MSAs. That we deal with also in our closing written submissions.

I am very nearly there, madam Chairman, gentlemen. The reality, we would submit, is quite straightforward. Grid has been forced to take the, if I can call them that, "interesting points" to avoid the inevitable conclusion that they were indeed dominant in the relevant market during the relevant period and during that time they abused their dominance by foreclosing the market as found by Ofgem. Grid cannot, we would submit, hide behind any supposed entitlement to recoup its earlier investment in the light, amongst other things, of an answer given by Mr. Turner to Professor Stoneman on the first day (p.51, lines 8-11), that, and this was Mr. Turner saying that National Grid would not have any right to have its market protected just because of prior investment before the gas suppliers and before the change in the market, just because they had invested did not mean that they were entitled to a protection. So they are, as it should be, in the position of everyone else, and given that we would say that the position is as set out in the Decision.

Finally, madam, we have heard the supposed explanation for the name "Project JAM", which was that MSAs simply sought to preserve the value of Grid's assets. We would venture to suggest an alternative explanation might be "jam today, jam tomorrow and jam for some time to come", but I am sure, again, the Tribunal does not quite need to decide that point.

On behalf of Meter Fit we have, as I said, deliberately sought to focus our submissions and we hope that that endeavour has been successful. We would ask you to dismiss Grid's appeal. There is one additional point that arises out of a question, madam, that you raised with Miss Carss-Frisk with regard to volumes before the short adjournment. There was a question with regard to what the Tribunal might need to find with regard to volumes. This is my fault, I need not have raised it. In terms, if the Tribunal were concerned about what

needs to be found by the Tribunal, what we are seeking is the upholding of the Decision generally but specifically with regard to actual foreclosure of the MSAs with regard to ----

THE CHAIRMAN: Is this when I asked Miss Carss-Frisk whether she was going beyond the cap on replacements and adopting your arguments ----

MR. RANDOLPH: Yes, exactly, I put it badly.

THE CHAIRMAN: -- that there was a reduction in volumes and she said she was sticking with what was in the Decision?

MR. RANDOLPH: Yes, and just in case that was still of concern to you with regard to what our position is, I thought I would set that out very briefly. Our position is as follows: we say that the evidence in the witness statements and the live evidence is clear, the MSAs had a foreclosing effect in relation to the volume caps and volumes that Meter Fit wished to have. That supports the findings in the Decision because the Decision is at 4.103 with regard to impact on volumes and then specifically but not exhaustively, we would say, the reference to Meter Fit and its concern with regard to volume caps are the two points. We say that the evidence before the Tribunal supports both of those. We say also that volume caps and volumes are inextricably linked, they must be. We are, therefore, content for the Tribunal to uphold Ofgem's Decision as it presently stands, which effectively goes to both volumes and volume caps, and more generally that British Gas reduced the volume of meters for CMOs. That is in 4.103.

There is, of course, nothing to stop the Tribunal – far be it from me to suggest the opposite – from, when hopefully upholding Ofgem's Decision, we hope, and in particular with regard to actual foreclosure – from commenting that the evidence before it supported the findings in the Decision, but we do not press you on that. No doubt the Tribunal has many points to deal with in this appeal, and another one probably would not be of assistance.

Madam, gentlemen, unless there are any questions, those are my submissions on behalf of Meter Fit.

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

MR. VAJDA: Could I just say that I am not going to be here tomorrow. I mean no discourtesy but I have a prior engagement elsewhere.

THE CHAIRMAN: Yes, if I had the choice between being here ----

MR. VAJDA: I hope that is a comment and not a question, so I am not going to answer that!

THE CHAIRMAN: It is a comment and how lovely Copenhagen is! Mr. Turner, it is your turn tomorrow morning. If we start at 10.30 are you going to be able to finish by the end of the day?

MR. TURNER: Yes, madam, we should be able to do that. We are putting the coffee pot on as we speak. One thing I would say is that I think we now have 150 pages of written material, which has been handed to us today. I will deal tomorrow in oral closing with the points that have been made by my friends in oral closing. On looking at this there are lots and lots of references to things which I will not be able to pick up orally tomorrow. I hope the Tribunal will understand that. That may necessitate us responding in writing to the written material which was not dealt with orally because we have no alternative to that.

THE CHAIRMAN: On the basis that you would be entitled to a reply ----

MR. TURNER: On those points, yes. I cannot deal practically speaking ----

THE CHAIRMAN: I understand, well let us see where we have got to by the end of tomorrow, but would any of the parties have any objection to Mr. Turner responding in writing to the points that have been made in the written submissions but which have not been discussed today?

MISS CARSS-FRISK: We do have a concern that once you start down the road of further submissions in writing after the hearing has finished, then you tend to end up in a cycle of further submissions, so we would hope that Mr. Turner could be strongly encouraged to seek to put everything into whatever, no doubt very substantial, document, that he will produce for tomorrow.

THE CHAIRMAN: Yes, but I think given that the ordinary order of submissions would have been your closing and then the respondent's and then a reply I am not going to shut you out from dealing with points that you consider important in the written submissions that we have received today, if you are not able to deal with them in submissions tomorrow given the constraints that we are under as regards the time for your closing submissions, but we will not engage then a further iteration between the parties, so anything in writing will have to be directly related to what is included in the written submissions of the parties who have handed up submissions today.

MR. TURNER: I understand that, this is a purely practical point.

THE CHAIRMAN: So we will resume then at 10.30 tomorrow morning. Thank you.

(Adjourned until 10.30 a.m. on Thursday 29th January 2009)