IN THE COMPETITION APPEAL TRIBUNAL

Case No. 1099/1/2/08

Victoria House,
Bloomsbury Place,
London WC1A 2EB

22nd September 2008

Before:

VIVIEN ROSE
(Chairman)

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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CASE MANAGEMENT CONFERENCE

APPEARANCES

Mr. Jon Turner QC and Mr. Josh Holmes (instructed by Pinsent Masons) appeared for the Appellant.

Mr. Brian Kennelly and Mr. Tristan Jones (instructed by Ofgem) appeared for the Respondent.

Mr. Fergus Randolph (instructed by SJ Berwin) appeared on behalf of Meter Fit.

Mr. Christopher Vajda QC and Ms. Kassie Smith (instructed by Reed Smith) appeared on behalf of Siemens Plc.

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

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THE CHAIRMAN: Before we start, I have some introductory remarks to make. The first point I want to raise is with regard to the notice of appeal. I have read the transcript of the first CMC in this case, which took place in May of this year, and I understand why the Tribunal did not require the notice of appeal to be revised, even though I, like my colleagues, have found it a rather difficult document to navigate my way around. I am therefore prepared to let it stand, but there is one point I wish to make regarding the future conduct of the case which is that it would be helpful if the written submissions submitted by National Grid before the main hearing in January summarise briefly each of the grounds on which National Grid asks the Tribunal to overturn the decision.

What I have in mind is this: it commonly happens that the parties at the start of their closing submissions at the Tribunal's hearing say they wish to rely on everything that is said in their pleadings and evidence as well as what is contained in their skeleton and their oral remarks at the hearing. I foresee it will be rather difficult for the Tribunal to follow that course here and the parties and the Tribunal do need to have access to a brief written summary of the points on which National Grid relies and it seems at present that the skeleton is going to be the best place for that.

The second point is that there is a tendency in the pleadings, both National Grid's pleadings and sometimes the interveners, to take issue with matters of fact presented in the decision but without indicating clearly how the party submits that this undermines the reasoning in the decision. It is common ground here that this is an appeal on the merits and so the Tribunal is interested not only in whether there has been a factual error or even a legal error, but in how it is said this affects the outcome of the case, namely whether there has been an abuse of a dominant position of the kind found by Ofgem.

Again in the skeleton arguments it would be helpful to the Tribunal if the parties were to tie in their allegations of factual error to the chain of reasoning by Ofgem in the decision so that the case is clarified.

Thirdly, much of the debate over the admissibility of pleadings and the requests for additional disclosure appears to arise because of issues raised which concern the detail about the businesses of the CMOs. There are two avenues of inquiry which the Tribunal is being invited to start down. First, there are questions raised about whether the CMOs were in a position to provide metering services on a greater scale than they currently do if the gas suppliers, absent the agreements being investigated, had wanted them to do so.

Secondly, there are questions about the adverse effect of the MSAs on the volume of business and the profitability of the CMOs.

As to the first of these, i.e. whether the CMOs would have been able and willing to expand their businesses if more work had been offered to them by the gas suppliers – I am thinking in particular of paras. 579 to 597 of the notice of appeal and the passages in the statement of intervention which respond to these. At present it seems to me it is going to be very difficult for the Tribunal to come to a conclusion on the issues raised in these paragraphs without a substantial amount of additional evidence much of which is likely to be very sensitive. I am also at present not convinced of the relevance of this point. My understanding was that whether or not a dominant company has acted in an abusive way does not depend on whether the existing competitors would be able to compete with it in the absence of the alleged abusive conduct. I am not aware of any authority in which the EC institutions have held that it is a defence to an allegation of abuse if the dominant company can show that all the existing suppliers competing in the market are either too small or too incompetent to be able to expand their market share if proper competitive conditions pertained. The test is rather whether a reasonably efficient actual or potential competitor, who may be entirely hypothetical, is being prevented from providing the services by the abusive behaviour.

As regards the profitability of the CMOs business, again I can foresee very serious difficulties in the Tribunal being asked to examine either (a) what were the CMOs expectations as to the volume and value of business that they would achieve once liberalisation had taken place, (b) what their profitability on the business actually done has been: and (c) to what extent any shortfall in actual versus expected profits and business is the result of the operation of the MSAs rather than other market factors. Again any exploration of this will involve extensive investigation of highly sensitive material. As I understand it the question of profitability of the business is bound to give rise to difficulties, given that the CMOs are part of larger organisations may be involved in electricity metering services as well leading to difficult questions about asset and cost allocation. Again, it seems to me at the moment that these issues are tangential at best to what the Tribunal has to decide. Ofgem did not attempt to quantify the effect in terms of volume or value of the foreclosure effect either for the purposes of establishing liability or in its assessment of the fine. I do not understand National Grid to be saying that if, contrary to their primary submissions, there is a foreclosure effect brought about by the MSAs, that that effect is *de minimis* in the sense that that is understood in competition law.

It appears from the notice of appeal that National Grid accepts that the density of operations is important for competing metering suppliers to operate efficiently. If that is the case there

may be scope for a narrowing of the issues here, because if the effect of the MSAs, as alleged, is to reduce the amount of work available to a reasonably efficient competitor, or to reduce the flexibility of the gas suppliers in choosing which meters to instruct the CMO to replace, then the parties may be able to agree that foreclosure, if it occurs, will have an adverse effect on a reasonably efficient competitor. If that can be agreed and I accept, of course, National Grid argue strongly that the MSA had no foreclosure effect, but if that much can be agreed then the relevance of detailed discussion about the patterns of work and volumes of business and profitability of the CMOs and the reasons for all those things seems to me very limited. I am not sure, therefore how findings about the expectations of the CMOs when they set up their businesses, their levels of profitability, other hiccups that may have occurred in getting their businesses started, is really going to help the Tribunal decide the issues in this case.

There are many issues which we will have to decide but the parties need to consider carefully what points they wish to make in this appeal and what evidence will need to be presented to the Tribunal and whether the Tribunal will be able to come to a conclusion on those issues. I do not expect the parties to respond instantly to what I have said in these introductory remarks, but they will appear in the transcript. I hope that everyone will consider them in due course.

Finally, on a logistical point, we have set aside the whole day to hear this application. But, I must make clear that we cannot sit beyond about five o'clock this afternoon. I hope we will be finished well before then, but advocates should bear that in mind. Mr. Turner?

MR. TURNER: Madam chairman, I appear for the appellant, National Grid with Mr. Holmes today. Ofgem - at the far end - is represented by Mr. Kennelly and Mr. Jones. Siemens is represented by Mr. Vajda, Q.C. and Miss Smith. The Meter Fit companies are represented by Mr. Randolph. Immediately to my left, Capital Meters is represented by Mr. Rayment and Mr. Bright. So, those are the parties before you.

Madam, this is the second case management conference in this appeal, as you know. The first, which took place in May, was occasioned prior to the service of the defence and the statements in intervention. May I first say in relation to your introductory remarks that we take to heart what you have said about the pleadings. We will comply with what you have said. We see that as good sense. Insofar as you have raised points about the issues in the case, those to some extent interact with some of the business that requires to be transacted today. With your leave, I therefore propose, as briefly as possible, to refer to the decision, to refer to the reasoning as we understand it in the decision so that you are appraised of our

thinking on how Ofgem's case has been put in the decision and what we see as being the distance between that case and points raised by the interveners to which we object.

Madam, there are a number of items that do fall to be addressed today. I will therefore proceed as briskly as possible. The first is our application to exclude from the appeal certain parts of the statements of intervention. You will have read our skeleton in relation to that. Secondly, there is our request which we see as essential for permission to add to the confidentiality ring two of National Grid's officials - Mr. Pickering and Mr. Rothwell - who are key members of the project team and currently working full-time on this case. Madam, that request was the subject of a letter to the Tribunal of last Tuesday, 16th September. It is included in the bundle which we supplied for the purpose of today at Tab 6. I will come to that. However, in short, in addition to the usual undertakings of confidentiality ring members, it is proposed that Mr. Rothwell and Mr. Pickering, should you look favourably on this application, would give stringent undertakings as to their future involvement in the metering business to ensure that the confidentiality of other parties' materials are adequately protected.

THE CHAIRMAN: That application is not linked with the application for the disclosure of documents in the event that passages that you seek to exclude from the statements of intervention are included.

MR. TURNER: Only in the sense that if those materials - and obviously we shall come to that - include confidential elements that they should be allowed to see those confidential elements as well.

Madam, as you have anticipated, the alternative application, if you are against us in relation to any exclusion is that in the specific areas there would need to be further disclosure or further information from the interveners to enable the appellant to deal with the case that is put.

Finally, we come to directions for the further conduct of the proceedings. You will have seen that National Grid asks for permission to file with its skeleton argument for the final hearing any brief submissions or further evidence which might be needed to deal with matters that it could not address in the notice of appeal or in the reply. Those break down into two main areas. First, there are two rather self-contained aspects of the reasoning in the abuse part of the decision (in s.4) concerning Ofgem's price comparison and Ofgem's assessment of volumes of meter replacement that British Gas contracted for ahead of signing the Metering Service Agreements (the "MSAs"). There is ongoing discussion

between National Grid and Ofgem to clarify the basis for Ofgem's decision in those areas. We currently expect a further clarification next week.

THE CHAIRMAN: These are the two points that you make in para. 10 of your written submissions.

MR. TURNER: Yes.

THE CHAIRMAN: My understanding, Mr. Kennelly, was that Ofgem do not oppose that aspect of the future directions; is that right?

MR. KENNELLY: That is correct, subject to submissions which I will make about timetabling more generally. We have a concern about how the request to file further evidence in relation to the decision will impact our preparation of our own skeleton argument. What Mr. Turner proposes is quite a lot of new evidence in relation to the decision which will be served very late in the day. I will make submissions about how much time we will need to address that for our skeletons. In principle we do not oppose his application for further submissions.

THE CHAIRMAN: Thank you.

MR. TURNER: For our part, we fully understand that there will need to be practical questions gone into about timing.

The other main area is if the interveners' new arguments and evidence are allowed in, whether, as a consequence, there would need to be further disclosure or other steps which would need to be factored in. I should say also that you will have seen from our skeleton that we have not as yet completed our review of the 5,000 confidential documents on the case file. Mrs. Bidwell, who is the in-house lawyer in the confidentiality ring, sitting behind me, has given a witness statement as to that. I will come to that and what we need to do in consequence.

Madam, you should have, by way of housekeeping, about there and a half bundles for this hearing. Just to check that they are with you, the first is the main CMC bundle for this hearing which should have on the spine 'Submissions & Correspondence for the Second Case Management Conference'.

THE CHAIRMAN: Yes. I have an authorities' bundle and an interveners' materials bundle.

MR. TURNER: Yes. Madam, you will also need to have to hand at the appropriate time the decision, which should be in the appeal bundles somewhere within reach, and the notice of appeal itself.

THE CHAIRMAN: Yes. I have the confidential version of the decision. I am very reliant on the parties to jump up if it looks like we are getting into confidential territory, and to ensure that nothing is said out of turn.

MR. TURNER: Madam, that is understood.

Madam, I move straight to our application to exclude specified parts of the statements, which we say trespass outside the framework of the appeal. This is covered in the skeleton argument at paras.16 to 37, and I shall not repeat the analysis set out there, which will be, in any event, largely familiar territory to you. The essential principles, we say, can be boiled down into three basic propositions which should not be controversial, and which indeed may not be controversial other than in perhaps of one ambitious claim made by one of the interveners. These are as follows: first, these are, by statute, appeal proceedings against an Ofgem infringement decision. That decision was made after an exhaustive administrative procedure which was designed to uncover as far as possible all of the relevant arguments and evidence. So these are appeal proceedings in that context.

The second is that the appellant and the competition authority are the main parties in this appeal. The interveners, by their nature, have an ancillary and subordinate role in Tribunal appeal proceedings of this kind.

The third proposition is that this Tribunal, we accept, certainly has the discretion to admit new evidence to come in at the appeal stage, including from interveners. The gist of our point is that the discretion must be exercised in a way which respects the statutory framework and which does not transform these proceedings from an appeal into a trial at first instance. That is, *a fortiori* , in the new allegations introduced by interveners from the sidelines.

Madam, it seems to me that the most efficient way to tackle this is to begin by asking you to turn Ofgem's Decision to see what the case on abuse comprises as we, National Grid, see it and its parameters. I am, therefore, going to start opening legal authorities, I want to get straight to the comparison. I will then, accordingly, turn to the parts of the interveners' cases with which we are concerned and make points about the differences which we perceive between the Decision on the one hand and those new elements on the other hand, and the practical implications which we perceive for the proceedings if those materials are allowed to stand.

Madam, if you have the Decision there, you will already be aware that there is a short summary. There is then a contents page from which you will see that it follows an orthodox structure with a section on the facts, a section on market definition and dominance, and that Ofgem's case on abuse is set out in s.4. What is also important to appreciate is that if you turn to the back of this document, the Decision, prior to the annexes on p.124, there is a single page which has been described by both parties as the operative part of the Decision.

That sets out at para.1 the parts of National Grid's agreements that are said to be abusive. Then it goes on to give the directions and to impose the penalty. Madam, that is the broad structure of the Decision and its contents.

Essentially, the parts of the MSAs which Ofgem has found to be abusive are the early replacement charges, which are paid if customers want to replace more installed meters in a given period than the amounts which are envisaged under these contracts. As we see it, Ofgem's essential case can be simply stated. We agree with Ofgem about this. These charges discourage the customers, gas suppliers, from arranging for higher numbers of meters to be replaced by other meter operators. The charges are anti-competitive because gas suppliers would, they conclude, arrange for higher numbers of meters to be replaced under less restrictive arrangements. There is a counterfactual developed in the Decision. More specifically, it is said that they would have done this in the early years of the contract which are important, because it is at that time that competition is in their words "nascent", and the customers would have benefited from this and they have been deprived of those benefits.

The bundling of meter maintenance with provision, a single charge being made to customers for both services, is not described as a separate abuse, and it is said that this would not necessarily be a problem if the early replacement charges were got rid of.

Against the back-cloth of the charges for meter replacement, Ofgem says that bundling does cause a situation where it is only National Grid rather than competing operators who replace the installed meters during maintenance jobs, and that reduces further any chances that competitors may have for replacing the installed meters.

Madam, if you will turn to the abuse section ----

THE CHAIRMAN: What happens then if a gas customer changes supplier? I know that a lot of the replacements are not customer initiated, but if there is a problem with the gas meter because the maintenance is to be carried out by National Grid, the gas supplier has to call in National Grid to maintain it, and then if National Grid replaces it then ----

MR. TURNER: It comes under the new National Grid contract.

THE CHAIRMAN: The NRR contract. If the gas supplier knows that it is going to be replaced, if they have a contract with another operator, they can call out that operator to simply replace it?

MR. TURNER: Yes. Madam, that is the situation and it is part of our notice of appeal, the rather large notice of appeal. We do point out that it is open to the customers to direct meter fault calls to their operators, the commercial competing operators, so that they can simply replace

these meters. Indeed, part of the complaint that is made is that originally the idea was that the competing meter operators would visit those meters that required maintenance, which are essentially the pre-payment meters that account for only 10 per cent of the population, and would replace them on a first visit fit basis. That would then give them the advantage that they would have put in their own meters and would gain the income from that going forwards.

Madam, the overview of the abuse, "overview" being Ofgem's term, is in 4.4 of the Decision on p.59. What I propose to do is very briefly to run through the structure of the abuse section. You will see from para.4.4 that the foreclosure alleged results from specified provisions of the MSAs. In 4.4(a), the early replacement charging arrangements, which have two aspects. Then over the page, when it comes to bundling, the way that the abuse is put is that bundled meter maintenance appreciably increases the foreclosing effects of the agreements. Where maintenance visits lead to the replacement of meters which are automatically supplied by National Grid under its own new and replacement agreements. So that where maintenance takes place National Grid then takes the meter for future rentals. There is then, after that, a long section on the early replacement charges and how they work. You will need to go over the legal sections at para. 4.35. 4.35 is the context of the abuse. You then have a section on foreclosure on p.68 and you will see from para. 4.44 that Ofgem says that on the basis of its analysis of the MSAs the authority has found that the MSAs imposed significant switching costs on gas suppliers who wish to replace a larger number of meters than the smaller number of replacements of the legacy MSAs. We say that that is the heart of the case against National Grid.

You then get, beginning on the following page a long section beginning under the heading: "The Legacy MSA Charging Provisions" above 4.49, on the charges and their machinery, which extends all the way to above para. 4.69 What you then have is an analysis of the effects of these charging provisions on the costs of replacing meters, assuming a certain pattern of replacement is carried out.

Under 4.85 there is a relevant counterfactual in which Ofgem examines what would be the effects of adopting a different system of early replacement charges whereby the charges are linked to the ages of individual meters, and it concludes that the costs of replacing meters under that arrangement would have been significantly less.

Maintenance does not feature in this decision until you get to para.4.81, where you see it is covered in five relatively short paragraphs. In those paragraphs Ofgem's case on maintenance is spelled out. In short what they say is that the problem solely comes from the

loss of additional opportunities to replace a particular number of the installed meters. What you do not see is anything about the problems coming from the fact that competing operators are, for example, deprived of valuable maintenance work in itself which would give them the ability to become profitable and arrange their operations efficiently, regardless of whether meters are replaced or not. In other words, there is no case made that the absence of the ability to go around maintaining the installed meters reduces the efficiency, the profitability of competing operators and thereby aggravates any foreclosure effect, even for a reasonably efficient operator; it is simply not there.

Then, as I say, you have the section on a relevant counterfactual and the conclusion drawn at the end of that is at para.4.101 where Ofgem says that an age related approach would have providing competing operators with significant opportunities to engage in meter replacement programmes, and suppliers would have faced early replacement charges that would be substantially lower.

Then comes a section which I should mention in view, madam, of your comments at the outset, because beginning at para. 4.111 there is a part of the decision entitled "The legacy MSAs deprived customers of the benefits of competition". This looks at the specifics of the facts on the ground; it does not look at tendencies to exclude reasonably efficient competitors, what it does is to develop an argument that gas suppliers did lose out as a result of the early replacement charges in the agreements, because those charges deterred the customers from replacing National Grid's meters, with meters that were cheaper for them to rent, and so what they do is they compare the prices that were available from competitors in that period with the prices in the National Grid contracts.

Then under para. 4.120 and following there is as section entitled: "Restrictions in Meter replacements do not benefit customers", and here Ofgem develops the points that the replacement charges in the MSAs mean that National Grid is restricting the rate of replacement to the glidepath, the schedule number allowed under the legacy metering service agreement, rather than using what it describes as "normal methods of competition". You see that from para. 4.120.

The last substantive section here begins at 4.123 under the heading "Product innovation", where Ofgem makes a claim that the MSAs are likely to prevent gas suppliers from introducing new metering technology. The reason for that is given in the last sentence of 4.123, namely:

"Since the MSAs give rise to switching costs that are artificially high, they are very likely to distort the incentives on suppliers to consider replacing existing meters with more technologically advanced meters."

Finally, the overall conclusion on foreclosure is at 4.127 namely, that these agreements:

"…are long term contracts that contain provisions that cumulatively serve to limit significantly the commercial benefits that gas suppliers and customers might reasonably expect to obtain if there were more effective competition because suppliers could switch to CMOs without incurring artificially high switching costs."

They conclude that:

"The MSAs have had the actual and likely effect of foreclosing competition within the relevant market."

Madam, there is one further passage I would refer you to, if you would go back to p.84, because you identified a part of the notice of appeal relating to actual effects, it was responsive (or intended to be) to this part of the decision. From 4.102 onwards there is a section entitled "The actual impact on competition of the costs of switching" and Ofgem here marshals evidence that British Gas had been prepared to give more meter replacement work to its commercial operators ahead of signing these metering service agreements, but that once the metering service agreements appear on the scene they throttled back on the volumes that they were prepared to make available, and that is taken by Ofgem as part of the reasoning in its decision as showing the actual impact on competition of the costs of switching, namely British Gas's decision, so it says, to reduce what it would make available to the other operators.

Coming back to the narrative in s.4, after 4.127 there is an extended section considering arguments that were or might be raised by way of objective justification by National Grid. I will skip over those and go to the grand conclusion on abuse which begins on p.106 at para.4.181. This summarises again the essential straightforward case on abuse.

Maintenance is mentioned now, for the last time, in 4.182. I will read it:

"Furthermore, irrespective of whether gas suppliers use competitors to replace meters, National Grid will continue to replace a significant proportion of pre-payment meters during maintenance visits. The Legacy MSA and New and Replacement MSAs include maintenance services (which includes the ability to replace meters with a new meter provided under the National Grids New and Replacement MSA) with meter provision. The authority considers that this

increases the foreclosing effects of the early replacement charging arrangements and further reduces the portion of the market which is available for CMOs on an ongoing basis. It is not the authority's view that there is a separate "bundling" abuse, or (therefore) that maintenance *necessarily* needs to be separated to bring the abuse to an end. In the absence of other restrictive factors of the MSA, the requirement to take maintenance from National Grid alone would not appreciably restrict competition".

In line with that, you will recall that the operative part of the decision at the end, on p.124, does not identify at para. 1 as abusive any provisions relating to bundling. It identifies only the inclusion in the long-term meter supply arrangements, the MSAs, of the early replacement charges - the take or pay charges and the premature replacement charges.

THE CHAIRMAN: So, you are saying, just going back to para. 4.4, that the inclusion of (b) - the bundling of meter maintenance there - that actually they then roll back from that? Or, are you saying that (b) is also just to do with foreclosing effect? It does seem that (b) there is something separate from the early replacement charging arrangements in (a).

MR. TURNER: It is unclear from 4.4(b). We say that it is clarified by the paragraph which I have just read, which is unambiguous. You find precisely the same formulation, which perhaps I should have mentioned as well, at 4.85 where Ofgem states that meter maintenance is, for this case, a relevant part of the contractual environment established by National Grid. It is not the authority's view again that there is a separate bundle abuse. So, it is repeated twice. It is not in the operative part of the decision at all.

It is against that background that you come to the case that was advanced by the interveners when they served their statements of intervention and the evidence on 27th June. Siemens is the party which makes the larges running on the issue of an abuse committed as a result of the bundling of maintenance. If, Madam, you would take up the statements of intervention bundle at Tab 6, which is the statement of intervention for Siemens. If you would look at p.18 at para. 44. Paragraph 44 contains Siemens' case on abuse as a result of the bundling. You will see that para. 44(a) is the case which Ofgem has set out in its decision. They treat it as a separate abuse, whereas Ofgem does not. But, it is the same mechanism - namely, a reduction in the overall numbers of meters which are available to be replaced.

Paragraph 44(b) is the part to which we object. This claims that there has been foreclosure because the retention of maintenance work has also deprived Siemens of valuable transactional work which would have improved significantly the mix of its activities and therefore its efficiency and profitability. There is a reference across to the witness statement

in support of Mr. David Lee at paras. 42 to 52. At para. 42 Mr. Lee says that the retention of maintenance work by National Grid has had additional and very serious implications for Siemens. He says at the end of that paragraph that it has prevented them from achieving the required operator efficiency needed to be efficient, profitable and able to offer competitive prices.

The paragraphs that follow - and there is some cross-reference back to earlier paragraphs as well - then develop this thesis.

THE CHAIRMAN: You are still looking at Mr. Lee's witness statement?

MR. TURNER: I am still looking at Mr. Lee at para. 42 onward by reference to some detailed quantitative information designed to demonstrate that the bundling of maintenance has produced these adverse effects on Siemens. You will see there, reference to a fair amount of factual information about the mix of business which Siemens has had, its efficiency, and the way that it carries out its work, which is new in the case. My points in relation to this can be stated as follows: (1) that at para. 44(b) in the statement of intervention you see a distinct new allegation which is not in the decision; (2) if you put yourself then in the shoes of National Grid on the receiving end of this it can be tested only by entering on to a new field of inquiry about the way in which meter maintenance activities interact with the planned activity of replacement and installation of meters because the case which is made is that if we had this maintenance work as well as the installation and replacement of existing meters we could carry out our work overall more efficiently - we would have more meter jobs a day - and more profitably. We have been deprived of this and that has led to us being weakened. It is an abusive provision for that reason.

It involves looking in detail, if we are to test it, at the extent to which it is correct that there are efficiency savings if you combine these activities of maintenance and installation. As I say, that is a highly fact-intensive job which was not done at any stage during the long three-year investigation. The evidence in support in Mr. Lee's statement involves, among other things, as you will see at paras. 44 and 45, and 47, references to a series of exhibited spreadsheets. Those spreadsheets (which are tucked away in the exhibit, DLL1 which you do not need to go to), essentially contained a whole bank of data that National Grid has not seen, which we cannot verify, because they are simply there presented in a hard copy spreadsheet, and we cannot therefore deal with as part of this appeal against the Decision.

In a nutshell, what is happening is that the interveners are raising a novel and different case from the case in Ofgem's infringement decision.

I add to that by emphasising that the interveners' case was not entirely new in the statements of intervention. It was initially trailed in only general qualitative terms in the first statement of objections. You will see, and I will show you in a moment, that Siemens, in particular, was given specific encouragement and a full opportunity by Ofgem during the administrative investigation to bring forward evidence about all of this after the first statement of objections, but it did not do so. The allegation, for such it was in the first statement of objections, then fell out of the case, and it is not, as you have seen, any part of the Decision subject to appeal.

THE CHAIRMAN: You are not objecting to para.44(a) of the Siemens' statement of intervention because you accept that that is reiterating the point about maintenance that Ofgem does make, which is that if you add that as part of the background they add to the foreclosing effect of the premature replacement charges. Do you say then that all this evidence that Mr. Lee seeks to give, and his spreadsheets, would not be relevant to that part of looking at maintenance as an element in the case, they are only relevant to what you say is the aspect of the allegations about maintenance that should be excluded?

MR. TURNER: That is right. In summary, Ofgem's case focuses on the fact that in a small number of cases, and the evidence is largely common ground about how small it is, when you attend a call-out on a maintenance visit for pre-payment meters in particular, you end up replacing the meter instead of simply fixing it and leaving it as it is. I think the evidence is that there are some 600,000 maintenance visits in a year, some of which are to the same meter, so it is about 300,000 different meters visited, and from those visits about 85,000 result in the need to replace the meter. For the rest, there is no such need.

What this new case is saying is that if the interveners had the ability to maintain the installed meters, *per se*, that would fit well with its overall operations. It would allow more jobs a day, would increase efficiency, and being deprived of that ability to do that has impaired its efficiency, weakened it and is an element in foreclosure.

THE CHAIRMAN: So you are saying that the extension of the case is that you are no longer just looking at maintenance visits in so far as they present an opportunity for replacing the meter, you are looking at maintenance visits as a use of the engineers that fits well with a replacement visit and enables them generally to do more visits per day?

MR. TURNER: Yes.

THE CHAIRMAN: Whether or not they end up replacing more meters?

MR. TURNER: Yes, and that applies to, therefore, not just the fraction of the meters which were replaced on the maintenance visits, but to 100 per cent of the maintenance work. What they complain of is being deprived of 100 per cent of the maintenance work.

I wanted then to show you, madam, that in the first statement of objections this sort of point was there. Would you take up the statement of interventions bundle, I hope that at the back of that at tab 11, you will have the first statement of objections. If you do, I would ask you to go to p.84 (the bottom left hand side numbering) and para.4.116, really a single paragraph by itself:

> "Meter Provision and maintenance are closely related services. The inclusion of maintenance services further forecloses the relevant market, limiting the potential pool of meters which may be maintained by third parties. This is particularly important given the importance of economies of density."

Then a quote from Siemens. Over the page you will see at 4.121 the other approach:

> "National Grid's policy of preventing third party maintenance of National Grid meters further contributes to the foreclosure of the market for the provision of gas meters for the reason that meter maintenance visits very often lead to meters being replaced."

The case that survived into the Decision was a development of 4.121. What happened was that after the receipt of the first statement of objections, Capital Meters, which is the commercial provider for whom Siemens was the sub-contractor and which was liaising with its meter maintainer, Siemens, met with Ofgem to discuss what evidence in response to the first statement of objections Ofgem would find helpful in building up its case. There is a note of that meeting attached to our skeleton argument in tab 1 of the main bundle. It is annex 2 to our skeleton argument and it is ----

THE CHAIRMAN: It is document 11229.

MR. TURNER: That is the one. There was a meeting on 14th July attended by representatives of Capital Meters and Ofgem. The introductory comment from Capital Meters' solicitor at that stage was that he noted that Capital Meters agrees with the legal analysis and the facts set out in the statement of objections and they will be commenting on this in detail in writing, Capital Meters is supporting Ofgem in this process and the purpose of the meeting was to discuss the areas to focus on to bolster their response.

You then turn the page and just above the heading "Suggestions from Ofgem":

> "TH [Mr. Hoskin] of Capital Meters concluded that CML's view is that the MSAs have had material and significant impact and it was seeking guidance on how it could assist Ofgem in its investigation."

You then have suggestions from Ofgem, the first being that PT, that is Miss Taylor, of Ofgem explaining that it would be very helpful to have information on the estimated loss caused to Capital Meters. If you go down to the foot of that page, TH, that is Mr. Hoskin, "noted this point", that was a comment from Ofgem that they wished to see how the market has been distorted and customers have been affected:

> "… and added that any operational impacts will be addressed by Siemens, e.g. any reduction in density."

The suggestions continue over the page. For present purposes the point is that Capital Meters there logs the point that Siemens will address any points on reduction in density after that stage and it did not. At no stage subsequent to that did Siemens follow through on what had been discussed then. At no stage did it supply, regardless of any meeting, any detailed evidence on the case which you now find in Mr. Lee's witness statement, nor for completeness did the other commercial operator, Meter Fit or its associated company, United Utilities do that. You reach a situation where the point is absent and understandably so in the infringement decision is any part of the abuse.

I should say that there is a reference in the decision to maintenance in the context of density and for completeness I will refer to that. If you have the decision and go to s.3 on topic of "Market definition and dominance" on p.37. Under the analysis of market definition, Ofgem considers whether various services are in the same markets. It looks at legacy in new and replacement meters on p.39 at the top, it looks at credit meters and pre-payment meters at the bottom. On p. 42 there is a heading "meter maintenance", in that at para.3.29 Ofgem notes that some suppliers had noted that they would not normally consider contracting for ancillary services including that of maintenance separately from domestic gas meter provision and the majority of those that would consider this indicated that their decision would be based on whether there was a cost benefit in separating the two.

> "The Authority has not found sufficient evidence that it would be cost effective for suppliers to appoint separate companies to maintain existing meters and to install meters.
>
> However, competition has only recently been introduced in the domestic gas metering market and a separate market for meter maintenance could emerge in future."

Then comments on PPM (pre-payment meter) maintenance has relatively high value, and also involving substantial work flow for trained meter technicians. Dropping to the bottom of that paragraph:

> "PPM maintenance might become an attractive stand alone service or an additional service to offering maintenance and installation of new and replacement meters for CMOs or others because it would provide significant volumes of work for the meter work force …"

and I emphasise "**could** help them to achieve economies of scale and density in their operations while their market share in meter provision grows."

THE CHAIRMAN: I think that is the paragraph that CML cites in its submissions.

MR. TURNER: Yes, this is the one that CML relies on. It is followed then with these words in 3.31 that:

> "… the Authority does not have sufficient evidence to suggest that CMOs or others are willing to provide maintenance as a separate service or that there is a demand from suppliers for maintenance services separate from meter provision at the moment. The Authority therefore considers that there is insufficient evidence to conclude that meter maintenance is a distinct market from the provision and installation of domestic-sized gas meters."

Then:

> "The fact that meter maintenance often involves meter replacement is relevant, however, as part of the analysis of the effects of the provisions of the MSAs."

So what you see there is first, that the reference to an effect on density is not footnoted, not supported by specific evidence and put in speculative terms "could help them to achieve economies of scale and density in their operations"; and secondly, that that is the prelude in 3.31 to the statement that the Authority does not have sufficient evidence to draw a conclusion that there would be a separate demand for providing meter maintenance and a specific statement that the relevance of meter maintenance, so far as the abuse case it develops is concerned, concerns the replacement. So that, in my submission, does not assist.

What points then, finally, do the CMOs make to suggest that this point should be now resurrected and allowed to be developed as part of these appeal proceedings which, from National Grid's perspective, is a major allegation? Capital Meters says in its skeleton that it is the summary in the decision which contains the allegation that maintenance work is needed to achieve efficiency of operations and it is a relevant part of the abuse. I will say

shortly that our position is that it does not do so, but in the interests of time I will address that only if my learned friend takes you to that; we say it does not do that.

Siemens similarly in its written submissions at para.28 refers to a wealth of paragraphs in the decision under the heading of the relevance of maintenance which, on inspection, have nothing in any case to do with maintenance, and if Mr. Vajda wishes to take you to those we can look at them. The only potential argument to consider is an argument from Siemens based on a rebuttal point made not in the decision but in the notice of appeal on the issue of dominance rather than abuse. That was in connection with the question whether National Grid's ownership of the large base of installed meters gave it advantages in its operations of scale or density over new entrants and whether this was therefore a barrier to entry before you got on to the question of abuse. That is covered in the decision at 3.68 under the heading above 3.66 "Barriers to entry and expansion", where you will see that Ofgem, as part of that proposition, stated that:

> "The domestic-sized gas meter market has characteristics which make entry and expansion on a significant scale very difficult in short space of time, even in the absence of the foreclosing features of the MSAs. These include National Grid's installed base and position in the market, the expected length of the asset life …"

and so forth. At the bottom of that page:

> "… as well as the need for potential rivals to achieve economies of scale and density to be able to compete effectively."

So that was the argument made about barriers to entry and expansion in the decision. It was addressed in the notice of appeal at para.289

MR. VAJDA: While Mr. Turner gets that, perhaps I could refer you to footnotes 213 and 214.

MR. TURNER: Yes, 213 refers not to density at all, but to the economies of scale of a dominant company and is therefore not relevant.

THE CHAIRMAN: This is making a point about barriers to entry regardless of any abusive conduct.

MR. TURNER: That is my point.

THE CHAIRMAN: They are existing barriers to entry which exist because of the previous position of National Grid as the monopoly supplier.

MR. TURNER: That is my essential point. What I will show you in a moment is that it is addressed in the notice of appeal but it is addressed in that context.

THE CHAIRMAN: Where do I find the notice of appeal?

MR. TURNER: The notice of appeal should be in a separate bundle. We did not prepare one for this hearing. Paragraph 289 on p.104. At 289(a) National Grid resists the proposition by saying that economies of density are all about the number of jobs that you do and not simply the number of installed meters that you have. The relevant part of it is over the page at (b) where National Grid ventured the proposition that the connection between the number of jobs and the installed base as a whole is indeed the flow of the maintenance work that you need to do on the installed base, but National Grid said that the maintenance work does not help you achieve economies of density in your installation and replacement work, referring to two points: (1) that there is virtually no maintenance required for the credit meters (the DCMs); and (2) so far as the prepayment meters are concerned that it was unplanned work because there would be fault calls and you have to get to them very quickly, subject to fast turn-around times, and therefore it would not help you get economies of density in your replacement and your installation work because the two activities do not synergise well.

What is said by Siemens is that this statement, this part of the notice of appeal (even if there is nothing in the decision) provides a sufficient basis for the case which is now sought to be made in the statements of intervention. As to this, we say that the proposition is plainly wrong; that what we are doing in the notice of appeal is responding and responding purely in general terms to that point concerned with the barriers to entry in the dominant section, and that it must be obvious that what the interveners are doing in their statements of intervention is going far beyond responding to para. 289. To address para. 289 they can lead evidence that National Grid is wrong about its proposition that maintenance does not fit well with the installation and replacement work. Indeed, Mr. Lee does precisely that in a part of his witness evidence (paras. 48 to 51).

If you return to the statement of interventions bundle at Tab 7, which is where Mr. Lee develops his case about foreclosure effects resulting from the maintenance work being deprived to them. This is something which was not, unfortunately, stated in our submissions. Therefore I mention it. He turns to para. 289 of the notice of appeal at paragraph ----

THE CHAIRMAN: I am sorry. Which paragraph of Mr. Lee are we looking at?

MR. TURNER: Paragraphs 48 to 51. That is the discreet part of Mr. Lee where he addresses that proposition. He says that the statement is wrong. You will see at para. 51 that it is not consistent with his experience and that according to him you do plan the maintenance work to fit in with the replacement work. So, he says National Grid got that bit wrong.

Now, in our written submissions, perhaps because Siemens had referred to paras. 42 to 52, we had done the same in our annex. I would say, having read this and seen the submissions, that we would be prepared for paras. 48 to 51 to stay as a response to para. 289 of the notice of appeal. It is a response. However, all of the rest of this -- all of the prior allegations, all of the spreadsheets, all of the analysis -- all of that goes to a new case on abuse which is not in the decision and to which we object. If it is to stay in, there are significant practical implications. I am conscious, again, that this is an appeal. If this was a High Court case and this had been introduced in a pleading at the end of June, you would naturally expect there to be disclosure of the relevant documents so that the other party could test it, and you would be envisaging a much longer timeframe than is usual for appeals in the Competition Appeal Tribunal, precisely because of the assumption that the facts will have mainly been gone into at the administrative stage. As we point out in para. 62 of our skeleton, we would need disclosure from the interveners; we would want disclosure which focuses on their systems for despatch and scheduling their work; we would wish to review their reasons for how there are any claimed inefficiencies in their operations. It is a new area. It is not covered. It would need to be gone into.

For completeness, we may also need to adduce further evidence as we say in Annexe 1 of our skeleton at para. 3, and try to obtain such evidence from On-Stream concerning the detrimental effect of having the urgent maintenance work on the efficient installation and replacement operations developed to a greater extent than we were able to do in the reply to the statement of intervention.

Madam, that is our case on one of the major new allegations in the statements of intervention.

I am looking at the clock. madam, and I am very conscious that there has to be fairness in terms of allocation of time. I am also conscious that there are a number of these points to cover and that I need to go into them and be sure that you have the points. So, what I propose to do with your permission is to develop two more of these more briefly than I have done with this first element, and then for the rest to rely more heavily on my written submissions and deal, as necessary, with anything in reply. I take it that we must finish today.

The next element in the statement of interventions then - the second element to which we object - concerns Capital Meters' new technical material and new analysis to support a proposition that bundling prepayment meter maintenance and provision has had major harmful effects on customers. It has deprived gas suppliers, they say, of the opportunity to

take meter maintenance from a cheaper source - namely, them - and has led to the gas suppliers having to pay much more money than they would otherwise have done. They say that this is a concrete illustration of the adverse effects of an abusive provision in the agreement.

Now, you will have seen already from the decision that Ofgem has specifically not found that there would be a separate market for the provision of maintenance anyway; secondly, that there is no allegation anywhere in the decision that bundling of maintenance has led to gas suppliers being substantially overcharged for the maintenance component of the work. It is not there. But, it is now sought to be introduced by the interveners, by Capital Meters specifically, through Mr. Hoskin, who is Capital Meters' principal witness.

THE CHAIRMAN: Just repeat what you say is the point that CML are introducing?

MR. TURNER: We are going to look at it now, but what they say is that because meter maintenance is bundles with meter provision, the customers, the gas suppliers, have been deprived of the opportunity to purchase meter maintenance from any other source apart from National Grid, and that the adverse effects of that are that the gas suppliers have lost out to the tune of many millions of pounds, and that this therefore demonstrates that the bundling provisions in the metering service agreements are abusive. It shows the harm that has taken place to the customers. You will see that in Mr. Hoskin's statement at Tab 2 in the statements of intervention bundle at para. 17. Madam, if I may say, this entire paragraph has been treated by Capital Meters as a confidential paragraph, although they have recently said by letter that National Grid's officials are entitled to know the essential case - namely, that they are saying that had maintenance been unbundled there would have been a major saving for gas suppliers.

THE CHAIRMAN: Mr. Rayment, do you have any objection to Mr. Turner proceeding in open court?

MR. RAYMENT: No objection, madam. I might add as obviously is relevant, that we have also agreed, although this is subject to the other parties, that confidential information could also be extended to National Grid employees in an extended confidentiality ring – in other words, we have agreed to Mr. Turner's application as regards as extending the confidentiality ring, so the information will also be available to National Grid via that mechanism.

THE CHAIRMAN: Yes, but there are a number of people in this room, and I do not know whether they are in the ----

MR. RAYMENT: No, I was just making the general point about our approach because Mr. Turner, once or twice, has seemed to me to take a slightly ----

THE CHAIRMAN: Let us get on to confidentiality in due course.

MR. TURNER: Paragraph 17 then refers to the exhibit TPH1. You have seen the numbers that are stated in para.17, and there is a spreadsheet. For that you need to go into TPH1, and about five pages into it there is a text on the left hand side of the page under the heading "The Maintenance Counterfactual". It is a single page in which Capital Meters set out a description of a modelling exercise that they have carried out on their own initiative. You will see from the first paragraph that the intention is to provide an indication of the savings that gas suppliers would have benefited from if there had been unbundling and if Capital Meters had undertaken maintenance work on the legacy meter population instead.

THE CHAIRMAN: That first paragraph should say, "NG would unbundle their published gas meter maintenance charges"?

MR. TURNER: Yes. There is then a description of detailed steps which have been followed. If you look only at the third bullet it has involved estimations being made of charges that Capital Meters would have levied, and that that estimate is, itself, based on certain factors – a call-out charge, a figure as to the proportion of meters that require a maintenance visit each year, and so on. I do not want to go into too much detail. At all events, there is a methodology spelt out in brief detail.

Then if you turn over the page on the right hand side there is a little spreadsheet in 8 point type entitled "Area 5 Volumes", and at the top left there is BGT, which means British Gas, and at the bottom left in bold "Cumulative NPV UK All Suppliers", and you will see that they have got figures which fall within the range indicated in para.17 of the witness statement.

This then arrives with National Grid when they serve their statement of intervention. Confidentiality is asserted as against National Grid's officials, and an important claim is made seeking to demonstrate that the bundling had had adverse effects on customers and consumers. We object to this as a very significant and brand new piece of analysis. It is based on a raft of assumptions and estimations which we have not been able to verify and, in some cases, understand. None of the underlying sources of that information which have gone into this have been seen by the outside advisors, let alone by any official with knowledge of the business. I can go into detail about things that are unclear, but the essential point is that we are embarrassed by this. We cannot deal with this. It is new. It is

unquestionably different and distinct from the case made in the Decision, and it would require a significant amount of further work and analysis.

In its submissions, Capital Meters says that National Grid's advisors are perfectly able to respond to this new modelling analysis because we have full access to the model and underlying data. That is wrong, we do not have access to the sources of this data. We cannot verify them and we need to ask them further questions about the methodology. We cannot begin to carry out the work and analysis properly unless we have access to one of our officials who is able to help us with the analysis. Mr. Rayment has very kindly now pointed out that they are willing to allow one relevant official to do that.

THE CHAIRMAN: But that is all beside the point, you say, because this is not something we should be going into?

MR. TURNER: Yes. We say it should not be allowed in principle, it is too far away. If it were to be allowed it would require a great deal of further work. That has got to be all built into the timetable, but it should not form part of an appeal against the Decision. It does open up a new area.

I think I am going to pass over one or two of the aspects of the maintenance bundling allegations which are set out in our submissions at paras.40(a) and 40(c) in the interests of time, but I will say, with some diffidence bearing in mind your remarks earlier, Madam Chairman, that we rely on what is in our written submissions.

I turn then to the second main area where the interveners are introducing a new allegation which is exercising the appellant, and that is a new and different case that the policy meter replacement provisions in the agreements are abusive because these provisions prevent competing operators from working effectively. This is covered in our skeleton at paras.41 and 42. Just to explain this, we have pointed out that the focus of the Ofgem is that the replacement charges in the metering service agreements limit the opportunities to replace National Grid's installed meters, which would otherwise occur and these charges are therefore abusive. Previously, again the first statement of objections, Ofgem had trailed a case on abuse that provisions within the metering service agreement, and different from simply the fact of these artificially high charges, were anti-competitive, because these were provisions requiring any competing operator to replace certain meters that were inaccurate, or which belonged to batches that were insufficiently accurate.

THE CHAIRMAN: They require the gas supplier to require CMO.

MR. TURNER: Yes, and therefore by indirect effect has a knock-on impact on the commercial operators.

THE CHAIRMAN: And the complaint or the point being made by Ofgem was that because these count towards the free replacements, that then limits the number of discretionary replacements that the gas supplier can decide to carry out.

MR. TURNER: Yes, now that point persists into the decision, namely that there is a large number of these as a sort of base load that you have to do, and they have estimated about £850,000 in total a year.

THE CHAIRMAN: But you are saying that they initially took issue with the fact that National Grid could require these meters to be replaced at all.

MR. TURNER: Because they said it had a different effect, and the different effect was that these meters, which had to be done, were difficult to get access to – bad work – and were geographically dispersed, making it difficult for competing operators to fit them into an efficient work pattern, and you see that case that these provisions were abusive for that reason developed in the first statement of objections. It is answered by National Grid in its written representations and it is not in the decision. I will show you that very briefly.

THE CHAIRMAN: Well you have given me ----

MR. TURNER: I will give you the reference: in the first SO you need to look at paras. 4.68 and 4.103.

THE CHAIRMAN: Yes.

MR. TURNER: I will not take you to the written representations. Essentially National Grid then come back and say that the need for these policy meter provisions is as follows: we have to maintain the accuracy of our stock, and the way in which the provisions work is as follows, and you will see that they are not objectionable. Ofgem does not obviously respond to us, but it does not include that line of argument as any part of the abuse in the decision. So the situation we arrive at is that these allegations are not in the decision, they are actually dropped by Ofgem having been expressly raised by it in the administrative procedure. The interveners on 27th June seek to recycle them again in this appeal against the decision, and that is a feature of all of the interventions, and I will simply show you some of the references, I am not going to go through each of them. If you go to Capital Meters in the statement of intervention file at tab 4. This is one of the witnesses for Capital Meters, Mr. Williams. He deals with this point. If you turn to p.4 of his statement he has a section headed (over para.13) “Impact of National Grid volume reductions”. This is the point which does mirror what is in the decision and which we do not object to, and which he says from his perspective what the impact has been of a reduction in available meter replacement volumes because of these agreements.

If you then turn over the page and he goes on to a new topic beginning under para.21 entitled as the heading: "Impact of National Grid police replacements", and says:

> "From my experience of managing [these contracts] I am also aware of a second aspect of the Legacy MSA which had had, and continues to have, a significant impact on CMO performance; the National Grid 'policy' replacement requirements."

He then develops his argument about this. He summarises the point at para.31, a quite important paragraph on p.10: and you will see at (i) to (iv) him developing a case about the CMOs, and he is actually speaking as an official of British Gas here, Centrica on behalf of Capital Meters, about the difficulties experienced because of these terms of the agreement, and all of this is new. I will not go into it. You have something similar from Siemens' witness, Mr. Lee ----

THE CHAIRMAN: The point about the 1:1.3 ratio of meters flagged for replacement, is that a point that was initially criticised by Ofgem?

MR. TURNER: I will need to cast my mind back. There was initially a confusion about the way that these policy meter provisions worked. It is true that the contract says that the pool of meters available should be 1.3 times the number that you have to do – putting it very crudely – but that National Grid when an issue arose at an early stage significantly augmented the size of the pool, and that that was made very clear in the written representations. It is not alleged to be an aspect of the abuse in the decision certainly, and I am not even sure that *per se* that was alleged ever to be an abuse.

Siemens' witness, Mr. Lee, covers the same point and he supports it with entirely new and detailed evidence about the economics of operating metering services efficiently. I shall not take you to it again but I will make the general point of the practical implication of allowing this new element to come into the appeal from the sidelines is significant, it is illegitimate, but if it were to happen what we would need to do would be as follows: National Grid, and that includes our officials with knowledge of how the business actually works, are going to need to see what is said against them, they will need to be able to review the underlying data, it has not been covered before. They are going to need to consider the claim and they are going to need to be able to respond to it. The witness evidence and the spreadsheets which we say cannot be taken at face value will need to be interrogated so that we understand it and it is a significant piece of work. We are not seeking, I must emphasise – and I have been asked to emphasise this – to take some procedural point simply to spoil an appeal, this is genuinely, first, not part of an appeal as we understand the process to run; and

secondly, with the timetable that has been set, which we respect involves genuine difficulties. So madam, that is the other main element.

There are a number of others which are also referred to in our skeleton, and I will leave all of those in t he interests of time over save for making the following comments. One of them, in para.46 of our skeleton, concerned the point that whereas Ofgem made no case that the interveners' viability was threatened in the short, medium, or longer term. The interveners themselves did seek to make such a case in their witness evidence. You may have seen from letters that have emanated from Capital Meters and Siemens that those relevant allegations and the relevant parts of their witness evidence are withdrawn and therefore it will not be necessary, I apprehend, to trouble you on that score.

The only other point I will mention among the ones which are mentioned in the skeleton is this: Capital Meters, as well as having that maintenance counterfactual, and the model also introduces a separate and new piece of modelling to compare its prices for meter provision against National Grid and that is to be overlaid on the exercise which you saw in the decision where National Grid ----

THE CHAIRMAN: Well before you progress further Mr. Rayment, para. 48 of the skeleton is that ----

MR. RAYMENT: Of Mr. Turner's skeleton?

THE CHAIRMAN: Of Mr. Turner's skeleton ---- Mr. Rayment at para. 48 of Mr. Turner's skeleton has some confidential material in it. Does that remain confidential?

MR. RAYMENT: No. Neither of those passages is confidential.

THE CHAIRMAN: So, it seems that your complaint, Mr. Turner, was that the price comparison had been expanded from a comparison in relation to DCMs to a comparison of prepayment meters.

MR. TURNER: That is the first point.

THE CHAIRMAN: But you say there is an extra point that there is a new methodology introduced for the comparison of DCMs

MR. TURNER: You will see in a moment that it is not simply a new methodology. As with the maintenance counterfactual, there is an explanation given in the exhibit to Mr. Hoskin's statement about what they have done. In certain respects we have tried - we have external economic advisors ourselves - to understand and replicate what has been done, but have failed. We would need to have further information about it to be able to test it, and further clarification, and to see some of the underlying source data as well. So, it is an additional exercise which, as yet, we have not been able to deal with.

THE CHAIRMAN: But, in your notice of appeal you do take issue with the findings of Ofgem about the price comparison.

MR. TURNER: Yes.

THE CHAIRMAN: You say that the prices are not greatly different if you take into account the cross-subsidy and that kind of thing.

MR. TURNER: Yes, that is right.

THE CHAIRMAN: So, they must be entitled to say, "Yes. Actually the prices are different" and support Ofgem in that contention.

MR. TURNER: Yes. Well, this may be a question of balance. What one sees is that they are introducing in support of that proposition first a new model, a new information in support of it, which, if it is admitted, we at least have to be able to fully understand and test. I take that point. The major proposition, though, is in relation to the price comparison. They do go somewhat further than Ofgem in saying that even for the prepayment meters we have an advantage and we are cheaper. They have developed something which is therefore not part of the decision. Now, it could be said, "Well, that is responsive", as, Madam, you have apprehended to the notice of appeal. We say it is not on the proper understanding of the notice of appeal because we do not say that that is the way that the matter should be tackled. We do propose at one point that if you are going to look at prices, you should look at PPMs and DCMs together, and take an aggregate of the overall cost to the gas supplier. But, they strike out in a rather different direction.

At the end of the day, for this allegation, if, Madam, you were to decide that this was legitimate; it fell within the parameters of the case; and it should stay, we will deal with it. But, we would request that we be able to have the further information which is needed properly to address it. That includes certain further clarification from Capital Meters. Also - and this will not be a problem as I understand it - the ability for Mr. Rothwell (one of our team) to be able to look at the numbers.

THE CHAIRMAN: Yes. Thank you.

MR. TURNER: Madam, that concludes all I wanted to say about the facts. Now, I could develop submissions in response to what my friends have said about the legal issues concerning their ability to introduce new material. They refer to cases -- I have got things I can say about the cases, and so forth. It may be that in the interests of time, rather than foreshadowing any of that, I will simply sit down and allow them to say what they will about it. You have heard my essential propositions.

THE CHAIRMAN: You are not proposing to deal with the normal feature of competition point then? You are drawing my attention to what you said in your skeleton.

MR. TURNER: I can make that point very briefly as you have raised it.

THE CHAIRMAN: Yes. It seemed to me that you were right in the sense, looking at the decision as to Ofgem accepting that payment completion, as you call it, is not of itself anathema to the competitive process, but there is a discussion at length in the notice of appeal as to the *Hoffmann-La Roche* tests and what normal competition means, and whether this is it, or not. To the extent that you may have been countering a case which was not made against you in the decision, there is then the question of whether the interveners are entitled to counter the case that you appear to be putting forward. But, perhaps you can deal with that briefly?

MR. TURNER: I think I can deal with that quite straightforwardly. It is quite true that Ofgem do not object to the existence of early replacement charges. Indeed, their decision built up a counterfactual which assumes a different sort of early replacement charge. All we are doing in the decision is providing the basis for a proposition - a chain of reasoning which starts from the point that it is at least normal for a company with the features of this business to include charges so that if somebody stops taking your product or service early that you can recover the revenue that you had contracted for - the payment completion point.

However, it was not, as you say, an issue between us and Ofgem. We have not pretended that it is in itself an issue between us and Ofgem that they object to payment completion. To the extent that there were any doubts about that from the decision, they were put to rest in the defence. I should say that there were doubts about it -- Well there are certain doubts about it in the decision which have been put to rest. I mentioned, while taking you through the decision, for example, para. 4.120. Paragraph 4.120 is an instance of a case in the decision where Ofgem said -- Perhaps can we return to that very briefly? (After a pause): Paragraph 4.120 and the following paragraph appear to be a vestige from an earlier stage in the administrative procedure when Ofgem was saying that early replacement charges, as we understood it, were a bad thing in themselves. In para. 4.120 they describe as normal methods of competition reducing costs, lowering prices, improving service. They do not mention the early replacement charging. Indeed, they go on in 4.121 to talk about National Grid acting objectionably because it is placing constraints on the rate at which gas suppliers may replace meters at their customers' premises.

So, on one view the argument that payment completion, early replacement charges were not part of normal competition was still there residually in the decision. But, what Ofgem have

now done in the defence is clarified that that is not an issue in dispute between the main parties. We accept that.

Therefore, from the interveners' perspective, it is not an issue between the main parties.

THE CHAIRMAN: Thank you.

MR. TURNER: You have seen the points that we make in relation to that. I will rely on what is in writing unless matters come out in the course of oral argument.

So far as legal submissions are concerned, Madam, therefore, unless you invite me to, I shall not proactively address the cases. I will allow my learned friends to speak in case they raise matters which I should deal with in reply. For the moment, I will stay silent.

THE CHAIRMAN: My only point is this: that insofar as I consider that I have a discretion whether to allow these points to be included or not -and I will exercise that discretion on the basis of the kinds of issues that you have put forward (namely, how much will they extend the scope of the inquiry and how closely, if at all, are they related to the points in the decision) – if you accept that, then I doubt that there is much between you and the interveners. If you are saying that because of the cases the Tribunal is precluded from allowing these points to be argued, otherwise than as a matter of at our discretion, then that would be a different point.

MR. TURNER: Yes. We do not say that there is a rigid jurisdictional bar to you doing this. The two points which I say are the key principles are, first of all, these are appeal proceedings that arise in a certain context. We have got the background of the investigation, and, looking forward, the short timescale for appeal proceedings; and on the other hand, you have an issue about the role of interveners. One of the points that you will have seen from the exchanges is that that is, to some extent, untrodden territory, but nonetheless, although there has not been a specific case on the point, it is clear enough from the essential principles what the position should be as to how the Tribunal should exercise its discretion.

THE CHAIRMAN: Yes, I have got your submissions.

MR. TURNER: That is our case. Madam, what I will say then is I will make certain very discrete points and allow my friends then to develop them as they will, as follows: Mr. Vajda refers to two cases which he said we had not referred to, the *Burgess* case and the Welsh Water, *Albion* authority, as cases which show that you can introduce new evidence at the appeal stage, and that there had been a change in the Tribunal's jurisprudence since the cases which we referred to in our skeleton. As to that, essentially, we will go to them as necessary. That was a case where both of them were cases where the appellants were seeking to introduce new evidence in relation to a non-infringement decision, and the choice

of the Tribunal in both cases was simply between remitting or deciding the points raised in the notice of appeal itself. It is quite different from this case.

Secondly, in both cases, the Tribunal only decided new issues where the necessary factual basis was already established or common ground, and it was simply a question of applying the law to the facts. The Tribunal could not have been clearer in both cases about the care it took to preserve that structure.

So far as interveners are concerned, a few points. Siemens argues that interveners should not be faced by any presumption like the Competition Authority against introducing on the appeal, and the reason is, according to them, that they did not take the decision, they only came in at the appeal stage, and so it is unfair for there to be the same presumption against them. As to that, we say it is just turning the thing on its head. It is precisely because these are appeal proceedings that Siemens was not directly involved, and Siemens does not assume a major role now, because they remain proceedings between Ofgem on the one hand and the appellant on the other.

The second point made by all of the interveners is that they say they are in an impossible position because the Tribunal has told them that they must not duplicate submissions, but at the same time we are saying that they are not allowed to add to what is already there. They say that, therefore, the scope for them to actually do anything useless is "vanishingly small". Well, as to that, that is not the case. You will have seen already that there are large parts of their evidence to which we do not object. They can and do give evidence on many specific matters raised by the appeal in just the same way as the Competition Authority does. Should it come to it, if you were to look at the *Napp* preliminary issue case – and I give the reference in para.82 – you will see the way that the Tribunal there decided to admit new evidence from third parties, albeit through the voice of the Office of Fair Trading.

Secondly, of course, the interveners can address points of law arising in the appeal in the same way as the Competition Authority. That is applying the law to the facts. It is a major part of Mr. Vajda's statement of intervention.

The last point is one made by Meter Fit alone, that interventions in this jurisdiction should be treated as very similar to those in the court of first instance, and he says that provided the interveners seek to uphold the Decision and get the appeal dismissed they have a free run. I will allow Mr. Randolph to develop that, should he choose to make that submission.

Madam, those are the legal submissions.

THE CHAIRMAN: Thank you very much, Mr. Turner. Who is going first? Mr. Kennelly, perhaps you could just say ----

MR. KENNELLY: Madam, actually this is, strictly speaking, a matter between the appellants and the interveners. We are listening very carefully to what is said about the Decision and about any suggestion that there was a change in the case between the statements of objections and the Decision, and there were certain developments and alterations. To the extent that those are raised I will make some submissions at the end, but we do not propose to comment substantively on the points made by Mr. Turner. That is not to say that we are precluded from making those submissions, but it would be a better use if I was to ----

THE CHAIRMAN: Is there anything you want to say now before Mr. Vajda addresses me?

MR. KENNELLY: No, madam, I wish simply to make some points at the end arising out of the submissions made by my learned friends, but I do not wish to hold anything back that may be of use to the interveners or indeed to National Grid.

THE CHAIRMAN: Thank you. Mr. Vajda, are you going next?

MR. VAJDA: Madam Chairman, there is a two-stage process in terms of Mr. Turner's application: first, what is the legal test; and secondly, how do you apply the legal test to the documents for the assertion. I have listened and welcomed the change of position of Mr. Turner this morning, because he has accepted, which was far from clear from his written observations, that the Tribunal has a discretion to admit evidence. The way that you put it, Madam Chairman, seems to me to be entirely right, the question of law is how do you exercise your discretion. This is not a case of mere presumptions.

If I can just make some very short points. I am going to adopt very much Mr. Turner's approach, because all our written submissions on the law are there. First, the scope of the proceedings before the Tribunal is set by the notice of appeal itself. That is para.4.1 of Schedule 8 of the Act. Secondly, National Grid accepted, and accepts today, that the principles it seeks to rely on, the presumption, are based in relation to the Competition Authority, they do not cover interveners.

MR. TURNER: I did not say that.

THE CHAIRMAN: Could you repeat that second point?

MR. VAJDA: In the written observations it was said that effectively there should be a presumption against new evidence coming in because the position of an intervener was analogous to that of the Competition Authority. What was said in answer to your question, Madam Chairman, is that the Tribunal has a discretion. I will explain in a moment how we say that the discretion should be exercised. We do not accept that there is any presumption one way or another. That is the point. Whether or not Mr. Turner is maintaining the position of presumption does not interest me. What does interest me is that the Tribunal

applies this in the correct way. We say there are no presumptions so far as the interveners are concerned. The interveners are in a different position from the Competition Authority. That is the point I am seeking to make.

THE CHAIRMAN: Yes, the difference is that the Competition Authority is held to the reasoning in its decision and it cannot say, or it has not been allowed to say before the Tribunal, "Well, we got to the right result but put aside our reasoning then and look at this new much better reasoning", and it is thought that what they should do then is withdraw the Decision and re-take the Decision. Obviously that does not apply to interveners. The question here is whether what the interveners are seeking to do is to uphold Ofgem's findings of abuse or introduce new abuses which they say ----

MR. VAJDA: Yes, I think that that is a pithy way of putting it. The hallmark of the case law of the Tribunal is flexibility, but our assumption in relation to the Competition Authority I think what is said is that the Competition Authority is not, if you like, allowed two bites of the cherry. Speaking for Siemens we have not had one bite of the cherry yet, so that is the point that I am making.

As I say, we say that this is a matter to be looked at flexibility and by reference, as we said in our written observations, to principles of relevance and fairness. The Tribunal will, of course, have in mind Rule 16.9 of the Rules which expressly permit, and indeed require the intervener to set out the facts and arguments on which it relies and indeed to annex the schedule of documents, those that it wishes to rely on and, of course, the Tribunal will bear in mind that the first order in this case was that there should be no duplication in the submissions of the defendant, Ofgem, and the interveners, and we say it is implicit from rule 16 that the interveners can introduce documents and arguments not introduced by the defendant.

The question is what are the limits to that? We very much adopt the approach set out in Mr. Randolph's submissions so far as the *VK* case is concerned, in the Court of First Instance, and I would say that there are three points that can be made there. First, plainly the intervener must support the formal order sought by the person in whose favour he is intervening. Secondly, as the European Court of First Instance put it, the intervention must be in the words in that judgment: "within the framework of the dispute", and if we can revert to what is the framework of the dispute in the present case, that of course is taken by the notice of appeal. Plainly, and this is really the third point, that the arguments of the interveners must be, and entitled to be responsive to the arguments raised by the party against whom one is intervening. It strikes me that there is an element of Catch 22 about

Mr. Turner's approach because he says that you must not duplicate what Ofgem has put in, but you cannot put anything new in either, and we say that is too rigid an approach. That is what I say the legal approach is and I do not think, having heard Mr. Turner, that there is actually a great deal between us on how this Tribunal should exercise its discretion, so can I now turn to the second issue, which is how do you apply the legal test to the specific points in issue?

What I would propose to do, madam Chairman, is to go by reference to our written observations if you have them, I think the are at tab 3 of the CMC bundle, and if I could ask you to take it up at p.7. The first point was an objection to para.20 to Siemens' statement of intervention, and this is the argument, para.40(a), and para.37 Mr. Lee's statement contains "a new argument that the bundling of maintenance is a barrier to entry in gas metering, because it ties up engineers who would otherwise be in the labour market."

The first point to notice about this is a point that Mr. Turner did not address, but I assume he is still maintaining his objection to his, is that here we are looking at dominance not abuse – this is in the dominance section – because if one goes to the Siemens' statement of intervention one can see. Do you have that? If one goes to p.7 there is a heading "Dominance" and then if one goes over the page one has then the objected to paragraph, 20, the barrier to entry point. What we say at 21 is that the submissions made, which include the position of engineers, are examples and evidence of the barriers to entry. Of course, the Tribunal will be aware that the issue of barriers to entry is hotly contested by Grid which basically says there are no barriers to entry.

We have dealt with this in some detail at paras. 23 to 26 of our submissions for today. Those submissions were prepared after Mr. Turner's – they were responsive to the Grid, we have not heard anything today on that so I was proposing to say "here is our case …" plainly if there is an issue ----

THE CHAIRMAN: So you are saying that as far as Siemens is concerned there is nothing in their statement of intervention which raises as an additional abuse the bundling of maintenance with ----

MR. VAJDA: I will come to that in a moment, because what Mr. Turner concentrated on today we will come to, if I can call it the "meter maintenance" point, in a moment so far as abuse is concerned. At the moment I am concentrating on Mr. Turner's first point which was not pursued orally this morning, and I am proceeding on the basis that it is still live, Mr. Turner has not expressly abandoned it. What I am saying is in relation to this point this is a

dominance point not an abuse point. I will come on to the points that Mr. Turner dealt with. This point goes to dominance, it goes to barriers to entry.

To see that, if you go back to Mr. Turner's skeleton at p.15 (a) and what Mr. Turner spent some time on this morning was (b) but nothing was said about (a). What I am saying is what we say is in response to (a) and since the argument has not developed further I simply rely on that. If there is any question you have on what we have in here I am happy to answer it but those are our submissions on that point.

We then go to the next point – if we still have Mr. Turner's skeleton – which is his first point today about a novel case about bundling of maintenance operations prevents CMA from achieving efficient operations. We have already had a look at this, but it is important to see what Siemens is saying. If one goes back to p.18 in the Siemens' statement of intervention. Siemens is not saying, "Well, there's an additional stand-alone abuse of maintenance bundling". Siemens is saying that maintenance bundling has aggravated the foreclosure effect of the MSA. Now, the issue of foreclosure, Madam Chairman, is at the heart of this case. What is in issue between all the parties is how one looks, in particular, at the glidepath because what National Grid - and, indeed, there is a somewhat surprising submission in their notice of appeal that the glidepath is not a restriction at all because it actually permits you to exchange a number of meters -- What is of great importance and is a point I will come to in a moment as to what Ofgem seek to do in their decision, is that one needs to understand how the glidepath operates. We would say - and this is perhaps a matter the Tribunal does not have to resolve today - it is simply misleading, when one is looking at the restrictive effect of the glidepath to look at how much you drop under, and what Mr. Turner called the early replacement charges kick in. What you have to look to see is in reality how many meters are out there to be contested? In that context both the bundling of meter maintenance and also – this is relevant to the next point which is the policy replacement and is of critical importance – if I could take you, Madam, to the decision again, just to see how Ofgem deal with it. It may be helpful if we could just go first of all to Annexe 2 at p.126. Annexe 2 is referred to somewhere in the body on the foreclosure part of the decision. What it does is set out the Authority's reasoning behind the statement in Chapter 4 (the abuse chapter) that suppliers are constrained in exiting the Take or Pay Zone even if they replace only a small percentage of meters in excess of the glidepath allowance.

Then at para. 2: "The number of non-discretionary DCM meter exchanges (i.e. those subject to policy replacement" --- That is an important point when we come on to that, because one

of the points that Ofgem are making, rightly or wrongly, is that the foreclosure -- the aggravating effect -- the foreclosure has been aggravated by the policy replacement of NG. Now, that is obviously a matter that the Tribunal have to decide. It is plainly part of Ofgem's case. We say it falls within the framework of this dispute.

The next item that you see is maintenance replacements, i.e. - and again I will come to this, but we have seen a bit of this from the passages that Mr. Turner took us to. Ofgem's case is that the maintenance aggravates the foreclosing effect because it means that there are a lot of meters that NG will get to and will then be able to replace and then go on to the N/R scheme.

They then conclude here in para. 2, looking at all the number, that these are effectively ones that had to be replaced and were equivalent to around 87 percent of the annual replacement allowance provided for by the glidepath. This means that in any of those years, suppliers had discretion over which meters were replaced and only around 130 meters within the much glidepath were allowed. So, that all goes also to the question of efficiency which I will come back to in a moment.

Then, if we go to para. 3, "This is illustrated in the Figure blow, which shows the impact of a supplier's remaining DCM stock falling just below 2.5 percent ----" Then if we drop down a line of two:

> "If the supplier could cut its future DCM replacements to zero, it would return to the glidepath in the following year, and pay Take or Pay charges on all of the 'additional' DCM replacement for only one year. However, in practice a supplier will still have to replace a significant number of DCMs in future years ..."

We see again policy replacement, maintenance replacement and functionality change provisions. So, what Ofgem are saying is that you need to look at these matters of policy replacement and maintenance to see how the glidepath works in practice. We see more of the same if you go over the page to para. 4.

> "Suppliers face uncertainty over the actual level of DCM replacement that will result from policy replacement [that is NG's policy replacement], maintenance replacement and functionality changes in future".

So, that is all pretty important. Miss Smith has helpfully identified the passage in the decision itself which refers to Annexe 2. That is really Footnote 298 to para. 455 under the heading 'Early Replacement Charges are Triggered at Modest Levels of Replacement'. Miss Smith says that we also need to look at para. 464 which also cross-refers to Annexe 2.

There is common ground that, of course, Ofgem are not saying - and I am coming now to look at the question of meters - that it is a separate issue. The question is: Did it, or did it not, aggravate the foreclosure effect? If there had been no glidepath we probably would not be here at all. It is the combination of glidepath and the other policies that were pursued by NG that need to be looked at in the round. Indeed, that is a point that Ofgem make in their decision. You cannot sort of salami-slice them and just say, "Well, just look at this aspect, and this" – You have got to look at them all in the round for the Tribunal then to find whether, in the round, there was a foreclosure effect. That is the way that Ofgem put it so far as meter maintenance is concerned at p.79.

Although Mr. Turner made great play of the fact that 4.81 to 4.85 is short -- It may be short, but it does not mean it is unimportant. Indeed, the importance of it is emphasised by the fact that in the summary of the decision -- Madam Chairman, unfortunately the summary is at the beginning. It is not paginated, and it does not have paragraph numbers on it, but if one can go to p.2 of the summary – I have numbered this (6). It is the paragraph which begins, "Even if a gas supplier is using CMOs to replace meters" -- Do you have that, Madam?

THE CHAIRMAN: Yes.

MR. VAJDA:

> "-- NG will continue to replace a relatively significant proportion of meters that are available under the glidepath during maintenance provisions. The Legacy MSAs and N/R MSAs bundle maintenance with meter provision . . .Maintenance of PPMs does not always to meter replacement. It still leads to a significant number of PPMs being replaced by NG each year. The Authority considers that preventing CMOs [and that of course includes Siemens] maintaining NG's meters increase the foreclosing effect of the MSAs: it reduces further gas suppliers' willingness and incentive to rent meters from competitors [it is saying it aggravates the foreclosing effect]; it prolongs the duration of the contractual relationship under the MSAs and, if gas suppliers switch to a CMO, it prevents CMOs replacing faulty DCMs and PPMs following a maintenance visit and increases the likelihood of exceeding the glidepath allowance and facing significant switching costs".

In this context, Madam, we, on our side of the bar, took a note of what you said this morning in your opening remarks, which was that National Grid accept that density of operation is important for CMOs. My note of what you said was that if the effect of the MOA is to reduce the amount of work available to an efficient competitor, the parties may

well be able to agree that foreclosure will have that effect on a reasonable and efficient competitor.

For our part – and I would need to take instructions - we would be very happy to go down that route in a sense because that is really what this particular dispute is all about. What we are saying is that this does have an effect on a reasonable, efficient competitor, and there is an argument as to whether or not Siemens is a reasonable competitor, which, in a sense, having heard what you said this morning, is neither here nor there, and that is what this is directed to. If one looks at the Decision, the Decision makes it plain that this, and indeed, as you Madam Chairman say National Grid have accepted, is highly relevant. Could I just go to the Decision, p.86, we see at 4.110 that Ofgem says:

> "Since the relevant market is characterised by economies of scale in which the ability to obtain scale will be a factor in a company's overall competitiveness, it is a likely effect of the Legacy MSAs that CMOs will find it harder to compete with NG for even the limited meter numbers which suppliers might want to replace with a CMO."

Then if we go to 4.170 – I am not going to read all this out aloud, but we would ask you, madam, to read to yourself at a convenient moment 4.170 to 4.176, which further makes the point about economies of scale and density. Perhaps I could just direct your attention to the opening words of 4.172:

> "There is a clear link between meter replacement volumes and density: the higher the volumes, the greater likelihood of meter density."

Of course, the meter replacement volumes are those that are in the glidepaths.

If this matter is not going to be resolved in the way that you suggested in your opening remarks, it will obviously be necessary for the Tribunal then to make a ruling as to whether or not to permit Siemens to make the argument.

Again, if we look at how Grid put it in relation just specifically to maintenance, because obviously one has to look at the position taken in the Decision, the Decision, I accept, does not say that there is a separate abuse for maintenance bundling. Siemens does not say that there is a separate abuse. The question is, does the maintenance bundling aggravate the foreclosure effect. In my submission, it is quite clear that Ofgem is saying that. That is part of the framework of the dispute, as one can see from the notice of appeal.

THE CHAIRMAN: Let me just be sure I understand the difference between you and Mr. Turner. You say that you are not claiming maintenance bundle is a separate abuse. You are saying that it aggravates the foreclosure effect of the glidepath. Mr. Turner, as I understand it,

accept that that is, of course, Ofgem's case, but he says that the only part of the maintenance services background which they focus to say it aggravates the foreclosure effect is that part of maintenance services which results in a replacement of the meter, whereas his complaint is that you are now broadening that and saying, "Well, even maintenance visits which do not result in the replacement of the meter, the bundling has a foreclosure effect because those would increase the density of visits that our engineers can carry out and therefore enable us to operate more efficiently". It is that broadening of what aspects of maintenance provision are looked at as part of the foreclosing effect that he says opens up whole new areas of exploration which he says will cause everybody difficulties.

MR. VAJDA: Yes, it is what is called in the High Court the "floodgates" argument. I hope that the passages that I have shown you from the Decision indicate that Ofgem, the decision-maker, is looking at the question of economies of scale. We see from annex 2 that the maintenance replacement policy, the bundling of maintenance, is relevant to the foreclosure effect. I took you a moment ago to that passage at 4.172 where there is a clear link between meter replacement problems and density, the higher the volumes the greater the likelihood of meter density.

This is in the case and it is in dispute in the notice of appeal. Could I ask the Tribunal to take up the notice of appeal, p.235 – I should add as well that I would not accept that you can, in a sense, partition the effect of maintenance in these two ways. That seems to me, with respect, and it may at the end of the day be right, that that is in a sense quite artificial and narrow. The question really here is the broad one, "Is the maintenance aggravating the glidepath or not?" To say that they are two distinct bits, one is the amount of meters that will be replaced, that is admissible and that is part of the case; and there is the other which involves economics of density, which is not. In my respectful submission, that is an artificial distinction, it is not a distinction that is drawn in the Decision. As I said, the Decision deals with both aspects. It may be that, at the end of the day, the Tribunal will be persuaded by Mr. Turner that actually, read fairly and properly, the Decision is very narrow and these points are not germane. Certainly at this stage we would say that is not a position that the Tribunal could reach.

Can we look at p.235, the section which begins, "13. Ofgem has no case on maintenance"? National Grid then deals with that down to 725, and we see, for example, at 722 how important maintenance is whether in fact it is effectively a route to replacing the lot or not. Then at 723:

"… it is difficult to understand Ofgem's claim at paragraph 4.81 of the Decision that the imposition under the MSAs of a single charge for Meter maintenance and provision *'is particularly significant because of the extent of PPM replacements that NG has typically undertaken'*."

So what it is clearly saying is that there is no case on maintenance at all, and as you, madam Chairman, pointed out Grid accept that economics of scale and density are relevant to efficiency, and that is plainly within the scope of the decision.

I see what the time is, I have pretty well come to the end of what I am saying on this and then just in terms of where I am going I have got the next submission which Mr. Turner dealt with orally, which is the policy point, but I will deal with that quite briefly, already I have taken you to passages in the decision. Nothing has been said on the linear nature, so again I am very much in the hands of the Tribunal; we have made submissions on that. I may say one or two words on the linear nature, and then I think that is probably it from our side, subject to anything the Tribunal has on the documents, so I would hope to not be very long.

THE CHAIRMAN: Who else is then going to be making submissions.

MR. RANDOLPH: Madam, I will be making very short submissions, I hope, after Mr. Rayment, just to cover Meter Fix's position. There will also be, just so my learned friend is aware, certain submissions I want to make with regard enlarging the confidentiality ring – that is a separate matter that has not been touched on, but that is another point that is going to be raised and Mr. Turner did say he wanted to deal with that. But I can be short on this point, I am very keen that the Tribunal deals with that as well.

THE CHAIRMAN: And Mr. Rayment, you are going to want to ----

MR. RAYMENT: Yes, I will be making some submissions, madam, but I hope that I will not have to go on at length about the law or, indeed, the matters on which we overlap with Siemens, of which there are a number, so I will try and concentrate on the eons that are specifically of concern to CML.

THE CHAIRMAN: It would also be helpful, thinking ahead as to what is going to come out of today's hearing, National Grid have helpfully set out in their annex paragraphs to which they take exception and I have noted up my copy of that to link in those paragraphs with the six different areas of dispute, but we have already had one instance this morning where a sub set of one set of those paragraphs is now permitted for certain purposes. I am wondering whether it is realistic to expect a judgment or ruling which, if I were to accede to any of Mr. Turner's submissions and seek to exclude arguments from the statements of

intervention, whether it is going to be feasible to highlight the paragraphs in the statements and the evidence, or whether it would be enough to indicate the principles which the Tribunal has concluded are the right ones and leave the parties to decide which bits fall and which do not. I appreciate that the latter course creates a greater possibility of further dispute or lack of clarity but perhaps you can think about that over the short adjournment. Should we come back at 2 even though we are slightly past 1 o'clock? We will resume at 2 o'clock.

(Adjourned for a short time)

MR. VAJDA: I was taking you to various passages in the notice of appeal. I took you, just before the adjournment, to the passages on maintenance at 717 to 728. Could I take you now to three other passages, one of which we have already seen – first at p.30.

THE CHAIRMAN: Just remind me why you are taking me to this?

MR. VAJDA: Yes. This is in respect to bundling of meter maintenance. If you remember, the issue between me and Mr. Turner is that Mr. Turner says, "Yes, we accept that part of the Ofgem case is that there may be an effect on follow-through in terms of you might get a replacement meter if you do maintenance", but we do not accept that it may have any other effect like economies of scale, density"; that is the area of dispute between the two of us. If you remember, this morning he conceded that part of Mr. Lee's evidence, which was previously objected to is no longer objected to. So, what I am dealing with is the plea area of dispute that remains between us on that. So, I am taking you to these passages in respect of that.

So, at p.30 one sees at paras. 36 to 38, under the heading 'Essential Features of Business Meter Provision', and under the first sub-heading 'Practical Requirements of the Economic Meter Installation Replacement' -- Then one sees scale and density of operation, and then we see, at p.30, the heading, 'The Efficient Approach to the Organisation of Meter Installation Replacement Work' So, this is all what National Grid is saying in relation to how one carries out this work, and says that CMOs tend to schedule policy replacements around the CREs (Customer Requested Exchange) in a particular area. Then, over the page - because this is relevant not so much to bundling, but the policy point which I will come on to in a moment, which is the other area that Mr. Turner dealt with this morning, which he objects to - you will see that what Grid says is that: "So far as the required policy replacement work is concerned, this substantially augmented the pool of available policy meters on which gas suppliers and CMOs could draw. So, this is effectively part of the argument - this was, in a sense, not anti-competitive, but pro-competitive.

Now, the next passage that we need to look at, which is a passage which Mr. Turner took us to this morning, but it is important that we go and have a look at that again, is at para. 289, p.104. This is where Mr. Turner made his submission that there was a distinction between the impact of meter maintenance bundling on the number of jobs, and just in relation to density. The passage I want to focus on is at p.105 where National Grid say:

> "-- the connection between the numbers of jobs carried out and the installed meters in a CMOs portfolio is the flow of maintenance activity that arises from the installed meters. The flow of maintenance activity is highly unlikely to confer on National Grid significant addition economies of density for the following reasons - ---"

Then they set them out. Now, it is important to note that that submission is not limited to maintenance that results in replacement meters. As you say, general observation about the impact of meter maintenance. That is an important point because a distinction has been drawn by Mr. Turner - on the one hand the effect of bundling meter maintenance on replacement work and also, on the other hand, just having the volume of work generally to keep your workforce occupied. It is quite clear that the passage here at para. 289 is looking at maintenance in both senses.

The last passage which we need to look at is at p.158 at para. 459.

> "The MSA approach thus has obvious advantages of planning the work of CMOs (Competing Meter Operators) efficiently since, the Decision itself points out at para. 2.15, '.. installation costs depend on the scale and density of operation ----'"

Then, a further submission is made at para. 460 which is perhaps less important in the present context than para. 459.

Now, drawing those strands together, madam, we have looked at the decision and we have looked particularly at para. 4.110, which is important. Perhaps we just ought to go back to that.

> "Since the relevant market is characterised by economies of scale in which the ability of scale will be a factor in a company's overall competitiveness, it is a likely effect of the Legacy MSAs that CMOs will find it harder to compete with Grid for even the limited meter numbers which suppliers might want to replace with a CMO".

So, what the decision does is recognise the importance of economies of scale to the foreclosure effect. Economies of scale, of course, goes back to this question of barriers to entry. If you have a market where there are no barriers to entry, plainly, like the foreclosure

effect of an agreement in practice may well be less than a foreclosure effect of an agreement where there are significant barriers to entry, obviously, determining quite what the foreclosure effect is, one has to look not just at the agreement itself, but also the market characteristics, the barriers to entry.

What Ofgem are saying is that there are economies of scale. That is a barrier to entry, and that anything that effectively affects adversely those barriers to entry to the competitors means that it is likely that CMOs will find it harder to compete with National Grid. So, looking at the glidepath, you cannot simply look at the glidepath in isolation - you have to look at the effect of the glidepath by reference to the market characteristics, which include barriers to entry. One of the features of barriers to entry is the need for the economies of scale to operate profitably. You cannot, in turn, look at the glidepath - which is the submission I made before lunch - simply in isolation in terms of the numbers that are permitted to be exchanged under the glidepath because you actually need to see how the glidepath operates in practice. That is of particular importance in relation to policy exchange (which I will come to in a moment) because obviously - and this is ultimately a matter for the Tribunal to decide, but not today - the effect of the glidepath and the police exchanges has been to impact the mix of meters that are available to the competitors and therefore it will affect their profitability, efficiency, etc. So, that is the case that Ofgem are making. It is that that the interveners are supporting.

So, what I now need to do so far as meter maintenance is concerned is just to go to Mr. Lee. You will remember, he is the gentleman who gives evidence on behalf of Siemens. If we pick it up at para. 42 -- As I apprehend it, paras. 42 to 47 are still objected to. What Mr. Lee says is:

> "The retention of maintenance work by National Grid has additional and very serious implications for Siemens because it also deprives Siemens of valuable transactional activity."

He then (Mr. Lee) responds to para. 289 of Grid's notice of appeal in relation to unplanned maintenance visits, and we do not need to get into the detail. What we need to focus on in my respectful submission is what he says at para. 46. which is that:

> "National Grid's retention of the PPM maintenance work therefore had a much greater impact on Siemens than is suggested simply by the volume of meters that were replaced."

That is, we say, very important when you are considering the foreclosure effect of a practice in a market where there are already significant barriers to entry.

So we say that that falls within the framework and therefore we say that we should be allowed to maintain that.

Subject to anything that you may wish to ask me about, madam, I will now move on to the policy point, which again is pretty similar. Again, perhaps the useful starting point is what the decision itself says, and if we can start by looking at para.2.94 "Required meter replacement". "Although the glidepath allows a certain number of meters to be replaced free by CMOs the suppliers' scope for replacing NG meters without paying early replacement charges is in practice much more limited." So it is the question of how it works in practice. What Ofgem says is that:

> "It is important when discussing 'free' meter replacement to distinguish between free in the sense of no charge being applied and free in the sense of an option to replace or not. As is explained in m ore detail in Chapter 4, after deducting non-optional meter replacements from the glidepath allowance, gas suppliers are left with only 13% of their DCM 'free' allowance, which accounts for less than 1 % of their legacy meter stock in the first year of the contract. This figure represents the ***degree of discretion*** suppliers have in choosing which meters to replace. The proportion of the meters identified above that are ***free*** to replace under the MSAs in the sense of free of charge and optional will depend on the impact of maintenance …"

And then you see: "The ability to comply with NG's policy replacement schedule", so that is why it is important because effectively what Ofgem is saying, rightly or wrongly, is that it is an aggravating feature, because in fact the glidepath is not all that it seems. This is then dealt with in a little more detail at 297, where you see Ofgem looks at the number of categories, and the third category is policy replacement, and then it goes on to describe, at 2.98 to 2.103 at p.29 how, in its view, that has reduced the amount of the so-called 'free' meters under the glidepath.

THE CHAIRMAN: Is it the case, as a matter of fact, that if the supplier elects to use a CMO to replace a policy replacement meter, that CMO provides its own meter so that it then does come out?

MR. VAJDA: Yes.

THE CHAIRMAN: -- of the National Grid legacy MSA into whatever contract the gas supplier has with the CMO. Then your point is, yes, but it counts against the glidepath.

MR. VAJDA: It counts against your quota, yes, and there is an argument which you may, or may not, have picked up as to whether, if you like, policy replacement meters are a good or bad

thing. Siemens say that these are ones where there is real difficulty with access, etc. That is an issue National Grid disputes, but that is really the point and that is the point that Ofgem is making that this is aggravating. Effectively, if National Grid did not have a policy replacement at all, who knows, Ofgem might have taken a different view of the glidepath, but this is a relevant factor in determining how the glide path operates, and the same point is made if we just go to annex 2 again, which we looked at this morning. The point is made in the context of meter maintenance bundling, if we look at para.3 which I think I took you to before lunch, six lines from the bottom: "However in practice a supplier will still have to replace a significant number of DCMs in future years as a result of …" and we see the first reason is policy replacement, and the fact that I referred to before lunch, maintenance replacement. So again it is in a sense similar to the maintenance bundling, that it is regarded as an aggravating feature. Here what is being looked at, if you like, is the mix of the contested market that is available.

If we now look at the notice of appeal and go to para. 426. I have already taken you to para.38 just after we came back from lunch, which had a reference to policy, and this is all under the heading "The replacement levels permitted under glidepath are not modest", and then 428:

> "Regarding '*policy'* replacements, in the past National Grid's policy replacement schedules have given suppliers considerable flexibility as to which Meters to replace, enabling them to plan their work in a way that achieves the necessary density …"

- again reference to "density" –

> "as explained in Section 2 above. From time t o time National Grid has increased *'the pool'* of policy Meters at British Gas' request, so as to give further flexibility to CMOs."

So there is plainly an issue there. Then National Grid states what they have done more recently and as Ofgem say in their defence: "what you have done since the decision is neither here nor there." So that is plainly, as I would put it, within the framework of the dispute.

If one then looks at what Mr. Lee says, if I can find Mr. Lee, I think the objective paragraphs begin at para. 53 at p.19. You will see, this is under the heading "Policy replacement work", "At paras. 298 to 2.103 of the decision Ofgem sets out the provisions within the MSAs deal with the policy replacements." That is of course reference to the decision. Then we see at 54:

"National Grid maintains at 428 of the notice of appeal that this arrangement allowed suppliers flexibility to determine which meters to replace and enabling them to plan their work in a way that achieves the necessary density. This was not the case in Siemens' experience."

If we go to 57:

"What ahs also been important from Siemens' point of view was that National Grid had substantial discretion in determining which meters were put on the list for replacement. Ofgem identifies, correctly, that the list only specified credit meters for replacement and also included '*substantial numbers of relatively young DCMs requiring replacement because of batches of meters have been found to be potentially inaccurate.*"

So we say that this is all ----

THE CHAIRMAN: Where were you just reading from?

MR. VAJDA: I am sorry, I was reading from para.57, bottom of p.20.

THE CHAIRMAN: Yes.

MR. VAJDA: Then Miss Smith reminds me that at 58 he responds to the statement of Mr. Avery on behalf of National Grid. So, in short, what we say here is that the question as to whether or not policy replacement provision aggravated the foreclosure effect of the MSAs is plainly in the Decision. That is what Ofgem says. It is plainly in this appeal, there is a dispute, and Siemens' submissions that Mr. Lee's evidence is responding to the points that were made by Grid, and it is well within the framework of the Decision and therefore ----

THE CHAIRMAN: This takes me back to the points that I was making in the introduction, which is what is problematic about this, which is that the notice of appeal challenges various facts without it being really clear what the relevance of the challenge is, or how the fact fits in to the reasoning, and then you say, "They have challenged that fact, we are now going to challenge their challenge of that fact", and the whole thing gets completely divorced from the actual issues that we are having to decide in order to decide whether there was an abuse of a dominant position. My concern is, yes, in a notice of appeal of 800 paragraphs you are bound to be able to pick out a sentence which then you can take issue with. But the notice of appeal must be directed at what was decided against National Grid in the Decision, and has to be kept to those bounds, and because the notice of appeal or evidence raises extraneous material, I think it is very dangerous if we then allow that to take on a life of its own separate from the flow of argumentation of the case.

MR. VAJDA: As I said at the outset, we see the force of what you, madam, said in your opening remarks about the effect on a reasonable, efficient competitor, and no doubt Mr. Turner will address you in reply on that as a way forward. Obviously at the moment, in the absence of the parties agreeing, or being compelled to agree by the Tribunal, that as the way forward, then one has to deal with it. For my part, I fully accept the way you have put the case law on abuse, but what effect it has had on policy replacement, which is quite important – very important – is that it is being said, "Well, actually, this is not part of the case it was in a former SO, it has now been abandoned". I hope I have shown it is quite an important part of Ofgem's case as to the effect of the MSAs. The Tribunal plainly will need to be careful that in so far as it says, "We do not want to get into", if I might call it, "satellite litigation", which Siemens might have considerable sympathy for, what is sauce for the goose must also be sauce for the gander.

THE CHAIRMAN: Is it your submission then that you and Mr. Lee are not going further than Ofgem went in that you are not complaining about either the fact that there is this policy replacement part to the way the industry, and you are not complaining about, or are you complaining about the way in which National Grid chooses the meters to be replaced or the size of the pool which it provides from which the suppliers have to nominate the meters to be replaced by the CMO – are you taking issue with those? I think that is what Mr. Turner thinks you are doing and that is why he is saying, now they are going beyond the point that Ofgem was making, which is simply that they do not have a completely free hand, the gas suppliers, as to which meters they choose, because these policy replacement meters count against the quota they have to do those. I understand that point, and that is a point that clearly Ofgem is making. The question is, are you making a point about the policy replacement other than that, to say there are other reasons why this is unfair, why it has an adverse effect on us because of the size of the pool or because it exists at all?

MR. VAJDA: No, the way, as I understand it, Ofgem formulated the Decision is that we have a glidepath, the foreclosure effects of which are aggravated, *inter alia*, by policy replacement. That is hotly disputed by National Grid, who say that is a complete nonsense. The question as to whether or not Ofgem or Grid is right is ultimately going to be a question of fact. The Tribunal is going to have to determine, did, as a matter of fact, these policy provisions aggravate or not aggravate the effects of glidepath. Therefore, it seems, in my submission, right that an intervener who comes in, accepting the case as it is, in a case where the appellant is putting this in issue saying that the policy replacement did not have any effect on the ground, it is for us to respond saying, "No, that is not right, it did have an effect on

the ground". It is plainly within the framework. Supposing the Tribunal were now to say, "Okay, we are going to cut it all out", and then at the end of the hearing make a finding that the policy replacement did not aggravate at all, we would say that would be plainly unfair because there was relevant evidence that was sought to be put in on that point and it would have been proper for the Tribunal to see the whole picture. This is not a situation where Siemens is saying, "There is a separate, self-standing abuse on policy replacement". That is not the point. There is a question of fact, what degree of aggravation, if I can put it like that, did policy replacement on the glidepath? As we know, at the end of the day, most competition cases are decided on the facts. As I say, this is really at the heart of it. Without wanting to mischaracterise Mr. Turner's case, it might be said that he takes a rather formalistic approach to the operation of the glidepath, and Ofgem takes a more broad brush or in the round approach. We have intervened in support of Ofgem on that. Ultimately, it is a question of fact, what happened on the ground.

THE CHAIRMAN: Mr. Turner, I cannot remember whether it was on this policy replacement point or on the previous point or on some other point, took us *in terrorem*, as it were, to your spreadsheet and said, "Look, this is what we will have to delve into and who knows what assumptions have been made and how can we possibly challenge these?" I think the gist of his submission was, "Well, we will need a whole week just to unpick all this". Obviously we have not got a week to spend unpicking that, and so there is a balance to be struck between a point which may be, as you say, a valid point which you should fairly be allowed to rely upon if it can be feasibly dealt with within reasonable parameters.

MR. VAJDA: That is why I come back to the suggestion that you made, madam, in your opening remarks, because one could seek to get agreement between the parties in the way I think you were suggesting on certain hypotheses that this would be the effect. This is something that we would have to discuss on our side, but we have thought about it, and we can see that what is plainly important is that the Tribunal has to determine whether there is an abuse by reference to the legal standard. You are looking at actual likely effects. The actual likely effect is ultimately going to be a question of evidence. What is important in terms of actual likely effects is that all parties have the opportunity to put relevant evidence before the Tribunal within obviously the framework of this appeal.

So far as the schedule is concerned and the *in terrorem* point, the President directed Grid to produce a draft order in relation to disclosure, which is at annex 1 to its written argument. There is nothing in annex 1 that deals with the schedule. In fact, the one bit so far as Siemens is concerned where discovery was sought was effectively in relation to what

Siemens might do in the future. We took the view, having seen what Grid have said and indeed in a sense rather along the lines of what is actually necessary to prove an abuse, that it is not going to be critical to this so we will drop it.

There is nothing in annex 1 in relation to schedules in the sense of a specific order. With respect, simply to wave an *in terrorem* point is not the answer. Obviously what the Tribunal has to do is apply an approach and say, "Is this within the framework of the dispute, is this something which, in the light of what Grid have said, is right and fair that the interveners should have evidence on?" That is, if you like, the next step. Then, if the answer is, yes, there should be, then there is the next step as to whether or not there should be disclosure. Disclosure of the schedule was something completely new to me. I heard it for the first time about 11.34 this morning, and I have not had time to take instructions on it. It may be that agreement can be reached on that. It may be that one would have to come back. Plainly, one cannot have the tail wagging the dog, and saying, "Well, because I'm worried that there might be a big application for disclosure, I'm not going to allow the interveners to advance evidence which is in response to a challenge to the decision which is absolutely at the heart of the decision, which is namely, to what extent, if at all, did the policy replacement provisions aggravate the effect of the MSA". But, I can certainly say that so far as Siemens are concerned, we do not want to get involved in satellite litigation. That is why I say that we are favourably disposed to what you have suggested. If other suggestions come up, we will look at them with goodwill, if I can put it like that.

Sorry, that was a rather long-winded answer.

THE CHAIRMAN: No. Thank you. That is very helpful, Mr. Vajda.

MR. VAJDA: Then I think that is all I want to say on policy replacement. I think I can be then very brief in relation to the next point, which Mr. Turner did not develop orally. If we just go to the Siemens skeleton -- This concerns the so-called linear nature of the glidepath. Paragraph 34. I am going to deal with this very briefly because Mr. Turner did not - and I am not criticising him for it in anyway - deal with that orally. This is, with respect, if I may say so, a somewhat technical point. I will take you in a moment to the decision. The point that the decision is making is that the glidepath is inflexible when viewed together with what Mr. Turner called the early replacement charges. In particular, it takes no account of the age of the meter being replaced. That is, if you like, the linear nature of it.

THE CHAIRMAN: It is not that it takes no account of it. It is that it averages the ages of the meters. It treats them all as being of an average age.

MR. VAJDA: Yes. There is then a factual dispute as to whether that is a fair or an unfair way of dealing with it. But, if I can just show the Tribunal how Ofgem deal with this in the decision -- Paragraph 4.49, p.70.

> "The Legacy MSAs Charging Provisions.
>
> The Legacy MSAs define the number of legacy meters that a supplier is 'scheduled' to rent each month, with this number declining to zero, in a uniform manner, over eighteen years for DCMs, and over seven years for PPMs".

Then, if we go to para. 4.75(c) -- This is the Authority having examined the impact of these provisions.

> "Early replacement charges apply long after the supplier has stopped the accelerated meter replacement programme. If a supplier only replaced DCMs above the 'free' allowance under the glidepath for three years, it would continue to pay early replacement charges for an additional twelve years".

You see at para. 4.78:

> "Suppliers looking to switch to cheaper CMOs to replace even small numbers of meters additional to that allowed by NG (under the glidepath provisions) would therefore incur early replacement charges that are very high relative to the costs of providing a new DCM and to the saving and/or other benefits that a supplier can expect to receive from switching out legacy meters".

Then, if we go to para. 4.87:

"The Legacy MSAs have been shown [this is in the context of objects counterfactual] have been shown to provide a substantial disincentive on gas suppliers to replace more meters than allowed by the glidepath. In line with this, the Authority has found that the early replacement charging provisions of the Legacy MSAs give rise to substantial barriers to entry and expansion of CMOs".

Then, effectively, what Ofgem does at para. 4.89 is to look to the counterfactual:

> "As they are the contractual form used by CMOs, UMS and NG in the N/R MSAs, age-related PRC arrangements are a useful counterfactual against which to compare the effects of the Legacy MSAs on the development of competition".

That is effectively the criticism that Ofgem make on the decision. What it is effectively saying is that you ought to be looking at the specific characteristics of the meter. That is the point made in the preceding paragraph at para. 4.88.

> "The provisions of the Legacy MSAs that give rise to these effects - in particular: the glidepath, the Take or Pay provisions, and the 'averaged' use of PRCs - differ

markedly from provisions related to the early replacement of meters found in the CMO contracts and in the NG's own N/R MSAs. Importantly, under the CMO contracts and the N/R MSAs, the early replacement charges payable will depend on the characteristics of each of the specific meters that are replaced, including the age of the relevant meter."

So, that is effectively the criticism that Ofgem is making. That is effectively what Siemens is talking about - the linear nature of the glidepath. Because of the time, if I can just - without going to it - give you the references in the notice of appeal -- 389(a), 391, 401, 404, 419, 428, 429, 435 to 437, and 440. Effectively, what National Grid is saying is, "Well, actually these provisions provide great flexibility. They are not inflexible". So, again, that is an issue that has to be decided by the Tribunal. We say that the failure to take account of the specific age of an installed meter lies at the heart of the decision.

THE CHAIRMAN: But, if you have system which charges in relation to the specific age of the meter, then you do not have a glidepath.

MR. VAJDA: That is right.

THE CHAIRMAN: So, your complaint about the linear nature of the glidepath which implies that there should be a glidepath which does not have a linear nature -- Are you saying that actually your point is the same point that Ofgem is making - that it should be age-related in relation to the meter?

MR. VAJDA: Yes, what you have is inflexibility.

THE CHAIRMAN: Well I understood something different. I understood that your complaint about the linear nature of the glidepath was a point that actually a lot more meters were replaced, or there were a lot more meters that are 16 years old than there are meters which are four years old, and that therefore by averaging it out you do not reflect the fact that inevitably because a huge number of meters, for some reason, in any particular year are going to come to the end of their life inevitably the gas supplies are going to fall below the glidepath into the zone or even beyond. But that would then take us into the question of: Is it right that there are pockets, years, in which there will be an abnormal, more than average number of legacy meters coming to the end of their life and should that be reflected some way in the glidepath, but that is a different point from the point which Ofgem is making that you should just have a replacement charge depending on the age of the particular meter that you are taking out?

MR. VAJDA: In my submission the two are related. Ofgem object to the glidepath on a number of grounds, and they then go on to say "Actually, there is an alternative way that you could

have done it, which is the so-called "counterfactual". What the Tribunal is going to have to decide is again, looking at how the glidepath operated in practice, together with all the surrounding economic circumstances, did it or did it not have a foreclosure effect? The fact that, if you like, there are no exceptions, we say it is … that even if you fall one below you are then subject to all the features, we say that is an aggravating feature that there is inflexibility as opposed to flexibility. The linear nature is perhaps shorthand for simply saying how it operates in practice. It operates in an inflexible way.

THE CHAIRMAN: But does your pursuit of this point take us into areas of having to find out facts about the installed meter base that we would not otherwise have to get into?

MR. VAJDA: I am just looking at – it is really paras 69 to 72 of Mr. Lee's statement.

THE CHAIRMAN: Yes, there it is, "the age profile of installed credit meters is uneven." Now, one would not have to get into this question about the peaks and troughs of the age profile of meters, one does not get into that if you have the glidepath average as National Grid do, and one does not get into that if you abandon a glidepath and just have an age related replacement cost, because whatever the age of the meter you are replacing happens to be, that then determines the charge. The point in 69 and 70 seemed to me to be making different points from the counterfactual and to raise substantially new areas of inquiry.

MR. VAJDA: Well so far as the age profile of the installed meters is concerned – I speak with diffidence here because I will be subject to correction if I get it wrong – that, as I understand it, is already an issue in the case and, indeed ----

THE CHAIRMAN: Well it is an issue in the case as to whether National Grid knows how old its meters are.

MR. VAJDA: What the deponent says is National Grid's own figures show that in a competitive and efficient market the natural process required would be to target older meters for discretionary replacement first, but the glidepath has not taken account of these peaks and troughs in the age profile of meters. As I understand it that is very much the point that Ofgem are making. Again, I see plainly we do not want to get into satellite litigation and the question really is how are a number of these points which are relevant to effect going to be addressed in a fair way by the Tribunal without in a sense getting into satellite litigation? Insofar as there is a dispute about this which is relevant to effect, then it seems to me the Tribunal is going to have to deal with it. I quite take the point that where one is looking at, say, the future prospects of a company, that is plainly outside the scope of the decision, but what one is looking at is both actual and likely effects.

I will take all the points that if you have made and if I have something further to say I will come back on that, but we say as a matter of principle this is a matter that we should be able to raise and it falls within the framework of the dispute.

That then so far as I can see takes me to the end of Siemens, because there was a passage that was objected to in para.78 of Mr. Lee, and you will have seen our submission and our letter, we have dropped that and that also then disposes of the disclosure issue because I said if one looks at annex 1 to Mr. Turner's skeleton there was a specific request in relation to para.78 of Mr. Lee which I will not say any more than that, because there is some confidential information there.

So we say, particularly if I come back to the question of meter bundling and policy replacement is, we say, at the heart of this, it is the question of the aggravating effect of the MSA, and we say that it would be wrong to shut out the interveners on this particularly given that this is in a sense seeking to respond to what Grid has said in its notice of appeal. I am sorry I have taken that long.

THE CHAIRMAN: No, it is mostly because I have been interrupting you, Mr. Vajda. Mr. Rayment.

MR. RAYMENT: Thank you, madam. Can we start and have in our hand para.40 of Mr. Turner's observations, because that really is the list of things that we have to deal with. It may be helpful just to say that we agree with Mr. Vajda that we can see the force of the suggestion that you were making about the possibility of exploring between the parties whether one could come to some agreement on the question of effect and that may well help the expeditious progress of the appeal, although I am not in a position at the moment to commit us one way or the other.

THE CHAIRMAN: No, I would not expect you to be.

MR. RAYMENT: Turning to para. 40 of Mr. Turner's observations. 40(a) is not a point for CML. As to 40(b) which is dealing with the density of metering operations, we are content to rest on what Mr. Vajda has said about that, and in para.38 of our statement of intervention we are effectively relying on Siemens in relation to the operational aspects.

THE CHAIRMAN: So your case then is not as Mr. Turner seemed to have interpreted it initially, that bundling of maintenance is a separate abuse but rather the ----

MR. RAYMENT: No, that is absolutely right.

THE CHAIRMAN: -- fact that maintenance is carried out by National Grid on the legacy meters has two effects: one, the Ofgem effect that where maintenance in fact results in

replacement then it is another tick up to National Grid has another meter installed and it counts against the – no, it does not then count against the glidepath.

MR. RAYMENT: Well, it may or may not.

THE CHAIRMAN: It has a second effect resulting in more visits being undertaken by National Grid technicians than by CML technicians and therefore impeding your growth of density of operations.

MR. RAYMENT: Yes, that is right. As we say, that is not a separate abuse, it is an added effect of the way the contractual provisions operate in the market.

It may just be helpful to turn up para.38 of our statement of intervention simply because of the point that you made, which is that the Tribunal faces a problem in its judgment that if it wants to exclude various bits, there is a problem about whether you attempt the specific paragraph numbers, and so on, and I think that although Mr. Turner refers to para.38 of our statement of intervention, I think I ought to clarify that so that he can come back, if necessary. As I understand it, it is actually going to be one sentence of para.38, which I think is the third sentence ----

THE CHAIRMAN: Is this the paragraph, "Thirdly" ----

MR. RAYMENT: "Further" – I think that is what is being complained about, and if there was a question about an excision ----

MR. TURNER: Madam, that is right.

MR. RAYMENT: I do not want to spend any time on it.

THE CHAIRMAN: It is only part of 38.

MR. RAYMENT: It is the third sentence on this point, which is effectively where we have set out our case as relying on Siemens in relation to operations. As you know, they carry out our operations.

THE CHAIRMAN: Would it be the third sentence from, "Further", until the end of that paragraph?

MR. RAYMENT: No, it is just that sentence.

MR. TURNER: Madam, it does not go to the end of that paragraph. The stepping-in point because of failure to achieve the requisite events is not something that we have seen in the Decision.

MR. RAYMENT: That is true, but that relates to the effects, so, yes, you are right, if you were minded not to allow that, it would go to the end of the paragraph.

The next point is the point at (c) that we have alleged that National Grid was fully aware of the effect of the reservation of maintenance work on competition. That refers to para.14 of

our statement of intervention. Can we just turn that up. It is the fourth bullet in para.14. Again, I do not think this is a point that need detain us very long. It is the last two sentences of that paragraph that I think are being objected to. The point about "fully aware", we simply say that that is an inference that we are entitled to invite the Tribunal to draw on the basis of the evidence about the effect of the retention of maintenance. That inference that one is inviting is based on the fact that the Siemens evidence about the effect at the coalface is in. That is all we are inviting the Tribunal to draw.

THE CHAIRMAN: It is more than that. It is an additional motivating factor in its decision not to allow competent and capable third parties to maintain its rented meters. What you are saying, in effect, is that NG deliberately has bundled maintenance in order to scupper ----

MR. RAYMENT: We say they knew what the effect of doing that was.

THE CHAIRMAN: Yes, but Ofgem's decision concludes that it does not have evidence to say that there would have been a demand for maintenance separately from metering anyway. It seems to me a contentious comment which if we were to have to decide whether it was true or not, I am not sure how we would go about deciding that. The decision to bundle maintenance with metering services, when would that decision have been taken – decades ago perhaps? How could one possibly know what the motivation was?

MR. RAYMENT: I think the point, and it is a modest point, is that your reaction to what I described as the "inference" may dispose of it in the sense that it cannot go anywhere.

THE CHAIRMAN: Yes, that is the problem, Mr. Rayment, the pleadings are full of these possible throw-away lines which, if one was really to get into them and decide whether they are true or not, which is the function of the Tribunal, would require huge amounts of work on everybody's part, which do not seem to be relevant to their case. That is the problem I have with a lot of this. It is all very well just to take up four or five lines in a pleading, but to establish whether that is true or not, or whether it is proven or not, if you are seriously pursuing it, is a very serious task. I will not say any more. You have said that ----

MR. RAYMENT: I think I have said all I can on that point, and I am going to move on. The next point is (d), which is about the new and detailed evidence and modelling analysis over which it is said that we assert confidentiality. Obviously, again, in so far as it is relating to the effects of bundling, its admissibility in that respect depends on your decision about the relevance of the effects of bundling. That is what Mr. Hoskin's evidence on this particular point is trying to assist the Tribunal with, which is an idea of the magnitude of the effects on the consumer. The Decision itself attempts some assessment of the impact on consumers. We say that there is no reason why we should not be able to assist the Tribunal too. As

such, it is relevant to an effect on consumers and should be admissible as such. We may need to come back to this, but, of course, Mr. Turner, in relation to this evidence at this point made much of the *in terrorem* argument, if you like, on this particular point, and generally expressed his client's embarrassment about dealing with this.

As far as that side of things are concerned, Grid has had, within the confidentiality ring many of the underlying assumptions on which the model is based. Indeed, those assumptions have also been capable of being shared with people outside the confidentiality ring. As you know, we have agreed that Mr. Rothwell and Mr. Pickering should be admitted to the confidentiality ring. Therefore, those advisers who are within the confidentiality ring, and have been puzzling over this material for some time, will be able to have their assistance, and we will do everything ----

THE CHAIRMAN: Mr. Austin is your witness?

MR. RAYMENT: Yes, he is our main witness. We are talking here about the price comparisons -- the implications of the price comparisons in relation to the bundling of maintenance. Of course, that evidence also has relevance at other points which we are going to come on to.

THE CHAIRMAN: This is the attempt to quantify in pounds what the down side of the bundling is.

MR. RAYMENT: Yes, that is right. But, I just wanted to make the point immediately that a lot of the objections about confidentiality and the practicalities of dealing with it, we think we can resolve. We think we have already gone quite a long way to resolving that. If they need further assistance we will endeavour to provide them with appropriate assistance. It is unfortunate really - and I do not think it is necessary to go into the background - but we did receive various requests for assistance in dealing with this material. We did respond as constructively as possible. I think negotiations were effectively ongoing when really this application started to come more to the fore. Those negotiations rather fell into the background when the question of whether it was even admissible at all took over. But, if this does go in, then those conversations will be able to resume, and I am sure that a constructive way forward will be able to be found. We are not persuaded that this would necessarily take an enormously lengthy time, given the skill of the advisors and the expertise of the people involved. Our own experts would be able to assist. So, hopefully, I am doing the best I can on these points because it is quite difficult to say exactly how long it would take, but we do not think that it is an insurmountable barrier.

As far as the alleged anti-competitive impact is concerned, I think we are now moving on to para. 41 of the issues in Mr. Turner's observations. Again, in our case, in our statement of

intervention at para. 14, the first bullet point, and Mr. Williams's evidence at paras. 21 to 33 that is aimed at by Mr. Turner – I think I can rely on what Mr. Vajda has told you about the policy for meter replacement provisions. Our evidence effectively is complementing what he says. Indeed, I think Mr. Turner recognised that in his submissions when he said that Mr. Lee gives similar evidence on these effects.

So far as 43 is concerned - the linear nature of the glidepath - that is solely a Siemens matter.

Then we come to para. 45 and the allegation that the effect of the MSAs has been to endanger the continued presence of two of the three competitors in the gas metering market. Well, as I believe you are now aware, we have effectively withdrawn -- well, effectively, we have withdrawn the objected-to paragraphs of Mr. Hoskin's witness statement. So, any issue about his evidence falls away. What I think I should do, however, is that we are not withdrawing anything else. To that extent, at the moment, we are proposing to leave paras. 38 and 39 of our statement of intervention as they are - plus or minus any excision of the third sentence. No doubt if Mr. Turner has an issue with that, he will be able to take it up in reply.

THE CHAIRMAN: So, you are accepting that you are not going to run a point saying that CML might have to exit the market.

MR. RAYMENT: That is right.

THE CHAIRMAN: But, you say that that does not mean that paras. 38 and 39 of your statement of intervention ----

MR. RAYMENT: -- need to be modified any further. There is one possible exception which I think I should just take you to, although it is not major given that we have clarified what our position is. That is in para. 39. I anticipate a point might be taken. (After a pause): It is really from the comma in the last sentence, starting, "The industry objective ...."

THE CHAIRMAN: Yes.

MR. RAYMENT: I accept the logic is that that should probably go. Then we come to the argument about the price comparisons. The points that we are dealing with here are paras. 10 to 13 of Mr. Hoskin's witness statement and the exhibit. In relation to the price comparison of the DCMs, Grid objects, at para. 48 of its observations, to the fact that CML's price comparison is based on a different methodological approach to the comparison of DCM prices carried out by Ofgem in the decision at paras. 4.111 to 4.116. We say that really this is a good example of Mr. Vajda's Catch-22 situation, which is that we are trying to provide support for the position adopted by Ofgem in the decision, but we are saying that

we cannot say it in different words effectively. It does seem to be accepted by Mr. Turner in the reply at para. 131 - I do not think that I necessarily need to take you there - that this is not a new point, as it were - the price comparison in relation to DCMs. Maybe if we just turn up the reply quickly?

THE CHAIRMAN: (After a pause) What am I returning to?

MR. RAYMENT: The reply at para.131. "… to raise points which are not new but which National Grid has not been able to deal with" and the price comparison is dealt with in para.132. Those cover the passages in Mr. Hoskin's witness statement which relate to the appendix contained in the price comparison.

THE CHAIRMAN: So your point is that in the reply they seem to be accepting that it is admissible but just complaining that they have not been shown enough information to be able to ----

MR. RAYMENT: That is right, and we say we can address that.

THE CHAIRMAN: That deals with the DCM comparison.

MR. RAYMENT: Yes. It is also worth pointing out although you may tell me that this is part of the way that this appeal has been generally conducted but also in para. 43 of the notice of appeal National Grid does make the point that on a fair comparison its DCM rental charges are similar to those of the CMOs.

THE CHAIRMAN: Well there is a lot said about the comparison that Ofgem have made, not just in the summary but elsewhere, but it does seem to be focused on the DCMs, rather than the PCMs.

MR. RAYMENT: That is right. Now, where our evidence goes a bit further is in relation to a comparison in relation to charges for PPMs, and we say there is no reason to exclude that comparison either, because it supports the same fundamental point that our offering is superior to National Grid's. It may not even be that it is our offering that is superior but it is certainly possible for an efficient competitor to provide these services at rates that are lower, and I think there is an assumption by National Grid particularly in its notice of appeal where it says that effectively PPMs are not an important route to market – you have been taken to that section of the notice of appeal already – but PPMs are not an important route to market for CMOs, because of the artificially low prices that apply to PPMs because of the regulated price cap. That assumption is not correct because what Mr. Hoskin's evidence shows is that in fact even taking into account the price cap it is possible for an efficient CMO to rely on competitive offering on PPMs as well. Those points are also

linked into the points in our statement of intervention in relation to the way that normal competition operates in the market.

Obviously, I repeat the same points in the face of submissions to you that if you let this in the flood gates will have opened. In my submission, I have already made the points that I can make about that and we say that it would not significantly derail the proceedings.

We then come to Mr. Turner's point at para.49 about payment completion. Our position is not quite as Mr. Turner suggests in para.50. As far as we are concerned it is not payment completion in principle we are objecting to it is payment completion as practised by National Grid that we make complaint about. We ourselves in a sense have payment completion in our contracts, it is simply that it is age based, age related completion.

We also operate different types of contracts which mitigate the risk of premature termination and we are simply making these points to show that these sorts of provisions contained in the National Grid, in the MSAs are not necessary or proportionate effectively, and that there are alternatives that are less restrictive of competition.

Do you want to turn up Mr. Hoskin?

THE CHAIRMAN: Give me one moment.

MR. RAYMENT: It is tab 5 in the non-confidential version, madam, if that helps.

THE CHAIRMAN: The paragraphs that are referred to, paras. 18 and 19, have been excised largely.

MR. RAYMENT: And tab 2 is the confidential version. Mr. Hoskin there is making the point that there are other ways that you can structure contracts to take into account the concern about premature termination but they do not have the same effects as the ones that are contained in the MSAs. To that extent it is a sort of counterfactual point. We have disclosed a standard short term contract to National Grid, they want further disclosure but we are not sure at the moment why that is necessary just to support this relatively limited point, we say. Obviously if there are other contracts that they want to see we will do our best to provide them on a confidential basis, but it is a relatively short point.

I think I have actually gone through the points fairly quickly in terms of what is left.

Obviously we take issue with what Mr. Turner and Mr. Holmes say in para.51 of their observations which relate to the further and entirely novel characterisation of the evidence that Siemens are trying to put in.

At para.52 we do not, as I have already indicated, accept their *in terrorem* arguments in relation to the practical impact on the proceedings. One factor is, and obviously this affects other parties too, that it does seem to CML, given that the trial date is not until 15th January,

there is some scope for reasonable slippage of the timetable, provided that everybody's interests can be fairly observed in doing that.

I think, unless I can assist, those are my submissions.

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

MR. RAYMENT: Can I just say for the record, I meant to say it in opening, we do ally ourselves with what Mr. Vajda said about the law.

THE CHAIRMAN: Yes, Mr. Randolph?

MR. RANDOLPH: That was a very fortuitous late intervention by Mr. Rayment because I was going to go on to that point first, because as, madam, you will have noticed, Mr. Turner's case has changed somewhat from his written application where effectively he was suggesting that new evidence or new submissions should be excluded, pretty much without more, and now he is clearly stating that the Tribunal has discretion. It clearly does. The question for you, madam, is how to exercise that discretion, what is the scope of that discretion, and then how it applies. In terms of the law, we would submit, it is set out at paras.26 and 27 of our skeleton submissions, which includes the point that was raised or referred to by Mr. Vajda in the *VK* case in 2005, which is important because it does state quite clearly that the rules of procedure do not preclude an intervener from using arguments different from those used by the party, but nevertheless must be on the condition that they do not alter the framework of the Decision. We say that is what this Tribunal, with respect, should have in mind when determining whether or not the evidence and the submissions which are the focus of this application should be excluded or not. It does not matter whether they are different to Ofgem's, that is entirely relevant. Do they fall within the framework of the dispute?

My learned friend, Mr. Turner, in a throw-away remark at the end of his submissions said, oh, well, my submissions with regard to the law were to the effect that interveners should be given a free rein. I did not say that. My observations are quite clear at paras.26 and 27: 27 is taken straight from the case law; 26 is the extract from Dr. Plender's work where he simply says that the intervener must therefore support the conclusions of one party or another. Absolutely. The corollary is that where a stranger to the litigation is permitted to intervene, it is not limited to supporting the arguments advanced by the parties, but may advance any arguments leading to the same conclusion. So it is not a free rein, it is a loose rein, but it must lead to the same conclusion.

The point of course in the *VK* case was that the court was exercised about the fact that in that case the interveners' additional arguments would lead to a different finding from that

which had been put forward by the party which it was supporting in its intervention. That was the point, it was going outside the framework.

What are we doing here? We are supporting Ofgem simply to the effect that, yes, we agree with Ofgem that there was an abuse of a dominant position by National Grid. On that basis we say we are entitled to put forward any additional arguments.

I do make this point, rules and procedure are essentially common sense most of the time, one would hope. If it were otherwise there would be no point in interventions. There would be no point because it would be purely duplicative. We rely strongly on *VK*. We rely also strongly on the learned words of Dr. Plender, he is now Mr. Justice Plender, as well. I do not know whether that assists or not.

That is the law, madam. Our submission is that you have a discretion to allow this evidence as long as it falls within the framework of the Decision. We say for all the reasons that have been alluded to this morning and this afternoon, and I am not going to go over them because they have been adequately canvassed by my learned friends Mr. Vajda and Mr. Rayment, that the two areas which concern Meter Fit – in other words, the bundling and the policy – are clearly within the framework of the Decision, and indeed by my learned friend Mr. Turner had to go to the Decision, certainly on the bundling. The bundling aspect is dealt with under the title, "Foreclosure". That is paras.4.81 and 4.85 of the Decision, they fall under the general title "Foreclosure" at p.68 of the Decision. It is not a separate abuse. This is a point Mr. Rayment was making, it is not a separate abuse, it is just an aggravating factor. It is one that we, we would submit, as interveners, should be entitled to address. If it had never been mentioned at all in the Decision one might have some sympathy for Mr. Turner's approach, but it was and it is, and it is clearly part of the decision-making process.

THE CHAIRMAN: You will have heard my exchange with Mr. Vajda, and Mr. Rayment says that CML take the same position, not surprisingly, which is that, "We do not say that it is a separate abuse, but we say it not only has a foreclosing effect because it leads to a replacement of meters, but also because it leads to National Grid carrying out lots of visits which, if we were able to do them, would help our engineers and technicians to be kept busy in an efficient manner". So your case is the same effectively?

MR. RANDOLPH: Yes. You will be aware, madam, that our evidence is obviously factually different to that of Siemens and CML, and it is set out pretty clearly in Mr. King's witness statement. Generally speaking, it is that. He gives evidence, he, Mr. King, gives evidence to the Tribunal about the effect of the contractual framework which he says led to

difficulties for, *inter alia*, Meter Fit. It was done deliberately on the basis that that would assist the Tribunal, not least because these issues were actually highlighted in the request for intervention. It was said that we are partly industry. The actual factual background is the fact that Meter Fit knows the commercial background may well be of interest to the Tribunal. One hopes that it will be in due course. National Grid saw that and, we say correctly, did not oppose our intervention. We were clearly an interested party.

If that sort of evidence is going to be excluded on a narrow reading of admissibility of evidence before this Tribunal then one has to ask oneself, what actual benefit is the Tribunal going to gain for commercial men and women in the various CMOs who can come to this Tribunal and say, "Well, look, I was actually there at the time and I remember what happened, it was X, Y and Z". That may be challenged by National Grid, and I am sure it will be. Mr. Turner will no doubt put questions in cross-examination. This goes to the point, madam, that you raised earlier about how we are going to test this evidence. There is a distinction, and I entirely accept it, between reams of data and what a person may say his experience was on the ground. That latter point, his or her experience on the ground, can be tested by way of cross-examination, and we would hope that in so far as it comes within the framework of the Decision, which we say it does, that is not only admissible but it should help one way or another. As Mr. Vajda said, most competition cases are effectively decided on the facts.

Passing very quickly, madam, to the actual passages that are the subject of this application in so far as Meter Fit is concerned, annex 1, to the submissions from Mr. Turner. In so far as Meter Fit is concerned, they do not like 9(iii) and Mr. King's statement at those paragraphs. If we could just turn to 9(iii), that is at p.5 of Meter Fit's submissions -- No, it is not. I apologise.

THE CHAIRMAN: Page 4, in fact.

MR. RANDOLPH: I am grateful. Thank you so much. The previous page sets out what 9 is all about. (9) The following headline points can be noted from Mr. King's evidence ----" So, it is synopsis of Mr. King's evidence. Now, obviously, if Mr. King's evidence is inadmissible ----

THE CHAIRMAN: Well, it does not work that way round though, does it? That was slightly something curious about your statement of intervention. The statement of intervention is pleading, and the evidence is in support of your pleaded case. Of course, your pleaded case must not go beyond what you know you can make good by your evidence. But, to describe the statement of intervention as a synopsis of the evidence is not really quite right, is it?

MR. RANDOLPH: Not all in the statement of intervention, madam, obviously - just this paragraph. All that para. 9 was doing was headlining some of the main the points that were set out in Mr. King's evidence. He is obviously saying different things elsewhere. At para. 7 we set out the succinct presentation of ... intervention. So, at para. 9 we are just setting out what Mr. King's evidence is going to. Paragraph 3 is just a synopsis of a part of that. So, it is the effects in particular that have manifested themselves as an inability of CMOs to build density, etc. in meter replacement, a dis-incentive on gas suppliers to allocate maintenance work to CMOs and the deprivation of the opportunity for CMOs to build up their portfolio, and the particular inability of Meter Fit to meet National Grid policy targets in any year since 2004. So, that is all that that does. Therefore, it is not a pleading to that extent - it is just that part of it. So, it either stays or falls with the admissibility of Mr. King's evidence because it is not introducing anything new.

THE CHAIRMAN: But how do I decide whether Mr. King's evidence ----

MR. RANDOLPH: I am going to come to that, madam.

THE CHAIRMAN: Right.

MR. RANDOLPH: Sorry. I just had to take it in order. At Annex 1 to Mr. Turner's submissions we then move on to 1(g) - Meter Fit's evidence. So, that is Mr. King's evidence. Paragraphs 32 and 33. Perhaps if we could turn that up, following on after the statement of intervention. So, the foreclosure affects the MSAs. This is Mr. King stating that the structure of the MSA has made it impossible for CMOs to build densities - factual statement - in any other way except meter replacements since they had no pre-existing portfolio of meters. It is almost impossible for gas suppliers to stay on the glidepath and therefore have volumes to attribute to CMOs. That is his evidence as to what the actual effect of the MSAs were. Then he gives some examples of that. Then, at para. 33, NG - Grid - took the conscious decision not to unbundled maintenance such that a supplier who may otherwise have wished to appoint a CMO to ... maintenance would have been faced with the uncommercial position of still having to pay NG for maintenance. So, again, a statement of fact. That may be contested by National Grid. They may say, "Well, it's not a conscious decision, and in any event, even if it were, it does not have the impact you say it does". But, that can be tested.

THE CHAIRMAN: What has it got to do with the actual case and the decision?

MR. RANDOLPH: Foreclosure effects, madam. Ofgem's decision was that the MSAs foreclosed unlawfully the market, in particular with the regard to the CMOs. This is simply particularising the effect - not in general, but specifically, with regard to Meter Fit: how it

impacted on Meter Fit on the ground at the time. That is all it is doing. It is not changing Ofgem's case. It is saying, "This is what happened". That is paras. 32 and 33.

We then go back to para. 24. It was not a typographical error.

THE CHAIRMAN: Paragraph 33 carries on over the page, does it not?

MR. RANDOLPH: Yes, madam - to the two particulars: the lack of ability of maintenance work meant that CMOs were unable to build sufficient market operations (that is the first), and maintenance activity jobs have a higher access rate and are more productive than policy jobs, and all maintenance work is completed by NG, which included a meter being replaced resulting in pressure on the Legacy ----

THE CHAIRMAN: This is useful, because I think where we get to with this is that the first part of para. 33 on p.9 looks as if it is alleging that bundling of maintenance is abuse. It looks as if it is complaining about the bundling of maintenance *per se*, rather than just because it is a foreclosure effect. But, I understand that you clarify that that is not -----

MR. RANDOLPH: It is under the title of Foreclosure Effects, yes.

THE CHAIRMAN: Right. Now, looking at (a), (b), and (c), I think Mr. Turner would say - and he will no doubt shake his head if I am mis-attributing comments to him, or thoughts to him - that as far as (c) is concerned, well, fair enough, that is what Ofgem say - that when the maintenance job includes the meter being replaced, that then results in pressure on the glidepath. That is the point that they make. That is the foreclosure effect that they identified from the bundling of maintenance. But, (a) and (b) is going wider than what Ofgem have said, talking about generally the lack of availability of maintenance work, meaning that there are fewer visits available for CMOs to perform. (b) is a soft of sub-set of (a) really, explaining why some jobs are preferable to others.

MR. RANDOLPH: Yes.

THE CHAIRMAN: Given that you have clarified that you are not making the point, really the contention is over (a) and (b) and whether you should be able to go that bit further than what Ofgem have said.

MR. RANDOLPH: We would answer that potential case being put by my learned friend on the basis of the ability of interveners to put ... as long as they fall within the framework and as it is under the heading 'Foreclosure Effects' and as it clearly deals with foreclosure effects, we would say that it does firmly fall within the framework of the decision. That is paras. 32 and 33.

Then para. 24, going backwards -- This, again, is a factual area - 'Further Extension to the Agreement - December 2007'. This is Mr. King telling the Tribunal what it has been able to

do since 2004. Again, one would think that that might be quite interesting, or of interest, to the Tribunal.

> "Meter Fit have been able to deliver reasonable replacement volumes since 2004. These have been a mix of CRE and Policy exchange. Exchange of NG policy work has always been more difficult to achieve."

This is the poor access point.

> "Up to the end of 2007, we have not been able to meet the NG Policy target in any one year since 2004 for these reasons. Any shortfall in delivery of NG Policy work renders an opportunity for NG to step in and replace these themselves. This adds even more pressure on the volumes available to BG to meet the contract commitments by removing available glidepath volumes."

Madam, this is simply setting out the position as from 2004 to 2007.

THE CHAIRMAN: Is that saying then that if National Grid replaced a new NG meter that that then counts towards the quota of free ----

MR. RANDOLPH: No, I think it is simply saying, although I may be told otherwise, that they can replace it and it becomes theirs, but I am being whispered to that it does as well, so there you are. You want the cake and eat it.

THE CHAIRMAN: Well, Mr. Turner, just to clarify that, if NG replace a meter does that then count as one of the free, i.e. not penalised exchanges that move down?

MR. TURNER: Yes.

THE CHAIRMAN: It does.

MR. TURNER: Yes.

MR. RANDOLPH: That deals with that point it seems to me firmly – I am very grateful to everybody.

THE CHAIRMAN: In other words, just to be absolutely clear, it is not only meters which a replaced by a competitor's meter which counts towards the quota.

MR. RANDOLPH: Yes, any. So that, we say, firmly falls within the framework of the agreement. Only one more to go, fortunately, because para. 51 is objected to insofar as certain paragraphs are responded to in the notice of appeal and those paragraphs are 428 and 459. We would say by way of preliminary that as Mr. Vajda correctly pointed out, we would respectfully submit, the scope of the appeal is bounded by the notice of appeal and were interveners not to be allowed to comment on passages in the notice of appeal then again that would be constraining an intervener, we would say, in an incorrect manner.

What Mr. King does at 428, p.148 of his witness statement, is simply refer to what he said at para.4.28 and it may be helpful to have it to hand. This is not a major point but, as a matter of principle Meter Fit are unwilling to accede to Mr. Turner's application. 428 at p.148 says – this is in connection with replacement levels permitted under the glidepath not being modest: "Regarding policy replacement in the past National Grid's policy replacement schedules had given suppliers considerable flexibility as to which meters to replace, enabling them to plan their work in a way that achieves necessary density." So that is it – "National Grid's policy replacement had given suppliers considerable flexibility" in the past." What Mr. King is doing at this paragraph is stating that when considering National Grid's statement when they refer to the past National Grid policy exchange only became known relevant to Meter Fit during the renegotiation in 2004. Since then their replacement has been prescriptive via BG to Meter Fit while National Grid may have increased their pool of policy meters they still remain a difficult category of meters to replace because of the prescriptive nature of National Grid's policy meters, and subsequent difficult access. So what Mr. King is dealing with there is the flexibility issue. It seems to me, with respect, madam, that that is a perfectly admissible aspect to cover by way of evidence.

The next paragraph is 459 that is complained of. 459 in the notice of appeal simply says that the MSA approach just has obvious advantages for planning the work it is talking about what the advantages are and sets out what the decision points out.

Mr. King, at 459, p.14 of his witness statement says that it is true that CREs are a priority for CMOs and that density of operations are important. However, the numbers of meters over and above CREs to be exchanged by CMOs are dictated by NG's policy exchange, by their very nature they impose a constraint on the freedom of CMOs to plan and schedule meetings. So again all Mr. King is doing there is commenting on the statement in the notice of appeal at 459 and putting Meter Fit's evidence. Again, that can be challenged by Mr. Turner when Mr. King comes to take the stand, but we would submit there is no reason to exclude it as of now.

Finally, madam, the last aspect of Meter Fit's evidence that is subject to the application is all of para.52 of Mr. King's witness statement, because that deals with Mr. Avery's witness statement, and Mr. King's take on Mr. Avery's witness statement. Given the time I really do not intend going through each and every point. I think my main point will simply be this: Mr. Avery has been put forward as a witness, there is no reason why, we would

submit, Mr. King cannot comment on Mr. Avery's evidence. Clearly if Mr. Avery's evidence is admissible then Mr. King's evidence should be admissible.

Madam, those are my submissions. The final point is we share your concern about satellite litigation. That concern may be addressed by the order of the President at the first CMC with regard to a list of issues. At the moment as far as I understand it there is a composite list but it has not been wholly agreed. It may be that if what, madam, you said at the beginning and throughout is borne in mind one can work towards a final definitive list of issues which can form the basis of the trial and which therefore will form the basis of the Tribunal's ultimate decision, which would avoid (or at least possibly avoid) having these additional issues which are challenges to challenges to challenges, which actually at the end of the day may not mean very much.

Madam, unless I can assist you any further, those are my submissions.

THE CHAIRMAN: No, that is very helpful, thank you very much, Mr. Randolph. Mr. Kennelly?

MR. KENNELLY: Madam, I wish to make just two points, one in relation to maintenance, and the other in relation to a point Mr. Turner made about normal competition. The point about maintenance relates to a submission that was made earlier, and I do not propose to be able to solve the problem faced by the Tribunal, but since Mr. Turner referred to ----

THE CHAIRMAN: I was hoping you were going to!

MR. KENNELLY: If I could, madam, I would but, as I am sure you have already worked out, it is not crystal clear from the pleadings. But since Mr. Turner referred to Ofgem changing its case between the statement of objections and the decision I felt I had to at least address you on that point from Ofgem's point of view.

Turning briefly to the statement of objections, the first statement. Mr. Turner took you to para.4.116 and in my submission he may have given the reference to density more importance than was intended at the time. This is a section relating to the effect of the bundling of maintenance on the pool of meters available, so it is the effect of bundling maintenance on volumes.

In the first SO this is referred to as being particularly important given the importance of economics of density. That was a passing reference in that section, the focus was on how the bundling of maintenance affected the ultimate pool of meters or volumes available for replacement. True it is that in the Decision there is no explicit link between the bundling of maintenance and reductions in density.

It is necessary, however, to point out to the Tribunal that that was not a deliberate decision by Ofgem to drop that part of the case. There is a link in the Decision, although we have to

acknowledge that it is not clear, between the reduction of volume caused by bundling of maintenance and then separately a link drawn between reduction in volume and reduction in density. In my respectful submission, that is what Mr. Vajda sought to point out to you today. In the Decision, Ofgem have linked bundling maintenance and reduced volumes.

THE CHAIRMAN: Reduced volumes of what?

MR. KENNELLY: Of available meters for replacement. The reference is at 4.81.

THE CHAIRMAN: The link that everyone else seems to be agreed is made in the Decision is that because maintenance often leads to replacement, though if, as we now seem to have established, it does not matter who replaces the meter, it still counts against the quota before you get to the glidepath, I am beginning to wonder what the point of this is. The point seems to be that because maintenance visits often lead to replacement, that then counts against the quota. The question was whether the Decision embraces also the point that generally carrying out maintenance bumps up the number of visits that you do, even they do not lead to replacement, and that would be helpful to the CMOs if they could carry out those visits.

MR. KENNELLY: Indeed, madam, there is no doubt about the first point. The issue is on the second point. As I acknowledged at the beginning, it is not stated explicitly in those terms. What I sought to do is draw your attention to two paragraphs where the dots may be drawn, but I do not promise that they are as clear as the interveners certainly would like.

Paragraph 4.81 is explicitly referring to the provision of meter maintenance under the legacy MSAs of the Decision, and it says:

> "Both the legacy MSAs and the N/R MSAs bundle charges for meter maintenance with those for meter provision. The effect of this is to prohibit CMOs or other parties from maintaining NG's stock of meters, which as discussed in Chapter 2, accounted for 93% of meters in 2004."

That makes a general point that the stock of meters is very substantial. There was a reference earlier in the Decision, as you know, in terms of market definition and dominance, to how the bundling and maintenance can affect expansion.

Then the Authority goes on to say:

> "… this is particularly significant because of the extent of PPM replacements that NG has typically undertaken …"

Then it refers to the lesser DCM replacements. On one view the word "particularly" qualifies the prior statement which makes a general point that being barred from

maintaining the meters excludes you from doing that activity in respect of a very large block of stock.

Later in the Decision, Mr. Vajda – I do not wish to repeat the submissions already made – made the point at 4.172 that a general link is drawn:

> "… between meter replacement volumes and density: the higher the volumes, the greater likelihood of meter density."

That is all I can say on those points. I wanted to complete the picture for the Tribunal.

The second point relates to normal competition, and I was rather concerned that Mr. Turner suggested there was no dispute between National Grid and Ofgem on this point, and he referred in particular to whether payment completion represented normal competition. I do not propose to take the Tribunal to all of these references, but for the avoidance of doubt, to the extent a dispute remains between the parties it is referred to explicitly in the defence at paras.4.37(e) to (i), para.175 and in particular paras.224 and 225. I am sure the Tribunal has those well in mind, but for the sake of completeness it is important, much as we would like to agree matters between us, to record that that issue is complex and is not entirely agreed, and therefore it is overly simplistic, I think, to characterise as the interveners as seeking to rock a steady ship. They may well have grounds for adding to that point.

I do not wish to draw attention to the particular submissions of the interveners, but in relation to CML, it was useful to hear the submissions from their representative because, in our submission, we certainly understood CML's statement of intervention to say what was being said in the Decision. They were not suggesting, save potentially for the very last sentence of para.23 of the statement of intervention, that payment completion was in principle anti-competitive, and I think that has been clarified today in their oral submissions. I appreciate the last sentence of para.23 of their statement of intervention may be ambiguous but certainly the first two paragraphs may be read consistently with our Decision. Of course, National Grid seek to strike out 21, 22 and 23. In case that distinction was not drawn earlier, we see a clear distinction between 21 and 22 and the last sentence of 23.

THE CHAIRMAN: Whether or not having payment completion of itself is normal competition, the Ofgem Decision did not attack payment completion for its own sake, as opposed to because of a particular structure that was adopted by National Grid. The reliance on a counterfactual which allows for age related payment completion would seem to confirm that normal competition or not, that is not where you chose to direct your fire power.

MR. KENNELLY: Madam, that is correct up to a point. There is not substitute for a close reading of the defence. We say explicitly that we do not challenge the principle of payment completion, we certainly do propose non-PRC counterfactuals, and we suggest a range of options which would have produced far less restrictive effects. I have given the paragraph references in the Decision and the defence.

THE CHAIRMAN: It is important not to get too hung up on these quotations from authorities, and not to substitute them for the test actually set out in Article 82. The question is not whether this practice is normal competition, but whether it is an abuse of the dominant position and those two are not necessarily the same thing.

MR. KENNELLY: Indeed, madam, and we shared Mr. Vajda's interest in the point which you made at the very beginning of the day, if the parties could agree that that may well simplify matters substantially.

Before I finish, there are further matters to discuss. We, in relation to the second point, raised by Mr. Turner, have had to contact a number of the suppliers who are not represented in these proceedings in relation to the proposal to admit two officials of National Grid to the confidentiality ring. This may not be a straightforward matter. I appreciate that time is running out today. I just wish to flag with the Tribunal that there are maybe two matters of substantial dispute which remain today in terms of how we proceed further. I wish to draw that to the Tribunal's attention. Forgive me, there was one further point which my learned friend, Mr. Vajda, has drawn to my attention. He was questioned by you, madam, about para. 69 of his client's statement of intervention – the witness statement of Mr. Lee behind Tab 7. This relates to the age profile of the meters ----

THE CHAIRMAN: This is the linear glidepath.

MR. KENNELLY: Indeed, madam. Here, again, on my reading of this, we did not see a substantial difference between this point and the point made in the decision. It seemed to us that what was being said here was that because of the uneven nature of the age profile, the fact that the averaged line rated an unnecessary lack of flexibility -- It is true that in the decision Ofgem drew attention to the uneven nature of the age profile of the meters at para. 4.94 and also criticised the lack of flexibility in the glidepath at para. 4.110 in the decision. Paragraph 4.97 is where we draw attention to the uneven age profile. Paragraph 4.100 is where we criticise the lack of flexibility which we say is unnecessary.

In my submission, madam, that is certainly how we read para. 69. I understand that that is what Mr. Vajda was trying to explain to you today - that there is no difference between

those points made in the decision and the point made in para. 69 of Mr. Lee's witness statement.

I am grateful.

MR. TURNER: Madam, I will whisk through this as briefly as I can. Starting with Mr. Vajda and the issue of the legal test, he says it is a two-stage question that the Tribunal must address: (1) What is the legal test? (2) How do you apply it? Well, we do say that there is a presumption, given the statutory framework about the introduction of new evidence, whether it comes from the competition authority or it comes from an intervener. Our point is that the interveners are not in any better position, or advantageous position about the introduction of new evidence than the competition authority - nor can they be. That is not inconsistent with the exercise of discretion by the Tribunal. The Tribunal exercises the discretion concerning the introduction of new evidence, taking into account that presumption. Mr. Vajda says that there are two touchstones for you to take into account, and two only - namely, relevance and fairness. He omitted the third, which in my submission is of equal or superior weight - which is respect for the statutory framework.

In exchange with Mr. Vajda you identified, madam, the question as being whether the interveners are seeking to introduce new allegations of abuse. Indeed, that is an important concern. Also material, however, is the introduction of new factual elements not previously covered, not addressed in the decision, not canvassed in the administrative investigation, and which would lead to significant work now. This is particularly important in relation to some of the matters now in issue where, as I say, the interveners had the opportunity to address these points in the administrative procedure - indeed, were invited to do so and did not do so. But, now, in their statements of intervention, they produce the points. That consideration goes, if anything, to Mr. Vajda's second touchstone - the issue of fairness in favour of National Grid.

On his other touchstone - the question of relevance to the appeal, we say that it must be repugnant to the idea of relevance where points that were initially raised by Ofgem during the administrative procedure, in statements of objection, are subsequently not included in the decision. When you are asking what is relevant from the point of view of the appeal process and the Tribunal, if a point was specifically not adopted by Ofgem in its decision, it is not relevant. Particularly, that is underlined where a conscious decision was made or, as we have heard from Mr. Kennelly, sometimes an inadvertent decision not to include something in the decision itself.

THE CHAIRMAN: What do you say about the *VK* point? Do you say that the CFI test is not relevant to our deliberations, or do you accept that something similar to what is set out there is what we ought to be doing?

MR. TURNER: I will make a number of brief points about that. So far as the court of first instance procedures are concerned, they are plainly different. They are different not least because, as you will be aware, in the court of first instance where the intervener may not seek a different form of order, as Mr. Randolph points out, it is expressly a feature of the Tribunal's rules that an intervener may, in certain circumstances, seek different relief, as you know. So, on the basic point there is already a difference in the rules.

So far as the court of first instance submissions made by Mr. Randolph are concerned more generally, we say that he has misunderstood the position and has mis-read that authority. If I may begin with Mr. Justice Plender's text -- The quotation was:

> "Where a stranger to the litigation is permitted to intervene, it is not limited to supporting the argument advanced by parties to the action, but may advance any arguments leading to the same conclusion as is advanced by a past".

Now, if it is sought to be said, therefore, that provided they are seeking to uphold the same ultimate conclusion - namely, a finding of infringement and upholding the decision, they can make any arguments that they wish - that is incorrect; that is not the situation in the court of first instance.

THE CHAIRMAN: It depends how much of the decision you treat as being the conclusion -- or how much of it you treat as being the framework - to use another metaphor - within which the arguments have been raised. Is the finding in the decision just that there has been an abuse of a dominant position, or is it a finding that there was an abuse of a dominant position in the MSA contract terms, or the MSA contract terms insofar as they relate to this or -- One could go into a large number of qualifications ----

MR. TURNER: Absolutely.

THE CHAIRMAN: -- or descriptions in ever-greater detail of what the decision is.

MR. TURNER: In my submission, the position as to that is clear: it is not sufficient merely to say that the decision under appeal found that there was an abuse of dominance. We say that there is an abuse of dominance, albeit for different reasons. Therefore we are within the framework of the appeal. It is clear - and it is clear in the court of first instance - that you take the case as you find it - I am now quoting from the Rules of Procedure - and that you are constrained not to introduce new factual allegations, new factual evidence to support the decision, subject to an application to annul. We emphasised in our written submissions that

we are aware of no case before the court of first instance where a competition authority - let alone an intervener - has introduced new factual elements to support a decision subject to an application to annul. It has not happened. Indeed, there is authority against that. I am conscious that this is a reply, but I can produce a paragraph from Bellamy & Child which establishes the position. The point, nonetheless, is that the court of first instance procedure is very clear. It is certainly not authority for the extravagant proposition that you have heard today for that reason. Nor is the *VK* case, in line with that. If you go to the *VK* case I can perhaps make that good. Can we take a moment to do so? This contains the statute of the Court of Justice. At the foot of the first page in Tab 17 is Article 40. At the end of Article 40 is the proposition that an application to intervene is limited to supporting the form of order sought by one of the parties. That is so.

The next tab contains the Rules of Procedure of the Court of First Instance. Over the page is Article 116. On the right-hand page at para. 3 is the principle that, "The intervener must accept the case as he finds it at the time of his intervention".

What the *VK* case confirms at para. 52 is that those two elements are separate and cumulative. You will see in para. 52 the *Verein* case. At para. 52 on p. 7 of 16, madam, you will see that after referring to the statute of the Court of Justice the court stated,

> "In addition, under Article 116(3) of the Rules of Procedure, the intervener must accept the case as it finds it as the time of its intervention. Although those provisions do not preclude an intervener from using arguments different from those used by the party it is supporting, that is nevertheless on the condition that they do not alter the framework of the dispute and that the intervention is still intended to support the form of order sought by that party".

So, one sees from that 'and' that merely supporting the form of order sought by the parties is not sufficient to mean that you are within the framework of dispute, there is a separate factor there, and that takes you to the fact that in the Court of First Instance you do not, as has never been suggested, introduce new factual evidence if you are the Competition Authority, or if you are an Intervener to support a decision which is the subject of an application to annul. I will merely give you the reference I will not go to it, but you will see in relation to the Competition Authorities at para.13.234 of **Bellamy & Child**. So in relation to a CFI proceeding we say that is of no assistance on this point.

We turn then to the nitty-gritty, namely the application of the law to the facts. The first point that Mr. Vadja addressed was the barrier to entry issue as a result of tying up engineers who would otherwise become free. As to that I would merely confirm that the

point is pursued, but because I did not raise it in opening I accept that this is an issue that, madam, you will need to decide for yourself on the papers, but it is pursued.

So far as the major first issue is concerned, namely the bundling of maintenance as itself an aspect of the abuse, Mr. Vadja clarifies that this is something that aggravates foreclosure effect. My first observation to that is that a matter which contribute to a foreclosure effect, and which is objected to is part of the abuse just as much as if there was some separate, self-standing provision which on its own caused an abuse. It is part of the abusive elements to which the interveners object, and therefore to distance themselves from the notion that this is an abuse is misconceived. It is on the case that they are running something that they are inviting you as the Tribunal to find is part of the abuse of dominance, and there was no getting away from that.

Siemens says that it is misleading to look merely at the volumes of replacements which arise from maintenance call out visits as an aspect leading to increased problems for the competing meter operators. Misleading or not (and we say it is not) that is the case set out by Ofgem in the decision, and that is the only case set out by Ofgem in the decision. We have gone to the only specific references to it, there can be no doubt whatsoever, and perhaps it is convenient, because otherwise I would merely come back to it later, if you would take up the decision I can address Mr. Kennelly's parting shot.

Mr. Kennelly referred to the word "particularly" as it is set out in para.4.81 and said that that particularly might have meant that there was much more – once the camel's nose is in the tent the whole camel will come in. I would ask you, madam, to start at para.4.21 which is entirely unambiguous on p. 64. Then you see the mistake that Mr. Kennelly has made: "We do not consider the bundling of maintenance with the provision of meters under the MSAs to be a separate abuse. The bundling of maintenance clearly exacerbates the foreclosing effects of the MSAs …"

and then:

> "This is because even where a supplier is using one or more CMOs to provide new and replacement meters, National Grid's maintenance of its legacy stock will lead to National Grid replacing both PPMs and DCMs. National Grid will then supply these meters under the N/R MSAs."

That is the case, it is repeated twice more as I took you to in opening, which is the allegation in the decision. If you go to 4.81 you see the mistake that Mr. Kennelly has made in relation to interpreting that paragraph, that is on p.79. In the relevant sentence what is said is:

> "The Authority considers this is particularly significant because of the extent of PPM replacements that National Grid has typically undertaken on maintenance visits."

Therefore the distinction is not between the machinery which we say is part of the decision and something wider and far more extensive, it is between an allegation relating to PPM replacements on maintenance visits and PPMs and DCMs replaced on maintenance visits. What is being said there is that the point is most significant in relation to PPMs.

Returning to Mr. Vadja. Mr. Vadja says that annex 2 of the decision shows that policy replacements, and he used the term in its broadest sense, are a part of the Ofgem decision on abuse.

Annex 2 of the decision, and indeed the decision as a whole does not run the same case in relation to the impact of the policy meter replacement provisions as the interveners do. Ofgem, I sought to say in opening, in the decision are referring to the headroom between the non-discretionary volumes for replacement and the ceiling which is the glidepath, and they say that that distance, that headroom is small and they make a point that the difference between the discretionary headroom and the non-discretionary amount that you have to fulfil makes the impact of the glidepath all the greater. But, what the interveners are now introducing in their statements of intervention is a far more extensive case, which is based on the proposition that National Grid policy meters have features which mean that ordering them to be replaced indirectly through the gas supplier creates all sorts of difficulties for the efficient work pattern of the CMOs – they are particularly difficult to access it is said; they are geographically dispersed it is said. These are matters, factual elements, which would need to be gone into by us now if they are to be introduced into the case, they are not part of the decision regardless of whether they were in the first statement of objections as a passing reference or not, they are not there in the decision at all.

Mr. Vadja went t hen to the question of meter maintenance at paras. 4.81 to 4.85 of the decision and said "There is a section on maintenance, we are addressing maintenance as well", and the fact that it may be short in the decision makes it no less important. Now, while I would agree that in principle something that is in the decision may be small but perfectly formed, nonetheless it is not its length that counts, it is its difference in content. What is being run by the interveners is an entirely different case in relation to maintenance. It is a case that – and I will endeavour not to repeat myself until I am blue in the face – that the maintenance visits which the commercial meter operators would undertake regardless of replacement and across the entire base of the installed legacy meters, would give them an

advantage in terms of density of work, would give them efficiency gains, would conduce to their profitability and that the refusal to allow this through the bundling provision is an aspect of foreclosure, and thereby a part of the abuse.

Mr. Vadja then refers to the notice of appeal and he says that even if there may be nothing there in the decision: "let us focus on the notice of appeal", and he took you to a passage that I had not covered in para.716 and following. I would invite you to pick that up, madam, because it does relate, as do a number of the points that were subsequently made, to the problem identified by you at the outset, that it is all very well to pick out stray words or do a word search for the term "density" or "maintenance", and say, "There you are, it is there, I can therefore run an entirely new case". That is not the way that one should approach this. The notice of appeal as a whole is responsive to the Decision. All of the positive averments there are responsive to the case which is made in the Decision and do not go beyond it.

If you go to para.716 and following, which is where the allegations on maintenance in the Decision are dealt with, you see plainly that those allegations are meeting the narrow case set out in the Decision and nothing more than that. Thus, at para.719, the parts emboldened in the quoted text relate specifically to the replacement of meters as a result of maintenance visits. In para.720 we refer, again in emboldened text, to the extent of replacements. Over the page we say in 721 specifically in the sentence that spans the page:

> "Ofgem's concern appears to be that meters installed by National Grid following a maintenance visit are then provided to the gas supplier under the N/R MSA."

We do not address, and we do not give an opening to address, any wider case.

Mr. Vajda then said, "Well, it is in the Decision, it is in the introductory section".

THE CHAIRMAN: I think you can move on to the policy ----

MR. TURNER: I will move on to the policy meters provisions. The first part of the Decision that was referred to was para.2.94. This is in the facts section. This was one of the major parts in the Decision referred to by Mr. Vajda for the proposition that it is a part of the Ofgem infringement decision that the policy meter provisions in the MSAs are part of the abuse. However, you see from this paragraph that there is a reference to the difference between non-discretionary and discretionary work, although the case remains one about using up the quota provided by the glidepath. It is not a case, and there is no case, that policy meters are unattractive work because of access difficulties or their geographical spread, or for any other reason, but that, whatever is said in submissions, I have shown by reference to the statements of intervention and the evidence, is the case made by the interveners. While it

remains their case we need to be able address it. If we need to be able to address it, it is an entirely new case and the very fact that we are embarking on an entirely new factual enquiry at this stage in the case should tell one how far away we have gone from the original Decision subject to appeal.

THE CHAIRMAN: In the notice of appeal you do go into this question of whether the policy requirement is a good or a bad thing, on the basis presumably that you say if National Grid was not requiring all these meters to be replaced then it may be that the gas supplier would say, "Thank you very much, CMO, I do not want any gas meter replaced this year". Do you posit a counterfactual where actually without the policy requirement there might be fewer meters replaced each year than there are with it, or is that not ----

MR. TURNER: I do not believe we do that. The only paragraphs that were referred to by Mr. Vajda in the notice of appeal, and I will look at one in a moment, do not address any negative case about the policy meter provisions set out in the Decision. What they do is address the contextual point that the policy meter pool of meters available to be drawn down every year is sufficiently large not in itself to cause any problems, but that is not an issue of dispute in the Decision, and the fact that it is mentioned in the notice of appeal should not be an opportunity for the interveners to suddenly make a new case on abuse about it.

You see this from the statements of intervention. Mr. Vajda took you to Mr. Lee's witness statement, and perhaps we can return there. Mr. Lee's witness statement from para.53 on p.19 and following under the heading "Policy Replacement Work" picks up, as you saw from Mr. Vajda's submission at para.54, a reference in the notice of appeal that the policy meter arrangements allow flexibility, and then kicks against it to create a new case on abuse. Those parts of the notice of appeal, although statements in there, were not anything directed against the Decision. We do come back to the point you raised at the beginning, that in a long notice of appeal – rightly or wrongly a long notice of appeal – there is the possibility for someone to range through it, scouring it, for words or expressions which are then used in order to build a case quite different from the case which is made in the Decision and appealed against in the notice of appeal. That is what has happened here. More generally, and along the same lines, we say it is quite misconceived simply to select broad phrases such as "National Grid contests that there is foreclosure", or, "National Grid denies that there is an abuse", and turn them round and say, "Well, there is an abuse, you have put that in issue", and then seek to establish it by introducing factual elements and

reasoning that are no part of the Decision subject to appeal. National Grid responds specifically to the Decision and its notice of appeal must be read in that context.

THE CHAIRMAN: Do you say that they are mistaken if they have interpreted the notices of appeal as putting forward a case that policy requirements are beneficial to the CMOs?

MR. TURNER: Yes. We do not say that policy requirements are beneficial. What we say is that they are not restrictive as they are operated. They are not put forward as a good thing by National Grid. What is said is merely that they are not themselves something which reduces flexibility of operations. Having made that statement, this is then picked up and turned into a case against us. First, we do not say it in that way, and nor is it a reaction to a point which is raised against in the Decision.

So Mr. Vajda says he is not going beyond the Decision in relation to either of these matters – the policy replacements or the maintenance – but of course he is. One sees this throughout the statements of intervention.

In relation to the retention of maintenance work, I ask you to briefly look again at Siemens statement of intervention, para.42, where you see set out in very clear terms that it is the ratio of the policy work to the customer driven work, a division coined by Siemens in this appeal which, going to the paragraph relating to (a) and (b) at the foot of the page, have limited Siemens ability to Siemens' ability to operate efficiently and profitably in the relevant market given the importance of access and density, and then the reference across to the witness evidence on that point in the statement of David Lee.

Along similar lines, if you turn the page, at para.44, I simply remind you, madam, that on the bundling of meter maintenance there are two aspects to what is said, and there is a clear division. 44(a) reflects Ofgem's case; 44(b) and the reference to the witness evidence, goes beyond Ofgem's case.

THE CHAIRMAN: Looking at 42(a), again for us to explore what ratio of policy work to customer driven work seems expected, whatever that means, and which it carries out under other comparable contracts, e.g. its electric metering contract. That does raise all sorts of extraneous matters. Paragraphs 44(a) and (b) -- you are saying that (a) is ----

MR. TURNER: (a) is the Ofgem case essentially - the overall number of meters that suppliers can choose to be replaced by CMOs without paying a charge. But, (b) - depriving them of valuable transactional work which would have improved significantly the mix of its activities and efficiency and profitability. There can be no doubt that this is a major new addition to the case.

Now, as to the practical implications of this, Mr. Vajda is correct when he criticises me for having failed to include in the annexe an application for disclosure in relation to these points. It was there in the skeleton, but you will see it in our skeleton at para. 62. It failed to make its way across into the annex. Paragraph 62 is on p.23. We said - and it was in relation to the complaints which have now gone about the impact on the viability of the companies - that if they are going to be raising these sorts of matters we will need to have disclosure of the relevant documents so that we can see what the problems were, what they thought about them and how it affected their appreciation of how they were doing. We say in para. 62 that:

> "The above categories of documents will also be relevant and necessary for testing the interveners' new specific claims that they have been adversely affected by the requirements in the MSA's to carry out National Grid policy meter requirements and by the inability to carry out maintenance work on National Grid's installed meters".

I apologise for the omission in the annex.

The linear nature of the glidepath. Madam, if I may make a factual correction? In exchange with Mr. Vajda on this you seemed to suggest that the premature replacement charges in the National Grid contracts were taken on an average basis of the ages of the meters and the Legacy stock as opposed to their actual individual ages. The precise position (for your note) is at para. 148 of the notice of appeal because that is not, in fact, how it is done. You will see from that - and I will not spend any more time - that the premature replacement charges do not bear a relation to the actual ages of any of the meters in the Legacy stock on an average basis or not. I can take you to it, but you will see it -- It is not for now.

Now, in relation to the linear nature of the glidepath, Mr. Vajda took you to parts of the decision relating to Ofgem's age-related counter-factual. He said, "Well, we are simply saying the same thing, now supported by Mr. Kennelly". But, that is not what Siemens are saying in relation to this issue - or, at least it is not all of it. Paragraph 69 of Mr. Lee does certainly deal with the issue of peaks and troughs, depending on the age profile of the meter stock.

But, the following paragraphs go far beyond that. If you turn to Mr. Lee and look at paras. 70 to 72, you will see that he addresses a second effect of the linear glidepath - that it takes no account of geographical variations in workload. Mr. Lee then talks about the difficulties experienced between the workforce in one area having too much to do and the workforce in

another area not having enough to do (para. 71 and so forth), and develops another argument about the effects of the National Grid glidepath which is unquestionably not any part of the decision, which, if it is to be tested, would mean going into this issue as well in order to test the way in which the workforce is scheduled and deployed to see how this is borne out, and which is no part of the decision. I leave that there.

We then turn to Mr. Rayment. Mr .Rayment confirms that so far as his client is concerned - and I quote his words - 'maintenance is not a separate abuse, but an added effect of the way the provisions operate in the market'. I say again that what he and they are saying is that this is an allegation that the bundling of maintenance produces foreclosure effects. It is set out that way very clearly, as you have seen in para. 44(b) of the Siemens statement of intervention, and it is there in para. 38 of Capital Meters' statement of intervention. As such, it is said to be part of the abuse.

In relation to the allegation that National Grid was fully aware that the reservation of maintenance would cause harm, there was, madam, as you pointed out, no such allegation in Ofgem's decision. Capital Meters' skeleton makes clear that it is based only on an extract from the decision which said that National Grid internally should have been aware of the competition risks. Well, that is a reference to something purely anodyne, purely general. It is not, therefore, well-founded in any event. It is not part of the decision. It is manifestly not well-founded. It should not be included in the case.

The next element addressed by Mr. Rayment was modelling the adverse effects of the maintenance bundling - the effects on gas suppliers of the bundling.

THE CHAIRMAN: Does this not stand or fall with whether -- Certainly, if the maintenance bundling point is limited in the way you say, then I am not sure that it adds anything to be able to quantify the loss suffered by the CMOs for not being able to do that work. Is that the point that is being made?

MR. TURNER: Perhaps it is in my interests to agree with that. I would, however, say that it may be thought to be slightly different because, on the one hand, the first allegation is that the bundling of maintenance weakens competitors, causes exclusion. The other allegation may be somewhat different - namely, that because other people are cheaper and they are prevented from doing the work, customers are occasioned harm.

Now, I would say that they are closely related. In strict principle they are probably slightly separate. The point remains, however, that it must be clear that you have an allegation concerning bundling of maintenance as a source of harm to consumers which is new in the interveners' materials. Mr. Rayment says we have had many of the underlying assumptions.

That is not correct at all. I have taken you to the maintenance counter-factual single sheet, which we have. We would need to see and understand a lot more about how Capital Meters charge us for maintenance work; what the cost drivers are if you increase the scale of that work so that one can make a fair comparison with National Grid before you get anywhere. That is an entire new expert field of inquiry which has not yet been embarked upon. Nor, by the way, is it correct in our submission that there were constructive negotiations about this, and that we jumped the gun by making an application. I will say no more about it, but the correspondence will speak for itself.

The issue of viability. Capital Meters has withdrawn the contention, as has Siemens, that there is any effect, long-term or short-term, on the viability of those operators.

So far as the price comparison is concerned, as a correction to Mr. Rayment - and purely for the record - it was not quite fair to refer to the fact that in the reply we had not identified that as a new allegation. We said specifically in our submissions at footnote 12 that we had looked at this again and we had to some extent changed our view and therefore this fell into one category rather than the other. Nonetheless, the point that remains here, which I will briefly address relates to pre-payment meters. I say nothing more about the comparison in relation to credit meters and whether that should be brought in or not, save that if it is brought in we would need to have the available information to be able to deal with it, and Mr. Rothwell would need to be able to see it to help us to deal with it.

THE CHAIRMAN: Are you saying that you are not now contesting that, or you are contesting it but you are not saying anything more about it?

MR. TURNER: I am contesting it but I am not saying anything more about it. In relation to pre-payment meters, I would say this, and urge upon the Tribunal the proposition that these are much cheaper than those available from National Grid is not only new, as Mr. Rayment has raised it, it is antithetical to the case which is made in the decision, because the decision proceeds on a different basis, and if I may ask you to look at two short paragraphs there: para. 2.117 (p.33) at the foot of that page, a simple clear fact is spelled out:

"National Grid's annual rental charges for PDMs have been lower than those of UMS or competing CMOs on installation." and there it is set out. Then at 4.116 in the pricing comparison that Ofgem has carried out you will see that Ofgem records that National Grid has notified gas suppliers of its intention to restructure by consolidating the metering business and UMS into a single structure which would allow them to rebalance the charges.

"However, this was put on hold and, when considering the effect of the MSAs the appropriate benchmark is the actual price that gas suppliers paid." That is why Ofgem

confines its analysis in the decision to the credit meters, because on the prepayment meters there is nothing to be said.

So far as the normal competition issue is concerned, Mr. Rayment has clarified extremely helpfully that it is not the principle of early replacement charges that his client contests, it is as it is practised in the metering service agreements. That is welcome, however, it does mean if that is the case that Mr. Rayment's submissions are at odds with the statement of intervention and the witness statement in support because those clearly say that the payment completion approach is an artifice and works against the market and so forth – in paras. 21 to 23 of Capital Meters' statement of intervention.

Similarly, Mr. Hoskin in his witness statement, which I shall take care not to reveal too much about as it is confidential, relies on contract options where there are no premature replacement charges. If that is to remain in the case and if it is to be useful which, given the clarification now made, it may not be we ought to have details of those. But if all he is saying is our payment completion charges where we have them are different one does wonder why this remains in the pleading or the evidence at all.

Finally, Mr. Randolph: I have dealt with Mr. Randolph's submissions in relation to the CFI intervention procedure. Mr. Randolph made a number of procedural points. He referred to the request for permission to intervene as supporting the power of the interveners because of what was in the request for permission to intervene now to raise certain specific issues. I would say as to that merely that he did not take you to any part of the request for permission to intervene, but it was in any event not contested by National Grid at an earlier stage that Meter Fit (or either of the other parties) had a sufficient interest and no question arose until we saw the contents of the statements of intervention.

So far as his statement of intervention is concerned he says that it, and in particular para.9.3 does not contain a proposition supported by evidence, but it is the other way around, that the statement of intervention points up what is in his evidence. Nonetheless, para.9 of the statement of intervention does set out a point which he says is to be drawn from the evidence of Mr. King and so in effect it is a proposition relied upon.

Further, at para.8 of the statement of intervention he clarifies that Mr. King's witness evidence is not mere evidence and that it contains analysis of foreclosure effects.

I am coming to the end now. If you would open Mr. King's evidence that Mr. Randolph took you to, and go to paras. 33 (a) and (b) at tab 10, pp. 9 and 10. The allegations that are made in para. 33(a) and (b) coincide with the allegations that we have objected to in relation to the other interveners' evidence, although there is nothing to support the mere statements

made by Mr. King, they are objectionable for that reason. They claim, under the heading "foreclosure effects" that these practices result in foreclosure of competing meter operators. So the proposition is that a bundling practice by an allegedly dominant firm produces foreclosure effects, and yet they say supposedly that that is not however arguing that there is an abuse. There is no daylight between those propositions and that is what is in effect being said. It is also clear from paras. 33(a) and 33(b) merely from glancing at what is said that the necessary field of factual inquiry that the parties and the Tribunal would now have to embark up on is completely new.

THE CHAIRMAN: I think we have your submissions on the maintenance work point. I think this is really the same point that we have explored in relation to the other parties.

MR. TURNER: I will not say anything more about that then. In relation to the list of issues – perhaps it is sensible for me to address adjectival questions subsequently. I have nothing further to address from Mr. Kennelly. (After a pause) This has taken some time and my solicitor reminds me we do need to try to address the question of the confidentiality ring, because that is quite a pressing matter for us and a timetable for next steps, although I do understand that that will be to some extent bound up with your decision on these matters.

THE CHAIRMAN: Well what is the issue in a nutshell on the confidentiality ring? Is it an issue in relation to Mr. Pickering and Mr. Rothwell, or is it a different issue?

MR. TURNER: That is it. It is allowing them access to the ring for essentially two reasons. First, that we simply have not been getting through the documents ----

THE CHAIRMAN: Let me stop you there, so that is the issue – whether or not they should be admitted to the confidentiality ring?

MR. TURNER: Yes.

THE CHAIRMAN: And who is it who objects to their admission to the confidentiality ring?

MR. KENNELLY: Madam, I had better speak at this stage because suppliers' confidential information is involved.

THE CHAIRMAN: Gas suppliers?

MR. KENNELLY: Gas suppliers, who are not represented here. We, having given notice to National Grid, wrote to suppliers asking them whether they objected. They have all, subject to one qualification from Scottish Power, who have failed yet to address it, agreed, subject to various terms, and the most significant of those is from British Gas. They are prepared to agree, subject to the individuals being barred from working in the metering business for two years. I have a copy of the letter. Madam, as you have probably seen from the witness statement from Mrs. Bidwell and from the correspondence, there is no dispute here that the

information is highly confidential and commercially significant. Simply because British Gas is not here today does not mean that their interests should be treated less seriously. I would ask the Tribunal to look carefully at the letter which they sent to us on this point.

THE CHAIRMAN: Mr. Turner, did you say that they were prepared to give an undertaking in those terms, or have you had an opportunity to consider whether you can accede to British Gas's conditions?

MR. TURNER: What they are prepared to do we say is already very extensive, which is to exclude themselves from the business for a full year. British Gas alone among the gas suppliers, and without reference to any specific material, says, "We want two years". As to that I would make the following brief observations: one, although not disputed that all of the information is highly confidential, we would say that in very large part we have seen very little that is confidential in here, and if British Gas is going to make that kind of demand, it ought to explain to the Tribunal what it is in the material concerned that requires such a draconian remedy, because none of the other gas suppliers say that.

Secondly, you may have picked up from Mrs. Bidwell's witness statement as a contrast that the Ofgem official to whom all of the confidential s.26 responses were sent in the early stages is now working for British Gas himself. It simply cannot have been the case that there was a two year gap before that occurred. Yet that is a very good comparison on what is sauce for the goose ought to be sauce for the gander.

The third point is that a year, if one thinks about it, even for information that is confidential, is surely enough for anyone to forget what they ever knew about any detail.

THE CHAIRMAN: To what period does the information relate?

MR. TURNER: The information in this case is largely in relation to the period 2002 to 2004. I am afraid I cannot vouchsafe whether there is not more recent information. I do not know how much more recent information there is.

THE CHAIRMAN: I think it is difficult for me to make a decision on the basis of what I have seen and heard so far. Clearly this is an important matter that Ofgem is rightly concerned about. It does seem to me that if more work was done one might be able to narrow down the elements of this information which British Gas is particularly concerned about and consider whether those elements really do need to be shown to Mr. Rothwell and Mr. Pickering. Mr. Kennelly, do you think there is any scope for being able to square this circle without the Tribunal having to make an order or not?

MR. KENNELLY: Madam, the problem we have is time. If this is not resolved today National Grid will not get the information to Mr. Rothwell and Mr. Pickering and that will have an

knock-on effect on the overall timetable, for which we have on our side concerns in any event. I think it would be better, madam, if you addressed the point today and reviewed British Gas's letter. That is what they have sent in, that is what they understand you will see and take a view today, if possible, on the point, otherwise there will be an unfortunate delay. British Gas do set out in that letter their reasons for asking for two years.

The only thing I would say is that obviously this request from National Grid came very late. The fairly lengthy statement from Mrs. Bidwell arrived on the 16th. We wrote to Gas and the other suppliers on the 18th. They replied the following day. This has had to be done in rather a hurry. On the Ofgem side we have no objection to a year. We even do not make the request for two years, we simply want to put British Gas' points to you as fairly as possible. Madam, if you would read British Gas' letter and resolve the point today that would be of great assistance, I think, to National Grid and therefore ourselves.

THE CHAIRMAN: Is there any letter in response from National Grid about the difficulty of taking these two gentlemen out of circulation for the ----

MR. TURNER: I am sorry, madam?

THE CHAIRMAN: It would seem to me that if one has to put them in a different section of the company for a year, would they then be brought back immediately after that year into the metering business, or would they ----

MR. TURNER: What they have undertaken, and National Grid has undertaken to support, is that they will not be working in the relevant business for a period of up to a year if the Tribunal saw fit to impose such a restriction. No decision had been taken as to what would happen after that time. It is rather difficult to know whether they would just be brought back or not.

THE CHAIRMAN: I had better read the correspondence.

MR. VAJDA: I simply rise to my feet. I have no objection to the matter being dealt with today, but what I would wish to know is whether the Tribunal got a copy of the letter that was sent by my solicitors on 19th September. We have no objection to the two individuals being added to the confidentiality ring for the purpose of looking at the Ofgem document, but we do seek to impose a condition that it does not extend to confidential documents that have been served or disclosed by Siemens in these proceedings which are more up to date. I just flag that up, that if the Tribunal wishes to make an order today that we have made a submission on that point.

MR. RANDOLPH: Madam, very briefly, I am instructed that British Gas have put out to tender the provisional supply of smart metering and CML Meter Fit, my client, and indeed On-Stream, which is National Grid's commercial arm, are the potential tenderees, although they

are in the tender process. We have taken specific instructions on this and there is a serious concern from my client that if these two gentlemen are privy to this information they should be effectively in purdah until at least the end of the tender process – that is a movable feast – until the decision has been taken as to which company gets it. I am told June 2009 possibly, it is very difficult to know. I would ask, madam, you to take that point into account because it is something that my clients are very concerned about.

I am very grateful.

MR. TURNER: May I just make a couple of points, in view of these points that have just been made. The first is that you may form a view about the adequacy of British Gas' objections when you read the correspondence, or you may not. If you do then that would solve it so far as British Gas is concerned. If you do not, then I would suggest that a way forward, because it will help stop a log jam, is that Mr. Rothwell and Mr. Pickering can proceed to see the documents of other gas suppliers or other operators who do not see it as problematic. There is no reason why they should not go right ahead with that. There is no reason why there should be any delay on that account.

So far as Mr. Vajda and Mr. Randolph are concerned, Mr. Randolph has raised the point now, which we had not heard before, and I would suggest that that be dealt with by his clients writing a letter to articulate that so that it can be considered. It is difficult to deal with that on the hoof in that way.

So far as Mr. Vajda is concerned, I am grateful to him for drawing that to our attention. I had forgotten that Siemens does say that for the material accompanying its statement of intervention that was shown more recently, it has an objection. We have not had time to react to that but we do not see why they cannot see that material. More particularly, if they cannot see it, we do have a concern that it will compromise National Grid in being able to defend itself. We will need to look at that.

So I would suggest in relation to those matters that they be held over, but it need not prevent Mr. Rothwell or Mr. Pickering from seeing a large amount of documents, almost with immediate effect, where people have no objections.

THE CHAIRMAN: The trouble is the difficulty of drafting an order to add them to the confidentiality ring to encapsulate what you have just said is quite time-consuming. I think it is difficult to allow them to do it before an order is made – or at least before they have given the undertaking. So, I am not quite sure that one can deal with it – although I see the convenience aspect. I think for procedural good order it is quite difficult to bring that about. However, we will consider whether there is something that we can do.

As far as the result of today is concerned, clearly I will produce something as soon as I can. I am assuming that you would prefer something soon, even if it was short – "small, but perfectly formed" as is said - even if the reasons for the decision are given in a concise form rather than a much longer ruling which would set out fuller reasons, but would take substantially longer to produce. But, we will proceed as quickly as we can. I do not think there is anything useful we can say really about timetable until that has been decided - only that everyone should be cracking on with such preparation as they can make in the absence of knowing what the outcome of today's proceedings are, rather than stopping work because we obviously cannot lose the date in January. So, everything will have to be fitted in before then.

MR. TURNER: Madam, I hear what you say. You are obviously quite right about not allowing Mr. Rothwell or Mr. Pickering access to potentially sensitive materials until an order is drawn. What I would say is that I apprehend that an order could be drawn, framed so as to refer to the confidential documents of those parties who are happy, without too much delay.

THE CHAIRMAN: If you would like to produce a draft, Mr. Turner, Mr. Holmes, and circulate it amongst people; if that can be agreed, then I would be happy to adopt that.

MR. TURNER: I am obliged, madam.

THE CHAIRMAN: Mr. Kennelly?

MR. KENNELLY: One final comment, madam, on the timetable. You will notice that National Grid, in their observations, have asked for permission to lodge further submissions and evidence, along with their skeleton argument, which will address aspects of Ofgem's decision which had not been addressed in the reply, and also in addition to the unredacted documents that they are reviewing; you have seen the witness statement from Mr. Bryan, which certainly suggests that they have a lot yet to do. We have a real concern that when the timetable is produced, it will be Ofgem that is squeezed at the end, and that we will have very little time between receiving all this material from Grid and the hearing to produce its own skeleton argument. I just want to flag that concern to the Tribunal.

THE CHAIRMAN: There is no reason why those two things should be coupled together really. Obviously the skeleton cannot be put together in a final way until they know what parts of the statement of intervention may have to deal with, but it does not sound as if the points about the additional submissions in evidence are dependent on what has happened today.

MR. KENNELLY: They are, in part, dependent on what happens today. Mr. Turner has asked that he has permission to put in further submissions in evidence in any event to address other aspects arising out of our case. That is what concerns us.

THE CHAIRMAN: I hear what you say, Mr. Kennelly. But, as I said a moment ago, I am not sure that there is much that we can do as regards timetable until we have got these matters resolved, which we will do as quickly as we can.

MR. KENNELLY: I am very grateful.

MR. TURNER: I promise this is the final remark: In relation to the concerns which I am sure a number of my colleagues share about getting the timetable right – and to an extent I understand Mr. Kennelly's perspective – might I suggest that it might be sensible for the issue of timetabling to be dealt with orally rather than by correspondence? I am not sure whether you might have had that in mind in any event.

THE CHAIRMAN: Let us see where we are once we have produced the result of today. Then we can take stock as to where we are with the timetable.

Thank you very much. These are very complex issues. I am very grateful to everybody for their written and oral submissions which have been of great assistance in helping me find my way around the issues.

Thank you.