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**IN THE COMPETITION**

Case No. : 1340/5/7/20 – 1341/5/7/20 (T)

**APPEAL**  
**TRIBUNAL**

Salisbury Square House  
8 Salisbury Square  
London EC4Y 8AP  
(Remote Hearing)

Thursday 30 July 2020

Before:  
The Honourable Mr Justice Trower  
Dr William Bishop  
Simon Holmes  
(Sitting as a Tribunal in England and Wales)

**BETWEEN:**

1340/5/7/20 (T)

(1) National Grid Electricity Transmission PLC

-v-

- (1) ABB LTD
- (2) ABB Power T&D Limited
- (3) ABB Limited
- (4) ABB Holdings Limited
- (5) ABB AB
- (6) ABB ASEA Brown Boveri LTD
- (7) ABB Norden Holding AB
- (8) ABB AG
- (9) ABB Beteiligungsund Verwaltungsgesellschaft MBH
  - (10) NKT Holding A/S
  - (11) NKT Cables Limited
  - (12) NKT Cables A/S
  - (13) NKT Cables Group A/S
  - (14) NKT Cables GMBH
  - (15) Prysmian S.P.A
- (16) Prysmian Construction Company Limited
- (17) Prysmian Cables (2000) Limited
- (18) Prysmian Cables & Systems Limited

(19) Prysmian Cavi E Sitemis Limited  
(20) Safran SA

Defendants

AND

1341/5/7/320 (T)

(1) SP Power Systems limited  
(2) Scottish Power UK PLC  
(3) Scottish Power Energy Networks Holdings Limited  
(4) SP Manweb PLC  
(5) SP Transmission PLC

Scottish Power Claimants

-v-

(1) Prysmian S.P.A  
(2) Prysmian Construction Company Limited  
(3) Prysmian Cables & Systems Limited  
(4) Prysmian Cavi E Sistemi SRL  
(5) Prysmian Cables (2000) Limited

Defendants

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## **A P P E A R A N C E S**

Ms Marie Demetriou QC and Michael Armtiage (On behalf of NKT)  
Ms Helen Davies QC and Ms Fiona Banks (On behalf of Prysmian)  
Mr Jon Turner QC, Ms Laura Elizabeth John and Julianne Morrison (On behalf of NGET)  
Mr Tristan Jones (On behalf of Safran)  
Mr Mark Hoskins QC and Ms Sarah Ford QC (On behalf of ABB)

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Thursday, 30 July 2020 --

(10.33 am)

Pre-Trial Review (continued)

THE CHAIRMAN: Right, good morning, everybody. I hope you can hear me. Ah, yes, I am afraid we will probably have the usual question over who is actually appearing on the screen, but I can see, I think, all of the advocates. I cannot see Mr. Holmes at the moment.

MR. HOLMES: I can see everybody.

THE CHAIRMAN: Good. I think the tribunal is here, even if you cannot see us all, and we will carry on where we left off.

Mr. Hoskins, before you recommence, overnight I think one of the things you told us yesterday, on the basis of your personal experience, was that you were not aware of a hot tub ever being used in a cartel damages case. So far as we are aware, that may be right in terms of actually getting a case to trial, but both of my co-tribunal members were involved in a case called *Peugeot v NSK* in which the tribunal, including Mr Justice Green as chairman, did direct that evidence be given concurrently.

That was a case, I think, where there were three experts. It was a follow-on case using the same jurisdiction as this one.

1 MR. HOSKINS: I think there is another example that  
2 Mr. Turner has discovered overnight which, rather  
3 embarrassingly, it appears that I was involved in.

4 THE CHAIRMAN: Yes, we have been sent that too.

5 MR. HOSKINS: Which is -- you will have to excuse my memory,  
6 but that was another case that -- it was ordered but the  
7 case was settled before trial, so certainly there are --  
8 there appear to be those two examples.

9 THE CHAIRMAN: Yes.

10 MR. HOSKINS: I think -- I mean, obviously Mr. Turner has  
11 a forensic flourish to make on the basis of my skeleton  
12 from 2014, if you have read it. It is probably best --  
13 I will let him make the points; if you will allow me to  
14 come back after he has made the submissions he wants  
15 and I will deal with it then.

16 THE CHAIRMAN: Yes, you and Ms. Ford, I think, are in the  
17 same position.

18 MR. HOSKINS: Exactly, exactly. The perils of the advocate.

19 THE CHAIRMAN: Indeed. At the end of the day, you are only  
20 a hired gun.

21 Submissions by MR. HOSKINS (continued)

22 MR. HOSKINS: Exactly. Can I begin with turning to  
23 National Grid's proposed agenda, which we spent some  
24 time on yesterday.

25 THE CHAIRMAN: Yes.

1 MR. HOSKINS: Superficially, of course, that looks quite  
2 neat and attractive. When we showed it to our expert  
3 Mr. Biro, he thought it was not really fit for purpose,  
4 and his comment was: well, if we are having a hot tub  
5 and we are using that agenda, there is an awful lot of  
6 work to be done on this. That is just the sort  
7 of anecdotal view of the expert, but it is all very well  
8 to present a document like that and say: here is the  
9 answer. One has to dig a bit deeper, and that is what  
10 I will do now as to its utility.

11 Can we please go to National Grid's draft protocol  
12 for the hearing of concurrent expert evidence, which is  
13 bundle {A/2/36}.

14 This is the draft they have produced for this case.  
15 Can we go through, please, to paragraph 7 on page 37  
16 {A/2/37}. It says:

17 "In relation to each of the [X] main agenda  
18 topics ... and subject to the Tribunal's discretion to  
19 modify the process ..."

20 Et cetera.

21 So on its own terms, the annex is described simply  
22 as a list of the main agenda topics. This draft does  
23 not purport to be a list of all relevant topics that  
24 would have to be considered. Then paragraph 7(i), you  
25 will see, suggests that this will primarily be

1 a discussion between experts and that "the Tribunal may  
2 ask questions about it".

3 Now, I am sure in reality, that "may" will become  
4 rather more definite because I am sure the tribunal will  
5 ask questions, but it does indicate the nature of  
6 a hot tub as being far more of a discursive process than  
7 certainly obviously cross-examination, and you have the  
8 point I made yesterday that that is not a sufficiently  
9 focused forensic process to get to the bottom of the  
10 many material issues in this case.

11 Now, if we can go to the annex itself at page 39  
12 {A/2/39}, I doubt it is really going to be controversial  
13 when I say that what this is is a high-level, incomplete  
14 summary of some of the issues in the  
15 joint expert statements grouped into themes, and that  
16 is -- the grouping into themes was the way it was  
17 presented yesterday.

18 Now, recognising that certain issues can be grouped  
19 together in themes tells you nothing about whether  
20 hot-tubbing is preferable to cross-examination, because  
21 any advocate worth his salt, when preparing  
22 cross-examination, will group the issues into themes and  
23 develop them in that way. There is no magic in grouping  
24 issues into themes. That does not help us take this  
25 particular question further.

1           Now, Mr. Turner took you to certain issues in the  
2 annex and took you to some of the items in the  
3 joint expert statements, I am sorry, I am not doing him  
4 justice here, but effectively said, "Look, each expert  
5 has expressed a view. That shows this is fit for  
6 hot-tubbing", if you excuse the sort of glib way  
7 I present it. But it is obvious that each expert has  
8 expressed a view on a large number of issues. Again,  
9 that tells you nothing about whether the best way to get  
10 to the bottom of those issues and the merits of those  
11 views is hot-tubbing or cross-examination.

12           The question for the tribunal is whether the merits  
13 of the respective issues are best tested by individual  
14 cross-examination or by a "discussion" between the  
15 experts in a hot tub. We say forensically  
16 cross-examination is clearly preferable as that is what  
17 one is trying to achieve.

18           Can we go to page 40 of the annex, please {A/2/40}.  
19 You will see the heading in the middle of the page,  
20 "Main driver of the different results 2: Cartel effect  
21 on costs/efficiency".

22           Now, the question of whether it is appropriate to  
23 rely on the actual reported costs of the defendants in  
24 the models is, you will have seen, at the heart of the  
25 debate between the experts on the appropriate

1 methodology to adopt. The defendants' experts,  
2 certainly our expert relies on the actual costs that ABB  
3 had, whereas Dr. Jenkins relies on proxies for those  
4 costs, and that is one of the fundamental differences  
5 between the experts.

6 Now, this agenda reduces that issue to three  
7 high-level questions, you will see them, 8, 9 and 10,  
8 but you will see that within those headings, those  
9 high-level questions, there are then cross-references to  
10 a number of issues in the joint expert statements. You  
11 will see there is quite a number of cross-references,  
12 and one of the -- this is by way of example it comes up,  
13 is issue 10 in the joint experts' statement. So let us  
14 have a look -- let us take that one, issue 10. That is  
15 at {E/17/20}. Bundle E, tab 17, page 20.

16 Issue 10, you will see the heading, "Inner  
17 confidentiality ring material". I understand that all  
18 the whole of these statements at the moment have been  
19 designated "inner confidentiality ring", just because  
20 I think nobody has gone through and picked any bits that  
21 are actually confidential or not. So we have to be very  
22 careful, but unless anyone shouts violently, I cannot  
23 believe there is any confidentiality in, for example,  
24 the issues, as they are described. So issue 10:

25 "What role if any does a model's ability to

1 precisely predict individual project prices/costs play  
2 when assessing whether that model can be used to  
3 accurately estimate the average overcharge across  
4 projects ..."

5 So this is where one takes the expert's model, and  
6 one uses it to go back and revisit real-life projects,  
7 and sees if it can come up with the actual figures that  
8 one observed. So you are testing the models that are  
9 produced to come up with the overcharge, which of course  
10 is not a real-world figure, and applying it to real  
11 projects and seeing whether they work or not. So that  
12 is what this particular issue is.

13 Now the detailed comments on this of the expert run  
14 to five pages, issue 10.

15 So there one has one issue. One has five pages of  
16 discussion, and what is necessary, what we are  
17 discussing, what we are focusing on is how do you test  
18 the merits of the various views expressed? Do you do  
19 that -- by "various views", I mean the individual views  
20 of each expert. Do you do that by shining the bright  
21 light of cross-examination on each expert's individual  
22 views, or do you do it by putting them all in the  
23 hot tub and they all discuss it at the same time?

24 Now, yesterday, my Lord, you suggested to Mr. Turner  
25 that the joint experts' statements, because they set out

1 the detailed views of the experts on each issue in this  
2 way, are effectively written hot tubs, and Mr. Turner  
3 eagerly agreed and said, "Yes, well, that is really what  
4 we have got here".

5 Of course then that raises the question, if we have  
6 already been through a hot-tub process in writing, what  
7 extra view is an oral hot tub going to bring? What --  
8 in what way is that going to move things on? In our  
9 submission it will not. If we have already had  
10 effectively a hot tub in writing, the way we will add  
11 real value is by having cross-examination of the  
12 individual experts. They will have to present and  
13 defend their individual views.

14 Now, yesterday, my Lord, when you expressed, I hope  
15 this is not too strong a word, some criticism or some  
16 doubt about the way in which the joint experts'  
17 statement had been pursued and what had been produced,  
18 I think it is important to understand that the  
19 claimant's legal team assisted their expert in preparing  
20 the preliminary list of issues which the experts then  
21 agreed and used, and it is not a letter that is in the  
22 bundle, it was provided to me this morning. It was  
23 a letter from BCLP of 23 June 2020 in which they say:

24 "Our letter of 16 June 2020 confirms without waiving  
25 privilege that the claimant's legal teams assisted in

1 the preparation of the preliminary draft list of issues  
2 circulated by their experts for the purposes of  
3 discussion." [as read]

4 So one can have a view on the merits of where we  
5 have ended up, but what the claimants can do is  
6 disassociate themselves from the value of this document  
7 because they helped their expert draft it.

8 Mr. Turner suggested that a hot tub was appropriate  
9 because there were only a few key issues, I think he  
10 used the phrase "a handful of issues" in relation to at  
11 least one of the headings. But again, with respect,  
12 that is not accurate. Can we go to bundle {E/17/6}, so  
13 that is the overcharge joint experts statement and  
14 Mr. Turner took you to item 4(a), it is at page 5 of the  
15 hard copy, my Lord, page 6 of the electronic copy.

16 THE CHAIRMAN: Thank you.

17 MR. HOSKINS: 4(a):

18 "What do you consider to be the main two drivers of  
19 the difference between the overcharge results obtained?"

20 THE CHAIRMAN: Sorry, I am in the wrong place, I think.

21 4 --

22 MR. HOSKINS: 4(a), it is at the bottom of hard copy 5 in  
23 the overcharge joint experts' statement.

24 THE CHAIRMAN: Sorry, I am in the wrong one.

25 (Pause).

1 MR. HOSKINS: Now, it does not follow -- I am sorry, my  
2 Lord, do you have it?

3 THE CHAIRMAN: I have it now.

4 MR. HOSKINS: It does not follow from that question, the way  
5 it is phrased, that there are only two issues that have  
6 to be tested. Each of these main two drivers, as they  
7 are described, is made up of a number of sub-issues, and  
8 you see that very clearly from the second column,  
9 Dr. Jenkins' comments, and again, I will be very careful  
10 not to read out any confidential information. Can you  
11 still hear me? They have started drilling outside my --

12 THE CHAIRMAN: Yes, I can, that is outside your room.

13 MR. HOSKINS: If you give me one minute, I will close my  
14 windows.

15 THE CHAIRMAN: Yes, I think that may be wise. We had the  
16 emergency services yesterday.

17 (Pause).

18 MR. HOSKINS: Sorry, it is not quite as exciting as the  
19 remote hearing I did which was interrupted by my  
20 opponent's cat who had to be removed from the room, but  
21 this is the life we now lead.

22 THE CHAIRMAN: I hope you have got enough ventilation to  
23 keep going, Mr. Hoskins.

24 MR. HOSKINS: I have, thank you. If I keel over, you will  
25 know what has happened. So I was looking at

1 Dr. Jenkins' comments on issue 4(a):

2 "The two key drivers are: my finding that there was  
3 a Cartel effect on costs (which explains approximately  
4 10 percentage points of the difference, see  
5 issues 39-56) ..."

6 So that main driver itself has 18 sub-issues.  
7 I have not done the arithmetic, but Ms. Davies told me,  
8 I think, that if one then goes to the 18 sub-issues and  
9 looks at the sub-sub-issues, that splits into a total of  
10 27 sub-issues. So it is not good enough simply to look  
11 at 4(a) and say there is two issues on this, and that is  
12 where this rests.

13 THE CHAIRMAN: Although, of course, it does depend, does it  
14 not, what the consequence of deciding one issue is on  
15 the other issues, if I can put it that way? So, I mean,  
16 I do not know whether issues 39 to 56 all lead you to  
17 different answers, or whether they are in fact dependent  
18 in their answer on the answer to earlier issues.

19 MR. HOSKINS: Well, let us visit them, and I will show you  
20 what the experts have said about them. It is obviously  
21 hard to completely unpick everything at this stage when  
22 we are in a PTR, but I can give you a sense of how  
23 material each of the sub-issues is to the experts.

24 THE CHAIRMAN: Yes.

25 MR. HOSKINS: If you allow me to do that. So we go to

1 page 77 of this document {E/17/77}.

2 THE CHAIRMAN: Yes.

3 MR. HOSKINS: There we are, thank you. That is page 76 of  
4 the hard copy, 77 of the electronic copy. You will see  
5 the heading at the bottom of the page, "Cartel effect on  
6 costs".

7 THE CHAIRMAN: Yes.

8 MR. HOSKINS: If we can go to the next page, page 78  
9 {E/17/78}, issue 39:

10 "As a matter of principle, could the Cartel have  
11 changed the economic incentive to cut costs and/or  
12 innovate relative to a competitive situation?"

13 So as a matter of principle, and you see the experts  
14 agree with each other in principle, the experts agree it  
15 is material.

16 THE CHAIRMAN: Yes.

17 MR. HOSKINS: What then follows is -- are the issues that  
18 relate to the question of in practice, so it is the same  
19 question, but rather as a matter of principle -- rather  
20 as a matter of practice in terms of the evidence and  
21 analysis.

22 So look at issue 40, you will see the issue that is  
23 put. You will see that the experts disagree with each  
24 other on the substance, and then if we go over the page  
25 to 79 {E/17/79}, but the experts agree that the point is

1 material.

2 THE CHAIRMAN: Yes.

3 MR. HOSKINS: I could do this between items 39 and 56, but  
4 you would soon become very bored of me.

5 THE CHAIRMAN: Yes.

6 MR. HOSKINS: You will see at 41: disagree on the substance,  
7 it is material. If you just flick through the issues up  
8 to issue 56, you will see that the vast majority of  
9 these issues, the experts disagree on the substance but  
10 agree that the issue is material.

11 So the suggestion somehow that this case could be  
12 boiled down, let us say on overcharge, to two main  
13 points and it is relatively simple, is, with respect,  
14 simply not accurate.

15 THE CHAIRMAN: Yes.

16 MR. HOSKINS: Can we go back, please, to {E/17/6}.

17 So back to issue 4(a) and this question about the  
18 main two drivers. Can we go over the page to page 8  
19 {E/17/8}, 4(b) at the top of the page:

20 "Are there any other material drivers of the  
21 difference between the overcharge results obtained?"

22 So the main two drivers, with all the sub-issues  
23 that I have indicated, and now we are into other  
24 material drivers. Nothing on the periphery, material,  
25 and just have a look at Dr. Jenkins, I will not read it

1 out in case I trespass into confidentiality; you will  
2 see that she in her opinion says: yes, there are other  
3 material drivers; and that view is reflected by the  
4 other experts.

5 The presentation that this all very simple is simply  
6 not accurate, and that is borne out by the examples that  
7 I have given, but one could do the same for the other  
8 issues in the case. Overcharge is the most complicated,  
9 without a doubt, but when one goes to Mr. Noble's seven  
10 issues that he identified, well, there you are, there is  
11 seven issues, but of course there is then -- there are  
12 depths that lurk between them, and the same when one  
13 goes to Professor Jenkinson and financing costs, but  
14 overcharge is certainly the most difficult.

15 So a little interim conclusion at this stage. You  
16 have the point I made yesterday, given the number,  
17 detail and non-binary nature of the relevant issues,  
18 a hot tub involving five experts is not going to shine  
19 a sufficiently cold, hard light on each of the experts'  
20 views. Only cross-examination will do that, and the  
21 real fear of a hot tub with five experts in it at the  
22 same time is it is not one of these lovely bubbly hot  
23 tubs you want to jump into, it is one of those ones with  
24 slightly green water that you do not want to go anywhere  
25 near. That is the sort of hot tub that is being offered

1 to the tribunal in this case.

2 The other point I want to just emphasise is we have  
3 already had a written hot tub process and the real  
4 question is: what will add more value? Going through  
5 that process again orally or having cross-examination?  
6 The cross-examination in our submission will clearly add  
7 more value because it is not just more of the same. It  
8 is a different exercise.

9 Now, our primary submission, as you will have  
10 surmised, I hope, by now, is that we say all the expert  
11 issues should be addressed by cross-examination, but if  
12 the tribunal thinks there may be some merit in  
13 hot-tubbing, there are other options short of  
14 hot-tubbing on everything, and Mr. Turner made that  
15 point as well. Of course he is right, it does not have  
16 to be all or nothing.

17 So, for example, the tribunal could have a hot tub  
18 on some issues but not others. Now, given the nature  
19 and scope of the issues between the experts, if one is  
20 just looking at it in terms of manageability and what is  
21 left in terms of issues between the experts, the most  
22 suitable for hot-tubbing would be the compound interest  
23 issue, the financing costs. So that is the  
24 Professor Jenkinson report and the responses to that.

25 The next most suitable candidate, I use "suitable"

1 in inverted commas for obvious reasons, would be pass-on  
2 and quantum issues raised in Mr. Noble's report. But  
3 the least suitable, and we say patently unsuitable  
4 issue, is overcharge in Dr. Jenkins.

5 Another option is the tribunal could have full  
6 cross-examination on all issues, so normal  
7 cross-examination, but then followed by a much more  
8 limited hot tub, say of one day, because if the tribunal  
9 thought -- we do see some advantage in being able to ask  
10 questions of all the experts at the same time. We would  
11 like to be able to do that. Then you could have  
12 cross-examination and then have a one-day hot tub at the  
13 end, and by that stage the tribunal will be up to speed,  
14 it will have watched the cross-examination, it will know  
15 what is in its own mind, and it may well think it is  
16 useful at that stage to have that sort of limited  
17 hot tub. That is another option.

18 But to make absolutely clear, our submission is this  
19 should all be done by way of cross-examination, and  
20 there is a really important point of principle in  
21 relation to rights of the defence here, which I would  
22 like to finish by emphasising.

23 This is a claim for around £160 million. Obviously  
24 there is envelopes, et cetera. It is a claim for a lot  
25 of money. The economic evidence is at the heart of this

1 case. It is not a peripheral issue, it is not a minor  
2 issue, it is the heart of the case. Mr. Turner  
3 described cross-examination as adversarial, as if that  
4 were a disadvantage. But adversarial is the bedrock of  
5 our legal system. Cross-examination is how we test  
6 evidence in civil and criminal cases. It is not like  
7 a civilian law system, like the French system, where the  
8 testing of the evidence is judge-led. That is not our  
9 system.

10 Now, hot-tubbing can be useful in some  
11 circumstances. Of course it can. This is not  
12 a submission which is against hot-tubbing. I made that  
13 clear at the start. But the question is whether  
14 hot-tubbing is appropriate in a particular case, and you  
15 have my submissions on that.

16 But there is another important point, which is that  
17 in some cases, all the parties will be agreed that  
18 hot-tubbing should be used. In those sorts of cases,  
19 one can well see why the court or tribunal will say:  
20 well, if the parties are agreed, and the tribunal is  
21 prepared to do the work, then that would be  
22 an appropriate course to go.

23 But that is not this case. In this case all four  
24 defendants are strongly opposed to hot-tubbing, and  
25 I hope that has become clear, at least from my

1           submissions, the strength of feeling on our side which  
2           I believe is shared by the other defendants. The claim  
3           has been brought against us for a lot of money. We want  
4           to defend ourselves by being able to cross-examine the  
5           claimant's experts. In our submission it would be wrong  
6           for us to be denied that right to defend ourselves in  
7           that way.

8           So we say that the position of the parties and the  
9           position of the defendants and the nature of the  
10          disagreement between the parties in this case is a very  
11          strong factor that should weigh in the tribunal's final  
12          decision of whether to have any hot-tubbing, or how much  
13          hot-tubbing, if that is the route the tribunal wishes to  
14          go down.

15          Now, I did say that there is a forensic flourish to  
16          come from Mr. Turner, based on a skeleton argument  
17          Ms. Ford and I put our names to in 2014, but if you will  
18          permit me, rather than tilting at that windmill,  
19          I suggest that Mr. Turner deals with that in his reply,  
20          and you then permit me a short response in relation to  
21          that new material, if that is a convenient way to  
22          proceed.

23          THE CHAIRMAN: Well, it slightly depends on what Mr. Turner  
24          is going to say about it. If he is simply going to say:  
25          well, look, this is what was done before; I think it is

1           probably better if you make your submission on it now.  
2           If it is something more elaborate that is going to be  
3           said that you cannot anticipate, well, then, I think you  
4           will certainly have a right to a rejoinder.

5           MR. HOSKINS: I am very happy to do that, my Lord. This was  
6           a case -- a different cartel, the *Gas Insulated*  
7           *Switchgear* cartel. The skeleton is dated 2014, so  
8           six years ago. In 2014 no cartel damages case had  
9           proceeded to judgment. So we had not had a full trial  
10          of a cartel damages case, and again, so if I have got  
11          this wrong, I will be corrected, but our belief is that  
12          no case had ever actually used a hot tub. The hot tub  
13          showroom had opened, and we were all looking with wide  
14          eyes at the beautiful gleaming hot tubs and thinking how  
15          they could be used.

16                 This case did not go to trial, it settled before  
17          trial, so we do not know how effective a hot tub would  
18          have been in a cartel damages case because it did not  
19          happen.

20                 At paragraph 7 of our skeleton argument, if you have  
21          it to hand. I am not sure it has gone into the  
22          e-bundle, I have a hard copy, you will --

23          THE CHAIRMAN: So have I.

24          MR. HOSKINS: Well, you will see that we express even back  
25          then, whilst saying that we were keen for a hot tub to

1           be used in that case, we said that having four experts  
2           in the tub at the same time is likely to be too  
3           unwieldy.

4   THE CHAIRMAN:  No, I am sorry, I have not, it has all been  
5           redacted, so I have not got --

6   MR. HOSKINS:  Paragraph 71, right at the end, you should  
7           have --

8   MR. HOLMES:  I think you mean paragraph 71?

9   THE CHAIRMAN:  71.

10  MR. HOLMES:  71, which we do have, yes.

11  MR. HOSKINS:  Sorry if I misspoke, sorry.

12  THE CHAIRMAN:  Yes.

13  MR. HOSKINS:  So you will see the reservation, even amidst  
14           the glowing and fulsome praise that we put down  
15           otherwise for hot tubs in that case at that time.  But  
16           let me make it absolutely clear, I talked about the  
17           perils of the advocate, but it is not simply that.  This  
18           skeleton does not reflect ABB's current views, because  
19           what we have had since 2014 is a wealth of experience,  
20           both of cases involving hot tubs and of cartel damages  
21           trials that have gone the distance.

22           With respect, while Mr. Turner can say: look, look  
23           what Mr. Hoskins and Ms. Ford said in 2014; it really is  
24           nothing more than a forensic flourish, because an awful  
25           lot of water has flowed under the bridge, and what we

1           are submitting to you now, and what the other defendants  
2           are submitting to you, is the position six years on with  
3           proper practical experience. So this is, with respect,  
4           nothing more than a forensic flourish.

5       THE CHAIRMAN: Can I just ask one question on that, and  
6           I quite understand what you say about the experience.  
7           Do you have any -- anything to tell us about a case in  
8           which a hot-tubbing has ordered but not worked very  
9           satisfactorily? In other words, the court has been  
10          concerned about the way it has actually worked in  
11          practice and said so.

12       MR. HOSKINS: I am not aware of one. What I am aware -- for  
13          example, Mr. Turner and I were in one of the first, if  
14          not the first case, to actually use a hot tub, which was  
15          *Streetmap v Google*.

16       THE CHAIRMAN: Yes.

17       MR. HOSKINS: I think it is either in the judgment or  
18          extrajudicially, Mr. Justice Roth expressed the view of  
19          how much work it had been.

20       THE CHAIRMAN: Yes.

21       MR. HOSKINS: I know you expressed the view the tribunal was  
22          not scared of the work in this case, but you have that  
23          point. It is to do the forensic exercise in the same  
24          way as it would be done through cross-examination is  
25          an incredibly onerous task. But I do make the point

1           that just because there is not a case where the judge  
2           has said, "Let us do a hot tub", and then at the end of  
3           it, publicly gone, "This just did not work", it depends  
4           on the particular case.

5       THE CHAIRMAN: No, I quite understand that and I am not  
6           suggesting that the fact that there is not one is  
7           against you. I just wanted to make sure that there was  
8           not anything positive out there that we were not being  
9           told about.

10       MR. HOSKINS: I am not aware of it, my Lord.

11       THE CHAIRMAN: Thank you.

12       MR. HOSKINS: The final item I need to deal with is the  
13           teach-in issue, which you asked us to present at the  
14           same time.

15       THE CHAIRMAN: Thank you.

16       MR. HOSKINS: Which you will be glad to hear, I can deal  
17           with much more shortly. Our position is that it is  
18           obviously entirely a matter for the tribunal whether it  
19           would find some form of teach-in of assistance in this  
20           case or not, and I say that with full cognisance of the  
21           expertise and experience of the members of the tribunal.  
22           We simply offer it as something you might want.

23           Now, just to explain, in *Britned*, what happened  
24           was that each expert provided a neutral explanation  
25           under oath of their working methodology, and also how to

1 use and interpret regression analyses. I had to say,  
2 speaking for myself, I found that very useful as  
3 an educational exercise. It was not a chance for the  
4 experts to argue their case.

5 THE CHAIRMAN: Yes.

6 MR. HOSKINS: That was absolutely clear. It was also not  
7 a hot tub because each expert spoke sequentially, not  
8 concurrently.

9 THE CHAIRMAN: Yes.

10 MR. HOSKINS: It lasted about a day, it certainly did not  
11 last more than a day. I cannot remember if it took up  
12 a full day or not. Each expert had prepared  
13 a presentation for the court, effectively slides which  
14 they spoke to. The questioning was led by the judge.  
15 Counsel were also permitted to ask questions as it went  
16 on, but it was quite clear that the questions were  
17 supposed to be neutral and clarificatory. It was not  
18 a time for counsel to be adversarial and try and promote  
19 their case, and that was what it was. We simply  
20 explained that that happened in *Britned*, and if you  
21 found it useful, you will no doubt ask for one in this  
22 case. If you do not think it useful, you will say  
23 a very polite "no, thank you".

24 THE CHAIRMAN: Perhaps as you have discussed -- raised that,  
25 and -- can I just tell you what we had in mind at the

1 moment which without -- and this is not prejudging in  
2 any way whether or not we are going to go for  
3 concurrent, because we think that it would be useful  
4 whatever form the expert evidence takes.

5 We do think a slightly different form of teach-in  
6 may be useful, quite short, but with each expert having  
7 the opportunity to explain in as, you say, Mr. Hoskins,  
8 neutral terms, the essential elements of their theory.  
9 Now -- their theories. Now, we had not had in mind that  
10 it would take us anything like as long as a day, but it  
11 was really just a how it is that we see, expert by  
12 expert, how it is that I see, expert by expert, the  
13 broad concepts and explaining, bearing in mind the fact  
14 that one member of the tribunal is highly expert,  
15 another member of the tribunal is very expert, and the  
16 third member of the tribunal really is not particularly  
17 expert at all, and no needs to guess which is which.

18 I think something along those lines, we do think  
19 might well be useful, and we would suggest that the  
20 parties might like to consider discussing what form that  
21 might take, but we did not think that a whole day should  
22 be spent on it. I will just say that for the moment.

23 So if you want to respond on that, that is fine.  
24 Otherwise I will -- Mr. Turner has also heard what  
25 I have had to say, as have the other defendants, and it

1           may be they will want to comment as well.

2       MR. HOSKINS:  As I said, we are in your hands on teach-in,  
3           so if the tribunal would find that useful, obviously we  
4           will facilitate it.

5       THE CHAIRMAN:  Great.  Good.  Is that all -- is that it,  
6           Mr. Hoskins?

7       MR. HOSKINS:  That is all I had to say.  I know some of the  
8           other defendants certainly want to pick up some points,  
9           but those are our submissions on behalf of ABB.  Thank  
10          you.

11       THE CHAIRMAN:  Thank you very much.  So who is going to go  
12          next?

13       MS. DEMETRIOU:  I can go next.  I will be very brief, sir,  
14          if that is acceptable.

15       THE CHAIRMAN:  Yes, thank you.

16                               Submissions by MS. DEMETRIOU

17       MS. DEMETRIOU:  We adopt Mr. Hoskins' submissions on  
18          hot tub, so NKT, for our part, we strongly agree that  
19          a hot tub would be inappropriate in this case.  We also  
20          really agree with both Mr. Turner and Mr. Hoskins that  
21          if a hot tub is ordered, it is not an all-or-nothing  
22          thing, and so if the tribunal was minded to have some  
23          kind of hot tub, despite our submissions, then that --  
24          it does not necessarily mean that all of the evidence  
25          has to be heard concurrently.

1           We would also say -- and this is really just to lay  
2 down a marker, which I do not think it is particularly  
3 appropriate to go into now but is more a question  
4 relating to timetabling, that if the tribunal is minded  
5 to have some kind of hot tub, then we would want to make  
6 submissions as to the form that that takes, so both,  
7 obviously, submissions as to the agenda, and that is  
8 something that Mr. Hoskins touched on, but also  
9 submissions as to the relative balance between the  
10 concurrent evidence and cross-examination.

11           So one of the things -- one of the cases that  
12 Mr. Turner talked about yesterday was the *Paroxetine*  
13 appeal in which there was concurrent evidence for one  
14 stream of economic evidence but not for another, which  
15 was dealt with by cross-examination. In relation to the  
16 concurrent evidence, there was a very short opportunity  
17 for counsel to ask questions by way of  
18 cross-examination, but I think that it was insufficient.  
19 So my own experience, and I believe that of others who  
20 were also in the case, other advocates, was that that  
21 was insufficient because really it did not give any real  
22 substantive opportunity to develop some of the points  
23 that we wanted to develop by way of cross-examination  
24 following the concurrent evidence.

25           So if it -- if the tribunal does order some type of

1 hot tub, then we would want, in the timetabling section  
2 of the debate, to make submissions as to the relative  
3 balance between concurrent evidence and  
4 cross-examination, and we would be seeking a substantial  
5 opportunity to ask questions by way of cross-examination  
6 to ensure that our experts' points have been properly  
7 put to the opposing expert.

8 So that is the point I just wanted to flag now, but  
9 I recognise it is a point that is more relevant to  
10 timetabling rather than the principle.

11 THE CHAIRMAN: Yes.

12 MS. DEMETRIOU: That is all I wanted to say.

13 THE CHAIRMAN: Thank you, Ms. Demetriou.

14 MS. DAVIES: My Lord, if I may go next.

15 THE CHAIRMAN: Yes, indeed.

16 Submissions by MS. DAVIES

17 MS. DAVIES: Just a few points on behalf of the Prysmian  
18 defendants. We strongly support the points that have  
19 been made by my learned friends Mr. Hoskins and  
20 Ms. Demetriou and are -- equally strongly agree that  
21 this case is not one in which it is appropriate for  
22 there to be a hot tub at all.

23 Insofar as the tribunal is nonetheless minded to  
24 consider it, of the various alternatives that might be  
25 available, we would urge the tribunal carefully to

1 consider which areas are actually suitable for  
2 hot-tubbing, and Mr. Turner himself accepted it was not  
3 an all-or-nothing decision, and we would respectfully  
4 absolutely underline the point that Mr. Hoskins made,  
5 that the overcharge aspect is by far the least suitable.  
6 The pass-on aspect, also not suitable. We have concerns  
7 about the financing aspect, but if one is looking at it  
8 in that respect, if the tribunal is minded, then that  
9 may be an area where something could be done. But as  
10 I say, our primary position strongly is that this is  
11 a case where a hot tub is not appropriate, and in  
12 support of that, I would just like to make two further  
13 points.

14 First, to underline the point that my learned friend  
15 Mr. Hoskins made about the rights of defence in this  
16 case. The particular difficulty with a hot tub in this  
17 case is that it is not just a case of two experts who  
18 produced their own models, and they are each criticising  
19 each other. Here we have five experts in relation to  
20 each of the three overarching categories of expert  
21 evidence who have adopted their own analysis and  
22 approach. The tribunal is ultimately going to have to  
23 decide on a particular number, if it is going to award  
24 damages in this case. That means it is going to be  
25 necessary for the tribunal not only to understand what

1 each of the five experts has done, but to drill down  
2 into each of their models to determine which one or  
3 potentially which aspects of a number of them it  
4 considers gives the best prediction of the amount that  
5 is due to the claimant.

6 Just by way of illustration, in light of the  
7 emphasis my learned friend Mr. Turner put yesterday in  
8 the overcharge issue, on the two main points of dispute  
9 as identified in issue 4(a) of the joint expert issues,  
10 this is not a case where it is just -- those two are the  
11 only ones that matter. So far as we can ascertain from  
12 the calculations in my learned friend's amended  
13 particulars of claim, each percentage of overcharge on  
14 his primary case, and by that, I mean his case in which  
15 he suggests there should be no account taken of pass-on,  
16 Mr. Noble's option 1, adds around £9 million to the  
17 claimant's claim.

18 That is taking into account both the overcharge  
19 position and then the financing cost on the overcharge,  
20 which is said by the claimants to give them an amount of  
21 damages due which is double the overcharge. It is  
22 slightly complicated how one gets there, because of the  
23 way my learned friend has set out his figures, but  
24 looking at it, that seems to us, in a rough-and-ready  
25 way, an estimate of what each percentage of the

1 overcharge that is being claimed adds to the claim.

2 That is why, in our respectful submission, it is  
3 entirely misleading to focus only on nine issues and not  
4 to look at the sub-issues, because each of those points  
5 could have a very material impact on the amount of the  
6 claimant's claim in this case.

7 The second point I wish to make simply arises out of  
8 the criticism my learned friend made of paragraph 34(c)  
9 of my skeleton, where we pointed out that the experts  
10 use different approaches to estimating the timing of  
11 payments of overcharge for the purposes of assessing the  
12 extent of pass-on.

13 Mr. Turner sought to dismiss that in his submissions  
14 yesterday as a minor issue on which, on inspection, we  
15 were not right that any testing was needed by  
16 cross-examination. He did so by referring the tribunal  
17 to some of the experts' responses in relation to item 44  
18 of the joint expert statement on the cost of funding and  
19 pass-on, which is at {E/8/77}. The tribunal may recall  
20 that in particular, he referred to the comments in this  
21 section of Mr. Biro, Mr. Coombs and Mr. Davies, but what  
22 he did not do was take the tribunal to the comments of  
23 his own expert, Mr. Noble, which is in the second column  
24 of this page.

25 THE CHAIRMAN: Yes.

1 MS. DAVIES: E -- sorry, I made an error, it is {E/18/77},  
2 not E8, sorry.

3 THE CHAIRMAN: Yes, I have got it.

4 MS. DAVIES: My Lord, if you look at Mr. Noble's comment, in  
5 particular in the first bullet, he is explaining, the  
6 first bullet, that as regards the differences between  
7 the estimate of the timing of payments of any  
8 overcharge, as between himself and Mr. Biro, there is  
9 a substantial difference. He calculates his approach  
10 results in an 11% lower estimate of groups 1, 2 and 4  
11 than using my approach, and groups 1 and 2 are the  
12 amounts for which the claimants, as we understand it,  
13 are claiming.

14 So that is -- between him and Mr. Biro there is  
15 a 11% difference as a result of this. Then in the  
16 second bullet, he explains that there is a 12%  
17 difference between himself and my expert, Mr. Davies, in  
18 relation to this. 11% and 12% are material numbers when  
19 one comes to look at how that feeds through into the  
20 claimant's claim. That no doubt explains, my Lord, why,  
21 if we go back to issue 27, which my learned friend  
22 Mr. Turner also referred to, which is at page 42 of this  
23 document {E/18/42}.

24 THE CHAIRMAN: Yes. these are the option points.

25 MS. DAVIES: Issue 27, where Mr. Noble sets out the key

1 areas of difference between his conclusion and those of  
2 the defendant experts, my Lord sees as the fifth bullet,  
3 "Payment profiles and timing of the overcharge".

4 THE CHAIRMAN: Oh yes.

5 MS. DAVIES: Which does have a material effect on the  
6 valuation in some of the experts' models.

7 THE CHAIRMAN: Yes.

8 MS. DAVIES: So this is very much a material point. It can  
9 make a very significant difference to the figures, and  
10 I emphasise that because this is part of the difficulty  
11 of the cherry-picking approach that has been adopted by  
12 my learned friend Mr. Turner in relation to the joint  
13 experts' statement and I very much underline -- would  
14 wish to underline the points that Mr. Hoskins was making  
15 in relation to that. One needs to look actually not  
16 just at some headline points but at the detail.

17 THE CHAIRMAN: Yes.

18 MS. DAVIES: The final point, my Lord, I just wish to make  
19 in relation to hot-tubbing, is a point we have adverted  
20 to in our skeleton, but relates to essentially what  
21 would happen in this case if at a PTR, which is now  
22 going to be at the end of October, the tribunal were  
23 persuaded that the hearing had to be conducted remotely.  
24 Now, as the tribunal knows, all the defendants have  
25 concerns about that, but we understand the claimant is

1 going to be pushing for that. Sorry, when I say all the  
2 defendants, all the defendants bar Safran. We  
3 understand that Mr. Turner would be pushing for that in  
4 October.

5 Now, certainly the experience of this pre-trial  
6 review, in our submission, would underline how difficult  
7 it would be to conduct a hot tub with five experts and  
8 the tribunal via Microsoft Teams. There were certainly  
9 moments -- a number of moments yesterday when some of my  
10 colleagues at the bench were speaking and I could not  
11 see them.

12 The nature of the system is perfectly fine for this  
13 kind of remote hearing where we are discussing practical  
14 matters, but if the tribunal is having to assess the  
15 weight which it wishes to attach to one particular  
16 expert over another, it is absolutely imperative that  
17 the tribunal has full visibility of the experts when  
18 they are giving their evidence, and there are very real  
19 concerns, given the way that this platform works, that  
20 that is just not going to be achievable remotely.

21 Now, the reason I raise it, notwithstanding one  
22 knows that the defendants apart from Safran have  
23 concerns about this, is that if my learned friend on  
24 23 October is going to be seeking to persuade the  
25 tribunal to have a fully remote hearing, should

1           circumstances change, and of course we are all aware no  
2           doubt of what the Government is saying today about the  
3           possibility of a second wave and so on and so forth, at  
4           that stage, it really is going to be too late to move  
5           from a hot tub to individual cross-examination.

6           There is simply -- with the best will in the world  
7           from the advocates appearing in front of you, it simply  
8           will not be possible between 23 October and the time at  
9           which the experts are going to be giving evidence, given  
10          that we will effectively be fully engaged in the trial,  
11          to prepare for full individual cross-examination.

12          So there is another real practical issue that arises  
13          in relation to the particular circumstances of this case  
14          where -- which we would -- strongly urge the tribunal to  
15          take into account. We have got to decide on the way  
16          forward today, and given that there is -- I am not  
17          saying it is a probability, but there must, given my  
18          learned friend Mr. Turner's approach, be a possibility  
19          that come October, one is going to be looking at how one  
20          can conduct this remotely. That is a real problem, in  
21          our submission --

22          THE CHAIRMAN: Yes.

23          MS. DAVIES: -- with the hot tub suggestion.

24          THE CHAIRMAN: Well, Ms. Davies, for my part, and I have not  
25          discussed the way you have just put this with my fellow

1 members, but I can quite see that the question of  
2 exactly what is going to happen when we get to  
3 23 October, so far as the conduct of this trial  
4 generally is concerned, may have an impact on the  
5 question of the feasibility of hot-tubbing. I only say  
6 "may", because I do not think the tribunal is satisfied  
7 yet that whatever the issues may be -- have been in  
8 relation to seeing people at this remote hearing, that  
9 they will not be perfectly capable of being solved  
10 before then.

11 So what I, for my part, am a little bit reluctant to  
12 countenance, is the idea that the -- whether to have  
13 cross-examination or hot-tubbing should be  
14 over-influenced by the possibility that we may run into  
15 difficulties on 23 October, because that seems to me to  
16 really be putting the cart before the horse in some  
17 ways.

18 MS. DAVIES: My Lord, I understand that, and of course it is  
19 a balance, but it is -- I mean, I think -- well, I hope  
20 my Lord understands why I wish to flag --

21 THE CHAIRMAN: Yes.

22 MS. DAVIES: -- that if we take the decision of hot-tubbing  
23 now, it is not going to be possible to move -- and that  
24 were to apply to all of these areas of expert evidence,  
25 it is actually not going to be practicably possible to

1           move to individual cross-examination with a trial  
2           starting on 2 November.

3       THE CHAIRMAN: No, I understand that, and you will certainly  
4           be entitled to make that submission, should we be in  
5           this situation on 23 October, because the court -- the  
6           tribunal is obviously only going to proceed with  
7           a hearing which it is satisfied can be conducted fairly.

8       MS. DAVIES: My Lord, I am grateful. Those are the  
9           additional points I wish to make on behalf of Prysmian.

10      THE CHAIRMAN: Thank you very much indeed.

11                 Mr. Jones.

12                         Submissions by MR. JONES

13      MR. JONES: Yes, my Lord, I am grateful. On behalf of  
14           Safran, we strongly agree with the points which have  
15           been made on behalf of the other defendants. Could  
16           I just stress two points. The first is that it is very  
17           important to keep in mind that although there are  
18           factual disputes in this case, the economic issues which  
19           we are talking about here are the core of the case, and  
20           it is in that context that we say what the defendants  
21           want to do, in terms of how the defendants want to run  
22           their own defence, must be a weighty factor in the  
23           tribunal's consideration of whether or not to proceed  
24           with hot-tubbing, and from Safran's point of view, as  
25           the other defendants have said, we very much want to be

1           able to put our case through cross-examination of the  
2           claimant's experts.

3           The second point I wanted to emphasise was just  
4           picking up on Ms. Davies' point about, if I can call it  
5           this, COVID-proofing the directions which are made. My  
6           Lord, I entirely understand that the tribunal would not  
7           want this to over-influence the decision on hot-tubbing,  
8           but on the other hand, there have been technical issues  
9           with this hearing. I, for instance, at the moment, my  
10          Lord, cannot see you or indeed any member of the  
11          tribunal. I am able to proceed with the submissions,  
12          notwithstanding that, but it would be most unfortunate  
13          if there was a hot tub in which the experts could not  
14          see each other, in which the tribunal or members of  
15          counsel could not see what was happening, and Safran,  
16          like the claimant, does consider that if it is  
17          necessary, because of developments in the pandemic, if  
18          it is necessary to consider having a fully remote  
19          hearing, we think that can be done. We think that would  
20          be the right way forwards, and that again is, in my  
21          submission, an important -- it should not  
22          over-influence, but an important consideration in your  
23          decision now as to whether or not to agree to the  
24          hot tubs proposal. My Lord, unless I can assist  
25          further, those are Safran's submissions.

1 THE CHAIRMAN: Thank you, Mr. Jones.

2 MR. HOSKINS: My Lord, can I -- sorry, my Lord, there is one  
3 point my solicitors have just asked me to raise --  
4 sorry, the joys of virtual -- which I think I should,  
5 given the indication, raise before Mr. Turner responds,  
6 which is this. It is on the forensic flourish point,  
7 because whilst you have seen the position, I took in  
8 2014, Mr. Turner was acting for National Grid in the  
9 same case.

10 THE CHAIRMAN: Yes.

11 MR. HOSKINS: Page 84 of the transcript of the PTR in *GIS*,  
12 if I could just read it out to you, Mr. Turner for  
13 National Grid in relation to hot-tubbing:

14 "We can deal with that very quickly. In terms of  
15 hot-tubbing, we do have views. At the moment we think  
16 that while in a number of competition cases it has great  
17 attractions, in this case it will not be appropriate and  
18 we will wish to explain why that is." [as read]

19 So there you have it, the forensic flourish. Worth  
20 not the paper it is written on. That is simply the  
21 point I wanted to make.

22 THE CHAIRMAN: Thank you very much.

23 Mr. Turner.

24 Submissions in reply by MR. TURNER

25 MR. TURNER: I am grateful, my Lord. I can keep my response

1 very simple. The case is about the best way to achieve  
2 justice, and specifically here to allow you, the  
3 tribunal, to get into the real issues, the expert  
4 issues, and eventually to write a judgment.

5 This is not about giving weight to one side's  
6 tactical desire for adversarial cross-examination,  
7 however vehement they say they are. I will start with  
8 Mr. Hoskins.

9 He made some general points yesterday about the use  
10 of concurrent evidence in these sorts of cases, and then  
11 some specific points about its suitability in the  
12 circumstances of this case, which he has developed  
13 today. I will briefly take the general points first.

14 He said, and we have now foreshadowed this, that the  
15 cases where hot-tubbing has been used before, which we  
16 pointed to in our skeleton, are different, and then he  
17 referred to the three competition cases in his  
18 experience where the court did not use concurrent  
19 evidence. One of those, by the way, the rubber case,  
20 also never reached the point of expert evidence at all.  
21 It settled at the factual evidence stage.

22 Concurrent evidence is a recent development in the  
23 English court system. It was introduced in April 2013.  
24 It was first used in a competition damages case in the  
25 Google litigation. That was decided in February 2016.

1 The judge was the President of this tribunal,  
2 Mr. Justice Roth. We quote in our skeleton at  
3 paragraph 58 what he said:

4 "I believe that is the first time this has been done  
5 in a competition case in the UK, and it led to a  
6 constructive exchange which considerably shortened the  
7 time taken by the economic evidence at trial ..."

8 The tribunal has now been made aware that even  
9 before that case, concurrent evidence was directed by  
10 Mr. Justice Roth to be used in the *National Grid*  
11 cartel litigation in the *Switchgear* case. That cartel  
12 litigation precedes this case and is also related to it.  
13 It is related in very specific ways. The expert line-up  
14 was very similar to the line-up today. Dr. Jenkins  
15 appeared for National Grid. She faced four economists  
16 instructed for each of the alleged cartelists, including  
17 again ABB and their expert Mr. Biro. The overcharge  
18 issues too were very similar. They concerned the  
19 assessment of an overcharge on a large number of  
20 projects which had been supplied.

21 Mr. Justice Roth is perhaps the most experienced  
22 judge in this field in the High Court. At that PTR,  
23 which was May 2014, he not only said that the case was  
24 suitable for concurrent evidence, having heard different  
25 submissions from the parties, to some extent reflecting

1           those that the tribunal has heard today and yesterday,  
2           he also laid down some mechanics which I would like to  
3           show you in view, my Lord, of your expression of how  
4           that might be addressed.

5           The case did settle before the final trial, but it  
6           is by far the closest parallel to our case in terms of  
7           its scale, its shape, and its subject matter.

8           If your Lordship and the members of the tribunal  
9           would turn, please, to {AU/17/1} on the electronic  
10          system, which I think now should contain the PTR order.

11        THE CHAIRMAN: I am just waiting for it to come up.

12        MR. TURNER: Yes. Otherwise if you have hard copies, I will  
13          go there anyway. Does the tribunal have printouts?

14        THE CHAIRMAN: Printouts of what?

15        MR. TURNER: Of the PTR order made by Mr. Justice Roth on  
16          that litigation. It is 22 May 2014.

17        THE CHAIRMAN: Yes. Yes, we have got those.

18        MR. TURNER: So this was his order and if you go forward to  
19          page 4 -- page 3, I apologise {AU/17/3}, his order  
20          starts at paragraph 7:

21                "The oral evidence of the parties' experts shall be  
22                given concurrently. The broad timetable to be followed  
23                ... shall be ..."

24                You will see how he envisaged carving it up. In  
25          that case, he actually envisaged four days for the

1 overcharge issues. There were pass-on issues which he  
2 had two days for, and one day on the interest issues,  
3 similar topic areas to this case.

4 Then if we turn the page {AU/17/4}, we come to  
5 something that is similar to what your Lordship was  
6 canvassing earlier:

7 "The format ... shall be an introductory statement,  
8 as set out ... below ... followed by questions from the  
9 Bench, followed by cross examination by Counsel."

10 Then he envisaged, at the start of the first day,  
11 a statement lasting up to 30 minutes by each expert,  
12 explaining their own approach, and then he had further  
13 refinements too which you will see there. So he had  
14 thought about it quite carefully and come to the view at  
15 that stage that that would be a useful way to deal with  
16 concurrent evidence, the contours of which very closely  
17 mirror what this tribunal is now concerned with.

18 The one comment I will make now in view of the  
19 question of whether -- that your Lordship also raised  
20 about whether there were any negative things that had  
21 been said about the experience of hot tub -- hot tubs is  
22 that in the *Google* case when that was then heard  
23 a year and a half later, Mr. Justice Roth did have  
24 a negative experience, to some extent alluded to in the  
25 judgment, certainly mentioned extrajudicially, with the

1 opening statements, because of the risk that those would  
2 be lawyered and would essentially be position statements  
3 that simply took up time and did not advance things.

4 THE CHAIRMAN: Yes. It was actually one of the reasons we  
5 were concerned about them going on for too long, if we  
6 were going to have them at all, because I know that  
7 Mr. Justice Marcus Smith, I think spent a whole day on  
8 them, which -- our instinctive response was -- reaction  
9 to that was that it may be too long.

10 MR. TURNER: Yes, and we have also referred in our skeleton  
11 to the *BCMR* case where there were some negative  
12 remarks there too made by the tribunal about that  
13 practice in that case --

14 THE CHAIRMAN: Yes.

15 MR. TURNER: -- where it can become adversarial.

16 THE CHAIRMAN: Yes.

17 MR. TURNER: So those, I think, are the sum total of the  
18 negative comments about this sort of thing.

19 THE CHAIRMAN: Thank you.

20 MR. TURNER: So far as Mr. Hoskins' submissions are  
21 concerned, this is not a forensic flourish really at  
22 all.

23 If you go to his submissions, it is merely to say  
24 that the points made there are in fact points that are  
25 just as relevant today. If you look at paragraph 67,

1           towards the end of his skeleton, after the redacted  
2           part, there he actually prayed in aid, as I do today,  
3           the fact that the economic evidence had a central nature  
4           in the case and the volume of it and its technical  
5           character.

6           Those are in fact features that point in favour of  
7           concurrent evidence, because it allows you to synthesise  
8           these questions, which do need to be addressed, by  
9           allowing all the experts to comment, each other, on  
10          their approaches and on each other's together rather  
11          than have a laborious sequence of individual  
12          cross-examination sessions with, on the particular  
13          topic, five experts talking about matters such as  
14          fluid-filled cables over and over again in isolation,  
15          and that is why Mr. Hoskins' point in his skeleton was  
16          right and accepted by the judge.

17          Similarly, if you drop to the bottom of that page,  
18          he said:

19          "Given the nature of this case and the competition  
20          law expertise of the judge, augmented in this particular  
21          case now, it was difficult to imagine a more appropriate  
22          case for hot-tubbing." [as read]

23          If you turn the page he refers to advantages, which  
24          you can read for yourself at (a), (b) and (c), which we  
25          equally adopt today and in particular (a):

1           Rather than hearing the expert evidence through  
2           [what he called the 'straitjacket'] of counsel's chosen  
3           cross-examination strategy, the court will be able to  
4           hear and test the evidence of the experts directly.  
5           Such a procedure is likely to be much more efficient in  
6           allowing the court to obtain a detailed understanding of  
7           the technical issues." [as read]

8           Where, of course, there are interrelated questions,  
9           that is clearly right and the judge accepted that this  
10          was the best approach.

11          I should perhaps make one more point. At  
12          paragraph 71 Mr. Hoskins went on in that skeleton to  
13          deal with the question whether you could have a group of  
14          experts in a hot tub together or whether you should have  
15          it one claimant and one defendant expert one after the  
16          other, and you will see from what he proposed, there was  
17          a series of hot tubs in each of which it is Dr. Jenkins  
18          sitting there the whole time and then all of the other  
19          evidence -- experts come in one after the other and sit  
20          with her. That was rejected.

21          Part of the thinking behind that was the point that  
22          Mr. Hoskins referred to when he said that we at  
23          National Grid in that case had expressed our own  
24          reservations. Our reservations were precisely the  
25          problem we perceived at that time that there would be

1 one expert on the claimant side, saying there is  
2 an overcharge of 20%, and four on the other, loudly  
3 saying: no, there is an overcharge of zero; and having  
4 much more airtime. So our concern, which we expressed  
5 at that time, was that the process would be unbalanced  
6 if there was a large number of people on one side and  
7 only one on the other.

8 The experience since then has shown that those  
9 concerns were unfounded. The *Paroxetine* case, or  
10 indeed the *Royal Mail* case, are fairly good examples.  
11 In *Paroxetine*, you did have the single expert  
12 economist for the competition authority on one end of  
13 the row, and then the industry parties with their  
14 economists lined up on the other sides, but it was  
15 managed in a structured way by the tribunal which led  
16 the questioning, and there was no unfairness, and the  
17 process worked extremely well with one expert on one  
18 side and a plurality on the other.

19 The next point was that Mr. Hoskins said that in the  
20 *Britned* case, which was heard in February 2018, the  
21 single judge coped without concurrent evidence. He may  
22 have done, but that does not tell you whether concurrent  
23 evidence would be a better solution in the circumstances  
24 of our case.

25 *Britned* was materially different from this case in

1 important ways. You had a claim for damages which  
2 related to an overcharge on a single bespoke and unique  
3 project, a submarine cable project. Here, we are  
4 assessing the effects of a restricted practice over the  
5 period of a decade on scores of underground cable  
6 projects over the whole period. There were two rival  
7 economists in that case. They adopted very different  
8 main approaches and you know that the judge simply  
9 preferred one of them to the other in a robust and  
10 binary manner. Our case is different from that.

11 It involves, as I say, the assessment of cartel  
12 overcharges over very large numbers of projects and  
13 a long period of time. You have five economists, and  
14 there has been a lively debate between them on issues of  
15 both methodology and substance.

16 If we turn back to on the Magnum system, please,  
17 {E/17/17}, this is just to remind you when it comes up,  
18 this was question 8 which I showed you yesterday. It is  
19 the methodological question, and if you read question 8,  
20 you see that the debate here is a very different sort of  
21 debate from whether to use Mr. Biro's simple comparisons  
22 between, as it was in *Britned*, one project and  
23 projects after the cartel, or a regression analysis.  
24 You will see if you read across that there is a very  
25 large measure of common ground in this case. The shape

1 of the expert evidence here is ideally suited to  
2 concurrent evidence led by the economist member of the  
3 tribunal in the way that has now become with rapidity  
4 increasingly common in recent years.

5 To summarise why, again, very briefly, it leads to  
6 a saving of time and costs because it boils down the  
7 issues and avoids the repetition of asking each expert  
8 in turn the same questions in separate individual  
9 sessions, and that is why it enables the tribunal to  
10 gain a clearer understanding of the real issues between  
11 these five experts, and I am looking at the territory  
12 where the defendants say this is the more complex case,  
13 overcharge, and then for you to write a judgment which  
14 pulls these strands together.

15 The third point was that Mr. Hoskins said to you  
16 that the only way to really drill down to the essence of  
17 a particular point is for you to have experienced  
18 barristers cross-examining. We certainly do not agree.  
19 We think that the tribunal is fully capable of getting  
20 to the heart of particular points, and there is no  
21 reason to think that in the previous cases where you  
22 have had concurrent evidence, the tribunal has failed in  
23 any respect to get to the heart of what had been  
24 detailed economic disputes. This is a specialist forum  
25 with pre-eminent members.

1           So then I turn to the central points that  
2 Mr. Hoskins has made and move from the general to the  
3 circumstances of this case.

4           The first thing he said was to adopt NKT's point in  
5 its skeleton yesterday, that the experts have generated  
6 in these large statements what they consider to be  
7 a large number of separate material issues. He  
8 submitted that you, one way or the other, however the  
9 evidence is taken, have to grapple with every single one  
10 of those, whether via cross-examination or in a hot tub.  
11 Having said that, he added that the position of these  
12 various experts on all of these issues is what he called  
13 non-binary or nuanced.

14           Putting those together, he emphasised that this  
15 points to the need for individualised testing of every  
16 expert's view in turn, rather than, in his words,  
17 letting them all have a discussion.

18           None of that is right. The position is that you,  
19 the tribunal, have to form a view on the points that you  
20 consider will enable you to reach the right outcome and  
21 decide the case. That is what a court or tribunal does.  
22 A hot tub is not letting them all have a discussion. It  
23 is a structured process. You have an investigation of  
24 the points conducted by the expert tribunal, and it is  
25 done in a systematic and a fair manner.

1           We adopt what Mr. Hoskins said in 2014. The fact  
2           that you have a range of views between these economists  
3           on the same topics points strongly in the other  
4           direction towards concurrent evidence. It is far more  
5           helpful to you to let you form your view if you do have  
6           these experts together, rather than having them  
7           cross-examined on the merits, not just of their  
8           opinions, but also on the relative merits of the other  
9           opinions one after the other, and in isolation from each  
10          other.

11          Today, Mr. Hoskins then added a further group of  
12          points. He began by saying that if you do adopt  
13          hot-tubbing, then they would want to make points about  
14          the draft agenda that we have proposed because their  
15          expert has said that he has things that he would wish to  
16          put in. It is somewhat regrettable that neither ABB nor  
17          any of the defendants sought to engage with our  
18          invitation to do this at a point before this PTR, so  
19          that if this tribunal had been minded to order  
20          a hot tub, this could have been addressed more  
21          efficiently.

22          Mr. Hoskins said that the fact that these points,  
23          the large number of individual material points are  
24          grouped together in themes, tells you nothing about the  
25          feasibility or desirability of a hot tub. We say that

1           it does. The single essential question for you, we say,  
2           on deciding what choice to reach, is whether these  
3           issues are better covered by sequential  
4           cross-examination or in a concurrent session. That is  
5           the single ultimate question, and we believe that the  
6           obvious answer is the hot tub.

7           He referred to question 10 in the joint statement on  
8           overcharge to make the point that there has already been  
9           a written hot tub essentially, and now says, we have had  
10          our hot tub, let us move on from that to a different  
11          approach to taking the evidence, which is  
12          cross-examination. There is little substance in that.  
13          An oral hot tub will allow this tribunal to address the  
14          different positions by hearing each expert on its own  
15          and on the others' views together.

16          He made a point which was to some extent collateral,  
17          but which I do need to address to put the record  
18          straight, saying that the claimants were involved in  
19          setting questions for their experts, or with their  
20          experts on the hot tub engagement of the parties, and  
21          therefore the claimants are implicated in the document  
22          that was -- the documents that were produced and their  
23          length. In fact all of the legal advisers contributed  
24          to this. We followed the usual protocol in the practice  
25          direction to Part 35. May I invite you to look at

1           {A/35/1}. It will come up on the system.

2       THE CHAIRMAN: We are looking here at the issues identified  
3       in the joint statements, are we?

4       MR. TURNER: That is right. You will see that our  
5       solicitors wrote to all the other solicitors, and they  
6       explained how they saw the expert discussion should be  
7       structured. Taking the numbered points in turn:

8           "The experts should be instructed ...

9           "... To comply with the provisions of paragraph 9 of  
10       [the] ... Practice Direction ... concerning  
11       discussions ..."

12           We said we wanted, and we underlined, "short reasons  
13       for any disagreement", the meetings and discussions on  
14       a without prejudice basis. Then:

15           "... the involvement of lawyers shall be as follows:

16           "... no representatives from the parties' legal  
17       teams shall be involved in the meetings, or the  
18       discussions ..."

19           If we could turn the page, please {A/35/2}:

20           "... representatives from the parties' legal teams  
21       may be consulted on the agendas for the meetings and the  
22       list of issues ... solely for the purpose of ensuring  
23       that the issues which will need to be considered by the  
24       Tribunal are ... covered; and ... presented in a form  
25       that is manageable, including in length, so as to assist

1 in focusing the experts' discussions ..."

2 So that is directly from the practice direction and:

3 "... there shall be no involvement of the parties'  
4 legal teams in the drafting of the experts'  
5 positions ..."

6 So this is all entirelyly basic, and the parties'  
7 solicitors on the other side wrote in to express their  
8 agreement.

9 That is merely to put the record straight and so you  
10 understand how this position was arrived at.

11 MR. HOSKINS: I am sorry, my Lord, none of the defendants --  
12 sorry, you may --

13 THE CHAIRMAN: I am getting real feedback at the moment.

14 MR. HOSKINS: Can other people mute please, probably.

15 Just to say that none of the other defendants  
16 actually participated in drawing up the list of issues,  
17 and if I got that wrong, my co-defending counsel will  
18 indicate. None of us actually contributed to the list  
19 of issues. It was only the claimant's legal team that  
20 did so.

21 THE CHAIRMAN: As a matter of interest, Mr. Hoskins, why was  
22 that?

23 MR. HOSKINS: I think largely because the defendants thought  
24 that it was not appropriate for the lawyers to get  
25 involved in the expert process in that way. We thought

1           we should stay out and let the experts do their job.

2       THE CHAIRMAN:  What, even on the question as to what it was  
3           that the experts were meant to be expressing views on?

4       MR. HOSKINS:  That is a very open-ended question, my Lord.  
5           I can only answer the two questions you have put to me,  
6           which is we did not participate and we did not  
7           participate because we did not want to intrude into the  
8           role of the experts in defining the issues between them.

9       THE CHAIRMAN:  All right.  Well, I will not press you any  
10          further.

11      MR. HOSKINS:  Thank you.

12      MR. TURNER:  My Lord, before you do not press my friend any  
13          further, I will just give you some references.  If we go  
14          in the bundle, please, on Magnum to {A/37/1} you have  
15          the response from the NKT solicitors.  They refer to our  
16          solicitors' letter:

17                 "We and Compass ... confirm that we agree with the  
18                 procedural parameters for the forthcoming without  
19                 prejudice meetings."

20                 Et cetera.

21          Now turn to 41, {A/41/1}.  This is Mr. Hoskins'  
22          solicitors:

23                 "We and Frontier ... agree with the broad principles  
24                 set out in BCLP's letter ... We are content to proceed  
25                 on the basis ..."

1           Now turn, please, to {A/42/1}. This is Prysmian:

2           "We refer to your letter ...

3           "We and Compass ... agree with the procedural  
4 parameters ... We also agree that the experts should  
5 liaise directly in ... administrative matters."

6           Now turn please to {A/43/1}, Hogan Lovells and  
7 Safran:

8           "We refer to your letter ...

9           "Hogan Lovells and CRA agree to the procedural  
10 parameters and suggested expert instructions as set out  
11 in your letter ..."

12           I do not think I need to develop this any further.

13 MR. HOSKINS: My Lord, if I am to be pressed, then let me  
14 read you -- I am sorry, this is really going off on  
15 a tangent, but let me just hopefully bring this to  
16 a close -- a letter from Addleshaw Goddard of 18 June to  
17 BCLP, again, unfortunately not in the bundle because we  
18 did not think this would be an issue. I will read it to  
19 you:

20           "We consider that involvement by the legal team in a  
21 substantive drafting of the issues that the experts are  
22 to discuss is contrary to the spirit and indeed letter  
23 of the parameters proposed. Since sending our letter,  
24 NKT's experts have received a draft list of issues from  
25 Mr. Noble and Professor Jenkinson. The metadata in the

1 draft received from Mr. Noble indicates that the author  
2 of the document is Laura John. We assume that is  
3 Laura John of Monckton Chambers, junior counsel for  
4 NGET, but please do let us know if that is incorrect.  
5 Assuming we are correct, this further highlights that  
6 the concerns expressed above are well founded. Both we  
7 and our clients' instructed experts intend to act in  
8 accordance with the spirit and the letter of the agreed  
9 parameters. We would encourage your clients and their  
10 legal teams to do the same. The expert process is  
11 intended to assist the tribunal. Your clients can make  
12 their legal case in submissions in due course at trial.  
13 They do not need to do so through the expert process."

14 [as read]

15 I am sorry to take up more time. I am really not  
16 sure this is going to help very much in deciding whether  
17 to have a hot tub or not.

18 MR. TURNER: Yes, I think if Mr. Hoskins' intervention in my  
19 reply is finished, then if he is going to refer to that,  
20 he ought to refer also to the response to that letter,  
21 reminding Addleshaw Goddard what they had already signed  
22 up to, but we can deal with that later.

23 THE CHAIRMAN: Yes. Well, this is essentially a point which  
24 goes to the, in some respects, unsatisfactory nature of  
25 the documents that were eventually produced, and I think

1           it serves to highlight the fact that in our view, the  
2           parties did not focus sufficiently on exactly what it  
3           was that the tribunal was going to find useful and  
4           helpful for the purposes of obtaining an agreed  
5           statement.

6           As it happens, these documents have another purpose  
7           which the tribunal will be assisted by, because they  
8           have served to coalesce in one place a number of views,  
9           but they are not a type of document that the tribunal  
10          anticipated would be provided, but we do not, for  
11          present purposes, propose to indulge or engage in  
12          an archaeological dig to find out why that is.

13         MR. TURNER: I am obliged. My Lord, I will continue.  
14           I have only got a few more points.

15          Mr. Hoskins said that if you are going to be  
16          considering a hot tub, it may be sensible for there to  
17          be cross-examination first before a concurrent evidence  
18          session. In fact, that is one of the very points on  
19          which Mr. Justice Roth has been very clear, and was very  
20          clear in the *Gas Insulated Switchgear* case, was wrong  
21          because it gets matters back to front.

22          He made the point, and we can get you the transcript  
23          references should you wish, that the cross-examination  
24          of the experts first was undesirable because it would  
25          polarise matters with hostile cross-examination, and he

1 thought it would be far better for there to be  
2 a constructive engagement with the tribunal asking  
3 questions directly, anticipating, correctly, that this  
4 would lead to more forthcoming and candid answers, and  
5 that any cross-examination subsequently by way of  
6 sweep-up should be done after the hot tub session.

7 The other format -- I am sorry, my Lord.

8 THE CHAIRMAN: No, all I was going to say, Mr. Turner, is  
9 I see it is 12 o'clock. I hope you are coming to the  
10 end of your reply because what we would like to do is  
11 retire and consider what we are going to do about this  
12 at the same time as we have our morning break, unless  
13 you think you are going to be a lot longer.

14 MR. TURNER: No, I think I will be five minutes maximum.

15 THE CHAIRMAN: All right. I will hold you to that.

16 MR. TURNER: I will go quickly then. You asked about  
17 concerns that had been expressed judicially about  
18 a hot tub. I perhaps now have given you sufficient on  
19 that. I was going to develop it a bit further, but  
20 I have referred to the *BCMR* point and where  
21 Mr. Justice Roth in *Google* had expressed concerns  
22 about opening statements in hot-tub formats, leading to  
23 adversarial engagement as being one of the main issues.  
24 So far as a teach-in is concerned, I will touch on that  
25 briefly.

1           Again, such an exercise has the prospect of turning  
2           into an adversarial or lawyered process. Here we have  
3           interrelated methodologies and approaches, "Please  
4           explain yours and comment on its relative merits and  
5           demerits with others." It is very easy to see that if  
6           the experts are to make opening statements, then just as  
7           the judge in *Switchgear* anticipated, it would be  
8           better to let them do that in a hot tub next to each  
9           other because then they can comment on what each other  
10          have said and --

11        THE CHAIRMAN: Well, can I make it quite clear, Mr. Turner,  
12          that when we are thinking of a teach-in, we are not  
13          really thinking of experts expressing views about other  
14          experts' points that stage. We are simply thinking that  
15          it would be an opportunity for each expert to explain  
16          the technicalities behind their approach. So on any  
17          view, it will not extend to explaining why it is that  
18          other experts are wrong.

19        MR. TURNER: That I understand and do appreciate. It is  
20          merely, as you have seen from the way they express  
21          themselves in the row I took you to, the methodologies  
22          are to some extent interrelated and have common  
23          features.

24        THE CHAIRMAN: Yes.

25        MR. TURNER: But I take it no further.

1           So far as NKT -- turning from Mr. Hoskins to the  
2 others, NKT, I have little to say about. She said,  
3 Ms. Demetriou, that there should be a balance between  
4 the hot tub and cross-examination. I merely underline  
5 the point again that the defendants have not engaged to  
6 date on this question, leaving matters in a rather  
7 unsatisfactory vacuum, but we for our part are content  
8 with the provisional hot tub agendas we propose. No  
9 doubt those can be refined.

10           So far as Prysmian is concerned, the only point I  
11 need to pick up is the concern about a fully remote  
12 hearing for a hot tub. Here we have made the point in  
13 writing, and I will amplify it briefly, there are in  
14 fact some advantages to a remote hearing in a hot tub.  
15 So far as the parties are concerned, you can actually  
16 see the people who are giving evidence collectively --  
17 which you cannot do otherwise. You only face their  
18 backs.

19           Secondly, with good remote technology, and I myself  
20 recently had a good experience, the Supreme Court uses  
21 Webex, you have a similar grid formation to this. You  
22 have in that case all of the judges of the court and  
23 counsel, everybody visible, perfectly easy to everybody  
24 else, and the collective debate where there are  
25 interventions, it is very well managed and worked well.

1           So far as Safran is concerned, there was a concern  
2           that technical issues may prevent visibility, but  
3           I believe that is addressed by what I have just said,  
4           and so, my Lord, that is all I have to say in reply.

5       THE CHAIRMAN: Thank you very much indeed. Well, we will  
6           now take our mid-morning break and it will be extended  
7           a bit because we want to discuss what you have all said  
8           to us.

9           Mr. Turner, the remaining issues that we have for  
10          this hearing are essentially logistics, are they not?

11       MR. TURNER: There is one which may not be. You will recall  
12          that the defendants added a new item 14 to your draft  
13          agenda.

14       THE CHAIRMAN: Oh, yes, yes.

15       MR. TURNER: So this is their submission, and the only way  
16          it has been crystallised is in the written skeletons.

17       THE CHAIRMAN: Right.

18       MR. TURNER: The claimant's experts surprised them with new  
19          analysis in the joint expert process which they have not  
20          had time to address.

21       THE CHAIRMAN: Yes.

22       MR. TURNER: So they may want further reports.

23       THE CHAIRMAN: Right. Are we going to be asked to make  
24          a direction in relation to that one way or the other  
25          this morning, do you know?

1 MR. TURNER: I do not know.

2 THE CHAIRMAN: Who is leading on this point for the  
3 defendants?

4 MS. DEMETRIOU: My Lord, I am leading on that point.

5 THE CHAIRMAN: Yes, Ms. Demetriou.

6 Submissions by MS. DEMETRIOU

7 MS. DEMETRIOU: So we would be seeking a direction that we  
8 have the opportunity to put in, if so advised and if  
9 necessary, a short supplemental response on points which  
10 are truly new, and we would ask for a direction that we  
11 do that by the same date that has been applied to the  
12 tax issue, which I think from recollection is  
13 4 September.

14 THE CHAIRMAN: Yes. Well, can I invite you all -- I think  
15 we will retire until 12.30 pm and come back and tell you  
16 what we are going to do about expert evidence then. Can  
17 I invite you, please, to discuss whether there is any  
18 room for a consensus on this point. If there is not,  
19 there is not and we will rule, but I would like you  
20 specifically to concentrate on that point.

21 All right. So we will log back in 12.30 pm.

22 (12.06 pm)

23 (A short break)

24 (12.30 pm)

25

## Decision

1  
2 THE CHAIRMAN: Right. Is everybody present? Yes, looks  
3 like it.

4 We have to decide the most contentious issue on this  
5 PTR, which is whether to direct that the expert evidence  
6 should be heard concurrently or sequentially. When  
7 I say "sequentially", I mean cross-examination by the  
8 parties in the way in which it was always done, before  
9 about seven years ago when the concept of concurrent  
10 evidence and hot tubs were first introduced into the  
11 Civil Procedure Rules.

12 The claimants say that this is an obvious case for  
13 concurrent evidence to be given, and the defendants all  
14 say to the contrary. They thoroughly and strongly  
15 disagree with the claimants on this issue. In  
16 particular, they say that it is not the normal approach  
17 in the Competition Appeal Tribunal despite what is said  
18 by the claimants, and they point to the fact that in the  
19 *Britned* case, which actually was not a CAT case but  
20 was a follow-on claim arising out of the same cartel,  
21 Mr. Justice Marcus Smith did not do it, although, as the  
22 claimants point out, the issues that arose in the  
23 *Britned* case were very different. They were concerned  
24 with a single project, with binary issues.

25 It is also said by Mr. Hoskins, who took the lead on

1 the argument on behalf of the defendants, that there has  
2 not been a full-blown cartel damages case in which  
3 they -- concurrent expert evidence has actually been  
4 used in the sense of being -- there being a full trial,  
5 but I think it is fair to say that it has at least been  
6 directed in cases, and our attention was drawn to the  
7 *Peugeot* case which the two tribunal members with whom  
8 I am sitting also were members of the tribunal. It was  
9 directed by that tribunal, chaired by Mr Justice Green,  
10 and we have also been shown a number of other cases in  
11 which in similar areas to this, the concept of or the  
12 idea of using concurrent expert evidence has been used.

13 We do not think at the end of the day, though, that  
14 the question of whether or not concurrent evidence has  
15 been used in previous cases adds a huge amount to the  
16 analysis because the question for us is whether this  
17 case is suitable for concurrent evidence, not whether it  
18 has actually been done before.

19 Much has been said on both sides, and prayed in aid  
20 on both sides, by the complexity of the dispute, and on  
21 the defendants' side, it is said that that of itself is  
22 one of the reasons why hot-tubbing is unsuitable,  
23 whereas on the claimants' side, they say that that is in  
24 itself what makes hot-tubbing immensely suitable.

25 In approaching the correct answer, we have had

1 a number of points that have been made to us, both as to  
2 the advantages and disadvantages, that I will very  
3 briefly run through.

4 So far as the advantages are concerned, Mr. Turner  
5 says that the tribunal can cut to the heart of the  
6 dispute more easily in circumstances in which  
7 hot-tubbing is utilised, and it avoids the straitjacket  
8 of a cross-examination, was a phrase I think he used at  
9 one point, and particularly so in circumstances where  
10 the tribunal has the very considerable advantage of  
11 an expert economist, as we do in this case in the form  
12 of Dr. Bishop.

13 Secondly, he says that experts can be more  
14 straightforward in a more discursive environment, where  
15 there is a less adversarial cross-examination conducted,  
16 whilst still giving the parties the opportunity -- the  
17 experts the opportunity to explain their case, and it is  
18 particularly suitable for tax evidence.

19 He also says -- and this, for us, is the core  
20 advantage -- it ensures that issues are addressed issue  
21 by issue, which enables them to be dealt with in a much  
22 more comprehensive and coherent manner, because it  
23 facilitates the boiling down of the issues in a way  
24 which assists the tribunal to see what the answer is  
25 given by each expert on the relevant issue, rather than

1 opening up the evidence that is being given by the  
2 experts in accordance with the adversarial technique,  
3 which inevitably will carry with it an examination of  
4 issues not in quite the coherent, comprehensive way that  
5 you get in concurrent expert evidence, but in a way  
6 which is more focused on how it is that an examination  
7 will best ensure that the party's case is presented in  
8 the most advantageous manner in their interests.

9 It is said in that context that in fact the greater  
10 the volume and technical character of the expert  
11 evidence, the more appropriate it is to have concurrent  
12 expert evidence because the more important it is to try  
13 and ensure that one gets a proper structured approach to  
14 the answer issue by issue. Another advantage is said to  
15 be that it facilitates judgment writing, and that  
16 inevitably is the case, if the matter is addressed on an  
17 issue-by-issue basis rather than an expert-by-expert  
18 basis.

19 So those in broad terms are the principal advantages  
20 that are advanced by Mr. Turner, although I have not  
21 done them justice in the way -- his advocacy justice in  
22 the way I have described them.

23 I should perhaps mention just one other advantage,  
24 which we bear in mind, although we do not think in this  
25 particular case should be determinative, which is that

1 looking at the timetable, so far as the actual time  
2 spent on the experts actually giving their evidence is  
3 concerned, it appears to be the case that it is likely  
4 that cross-examination would take longer in tribunal  
5 hearing time than would be the case with concurrent  
6 evidence.

7 Now, that does not mean to say that the overall time  
8 will necessarily be any shorter because it is inevitable  
9 that the tribunal's own efforts in getting to grips with  
10 the focus of the concurrent evidence will itself take up  
11 tribunal time, but that is a rather different question  
12 to which I will turn.

13 Now, the disadvantages which have been impressed on  
14 us by the defendants are, first of all, the burden on  
15 the tribunal, and we accept that it is more burdensome  
16 on the tribunal for there to be concurrent evidence.  
17 But we wish to make clear that in the preparation for  
18 this particular case, it is not the tribunal's intention  
19 simply to prepare for the hearing of the case during the  
20 period of time within which the case is being heard. It  
21 is the tribunal's intention that over the course of the  
22 weeks before the hearing actually starts, all members of  
23 the tribunal will spend time in seeking to get to grips  
24 with the expert evidence.

25 So to the extent that that preparation time is not

1 factored into the timetable, we do not regard that as  
2 a factor that cuts against using concurrent evidence,  
3 and so that is an important factor, or was an important  
4 factor that was advanced by the defendants that we do  
5 not agree with.

6 It has also been said by the defendants that it is  
7 not a sufficiently focused process to have some form of  
8 concurrent expert evidence given, and it is better to  
9 have the merits of the position of each expert tested by  
10 cross-examination. For that purpose, there is a great  
11 deal to be said in accordance with the adversarial  
12 system, which this jurisdiction is highly familiar with,  
13 to have individualised cross-examination of each expert,  
14 because that really drills down into the questions which  
15 this tribunal needs to determine, on not just a broad  
16 issue-by-issue basis but a detailed issue-by-issue  
17 basis. We were taken by both parties to a number of  
18 issues that appear to arise in this case, in order to  
19 illustrate the nature of the issues which the experts  
20 are going to have to address and to explain to us why it  
21 was that in some respects, the experts were passing each  
22 other like ships in the night, and in other respects, it  
23 could be seen that there really had to be detailed  
24 cross-examination, so it was said, in order to ensure  
25 that the views that were being expressed by the relevant

1 expert were properly tested. This was necessary, so it  
2 was said, in order to ensure that we reached, at the end  
3 of the day, a fair and structured conclusion based on  
4 a fair and structured analysis of the evidence that was  
5 being given.

6 We see the force, of course, in an argument that  
7 cross-examination is an effective way of testing expert  
8 evidence in many instances, but we do not share the view  
9 in this case or the -- it is not our view that in this  
10 case, this is the best way of getting to the bottom of  
11 the evidence. In our view, we are much more likely to  
12 find ourselves in a situation where the views that are  
13 expressed by the experts are expressed in a coherent  
14 manner through an initial process of concurrent  
15 evidence.

16 However, we should stress that we recognise that  
17 this is one of those cases where the nature and  
18 complexity of the issues which arise means that it is  
19 particularly important that the defendants, if  
20 concurrent -- and indeed the claimant for that matter,  
21 if concurrent evidence is to be ordered, which we will  
22 order, are given an adequate opportunity at the end of  
23 the hot tub to engage in an appropriate amount of  
24 clarificatory cross-examination.

25 The reason we say that is not because we wish to

1 encourage cross-examination as a further method of  
2 testing the evidence in general terms, but we do  
3 recognise that the nature of the case is such that it is  
4 more possible than in some cases that a party's case is  
5 not adequately explored during the course of the  
6 hot tub.

7 So when we are considering at the end of concurrent  
8 evidence being given in relation to particular issues,  
9 and I will come on in a moment to the way in which we  
10 think the concurrent evidence-giving ought to be  
11 structured, we do think that it is appropriate for there  
12 to be adequate time built into the timetable to -- for  
13 there to be short structured cross-examinations if it is  
14 required in order for parties' cases to be put to the  
15 experts.

16 Now, I should just perhaps mention two other points  
17 that were made by the defendants which we have taken  
18 into account when considering whether concurrent  
19 evidence ought to be given. The first is a point was  
20 made about the joint experts' statement in this case  
21 effectively being a written hot tub or a hot tub in  
22 writing already, and we needed now to get on with  
23 cross-examination, a greater value in having a different  
24 approach.

25 We do not share that view. We still think that the

1 concurrent evidence-giving is -- will add very  
2 considerable value to the determination of the issues in  
3 this case.

4 The second point, and perhaps much more importantly  
5 than that, is the submissions that were made by  
6 Mr. Hoskins in relation to the rights of the defendants  
7 in a case of this sort, where very substantial sums of  
8 money are at stake. The expert evidence in this case is  
9 plainly not expert evidence which is peripheral to the  
10 issues. Indeed, it is at the very heart of the case.

11 He impressed upon us the importance and the  
12 significance of the fact that all four defendants were  
13 strongly opposed to hot-tubbing. We have borne that  
14 very carefully in mind, and indeed discussed it at some  
15 length, as to the weight that we should give that factor  
16 when deciding how to proceed.

17 All I think we wish to say about that is this. Our  
18 view is that in a case of this sort, the giving of  
19 concurrent evidence is actually a fairer way of  
20 proceeding to resolve in a just manner the issues in  
21 dispute between the parties, than the conventional form  
22 of adversarial cross-examination, so long as the lawyers  
23 have an appropriate opportunity to ensure that the case  
24 which they wish to put on behalf of their clients has  
25 been adequately explored during the hot-tub exercise.

1           But that does lead me on to an important point that  
2           we wish to make in relation to the procedure that we  
3           propose should be adopted in this case, which is this.  
4           It is not only at the end of the giving of the  
5           concurrent evidence that it is important that the  
6           parties have an opportunity to contribute to the proper  
7           getting to the bottom of the issues by some  
8           appropriately confined cross-examination. It is also  
9           before the process actually starts that it is important  
10          that the parties exercise both the right and, in our  
11          view, the obligation to participate in the process of  
12          identifying what the proper issues are, in order to  
13          minimise the prospect of them not being covered properly  
14          during the course of the concurrent evidence.

15          To that end, we think it is important that the  
16          defendants should now engage in the process of getting  
17          to grips with both the protocol and the annex which has  
18          been put forward in draft by the claimants, for the  
19          purposes of ensuring that the concurrent evidence-giving  
20          exercise is properly structured.

21          Now, can we say that as matters presently stand, we  
22          are not going to get into the question of criticising  
23          the defendants in any way for not participating to date.  
24          We think, for what it is worth, that it would have been  
25          better if they had, but we also understand that this is

1           contentious and adversarial litigation in which the  
2           defendants quite properly took the view that they ought  
3           not to participate at this stage until the question of  
4           the principle of evidence being given in this way had  
5           been determined. But now that we have determined that  
6           it should be given in this way, we would urge the  
7           defendants to be proactive and co-operative, as we are  
8           sure they will be, in resolving questions as to how it  
9           is that we -- the paperwork is put together.

10           So to that end, there are two aspects of the  
11           materials which have been put before the tribunal.  
12           There is the actual protocol itself that has been  
13           suggested by Mr. Turner, and there is also the annex  
14           which is to be -- both of which are to be found behind  
15           tab C, and we wish to make the following observations in  
16           relation to those two documents, although we do not  
17           think it is appropriate at this stage to give  
18           a direction as to the form it should take.

19           The first is if -- on the protocol that has been  
20           prepared, we envisage that there should be three  
21           separate hot tubs, one for each in paragraph 1, three  
22           separate hot tubs, one for the overcharge experts, the  
23           second one for the cost of funding experts and the third  
24           one for what we will call the passing-on experts, which  
25           will deal with regulatory issues as well.

1           The second point on the protocol itself is that we  
2 do not think that it is necessary or appropriate to  
3 include anything about arrangements in court under  
4 paragraph 3 at the moment, because it is inevitably  
5 going to be necessary to revisit this in the light of  
6 what happens on the pandemic and the arrangements to be  
7 made for the next PTR.

8           The third point that we make is that we consider  
9 that on the whole, paragraphs 4 to 8 of the protocol  
10 broadly reflects what we would expect to see. We do  
11 not, however, suggest that the defendants should not be  
12 able to make other suggestions in relation to the form  
13 it should take, and if anyone has any submissions that  
14 they wish to make now in relation to that in the light  
15 of the ruling that we have just given on the principle,  
16 we will certainly hear those submissions now.

17           But subject to that, we would direct -- we will be  
18 directing the parties to consult with each other and  
19 agree the form of the protocol, and if there is any  
20 disagreement, we will deal with it in written directions  
21 in due course.

22           So far as the annex itself is concerned, we do not  
23 propose to get into the detail of this because we would  
24 not wish to pre-empt or be thought to have pre-empted  
25 the defendants' ability to make suggestions as to what

1           should be included by way of issues in the form of the  
2           annex. But we will simply say this: that the structure  
3           which the annex takes is, broadly speaking, what we  
4           would have expected to see, and we think it is helpful  
5           to present the annex in three separate parts and we  
6           think it is -- as I think I have already made clear, the  
7           experts who are required to -- or who will be  
8           participating in the concurrent -- giving of concurrent  
9           evidence under each of the three broad issues will be  
10          the experts who have actually given evidence in their  
11          reports on those issues.

12                 So far as timetabling is concerned, at the moment we  
13          have in mind that the parties should use their best  
14          endeavours to agree both the form of the protocol and  
15          the form of the annex by 4 September, and that, as  
16          I say, extends to both the protocol and the annex  
17          itself. We would hope that the annex should not extend  
18          to more than ten pages. We do not see any reason why it  
19          should. That, I should emphasise, is ten pages in  
20          addition to the protocol; I am not suggesting it is ten  
21          pages as a document altogether, but ten pages in  
22          addition to the protocol.

23                 The only other thing I wanted to say at this stage,  
24          subject to any response that the parties may have,  
25          I think I have said all I need to say about the nature

1 of the cross-examination which we will in principle  
2 allow at the end of the giving of concurrent evidence,  
3 but perhaps I can just re-emphasise, it is, as always  
4 seems to be the case in relation to -- evidence-giving  
5 of this sort, for the purpose of clarifying the way in  
6 which points have been expressed by experts. It is not  
7 intended to go any further than that.

8 That is the first point. The only other point  
9 I want to make is in relation to the teach-in, or the  
10 suggestion of a teach-in. We think that it would be  
11 helpful. What we would find helpful is a short teach-in  
12 from each expert at the beginning of each hot tub. But  
13 we do not have a very lengthy teach-in in mind. The  
14 sort of thing we had in mind, although we are open to  
15 the parties' reaction to this, is 20 minutes from the  
16 claimant's experts and about twice that time for all  
17 four of the defendants' experts.

18 The reason we put it like that is because we  
19 anticipate that the defendants' four experts will  
20 consult together to deal -- to ensure that they  
21 distribute points in common between them. We quite  
22 appreciate in saying that that the analysis that has  
23 been adopted by the defendants' experts are different on  
24 a number of issues, but there is also a fair bit of  
25 common ground.

1           So that is our ruling in relation to concurrent  
2 evidence.

3           Mr. Turner, is there anything you want to say in the  
4 light of that?

5           Your microphone has been turned off.

6                           Submissions by MR. TURNER

7       MR. TURNER: My Lord, no, I am grateful. I think, on behalf  
8 of all the parties, this gives us a very good basis for  
9 taking this forward now, and we will all endeavour to be  
10 constructive as well as proactive. I would like to  
11 speak to my team about the proposed structure for the  
12 teach-in, but my initial reaction is that this is  
13 appropriate, even if the defendants collectively have  
14 twice as long as the claimant does.

15           One of the concerns was, for example, if you take  
16 the overcharge methodology, you have four separate  
17 individuals all saying that there was an overcharge of  
18 nothing, and one saying: for my own reasons, I consider  
19 that there was an overcharge of up to 20%; but if there  
20 is -- if we are talking about sessions that are really  
21 this contained, as you have indicated, then my initial  
22 reaction is that this will work.

23       THE CHAIRMAN: Yes, thank you. I should perhaps have said,  
24 I think one thing I did not say when I was making --  
25 giving my sort of shortened reasons was the time -- the

1 timing point as to what sort of length we anticipate the  
2 concurrent evidence lasting for.

3 Now, this is -- can I just say this is the  
4 tribunal's view based on two things. One, its own  
5 feeling about the time period, but it also reflects what  
6 the parties have said in their own timetable. We felt  
7 that overcharge three days, cost of funding three: days,  
8 passing on two days, felt right -- about right.

9 Now, taking into account what you had said,  
10 Mr. Turner, in your submissions about the timetable that  
11 you thought would be required, and also the fact that we  
12 probably have in mind the possibility of a little bit  
13 more cross-examination than you perhaps ideally would  
14 have wanted, and that is factored into our thinking on  
15 timing.

16 MR. TURNER: Yes. If I got that correctly, overcharge  
17 three days, it is not very different from what we had in  
18 mind.

19 THE CHAIRMAN: No.

20 MR. TURNER: That would leave two days in the remainder of  
21 that week for supplemental questions from counsel. It  
22 is our view that that should be adequate, particularly  
23 in circumstances where all the defendants say that with  
24 a full cross-examination, they would only want  
25 Dr. Jenkins there to be cross-examined by all of them in

1           their timetable for two days.

2       THE CHAIRMAN: I do not -- sorry, I do not think -- no,  
3           I said overcharge three days, and that is the entirety  
4           of overcharge, was what I had in mind.

5       MR. TURNER: That is right, yes.

6       THE CHAIRMAN: Then the entirety of cost of funding three  
7           days, and then the entirety of passing on two days. So  
8           that would involve both the concurrent evidence and any  
9           supplementary questions which were required.

10      MR. TURNER: I see.

11      THE CHAIRMAN: That is what I had in mind. That is what we  
12           had in mind. But can I say, we do not at the moment --  
13           we are content at the minute for you to tell us that  
14           that does not work in the light of what I have -- what  
15           we have ruled. The reason I put it like that is that we  
16           do not want this to be over-driven by timetable  
17           constraints, given that this case has actually got  
18           slightly more time than I think the parties need --  
19           thought they needed at the moment. So what is important  
20           is that, given the parameters that we have set as to the  
21           exercise which should be carried out, the parties are  
22           content that they have got enough time to deal with it.

23      MS. DAVIES: My Lord, can I immediately say in relation to  
24           that, we will want to make some submissions about those  
25           times. I realise, however, it is just past 1 o'clock.

1 THE CHAIRMAN: Yes.

2 MS. DAVIES: But --

3 THE CHAIRMAN: Can you just give us an indication as to what  
4 your submissions may be?

5 Submissions by MS. DAVIES

6 MS. DAVIES: Yes, our submission will be that the time  
7 allowed for the overcharge hot tub of three days would  
8 not be sufficient.

9 THE CHAIRMAN: Right.

10 MS. DAVIES: The extent of the issues between the different  
11 parties, and bearing in mind what my Lord has also said  
12 about cross-examination, my Lord may recall, for  
13 example, in the *ABB* case -- *National Grid v ABB* case  
14 on insulated switchgear, four days were being set aside  
15 for a hot tub on overcharge, and there was one less  
16 expert in that case. So in fact our suggestion in  
17 relation to that was going to be in any event it should  
18 be a five-day period for that one.

19 THE CHAIRMAN: I see. Because I -- I do not think we had  
20 understood that on timetabling, the defendants had  
21 specific positions in relation to what Mr. Turner had  
22 said in his timetable on hot-tubbing.

23 MS. DAVIES: We had not developed them in our skeletons in  
24 light of our opposition to the principle, but when we  
25 were discussing timetable, I was going to make the point

1           that we thought -- in fact two-and-a-half days that have  
2           been allowed in Mr. Turner's skeleton for the overcharge  
3           hot tub was insufficient. That was -- and then we have,  
4           of course, heard what my Lord has said in relation to  
5           the ability on the part of the defendants where  
6           necessary to cross-examine.

7           THE CHAIRMAN: Yes.

8           MS. DAVIES: Now, bearing all that in mind, and there has  
9           been some discussion between the defendants about this,  
10          not in relation to the last point but the former, we  
11          would suggest we should allow a five-day period for the  
12          overcharge hot tub.

13                 The good news, however, is certainly from my  
14          perspective, and I have not had a chance to consider  
15          this -- to discuss this with the other defendants'  
16          counsel yet, the financing hot tub in our view certainly  
17          would not require anything approaching three days. The  
18          nature of the issues in relation to the cost of  
19          financing are a mix of legal and expert, and the actual  
20          disputes between the experts in relation to cost of  
21          financing could be dealt with in a shorter hot tub, and  
22          I will just need to discuss with others whether we bring  
23          that down to two or perhaps shorter.

24          THE CHAIRMAN: Right.

25          MS. DAVIES: The pass-on hot tub, we would agree three days.

1 THE CHAIRMAN: We thought two, actually, for that, but if  
2 you think -- you think it three, do you?

3 MS. DAVIES: Well, sorry, apologies, I cannot read my own  
4 handwriting obviously. The pass-on hot tub is likely,  
5 in our view, to be -- need to be longer than the  
6 financing.

7 THE CHAIRMAN: I see. Okay.

8 MS. DAVIES: Not least because of a number of different  
9 permutations that have come up recently.

10 THE CHAIRMAN: Yes, yes. I mean, I do not -- I do not want  
11 you to go away from what I said, Ms. Davies, thinking  
12 that there will be material time available for you to  
13 cross-examine, because there will not be. I think we  
14 need to discuss -- I mean, there will be enough to  
15 enable fairness to be done, and that was the important  
16 point we made -- we wanted to make, but I think we need  
17 to concentrate on how long we think the hot tub is going  
18 to take.

19 MS. DAVIES: Well, my -- yes, I understand that, my Lord,  
20 but of course there are four separate defendants.

21 THE CHAIRMAN: Yes.

22 MS. DAVIES: Even allowing an hour to each of the  
23 defendants' counsel to cross-examine is the better part  
24 of a court day. So that is why I am suggesting overall,  
25 if one looks at a five-day period for the overcharge

1 hot tub plus cross-examination, we may finish slightly  
2 earlier than that, but actually that seems a sensible  
3 allowance in this timetable, rather than seeking to  
4 start the next hot tub at some point on day 5. It seems  
5 better to allow day 2.

6 THE CHAIRMAN: Okay. I understand your position and we --  
7 that is helpful, because we can then consider that over  
8 the short adjournment as well.

9 MS. DAVIES: My Lord, as I said, I have not had a chance yet  
10 to discuss all this with the other defendants. I was  
11 going to be taking the lead on timetabling, which is why  
12 I interjected.

13 THE CHAIRMAN: Yes.

14 MS. DAVIES: But because we have only just heard my Lord's  
15 ruling, we obviously have not had a chance to discuss  
16 the implications of that.

17 THE CHAIRMAN: Quite. All right. Well, we will adjourn  
18 then again until 2.05 pm, and then at that stage,  
19 I think we will deal with the -- I do not know whether  
20 you had any -- you made any progress, did you, on  
21 further expert evidence or not, which is the final  
22 contentious point, I think.

23 MR. TURNER: I am afraid not, my Lord. There was  
24 a discussion, but it will be something that you will  
25 have to deal with.

1 THE CHAIRMAN: Okay. All right. So --

2 MR. HOSKINS: My Lord, sorry, I would like to make  
3 a submission to you on the best endeavours to agree the  
4 protocol and the annex.

5 THE CHAIRMAN: Yes.

6 MR. HOSKINS: I can either do it very quickly now, or we can  
7 do it when you come back.

8 THE CHAIRMAN: Can you just tell us what it is -- no,  
9 I think it is better if you make the submission now,  
10 because we can then discuss it over lunch.

11 Submissions by MR. HOSKINS

12 MR. HOSKINS: Fine. It is very quick. You suggested or you  
13 directed 4 September.

14 THE CHAIRMAN: Yes.

15 MR. HOSKINS: I would ask for that to be Friday,  
16 11 September for two reasons. One, the obvious one, the  
17 holiday period, and I am not saying we are all away for  
18 all of that time, but different people are away that  
19 need to be involved at different times over that period.  
20 Secondly, 4 September is also the deadline for the tax  
21 materials and the amended defences. So there is a lot  
22 for each of the defendant teams to be dealing with on  
23 that day, and that is why I ask simply for the extra  
24 leeway of one week.

25 THE CHAIRMAN: Okay. Does anyone else want to say anything

1 about that?

2 MS. DAVIES: We would support that request, my Lord.

3 THE CHAIRMAN: All right. We will consider that over lunch.

4 2.05 pm.

5 (1.07 pm)

6 (The luncheon adjournment)

7 (2.07 pm)

8 THE CHAIRMAN: Right. Has everyone joined? I hope so. So  
9 we have got -- I think everyone is here. Right, okay.

10 So where are we on the agenda, Mr. Turner? We had  
11 got to --

12 Submissions by MR. TURNER

13 MR. TURNER: I think that there may be a couple of  
14 concluding remarks on the hot tub point --

15 THE CHAIRMAN: Yes.

16 MR. TURNER: -- but no more than that. Then you had asked  
17 the parties to liaise about the contentious issue of new  
18 analysis.

19 THE CHAIRMAN: Yes.

20 MR. TURNER: I indicated before the short adjournment that  
21 we have crystallised our positions but have not agreed.

22 THE CHAIRMAN: Yes.

23 MR. TURNER: So I do not think either side apprehend it is  
24 going to take that long to explain it to you.

25 THE CHAIRMAN: Yes.

1 MR. TURNER: But it may be sensible for that to be dealt  
2 with next. After that, the only remaining issues are  
3 small matters of logistics.

4 THE CHAIRMAN: Yes, and timetabling. Good, okay. Well, let  
5 us -- so what are you suggesting, that we move on to the  
6 question in relation to the new evidence and then wrap  
7 up the hot tub, or do you want to wrap up the hot tub  
8 first?

9 MR. TURNER: Wrapping up the hot tub first would, I think,  
10 be best.

11 THE CHAIRMAN: Yes.

12 MR. TURNER: It is only a question of a minute or two.

13 THE CHAIRMAN: Okay, let us do that, then.

14 MR. TURNER: What happened was that you had set out how  
15 provisionally the tribunal was looking at the timings.

16 THE CHAIRMAN: Yes.

17 MR. TURNER: Then Ms. Davies interjected in order to give  
18 the defendants' position.

19 THE CHAIRMAN: Yes.

20 MR. TURNER: I should just give ours.

21 THE CHAIRMAN: Yes, thank you.

22 MR. TURNER: If it is possible for you, please, to call up  
23 our draft timetable, which is at {A/2/29}.

24 THE CHAIRMAN: Yes. Yes.

25 MR. TURNER: Now, I am not sure this is the right one.

1 MS. DAVIES: 27, you mean.

2 MR. TURNER: Well, if you go -- well, I am looking for my  
3 draft timetable.

4 MS. DAVIES: Yes, that is at page 27.

5 MR. TURNER: Thank you. If we go back two pages {A/2/27}  
6 then, there we are, thank you very much. What we have  
7 here was the expert evidence in the two rows at the  
8 bottom.

9 THE CHAIRMAN: Yes.

10 MR. TURNER: Week 5 beginning 30 November and week 6.

11 Translating this into what your Lordship said about  
12 the tribunal's provisional views, we had overcharge  
13 there for, as you can see, roughly two and a half days.  
14 We would agree that three days can be set aside, or even  
15 longer. The important point is that that entire week  
16 can be used for the overcharge session, whether it is  
17 three days or even spills over a bit longer, there is  
18 sufficient time in that week to get it done with the  
19 kind of sweep-up cross-examination that is appropriate  
20 for a hot tub. I hope that would not be contentious.

21 THE CHAIRMAN: No. I think I should just mention one point;  
22 we were going to come on it in relation to timetabling.  
23 That week of 30 November, and it may be none of this  
24 matters too much from -- but I do not know, we will wait  
25 to hear, there are, I am afraid, two days that week when

1 the tribunal cannot sit --

2 MR. TURNER: Yes.

3 THE CHAIRMAN: -- which are the Tuesday and the Friday and,  
4 I mean, I had not -- I was going to deal with -- we have  
5 got three days across the duration of the trial when the  
6 tribunal cannot sit, and two of them happen to be in  
7 that week.

8 MS. DAVIES: My Lord, can we just ask which the other day is  
9 because --

10 THE CHAIRMAN: Yes, it will help you. I am sorry, we should  
11 have given you this information before. The first day  
12 is Friday, 6 November which is the first day -- the last  
13 day of the first week of the trial, and the other  
14 two days are Tuesday, 1 December, and Friday,  
15 4 December.

16 MR. TURNER: Thank you.

17 THE CHAIRMAN: Apart from that, the tribunal can sit for the  
18 duration.

19 MR. TURNER: Thank you.

20 Now, focusing again -- and we will take account of  
21 that, but the important point is that the overcharge  
22 hot tub and any sweep-up questioning ought to be  
23 accommodated within a week.

24 THE CHAIRMAN: Yes.

25 MR. TURNER: So we can envisage that, however it is

1           organised.

2           THE CHAIRMAN: Yes.

3           MR. TURNER: So far as cost of funding is concerned, we  
4           agree with what Ms. Davies said. Three days does seem  
5           to us to be too long, given the nature of the issues in  
6           that case. We had in mind that those issues can be  
7           addressed with a day's hot tub with around half a day of  
8           supplementary questioning from counsel. But even if it  
9           is a little bit longer, a two-day cushion seems to us to  
10          be about right.

11          THE CHAIRMAN: Right.

12          MR. TURNER: That leaves the regulation, passing on and  
13          quantum points, and there we had in mind that that would  
14          be likely to occupy perhaps three days in total, of  
15          which two days would be a hot tub, or maybe a little bit  
16          more, with the sweep-up questioning after that.

17                 Therefore, if you combine the cost of financing, all  
18          told, and the regulation, again, it fits within a single  
19          court hearing week.

20          THE CHAIRMAN: Yes. Okay. So actually there is  
21          a considerable amount of agreement between you, which is  
22          satisfactory from the tribunal's point of view, because  
23          our position, to be honest with you, Mr. Turner, was  
24          going to be that if there was one party who felt that  
25          a particular period was appropriate to set aside, and we

1           took the view that that was something that was  
2           a reasonable position to maintain, we were going to  
3           direct that. We are not going to over-impose  
4           restrictions on the expert evidence in this case.

5           So what you are really saying is that we have  
6           a total of two working weeks for the expert evidence,  
7           overcharge for the first, and financing or cost of  
8           funding, and pass-on for the second?

9           MR. TURNER: Yes.

10          THE CHAIRMAN: All right. Well --

11          MS. DAVIES: My Lord, sorry.

12          THE CHAIRMAN: Yes, Ms. Davies.

13                               Submissions by MS. DAVIES

14          MS. DAVIES: In relation to that, it does indeed sound that  
15               happily this is an area where we have reached a large  
16               measure of agreement. There is just one point I wish to  
17               flag. My learned friend Mr. Turner's proposal in  
18               relation to hot-tubbing has a break in between the  
19               overcharge hot tub for additional reading and then what  
20               he was then proposing as the second hot tub, which was  
21               cost of financing and regulation, et cetera.

22          THE CHAIRMAN: Yes.

23          MS. DAVIES: There is a concern on the part of those  
24               defendants who have one expert who is dealing with  
25               everything, which is my client, ABB and Safran, that

1           having a two-week continuous hot tub would impose really  
2           quite an unfair burden on those experts in contrast to  
3           the other parties where they have different experts  
4           dealing with it. So we would -- obviously we are in the  
5           tribunal's hands as to how it wants to structure the  
6           timetable to give its -- time for preparation, but we  
7           would ask for the idea that there be a break between  
8           each hot tub to be respected for that reason, even if  
9           only a day in between, will actually just assist.

10        THE CHAIRMAN: Yes. Well, I think so far as the tribunal is  
11        concerned, having a break between each hot tub, even  
12        though most of the prep will already have been done, it  
13        is useful to sort of take stock and so on. So I think  
14        we would be amenable to that.

15        MR. HOLMES: Some of it may happen naturally with the days  
16        on which the tribunal cannot sit, particularly the 4th.

17        THE CHAIRMAN: Yes.

18        MR. TURNER: We agree with that, my Lord. We think that is  
19        very helpful and constructive.

20                The only final rider that I would enter is that in  
21        allowing the parties sufficient time, I recall the  
22        warning that Mr. Justice Roth has made in previous  
23        exchanges about a hot tub, that one does not want to  
24        combine a hot tub with full cross-examination, and that  
25        the cross-examination is meant to be supplementary, and

1           you will have seen that at least he has kept it very  
2           controlled for that reason.

3       THE CHAIRMAN:   Yes, yes.

4       MR. TURNER:    So, my Lord, the next area was the new  
5           evidence.

6       THE CHAIRMAN:   Yes.

7                        Submissions by MR. HOSKINS

8       MR. HOSKINS:   Sorry, there is still one small point on  
9           hot tub, my Lord, I think I begged your mercy and  
10          I think all the other defendants likewise begged mercy  
11          to 11 September instead of 4 September for agreeing the  
12          protocol and agenda.

13      THE CHAIRMAN:   Yes, you are quite right, Mr. Hoskins, and  
14          I did not understand anyone to disagree with that and  
15          mercy is given.   So the 11th is the date.

16      MR. HOSKINS:   That has made a lot of people very happy, my  
17          Lord.   Thank you very much.

18                        Submissions by MR. TURNER

19      MR. TURNER:    So, my Lord, I think we now move on to the new  
20          evidence or analysis point.

21      THE CHAIRMAN:   Yes.

22      MR. TURNER:    I will try to summarise where the parties are  
23          on this.   The defendants' perspective is that the  
24          claimants have -- the claimants' experts in the joint  
25          statement process have produced certain elements of new

1 analysis which, by the time of finalising it in the  
2 statement, they had not had sufficient time to deal  
3 with. They therefore say that in justice, they need  
4 time to deal with that. They do not restrict themselves  
5 to the points that they have mentioned in their skeleton  
6 arguments, where Prysmian and NKT have set out a number  
7 of concerns. They say that they are still looking at  
8 what may be new analysis, which they need time to deal  
9 with.

10 The proposal that was made was that they should  
11 continue to do that and responsibly put in any further  
12 evidence that they consider to be strictly necessary,  
13 because they have not had the time to deal with the  
14 claimants' experts' points, by 4 September. At that  
15 point, National Grid will see it and can then object and  
16 bring the matter before the tribunal if it says that  
17 some of this should not have been produced, and is  
18 itself unmeritorious, and that that will ensure  
19 fairness.

20 Our perspective is different. I explained that we  
21 are now at a point at the very end of July where the  
22 trial is only a few months away. You have heard from  
23 Mr. Hoskins that for many participants in this, August  
24 is a difficult period. There is only one month,  
25 essentially, and a little bit longer after the August

1 break, before we have the skeletons for the trial.

2 There are other things happening as well, as you have  
3 heard.

4 We say that if the defendants' position is that they  
5 would be prejudiced because something new has been put  
6 in that they have not been able to deal with, in  
7 principle it is a fair point, but in practice they  
8 really should have been able to say what these areas  
9 are. They have had time with their experts during the  
10 intensive process to tell them if there are such points,  
11 and their skeleton has come up with a number which we  
12 will say are, when you look at them, you will be  
13 satisfied are totally artificial.

14 There is on the claimant's side the potential for  
15 huge injustice and prejudice the other way, because if  
16 you give an open-ended permission to the defendants to  
17 file new reports and new material, which may itself  
18 contain what we consider to be new analysis, this is  
19 very dense stuff. It will land, according to them, on  
20 4 September and then the claimants are in a very  
21 invidious position, having to object to it or leave it  
22 to stand in the few intensive weeks before the  
23 skeletons.

24 What if it does contain new material analysis, and  
25 in any event, is there to be a further agree or disagree

1 process? If you are satisfied, therefore, that the  
2 process has been orderly and that there is nothing of  
3 substance in the points that have been raised by the  
4 defendants in their skeleton arguments in practice,  
5 which we are satisfied is correct, then you should not  
6 accede to this point.

7 For that reason the two sides have discussed it but  
8 cannot agree.

9 THE CHAIRMAN: So does this point boil down to  
10 a disagreement as to whether there are in fact and by  
11 way of genuine analysis new points on which -- because  
12 on the one hand, the defendants say that there are new  
13 points, and presumably if they are right on that, the  
14 principle of a reply being put in is accepted, but you  
15 say that this is all artificial because it is designed  
16 to put you in a position where you are faced with  
17 a whole load of responsive material too close to the  
18 trial, which is not genuinely responsive material. Is  
19 that basically what it boils down to, this point?

20 MR. TURNER: With a qualification. All the experts have put  
21 in new material and new points, and there is new  
22 analysis. You will recall that we attached to our  
23 skeleton a short schedule of material from the  
24 defendants on the overcharge side --

25 THE CHAIRMAN: Yes.

1 MR. TURNER: -- which came in in the process.

2 THE CHAIRMAN: This was behind B, was not it? Yes.

3 MR. TURNER: Yes. So you will see that this is what we on  
4 our side faced, and therefore, may I just illustrate  
5 this perhaps most easily if we could have up on the  
6 screen {E/17/69} which we looked at yesterday.

7 You may recall that one of the issues concerned the  
8 importance of a recent National Grid procurement  
9 exercise for this type of cable called fluid-filled in  
10 which a Korean supplier came in with a price. The  
11 claimants say this should be taken as a competitive  
12 benchmark. The defendants' experts disagreed.

13 But the important point is when you look at this  
14 row, if you would turn over the page, please, to 70,  
15 page 70 {E/17/70}, that the document reveals the way in  
16 which the expert process happened. So if you look at  
17 Dr. Helen Jenkins' column in the second paragraph, it  
18 says:

19 "In Mr. Davies' Annex to the Joint Statement he has  
20 critiqued the conclusions I draw from [this] ...  
21 Evidence."

22 So you see there was new evidence there and then  
23 Dr. Jenkins says:

24 "I disagree with his concerns for three reasons."  
25 She sets those out. In the last paragraph in her

1 column, she says specifically:

2 "Mr. Davies also presents some further analysis  
3 where he compares [these new] ... prices against  
4 post-Cartel [cross link polyethylene] cables in his  
5 Annex to the Joint Statement. I have presented  
6 a responding analysis in ... my Annex ..."

7 Then if you turn the page to 71 {E/17/71} and look  
8 at the Prysmian expert, Davies, he says -- this is  
9 page 71 for the Magnum to catch up, he says at the top  
10 in the fifth column:

11 "Dr. Jenkins has raised three criticisms of my  
12 analysis. I find her arguments unconvincing for the  
13 following reasons ..."

14 This illustrates that what has happened is that  
15 there has been, since the reply reports when everybody  
16 saw the other experts' critique of their original work,  
17 an engagement where on all sides they did produce  
18 certain new analysis. It was a long process and you see  
19 from this that they had an opportunity generally to  
20 liaise, and the new analysis where it appears is  
21 generally synthesised in the short annexes to the joint  
22 statement on all sides.

23 The real question is therefore not whether there is  
24 new analysis, because they have all done it. The real  
25 question is whether the claimants' expert, in the ways

1           that they have outlined, has produced new evidence that  
2           in the time available, came too late for the experts on  
3           the other side to be able to deal with. That is the --  
4           that is the contention.

5           In support of their contention, they have referred  
6           to a number of specific examples in their skeleton  
7           arguments, NKT and Prysmian essentially. We have looked  
8           at those. We have spoken to our experts more generally,  
9           and we do not think that there is substance in them, and  
10          we can show you why.

11          The defendants' position now is that those are in  
12          any event not exhaustive, and that they are still  
13          looking to see if there are other points that they may  
14          need to respond to with further reports, and they  
15          suggest the long-stop for doing so of 4 September.

16   MS. DEMETRIOU: So sorry, but I just (inaudible).

17   THE CHAIRMAN: I am sorry, Ms. Demetriou, we cannot hear  
18          you.

19   MS. DEMETRIOU: Ah, can you hear me now?

20   THE CHAIRMAN: Yes, a little bit better.

21   MS. DEMETRIOU: I am so sorry to interrupt, but it is not  
22          our position now. We made it very clear in our skeleton  
23          that the examples were non-exhaustive, and that is  
24          because there was a lot of material that we were working  
25          through, and so this is not a change of position.

1 I just wanted to make that clear.

2 MR. TURNER: Yes, that is a point well taken.

3 We nonetheless see those as being the  
4 crystallisation, which should have been clear by now, of  
5 what some of their best points are, and the reason why  
6 it is important is because this process has been  
7 extremely intensive and costly and has resulted, as you  
8 see, in these very long and detailed documents. If the  
9 defendants are permitted to produce further evidence  
10 again, and keep this process going without a clear,  
11 proven justification, that is both disorderly and it is  
12 unfair to the claimants, and that is why we say that you  
13 should not accede to their suggestion that there should  
14 be an open-ended process, and we should look at the  
15 specifics that they have raised.

16 THE CHAIRMAN: Can I make one possible suggestion? If  
17 one -- if a direction were to be given that there is  
18 a final opportunity which may or may not be the end of  
19 August or the beginning of September, that -- and that  
20 as part of the process of putting in any further  
21 material, the experts would be required to justify by  
22 way of certification the reason why they did not  
23 actually deal with the point first time round, and so  
24 that it is a genuine responsive point which would be  
25 part of their obligation to the court to -- in the light

1 of the duties that they owe to the court, to give  
2 a genuine explanation as to why this is a genuine reply  
3 point; would that go some way towards ensuring that this  
4 process is brought to absolute finality, and that, as  
5 a matter of professional responsibility, the witness  
6 concerned is also undertaking an obligation to explain,  
7 in order to justify the new material being put in, why  
8 it was not put in before?

9 MR. TURNER: Yes, I understand the point. It goes some way,  
10 but it does not solve the problem. It does not solve  
11 the problem because even if accompanied by such  
12 a professional declaration, the expert in question  
13 produces a new analysis themselves which, when the  
14 claimants see it, they consider involves a need for them  
15 to deal with that. We are very close to the trial and  
16 I cannot overstate how exhausting and intensive this  
17 sort of process is.

18 THE CHAIRMAN: Yes.

19 MR. TURNER: That is why, although I do fully understand  
20 that approach, given where we are and given the many  
21 exchanges that have now taken place between the experts,  
22 the better approach would be for the -- for any party to  
23 say, "We can show you that here is an issue where we  
24 have not had a fair opportunity and we should be given  
25 an opportunity", and that that should be the basis of

1           any further permission.

2           THE CHAIRMAN: So how do you envisage that process going  
3           forwards? I mean, are there going to be -- is there  
4           going to be an articulation? Are you expecting us to  
5           rule on an issue-by-issue basis whether or not this is  
6           truly a reply issue?

7           MR. TURNER: We are, because there are a number of points  
8           taken in the skeletons, a fairly small number of points.  
9           Ms. Demetriou says they are non-exhaustive because we  
10          are still continuing to look, but by now they should  
11          have come up with the points that need to be addressed.  
12          We can shine a clear light on them in short order.

13          THE CHAIRMAN: Do you want us to do that now?

14          MR. TURNER: Ideally, yes.

15          THE CHAIRMAN: But what is the point in embarking on that  
16          exercise if it is a non-exhaustive process --  
17          non-exhaustive examples anyway?

18          MR. TURNER: Because it should then be -- the point is  
19          because that -- they may be taken to have brought  
20          forward the points that they see as the major points  
21          already. They have spoken to their experts, they have  
22          had time and they have produced their skeleton  
23          arguments. Between the time of the skeleton arguments  
24          and this hearing, you have nothing further. It should  
25          therefore be for them, if they have any further specific

1 points, to raise them.

2 I say this because the expert process ought to be  
3 closed now as we are in the final stages of preparation  
4 for the trial itself.

5 THE CHAIRMAN: Well, do not misunderstand me, Mr. Turner,  
6 I entirely understand that submission and the tribunal  
7 is not doing anything -- not going to do anything which  
8 is going to facilitate the putting in of extra material  
9 that is not 100% justified, and what we are really  
10 trying to identify is how best that process can be  
11 controlled if it is necessary to be conducted.

12 MR. TURNER: Yes.

13 THE CHAIRMAN: At the moment I am not -- speaking entirely  
14 for myself and I am not sure that we as members have  
15 reached a view yet on this collectively, but I am not  
16 myself sure that simply saying stop now, full stop, is  
17 the fair answer. I do not -- and I am not sure we are  
18 going to get a sufficient handle on that, to be frank,  
19 in relation to -- in a comprehensive way in relation to  
20 the issues because what we have got to try and do is  
21 craft a solution to this problem that is capable of  
22 being applied across the board, and I think what you are  
23 really inviting us to do is say: right, end of story in  
24 relation to expert evidence, under no circumstances can  
25 any more be put in.

1 I am quite uncomfortable that we are going to be  
2 able to get to that conclusion today.

3 MR. TURNER: As matters stand, if you are satisfied, after  
4 looking at the points in their skeleton, that they have  
5 raised nothing of substance --

6 THE CHAIRMAN: Yes.

7 MR. TURNER: -- then, in my submission, the tribunal should  
8 be wary about giving a permission on a general basis  
9 for -- and in that case, I would say it should be  
10 a general permission, but giving a permission on  
11 a general basis for all parties where they feel that  
12 there is further material that they need to address that  
13 they have not had the chance to do so, to put something  
14 in by 4 September, because what I apprehend will happen  
15 is that you will then be faced with material which one  
16 side or the other says itself contains prejudicial new  
17 material and which they cannot deal with.

18 THE CHAIRMAN: Well, we all know in a litigation context  
19 what the concept of responsive or reply material is. It  
20 is just that. There is a very clear distinction, both  
21 in expert evidence terms and in argument, submission  
22 terms, between a response that itself raises a new point  
23 and a response that is genuinely responsive. One can  
24 normally identify the distinction without too much  
25 difficulty, certainly lawyers can. I mean, it may be

1 more difficult for experts, I do not know.

2 I suspect I speak for the other members of the  
3 tribunal when I say that we simply are not interested in  
4 anything other than a genuine responsive reaction,  
5 subject -- subject obviously to hearing what the  
6 defendants may say on this point. But that would be my  
7 very clear provisional view.

8 I hear what you say as well about the need to avoid  
9 a generalised permission. What I am keen to ensure that  
10 we identify, though, is a practical means of identifying  
11 whether there is indeed a need, in order to deal with  
12 this case justly, to give people an opportunity to  
13 produce what is a genuine response to a new point, and  
14 at the moment I am not quite sure how in practical terms  
15 we are going to achieve that in a comprehensive manner  
16 today.

17 MR. TURNER: Yes.

18 THE CHAIRMAN: I mean, part of the problem flows from the  
19 sheer size of the relatively recently produced joint  
20 statement. I mean, that, I suspect, is part of the  
21 problem.

22 MR. TURNER: May I -- may I make a suggestion which is to  
23 merely illustrate the difficulties that allowing new  
24 evidence in on that basis may cause, simply by reference  
25 to one of the points that has been raised against me, so

1           you can see how this could cause problems --

2       THE CHAIRMAN: Right.

3       MR. TURNER: -- before you reach a final view.

4       THE CHAIRMAN: Yes.

5       MR. TURNER: I will just take one of them. This is one that

6           I have discussed particularly with Ms. Demetriou. If

7           you turn up NKT's skeleton argument at {A/4/13}.

8       THE CHAIRMAN: Yes. This is the non-exhaustive examples?

9       MR. TURNER: Yes. So here are the non-exhaustive examples.

10           In the first of those -- there are three of them. The

11           first of them says that:

12                 "In relation to pass-on, Mr. Noble has introduced

13           material new evidence in relation to the regulatory

14           allowances for [tax] ..."

15       THE CHAIRMAN: Yes.

16       MR. TURNER: Pausing there, we touched on that yesterday.

17           This is the regulator giving the company allowance to

18           pay its tax bill:

19                 "NKT's expert ... Mr. Warren, understands that

20           Mr. Noble now considers that National Grid's regulatory

21           allowances for [tax] ... were lower than they would have

22           been in the absence of the cartel ..."

23           Then he refers to two paragraphs of the joint

24           statement:

25                 "This is quite separate from the question of how the

1           incurring of any overcharge ... affected its corporation  
2           tax burden, and appears to be an entirely new (and  
3           unpleaded point) point, with an impact on the overall  
4           damages claimed in the region of £15-30m. It is  
5           essential that NKT is in a position to understand the  
6           relevance of this new evidence to National Grid's case."

7           So it wants an order.

8           Let me show you what this comprises. If we go to  
9           the joint experts' statement -- question they refer to,  
10          it is at {E/18/87}.

11         THE CHAIRMAN: Yes.

12         MR. TURNER: So that is question 49 and if you turn over the  
13         page {E/18/88} to 88 --

14         THE CHAIRMAN: Yes.

15         MR. TURNER: -- you see the discussion and Mr. Warren, in  
16         the fourth column, says:

17                 "Mr. Warren understands that Mr. Noble has changed  
18                 his approach to assessing [tax] ... and now considers  
19                 that a fourth adjustment is required ... to include  
20                 a further group of cash flows relating to the regulatory  
21                 allowances for [tax] ... Mr. Warren understands  
22                 Mr. Noble's new approach to be that, because of any  
23                 overcharge ... regulatory allowances for [tax] ... were  
24                 lower than they would have been ..."

25          So there is the point crystallised. You see how

1 Noble addresses this in the first -- or rather the  
2 second column there, the first populated column. He  
3 says:

4 "Mr. Warren suggests that all the tax adjustments  
5 ... should have been applied to [various groups] ...  
6 However, I disagree with this."

7 He explains his position. Then he says, seven lines  
8 down:

9 "Relatedly, Mr. Warren suggests I have changed my  
10 approach, and introduced a fourth adjustment: this is  
11 not correct."

12 Then he explains the position about how regulated  
13 entities are granted revenues to cover tax by Ofgem, and  
14 he says there is no new evidence or analysis here.  
15 Essentially what has happened is that Mr. Warren missed  
16 a feature of the regulatory regime in his work which was  
17 in the public domain.

18 If you go back a page {E/18/87}, so you have the  
19 other experts talking about this, and focus on Mr. Biro  
20 who simply says --

21 THE CHAIRMAN: Which one is he?

22 MR. TURNER: He is the third column.

23 THE CHAIRMAN: The third column.

24 MR. TURNER: He says:

25 "For the reasons discussed in my response [above]

1           ... I consider that little weight should be placed on  
2           ... tax effects."

3           So there is no other expert who says some new point  
4           has cropped up. Let me show you that Mr. Biro knew  
5           about this point and fully appreciated it because it was  
6           part of Mr. Noble's first report. If we go to  
7           {E/4/151}, you have Mr. Biro's first report on the  
8           defendants' side and in the footnote at 397, last few  
9           lines, he says what the regulator does. He has moved to  
10          applying this -- thank you:

11          "... the Regulator has moved to applying a post-tax  
12          [weighted average cost of capital] ... while treating  
13          [corporate] ... tax as an explicit cost to be covered by  
14          allowed revenues ..."

15          So he knew it. All that has happened is that one  
16          expert has failed to understand the point, and what  
17          Noble does is stand by his original analysis concerning  
18          how the system works. If you go to {E/18/105}, he  
19          explains it in paragraph 3.17. It is what he has always  
20          said:

21          "Apportionment across all [these] groups is  
22          necessary since the regulatory regime provides revenue  
23          allowances for [tax] ... Regulated entities are [given]  
24          ... revenues to cover [their tax] ..."

25          So what has happened is not new evidence but one

1 expert says, "Ah, I have missed it, I have missed it and  
2 I want now to deal with it". It is not new analysis,  
3 but what they want to do to deal with it is themselves  
4 to put in what would amount, if they do deal with this,  
5 to quite a substantial piece of further work.

6 So --

7 THE CHAIRMAN: I am just trying to work out how this would  
8 play out.

9 MR. TURNER: Yes.

10 THE CHAIRMAN: Let us assume that that we are with you and  
11 we do not allow further information in. What happens in  
12 the discussion in the giving of the concurrent evidence?  
13 Because by that stage, of course, your -- the position  
14 on the paper will be that the point is still in issue,  
15 and there will be a discussion, and will not the other  
16 experts by then be able to discuss it, informed by what  
17 they would have put in, in a report, and would all be in  
18 a slightly less advantageous position because it will  
19 not be in writing?

20 MR. TURNER: Well, the problem is, my Lord, I give you this  
21 as one illustration. There are many, many areas where  
22 all of these experts, if you allow this, will say,  
23 "I would like to just respond to that and take account  
24 of this last point".

25 THE CHAIRMAN: Yes, no, I can see that.

1 MR. TURNER: So what I am seeking to do with this  
2 illustration is give you one example, it is their  
3 lead-off point, to show you what will happen, but it  
4 will not be limited to this. Here this expert will  
5 produce a substantial further work saying, "I have got  
6 this point now and I have rerun my analysis and here it  
7 is".

8 THE CHAIRMAN: Yes.

9 MR. TURNER: When faced with that, on the claimants' side,  
10 one against these four parties, there may be numerous  
11 points, because it is open-ended, where a whole range of  
12 new analysis comes in. I am trying to draw to your  
13 attention that as well as wanting, quite understandably,  
14 to have as much as possible debated until the experts  
15 are all so exhausted they cannot go on, from our point  
16 of view, there has to be finality.

17 THE CHAIRMAN: No, I -- for my part I am entirely with you  
18 on that point, Mr. Turner, and I -- whatever we decide  
19 on this issue, you are plainly correct on that. A line  
20 has to be drawn, yes. Okay. All right.

21 Do you want to add anything else or shall I hear  
22 from the defendants on this?

23 MR. TURNER: Well, the only other thing that I was going to  
24 do, this is one of about four points, four or five.  
25 I could take you through the others to show you the

1           totality of what they have said in their skeletons is  
2           the justification for opening this up.

3           THE CHAIRMAN: Yes.

4           MR. TURNER: I will be able to show you that there is  
5           a similar answer to all of it, but it will increase your  
6           concern that if you give the open-ended permission, what  
7           will come will be a swathe of new analysis on  
8           a generalised basis to which the recipients will then  
9           feel under great pressure to try themselves to take on  
10          board in a very short period before the trial.

11          THE CHAIRMAN: Yes.

12          MR. TURNER: So we say that for that reason, the point of  
13          finality has come, as it was meant to do, in the  
14          original litigation timetable.

15          THE CHAIRMAN: Thank you.

16                        So who is leading on this for the defendants?

17          MS. DEMETRIOU: I am, my Lord.

18          THE CHAIRMAN: Thank you, Ms. Demetriou.

19                        Submissions by MS. DEMETRIOU

20          MS. DEMETRIOU: So I would like to start with the example  
21          that Mr. Turner took you to, just because you were just  
22          looking at it, and then I will return to make some more  
23          general points, if that is acceptable.

24          THE CHAIRMAN: Yes.

25          MR. TURNER: So it is very telling, in my submission, that

1           when Mr. Turner was seeking to persuade you that this  
2           had always been part of Mr. Noble's analysis, he was not  
3           able to take you to any -- to either of Mr. Noble's  
4           reports to show you where he has explicitly dealt with  
5           the regulatory tax allowances, and instead he was -- he  
6           was forced to take you to a footnote in Mr. Biro's  
7           report.

8           Now, this point is illustrative of the problem that  
9           you saw yesterday, which -- in relation to a different  
10          tax issue, the natural tax consequences point, that we  
11          discussed under the RFI head of the agenda, and in which  
12          you granted permission for a supplemental -- a short  
13          supplemental responsive report. The common theme is  
14          that Mr. Noble did not explain in either of his reports  
15          what assumptions he was using for his calculations, and  
16          so it may be, we just do not know, that Mr. Noble took  
17          account of the regulatory tax allowances in his first  
18          two reports, but they were not mentioned and the first  
19          time they were mentioned was in response to this  
20          question in the joint expert process.

21          So that is the fundamental difficulty. Now, it is  
22          not just Mr. Warren that says this point is new. The  
23          same -- the same complaint is made at least by Safran's  
24          expert and by Prysmian's expert, and I am sure their  
25          respective counsel can take you to the relevant parts of

1 the joint expert statement.

2 But the difficulty is that -- that what we require  
3 is time to ascertain what the assumptions were on which  
4 Mr. Noble based his analysis, and that may require us to  
5 make a request for further information in the same way  
6 that ABB did in respect of the other tax issue, because  
7 these assumptions are just not explicit. If they were  
8 explicit, then no doubt Mr. Turner would have taken you  
9 to where they are in the first two reports, but they are  
10 just not there. So that is -- that is the problem.

11 Now, can I take you to one further issue, just to  
12 illustrate the nature of the difficulty we are facing.  
13 So that is another point which arises on the second  
14 joint expert report, and this relates to a separate  
15 point which concerns factoring in of the overcharge into  
16 the regulatory allowances for the first price control  
17 period.

18 Now, it is not an example we have set out in our  
19 skeleton, although I believe Prysmian have in their  
20 skeleton, but let me just show you the nature of the  
21 problem. So this is another new point that we have been  
22 considering.

23 So if you could turn to bundle {E/18/51}. So  
24 question 30(c), which might start on the previous page  
25 {E/18/50}, I think it does, this concerns the

1 factoring-in analysis of the overcharge in respect of  
2 the first price control period. In short, what  
3 Mr. Noble has done is that in his first -- in his two  
4 reports, both the first report and the reply report, he  
5 does not accept that there was any factoring in of the  
6 overcharge in the first price control period at all.  
7 That is the basis on which he wrote both of those  
8 reports.

9 That is despite the fact that our expert in his  
10 first report had an extensive analysis of precisely how  
11 the overcharge had been factored in into the first price  
12 control period. Now, that was not responded to in terms  
13 in the second report. Mr. Noble maintained his position  
14 in his reply report that there was no factoring in.

15 But then what happened during the joint expert  
16 discussions was that he changed tack, and he introduced  
17 a new analysis whereby he does factor in, he conducts  
18 a factoring-in exercise in respect of the first price  
19 control period. Now, if I can just show you how that  
20 all evolved. If you would go to Mr. Coombs' first  
21 report, which you will see at {E/5/109}. So section 11  
22 of his report deals precisely with the additional  
23 revenues during period 1, and just to show you what he  
24 considered, so looking at paragraphs 11.1 and 11.2, I do  
25 not want to take you to the actual analysis itself, but

1           you just see the scope of what he considered. So he is  
2           there considering precisely the question of whether the  
3           additional revenues were factored into -- whether the  
4           overcharge was factored into the additional revenues  
5           allowed to National Grid during the first period.

6           Then you see, if you go to Mr. Coombs' second  
7           report, so that is in bundle {E/13/56}. Paragraph 5.2.  
8           So here you can see section 5 is addressing Mr. Noble's  
9           conclusions, that is Mr. Noble's conclusions in his  
10          first report in respect of period 1 additional revenues.  
11          If you go to paragraph 5.2, he says that in his -- in  
12          his first report:

13                 "... [he] reached the third conclusion above i.e.  
14                 that it depends on the facts."

15                 Then he says:

16                 "Mr. Noble, however, reaches the second, rather  
17                 extreme, conclusion above. He concludes that the  
18                 Overcharge was not reflected in any of [National Grid's]  
19                 ... capital expenditure allowances (as set by Ofgem) and  
20                 therefore that [National Grid] ... did not receive any  
21                 Additional Revenues in Period 1."

22                 So that is reflecting Mr. Noble's position in his  
23                 first report, and then in the reply report of Mr. Noble,  
24                 and you can see that at {E/11/53} and if you go to  
25                 page 53. Mr. Noble continued -- despite this being

1 a very live issue from the first rounds of reports,  
2 continued to proceed on the basis that no factoring in  
3 had taken place. If you go to paragraphs 4.66 and 4.67,  
4 you see the conclusion, and so his conclusion -- he  
5 certainly has not conducted any factoring-in analysis in  
6 his report. His conclusion is that it is unlikely. So  
7 that is the basis on which his second report was made.

8 Then going back to the joint experts' statement, the  
9 second joint expert statement at -- so that is {E/18/51}  
10 you see in the first column, or rather the second column  
11 which is Mr. Noble's column, that he presents a new  
12 analysis. So you see that he says he has:

13 "... considered the arguments and analysis ... These  
14 have caused me to revisit the scenarios I presented in  
15 Noble 2 and my conclusions."

16 He sets out some bullet points:

17 "I have refined my scenarios -- they now use  
18 calculations that differ by project and by PCP, thereby  
19 more precisely representing the conclusions of my  
20 analysis. I have also altered my conclusions: I regard  
21 it as likely that at least some of the overcharge was  
22 factored [in] ... The precise extent ..."

23 Et cetera, et cetera.

24 So he now factors in, to some extent at least, the  
25 overcharge, and then he says:

1           "I also continue to present a no-factoring-in  
2 scenario ... this has three potential uses ..."

3           So this is very new -- this is certainly new  
4 analysis, and it is really difficult to understand,  
5 indeed impossible to understand, why it was not done at  
6 the reply report stage.

7           Now, it is all very well for Mr. Turner to talk  
8 about orderly processes, but this is a very real point.  
9 This was not an orderly way for the claimants' experts  
10 to proceed because the problem was fairly and squarely  
11 put in our expert's first report. It was essentially --  
12 it did not cause any change of Mr. Noble's position in  
13 his reply report, and then we have a change of position  
14 at this very, very late stage, and you see what is said  
15 by our expert two columns along in the third column. So  
16 at the bottom of the page:

17           "During the course of the joint statement process,  
18 Mr. Noble has significantly revised his analysis ... and  
19 now presents estimates of [National Grid's] ... losses  
20 under three different scenarios ... In the time  
21 available in the joint statement process, Mr. Coombs has  
22 not had sufficient time to fully consider Mr. Noble's  
23 revised analysis."

24           Now, the position is that Mr. Noble's appendix was  
25 produced on Sunday, 19 July, in the middle of the day,

1 a few hours before the Monday deadline for filing the  
2 joint expert statement. It included -- it included  
3 thousands of rows of new calculations, and it simply has  
4 not been possible, in the context of the joint expert  
5 discussions, to review the new analysis and respond to  
6 it.

7 So the -- so we say that this is a point really of  
8 fundamental fairness. Either this new analysis must be  
9 excluded, and we are not at the moment asking the  
10 tribunal to -- to rule that it is inadmissible. We are  
11 not doing that at the moment. But either -- fairness  
12 dictates, we say, either that it is ruled to be  
13 inadmissible because it is new analysis which they do  
14 not have permission at the moment to adduce, because it  
15 is new, and it is not right, we say, in this context for  
16 Mr. Turner to lump anything new in one category, because  
17 there is a very clear distinction in our submission  
18 between the experts rerunning their own analysis, with  
19 some different figures that have come out of the joint  
20 expert process, and that is the kind of thing which we  
21 say is fair enough, and that is the kind of thing that  
22 Mr. Turner is right to characterise as something which  
23 is helpful which is helping to narrow the process.

24 So that is new but not objectionable because it is  
25 not prejudicial, but there is new in the sense of

1 an entirely new analysis that should have been in the  
2 report, such as this, and we say that that does cause  
3 very real prejudice, and so either it has to be ruled as  
4 inadmissible because they do not have permission to  
5 adduce it or, and we say that this is the less extreme  
6 response, we have to be given sufficient time to  
7 consider it and decide whether it is necessary to  
8 respond.

9 Because, my Lord, the alternative is the one that  
10 you canvassed, which is that our experts cannot be  
11 expected to be gagged when it comes to dealing with this  
12 new analysis. They cannot stand there in the hot tub  
13 and not respond to it at all. So the alternative would  
14 be that they are responding during the hot tub, and that  
15 is unsatisfactory for everyone, including for Mr. Turner  
16 and his clients.

17 So, my Lord, there are other examples that I could  
18 take you to. I, like you provisionally indicated, do  
19 not think it is going to be a very satisfactory way of  
20 resolving this point, not least because it is all very  
21 well for Mr. Turner to say, "Well, you should have  
22 identified all these points by now and engaged before  
23 the hearing", but look what happened when it came to one  
24 of the points that we did identify in our skeleton  
25 argument. Mr. Turner did not come back saying, "Well,

1           our expert says this". He has had our skeleton for  
2           quite a few days. He on his feet gave me -- gave us his  
3           response to it in circumstances where it is very  
4           difficult for me to take instructions from my clients  
5           and my experts to see what they say about these various  
6           points.

7           So I am responding on my feet as best I can, but if  
8           the guillotine were going to come down today, then,  
9           frankly, the claimant should have done better in terms  
10          of indicating what their response was to these points.  
11          But the bigger point, my Lord, members of the tribunal,  
12          is that these are non-exhaustive -- non-exhaustive  
13          examples.

14          Now, we have no wish at all to expand the --  
15          unnecessarily expand the scope of the expert evidence,  
16          and both we and our experts take our professional duties  
17          very seriously and understand precisely what is meant by  
18          responsive evidence. But the key point that we wish to  
19          address is the one of fundamental unfairness which is  
20          very new analysis, which should have been in the expert  
21          reports themselves and was not, and has been given to us  
22          in large quantities very, very late. So that is really  
23          the point.

24          We thought that the most efficient way of addressing  
25          that, rather than going through every point now, because

1 we do not think that the tribunal will be in  
2 a position -- we are not in a position to identify every  
3 possible new point and make full submissions on them  
4 today, because, as I say, there has been so much so  
5 late.

6 So we rather thought that the most efficient way of  
7 dealing with this was to give us permission to respond  
8 to any genuinely new points, as I say, we would exercise  
9 that possibility very responsibly. If Mr. Turner thinks  
10 that it is not genuinely -- we would be very happy, in  
11 response to your Lordship's suggestion, for the experts  
12 alongside that to justify why the point is new, very  
13 happy to do that. That would be a helpful thing,  
14 because it would certainly exert a discipline over the  
15 process, and then of course Mr. Turner must have  
16 an opportunity to object. We completely accept that,  
17 and so that is why we think that that is the orderly way  
18 of proceeding, given the very difficult position in  
19 which we have been placed at this very late stage.

20 Now, my Lord, I can take you to other examples.  
21 I am just not sure it is going to be terribly helpful to  
22 do that. I know that Ms. Davies has examples too, I am  
23 rather in your hands, but those really are the points of  
24 principle that I wanted to make.

25 THE CHAIRMAN: Yes, thank you very much. I think we need to

1 deal with this as a point of principle, to be honest  
2 with you. I think Mr. Turner had other examples he was  
3 going to show us, and you have other examples you are  
4 going to show us, but I think you have both illustrated  
5 the way you put your case by reference to one example,  
6 and I think we will have to reach a conclusion together  
7 in the light of that.

8 I will hear you in a moment, Mr. Turner, but I just  
9 wanted to find out, do any other defendants want to say  
10 anything on this point?

11 Submissions by MS. DAVIES

12 MS. DAVIES: My Lord, if I may, very, very briefly. We  
13 totally support and endorse everything Ms. Demetriou  
14 says. If I can just show my Lord just one other part of  
15 the joint memo in relation to the factoring-in point,  
16 just to show you where my expert explains the scale of  
17 the problem that was facing him.

18 Like Ms. Demetriou's expert, my expert, in his very  
19 first report, had made his position on factoring in very  
20 clear. He had clearly explained, and I will just give  
21 my Lord the references, it is paragraph 7.73 of his  
22 original report {E/7/114} what his approach to factoring  
23 in, which included full -- 100% factoring in after the  
24 price control described as TPCR 4.

25 I entirely support everything Ms. Demetriou said

1 about Mr. Noble's changing position, but what I just  
2 wanted to draw my Lord's attention to is what my expert  
3 says at joint expert statement {E/18/57}, where at the  
4 bottom of the fourth column, Mr. Davies explains that:

5 "Mr. Noble's current position appears to be quite  
6 different from the position in his first report and his  
7 reply report. I understand him to say that he now  
8 regards Scenario A [which is the primary position in his  
9 first two reports] as less likely than his new Scenario  
10 B, which includes some factoring-in in the later  
11 periods. I take from this that Scenario B is now his  
12 preferred approach, on which he will base his assessment  
13 of pass-on."

14 So we have had a major movement by Mr. Noble to what  
15 his actual analysis is:

16 "I have not had time fully to consider Mr. Noble's  
17 new Scenarios B and C, or fully to review the two new  
18 spreadsheets (which are large, at 59MB and 70MB)  
19 containing the models for these scenarios (and  
20 Mr. Noble's updated tax calculations, which were further  
21 updated one week later) as these were introduced less  
22 than eleven working days before the joint statement  
23 filing deadline."

24 All he can do in the time that was available --  
25 because bearing in mind, of course, my expert was

1 dealing with the entirety of these two joint experts'  
2 statements as well, and we have also got similar issues  
3 in relation to Dr. Jenkins, we have given some examples  
4 in our skeleton, which are points which are not late --  
5 in any way late understandings by our experts or so on,  
6 but genuinely new material from the claimants' experts.  
7 It just was not possible with this scale of new material  
8 to deal with it and the real question here is efficient  
9 approach to this -- to the expert issue. My experts  
10 obviously are going to go through this material now. If  
11 there are points that they feel it is absolutely  
12 necessary to raise, it is actually better for all  
13 concerned, including the claimants' experts, that they  
14 are raised in advance and they are given notice of it,  
15 and that was why we raised this point now rather than  
16 simply seeking to withhold points until the trial.

17 That is all I wish to say, my Lord.

18 THE CHAIRMAN: Thank you.

19 Submissions by MR. JONES

20 MR. JONES: My Lord, could I address you briefly on Safran's  
21 position. Could I just start with this positive point,  
22 which is that, notwithstanding everything which has been  
23 said about the joint expert process, it has had some  
24 very positive consequences, and as Mr. Turner showed  
25 you, my Lord, on many of these issues, the experts got

1 together, they exchanged views, they exchanged responses  
2 to each other's views, and one can read the report and  
3 essentially see the landing -- the final landing that  
4 they have reached, and that helps to solidify the  
5 positions and identify what the tribunal needs to focus  
6 on, the real disputes between them.

7 There were, though, several areas in which, in  
8 common with the other experts, Safran's expert was not  
9 able, just in the time available, to fully deal with  
10 material that Mr. Noble had put forwards. My Lord,  
11 I will not take you to those, but they are expressed  
12 repeatedly in the final column of that joint report,  
13 where Ms. Jackson repeatedly says:

14 "In the time available I have not been able to look  
15 into this."

16 She has been working fast on it, the team have been  
17 working fast on it. The position at the moment is that  
18 we actually think it is pretty unlikely that there will  
19 be anything much that she would want to say, but she  
20 might do, and is, as I say, still looking at it. The  
21 only real question is what process should be put in  
22 place to make sure that what was actually a productive  
23 process between the experts carries on and nothing is  
24 left hanging over.

25 It is not appropriate to impose some sort of

1           guillotine on us today. Everyone is doing this in good  
2           faith and as quickly as possible. We are very happy to  
3           have a deadline. That strikes us as sensible. In  
4           common with Ms. Demetriou, we also think it is very  
5           sensible for us, if we do come up with anything else we  
6           want to say, to explain why it is that it is new.  
7           Hopefully if we do that, it will be agreed by  
8           Mr. Turner's clients, the concerns they have will not  
9           come to fruition. If it is not agreed, then we can  
10          raise it with the tribunal in due course.

11       THE CHAIRMAN: Thank you.

12                 Mr. Hoskins, you are the only person who has not  
13                 said anything on this subject. Do you want to add  
14                 anything to what has already been said?

15       MR. HOSKINS: I have nothing to usefully add, you will be  
16                 delighted to hear, my Lord.

17       THE CHAIRMAN: Mr. Turner.

18                         Submissions by MR. TURNER

19       MR. TURNER: I am obliged, my Lord. The submissions you  
20                 heard, particularly from Ms. Demetriou, are forceful but  
21                 they are not correct in suggesting that -- we have only  
22                 focused on Noble -- Noble sprang new analysis that the  
23                 others have not had time to consider, and I can show you  
24                 that in a moment.

25                         But really, from your perspective, the litigation

1 management question I would suggest is -- comes down to  
2 this, which they did not deal with. If, for whatever  
3 reason, say, Mr. Warren missing something that was in  
4 the earlier reports, they do want to produce new  
5 analysis and deliver it by 4 September, how is it in  
6 practice going to be possible to confine that and to  
7 prevent this process from getting out of hand? Bearing  
8 in mind the intensity of the process that has already  
9 occurred, in my submission, the tribunal ought to be  
10 extremely wary about allowing it to proceed in that way,  
11 and that if you are going to do so, it must be very,  
12 very carefully limited.

13 Now, I mentioned a moment ago that it was forceful  
14 or incorrect. It is quite easy to demonstrate. We  
15 talked about two main points. The first is this issue  
16 of the regulatory allowance for tax, where you will  
17 recall that the point in their skeleton was that there  
18 was an entirely new and unpleaded point.

19 That is not really maintained. What is said is that  
20 there was maybe something in Mr. Noble's original work,  
21 but they did not spot it, unlike Mr. Biro who did, and  
22 that because they did not spot it, it would now be  
23 unfair if they were not given the opportunity to deal  
24 with it again. So that is -- what I said was correct,  
25 and that is therefore the scenario that Ms. Demetriou

1 has to deal with. She did not deal with the question,  
2 if he does produce further significant analysis on this  
3 front, you heard nothing on how that is then to be  
4 responded to.

5 So far as factoring in is concerned, it is worth  
6 spending a moment on that, because a lot of what was  
7 said to you was not accurate. Ms. Demetriou, in her  
8 enthusiasm, did stray into talking about the way in  
9 which this arose in the without prejudice discussions.  
10 That was not right that this appeared shortly before the  
11 deadline at all. My instructions, now she has raised  
12 it, was that the factoring-in analysis that you have  
13 seen was shared as early as 3 July and did not change  
14 from that point, and I say that because Ms. Demetriou  
15 said something quite contrary.

16 So far as this factoring-in issue is concerned, the  
17 Noble report did, it is true, take the initial position  
18 that Ofgem had not factored in an overcharge. It is  
19 quite right. What he did do, by the way, was to say,  
20 "Well, if I am wrong about that, and I assume various  
21 significant factoring-in scenarios, this is how the  
22 picture looks". He did that explicitly from the outset.

23 I will give you an example. If we pick up {E/3/115}.

24 THE CHAIRMAN: I am sorry, you disappeared.

25 MR. TURNER: Ah, have I disappeared?

1 THE CHAIRMAN: No, you are all right now. But I did not  
2 catch the entirety of the reference.

3 MR. TURNER: I am sorry. {E/3/115}, at A6.2, you will see at  
4 the bottom, he says very simply: I have got some tables,  
5 which he then deals with, which assume that Ofgem  
6 factored in 10% and then 30% of the overcharge.

7 So he had said: yes, my primary position is it did  
8 not happen, but let me show you what it looks like if it  
9 did. He did the same in his reply report. If you go to  
10 {E/11/84}, if you look at 8.12, at (a), at the bottom of  
11 the page, there are then some tables, and you will see  
12 he is maintaining this is what would happen if there was  
13 this degree of factoring in. So that analysis was  
14 already there before the expert engagement started.

15 Now what happens is that the experts have their  
16 without prejudice discussion. At that point Mr. Noble  
17 was persuaded by points that had been made by the  
18 defendants' experts. For that reason, he himself says:  
19 I take on board these points and I move closer to your  
20 position.

21 If we can bring up {E/18/42}, you have there the --  
22 what he says. It was a row that we looked at before,  
23 and the second column, he says in the introductory  
24 paragraph that he has clarified his position and he has  
25 taken on board points that were made, include -- that is

1 factoring in and taxation, and he sought to narrow the  
2 differences.

3 If we turn over the page {E/18/43}, he sets out how  
4 it looks and you will see at the top in the column he  
5 says: this is what it looks like with these adjustments.

6 He says:

7 "The changes I have made to my analysis mean my  
8 pass-on rates -- when assuming [that this] Group 2 is  
9 passed-on -- now appear to be higher than those of  
10 Mr. Biro ..."

11 So what has happened is that the process has worked  
12 as it should. Our expert has done what this process is  
13 meant to achieve by saying, "I am with you to an extent  
14 and I have worked through these numbers. They are  
15 closer to you than they were before". Mr. Biro has no  
16 problem with that but in the final versions of the joint  
17 experts' statement, it is true that two of the experts  
18 say, "I have not had time to process these figures".  
19 That is all that this point amounts to.

20 So to summarise, again, this is not an example of  
21 some new analysis which has been sprung by the  
22 claimants' expert on the others, and you will see that  
23 the numbers there on the page are essentially within the  
24 0 to 30% range that Mr. Noble had always, (a), (b), (c),  
25 had always had in play and had explicitly indicated in

1 his main report and then the supplemental.

2 THE CHAIRMAN: Yes.

3 MR. TURNER: So for this reason, I say if this is the sort  
4 of basis on which the tribunal is to say, let us open  
5 the doors and allow in further analysis, the risk of  
6 unfairness to the claimant and disorderliness does  
7 arise. Ms. Davies says this will simply mean that  
8 everything is there in order in writing before the  
9 hearing. The real danger, to which neither she nor  
10 Ms. Demetriou nor Mr. Jones turned their minds, is what  
11 happens when, as we expect, a large amount of new  
12 analysis comes in which then the claimants are under  
13 extreme pressure to try to deal with, and it is for that  
14 reason that I say that the right approach is for the  
15 defendants to show you where there is an issue that  
16 justifies taking this measure.

17 The alternative, and it would have to be a fallback,  
18 would be something along the lines that your Lordship  
19 has said, but appreciating the great risk that the  
20 claimant will then be placed in a deeply invidious  
21 position, and trying now to address that point by  
22 finding some way of limiting the process to mitigate the  
23 risk of that happening and achieve fairness all round.

24 THE CHAIRMAN: Yes.

25 MR. TURNER: No suggestion about how that would be done has

1 emerged from the other side. For my part, I see it  
2 difficult to envisage how that would be done, but that  
3 would be what would be needed if such a compromise  
4 solution were to be addressed.

5 THE CHAIRMAN: All right. Thank you very much, Mr. Turner.  
6 I think we will take our mid-afternoon break now, and we  
7 will take ten minutes, because we need to discuss what  
8 we have just heard.

9 I think once we have ruled on this point, it is  
10 simply timetabling left, is it not? Because under no  
11 circumstances are we not going to finish this afternoon.

12 MR. TURNER: Understood.

13 THE CHAIRMAN: All right. We will come back in shortly  
14 after 3.30 pm.

15 (3.22 pm)

16 (A short break)

17 (3.32 pm)

18 Decision

19 THE CHAIRMAN: Right. Is everyone back in court?

20 All right. On the last issue which has been  
21 discussed, can we say straightaway that we are not at  
22 all satisfied that these are genuinely new points, the  
23 ones that we have been looking at. Nonetheless, we do  
24 think that fairness requires the opportunity for one  
25 last go by the experts in relation to identified issues,

1 where they are professionally satisfied that they did  
2 not know that the analysis which they are being asked to  
3 comment on is an analysis that had -- was coming up, and  
4 they do not consider that they had had an adequate  
5 opportunity to deal with that analysis before now.

6 If the experts concerned are prepared to certify  
7 that that is the case, the defendants concerned have  
8 permission to put in a further report to deal with the  
9 point.

10 We consider that that is the appropriate way  
11 forward, not least because we are concerned that we have  
12 as much as possible in writing before the evidence is  
13 actually given in concurrent form at the hearing. We  
14 are also concerned that for perfectly understandable  
15 reasons, neither we nor the parties are in a position to  
16 adopt a fully comprehensive approach now to whether or  
17 not this is genuinely new material, so far as the  
18 defendants' experts are concerned.

19 So for that reason, on the basis of the  
20 certification that I have indicated by the experts, the  
21 permission is granted and -- but we lay down a marker  
22 now that the shutter is coming down when that work has  
23 been done, and I think the time sought is 4 September,  
24 and in principle we think that is the appropriate time  
25 for that to be done. It is two months before the start

1 of the trial. We are deeply conscious of the burden  
2 that that will put on the claimants, but nonetheless, we  
3 think that that is the appropriate and fair result.

4 Submissions by MR. TURNER

5 MR. TURNER: My Lord, I am grateful for that. May I address  
6 you on two points nonetheless, just before a final  
7 landing is reached. From the claimants' perspective,  
8 there are two elements to the concern. There is the  
9 potential volume of new material, and then there is the  
10 question which remains an issue: what happens if that  
11 new material from the defendants itself contains new  
12 analysis that our experts have not been able to cover?

13 THE CHAIRMAN: Well, I think, Mr. Turner, if that happens,  
14 you will have to deal with that in the same way as you  
15 would have to deal with the possibility that material is  
16 put in or sought to be put in that goes beyond the  
17 responsive material that we contemplate, and those -- we  
18 accepted in reaching this conclusion, and can I say, we  
19 did not find it a particularly easy decision to reach,  
20 we accepted in this conclusion that there may have to be  
21 some form of further resolution if there is a dispute  
22 about what the defendants are proposing to put in. We  
23 do, though, place considerable reliance on the  
24 assurances that we were given about the understanding of  
25 all parties involved that they know what responsive

1 evidence means and they understand the limitations of  
2 the direction that we have given.

3 MR. TURNER: I am obliged. That does -- gives a very clear  
4 steer on the new analysis point. May I raise, though  
5 just one further final point on the volume issue.

6 THE CHAIRMAN: Yes.

7 MR. TURNER: To take the example that I gave at the outset,  
8 the regulatory allowance for tax.

9 THE CHAIRMAN: Yes.

10 MR. TURNER: So Mr. Warren for NKT now spots that he has  
11 missed something that was present in the original  
12 analysis and he says, "Well, I need time to take that  
13 into account". What he does is to produce new analysis  
14 in order to do that. It is inherent in what he wants to  
15 do.

16 So it may be responsive in that sense. It is also  
17 something that on the claimant experts' side is very  
18 difficult to deal with. They will then have to check  
19 the further work that has come in. If that is  
20 multiplied across all of the defendants and with many  
21 issues, you can quite easily see that this could be  
22 a deluge. If one says there are five experts on the  
23 defendants' side, imagine that they all put in an  
24 updated model and 50 pages each, you are already able to  
25 see that that is something which could be very, very

1           difficult for the claimants' experts to address at that  
2           point.

3           When we hung up, if that is the right expression,  
4           went into the retiring room, I had been thinking about  
5           whether there was a control mechanism that could be  
6           beneficially added, and I would like to merely raise  
7           this in case the tribunal is attracted to it. This is  
8           a case where, for whatever reason, as things have  
9           developed, the defendants have each been allowed to  
10          adduce expert evidence in their own right, although,  
11          broadly speaking, they are all opposing the claimant.  
12          So you have one expert on one side and four or five on  
13          the other. At this point, may I make the suggestion  
14          that to help control what may occur, there should be  
15          a response from one expert on the defendants' side on  
16          any given point, but not multiple parallel responses on  
17          the same point.

18         THE CHAIRMAN: Mr. Turner, I am reluctant to go down that  
19          route, but I will say this, I would be astonished, and  
20          the tribunal will be horrified, if the response evidence  
21          at this stage comes anywhere near the level of the sort  
22          of page numbers and volume that you have indicated, and  
23          I think we will just have to leave it at that.

24         MR. TURNER: I am obliged. Thank you.

25         THE CHAIRMAN: All right. Timetable.

## 1 Discussion re trial timetable

2 MR. TURNER: Trial timetable. The differences were mainly  
3 the product of the opposing views on whether there  
4 should be hot tubs --

5 THE CHAIRMAN: Yes

6 MR. TURNER: -- which we have essentially resolved. The  
7 main other point of principle is whether the respective  
8 sides should be more or less on an equal footing in  
9 terms of the time allocation for opening and closing  
10 submissions.

11 THE CHAIRMAN: Yes. Well, can I say straightaway in  
12 relation to openings, I cannot remember whether I have  
13 said this already, we are not great enthusiasts, any of  
14 us, for a lengthy opening, I do not mind saying.

15 We think that there is a vast amount of paper in  
16 this case. I have no doubt that you will have lengthy  
17 skeletons for us. We propose to set aside, as I have  
18 already indicated, quite a lot of time for pre-reading.  
19 I am -- for my part, I do not think more than a day's  
20 opening for you and one and a half days between the  
21 claimants (sic) is going to be necessary or particularly  
22 helpful to the tribunal. We just want to get on with  
23 the evidence once we are -- because by the time the case  
24 starts, we will be very familiar with what the issues  
25 are.

1 MR. TURNER: My Lord, we would agree with that and would  
2 live with it.

3 THE CHAIRMAN: Thank you.

4 MR. TURNER: I do not know if my friends wish to comment.

5 THE CHAIRMAN: Yes, does anyone else want to add anything on  
6 openings? Good.

7 MR. TURNER: Closings, if we turn up --

8 MS. DAVIES: Sorry, could I just add one point, my Lord.

9 THE CHAIRMAN: Yes.

10 MS. DAVIES: That will shorten -- that would mean that we  
11 will be starting the evidence in week 1.

12 THE CHAIRMAN: Yes.

13 MS. DAVIES: All the enquiries that have been made of  
14 witnesses at the moment -- sorry, because it is my  
15 witnesses who come after Mr. Turner's witnesses -- have  
16 assumed that the earliest they would be giving evidence  
17 would be Friday, 13 November. I am not in a position,  
18 I am afraid, today to confirm that they can come earlier  
19 than that, and I am just mentioning that because I do  
20 not want it to be -- we will have to make some enquiries  
21 as a result of that indication.

22 THE CHAIRMAN: No, Ms. Davies, that is quite understood, and  
23 I suspect that all we can probably do today is deal with  
24 a series of points of principle on the timetable.  
25 I suspect everyone will have to go away and see what the

1           consequences are, so that is fully understood.

2       MS. DAVIES: I am grateful, my Lord.

3           Discussion re closing submissions

4       MR. TURNER: The next item, I think it is the only other  
5           timetable item, subject to anything that my learned  
6           friends want to raise, is closing submissions. It may  
7           be a similar story. If we turn up the Prysmian draft  
8           timetable, it is at {A/5/26}.

9       THE CHAIRMAN: Yes.

10      MR. TURNER: You will recall that on our timetable, there is  
11           a break before the service of written closing  
12           submissions comfortably in time for the Christmas  
13           period.

14      THE CHAIRMAN: Yes.

15      MR. TURNER: As an overall bird's-eye view of what is  
16           desirable for the case, I would suggest that if we can  
17           get through the factual and expert evidence and have  
18           time over for the defendants to prepare written  
19           closings, which can be delivered before we break for  
20           Christmas, that would be highly desirable all round.

21      THE CHAIRMAN: Yes.

22      MR. TURNER: So my hope is that we can mutually try to  
23           achieve that, now that the -- your Lordship has given  
24           indications about the length of openings and the hot tub  
25           within two working weeks.

1 THE CHAIRMAN: Yes.

2 MS. DAVIES: My Lord, in relation to that -- sorry, can  
3 I just say that I understand, of course, the  
4 desirability from a personal level for Mr. Turner to get  
5 documents in just before Christmas, but there is  
6 a complicating factor here from the defendants' point of  
7 view and with -- we will have to have a look at how the  
8 timetable plays out, but certainly having a look at the  
9 hot tub allowance that we were discussing before -- just  
10 at the beginning of this afternoon, I think that is  
11 likely to be unpracticable. The reason is the  
12 defendants have agreed, as my Lord knows, to liaise in  
13 order to prevent duplication.

14 THE CHAIRMAN: Yes.

15 MS. DAVIES: That inevitably means that as well as time for  
16 writing, we are also going to have to have time for  
17 exchanging drafts of submissions to ensure that all the  
18 defendants are happy about how things are being dealt  
19 with. It is simply not going to be practicable for us  
20 to produce written closing submissions in a few days,  
21 which is actually all we are going to have left in the  
22 timetable, or even a week.

23 There is a second factor, which is my learned  
24 friend's desire to have everything in before Christmas,  
25 is also presumably triggered by the fact he is assuming

1           that the tribunal will be reading during the vacation  
2           period, so that we can start the actual oral closing  
3           submissions on the first day of the new term, which is  
4           11 January.

5           Now, of course, it is entirely a matter for the  
6           tribunal whether they are prepared to do that, but we  
7           had in our timetable assumed that the tribunal would in  
8           fact wish to set aside non-vacation days to do the  
9           reading, which would be the week -- if that happens, it  
10          is the week of 11 January. On that basis, there is not  
11          in fact any pressing need either for the written  
12          closings to come in before the Christmas period, apart  
13          from personal convenience of counsel to give them a nice  
14          Christmas. Actually, in order to produce the most  
15          effective written closings, it would be better to give  
16          parties the time to do it. So --

17        THE CHAIRMAN: I think I can say straightaway, Ms. Davies,  
18           I am -- and Mr. Turner, I am sure you will understand  
19           this, from the tribunal's point of view, ensuring that  
20           there is adequate time for the defendants to liaise on  
21           non-repetitive written closings is actually quite  
22           important, because we do not want four slightly  
23           different ways of putting exactly the same point.

24        MR. TURNER: Yes.

25        MS. DAVIES: My Lord, I am very grateful.

1 MR. TURNER: I fully agree with that, and I think that this  
2 debate is mainly useful for teasing out the principles,  
3 which, as your Lordship says, we will implement after  
4 this hearing has concluded.

5 The final point that I wanted to raise on the  
6 timetable is the debate about the length of the  
7 closing -- closing oral submissions.

8 THE CHAIRMAN: Yes.

9 MR. TURNER: Here, the competing positions were that we  
10 thought that the claimants should have at that point two  
11 days, the defendants two days and a short reply. In  
12 view of what your Lordship says -- I am sorry, two days  
13 for us, two-and-a-half days for them and then a short  
14 reply for us, so it fits within a working week, the  
15 closing submissions process.

16 On the other side, the proposal is that we should  
17 get the two days and that they should have  
18 three-and-a-half days. Therefore, substantially more  
19 than us at the critical point in the trial.

20 THE CHAIRMAN: I think you get two and a half, actually,  
21 because they give you a bit -- a reply at the very end  
22 for half a day. So I think it is two and a half to  
23 three.

24 MR. TURNER: Yes.

25 THE CHAIRMAN: Three and a half, sorry.

1 MR. TURNER: Yes. Essentially my experience has been the  
2 balance in the main submissions between the opposing  
3 parties is of the main importance, but either way,  
4 an imbalance between the two sides is something that we  
5 would seek to resist.

6 THE CHAIRMAN: Thank you, Mr. Turner. I am going to cut  
7 through this, because I do not think we should actually  
8 reach a final conclusion on this at this stage. The  
9 reason I say that is because I think it will become much  
10 clearer, once we have got a bit further through the  
11 process and into the trial, exactly how different the  
12 position of the defendants is. I have no doubt that  
13 they will do what they say they will do in order to  
14 ensure that there is not duplication, but I am a bit  
15 reluctant to reach a conclusion now on exactly the  
16 extent of the interrelationship between them. I do not  
17 think it matters too much for the opening, but it will  
18 matter much more for the closings.

19 MR. TURNER: My Lord, on reflection, that sounds absolutely  
20 right, and we are agreed with that.

21 Discussion re interpretation and video link

22 MR. TURNER: I think, then, the final matters are very  
23 minor. It is the point concerning interpreting, where  
24 witnesses have difficulty with English as a first  
25 language --

1 THE CHAIRMAN: Yes.

2 MR. TURNER: -- and the video link question.

3 THE CHAIRMAN: Yes.

4 MR. TURNER: On interpreting, we suggest the tribunal leaves  
5 it to the parties to liaise with the registrar and Opus  
6 about what is doable on the IT front.

7 THE CHAIRMAN: Yes. I mean, I think you may find difficulty  
8 in getting simultaneous translation, but do your best  
9 because it is obviously a good thing if you can, but if  
10 you cannot, you cannot.

11 MR. TURNER: I am obliged. The final point that I believe  
12 arises is the question of video link. We are happy with  
13 most of the witnesses who have difficulty, the  
14 defendants saying that they will attend by video --

15 THE CHAIRMAN: Yes.

16 MR. TURNER: -- in these circumstances and agreeing that  
17 now. There is one sticking point. It is one of the  
18 cartel witnesses, a Mr. Waimann for NKT. NKT have  
19 explained in correspondence that he is vulnerable and  
20 diabetic and would prefer to give evidence by video. We  
21 are very sympathetic to that and very conscious of  
22 vulnerability, particularly in the time of the pandemic.

23 However, your Lordship will appreciate that  
24 video link is a very difficult way to cross-examine  
25 a significant factual witness where issues of

1           credibility are at stake. The current position -- our  
2           current position is that if we hold a physical trial,  
3           and let us assume that the COVID-19 restrictions are  
4           relaxed, so I am looking optimistically at the outcome  
5           for trial, then in that scenario he should come. We  
6           accept, however -- fully accept that if there are likely  
7           to continue to be quarantine requirements or other  
8           COVID-19 restrictions for the trial that we should be  
9           sympathetic, and that that may not be practical. That  
10          is the only qualification we wish to enter.

11        THE CHAIRMAN: All right. Well, I think the tribunal has  
12          noted the qualification, and I think we may have to  
13          revert to this at the second PTR.

14        MS. DEMETRIOU: May I just make one clarification? Because  
15          Mr. Turner said that we have said that Mr. Waimann is  
16          diabetic. That is in fact not correct. We have not --  
17          he is not diabetic and we have not said he is diabetic.  
18          He does not wish to come and give evidence in person,  
19          but we are very content to revisit this question at the  
20          PTR.

21        THE CHAIRMAN: Thank you, Ms. Demetriou.

22        MR. TURNER: I am sorry, it may be another witness who  
23          suffers from that condition. Apologies if I misspoke.

24        THE CHAIRMAN: Good. All right. Now, does anyone else have  
25          any other timetabling or logistic issues they wish to

1 raise? I am just looking down my checklist to see  
2 whether there is anything the tribunal has got. Wait  
3 a minute.

4 (Pause).

5 If you just give me a moment, I am going to  
6 disappear off your screen.

7 (Pause).

8 Yes, just a couple of pickup points. I mean, we  
9 have touched on some of them, I think, but just to deal  
10 with them. When we get -- there is a time, I think, in  
11 relation to the trial bundles and the skeleton  
12 arguments, or how they relate to the skeleton arguments,  
13 and also we will, of course, want a reading list at the  
14 time we get the skeleton arguments, and we would much  
15 appreciate that reading list being agreed. As you will  
16 know, in a case like this, the tribunal is not going to  
17 confine itself to the reading list, but it would be  
18 helpful what the parties between them think need to be  
19 read.

20 Now, I imagine that you are going to want the trial  
21 bundles completed in sufficient time to enable the  
22 skeletons to be cross-referred properly to the trial  
23 bundles, because that makes everyone's job a lot easier.  
24 Have we got a time on that?

25 MR. TURNER: We do not have a time on that. With the

1           electronic system, the trial bundles are being updated  
2           as we go along.

3       THE CHAIRMAN: Right. So that much facilitates, does it  
4           not, the idea of -- because presumably does the page  
5           numbering change? I suppose it might, might it not? We  
6           need to have a cut-off point when the page numbering  
7           changes.

8       MS. DAVIES: My Lord, I have asked that specific question  
9           about the bundles B through to E that we have been using  
10          for the purposes of this hearing, which are going, as  
11          I understand it, to remain bundles B through to E for  
12          the trial, and page numbering will not change in those  
13          bundles, I am told.

14                There may be some addition -- or there should be  
15                an addition to bundle C, which will be the Prysmian  
16                judgment, but otherwise -- so the factual evidence and  
17                the expert evidence, as I understand it, and I will be  
18                corrected if I have got this wrong, but it would be  
19                obviously helpful for everyone if it could be the case,  
20                we now have the trial bundles. It is the chronological  
21                bundles and the underlying material that have not yet  
22                been produced.

23       THE CHAIRMAN: Fine.

24       MR. HOLMES: It would help if the page numbering for the  
25           electronic version and the hard copy versions were the

1 same because there are other instances where they do not  
2 correspond at the moment.

3 THE CHAIRMAN: Yes, that is a very good point. So  
4 I think -- so shall we have a cut-off -- I think --  
5 I quite understand why some of the bundles may be  
6 organic, in the sense that they are changing from time  
7 to time at the moment in their electronic version, but  
8 I think we need a cut-off moment at which we stop  
9 changing the numbering, which perhaps we could say is  
10 the end of September.

11 MR. TURNER: Yes.

12 THE CHAIRMAN: So I think -- was that it, Simon?

13 Oh, yes, what about the date for the trial bundle?  
14 When do you want to say that it is actually going to be  
15 finalised? Because, as I understand it, I mean, we will  
16 doubtless be working from an electronic version. I do  
17 not know, can someone give me a sense as to how much  
18 paper there actually is going to be?

19 MR. TURNER: I am afraid -- well, Ms. Davies is shaking her  
20 head, and I am going to shake mine.

21 THE CHAIRMAN: Yes.

22 MR. TURNER: There are already several thousand pages.

23 THE CHAIRMAN: Yes. Is the proposal -- I mean, we will be  
24 working from the Opus system. What is the proposal in  
25 relation to hard copies, or are we going to try to do

1           this case entirely electronically?

2           MS. DAVIES: I am sure we can provide the tribunal with hard  
3           copies of whatever they require. Speaking for myself,  
4           probably showing my age, I shall not be doing it  
5           entirely electronically.

6           THE CHAIRMAN: No.

7           MR. HOLMES: It is certainly helpful where something is on  
8           the agreed reading list to have that in hard copy.

9           DR. BISHOP: Yes, that is right.

10          MR. HOLMES: That sort of circumscribes the amount of hard  
11          copy.

12          THE CHAIRMAN: Yes, it may or may not. It may at the end of  
13          the day be easier to provide the whole lot in hard copy,  
14          to be honest with you, because I certainly agree with  
15          Mr. Holmes that when one is actually reading --  
16          pre-reading, it is much easier to do it, or I find it  
17          much easier to do it in hard copy. I find it tiring  
18          reading through on the screen all the time.

19          MR. JONES: My Lord, can I suggest that there may be a  
20          distinction to be drawn between the bundles which are  
21          mainly B to E which have already been largely settled,  
22          which have the expert reports and the witness statements  
23          and so on, and bundles which the parties are currently  
24          liaising on which are going to contain sort of  
25          contemporaneous documents which might be necessary to

1 show you in the hearing and which underlie the experts'  
2 reports. I mean, it is obviously a matter for the  
3 tribunal, but, my Lord, if you wanted a targeted group  
4 of bundles, one might have the former, but not  
5 necessarily the latter.

6 THE CHAIRMAN: Yes. Well, I can certainly see that if we  
7 are not going to be dipping into the latter as part of  
8 our pre-reading, I can see that.

9 MR. HOSKINS: My Lord, I am being deluged, sorry, by  
10 WhatsApp messages from those instructing me saying they  
11 doubt very much you will want all the documents in hard  
12 copy, and they do not think it is really going to be  
13 physically possible, so ...

14 THE CHAIRMAN: I do not think we disagree with that. Well,  
15 can you tell those instructing you, or they can hear  
16 from what I am going to say, that I am delighted to hear  
17 them say that.

18 All right, I think -- I am glad we have had that  
19 discussion. That has given us a much better idea of the  
20 shape, and I think the solution is that we will -- the  
21 main bundles which we will be expected to pre-read from  
22 can be provided in hard copy, but the underlying  
23 documents which will simply be referred to occasionally  
24 during the trial can remain simply in electronic form.

25 MR. TURNER: My Lord, there are three brief matters that

1 I would wish to raise, but I will pause because I think  
2 you were going to say something else.

3 THE CHAIRMAN: I am not sure I was, actually. I think we  
4 have given you all our practical points.

5 MR. HOLMES: Just one small practical point, which is a much  
6 smaller piece of paper, is to what -- and that is a date  
7 for having the revised, hopefully agreed trial  
8 timetable.

9 MR. TURNER: That was my first point.

10 MR. HOLMES: Ah.

11 THE CHAIRMAN: Thank you.

12 MR. TURNER: I was going to propose that the parties get  
13 together after this, it is related to my second point,  
14 and subject to people's availability, because we are now  
15 entering the August period, we could seek to agree  
16 something and get it to you within -- would a fortnight  
17 be convenient to the tribunal or --

18 THE CHAIRMAN: Well, if you could manage something a bit  
19 quicker than this, only for this reason, that I have the  
20 great good fortune to be sitting as vacation judge for  
21 the first two weeks of August, so I shall actually be  
22 around, and it would be quite convenient if there is any  
23 difficulty for me to look at it while I am still around,  
24 if I can put it that way.

25 MR. TURNER: Friday, 7 August?

1 THE CHAIRMAN: That would be perfect for me.

2 MR. TURNER: My related point was when we sit down with each  
3 other, I neglected to ask how long the tribunal would  
4 want for reading the closing submissions, because the  
5 practices do vary. We imagine that you would want at  
6 least a three-day period and maybe significantly more  
7 than that.

8 THE CHAIRMAN: I mean, my initial reaction is that we will  
9 want a week.

10 MR. TURNER: Yes.

11 THE CHAIRMAN: But -- proceed on the basis that that is what  
12 we would like.

13 MR. TURNER: Very well.

14 THE CHAIRMAN: I think we may want to revisit that. I mean,  
15 I am conscious of the fact that we need at some stage to  
16 firm up on exactly when the reading period is going to  
17 be, and exactly when the closing submissions are going  
18 to be, for everyone's convenience, but I would like to  
19 leave a little bit of flexibility in relation to that at  
20 this stage. I think we will try and firm it up at the  
21 next PTR.

22 MR. HOLMES: We also have a date already agreed, I think,  
23 for the skeletons and the trial bundle at that time, and  
24 if we have the agreed reading list at that time, that  
25 gives the tribunal the option of reading material.

1 I would also flag that, at least speaking for myself,  
2 that I am in another hearing here in the week at the end  
3 of October -- sorry, the week to the 22nd.

4 MR. TURNER: I am obliged.

5 THE CHAIRMAN: But hang on, you were making points, were you  
6 not, Mr. Turner, about the closings, the reading period  
7 for the closings?

8 MR. TURNER: Yes.

9 MR. HOLMES: My apologies, I thought -- my apologies.

10 MR. TURNER: So those were the two additional points that  
11 I thought would be useful to clarify before we sit down,  
12 and we will work towards 7 August. My final remaining  
13 point is what has come in to me on the WhatsApp, and  
14 which is a significant point which I need to correct in  
15 what I said, just so that you have this clear.

16 My Lord, you will recall yesterday, we were  
17 discussing how the pass-on issues work in the case, and  
18 you asked me if this Ofgem letter, August 2019, was the  
19 only basis for inferring what Ofgem would do when, or if  
20 or when, National Grid gets a damages award from the  
21 tribunal in this case.

22 I should have made clear that the Ofgem letter does  
23 not come out of the blue, it is a part, on our case, of  
24 the established regulatory machinery, and if you would  
25 briefly, please, turn up {E/3/20}, that is where this

1 point in our case is crystallised. It was Mr. Noble's  
2 main report. It will come up in a moment. {E/3/20}  
3 page 20.

4 Yes. So here is the part of his main report dealing  
5 with the passing on, and if you go in it, please, to --  
6 well, if you look at paragraph 4.6, Ofgem said in that  
7 letter that they are going to apply this sharing factor.  
8 4.7 sets out what Ofgem said. If you go over the page,  
9 please {E/3/21}, and then in 4.8, he explains the detail  
10 of the price regulation regimes and what this sharing  
11 factor means. It is something which is a more general  
12 aspect of the Ofgem regulation.

13 What he says at the end of 4.8 is that Ofgem is  
14 confirming its intention to apply this regulatory  
15 sharing factor to any damages or settlement sum.

16 Then if you go on one more page, at 4.14 {E/3/22},  
17 something the tribunal ought to know as well, bearing in  
18 mind your Lordship's question, if you look here at 4.14  
19 in that previous case, *Gas Insulated Switchgear*,  
20 your Lordship knows there was not a judgment. The case  
21 settled.

22 THE CHAIRMAN: Yes.

23 MR. TURNER: At 4.14, Ofgem did apply that sharing factor to  
24 what it got from National Grid in that case. So it has  
25 been done.

1 THE CHAIRMAN: Okay.

2 MR. TURNER: So that was the first point, to say there is  
3 a solid basis beyond the Ofgem letter.

4 The second point is your Lordship asked me and  
5 counsel more generally whether there was any relevant  
6 authority on dealing with regulated entities in this  
7 fashion. I will not go into it in detail, but there is  
8 one in the bundle that I should have referred you to.

9 It was the *Britned* case --

10 THE CHAIRMAN: Oh, right.

11 MR. TURNER: -- in the Court of Appeal, and so for you and  
12 the members of the -- other members of the tribunal's  
13 note, there is a discussion about an interplay with  
14 regulation that begins at around paragraph 189, and the  
15 nub of it seems to be that the Court of Appeal says, if  
16 you have got limited material available as a court, then  
17 you must form a view as best you can on the material,  
18 and treat that as one of the uncertainties that have to  
19 be taken into account in assessing the amount of the  
20 claimant's loss. But you will be able to read it for  
21 yourselves, and there will be submissions on it. But as  
22 you had asked me, I felt it necessary to explain there  
23 is that authority.

24 THE CHAIRMAN: Well, that is something to look forward to  
25 for later.

## 1 Discussion re confidentiality

2 MS. DAVIES: My Lord, I do not have any points to supplement  
3 any of the submissions I made yesterday, but there is  
4 a point about confidentiality that I raised with  
5 Mr. Turner that I do need to raise with the tribunal.

6 THE CHAIRMAN: Yes.

7 MS. DAVIES: During the course of the last two days, there  
8 has, of course, been reference to the joint experts'  
9 statement and the annexes to it, some of which contain  
10 inner confidentiality ring material. There has not been  
11 any oral references to the inner confidentiality ring  
12 material, but those documents have been referred to in  
13 the hearing, and for that reason it is agreed, as I  
14 understand it, between all the counsel, that we ought to  
15 be asking the tribunal to make a protective order.  
16 There is a precedent for this in Mr. Justice Barling's  
17 order in the third CMC in the *National Grid*  
18 proceedings, which is -- let me just pull up the page  
19 number -- at {G/8/2}, and at paragraph 1 is the  
20 precedent that I was referring to:

21 "Any documents read to, or by [substitute 'the  
22 tribunal'] ... or referred to by the parties' Counsel,  
23 at the [PTR] ... which have been designated as  
24 containing Confidential Information ... shall remain  
25 subject to the protections set out in that

1 Confidentiality Order."

2 The caveat to that that I have discussed and agreed  
3 with Mr. Turner, and I believe the other defendants'  
4 counsel are also happy, is that we are happy to have  
5 a carve-out for anything that was expressly read by  
6 counsel to the tribunal, because we are confident that  
7 nothing that was expressly read contained any  
8 confidential information, and consistent with, you know,  
9 openness and so on, we thought that ought to be  
10 reflected. But I just thought I ought to mention it  
11 because we need the tribunal obviously to include this  
12 in the order for the PTR.

13 THE CHAIRMAN: Two points on that, Ms. Davies. I mean, as  
14 a matter of principle, that seems to be entirely  
15 sensible. I assume that this tribunal has jurisdiction  
16 to make these orders, does it? Because we are not the  
17 High Court.

18 MS. DAVIES: Yes, is the short answer to that. I have not  
19 got the relevant provision in the CAT rules to hand,  
20 but --

21 THE CHAIRMAN: Thank you very much. I would be very  
22 grateful if somebody could just let me have a note of  
23 where that is to be found. But in principle the  
24 tribunal will certainly make an order along those lines.  
25 That seems entirely sensible.

1           The only other point on orders is the -- what you  
2           are going to do about putting together an agreed draft  
3           minute of what has gone on today and yesterday. As  
4           I indicated, I am around for the next couple of weeks,  
5           so if there needs to be any further debate about --  
6           I mean, I do not anticipate it, but if there is any  
7           problem putting together the order, I would be grateful  
8           if you could get it to me during the course of next  
9           week.

10           Presumably, Mr. Turner, you will take conduct of  
11           putting an order -- a draft together?

12       MR. TURNER: We will do that. I do not expect there to be  
13           a problem.

14       THE CHAIRMAN: No.

15           All right. Has anyone got anything else? We will  
16           add in -- on the assumption I am satisfied as to  
17           jurisdiction, which I am sure I shall be -- we will add  
18           in the point about the confidentiality to the draft  
19           order -- to the minute of order.

20           Has anyone got anything else they want to ask us to  
21           do, or directions to give? No.

22           Well, thank you all very much for your assistance  
23           over the course of the last two days. We look forward  
24           to meeting you again in October.

25       MR. TURNER: Thank you.

1 (4.10 pm)

2 (The tribunal adjourned)

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