

This Transcript has not been proof read or corrected. It is a working tool for the Tribunal for use in preparing its judgment. It will be placed on the Tribunal Website for readers to see how matters were conducted at the public hearing of these proceedings and is not to be relied on or cited in the context of any other proceedings. The Tribunal's judgment in this matter will be the final and definitive record.

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
(Hybrid Hearing)

Friday 23rd October 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)

National Grid Electricity Transmission PLC

-v-

PRYSMIAN S.P.A and Others

A P P E A R A N C E S

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)

Digital Transcription by: Opus 2
Tel No: 020 3008 5900
Email: production@opus2.com

Friday, 23 October 2020

(10.50 am)

(Opening section missing due to technical issues)

THE CHAIRMAN: I understand, Mr Turner, that the system in court, which is here all the time, is working, so there is a transcription being made in the normal way of these proceedings. I also understand that the live feed for people who have signed in to listen to this hearing is also functioning, so, so far as transparency and recording are concerned, we are all right.

The system itself for instantaneous transcription which is being produced by Opus is not at the moment up and running but I think our view is that we should just carry on anyway, as we have the two things that matter for present purposes. I realise it's not ideal but the parties will be able to get a transcription from the normal system so they can see what's actually happened.

MR TURNER: We are grateful and it has been kindly also pointed out that we all have our individual Opus screens for documents which aren't in the hard copy bundle prepared for today.

THE CHAIRMAN: Yes.

MR TURNER: My Lord, we were talking about the arrangements for Mr Romeo.

THE CHAIRMAN: Yes.

1 MR TURNER: I had given our position, which is that this, if
2 it takes place by videolink, should be at the office of
3 an independent Milan law firm and there should be an
4 independent lawyer in Milan assisting. At that point
5 Ms Davies wanted to explain the arrangements that she
6 has already set up and I will, therefore, sit down and
7 allow her to do that.

8 MS DAVIES: I'm grateful to my learned friend and I'm also
9 grateful to the tribunal for their indication that they
10 will permit Mr Romeo to give evidence by video link in
11 the circumstances.

12 What I wanted to explain is, obviously, this only
13 came to light so far as the legal team are concerned on
14 Tuesday.

15 THE CHAIRMAN: Yes.

16 MS DAVIES: Since then we have been endeavouring to try and
17 find a law firm in Milan who has both an appropriate
18 conference room facility which is going to be available
19 and also an English-speaking lawyer, which is also
20 necessary, obviously, to be able to -- if there is any
21 issue because certainly I don't speak Italian and
22 I doubt my learned friend does.

23 Mr Romeo has asked for the bundles to be provided in
24 hard copy and available to him, which we believe is
25 appropriate for a witness; they should have access to

1 the hard copies. So the bundles are going to have to be
2 shipped to Milan and stored in the law firm. They are
3 obviously going to have to contain the material that is
4 in the inner and outer confidentiality rings because
5 that's spread through the bundles.

6 We have managed to ascertain that a reputable law
7 firm called Bonelli have the facilities available and
8 also an English-speaking lawyer who has no prior
9 involvement with Prysmian -- it has not worked on any
10 Prysmian case -- who could be available to assist.

11 What we think will be difficult given Prysmian's
12 position in Milan is to find an appropriate Milanese law
13 firm who has never previously worked with Prysmian,
14 which seemed to be the suggestion that my learned friend
15 was just making, with an appropriate conference room
16 facility and also a fluent English-speaking lawyer.

17 So that's what we have managed to ascertain since
18 Tuesday. We, for our part -- on the basis that the
19 lawyer in the room will be someone who has had no prior
20 involvement with Prysmian, we would respectfully suggest
21 that would be sufficient, and, of course, if the
22 claimant wished to instruct someone in Milan to attend
23 as well, we would, of course, have no objection to that,
24 but, of course, we are in the tribunal's hands. If the
25 tribunal would like us to carry on trying to find

1 something different to that, we will, although we do
2 question whether it's necessary.

3 THE CHAIRMAN: I don't know what Mr Turner's position is or
4 his client's position is in relation to instructing
5 someone on their own behalf. I mean, I think from our
6 perspective that would be appropriate, should the
7 claimant wish to do it. I mean, I only put it like
8 that.

9 Mr Turner, I don't know whether that's something you
10 are likely to want. It may depend on the details that
11 you get, once they have been finalised, from Ms Davies'
12 clients as to exactly what the arrangements are going to
13 be.

14 MR TURNER: Yes. Most importantly the law firm concerned.
15 If it's a law firm that does work for Prysmian, that
16 does place a different complexion on it. We can easily
17 provide names of Milan law firms able to do that. So
18 I will suggest --

19 THE CHAIRMAN: Can I suggest that we leave it like this
20 then: you both have received the indication from the
21 tribunal that if the claimants consider it necessary,
22 they should be entitled to have a lawyer instructed by
23 them attend during the course of the cross-examination
24 of Mr Romeo but, subject to that, I hope that we can
25 leave it to you to deal with and sort something out

1 between you. If you run into any difficulties, you are
2 always at liberty to approach the tribunal during the
3 course of the next week or so. But I suspect we are not
4 going to be able to take it further today, are we?

5 MS DAVIES: No.

6 MR TURNER: Thank you. The qualification is, if you still
7 have the Macfarlanes letter open --

8 THE CHAIRMAN: I do.

9 MR TURNER: -- and you look at the highlighted text three
10 paragraphs down on page 1, the last sentence refers to
11 something that we have said for good order we would be
12 interested in obtaining details about.

13 This morning I have been provided with one document,
14 which is all my friend says that they were able to
15 obtain in the time available. If I may, I'll hand that
16 to the tribunal. But it is confidential.

17 The nature of it is such that we will -- yes, we
18 will ask --

19 THE CHAIRMAN: I regret I am insufficiently educated to be
20 able to read this.

21 MR TURNER: We will ask for further details because it does
22 not deliver on what was referred to in Macfarlanes'
23 letter.

24 MS DAVIES: Can I just explain in relation to that. We
25 received, at around 4 o'clock last night, a request that

1 we actually make available the last sentence. That was
2 what we were able to get overnight, which confirms the
3 ongoing nature of the issue. My learned friend says
4 that is not sufficient for their purposes. We will go
5 back and get more material.

6 MR TURNER: It does not refer to any issue. It refers to
7 a particular location.

8 THE CHAIRMAN: Well, I think it suffices to say that the
9 tribunal's view in relation to this proceeds on the
10 basis that what Macfarlanes say in their letter is
11 accurate. If it transpires that it is not, we will have
12 something further to say about it.

13 MR TURNER: The other witness is Mr Head. So far as Mr Head
14 is concerned, we have taken stock. We do not need him
15 to attend for cross-examination now. So he falls away.

16 THE CHAIRMAN: Thank you.

17 MR TURNER: The combination of these two developments in
18 relation to Mr Romeo and Mr Head mean that there is an
19 impact on the trial timetable.

20 THE CHAIRMAN: Yes.

21 MR TURNER: There was a draft attached to our skeleton.

22 THE CHAIRMAN: Yes.

23 MR TURNER: Which you can find in tab 2 of the hard copy
24 bundle. If you do not have it elsewhere.

25 THE CHAIRMAN: Yes, I have it.

1 MR TURNER: You will see that what this means is that in
2 week 2, on Friday 13 November, if Mr Head is now not
3 coming, that day is open. We, in the work that I have
4 been doing on the cross-examination for the principal
5 witness, Mr Romeo, have realised that the
6 cross-examination threatens to take him over the two
7 days that we had warned him for, particularly if I now
8 have to do it remotely.

9 THE CHAIRMAN: I was going to ask about that. I mean, my
10 experience over the course of the last nine months has
11 been that it does take significantly longer if you are
12 doing it remotely.

13 MR TURNER: With that in mind, we have proposed to Prysman
14 either that he should be warned also for the Wednesday
15 or that, if available, he should come on the Friday --
16 or attend remotely on the Friday, in place of Mr Head.

17 THE CHAIRMAN: Yes.

18 MR TURNER: What has been said is that he cannot come on the
19 Friday, but now Mr Spraggs, who was previously
20 unavailable that week, is available.

21 THE CHAIRMAN: On the Friday?

22 MR TURNER: Yes. However, we do not wish to interrupt the
23 existing order, so our preference is that Romeo should
24 be warned for three days in week 3, Monday, Tuesday and
25 Wednesday, as well as Mr Spraggs.

1 THE CHAIRMAN: Right.

2 MR TURNER: It is likely that Mr Spraggs, in fact, can be
3 restricted to the Tuesday and the Wednesday.

4 THE CHAIRMAN: So your position is that you want, what? You
5 want to do Romeo before Spraggs. Is that the point?

6 MR TURNER: Yes, that was the existing arrangement.

7 THE CHAIRMAN: Right.

8 MR TURNER: We think it will make much more sense.

9 THE CHAIRMAN: What are we going to do on the Friday then?

10 MR TURNER: Friday, at the moment, therefore, is an open
11 day, it would be a non-sitting day, unless that is there
12 is a run-off on our own witnesses. There is an
13 application for Mr Hedd Roberts also to be admitted with
14 a new statement, which we will get to at the end of the
15 agenda. I have had no indication that it affects the
16 timetable for cross-examining our witnesses, but it is
17 to be borne in mind.

18 MS DAVIES: My Lord, can I just explain in relation to this,
19 as my learned friend has indicated, Mr Spraggs is
20 available on the Friday but Mr Romeo is not. Mr Spraggs
21 is not available on Thursday or Friday of the following
22 week, the days that are down for reading in, and we
23 would have a concern -- I share my Lord's view about
24 cross-examination remotely, it can take longer -- and we
25 would have a concern, therefore, about ensuring that

1 Mr Spraggs is completed if my learned friend's proposal
2 is adopted. Of course, it is entirely for us in which
3 order we call our witnesses, and we would rather use the
4 Friday and have Mr Spraggs called then to ensure that
5 our evidence can be finished appropriately. So far as
6 the claimant's witnesses are concerned, what I have
7 actually indicated to my learned friend is timetable for
8 cross-examining the witnesses for which he currently has
9 permission. I also indicated to my learned friend that
10 if he gets permission for Mr Roberts, I am going to have
11 to consider whether I need to cross-examine Mr Roberts,
12 and I haven't given an estimate for that yet. But if
13 Mr Roberts is required, I still would be confident that
14 we will finish the claimant's evidence in the four days,
15 Monday to Thursday.

16 THE CHAIRMAN: That's what I was going to ask you. How long
17 do you think Mr Spraggs is going to take?

18 MR TURNER: The evidence is interrelated. At the moment, it
19 looks like it can be accommodated in under a day, at the
20 moment.

21 THE CHAIRMAN: Right.

22 MR TURNER: I don't understand Mr Spraggs to be intending to
23 give evidence remotely as well. We have only heard
24 him -- he is turning up.

25 THE CHAIRMAN: At the moment, I am very reluctant not to use

1 the Friday. I realise, you know, you have been
2 proceeding on the basis that you were going to deal with
3 Romeo before Spraggs. But these things do happen in
4 trials sometimes. And unless there is a good reason
5 sort of over and above, if I can put it this way,
6 convenience and/or possibly tactics, although I am not
7 accusing you of that at all, I am minded to think that
8 Spraggs ought to come on the Friday, as he is available.

9 MR TURNER: My Lord, in that case, we are happy to go with
10 that suggestion.

11 THE CHAIRMAN: Thank you very much. That then has the
12 advantage of giving us the Wednesday as overrun for
13 Romeo.

14 MS DAVIES: I should have said Mr Romeo is available Monday
15 to Wednesday.

16 THE CHAIRMAN: Yes, I thought I had got that in my head.
17 Well, I assumed that was the case. That does have the
18 advantage of ensuring that -- because I suspect that he
19 will take much longer than we think he is going to.
20 There are lots of reasons for that. He is abroad. Is
21 his evidence being given with the assistance of an
22 interpreter?

23 MR TURNER: No.

24 THE CHAIRMAN: So we do not at least have that disadvantage.
25 But is he a fluent English speaker?

1 MR TURNER: He appears to be, from his written material and
2 his background, and he studied English.

3 THE CHAIRMAN: In any event, as I think we all know, it does
4 take longer. What we will do is we will put Romeo in
5 then for the Wednesday, as well as the Monday and the
6 Tuesday, and Spraggs in for the previous Friday.

7 Good, was there anything else that arose in relation
8 to this particular issue?

9 MR TURNER: Not that particular issue, but still under the
10 same agenda items there were some general points that
11 were made in the skeletons.

12 THE CHAIRMAN: What, on the --

13 MR TURNER: On the COVID-19 situation.

14 THE CHAIRMAN: Yes.

15 MR TURNER: And I can deal with those very briskly.

16 THE CHAIRMAN: Yes.

17 MR TURNER: One, if there has to be a fully remote hearing,
18 because things are changing day by day, our firm
19 position is that that is still workable, particularly
20 given the reduction in the parameters of the trial.
21 Two, Prysmian have made certain observations in their
22 skeleton argument, you will have seen, about the
23 mechanics of a part-physical hearing. The first point
24 is that they suggest that if the number of physical
25 attendees in court allowable falls under five, that may

1 prevent Prysmian's rights of defence from being
2 respected, top of page 2 in their skeleton.

3 I just wish to make the observation that there is no
4 special rights of defence issue. This is a damages
5 claim between two equal litigants. It is not a public
6 law investigation, the public law investigation has
7 concluded.

8 The second point, on the practical level, we
9 consider that each side can manage, if needs be, with
10 there being two counsel, leader and junior, and just one
11 solicitor. We are aware that in a recent case in the
12 Court of Appeal the question of leading counsel
13 appearing alone in court was canvassed, and that was
14 regarded, correctly, as cruel, and the bond with their
15 junior should not be severed in that way. So that is
16 our position on physical appearances, but we do agree
17 that the situation does need to be kept under review on
18 a regular basis.

19 The third point, Prysmian says that, for reasons of
20 equality of arms, if one side's expert cannot attend in
21 person for the session, the counterpart should attend
22 only remotely as well. We do not object. It is
23 a matter for the tribunal, but that does seem sensible.

24 THE CHAIRMAN: Yes.

25 MR TURNER: Fourth point. We understand that Mr Davies is

1 travelling from France for the trial. We understand he
2 is intending to arrive a few days ahead, and we agree
3 with what Ms Davies has said in the skeleton, that it is
4 appropriate to raise with the tribunal whether you are
5 content that he should attend court in the 14-day period
6 of self-isolation under the current rules. If you are
7 content with that, then we for our part do not think it
8 much matters if you give an informal indication or
9 guidance, which can be recorded on the transcript, or
10 make a formal direction.

11 Fifth and finally, Prysmian make the same point
12 about equality of arms for the barristers, for the
13 leading counsel, for Ms Davies and myself. If one of us
14 has to self-isolate, the other should not appear in
15 court. We do not object to that either. Again, it is
16 a matter for you.

17 So those are the issues.

18 THE CHAIRMAN: Ms Davies.

19 MS DAVIES: My Lord, I am grateful. Can I just deal with
20 Mr Davies first. The reason we have raised that is, of
21 course, the government guidance says we have to first
22 raise it with the tribunal. It is unclear quite what
23 that means.

24 THE CHAIRMAN: We wondered whether we were going to be asked
25 to make a direction that he should come in person, and

1 that that would somehow do something under the
2 legislation. I am not sure that it does.

3 MS DAVIES: The legislation has a carve-out for attending
4 legal proceedings --

5 THE CHAIRMAN: It does, yes.

6 MS DAVIES: -- but it is just because of the guidance that
7 we felt we had better raise it.

8 THE CHAIRMAN: Thank you very much. Our view is that,
9 firstly, insofar as it is relevant for the purposes of
10 the legislation, we think it is appropriate that he
11 should come.

12 As to the actual practical arrangements when he
13 comes here, I do not think any of us have any particular
14 concerns about the fact that he has come from France and
15 is coming into this building, although we are sure that
16 he will proceed on the basis that, if he has any
17 concerns about his own health, he does not come and
18 tells the tribunal that there is an issue. I think one
19 has to just leave it to the common sense of a
20 professional.

21 MS DAVIES: Of course, my Lord, as indeed for every person
22 coming into court during this current situation and, of
23 course, there are temperature checks as we come in, so
24 they are providing some assistance as well.

25 THE CHAIRMAN: Yes.

1 MS DAVIES: I am very grateful. So far as the other matters
2 are concerned, we raised them simply to just flag issues
3 with the tribunal. Of course, I take my learned
4 friend's point entirely that all these matters are
5 matters for the tribunal, but the equality of arms
6 point, we understand, is generally being adopted by
7 other judges and it seems to us appropriate --

8 THE CHAIRMAN: Thank you for raising it with us and the
9 principle is both understood and agreed. Quite what
10 happens in practice, if one of these situations emerges,
11 we will have to leave it --

12 MS DAVIES: My Lord, we particularly were alive to it
13 because it happened to a colleague of mine in chambers
14 last week and, because there had been no prior
15 discussion, it caused a bit of a panic on the morning of
16 the hearing, whereas, of course, if we know the
17 parameters now, and one or other of us, unfortunately,
18 has to self-isolate, then, of course, we can immediately
19 inform everybody and address it.

20 THE CHAIRMAN: For all I know, the same may happen to
21 members of the tribunal. We will just have to deal with
22 it as and when it emerges as an issue.

23 MS DAVIES: The final point in terms of number of people in
24 the room, the issue is really, once we have got
25 witnesses in the room as well, is that going to

1 constrain the numbers that can come in? I accept that
2 from the counsel team, the solicitor's team, having lead
3 and junior counsel and a representative of our
4 respective instructing solicitors will suffice, but if
5 we get to a point where, with witnesses in the room, we
6 can't have that, then things become more difficult.

7 THE CHAIRMAN: No, I understand that. Our present
8 understanding of the position is that we can fairly
9 satisfactorily deal with this and maintain proper social
10 distancing by having five for each party, up to five.
11 I notice there are four on each team in the room at the
12 moment, and just looking at the layout of the room, it
13 seems satisfactory.

14 Normally, one would expect people to help the
15 witness, and it may be that one of your allotted four or
16 five will have to be the person who helps the witness
17 with the documents, if necessary, and so on. We will
18 just have to slightly play it by ear as we go along.

19 So far as that is concerned, I think the
20 arrangements that you all seem to agree on seem pretty
21 satisfactory to me.

22 MS DAVIES: We are grateful, my Lord.

23 MR TURNER: Good. My Lord, that is it for the first two
24 agenda items. The next three --

25 MS DAVIES: We have to get the tribunal's agreement for the

1 video.

2 MR TURNER: Quite right.

3 THE CHAIRMAN: Which I have to say -- I am not sure we are
4 going to change our minds, but we were discussing in the
5 retiring room just now whether we ought to. We are very
6 happy with Opus. We found it very helpful on the last
7 occasion. The only thing that seems to have not worked
8 quite this time around is something to do with the
9 platform, I think.

10 MS DAVIES: It is working now.

11 THE CHAIRMAN: Oh good, excellent. Maybe we will not have
12 the problem again. But, in principle, I think, your
13 instructing solicitors, we understand it, have made
14 great efforts to sort of liaise with Opus and the
15 tribunal to make sure that it actually is going to work,
16 and I think a little bit of an enquiry as to what went
17 wrong this time might be in order. But, in principle,
18 we are happy to continue in this way.

19 MR TURNER: I am obliged.

20 Then I will turn to the next three agenda items,
21 which are all essentially concerned with the trial
22 timetable, other aspects.

23 The only point between the parties, as you will have
24 seen from the skeletons, concerns closings. If you turn
25 back to the draft timetable behind our skeleton, the

1 question is this: we propose one week to prepare the
2 closings in writing after the evidence concludes, and
3 that oral closing should then be delivered, we suggest
4 a programming, one day a piece, on the Thursday and
5 Friday of the following week, taking you to the end of
6 the term almost. It finishes on the 21st.

7 Prysmian, on the other hand, consider that longer is
8 needed to prepare the written closings and that they
9 should be lodged on 18 December -- that's at the end of
10 week 7 -- or even in the New Year, and oral closing
11 should in any event then be delivered in the new term in
12 2021 in the week commencing 11 January.

13 THE CHAIRMAN: Yes.

14 MR TURNER: Those are the two positions. Our concern is
15 with efficiency and avoiding needless extra costs. We
16 take the view that six working days is ample to produce
17 written closings. The argument which was made in July,
18 that Prysmian needs to liaise with several other
19 defendants so that there is not duplication, that no
20 longer applies. It is a matter for the tribunal how
21 long you require to review the written closings when
22 they land. If they are lodged on 11 December, we say
23 there is a strong case for getting it done before the
24 end of the court term, while everything is still fresh
25 in the tribunal's mind.

1 The case for wrapping it up by the end of term, in
2 my submission, looks even stronger, assuming that
3 in December we are all still in the part-physical trial
4 but the shadow of increased COVID-19 risks is still
5 looming. There is then an obvious impetus to just carry
6 on and get it done.

7 The sensible approach, in my submission, is for us
8 to provisionally arrange now to press on and bring this
9 trial to a finish this year, in 2020.

10 So far as the length of oral closings is concerned,
11 a full day a piece, as we stand here today, seems
12 sufficient but there is also the possibility, were it
13 needed, of spillover to the following Monday,
14 21 December, the last day of term.

15 My Lord, those are our views.

16 MS DAVIES: My Lord, we are really in the tribunal's hands
17 about this. Really just two points. The six working
18 days, in the context of this case, is tight, we would
19 submit, not only because of the depth of the material
20 that is being covered and the breadth of it, but also
21 because of the confidentiality issues, which also
22 create, as the tribunal will understand, problems in
23 terms of making sure documents are appropriately marked
24 and so on and so forth.

25 In addition, there is a concern on our part that,

1 even with the best will in the world, the likelihood is
2 that there must be a reasonable prospect that there is
3 going to be some disruption because of the COVID
4 situation over the course of the seven-week hearing
5 given the difficulties of people having to go into
6 self-isolation potentially, and so on, and we do have
7 a concern that actually my learned friend's timetable
8 has no flexibility in it to accommodate anything like
9 that, whereas if we keep the week of 11 January within
10 the timetable, that also creates some flexibility. But,
11 as I say, we are really in the tribunal's hands. Of
12 course, written closings can be produced within six
13 days, if we have to. The question is whether they are
14 going to be the most helpful written submissions for the
15 tribunal.

16 THE CHAIRMAN: Thank you very much.

17 I think we fairly strongly prefer trying to finish
18 this case before Christmas. So, while we do not rule
19 out the possibility that we will change our minds after
20 the evidence is complete, we think that is pretty
21 unlikely and we wish to plan to finish it before
22 Christmas. So we will adopt Mr Turner's proposed
23 suggestion. We are particularly concerned with issues
24 of efficiency and so on, and we do think that while we
25 recognise that it imposes fairly considerable burdens,

1 both on counsel and the tribunal, hitting this
2 timetable, we think it is achievable and that is what we
3 propose to direct. But we do give either party liberty
4 to say, at the end of the evidence, this is no longer
5 achievable, for whatever reason. The most likely
6 reason, we anticipate, being disruption to the trial as
7 a result of COVID.

8 MR TURNER: My Lord, I think there is nothing further that
9 needs to be discussed under those items. In that case,
10 I will move on to agenda item 6, which is the evidence
11 of the settled parties.

12 THE CHAIRMAN: Yes.

13 MR TURNER: The question here is what use can be made of
14 their factual witness and expert evidence which was
15 served.

16 Our position and Prysmian's are almost completely
17 aligned. We agree that the factual and expert evidence
18 of the settled parties, ABB and NKT and Safran, will not
19 stand as evidence at the trial in its own right. We do
20 not intend to deploy it in that way.

21 And we agree, however, that it can be referred to
22 where that is necessary to explain the expert evidence
23 of either National Grid or Prysmian, particularly
24 because they cross-refer to points made elsewhere.

25 That is the agreement. So far as cross-examination

1 of the experts is concerned, there may be a difference.
2 The expert evidence will now be given concurrently in
3 this case, the hot tub, and the scope for
4 cross-examination by counsel on top of the concurrent
5 evidence is, therefore, limited, and it is covered by
6 the agreed wording of the draft hot tub protocol, which
7 tracked your Lordship's remarks from the July hearing
8 and matched the approach which was taken by
9 Mr Justice Roth in the *Paroxetine* case. If we can call
10 that up on Opus, it's at {N5/367/6}, a dry run. This
11 was the agreed protocol for managing the hot tub. If
12 you go in that to page 6 -- this is the first page.

13 Yes.

14 You will see from paragraph 5(ii):

15 "After the process set out in (i) and (ii) has been
16 completed ..."

17 THE CHAIRMAN: That does not quite work.

18 MR TURNER: No, it does not. We need to revisit that, for
19 a start:

20 "... Counsel for each of the parties will be given
21 an opportunity to ask questions of the Experts. Any
22 cross-examination must be limited to clarifying relevant
23 matters in relation to the topic under consideration or
24 be required, in order for parties' cases to be
25 adequately explored or put to the experts."

1 That was the agreed parameter of the counsel
2 questioning of experts, and it is an altogether
3 different matter for, say, Prysmian, to say, "I want to
4 put to you, expert for National Grid, the analysis which
5 has been carried out by NKT's or ABB's experts on the
6 given question," because that would be tantamount to
7 deploying that evidence in its own right, as opposed to
8 using material to criticise the analysis of the opposing
9 expert, in this case from National Grid.

10 THE CHAIRMAN: I can see why you say that. At the end of
11 the day, it depends on whether or not the reason it is
12 being deployed is for clarification purposes or not.

13 MR TURNER: Yes.

14 THE CHAIRMAN: So I think --

15 MR TURNER: That was the marker that I wished to place.

16 THE CHAIRMAN: I mean, I understand why you place the
17 marker, but I am not sure it affects the principle of
18 what it is that the parties have anticipated as being
19 the appropriate use to be made of the other evidence.

20 MR TURNER: My Lord, I am grateful.

21 If the tribunal is content with the approach that we
22 are agreed on then, as between the parties, we have
23 proposed a very minor amendment that should be made to
24 the agreed reading list for the trial.

25 THE CHAIRMAN: Yes.

1 MR TURNER: The agreed reading list, which --

2 THE CHAIRMAN: I have got it here somewhere. If it is in
3 the bundle. I do not think it is.

4 MR TURNER: I have the Opus reference, which is
5 {N5/472/3-4}.

6 THE CHAIRMAN: I have a hard copy, old-fashioned way of
7 doing it.

8 MR TURNER: And faster.

9 THE CHAIRMAN: (Laughs).

10 MR TURNER: The only change is that that agreed reading list
11 included the entirety of the joint experts' statements,
12 and there were a number of experts. But it will not be
13 necessary to read the columns filled in by the settled
14 parties' experts except where that is cross-referred to
15 by Mr Davies on the one hand or one of the National Grid
16 experts on the other.

17 Unless my friend has anything particular on this
18 item, we can move straight to the next two agenda items,
19 7 and 8, the concurrent evidence agendas and the expert
20 evidence more generally.

21 There are two aspects. First, whether the position
22 of the experts on taxation issues needs any more
23 clarification. On that, Mr Noble, on National Grid's
24 side, has liaised with Mr Davies, on Prysmian's side,
25 because Mr Davies served a further report after the July

1 PTR hearing, on 4 September. They had a without
2 prejudice discussion, they have produced a short
3 addendum to the joint statement covering that. We do
4 not believe that there is any issue about it but note
5 that it was filed.

6 THE CHAIRMAN: We understand that it was filed, I think,
7 yesterday. I do not think any of us have looked at it
8 yet, but it is probably not necessary for us to do so.
9 It is the product of the experts' collaboration?

10 MR TURNER: Yes.

11 THE CHAIRMAN: Yes.

12 MR TURNER: Yes, it has not involved lawyer drafting.

13 MS DAVIES: It does not require any further clarification,
14 but it should also be added to the tribunal's reading
15 list.

16 THE CHAIRMAN: Yes, thank you very much.

17 MR TURNER: Thank you.

18 THE CHAIRMAN: Yes.

19 MR TURNER: Then we go to agenda item 8.

20 THE CHAIRMAN: Yes.

21 MR TURNER: Which is addressing remaining areas of
22 disagreement between the parties for the agendas for the
23 concurrent evidence sessions, the meat of them, the cost
24 of finance and pass-on. It is now essentially a cost of
25 finance debate. If you turn up the draft hot tub

1 agenda -- you find that too behind our skeleton. That
2 is at the back of tab 2 of the bundle. Or I can give
3 the Opus reference, if required.

4 THE CHAIRMAN: We have all got copies actually.

5 MR TURNER: You have all got it? So if you have that at the
6 back of tab 2, the only real area of disagreement
7 concerns the agenda for cost of funding. If you go in
8 the document to page 5, under the heading "Financing
9 Losses", you see that for paragraph 22(ii) and
10 paragraph 24, and then over the page, 25 and 26, there
11 are competing drafts.

12 THE CHAIRMAN: Yes.

13 MR TURNER: I can take three of these points together
14 because the same point arises, and that is for 22(ii),
15 24 and 26.

16 THE CHAIRMAN: Yes.

17 MR TURNER: If you read 22(ii), by way of example, because
18 it is the same point all the way through, the green
19 text, which is us, asks:

20 "What, in your opinion, are the likely sources of
21 finance that the claimant used to meet any additional
22 financing requirements arising due to any overcharge?"

23 Prysmian contends:

24 "No, it must say what evidence, if any, have you
25 identified as to the source of finance or sources that

1 the claimant used to meet any additional financing
2 requirement arising due to any overcharge."

3 So the point throughout is this: the red text asks:
4 what factual evidence have you, the expert, identified.
5 It stops and omits to ask what the expert's views about
6 it are in the light of the factual evidence. Our
7 submission is that our draft is the right one because
8 the expert's task is not just to identify factual
9 evidence, it is to give an opinion based on the
10 evidence.

11 The substance of Professor Jenkinson's opinion --
12 I do not know if the tribunal has had a chance to read
13 his two reports -- as a corporate finance expert, is
14 that, in view of the facts which are known and described
15 by National Grid about its debt and equity financing
16 arrangements, he considers that those financing
17 arrangements will have applied to the cartel overcharge
18 also. He then goes on to estimate what the associated
19 cost to National Grid would have been as a result. That
20 is his evidence. He is exercising his expertise in that
21 field.

22 I will illustrate, if I may -- I do not have a
23 Jenkinson in hard copy. If we call up on Opus
24 {E/2/42} -- this is his first report -- yes, one
25 disadvantage, you don't have the document to flip

1 through, but in this section he states at
2 paragraph 4.22 --

3 MS DAVIES: I am very sorry, the pink on this is actually
4 confidential. If this is being streamed to anyone, my
5 learned friend might have an issue.

6 MR TURNER: Is this being streamed?

7 THE CHAIRMAN: I do not know whether it is. Is this being
8 streamed? Is this available for public inspection?

9 MR TURNER: Someone is nodding. No, no.

10 MS DAVIES: Just checking. I am sorry to have interrupted.

11 THE CHAIRMAN: Not at all. You have actually identified
12 a point that I was not aware of, which is the extent to
13 which material coming up on the screen is available to
14 anybody else apart from the barristers in court and the
15 tribunal. What is the position?

16 MS DAVIES: It is something we touched on in our skeleton.
17 Our understanding is that it is going to be possible for
18 people to apply to join the Opus stream -- it sounds
19 like no one has actually done it today, that is what
20 I think I am being told -- and to see the documents as
21 they come up on the screen but that Opus will have --
22 just as they will have a list of those who are in the
23 inner and outer confidentiality clubs for the purposes
24 of the audio, they will have that so that if we do need
25 to look at documents, they can lock people out. But,

1 obviously, it does mean that --

2 THE CHAIRMAN: It is particularly difficult, is it not, when
3 you have a single page which has some blocked and some
4 not blocked.

5 MR TURNER: I am being told that it is being streamed.

6 MS DAVIES: We have just had a message from one of the
7 solicitors at Macfarlanes saying he can see it. The
8 question is whether anyone is on the stream who is
9 not -- I believe this is inner confidentiality material.
10 One way of addressing it is that we determine that only
11 people within the inner ring can actually see the
12 document feed as well. It is something that I became
13 aware of quite late in this week, so we are trying to
14 work out. Of course, it does not normally arise in
15 court because normally everybody would be in the
16 courtroom, but they are far enough back that they cannot
17 actually see what is on the screens.

18 MR TURNER: In that case, may I suggest we approach it in
19 a different way for efficiency. If the tribunal members
20 have your individual Opus screens, as the referendaire
21 said, would it be in order for you to call up on your
22 own screens these documents?

23 THE CHAIRMAN: I think we will do that because this issue
24 does, as Ms Davies says, arise in court from time to
25 time. I do not think I have ever had a case in which

1 anyone has applied to see written material in court in
2 the normal way, which is actually confidential, although
3 technically, I suppose, if you are sitting in open
4 court, one would have to go into private in order to
5 stop it being disclosed. But it has not arisen, to my
6 knowledge. But I think, Mr Turner, if I may say so,
7 your suggestion is very sensible. We need to go on to
8 our laptops, do we, and open up the documents?

9 MR TURNER: (Inaudible).

10 THE CHAIRMAN: I see, so they do not actually see the
11 document? If everyone is happy with that, it would be
12 rather easier if we continued to do it this way. If
13 push comes to shove, we do have our own individual Opus
14 laptops, so we can do it ourselves, but we would rather
15 someone else did it for us, to be honest.

16 MS DAVIES: I have just been told that, as we understand it,
17 the only people who are on the screen that includes the
18 document are people who are in the inner confidentiality
19 ring today. What we will need to discuss after this is
20 how we address this going forward.

21 THE CHAIRMAN: All right, I think alarm but solved. If we
22 could go back then to the document that we were looking
23 at.

24 MR TURNER: This is a concrete illustration of the point of
25 principle I have just made, that the expert is

1 exercising their expertise based on the facts which they
2 are considering. At paragraph 4.22, you see the expert,
3 Professor Jenkinson, referring to the factual witness
4 from National Grid in the treasury department,
5 Alexandra Lewis, explaining the company's capital
6 structure and how it functions. That is a part of it.

7 THE CHAIRMAN: Yes.

8 MR TURNER: Then if you go forward to paragraphs 4.29 to
9 4.30, it is very easy to see that he is expressing an
10 expert view about the financing structure and costs for
11 the claimants, which he then says applies to the secret
12 cartel overcharge in this case.

13 So it is practising a clear expertise, and if you go
14 back to the language that we are using in these
15 questions -- 22(ii) is a good one to stick at -- the
16 same applies for the others:

17 "What, in your opinion, is the likely sources of
18 finance?"

19 This is his expert opinion based on the factual
20 material.

21 THE CHAIRMAN: Yes.

22 MR TURNER: Moreover, as we read Mr Davies' reports for
23 Prysmian, he is essentially doing a similar thing in
24 some places too. So if you go to Mr Davies' first
25 report, which is at {E/7/129}, for example.

1 THE CHAIRMAN: Yes.

2 MR TURNER: You will see at paragraph 8.11 he refers to his
3 factual understanding about how the claimant managed
4 their cash balances in this instance, and then he
5 expresses his view, "It seems to me unlikely that in
6 view of the facts, X or Y would have happened so far as
7 the financing of these overcharges is concerned."

8 He too is approaching things in the same way. If
9 you go forward in that document to page 132, {E/7/132},
10 paragraph 8.25, he says at the foot of the page:

11 "Based on the analysis ..."

12 Which is presented above:

13 "... I do not find it plausible that NGET would have
14 required to raise any additional debt or equity ..."

15 So he expresses his view about what actually
16 happened in terms of financing based on the factual
17 material. That is why the right framing is not, "What
18 evidence have you identified," but, "What is your
19 opinion?"

20 The assessment of the factual evidence is obviously
21 not just a matter of law for the tribunal, it squarely
22 engages expertise in the field of corporate finance.

23 So why is there this desire on Prysmian's side for
24 the expression of opinion by National Grid's expert on
25 corporate finance to form no part of the hot tub debate.

1 Prysmian is running a basic argument in the case,
2 which is quoted in our skeleton for this hearing, along
3 radically different lines from National Grid. If you
4 have our skeleton, we have quoted the relevant parts in
5 paragraphs 20 to 22. It's on page 7. Basically,
6 Prysmian's case, as you see there from the extract from
7 the skeleton that we have quoted -- I have given two,
8 but I can give more references from the experts -- their
9 case is that since there were no specific additional
10 financing facilities, to cover the cartel overcharge or
11 at least these cable projects, it is not possible for
12 National Grid to prove it suffered specific financing
13 losses, the compound interest claim.

14 We say that is wrong as a matter of law, and we have
15 set out the reasons in our skeleton for the trial. But
16 what Professor Jenkinson does is he explains why it is
17 wrong as a matter of economics and corporate finance,
18 and I can, if the tribunal wishes, give you further
19 references from his reply reports to show how he does
20 this, but I hope for present purposes you have the
21 point. You do not need to get into the substance of
22 this dispute between the two sides at this stage. Given
23 this agenda item, it is right, though, to reject very
24 sharply Prysmian's threshold suggestion that
25 Professor Jenkinson is dealing, in his reports, with

1 matters for the tribunal rather than of expertise. It
2 is completely right to frame the agenda and for the
3 tribunal's questioning to take the form that allows
4 Professor Jenkinson to discuss his views with the
5 tribunal.

6 So that deals with three of the four cases in this
7 draft.

8 The last one is question 25, if you have the draft
9 agenda still open on page 6.

10 THE CHAIRMAN: Yes.

11 MR TURNER: "National Grid additional question."

12 Which defendants don't agree:

13 "If the claimant incurred equity costs in connection
14 with financing the overcharge, how should those be
15 measured?"

16 THE CHAIRMAN: Yes.

17 MR TURNER: This too is plainly a matter of expertise. It
18 is essential as a question, given National Grid's case
19 that there were equity finance costs that are claimed
20 for in the case, for there to be this question.

21 Prysmian says in its skeleton, and in the prior letter
22 from the solicitors, that it is unnecessary -- it is
23 unnecessary because Prysmian's expert does not engage
24 with this issue. Prysmian explained that by referring
25 across to the joint expert's statement at questions 11

1 and 12. If we can call that up, it's at {E/18/22}, the
2 second joint experts' statement. This is questions 10
3 and 11. There you have only question 11 but the same
4 answer. Mr Davies is the penultimate column on the
5 right. His answers to these various questions about
6 equity are:

7 "I have not considered this, for the reasons stated
8 in my response to Q8, above."

9 So you have to go back, please, to page 17,
10 {E/18/17}, which is where you get his real point,
11 page 17 in this document, and you will see he says
12 there, the fourth expert column:

13 "I have not seen evidence that either Claimant took
14 on any additional financing facilities to fund any
15 underground power cable projects and I do not think it
16 plausible that the Claimants would have been required to
17 raise any equity as a result of the levels of overcharge
18 I have calculated ... so equity financing costs are not
19 relevant to my approach."

20 Then he quotes a legal point from the *BritNed*
21 judgment.

22 So the fact that Mr Davies has not addressed that
23 point, in my submission, does not make it irrelevant and
24 nor does it make it a matter that does not need to be
25 explored by the tribunal with Professor Jenkinson. It

1 is key to the case that equity finance costs arose for
2 National Grid as a result of the overcharge and how to
3 measure them, and his assistance as an expert on those
4 points, regardless of the legal questions, is
5 appropriate. So, for those reasons, my Lord, we say
6 that the green text should be preferred in each of those
7 instances.

8 THE CHAIRMAN: Yes, thank you. Ms Davies?

9 MS DAVIES: My Lord, what we are here debating is simply how
10 best to formulate, for the purposes of a hot tub agenda,
11 the issues that need to be determined.

12 So far as the point about 22(ii), 24 and 26 is
13 concerned, it really is a very short point in terms of
14 what is the role of the expert. The tribunal ultimately
15 are being asked by the claimant to award them compound
16 interest on the basis of the *Sempra* line of authority
17 that the tribunal will be well familiar with, and it is
18 obviously clear that it is a matter for the claimants to
19 prove that as an additional head of damage. Our short
20 point, therefore, is simply that the agenda should
21 reflect appropriately the role of the experts in
22 relation to that. We submit our formulation better
23 reflects that because ultimately, it is a factual
24 question for the tribunal, but it is a short point. We
25 are again within the tribunal's hands.

1 So far as the second point is concerned, given that
2 Mr Davies has not addressed the measure of the cost of
3 equity because, on his analysis, it is not relevant, for
4 the reasons that he explains in summary in item 8 of
5 the -- we simply do not understand why that needs to be
6 on the hot tub agenda at all. If our legal position --
7 I do not know if my Lord has yet seen or had an
8 opportunity to read our skeleton.

9 THE CHAIRMAN: I have, I would not describe it as
10 a skeleton, Ms Davies, but they were very helpful
11 opening submissions.

12 MS DAVIES: My Lord will know, therefore, that our position
13 is that in law the cost of equity is not a recoverable
14 head of damage.

15 THE CHAIRMAN: Yes.

16 MS DAVIES: Mr Davies has also explained in his expert
17 evidence that he has not seen any evidence, as per item
18 8, that they took -- as he says:

19 "... I do not find it plausible that the Claimants
20 would have been required to raise any equity ..."

21 In fact, there is no evidence that the claimant did
22 raise any equity. Those are our two answers in relation
23 to that. But we have not adduced expert evidence as to
24 the measure of the cost of equity. The only expert
25 evidence as to that is Professor Jenkinson, and we

1 therefore -- so --

2 THE CHAIRMAN: Because at the end of the day, Ms Davies, you
3 stand by your position in relation to how it is that
4 this all works, and if you were to introduce evidence in
5 relation to measure, it might be said to be inconsistent
6 with your position. I am sure the tribunal understands
7 that.

8 MS DAVIES: So simply on that, we do not understand what
9 needs to be explored --

10 THE CHAIRMAN: The only thing that may need to be explored
11 is that the tribunal may wish this to be in the hot tub
12 agenda for the purposes of asking any questions that it
13 has in relation to it on the assumption that you are
14 wrong on your position.

15 MS DAVIES: If the tribunal feels that is appropriate -- it
16 is simply that there is not a competing expert issue
17 about --

18 THE CHAIRMAN: That is right, and Mr Turner will doubtless
19 make submissions about the significance of that, so far
20 as the evidence is concerned, in due course. Can I just
21 say in relation to both these issues that the tribunal
22 does, of course, appreciate that the effect of this
23 debate has been to identify an area of dispute between
24 the parties in relation to cost of funding which is
25 clearly going to be critical to this aspect of the

1 damages claim, and we are only too well aware of that.

2 I think our view is -- and this is more than just
3 the judgment of Solomon -- we think it is helpful --
4 that in fact both the questions stay in. So, in fact,
5 all you do is you put "and" between the green and the
6 red so far as the 22(ii) is concerned, and the same is
7 done in relation to the others.

8 The reason we are going to suggest that is that we
9 are only too conscious of the role of experts, the role
10 of the tribunal as the fact finder and by whom the legal
11 principles have to be determined, but this is the kind
12 of area where it is sometimes slightly easier to
13 identify precisely where the correct line is to be drawn
14 when there is the discussion in the hot tub itself.
15 What we would not wish to do is end up with a form of
16 words that unnecessarily restricts it at this stage. We
17 are only too conscious of the limits of the role of an
18 expert.

19 So our view is that the green and the red should
20 both stay in in relation to all the questions and that
21 question 25 should also stay in. We are conscious that
22 your clients do not have evidence on that point.

23 MR TURNER: My Lord, I think we then move, on the agenda, to
24 the confidentiality issues, which are 9, 10 and 11.

25 THE CHAIRMAN: Yes.

1 MR TURNER: 9. The terms of the confidentiality order to be
2 put in place by the tribunal, which has stirred up
3 a hornet's nest.

4 THE CHAIRMAN: I have to say, Mr Turner, I do not think we
5 had any idea that this would cause the problem that it
6 seems to have caused at the time we made the suggestion
7 that was actually, I think as much as anything else,
8 a sort of belt and braces exercise off the back of what
9 Mr Justice Roth had done in another case. It was not
10 really anything more than that.

11 We were not concerned, of ourselves, as to the
12 effectiveness or suitability of the order that was
13 already in place having been made by Mrs Justice Rose.
14 It was really a tidying up exercise as much as anything
15 else and it seems to have caused a great deal of
16 problems. I am only talking here about the order. I am
17 not talking here about the practicalities, going
18 forward, on confidentiality.

19 MR TURNER: My Lord, we agree, and I suspect that Ms Davies
20 and Prysmian agree too. The issue here is actually
21 quite short, despite the heat that has been generated.
22 It is whether the tribunal should make a confidentiality
23 order that binds the settled parties, including
24 Scottish Power and ABB and so on, as well as the two
25 remaining parties.

1 THE CHAIRMAN: Can we make one suggestion -- and this may
2 not be satisfactory or appropriate, for all sorts of
3 reasons, but we make it nonetheless: we do wonder
4 whether in the light of what has happened, there is any
5 need to interfere with what is already in place. I just
6 throw this out for you now: do we need to make our own
7 order if it is going to cause all this problem?

8 MR TURNER: Well, for the reasons I am going to develop very
9 briefly, I do not think it will cause a problem.

10 THE CHAIRMAN: Right.

11 MR TURNER: We do continue to think that the tribunal should
12 make an order. The trial will happen in front of the
13 tribunal. People should owe confidentiality obligations
14 to the tribunal, it seems right that that should happen.
15 Also, if there are any changes to the composition of the
16 confidentiality ring or other modalities, rather than go
17 back to the high court to finesse those, it is better
18 for this tribunal to deal with those as the case
19 evolves.

20 THE CHAIRMAN: You mean a variation of the order.

21 MR TURNER: A variation of the order and so on, yes.

22 THE CHAIRMAN: On any view, do we not have power to do that?

23 MR TURNER: To vary the order of Mrs Justice Rose --

24 THE CHAIRMAN: Yes, because this issue, as I understand it,
25 insofar as it is an issue, relates to such difficulties

1 that there may be in relation to an order that is
2 binding people who are no longer parties to the
3 proceedings.

4 MR TURNER: Yes.

5 THE CHAIRMAN: That is the only question that has arisen.

6 I had understood that this tribunal takes what comes
7 from the High Court as it is, and I would be very
8 surprised, although I am not going to say I know the
9 answer off the top of my head, but I would be very
10 surprised if we were not able to vary Mrs Justice Rose's
11 order in relation to confidentiality, should we need to
12 do so. I just wonder whether that is not the simplest
13 way forward on this. Rather than thinking about making
14 a new order, we just simply proceed on the back of the
15 Rose order, varying it, if we need to, during the course
16 of the proceedings. In other words, are we making a bit
17 of a mountain out of a molehill on this unnecessarily?

18 MR TURNER: It is a fair point, my Lord, I do follow that.

19 I think that that might work, save that, in any
20 scenario, there is still the question of parties who are
21 not currently before the tribunal being made potentially
22 subject to a variation that you enter. What I was going
23 to say was that, having read the letter that came in
24 yesterday from Freshfields for ABB -- I do not know if
25 your Lordship saw that.

1 THE CHAIRMAN: Yes.

2 MR TURNER: A long and detailed letter from them. Then
3 there was a further letter from NKT's solicitors,
4 Addleshaw Goddard. For our part, we think that we can
5 see sense in the tribunal making a confidentiality
6 order, as opposed to varying the High Court order, which
7 does bind the settled parties as well as the two
8 remaining parties. That accords with what ABB has
9 argued for. There is a neatness to it because then this
10 single jurisdiction takes control over the entire
11 mechanism, and it seems to us that if there is no
12 disagreement on any side about that, that that is
13 equally something that can be done quickly and
14 efficiently and would satisfy everybody. If everybody
15 is content with that, it becomes a pure question of
16 mechanics.

17 THE CHAIRMAN: Did I not understand that Scottish Power had
18 an issue in relation to it?

19 MR TURNER: I see a nod. I might need to check on that. It
20 is true that Scottish Power were not even present at
21 the July PTR.

22 THE CHAIRMAN: Yes.

23 MR TURNER: They had settled before then. If it is true
24 that they also have a concern, then I can see that
25 your Lordship may feel that that solution may require

1 them to be consulted too.

2 My own concern about that is that, equally, if
3 your Lordship makes a variation, there is something to
4 consider on that front, which come to, then if it
5 affects them, it may be said they may need to be heard
6 as well.

7 THE CHAIRMAN: Yes. Well, I can quite understand that if an
8 order was made in proceedings when there were parties to
9 those proceedings which has an impact on the position of
10 somebody who has settled, the court has to think a bit
11 about whether or not it is going to affect them in any
12 way. In a sense, we are sort of moving into slightly
13 more of the later questions on confidentiality about the
14 extent to which third parties need to be involved in any
15 dedesignation exercise, for example. It is all about
16 how the court approaches questions of confidentiality
17 when third party interests are at stake.

18 It may be that before we reach a final conclusion as
19 to what the right thing to do with the order is, we
20 should look at the entirety of the shape of the problem
21 and see where we are go.

22 I mean, we did really wonder whether we were not
23 making a bit of a rod for our own back on this by making
24 our own order, but we will mull on it once we have seen
25 the shape of the entirety of the confidentiality point.

1 It is slightly strange this, this whole issue -- I don't
2 mind saying, 9, 10 and 11, I find the most perplexing
3 when I was reading in for this PTR, probably because of
4 the way it has developed over the course of many years
5 and just trying to understand who actually was
6 interested in the outcome, I found a little difficult to
7 get my head round.

8 Is it sensible then, Mr Turner, just to park the
9 pure question of whether or not a new order should be
10 made and look at the substance of the confidentiality
11 issues?

12 MR TURNER: Yes. That is a very sensible approach. So

13 I turn to agenda item 10.

14 THE CHAIRMAN: Yes.

15 Submissions by MR TURNER

16 MR TURNER: It has two parts, (i) and (ii). First, whether
17 documents that are currently marked "Confidential", or
18 "Inner confidentiality ring" in particular, should be
19 dedesignated, so that they can be referred to in open
20 session and possibly in the tribunal's eventual written
21 judgment.

22 Second, how documents which continue to be
23 designated as "Confidential" can be put to the witnesses
24 for the purpose of questioning. My focus is very firmly
25 on the first part, dedesignation, because that will

1 knock the whole point on the head, in my submission.

2 THE CHAIRMAN: Yes.

3 MR TURNER: If you are satisfied that the documents that
4 I am concerned with are non-confidential, then the
5 difficulties inherent in putting confidential documents
6 to the witnesses are not going to arise.

7 THE CHAIRMAN: Can we just back up on this point and
8 understand the parameters of what we are talking about
9 here, just so I have got this clear. There are two
10 aspects to this. The first is I think we would like
11 some sort of feel of the extent of the problem.
12 Secondly, how does this fit conceptually with the fact
13 that, in normal litigation, material that is
14 confidential -- of course, the court makes an effort to
15 ensure that confidentiality is maintained wherever
16 possible, but at the end of the day, if it is relevant
17 material that has to be put to a witness for evidential
18 purposes and has to be dealt with in court, yes, the
19 court may go into private for the purposes of doing it,
20 but there is nothing to stop an advocate, in those
21 circumstances, putting a confidential document to
22 a witness, if the court thinks that that is the right
23 thing to be done. There is no impediment of law in
24 relation to that, is there?

25 MR TURNER: No, we agree. What is said, at the very most,

1 I believe, is that there may be a practical question
2 where, if the witness is a competitor or belongs to
3 a competitor organisation, that to show a sensitive
4 commercial document to them might usefully be
5 accompanied by obtaining an undertaking from the witness
6 not to use it in other contexts.

7 THE CHAIRMAN: What I am just trying to get to the bottom
8 of, just so that I can see what world we are in, that is
9 simply because the court is sensitive to not disclosing
10 commercially confidential information unless necessary.
11 But if it is necessary, it is necessary and that is an
12 end of it.

13 MR TURNER: Yes.

14 THE CHAIRMAN: Yes.

15 MR TURNER: Yes, absolutely. That is certainly the case.

16 THE CHAIRMAN: Yes.

17 MR TURNER: So we agree with your Lordship on that. On your
18 first question, getting a feel for the extent and shape
19 of the problem, I can deal with that straight away. We
20 are concerned, on the National Grid side, with
21 essentially one type of document alone. Those are
22 documents which do not belong to Prysmian, in the sense
23 that they did not originate from Prysmian, they were not
24 taken from their premises or supplied by them, those
25 documents were obtained by the European Commission from

1 other parties in its investigation into the cables
2 cartel. The ones concerned are contemporaneous,
3 sometimes called "pre-existing" documents. Those are
4 the documents which show what individuals in the cartel
5 were doing. They will show how the cartel operated in
6 Europe, and particularly in the United Kingdom, and they
7 cast light on its effects.

8 These documents may well refer to the activities of
9 particular people, individuals, from Prysmian. They
10 might even have been sent at the time to Prysmian
11 individuals, emails and so forth. Documents of that
12 kind will be an important feature of the trial, in
13 answer to your Lordship, because of the issues which are
14 now in dispute, as you see from the trial skeletons.

15 I will give you three instances. The first is that
16 Prysmian is disputing in the trial that the agreement to
17 keep Korean and Japanese suppliers out of the market in
18 Europe had any effect in the United Kingdom, and these
19 documents will be relevant to that contention. If you
20 will note, it is in various places, but the defence at
21 36A.3.

22 Second point: Prysmian argued that individuals who
23 are not put forward now by it to give evidence in the
24 witness box, like Mr Corbelini, are, in their words,
25 "irrelevant to this damages claim". These documents are

1 relevant to showing that that is incorrect. The third
2 point is that Prysmian argues strongly that the UK
3 Prysmian companies, which were not addressees of the
4 Commission's infringement decision but in the same
5 group, were not involved in implementing the cartel, and
6 these documents are relevant to that important point
7 too.

8 So there are already three large issues to which
9 these documents will be relevant.

10 THE CHAIRMAN: You have given us three examples there. Are
11 you able to give us any idea of the scale of this in
12 terms of either the number of documents or the size of
13 these documents so we can get a better idea of how big
14 an issue this is likely to be?

15 MR TURNER: There are a fairly substantial number of these
16 documents, perhaps at least in the order of 15 or more,
17 which I may wish to put in cross-examination at the very
18 least.

19 So far as the pool of such documents are concerned,
20 I am reminded that there are, in fact, several hundreds
21 of these; we are still working this up. What I do know
22 is that these documents will be an important feature of
23 my submissions and the cross-examination at the trial.

24 THE CHAIRMAN: To whom does the confidentiality belong?

25 MR TURNER: Well, this is a point which I will address in

1 just a moment. We say that there is not confidentiality
2 in this document at all.

3 THE CHAIRMAN: Sorry, no, if they were to be confidential --

4 MR TURNER: Then it would be the third parties concerned.

5 THE CHAIRMAN: Who are they?

6 MR TURNER: In the Commission's investigation, they
7 investigated a range of other companies, such as
8 Hitachi, Sumitomo, Nexans.

9 THE CHAIRMAN: Is there a whole range of these companies
10 which fall into that category for the documents that you
11 want to put?

12 MR TURNER: There are a smaller number of them but I cannot
13 limit it to a particular --

14 THE CHAIRMAN: I mean, just so you know, the issue we
15 slightly have with this at the moment is we are
16 concerned about a wholesale dedesignation process
17 involving third parties at this stage, where -- I think
18 quite a lot of these points have actually been in issue
19 for quite a long time now. What we are uncomfortable
20 about is reaching a unilateral decision in relation to
21 that without giving those people who actually own the
22 rights that you are saying don't exist, if they do
23 exist -- being able to either say to you, "We do not
24 mind at all, go ahead," or coming to us and saying, "You
25 should introduce, in the context of this trial, the

1 following X, Y, Z protections to ensure that our
2 commercial confidentiality is maintained."

3 What would normally happen in commercial litigation
4 is -- let us assume a witness summons or something like
5 that had to be issued against someone to get hold of
6 documents, you may well find that during the course of
7 the trial there would be a bust-up about exactly what
8 use was going to be made of somebody else's documents at
9 the trial, and the court is obviously going to be
10 sensitive to protecting their position if it can.

11 While, of course, we understand, Mr Turner, your
12 submission about it being a very long time ago, a lot of
13 this material, it is very difficult to see how there is
14 any confidentiality still extant in relation to it and
15 so forth, we feel slightly uncomfortable about just
16 simply reaching that decision on a unilateral basis here
17 and now at this stage without very much notice having
18 been given to third parties.

19 MR TURNER: I will deal with that directly, my Lord.

20 I fully take the point and I will satisfy you that in
21 relation to the limited category of documents that I am
22 going to be asking for -- I will explain that in
23 a moment -- you can make this order. I will explain
24 directly why.

25 To illustrate it -- and then I will turn to those

1 submissions -- you will see that there are two examples
2 already in the bundle. If you have that hard copy
3 bundle, and you go in it to tab 43.

4 THE CHAIRMAN: 43?

5 MR TURNER: 43.

6 THE CHAIRMAN: Thank you.

7 MR TURNER: This is one of the documents. This is an
8 example of what we are talking about. Let me just
9 explain to you what it is. Begin at the foot -- and
10 I will respect the confidentiality by not reading out
11 specific parts of it, by merely alluding to them -- you
12 will see from the foot of it that it is a Japanese
13 supplier writing in September 2002 to a range of other
14 companies. Do you see that from the email list?

15 If you look at the first name on the second line of
16 the address bar there, you will see a particular name.

17 THE CHAIRMAN: Yes. I see.

18 MR TURNER: Now look at the request which is made by that
19 Japanese company, which is the text at the bottom of the
20 page, reading the first paragraph in particular, under
21 the "Dear Mr..." You see what they are asking?

22 THE CHAIRMAN: Yes.

23 MR TURNER: Then you go to the middle of the page, the email
24 above, which is 13 September, for the response.

25 THE CHAIRMAN: Yes, I see.

1 MR TURNER: You see the names of the addressees there, the
2 individuals? You see those two names. Finally, you
3 look at the top email and note the initials of the
4 writer:

5 "Best regards ..."

6 THE CHAIRMAN: Yes.

7 MR TURNER: And who he is.

8 THE CHAIRMAN: Yes.

9 MR TURNER: Before leaving this document, you will note that
10 in the top right-hand corner it says "Inner
11 confidentiality ring material", which is the Opus stamp,
12 and beneath it is an important statement,
13 "Non-confidential version".

14 THE CHAIRMAN: Yes, I see.

15 MR TURNER: If you go back one tab to tab 42, these are
16 cartel meeting minutes of 19 November 2003. Without
17 naming them, you will see the participants listed by
18 their initials and you will note the initials in the
19 third and fourth places.

20 THE CHAIRMAN: Yes.

21 MR TURNER: It refers to "Our update", and I think I can
22 mention this. "R", you know from the decision, is the
23 code for European cartelists and "K" is the code in the
24 decision for Korean cartelists.

25 THE CHAIRMAN: Yes.

1 MR TURNER: As respects the subject matter of this short
2 document, look at the sentence which begins with capital
3 letters:

4 "In addition ..."

5 THE CHAIRMAN: Yes. Can I clarify that both these documents
6 are documents which have been through the Commission
7 process in terms of access to the file and for which
8 confidentiality has not been sought at that stage?

9 MR TURNER: On these ones it appears to have been sought and
10 they have been redacted. Hence the Commission's stamp,
11 "Non-confidential version". The point that I was going
12 to make is I do understand --

13 THE CHAIRMAN: Are you saying in another version, the parts
14 to which you have referred but not read out --

15 MR TURNER: Yes.

16 THE CHAIRMAN: -- have been redacted?

17 MR TURNER: Yes, if you take this page that we are looking
18 at now, you will see a box at the bottom -- can you see
19 that square box?

20 THE CHAIRMAN: I see.

21 MR TURNER: With the redaction.

22 THE CHAIRMAN: With the description of what it is that has
23 been redacted.

24 MR TURNER: Yes.

25 THE CHAIRMAN: Yes, I see.

1 MR HOLMES: Yes, But if I take the document at tab 43, there
2 is no analogous box suggesting that the parts that you
3 have read out have been redacted.

4 MR TURNER: Not on that particular page. It formed part of
5 a larger document. This is an extract from a longer
6 email string.

7 MR HOLMES: So those parts are remaining on a document which
8 is marked "Non-confidential".

9 MR TURNER: Yes, exactly. This is the point that I am now
10 going to make something of.

11 The point is this: I've mentioned three areas of
12 dispute in the trial, three issues, and without perhaps
13 developing them now -- I am hampered -- you can see how
14 these sorts of documents are directly relevant to some
15 of these major issues. I am likely to need to make
16 submissions on documents like this and put a range of
17 this type of document to Mr Romeo in particular.

18 THE CHAIRMAN: Just so again we have got the shape of this,
19 this is a practical question, so far as you are
20 concerned, because it is not suggested that this
21 material cannot be shown to the tribunal, or indeed put
22 to witnesses; it is just the conditions under which that
23 may have to be done?

24 MR TURNER: That is right, yes. On that, my Lord, our
25 submission is, if these continue to be created as inner

1 confidentiality ring documents, when that is
2 unnecessary, it is highly unsatisfactory because the
3 tribunal will be going into private session for me to be
4 able to do this, and that will mean either going in and
5 out and in and out of private session, or it will mean
6 destroying the coherence of the line of
7 cross-examination because all of the confidential
8 documents should, as far as possible, be stored up until
9 the end in the usual way. That is problematic in its
10 own right.

11 Secondly -- and I do need to mention it -- the
12 holding of this important trial, with large amounts of
13 unwarranted confidentiality designations does run
14 against the principle of open justice.

15 The third point is that, of course, the tribunal may
16 wish to refer to some of this material in the writing of
17 its eventual public judgment.

18 THE CHAIRMAN: Can I ask why we are faced with this at this
19 stage? The reason I ask that is because if it had been
20 dealt with a bit earlier as a point, it would have been
21 much more straightforward to assuage such concerns as we
22 have about people who may have an interest coming along
23 to tell us either that they don't mind or that they do
24 for the following X, Y, Z reasons.

25 MR TURNER: It has crystallised in the preparation for the

1 trial, where we have had to consider, as the issues have
2 themselves become more concrete, what are the documents
3 that will need to be deployed to meet those issues. So
4 you are aware that there have been recent exchanges of
5 pleadings, there have been the trial skeletons and it is
6 quite true that now it has come into very sharp focus,
7 whereas it had not done so before.

8 Secondly, I will now seek to persuade you that, for
9 the limited category of documents that I will be making
10 this application for, the tribunal can confidently give
11 a direction that such documents can be treated as
12 non-confidential for the trial.

13 MR HOLMES: Sorry, just to clarify that, linked to my
14 earlier question, when I asked about the scale of it.
15 You said there were hundreds of documents, now you are
16 talking about a limited category. You are only
17 concerned with a subcategory of those to which you were
18 referring earlier?

19 MR TURNER: No, let me be quite clear, the only category
20 that I am going to be making my submissions about now,
21 very brief submissions, are the ones which, like these
22 documents, bear the mark of the Commission in the top
23 right-hand corner, "Non-confidential version".
24 Previously, and at the time of the skeleton, we had said
25 that documents which were also unmarked from the

1 Commission's file, did not have that at all, should also
2 be part of a direction made by the tribunal. The
3 tribunal may know that in relation to those we had
4 picked out a number of documents that we did think were
5 going to be needed at that time, and we wrote to the
6 solicitors for some of the third parties, the
7 non-defendants, about those. We got some responses. In
8 many cases they said that they were content with the
9 documents that we were interested in, to dedesignate
10 them.

11 THE CHAIRMAN: Yes.

12 MR TURNER: For the rest of it, we are not actually
13 concerned. So that issue has essentially gone away and
14 I will not trouble the tribunal with it now. That is
15 why all I am referring to now -- and I want to make some
16 points about it, to give you the confidence to give such
17 a direction -- is restricted only to documents from the
18 Commission file which bear in capital letters the stamp
19 on the right, "Non-confidential version."

20 THE CHAIRMAN: What are you actually asking us to do? Are
21 you asking us to make a direction under the order that
22 was made by Mrs Justice Rose? I am just trying to work
23 out what exactly you are asking us to do.

24 MR TURNER: There are two approaches that can be taken
25 technically. Either you can make a direction under the

1 order of Mrs Justice Rose -- and I will show you that
2 for you to do so is consistent with that order -- we
3 will look at that in a moment. Alternatively, my Lord,
4 as you said a few moments ago, you have power yourself
5 to manage your own procedure and to vary the order of
6 Mrs Justice Rose in any event, and we agree with that
7 too.

8 I can be quite brief then about the type of
9 documents that I am concerned about. Just to recap, it
10 is cartel documents, contemporaneous, bearing on the
11 issues in the case, which bear the stamp
12 "Non-confidential version", applied by the Commission,
13 as Mr Holmes rightly says, from the time of its access
14 to file procedure in the investigation into the cables
15 cartel.

16 My first point is that none of those cartel
17 documents have any quality of confidentiality vis-a-vis
18 third parties. They have been sanitised so that there
19 can be no doubt about them containing business secrets.
20 All of these documents were placed by the Commission on
21 the so-called "Accessible" file and when they were
22 placed on that file in that form, Prysmian and others
23 obtained copies of it anyway. By the way, that will
24 have included individuals such as Mr Romeo, one
25 considers; he will have had access to them as well.

1 In accordance with the Commission's practice, the
2 Commission invites the parties from whom it has obtained
3 the documents to identify any genuinely confidential
4 information before posting them on the accessible file
5 and before making them available to competitors. That's
6 the normal approach, and where the Commission accepts
7 redactions, it then marks them with this stamp
8 "Non-confidential version", so the documents that you
9 see here, where they bear that stamp, have been through
10 that process.

11 THE CHAIRMAN: So why did they end up in the inner
12 confidentiality ring in the first place?

13 MR TURNER: Because Mrs Justice Rose ordered that that is
14 where they should start -- and I will come to this in
15 a moment -- and a process of dedesignation should
16 automatically follow. But the order missed a trick
17 because it referred only to dedesignation actively being
18 undertaken by the defendants to the proceedings. It
19 said nothing, as I will show you in a moment -- the
20 mechanism did not say anything about the third party
21 documents other than giving the claimant liberty to
22 apply.

23 So I will take you to that in a moment. I will take
24 you first, if you have the hard copy file, to tab 50.
25 It is a very brief statement. It is the Commission's

1 current statement on the use of confidentiality rings in
2 its access to file proceedings. It is at tab 50.

3 THE CHAIRMAN: Meat and drink to Mr Holmes, but not
4 something I am particularly familiar with.

5 MR TURNER: Yes, it is a heady drink. If you have the first
6 page open and you look at paragraph 5, at the foot of
7 the first page, under the heading "Access to file", it
8 says:

9 "The Commission notice on access to the file
10 explains the practicalities of the access to the file.
11 According to this notice, the statement of objections,
12 the charge sheet addressees, will be granted access to
13 all documents making up the Commission's file with the
14 exception of internal documents and confidential
15 information. Access to the file is granted to the
16 addressees after an SO has been notified."

17 So that is the process; the charge sheet is put out
18 and then you give access to the file in that form:

19 "Traditionally, DG Competitions, the relevant
20 department of the Commission, requests any person
21 providing information for the Commission's file, the
22 provider, to prepare a non-confidential version of the
23 original documents. In some instances, it may not be
24 possible for the information provided to provide in
25 a timely manner a meaningful non-con version. However,

1 granting access to such information may be necessary for
2 an effective exercise of the rights of defence."

3 So that is a brief explanation of what they do.
4 I am not concerned with any documents where there is
5 a doubt about it, I am only interested in the documents
6 bearing the stamp, "Non-confidential version".

7 The sort of material that counts as confidential,
8 and how to deal with it -- and Mr Holmes will be
9 familiar with this too -- is in the previous tab, where
10 there are some pictures, tab 49, of the Commission's
11 informal guidance paper, March 2012, and they give
12 guidance on how to do it. You will see on page 5, as an
13 example, "Reason for confidentiality request", the sort
14 of thing that is claimed for is a business secret:

15 "Ingredients in their properties which are not known
16 to third parties ..."

17 I'm reading from the middle box towards the foot of
18 page 5:

19 "If disclosed, our company is likely to suffer
20 significant losses, since our competitors would be able
21 to manufacture similar products. Our know-how is not
22 legally protected."

23 It is very familiar in terms of the English approach
24 too. You make a claim for material that really does
25 have the quality of confidentiality.

1 THE CHAIRMAN: Why on earth do they use Little Red Riding
2 Hood as their starting point on all this?

3 MR TURNER: That I can investigate, my Lord, and we will
4 report back. Mr Holmes knows.

5 MR HOLMES: I think Humpty Dumpty also gets a look-in.

6 THE CHAIRMAN: Very good. Anyway, yes.

7 MR TURNER: They deal with the sort of material that is not
8 accepted as confidential too. If you look, for example,
9 on page 10 at the top:

10 "Public information as well as evidence pertaining
11 to the alleged infringement cannot be accepted as
12 confidential in this context."

13 As I say, I am concerned today -- I am limiting my
14 focus only to documents marked in capital letters,
15 "Non-confidential version" on every relevant page after
16 this process has been gone through. The documents are
17 therefore sanitised because confidential secrets are
18 removed.

19 THE CHAIRMAN: Do you say that the very fact that it has
20 been disclosed in this way -- leave aside the stamp --
21 but fortified, I suppose, by the stamp -- means that the
22 confidence has actually been lost?

23 MR TURNER: No, I do not say that. I will take you in just
24 a moment -- there is a relevant judgment on this by
25 Mr Justice Roth.

1 THE CHAIRMAN: Right.

2 MR TURNER: He explains that where the material does have
3 genuinely confidential information, there is the quality
4 of confidentiality, then the court or tribunal in
5 a damages action, such as yourselves, does have
6 a responsibility to preserve that.

7 THE CHAIRMAN: Was he dealing with cases where there was
8 a stamp, a Commission stamp saying "non-confidential"?

9 MR TURNER: No, he was dealing there with a case where there
10 was a request, again by my clients, for access more
11 generally to a range of documents that did not have this
12 stamp, and that is why the point was a real point in
13 that case.

14 THE CHAIRMAN: Right. Can I ask the question again slightly
15 more precisely. If the Commission has stamped it,
16 "Non-confidential document", does that of itself give
17 rise to the loss of confidence?

18 MR TURNER: Yes. There are three bases, recognised bases,
19 for protecting third parties. You may have seen
20 reference to this in our skeleton. The first is where
21 the documents are legally professionally privileged.

22 THE CHAIRMAN: Yes.

23 MR TURNER: We are not concerned with that in any of these.
24 The second is where the documents form part of what is
25 called a leniency or immunity application, and the

1 practice and law there is very clearly that that is to
2 be shielded from disclosure in damages actions, save in
3 rare cases.

4 The third case is commercial confidentiality, which
5 means real quality of confidentiality.

6 THE CHAIRMAN: Yes.

7 MR TURNER: In the sense that disclosure of it would be
8 likely to cause harm in the way described in the box on
9 page 5 of this document that we were looking at a moment
10 ago.

11 THE CHAIRMAN: Yes.

12 MR TURNER: My point here is that these documents, the only
13 ones that I apprehend will help the trial proceed
14 smoothly and without the friction and grit that I am
15 anxious to avoid at this PTR, are the ones marked
16 "Non-confidential version".

17 THE CHAIRMAN: Just applying that test to one of the parties
18 who we know is concerned about this, because there is
19 the Milbank letter --

20 MR TURNER: Yes.

21 THE CHAIRMAN: How do those documents fit with this
22 submission?

23 MR TURNER: There are two points to make on that. I do not
24 have the document open in front of me, but I know the
25 letter. The first is that that letter was concerned

1 with documents not marked "Non-confidential version".

2 THE CHAIRMAN: That was the real question I was after, yes.

3 MR TURNER: The second is that the lawyer who wrote that
4 letter from Milbank took the view that there was the
5 quality of confidentiality merely because those
6 documents were disclosed to the Commission by it, and
7 said that that was the context in which these documents
8 were given and that inherently creates a relationship of
9 confidentiality. That is incorrect and clearly
10 incorrect as a matter of law.

11 On that point, and to show you a single case drawing
12 the strands together, I will show you the
13 Mr Justice Roth case at tab 47 of this bundle.

14 You see from the first page it was a case brought by
15 the same claimant, National Grid. One of the parties
16 there was common to both pieces of litigation -- it has
17 now settled out of this one -- ABB. If you turn to the
18 first page, Mr Justice Roth introduces it, paragraph 1.
19 It was an application by National Grid for disclosure in
20 a follow-on damages action subject to a European
21 Commission decision. The decision in its subject matter
22 was closely related to the cables cartel here: heavy
23 electrical engineering equipment. In that case, the
24 situation was that two parties to the proceedings
25 claimed that, for reasons of French law, they were

1 prohibited from giving disclosure to the English court.
2 The response of National Grid was to say, "Well, we can
3 circumvent that problem, if it is a problem at all" --
4 the English Court of Appeal subsequently said that they
5 were wrong about that -- "because we will seek the
6 disclosure from other parties to the Commission's
7 investigation who obtained those documents from the
8 Commission's file." Because under English law
9 approaches to disclosure, those are still documents in
10 the control of the parties who obtained them through the
11 Commission.

12 What this case was about was whether there was
13 a concern about those parties giving disclosure of
14 documents obtained from the Commission and, if so, what
15 the rules were.

16 THE CHAIRMAN: Yes.

17 MR TURNER: You will see from paragraph 10 on page 5 a short
18 summary of what I have just outlined as the factual
19 dispute. Two parties -- and that was ABB and another
20 party, Siemens -- through their right of access to the
21 file, had got copies of documents that had been obtained
22 from other people, and National Grid, therefore, applied
23 for disclosure of the documents from ABB and Siemens
24 because the others said, "We can't give them to you
25 because of French law." National Grid excluded from

1 their application documents created for leniency
2 purposes and, obviously, legally privileged documents as
3 well.

4 The argument of the defendants in that case, you can
5 see from the top of page 6, in paragraph 15, was that
6 they said, "We can't give these to you either. This was
7 a special process by which we obtained these documents.
8 It is a mysterious European process and if you want
9 them, claimant, you must ask the Commission for them.
10 Do not come to an English court and seek disclosure."

11 In response, National Grid wrote to the Commission,
12 and it obtained an answer which then was the basis for
13 this judgment, and which has subsequently been applied
14 in various contexts, both in case law and indeed
15 followed in the damages directive and in various other
16 contexts in litigation. So in paragraph 16 -- I would
17 ask you to read for efficiency the first paragraph,
18 which is of the Commission's letter, which said that:

19 "Following Article 339 TFEU and Article 28 of
20 Regulation 1, the Commission is bound to protect the
21 confidentiality of information covered by the obligation
22 of professional secrecy. As a result, where pursuant to
23 national disclosure rules, parties to the proceedings
24 pending before a national court or third parties are
25 ordered to make disclosure of documents that originate

1 from the Commission, including the confidential versions
2 of the Commission decision ..."

3 That is the text of the decision itself:

4 "... the national court has to provide for
5 appropriate protections of business secrets or other
6 confidential information that belong to legal or natural
7 persons other than the ones to whom the disclosure order
8 has been addressed."

9 Then if you go across to the final paragraph, 4, on
10 the facing page:

11 "Equally, and subject to the above conditions, the
12 Commission would not object to the disclosure in
13 proceedings before the English court concerning
14 application of the competition rules of documents
15 obtained through access to the file, provided that the
16 originators of that information, parties from whom the
17 information was obtained by the Commission, are
18 guaranteed protections ..."

19 I underline this:

20 "... equivalent to those addressees of a disclosure
21 order enjoy under the applicable national law. The
22 documents referred to are both those the Commission has
23 obtained itself ..."

24 They carry out these dawn raids or inspections:

25 "... and those prepared and sent by the parties to

1 questions raised by the Commission in the course of its
2 investigation."

3 Mr Justice Roth then gave a ruling in favour of
4 National Grid in that case, and paragraphs 22 to 24
5 contain the meat, but if you look at 22, he was dealing
6 with an argument that the Commission investigation might
7 still somehow be resurrected, so it would be
8 inappropriate to give disclosure, and Mr Justice Roth
9 says:

10 "Even if it is assumed there is a possibility of the
11 Commission still reopening the investigation into the
12 cartel in such a way that disclosure of these documents
13 emanating from Areva and Alstom could impair the
14 investigation, a possibility which I regard as somewhat
15 theoretical, I cannot begin to see how disclosure as
16 between parties to English court proceedings with the
17 added protection of a confidentiality ring could
18 possibly undermine such an investigation."

19 So to draw the strands together, he says -- and the
20 Commission takes the same view -- that documents which
21 have been obtained from the Commission file have no
22 special status. What the court must do is give them the
23 same protections, through confidentiality rings and
24 orders, if appropriate, as would apply to confidential
25 documents in English court proceedings, and in that way

1 the court must attend to the interests of third parties.

2 THE CHAIRMAN: His focus was quite a lot, was it not, on the
3 position of the Commission, as opposed to the third
4 parties, the extent to which it was going to undermine
5 the Commission's investigatory activities?

6 MR TURNER: Yes, it was here, but what he does say is that
7 you take care of third parties.

8 THE CHAIRMAN: Yes.

9 MR TURNER: My Lord, you are right in the sense that if
10 there is arguable confidential material, then, yes, that
11 may need to be discussed, debated. But the point that I
12 am seeking to make here is that the limited category of
13 documents which I am now concerned with are ones that
14 have themselves been cleaned or sanitised. They are
15 explicitly the non-confidential versions, following
16 a process which I have shown you.

17 If you apply his ruling to the present case, these
18 documents can be disclosed. The only question for the
19 court is whether they might have the quality of
20 confidentiality that should concern the tribunal and
21 which may require you to consult the third parties. My
22 submission is that manifestly they do not because they
23 are explicitly non-confidential documents.

24 THE CHAIRMAN: I understand that.

25 MR TURNER: So that is the substance of it.

1 THE CHAIRMAN: Yes.

2 MR TURNER: The remaining point for me to make is this.

3 Prysman has raised the concern that Mrs Justice Rose
4 made a confidentiality order in 2016 and that by seeking
5 a direction from this tribunal now would be inconsistent
6 with the terms of that order. I have dealt with that in
7 the skeleton. It is not correct, but I will show you
8 very briefly. The order is at tab 19 of your hard copy
9 bundle or at {G/4/1} on Opus. If you go in it to,
10 first, page 3, {G/4/3}, paragraph 1.1, there is
11 a definition:

12 "The Confidential Commission Document."

13 The point I made in the skeleton is that that label
14 does not necessarily refer to something having the
15 quality of confidentiality. As it says, it means any
16 non-public document created or obtained by the
17 Commission in connection with or for the purpose of its
18 investigation which forms part of the file.

19 Then the part of the order dealing with the problem
20 we now have is in paragraph 6 and 7 --

21 THE CHAIRMAN: Yes.

22 MR TURNER: -- beginning on page 7. Paragraph 6, to answer
23 your Lordship's earlier question, was the starting
24 point. It says:

25 "Subject to the following paragraph 6.2, 3 and 4,

1 the decision and all confidential Commission documents
2 ..."

3 That is the non-public documents we have now seen:

4 "... disclosed in these proceedings shall be deemed
5 inner confidentiality ring information."

6 But it then went on, if you look at paragraph 6.3,
7 6.1, 6.2 dealing with redactions issues, which I am not
8 concerned with, 6.3 said this:

9 "On ABB's disclosure ..."

10 Because ABB was the party which provided this to
11 National Grid:

12 "... of the BritNed version of the file ..."

13 That meant the file provided in earlier proceedings
14 that Mr Justice Marcus Smith had been trying:

15 "... the defendants shall on an ongoing basis, but
16 in any event within 56 days, review the documents
17 belonging to them and identify which of those documents,
18 if any, should be redesignated as either outer
19 confidentiality ring or non-confidential."

20 Then the judge laid down that the defendants should
21 comply with two important principles when they were
22 doing that. (a) that information -- this is quoting the
23 European general court in a case:

24 "... that was secret or confidential, but which is
25 five years or more old, and must for that reason be

1 considered historical, is not secret or confidential
2 unless exceptionally the applicant shows that, in spite
3 of the age, the information still constitutes essential
4 elements of its commercial position."

5 I pause there because that shows you that the
6 European position, as the English practice is too, is to
7 concern itself with genuine confidentiality, whether it
8 really does have commercial confidentiality, and (b) is
9 documents that relate purely to the operation of
10 a cartel cannot comprise a commercial secret. You saw
11 a reflection of that, an echo, in the Commission's
12 guidance we looked at a little bit earlier.

13 What this meant was that for documents that the
14 defendants had contributed to the file there was
15 a process. They had to go through this and consider
16 dedesignation. They did it, and ultimately, I am happy
17 to say that all of the Prysmian documents, all of the
18 NKT documents, all of the ABB documents, were all
19 designated as non-confidential.

20 THE CHAIRMAN: Just so I have got this clear, when one looks
21 at the definition of confidential Commission document in
22 1.1, which limits it to the European Commission files
23 disclosed pursuant to paragraph 5 of the order, that is
24 the file in the version that came from ABB, is it?

25 MR TURNER: Yes.

1 THE CHAIRMAN: So this order actually only -- it covers
2 a very specific -- I do not know whether there has been
3 any other disclosure of material that was with the
4 Commission. Was that the only stuff?

5 MR TURNER: ABB, for reasons of efficiency, provided --
6 there is one Commission accessible file.

7 THE CHAIRMAN: Right. So everything that you want to put
8 that you are concerned about falls within that
9 definition?

10 MR TURNER: Yes.

11 THE CHAIRMAN: Yes.

12 MR TURNER: That's right.

13 So the point there that you see from 6.3 is that,
14 although they have started in the inner confidentiality
15 ring, the judge was quite fierce in laying down
16 a process that the defendants needed to follow to
17 consider making them non-confidential.

18 THE CHAIRMAN: She does not seem to have contemplated in
19 making this order that third party addressees should be
20 involved in the 6.3 process.

21 MR TURNER: That's right. What happens is that they are
22 mentioned only in 6.4 and 6.7, immediately underneath.

23 THE CHAIRMAN: Yes, I see.

24 MR TURNER: You will see, 6.4 says that the claimants have
25 got liberty to apply -- there is a reference there to

1 third party addressees -- and then 6.7 says:

2 "There shall be liberty to apply, which shall be on
3 notice to any party or third party addressees, if
4 appropriate."

5 That was it.

6 THE CHAIRMAN: Right.

7 MR TURNER: So my submission is this: the documents from the
8 file that came from the defendants are not part of the
9 concern today because all of those have been, including
10 from Prysmian, designated as non-confidential.

11 THE CHAIRMAN: Yes.

12 MR TURNER: But documents like the two that I have shown
13 you, and of which there are many others -- and
14 I apologise to Mr Holmes, I do not have a precise
15 number, but I am still putting that together and, as
16 I say, already, offhand, I am looking at more than 15 or
17 so that I can see will be produced in the trial.
18 Documents that have come from third parties are not
19 covered by this. There was not a dedesignation, and
20 I am not going to ask this tribunal to do anything in
21 relation to them at all except where they have already
22 gone through the Commission's process and they have been
23 formally designated non-confidential already, because
24 there cannot be a reason for treating those as
25 confidential --

1 THE CHAIRMAN: Actually, you are making an application under
2 6.4, are you not?

3 MR TURNER: I am either making an application under 6.4 and
4 6.7, yes, or asking your Lordship and the tribunal to
5 make its own order, varying it if necessary. But, yes,
6 precisely because this request is consistent with the
7 terms of the order.

8 THE CHAIRMAN: Yes.

9 MR TURNER: So, my Lord, I have covered the point that, at
10 least until today, and until we got the letters from the
11 third party solicitors that have come in, those all
12 dealt with another type of document, namely ones that
13 did not bear the stamp. We did not write to them about
14 that category of the documents because we saw no need.
15 We wrote to them about documents that were entirely
16 unmarked. We still took the view that, because they
17 were unmarked, it appeared that no confidentiality claim
18 had been made in the first place for them. But you have
19 seen that there were some responses and, as I say, our
20 position in relation to them is we do not need to take
21 it further with you because the solicitors for those
22 parties either said, "Yes, we are happy," for the ones
23 that we are interested in, or, if they have said, "We
24 are not," we are not going to argue about it because
25 I do not propose to use those documents.

1 So, my Lord, we are content to leave it there.

2 I hope that that is clear but that is --

3 THE CHAIRMAN: It is, thank you, Mr Turner. Ms Davies.

4 Submissions by MS DAVIES

5 MS DAVIES: My Lord, there are three issues that were
6 addressed by my learned friend's submissions under the
7 heading of confidentiality. The first relates to
8 whether the tribunal should make its own confidentiality
9 order. So far as that is concerned, we are entirely
10 neutral. We regard our confidential material as
11 adequately protected by the order of Mrs Justice Rose.

12 THE CHAIRMAN: Yes.

13 MS DAVIES: If the tribunal considers it is appropriate to
14 make its own order, for the reasons that were canvassed
15 at the hearing in July, we do not object to that, and we
16 are not going to engage with the debate whether the
17 tribunal has jurisdiction to make that order in relation
18 to settled parties or not because we do not regard it as
19 necessary for our purposes, so we regard that as
20 a matter for the tribunal and my learned friend,
21 Mr Turner.

22 The second category is confidential documents
23 disclosed by the claimants and by my clients, Prysmian,
24 and the use of those in trial, where my Lord raised the
25 point as to the ability to put those to witnesses. The

1 reason this has come up is that within the schedules for
2 the confidentiality order, myself and my learned friend,
3 Mr Turner, have undertaken in fact to the High Court
4 that we will not reveal the confidential information to
5 anyone who is not within the confidentiality ring. That
6 is in paragraph 13 of the schedule at tab 19 of
7 Mrs Justice Rose's confidentiality order.

8 So part C at {G/4/14} of the document, each of us
9 has undertaken we:

10 "... Will not disclose the Inner Confidentiality
11 Ring Information to any person who is not an Inner
12 Confidentiality Ring Member ..."

13 The same applies to the outer confidentiality ring.

14 My learned friend and I are agreed, subject, of
15 course, to the tribunal approving this, that effectively
16 there should be an amendment to the confidentiality ring
17 to enable each of us to put, within the constraints of
18 the ring, so respecting otherwise the confidential
19 information, to a witness -- so I can put to
20 a National Grid witness any document that National Grid
21 has disclosed, and my learned friend can put to Prysmian
22 any document that Prysmian has disclosed, and also we
23 will be able to put to a Prysmian witness any document
24 taken from the accessible file of the Commission because
25 those documents were available to Prysmian as part of

1 the Commission access to file.

2 THE CHAIRMAN: Yes.

3 MS DAVIES: But, of course, we otherwise need to respect the
4 position --

5 THE CHAIRMAN: Of course you do. I have to say I did
6 wonder -- I am sure this order and these undertakings do
7 not actually contemplate this particular situation, but
8 the way in which things have developed, I quite agree
9 that you have to organise it so that you can do that.

10 MS DAVIES: So we will be asking as part of the order today
11 for a provision that entitles us to do that.

12 THE CHAIRMAN: I think, on any view, we will give you that.

13 MS DAVIES: That then leaves the category on which my
14 learned friend spent a lot of his submissions on, which
15 are documents taken from the accessible file, disclosed
16 by neither my client nor NKT or ABB, that are marked
17 "Non-confidential".

18 So far as those are concerned, as my Lord pointed
19 out to my learned friend Mr Turner, the interest, if
20 there is one, is not of my clients, in the sense that it
21 is not documents that my clients provided to the
22 Commission, but it is the interests of the third party.
23 Ultimately, as we said in our skeleton, we regard it as
24 a matter for the tribunal as to whether it is prepared
25 to make the global dedesignation order that my learned

1 friend is seeking today without giving notice to the
2 third parties or whether the tribunal requires, under
3 the provisions that my learned friend was just referring
4 to, notice to be given to the third parties. But what
5 we are concerned about is unnecessary disruption, and we
6 do feel, therefore, given that the third parties have
7 not been put on notice of this application, that my
8 learned friend's submissions need to be set in the right
9 context. I do, therefore, just want to take the
10 tribunal through certain points which I submit need to
11 be taken into account by the tribunal in reaching the
12 view in relation to that.

13 So far as this category of documents is concerned
14 and in relation to Mr Holmes' question, whilst my
15 learned friend portrays it as a limited category of
16 documents because it is a category defined by whether or
17 not the stamp "Non-confidential" is on the top of the
18 document, our understanding is that there are in fact
19 thousands of Commission file documents in the bundle,
20 many, if not most, of which have that stamp on them.
21 Those documents emanate from 12 corporate groups who
22 were the subject of the Commission's investigation.
23 Three of them, of course, are my clients, ABB and NKT,
24 who, as my learned friend indicated, have each reviewed
25 the designations and have in each case agreed, pursuant

1 to paragraph 6.3 of the confidentiality order, that
2 those documents can be removed from the inner
3 confidentiality ring.

4 I am afraid I am not in a position to tell the
5 tribunal how many corporate groups, documents, over and
6 above that are on the file and in the bundles, but it is
7 up to nine potentially, therefore.

8 In terms of the issue that is being created, my Lord
9 asked my learned friend, Mr Turner, why is this only
10 coming to light now. The reality is it is only coming
11 to light now because the claimants have very belatedly
12 thought about it. Our case in relation to the issues
13 which these documents are relevant to has been
14 consistent throughout these proceedings. It has
15 consistently been our case as to the effect of the
16 cartel on UK suppliers, for example, and so on.
17 literally nothing has changed about that, and these
18 documents were disclosed into the inner confidentiality
19 ring back in 2016.

20 What I then just briefly need to set the context so
21 the tribunal can take a fully informed decision in
22 relation to this, my Lord, what we do know, from the
23 correspondence that has happened very recently in
24 relation to the unmarked category, is that three third
25 parties have already made it clear that they do not

1 agree to the dedesignation of other documents. Those
2 are Milbank, which is in tab 38 of this bundle
3 (inaudible). My Lord, just to remind the tribunal,
4 Milbank said in their letter at paragraph 3.2.3 on
5 page 2 their position is that: {N5/485/2}

6 "Whether these documents were expressly identified
7 as confidential on the Commission's administrative file
8 is not relevant to the issue of their confidentiality
9 status and treatment in these Proceedings. Our clients'
10 reasonable expectation at the time of providing these
11 documents to the Commission was that disclosure -- even
12 on the Commission's accessible file -- would be
13 restricted to a very limited number of parties. Indeed,
14 this is reflected in the dedesignation of all the File
15 Documents as Inner Confidentiality Ring Information
16 pursuant to the Confidentiality Order."

17 So that is a position that applies absolutely to the
18 category of documents that my learned friend is seeking
19 today.

20 THE CHAIRMAN: Although, as I understand it, these Milbank
21 documents do not have "Non-confidential" on them.

22 MS DAVIES: The specific ones that my learned friend's
23 solicitors wrote to Milbank about last week do not, but
24 the position that they took in this letter is equally
25 applicable to the ones that are stamped -- I mean, the

1 problem is that my learned friend's solicitors have not
2 written to any of these parties --

3 THE CHAIRMAN: I understand that point.

4 MR BISHOP: I think Mr Holmes said -- and it might have been
5 said by Mr Turner as well -- that there will have been
6 communications backwards and forwards between the
7 parties whose document they are and the Commission at
8 the time of the designation.

9 MS DAVIES: That is right, my Lord, yes.

10 MR BISHOP: So one thing that can be said is that people
11 applied their minds to this particular issue at that
12 stage.

13 MS DAVIES: What can be said is that they applied their
14 minds as to the extent to which the documents can be
15 disclosed to the people party to the Commission
16 investigation, because the whole purpose of the debate
17 with the Commission about confidentiality is what goes
18 on to the Commission's accessible file, as Mr Holmes
19 will be very familiar with, and if it is marked
20 "Non-confidential" on the Commission's accessible file,
21 it can be provided to the other parties to the
22 investigation.

23 We are in a different -- and this is the point that
24 Milbank go on to make in the next paragraph of this
25 letter and indeed are making in paragraph 3.2.3: we are

1 here looking at a different issue.

2 MR BISHOP: Sorry, I've turned away from it.

3 MS DAVIES: It's tab 38. To what extent should documents
4 that were provided to the Commission and formed part of
5 the Commission's accessible file be generally available
6 without any protection to someone who was not party to
7 the Commission's investigation? That's what this issue
8 is about, and the Commission's ruling in relation to
9 that is not addressing that point, it's solely
10 addressing the components and the constitution of the
11 accessible file.

12 MR BISHOP: Is it not the case, though, that when the
13 parties were considering redactions in the course of the
14 Commission's process, they would be seeking the maximum
15 possible protection from a confidentiality point of
16 view, particularly with a view to the possibility of
17 follow-on damages actions?

18 MS DAVIES: Mr Holmes may well be exactly right about that.
19 I'm not trying to make the third party's arguments
20 (inaudible) their interests but I am concerned that the
21 tribunal, for the reason that we do not want unnecessary
22 disruption, simply understands what their position is in
23 taking the decision whether or not they need to be put
24 on notice of this application.

25 THE CHAIRMAN: Understood.

1 MS DAVIES: And you see here in paragraph 3.2.3 Milbank
2 (inaudible) are making a point that their reasonable
3 expectation at the time of providing the documents to
4 the Commission and as part of the discussions with the
5 Commission was that disclosure would be restricted to
6 a very limited number of parties.

7 THE CHAIRMAN: I understand. That's their point.

8 MS DAVIES: That's their point, and then in 3.2.4 they say:

9 "As it is not a defendant to these proceedings ..."

10 So it has not been pursued by these claimants as
11 part of a follow-on damages claim:

12 "... it is proper for the documents to be subject to
13 additional protections."

14 Again this is reflected in the confidentiality
15 order, which clearly established a different approach to
16 the treatment of the defendant's documents, as opposed
17 to those belonging to the other addressees of the
18 defendants.

19 THE CHAIRMAN: Is that right?

20 MS DAVIES: I assume they are referring to the differences
21 between 6.3 and 6.4 because in paragraph 6.3, as my
22 learned friend indicated, the defendants were required
23 to actually review their designations for documents
24 belonging to them, so that's the documents that they had
25 provided to the Commission, and dedesignate subject to

1 those provisions. There isn't a similar provision in
2 the order requiring the third parties to undertake that
3 process.

4 THE CHAIRMAN: I see.

5 MS DAVIES: What there is is there is liberty to apply,
6 which is paragraph 6.4, and there is also the provision
7 in 6.2, which my learned friend did not address because
8 he said it was not applicable, and I agree it is not
9 applicable but it is of relevance in our submission.
10 That had a specific mechanism: were National Grid
11 wanting to show any of these documents to an individual,
12 then they needed to approach the third party and try and
13 get the third party's agreement. That is reflected in
14 paragraph 6.2 and you see that includes, at 6.2(a)(i),
15 "Any confidential Commission document," which is the
16 entirety of the accessible file.

17 THE CHAIRMAN: Yes.

18 MS DAVIES: Obviously, if they could not get agreement and
19 there was an objection, then there could be an
20 application to the court, but the whole scheme of this
21 has been set up, therefore, on the basis that for those
22 third party documents that mechanism applied for showing
23 it and there was a liberty to apply, and the backdrop to
24 this, just if I could put it briefly, finish this
25 point -- the backdrop to this -- sorry, before I do

1 that, I should just refer also to -- as well as Milbank,
2 we have Latham & Watkins at tab 39. On the second page
3 they make clear that:

4 "For the avoidance of doubt, SCI and JPS do not
5 agree to the dedesignation of any other file document or
6 pages within the file documents."

7 Similarly Winston & Strawn for Hitachi. Their
8 letter isn't in the bundles but they wrote saying
9 precisely the same thing last night.

10 The backdrop to this, just if I may very briefly --
11 I am conscious of the time but it will not take me
12 a couple of minutes -- is that, as my learned friend
13 indicated, the documents that Freshfields disclosed --
14 Freshfields is the ABB party -- were the accessible file
15 as produced in the BritNed proceedings, and the BritNed
16 confidentiality order -- sorry, the backdrop to that is
17 explained in the BritNed order that actually is in
18 tab 20 of the bundle, and if my Lord looks at
19 paragraph 2.4, what that required was that ABB had to
20 write to each of the third party addressees enclosing
21 a copy of the order and notifying them that a copy of
22 the accessible file would be provided to BritNed in the
23 second confidentiality ring, and inviting observations,
24 and then that led to a process, as the tribunal can see
25 from paragraph 2.5 and 2.6, of agreeing the terms of the

1 confidentiality order that was going to apply in
2 relation to the BritNed proceedings, which included all
3 these documents going only into the inner
4 confidentiality ring.

5 So that's how they were dealt with, initially in
6 BritNed and then in these proceedings. Mrs Justice Rose
7 at the first CMC actually required a similar process to
8 be undertaken, in that it -- if we go back to the first
9 CMC order at tab 18, in paragraphs 4 and 5, before the
10 BritNed accessible file documents went into the inner
11 confidentiality ring in this case, ABB were required to
12 notify each of the Commission and the relevant third
13 parties that that was what was proposed in this case,
14 and those third parties were given the opportunity to
15 object, should they do so, and that would then come back
16 to the court, and we have at tab 21 of the bundle an
17 example of the notification that was sent back
18 in December 2016, in fact the notification that was
19 sent, and that included a copy of the order concerning
20 disclosure, and over the page, the main paragraph:

21 "We therefore notify you of our intention to
22 disclose into the confidentiality ring established in
23 the proceedings the version of the Commission's
24 administrative file that has been disclosed in the
25 BritNed proceedings."

1 So the whole scheme that has been adopted in these
2 proceedings is those third parties are given notice of
3 what has been proposed, they are told it's going into
4 the inner ring, there is a dedesignation provision, but
5 the question for the tribunal is whether, against that
6 background, it should do so without notice to them, and
7 there is an added wrinkle, if I may just literally --

8 THE CHAIRMAN: Finish the point.

9 MS DAVIES: So there are 45 documents, as we understand it,
10 on the file which are stamped "non-confidential", so to
11 which my learned friend's application relates, which
12 were the subject of specific correspondence back in 2018
13 between National Grid, my learned friend's clients and
14 the third party from whom those documents were obtained,
15 because they were being asked to review redactions that
16 had been made on those documents in light of the
17 principles in *Pergon* and others, and those parties
18 agreed to lift some of those redactions but they did so
19 having been told expressly by National Grid that those
20 documents would be going into the inner confidentiality
21 ring, and examples of that are at tab 23 of this bundle,
22 which is a letter to Latham & Watkins, and just above
23 the heading "Leniency Application" my Lord sees the
24 express confirmation from Bryan Cave Leighton Paisner
25 that the documents are to be disclosed into an inner

1 confidentiality ring, which consists of external
2 advisers only, and the same was said to
3 Winston & Strawn, on the next tab, by Bryan Cave
4 Leighton Paisner.

5 Very finally, if I can just say this in relation to
6 the National Grid and ABB decision that my learned
7 friend took the tribunal to, that was concerned with the
8 accessible file documents, so it was concerned with
9 precisely the documents that we are here now concerned
10 with, and Mr Justice Roth, in both paragraphs 22 and 24
11 of that decision, expressly indicated that there was the
12 added protection of the confidentiality order, which was
13 part of his decision-making in relation to requiring
14 disclosure.

15 So, simply in relation to that, our concern is that
16 doesn't deal with the particular problem that is now
17 being presented by this very late application. It is
18 a matter for the tribunal but we are just concerned that
19 the decision be taken on a fully informed basis.

20 THE CHAIRMAN: Thank you.

21 At the end of the day there is a strong element of
22 what is the most practical way forward whilst still
23 protecting third party rights and that is a decision
24 that we have got to reach.

25 Mr Turner, was there anything that you wanted to add

1 or have you finished that point and we will let you know
2 our decision after the short --

3 MR TURNER: If I can very briefly reply.

4 Submissions in reply by MR TURNER

5 MR TURNER: The theme that you just heard is unnecessary
6 disruption and the desire to avoid it. The boot is on
7 the other foot. The unnecessary disruption will occur
8 if these documents are treated as confidential because
9 that will put grit into the process of trial, and that
10 is a certainty. Ms Davies is referring to disruption if
11 third parties come to the tribunal in a flap; I'm
12 referring to a different sort of disruption.

13 Secondly, Ms Davies dealt nowhere in that address
14 with the substance of the point that I made. I pointed
15 out that as a matter of principle this particular group
16 of documents has no bar against it to open disclosure.
17 So the points that she made were in each case
18 atmospheric and did not grapple with the point.

19 She referred to a number of such documents. It
20 makes no difference. She made an allegation of
21 lateness, which we say is wrong but in any event does
22 not affect the point you need to consider, which is the
23 needs of efficiency in the forthcoming trial.

24 She said that the third parties had an expectation
25 that these documents would be restricted. That is not

1 true; they cannot have expected that in relation to
2 documents explicitly non-confidential, and in any event
3 the mechanisms of the order made by Mrs Justice Rose
4 said that third parties should be consulted if
5 appropriate. So any expectation was in that context.

6 Then she said that third parties were content to
7 disclose these documents to the competitors before the
8 Commission but they may not have been content to
9 disclose them to other individuals, and in relation to
10 Mr Holmes' intervention there, I would reinforce the
11 doubt: what additional interest dealing with
12 confidentiality is there? There is none.

13 Finally, Ms Davies referred to the order of
14 Mrs Justice Rose and the earlier paragraph, 6.2. It
15 referred to the treatment of documents which are
16 accepted to have been confidential and how you show
17 those to witnesses. That is a different matter from the
18 one we are concerned with now, which is whether these
19 have the quality of confidentiality or not.

20 Mr Justice Roth certainly did indicate in 2011 that
21 there was the protection of confidentiality to be given
22 on the same terms as in an equivalent English case and
23 that means to ask oneself the question: is this
24 confidential material or not.

25 So my application stands undented by what you have

1 heard because there really is a practical need for these
2 documents to be released openly, so that they can be
3 referred to at the trial, because it will make the
4 conduct of the trial far easier and fairer.

5 THE CHAIRMAN: Thank you very much. All right. We will
6 rise now, I think, and we will let you have our decision
7 in relation to this after the short adjournment, and we
8 have got then, I think, one more item, have we not, on
9 the agenda, which is the Roberts witness statement -- or
10 is there anything else?

11 MR TURNER: Returning to the point about the order we parked
12 on confidentiality.

13 THE CHAIRMAN: Sorry? Oh, to the point about order, yes.
14 We will discuss that over the short adjournment too.

15 Yes, so it's really just the Roberts thing.

16 Right. We will rise until ten past two.

17 (1.10 pm)

18 (The short adjournment)

19 (2.10 pm)

20 JUDGMENT (submitted for approval)

21 MR TURNER: I am grateful. May I suggest one refinement or
22 addition to that?

23 THE CHAIRMAN: Yes.

24 MR TURNER: Some of these documents are going to be put in
25 cross-examination to Mr Romeo.

1 THE CHAIRMAN: Yes.

2 MR TURNER: The natural inclination may be for some third
3 parties to immediately call up Macfarlanes and Prysmian
4 and say they want to do this. So it rather undermines
5 the cross-examination if that were to occur.

6 THE CHAIRMAN: Yes.

7 MR TURNER: It is possible to avoid that by your Lordship
8 giving an indication or making a ruling that, if we are
9 to do that, they are not to consult with Prysmian or its
10 legal representatives about it, precisely for that
11 reason, and that they should make their own decision
12 about its confidentiality without recourse to the
13 Prysmian team.

14 THE CHAIRMAN: Well, I think you are perfectly at liberty to
15 make that point in your notice. You will have to
16 persuade me to grant some form of injunction or anything
17 like that to restrain them from doing that, a bit like
18 a secrecy order that you sometimes get in aid of
19 freezing injunctions and that sort of thing, and I do
20 not think that would be appropriate. But if you can
21 craft the notice in such a way that -- I mean, we
22 clearly are interested in best evidence, and
23 I understand the point that you make about nothing
24 happening which might interfere with the quality of the
25 evidence. I leave it to you -- we are not going to give

1 any further directions as to the form the notice takes;
2 all we are concerned to ensure is that the third party
3 concerned should have the opportunity to come to this
4 tribunal and say additional protections are required.

5 It may be that the way that you express yourself
6 makes it less likely that discussions with Prysmian will
7 take place, but I am not sure we can do very much more
8 than that. The reality is that you have actually given
9 third parties notice anyway in relation to a large
10 number of these documents because we have seen the
11 correspondence that has come back.

12 MR TURNER: That was for groups of documents, but if we are
13 to pinpoint specific documents, it does create --

14 THE CHAIRMAN: Yes. If you want to give notice in relation
15 to more documents than you are going to put, you have
16 obviously got to act bona fide in relation to this, but
17 if there are documents -- we are certainly not saying
18 that simply because you have notified a document, you
19 have to put it. What I think the tribunal would be
20 unimpressed by is if you gave notice in relation to
21 hundreds of documents which clearly had nothing to do
22 with what the case is about.

23 MR TURNER: Of course.

24 THE CHAIRMAN: I leave it up to you, Mr Turner, as to how
25 you put this in a way that protects the best evidence

1 considerations that I identified.

2 MR TURNER: Yes, I should say that I may take the view that,
3 depending on how this is crafted, for example asking the
4 third parties to be transparent about what they do or
5 what they propose to do, would not involve the tribunal
6 needing to get involved with anything like injunctive
7 relief. But we could say, "We propose to give it to
8 you. Will you in return behave in this way," and if
9 they say yes, that would avoid this difficulty. If that
10 does not happen, I may take the view that we may have to
11 deal with particular matters in closed session, if the
12 documents --

13 THE CHAIRMAN: That continues to be a position.

14 MR TURNER: Yes.

15 THE CHAIRMAN: It is obviously less convenient, but as
16 a fallback position, if you run into these kinds of
17 difficulties, we may have to continue to deal with it
18 confidentially. But we do not at the moment see any
19 other way around it. It is unfortunate, and I am
20 afraid -- and I understand the problems in preparing for
21 cases like this, but had this been done a year or so
22 ago, these sort of problems would not have arisen.

23 MR TURNER: I am obliged.

24 THE CHAIRMAN: Sorry, just one moment. (Pause)

25 A very good point and actually I should have made

1 it.

2 The liberty to apply that is given to the third
3 parties is in relation to specific documents. So
4 I think we need to express that on the face of the
5 permission that has been given because what we do not
6 want to find out -- the tribunal does not want it
7 either -- is a generalised challenge to what is being
8 done. It is up to a third party, if they want to mount
9 a generalised challenge, we cannot stop them, but the
10 important point is they have liberty to apply in
11 relation to particular documents, so if that could be
12 expressed on the face of them.

13 MR TURNER: Yes, my Lord, it will.

14 One final point on this: the tribunal will, of
15 course, be free, when such documents are dealt with, if
16 they have to be dealt with in confidential form,
17 subsequently to refer to them openly. We put the
18 example in the bundle at tab 44 -- it is only a single
19 page -- of how Mr Justice Marcus Smith approached
20 a similar sort of problem that arose in that case. He
21 said that there was a part of the decision which
22 involved confidential material but that having heard the
23 evidence, seen how it was used, he was satisfied it was
24 non-confidential and therefore he was able to refer to
25 it openly in his judgment.

1 THE CHAIRMAN: Yes.

2 MR TURNER: At the end of the day.

3 THE CHAIRMAN: I had a case just the other day where I had
4 to give two judgments, which was extremely tiresome, one
5 on the confidential and the other on the
6 non-confidential -- it was a disclosure dispute -- and
7 there are a number of different ways one can deal with
8 this problem in the context of a judgment. You just
9 have to try and -- whatever works best.

10 Can I just say, this tribunal is not in the business
11 of disclosing confidential information unnecessarily.
12 Obviously. Obviously, the tribunal is not going to say
13 anything about confidential information which it does
14 not feel it is necessary to say.

15 Right.

16 MR TURNER: My Lord, the last --

17 THE CHAIRMAN: Oh, I should have said, the final bit in
18 relation to the confidentiality question relates to the
19 order. We have decided that we are not going to make
20 a further order. The more we thought about it, the more
21 we felt that the order that has already been made works
22 perfectly satisfactorily and, given that there is still
23 a difficulty for some settled parties, we just do not
24 see the need to resolve the question of the extent of
25 this tribunal's powers as against settled parties

1 MR TURNER: The application is opposed.

2 THE CHAIRMAN: Yes.

3 MR TURNER: It is opposed on the basis -- you have seen from
4 the skeleton -- that it is late and it would add to
5 Prysmian's burden unduly in preparing for the trial.

6 THE CHAIRMAN: Yes.

7 MR TURNER: The background is this. We claim compensation
8 for cartel overcharges on these cable projects only
9 where they have been classified for regulatory purposes
10 in a particular way.

11 THE CHAIRMAN: Yes.

12 MR TURNER: Where they are called infrastructure assets and
13 not connection assets.

14 THE CHAIRMAN: Yes.

15 MR TURNER: So the starting point is that one needs to know
16 which are the projects, and parts of projects,
17 classified as infrastructure assets and which are not.

18 It has been clear, starting with the pleadings,
19 since the claim was first filed in 2015 that this -- the
20 way it is referred to is the regulatory split -- has
21 been a basic feature of the case. It is there in the
22 particulars of claim and in the description of
23 infrastructure assets that we list out in an appendix to
24 the particulars. I perhaps do not need to show you.

25 Then at the first case management conference, in

1 October 2016, Mrs Justice Rose set out exactly how any
2 threshold disputes about this or other basic factual
3 issues should be tackled as case management. She was
4 very clear that what should be done is that they should
5 be ironed out or flushed out, both terms used, early,
6 ahead of the expert reports, so that the experts who
7 crunch the numbers on quantum can work on a solid
8 foundation, either the numbers are agreed or it is clear
9 that there is a factual dispute and the experts can put
10 forward alternative analyses.

11 So she ordered that the first step should be
12 disclosure of relevant documents by the claimant,
13 coupled with the provision of information, and after the
14 claimant had done that, the defendants would respond, so
15 that any specific concerns would be flushed out and
16 addressed early. That was 2016. There then was
17 subsequent engagement. There was a great deal of
18 detailed work carried out and National Grid provided the
19 information and 209 documents originating from its
20 internal asset management team.

21 Then the experts engaged, basing themselves on the
22 regulatory splits for which this detailed information
23 and evidence had been given many months earlier.

24 They served their main reports in March this year
25 and they finalised the joint memorandum in June.

1 That is a very brief history and then it is only
2 a few weeks ago, on 11 September, that the Prysmian
3 defendants amend their statement of case, so as to plead
4 that the regulatory split for certain specified projects
5 was not admitted, and to do so in very particular ways.
6 I am afraid I have been locked out of Opus again, but if
7 this flashes up on the screen, it should not be
8 a problem.

9 If we could turn, please, to {F/31.1/1}. This is
10 the Prysmian pleading which has caused the
11 consternation. What you will see is that the latest
12 amendments are pink, and they have added a column, a new
13 column, on the far right-hand side.

14 MS DAVIES: It is in the hard copy bundle, if that would be
15 easier.

16 MR TURNER: That would be.

17 THE CHAIRMAN: Thank you.

18 MR TURNER: Thank you, that's very helpful.

19 If you take the first project -- it is called
20 Newby-Nunthorpe. It is not a random project. This is
21 a big one and accounts for a significant chunk of the
22 overcharge claim. They say:

23 "The Prysmian Defendants do not admit the proportion
24 of infrastructure assets in this project as (i) it
25 cannot be confirmed from the documents disclosed to

1 date; and (ii) the Claimant is relying on internal
2 confirmations of the allocation which have not been
3 verified in evidence."

4 THE CHAIRMAN: Yes.

5 MR TURNER: Then if you go forward in this to page 25,
6 {F/31.1/25}, for many of these projects where they enter
7 the new text, they are even more specific. If you take
8 West Thurrock, number 55, they say there:

9 "The Prysmian Defendants do not admit the proportion
10 of infrastructure assets in this project as it cannot be
11 confirmed from the documents disclosed to date and no
12 evidence has been served to support the claimed
13 allocation."

14 Then they add:

15 "In particular, NG01892 shows scheme number 13041
16 referring to Grain Infra-BritNed Intercon (which is
17 understood to be a reference to ..."

18 Project 37:

19 "... and no reference is made to West Thurrock ..."

20 With a number.

21 So what has happened on 11 September is you now
22 have, for the first time, very particular, very
23 specific, points about why they are not going to accept,
24 for certain projects, listed individually, the
25 regulatory split that is claimed.

1 They have said, "Well, we did this, although it was
2 strictly unnecessary." One must ask why did they do
3 this if it was unnecessary. The reason they did it is
4 because they knew that if they were going to try to take
5 a technical point now about verification via witness
6 evidence at the trial and add these new allegations,
7 they would have to put it on the pleadings to counter
8 the unattractive impression that this is a litigation
9 ambush. Our position is this: on any view, it is this
10 amendment to the case which is late, despite the very
11 clear case management by Mrs Justice Rose, almost four
12 years ago to the very day, there had been no suggestion
13 at any time that the particular documents and
14 explanations given for specific projects were
15 insufficient or why, as there is now.

16 We are not going to object to this amendment, to
17 introduce specific non-admissions, but in view of it, if
18 this comes in, justice requires that we should be able
19 to put forward Mr Roberts.

20 THE CHAIRMAN: But Ms Davies says that this was put in issue
21 by a non-admission at the outset.

22 MR TURNER: Yes, I will come to that. What there was was
23 a general non-admission.

24 THE CHAIRMAN: Yes.

25 MR TURNER: And what I will show you is that the pure

1 general non-admission was not in accordance with the
2 spirit of the case management procedure, clearly laid
3 down by the judge, and is far weaker than the list of
4 specific points which are now included in September.

5 THE CHAIRMAN: Yes.

6 MR TURNER: So we say that we should be able to put forward
7 then the witness to stand behind what the asset
8 management team said in the earlier documents, and if
9 Ms Davies really wishes, she can cross-examine. She
10 said earlier that she may or may not.

11 That is the essential context for this application
12 to adduce the statement.

13 THE CHAIRMAN: Yes.

14 MR TURNER: On the other side, the arguments are these --
15 and I have in mind paragraph 29 of their skeleton --
16 that our statement to introduce this is late.

17 THE CHAIRMAN: Yes.

18 MR TURNER: Which disregards, we say, the context, why we
19 did it. Second, that Prysmian is, "Heavily engaged in
20 other matters of trial preparation," and that this:

21 "... creates difficulties in terms of affording
22 Prysmian a proper opportunity to deal with it."

23 On that, we say it is a very slender thread for
24 trying to suggest that they face prejudice. Rather, the
25 real prejudice to National Grid from not admitting this

1 statement, given the late amendment, is what is obvious,
2 and if I may, I will very briefly develop the point
3 about how this has arisen, answer your Lordship's query
4 about the earlier non-admission so that you can see
5 where the real merits lie.

6 The parties had been proceeding for the past few
7 years, and all the experts had engaged, on the basis of
8 the regulatory splits detailed by National Grid. That
9 was because of the very clear case management that
10 Mrs Justice Rose had given back in 2016.

11 As I indicated before, she ordered the parties to
12 engage early on these basic factual questions, and her
13 intention was that they would do that so that then the
14 experts could engage in an orderly fashion and having
15 awareness of the factual parameters of the dispute.

16 Her concern, in short, was to avoid precisely the
17 situation that I am arguing about now.

18 If we turn to the transcript of the first CMC, here,
19 I am afraid, I will have to ask you to look at Opus.

20 THE CHAIRMAN: Yes.

21 MR TURNER: Can we call up {T1/1/1}. We only have a single
22 page in the hard copy bundle. This is the first page of
23 the transcript. It was four years ago, and I will show
24 you that what the judge did was emphasise the importance
25 of flushing out underlying factual disputes with

1 clarity, the aim being to avoid surprises at this point.

2 If we go, please, to {T/1/26} in the same document,
3 you will see Mrs Justice Rose at the bottom, and you
4 will see what she says:

5 "All right, but what we have got to avoid is the
6 economists all doing their number crunching using
7 different figures for the value of commerce affected
8 ..."

9 That is the value of relevant sales:

10 "... and that will be buried deep within the model
11 somewhere and, ping, out will come different results for
12 the overall pricing differential, say during and post
13 cartel, and it might only be by burrowing into the data
14 that you work out that one of the reasons why the
15 numbers that have emerged at the end of the day are so
16 different (if they are so different) is that they have
17 taken completely different figures for value of
18 commerce, and then the judge will say, 'Well, why have
19 you taken different figures for the value of commerce?'
20 and they will say, 'Because our clients told us that
21 actually it is not £24 million dah-de-dah, the value of
22 commerce on that contract was only £16 million because
23 we've not included this or we have including that.'
24 Then we will not be in a position to work out who is
25 right about that. What I do not want to happen is that

1 the economists are using different values for all these
2 without it being apparent that they are using different
3 values and in circumstances where it would have been an
4 easy or straightforward thing to work out what are the
5 correct values because if at the end of the day the
6 judge says, 'No, I think £24 million is right', the
7 economists who have used only £16 million for the value
8 of commerce, either all their work is just going to have
9 to be jettisoned because it is all based on the wrong
10 figures, even though actually what they might have done
11 is quite valuable, or they are going to have to, in a
12 great panic, rerun the model using ... different figures
13 and it can all have been flushed out at a much earlier
14 stage -- like now."

15 Then comes the bit that I have quoted in the
16 skeleton. Mrs Justice Rose says, in the first line:

17 "That is what I am trying to get at; that the
18 experts should be working so far as possible on data
19 which either it is agreed so they are using common data
20 or if they are using different figures at least we know
21 that they are using different figures and if the reason
22 why they are using different figures is because of some
23 factual dispute or is something that could be ironed out
24 at an early stage, that we identify that and iron it out
25 so they are both using as robust (to use a much

1 over-used adjective) figures as they can. It may be,
2 because I am a traditional person, that the way you
3 flush that out is you have schedule and you have another
4 column where it says in your fifth column where it says
5 'Value of commerce affected' as what we think, add a
6 further column 'Value of commerce affected' as what they
7 think. It may be the same; it may be different, but if
8 it is different then that does lead to us needing to
9 have disclosure and some factual evidence as to what the
10 value of commerce is, or some exploration of that.
11 There is no point not knowing that and them just
12 including different numbers in their model."

13 THE CHAIRMAN: Yes.

14 MR TURNER: So it was a clear, practical approach. It was
15 assented to by Ms Davies explicitly on the following
16 day, if we turn, please, to {T/2/31}. Mrs Justice Rose
17 put the point out, and you will see near the bottom
18 Ms Davies says -- I am looking for it somewhere there --
19 she does not dissent from the process that has been
20 outlined.

21 MS DAVIES: I think it is the point two-thirds down the
22 page:

23 "I think the point I am trying to make is that we
24 certainly agree with my Lady's sentiment --

25 MR TURNER: Thank you, that is it.

1 THE CHAIRMAN: I have got it.

2 MR TURNER: Yes. So that is what the court did. It then
3 set up the process for engagement over the general issue
4 of what are the value of the relevant sales so as to
5 flush out any disputes, as she said, early on, so that
6 they could be addressed in the witness evidence in good
7 time for the experts to consider in their reports. The
8 process so far as concerns providing information, rather
9 than disclosing documents, was in paragraph 19 of the
10 order made by the judge, which in your hard copy bundle
11 should be at tab 18 at page 7. So here is her order,
12 and you will see in paragraph 19:

13 "The party shall prepare a schedule for the power
14 cables projects specified in Appendix 2 of the
15 Claimant's particulars of claim, which shall stand as
16 pleadings as follows: (a) Claimants prepare a draft
17 schedule by April 2017."

18 You will see that (iii), that was to include
19 information about the so-called regulatory splits. Then
20 (b):

21 "The Defendants, by 26 May, indicate in the schedule
22 at least in respect of which of the projects, if any,
23 they dispute the attribution or the features or the
24 value of commerce figures and together with their
25 reasons for doing so ..."

1 Note the judge wanted them to do what they have now
2 done on 11 September:

3 "... and the alternative figures or features they
4 propose."

5 THE CHAIRMAN: Yes.

6 MR TURNER: So far as concerns disclosure of documents, if
7 you go on in this to page 14 in the same tab -- you have
8 to turn this to landscape view -- under the heading,
9 "Pass-on", there is a box which says "PO" -- or
10 pass-on -- 1".

11 THE CHAIRMAN: Page?

12 MR TURNER: 14. There should be two big boxes and halfway
13 down on page 14, there should be a box marked "Pass-on"
14 and in the left-hand column it says PO1. This was the
15 disclosure, as opposed to the information, which came in
16 the schedule:

17 "Documents providing evidence on the proportions of
18 each project undertaken under the infrastructure and
19 connections charging regimes such as ..."

20 Then it lists the relevant type of technical
21 document.

22 So what was intended was that there was both going
23 to be an explanation given and, if challenged, specific
24 reasons why there was a challenge, and disclosure.

25 National Grid did give the explanations and it disclosed

1 209 documents in March 2017.

2 THE CHAIRMAN: Maybe you are going to come on to this, but
3 you showed us the schedule which was the latest
4 iteration from the defendants; what form did your
5 original schedule take?

6 MR TURNER: I am coming to that directly. If you turn to --
7 I think it is only on Opus again, I apologise --
8 {L/2/28}. Here you see what came. So here is the
9 schedule, and again start with Newby-Nunthorpe, which is
10 the first one, the big project. Does your Lordship have
11 that?

12 THE CHAIRMAN: Yes.

13 MR TURNER: "The Claimant relies on ..."

14 A particular document called "Final Completion
15 Report":

16 "... which explains that this project formed part of
17 a wider development relating to the Teeside Power
18 Project that comprised eleven separate schemes (see
19 paragraph 2).

20 Of the document. Paragraph 22 of that document
21 explains that:

22 "... although the wider development had involved
23 Teeside Power Limited entering into a two-stage
24 Bilateral Connection Agreement with the Claimant in
25 respect of the 275kV and 400kV connections at Lackenby,

1 'there were no commercial issues arising specifically
2 from the completion of this scheme'. The Claimants
3 Asset Management team has reviewed [that document] and
4 has confirmed their view, in light of the explanations
5 in paragraph 22 [of the document], that this specific
6 project was 100 per infrastructure."

7 So you will see, pausing there, that what they did
8 was, standing as pleadings, say, "These are our reasons
9 why we said that this belongs in one bucket, not the
10 other." They said, "Our asset management team has given
11 this reason for interpreting it in that way":

12 "In addition, the Claimant notes that the NG01379
13 (Resanction Paper) categorises [a particular scheme] as
14 a 'capital' scheme ..."

15 As opposed to revenue:

16 "... which is consistent with the allocation ... as
17 100 per cent infrastructure.

18 "The Claimant also relies on ..."

19 A regulatory reporting pack and draws attention to
20 something in that, and finally:

21 "The Claimant's Asset Management team has confirmed
22 the allocation of the project to Category 2.1 indicates
23 the project was 100 per cent infrastructure."

24 So those were the reasons that are given on the
25 claimant's side for the project. Prysmian originally

1 filed a response to the schedule that National Grid
2 served --

3 MS DAVIES: For the avoidance of any doubt, it is not this
4 schedule.

5 MR TURNER: In July 2017. It then amended it three times:
6 in December 2017, in July 2018 and then again
7 in December 2018. At no point did Prysmian say that for
8 any particular project the documents or the explanation
9 given by National Grid were insufficient or ambiguous in
10 a way that they explained. Had it done that, that would
11 have been dealt with promptly by us in line with
12 Mrs Justice Rose's intentions to flush this out early.

13 If there had been a specific dispute left on
14 anything by the time of the factual witness statements,
15 the end of October 2018, it could and it would have been
16 addressed then. But there was no specific dispute.

17 If we can go, please, to the last of their responses
18 prior to this amendment. I think it is at {F/24/1} on
19 Opus. Here you have the last of the Prysmian responses
20 prior to their amendment.

21 THE CHAIRMAN: Is it possible to get those two documents up
22 on the screen alongside each other?

23 MS DAVIES: My Lord, sorry, my intervention was designed to
24 indicate this is not a schedule responding to the
25 previous schedule.

1 THE CHAIRMAN: I understood that, and I had already picked
2 up that the columns in your document -- I hadn't seen
3 this one before, but I had seen the latest iteration --
4 were different from the columns --

5 MS DAVIES: This is the schedule that has actually been
6 produced pursuant to paragraph 19 of Mrs Justice Rose's
7 order, which is responding to what is actually appendix
8 2 to the particulars of claim, which is a schedule which
9 sets out similar columns.

10 THE CHAIRMAN: I understand that, but I think Mr Turner's
11 point -- and he will correct me if I am wrong -- is
12 that, in accordance with paragraph 19 of Mrs Justice
13 Rose's order, his clients served that which we have just
14 been looking at, to which your clients were meant to
15 respond.

16 MS DAVIES: No, my Lord, if he is suggesting that, that is
17 incorrect.

18 THE CHAIRMAN: That is what I understood, but maybe I have
19 got that wrong.

20 MR TURNER: With respect, the schedule was the original
21 blank text that was provided.

22 What I have shown you was part of our disclosure
23 statement.

24 THE CHAIRMAN: I see.

25 MR TURNER: Where we, when we gave disclosure, listed out

1 our reasons, and we provided that information. So that
2 is in substance actually the explanation that was
3 provided.

4 THE CHAIRMAN: So what is appendix 2?

5 MR TURNER: Appendix 2 to the particulars of claim is the
6 list of all of the cable projects bought by
7 National Grid -- there were originally 108 --

8 THE CHAIRMAN: I see, so it is just a reference to the
9 projects?

10 MR TURNER: Yes, it is just a reference to the ones where
11 the claim is they were overcharged.

12 THE CHAIRMAN: Mr Turner, what is the draft schedule which
13 you were ordered to be provided by 28 April 2017 -- what
14 is that document?

15 MR TURNER: Yes, I am told to go to {F/31.1/1} on Opus.
16 This, if you see the top of the page, on the right-hand
17 side -- sorry, it has now gone. {F/31.1/1}. This is
18 the Prysmian documents.

19 MS DAVIES: That's the document in tab 40 of the hard copy
20 bundle.

21 MR TURNER: Yes. So this is Prysmian's position. This is
22 the updated one. I see, I am sorry, yes. If you look
23 at the bullet points on the top --

24 THE CHAIRMAN: On the top of which ...?

25 MR TURNER: Take the latest document with the pink on the

1 side.

2 THE CHAIRMAN: Yes.

3 MR TURNER: At the top, under the word "Key", on the
4 left-hand side of the box:

5 "Claimant's Position and Amendments:

6 "Text in black reflects the Claimant's position set
7 out in the ... schedule dated 20 June 2017."

8 Then on the right:

9 "Prysmian Defendants' Position ..."

10 Giving the different points at which they had
11 changed or updated their position.

12 THE CHAIRMAN: I see. So is the claimant's schedule of
13 20 June that which Mrs Justice Rose ordered to be
14 provided?

15 MR TURNER: I will just confirm that. My understanding is
16 that the document that you have seen at {L/2/28}
17 provides the detailed written explanation that was
18 relied on by the claimants --

19 THE CHAIRMAN: Right.

20 MR TURNER: -- in January 2018. So that there you have
21 a specific explanation given, and that what is then
22 added in the pink column in the new Prysmian document is
23 commenting, as you can see from Newby-Nunthorpe, on now
24 why they say there are problems that they do not accept
25 the accuracy of the claimant's position.

1 THE CHAIRMAN: Yes. I understand all that. I am on quite
2 a narrow point at the end of the day, I think, which is
3 you took us to paragraph 19 of Mrs Justice Rose's order
4 and you made the perfectly understandable submission
5 that Mrs Justice Rose, in paragraph 19, contemplated
6 that one of the specific details she wanted pleaded out
7 with a positive case one way or the other, was the
8 detail referred to in paragraph 19(a)3 of her order.

9 MR TURNER: Yes.

10 THE CHAIRMAN: I have very clearly got that point. What
11 I was just keen to understand is what document reflects
12 your compliance with that order or that part of the
13 order, because if you provided a document which
14 reflected that part of the order, all other things being
15 equal, Ms Davies needed to respond to it in positive
16 terms in accordance with paragraph 19(b) of the order.
17 It is not more complicated than that.

18 MS DAVIES: I do not want to interrupt my learned friend
19 unduly, the original schedule is in bundle F, tab 9,
20 which is appendix 2, which is what I was describing.
21 I do not know if that can be brought up. But that is
22 the original schedule, as is clear from the heading in
23 bundle {F/9/1}.

24 THE CHAIRMAN: There is your answer, Mr Turner, because it
25 has got a column saying "Proportion of infrastructure

1 assets", to which Ms Davies might be thought to have to
2 plead.

3 MR TURNER: Yes, there is the appendix 2 list with the
4 proportion set out. As I say, a detailed written
5 explanation, which is the nub of the case today, was
6 provided in January 2018, and that was the one I took
7 you to at {L/2/28}. That contained the various
8 confirmations from the National Grid asset management
9 team about the correct interpretation of various
10 documents and a narrative about why our regulatory
11 splits were correct.

12 THE CHAIRMAN: Yes. So what you originally showed us is
13 a further sort of development of some of those columns,
14 if I can put it that way.

15 MR TURNER: Yes. A further development which provided
16 a detailed narrative, explaining how they had arrived at
17 that position, combining the disclosure documents with
18 the internal reasoning of the asset management team.

19 If we can go back, please, to {F/24/1}.

20 THE CHAIRMAN: Do you say in paragraph -- sorry to be so
21 focused on Mrs Justice Rose's order, but do you say that
22 the features of those projects, as described in 19(b),
23 extends to whether or not they constitute infrastructure
24 assets or connection assets?

25 MR TURNER: Yes, absolutely, because that feeds into the

1 basic question of whether we are claiming for it or not.

2 THE CHAIRMAN: Yes.

3 MR TURNER: As you will see, it is the features of those
4 projects which decides that point.

5 Where I was was looking at Prysmian's last iteration
6 prior to the current amendment, which is at {F/24/1},
7 which I hope you have on screen.

8 THE CHAIRMAN: Yes.

9 MR TURNER: If you look at what they said in relation to
10 Newby-Nunthorpe -- we will need to go over the page:
11 {F/24/2}

12 "The Prysmian Defendants' affected value of commerce
13 is taken from the SAP data."

14 Is this -- yes. {F/24/1}, nothing specific.

15 If you go to page 40, {F/24/40}, the other project
16 we were looking at, West Thurrock.

17 THE CHAIRMAN: Yes.

18 MR TURNER: You have got the claimant's position on value of
19 commerce in the third from the right column, and then at
20 the end:

21 "Basis for alternative value of commerce figures
22 identified by the Prysmian Defendants.

23 "The Prysmian Defendants' affected value of commerce
24 is taken from the SAP data."

25 Finally, if you go to page {F/24/89}, at the end of

1 their schedule there are explanatory notes, which they
2 have had since their first responsive schedule, and
3 Ms Davies is presumably going to refer to paragraph 1.2,
4 where they say in their notes on what they have done:

5 "The Prysmian Defendants have not addressed: (a) the
6 Claimant's procurement process; (b) the proportion of
7 infrastructure assets; or (c) the alliance fee ..."

8 Something else. But it is (b) that they say is
9 important:

10 "... as [they] are not in a position to admit or
11 deny this information."

12 So what one had, prior to the latest development,
13 was a general statement that they have not addressed
14 this because they are not in a position to admit or
15 deny. What you did not have was an explanation of why,
16 what was ambiguous or insufficient in a particular case,
17 such as has now been provided. But Prysmian could not
18 have been under a misapprehension as to the need to
19 plead the specific denials or reasons for taking the
20 position that they took, that they wished to rely on.

21 All of those amendments were made more than a year
22 before the expert reports, which came in March this
23 year.

24 The outcome of Mr Noble's -- our expert --
25 discussions with Mr Davies, and all the other defendant

1 experts, showed that the position appeared to be agreed.

2 If you could perhaps call up on Opus {E/18/39}. You
3 will see a specific question for the experts to address
4 in their joint memorandum. The question, which is in
5 the box at the bottom, item 24, is:

6 "Do you agree with the Connections/Infrastructure
7 splits as described in Appendix 2 ..."

8 That's of Mr Noble's first report:

9 "If not, why not?"

10 The high level comment in bold under that is:

11 "The experts agree with each other.

12 "The experts agree it is less material."

13 But then if you turn to the fourth row along, the
14 penultimate column, you will see Mr Davies' response for
15 Prysmian:

16 "I have not considered this issue in detail, instead
17 I have used the percentages provided by the Claimants in
18 Appendix 2 ..."

19 Of the particulars of claim and appendix 2 of the
20 other claimant's particulars:

21 "... as no comprehensive alternative sources were
22 available to me with this information. I have therefore
23 been unable to test the accuracy of the percentages
24 provided by the Claimants."

25 So that was the position taken, and although he took

1 that position -- he said there were no comprehensive
2 alternative sources -- no request was received, either
3 from him or from Prysmian, for any documents or
4 information, to clarify anything, additional to the very
5 substantial disclosure which National Grid had given,
6 and there was not a suggestion that either Mr Davies or
7 Prysmian had a reason to proceed on the basis of
8 anything different from the regulatory split that
9 National Grid had identified.

10 That is the context. Then, on 11 September, the
11 controversial amendments by Prysmian are finally
12 inserted on the pleadings. Could you, please, go back
13 to those -- again in Opus, that's {F/31.1/1} --
14 Ms Davies will remind me where it is in the hard copy.

15 MS DAVIES: Tab 40.

16 MR TURNER: Tab 40, thank you.

17 We have looked at the first entry, which is the big
18 Newby-Nunthorpe project. Now if you go to page 25,
19 {F/31.1/25} and go on page 25 to West Thurrock, you will
20 see there a very particular objection made for the first
21 time:

22 "The Prysmian Defendants do not admit the proportion
23 of infrastructure assets in this project as it cannot be
24 confirmed from the documents disclosed to date and no
25 evidence has been served to support the claimed

1 allocation."

2 Then:

3 "In particular, NG01892 shows scheme number 13041
4 referring to Grain Infra-BritNed Intercon (which is
5 understood to be a reference to [a different project]
6 and no reference is made to West Thurrock ..."

7 THE CHAIRMAN: On one view, taking a very conventional
8 approach to this sort of thing, what Ms Davies has done
9 by that is converted her case in relation to
10 West Thurrock, which had been a bare non-admission, into
11 a positive case in relation to a particular assertion.

12 MR TURNER: Yes.

13 THE CHAIRMAN: If one is taking a very technical approach to
14 this, a pleadings approach to this, what may be more
15 difficult is where there is just a reiteration of a bare
16 non-admission because she will say, I suspect, that
17 that's what her position has been all along, and it's
18 conventional when you don't admit, you put the other
19 side to proof and they have to prove it. I think that's
20 the root of her case.

21 MR TURNER: That is the root of her case. The short answer
22 to it is that in October 2016 a specific mechanism was
23 set down to try to vault over that so that there would
24 be engagement, and in reliance on that, the parties had
25 engaged and we had expected, therefore, that this was

1 not an issue to trouble the court now.

2 THE CHAIRMAN: Yes.

3 MR TURNER: Beyond the general sweep-up in the explanatory
4 note you have seen at the end of the schedule, you did
5 not have this detail.

6 THE CHAIRMAN: Yes. It is fair to say, I think, that
7 Ms Davies' case has to place a lot of weight on that bit
8 of the explanatory note because that is really the
9 core --

10 MR TURNER: That is the core of it, and our response is that
11 that was not the way that we understood that this was
12 going to happen. What we are now faced with, a few
13 weeks ago, is very detailed material saying, no, this
14 does not work and that does not work and we do not
15 understand the other, for individual projects. As
16 your Lordship says, it is a form of positive case.

17 THE CHAIRMAN: Certainly in that case, I think it
18 undoubtedly is, subject to anything Ms Davies wants to
19 say; I mean, there may be other examples in the schedule
20 where it is less obviously asserting a positive case.

21 MR TURNER: Yes, you will see that this particular one --
22 I will pick it up in a moment -- is reflected in what is
23 said immediately after, in project 56, and if you go
24 through, you will see that there are a variety of
25 particular reasons given.

1 THE CHAIRMAN: Yes.

2 MR TURNER: So then one says, well, how does National Grid
3 respond to this development a few weeks ago, before
4 trial.

5 THE CHAIRMAN: Can I ask a question and test it this way.
6 Let us assume that Ms Davies had not put the schedule in
7 at all. We got to trial and she simply said Mr Turner
8 has not proved his case and put any evidence in on it.

9 MR TURNER: Yes, I would bring forward the same reasoning,
10 which is that we put forward material supported by
11 explanations and documents intended to stand as
12 pleadings in the context where the judge said, if this
13 is going to be contested, then the defendants, including
14 Prysmian, must put forward that they deny and the
15 reasons why.

16 THE CHAIRMAN: Okay.

17 MR TURNER: In that context, the bare non-admission of
18 everything really was not sufficient, and it did take us
19 by surprise.

20 What we have done is not sought to say you are not
21 entitled to do this and we are going to contest the
22 amendment. We are seeking to respond to it in a very
23 practical and, we think, entirely sensible way, which is
24 this. For the large part it is the asset management
25 team, without saying who the individuals are, and we

1 have said for this reason this particular document needs
2 to be interpreted this way and that is why you should
3 see this as an infrastructure rather than a connection
4 asset.

5 Mr Roberts is a senior individual, connected with
6 that team, and we have said that he can come forward and
7 he will essentially be there to give evidence. There is
8 nothing here that is within Prysmian's knowledge, but if
9 Ms Davies wants to question him about anything, there is
10 the witness and it is open to this to be done at the
11 trial.

12 That is, therefore, the approach which we decided to
13 take. If you now go to the hard copy bundle and go in
14 it to tab 4, page 9, you have there Mr Roberts'
15 statement. This is the second statement.

16 THE CHAIRMAN: Yes.

17 MR TURNER: He does not introduce himself here with his
18 position, but essentially, he explains in the first
19 statement that he was in a job position which gave him
20 knowledge of this material. He was the electricity
21 charging and access development manager.

22 You have seen for the large Newby-Nunthorpe project,
23 one of the challenged cases, what National Grid said in
24 the schedule about it. It said in particular that the
25 relevant document had said:

1 "There were no commercial issues arising
2 specifically from the completion of this scheme."

3 On that footing, National Grid's asset management
4 team confirm that what this means is:

5 "This project is a 100 per cent infrastructure
6 project."

7 THE CHAIRMAN: Yes.

8 MR TURNER: Now, in this statement, to see how he approaches
9 it, if you go to paragraph 8 and 9 on page 11, you see
10 the heading: {D/10.2/4}

11 "References to 'commercial impact'/'commercial
12 issues'."

13 THE CHAIRMAN: Yes.

14 MR TURNER: He says:

15 "In a number of instances, National Grid's Schedule
16 records that a given project did not involve any
17 connections assets on the basis that the relevant scheme
18 paper ... states on its face the scheme had 'no
19 commercial impact', or that 'no commercial issues' arose
20 ... or words to that effect."

21 What he does is he explains how in the commercial
22 context you are to understand that, and he says, four
23 lines down:

24 "... these phrases are used by ... authors to
25 confirm that there are no assets in the scheme ..."

1 To be charged to the connection customers.

2 Paragraph 9:

3 "As NGET's Schedule states:

4 "(a) a scheme final completion report for the scheme
5 associated with ... (Newby-Nunthorpe) states that 'there
6 were no commercial issues arising specifically from the
7 completion of the scheme'."

8 He has explained, therefore, how it is that it is
9 interpreted in this way, and the idea is that he is
10 there to stand and give evidence at the trial to confirm
11 the point that the asset management team had already put
12 in in writing.

13 Then if you take the West Thurrock case, the other
14 one I showed you -- it was project 55 -- Prysmian had
15 come up with a specific point, we saw, that two
16 different documents do not match up, they say, so you
17 have not proved your case. If you go in this witness
18 statement to paragraph 15.

19 THE CHAIRMAN: I had not understood, but I might be wrong,
20 Prysmian to object to the admission of this on the
21 grounds that it was not capable of being relevant to the
22 issue if the issue is in issue, if I can put it that
23 way.

24 MR TURNER: No, I am not seeking to defend it on that basis.

25 What I am seeking to do is to address our point that,

1 for reasons of justice, it needs to be introduced to
2 show you what it does --

3 THE CHAIRMAN: Yes.

4 MR TURNER: -- and why it is there.

5 THE CHAIRMAN: Sorry, you took us to which paragraph?

6 MR TURNER: I think if we go on internal page 8.

7 THE CHAIRMAN: Yes.

8 MR TURNER: Paragraphs 21 and following. At paragraph 21 he
9 takes a group of these which are all treated in the same
10 way -- if you remember, I said that the surrounding
11 projects are also given the same treatment in Prysmian's
12 document -- and he says: {D/10.2/8}

13 "I note that for projects #54 ... #55 ... and #56
14 ... the Prysmian Defendants ..."

15 Say in the schedule:

16 "... that they do not admit the proportion of
17 infrastructure assets ... on the basis that (a) the
18 document relied upon by [Grid] ... shows the scheme
19 numbers listed against these projects in [the] Schedule
20 as referring to ..."

21 Another project:

22 "... and (b) the documents referenced in [the]
23 Schedule for these projects do not refer to the scheme
24 numbers listed for those three projects."

25 What he then does is he goes on to explain the

1 ambiguity or why that is the case, that there were four
2 related projects which need to be taken together, and he
3 explains how it is that what was said in the earlier
4 narrative stacks up --

5 THE CHAIRMAN: Yes.

6 MR TURNER: -- and supports it.

7 So that is the flavour of what is happening in the
8 witness statement which is now objected to.

9 THE CHAIRMAN: Yes.

10 MR TURNER: To draw the strands together, the evidence
11 should be admitted. Yes, it is late, but our case is
12 that the lateness arises as a result of Prysmian's
13 change of position and its failure earlier to comply
14 with the direction given by Mrs Justice Rose.

15 Third point, there is no prejudice to Prysmian if
16 the evidence is admitted. You have seen that their
17 skeleton says Prysmian is obviously heavily engaged in
18 other matters of trial preparation and this creates
19 unspecified difficulties dealing with it.

20 That is not a sufficient claim of prejudice, and
21 there cannot be because this statement, by its nature,
22 does not open up material which requires any further
23 response, and nor was that suggested.

24 The fourth point is that justice is therefore going
25 to be done if, as we propose, Roberts is available for

1 cross-examination on this statement, if Prysmian really
2 do wish to call him. There is no question of there
3 being insufficient time in the trial timetable.

4 Lastly --

5 THE CHAIRMAN: Your suggestion was that if he was going to
6 be called, he would be slotted in at the end of the NGET
7 witnesses?

8 MR TURNER: Yes, that is right.

9 THE CHAIRMAN: Yes, okay.

10 MR TURNER: Finally -- and to come back to the first of my
11 points -- there is an obvious risk of unfairness to the
12 claimant in the circumstances I have outlined about the
13 litigation history if this is not admitted.

14 THE CHAIRMAN: Thank you. Ms Davies.

15 Submissions by MS DAVIES

16 MS DAVIES: In summary, there has been no change of
17 position, there has been no non-compliance with
18 Mrs Justice Rose's, as she then was, order, and there
19 are real difficulties. I can explain that.

20 We need to go back to the beginning of Mrs Justice
21 Rose's order, which is in tab 18 of the bundle for today
22 or at {G/3/7}. This is paragraph 19 of the first CMC
23 order, and that required the claimants to prepare
24 a draft schedule by 28 April 2017 -- in fact, that was
25 slightly delayed until June 2017 -- and then us to

1 indicate in this schedule, at least in respect of which
2 of the projects, if any, they dispute the claimant's
3 attribution, the futures of the project and so on.

4 The claimant's schedule that was served in response
5 to this is the schedule at bundle {F/9/1}, if that could
6 be brought up on Opus.

7 THE CHAIRMAN: Yes.

8 MS DAVIES: As my Lord noted, that did include a heading,
9 "Proportion of infrastructure assets".

10 THE CHAIRMAN: Yes.

11 MS DAVIES: Of course, this issue is a factual issue, where
12 the claimants are the only parties who know whether the
13 material is infrastructure or connection, but it is
14 critical to their claim because, as my learned friend
15 Mr Turner indicated, they do not claim any overcharge at
16 all in relation to connection asset. That has
17 throughout been their position, and they throughout,
18 therefore, have known that an important part of their
19 case is showing that the project in relation to which
20 the claim is made is indeed an infrastructure asset.

21 Our responsive schedule to this schedule, served
22 pursuant to paragraph 19(b) of the case management
23 order, is the one which is to be found in bundle
24 {F/12/1}, which was served on 18 July 2017. My Lord
25 sees at the top that that is indicated to be our

1 response to the claimant's schedule prepared pursuant to
2 paragraph 19(a) of the order of Mrs Justice Rose.

3 My Lord will immediately note that there is not
4 a column in this in relation to the proportion of the
5 infrastructure split because that was dealt with on
6 page 84 of this tab, so {F/12/84}, in paragraph 1.2,
7 where we explain very clearly that we had not addressed
8 either their procurement process or (b) the proportion
9 of infrastructure assets or (c) the alliance fees paid:

10 "... as the Prysmian Defendants are not in
11 a position to admit or deny this information."

12 So we entered a clear non-admission in relation to
13 the infrastructure proportion column of the schedule.
14 That position was then maintained in the next iteration
15 of this schedule, which was served on 9 July 2018, which
16 is not in the F bundle at the moment, but my Lord can
17 see that it was also then maintained in the third
18 iteration of this schedule, served on 21 December 2018,
19 because that is in bundle {F/24/89}, where paragraph 1.2
20 has not been amended. So that is the third iteration.

21 In the meantime, and separately from this, at the
22 second case management conference, Mrs Justice Rose made
23 an order which is to be found in bundle {G/7/6}, in
24 paragraph 12, requiring the claimants, for each project
25 in appendix 2 to their particulars of claim, which is

1 the appendix that we have just been looking at, the
2 schedule we have just been looking at, as updated --
3 again as updated by the iterations that then came
4 subsequently. They shall -- and you see in
5 paragraph 12(a):

6 "... identify which disclosed document it relies on,
7 and specific references to the relevant
8 page/paragraph/tab ..."

9 Et cetera:

10 "... in order to establish the allocation of each
11 project as infrastructure or connection asset or the
12 proportion of each project that is allocated as an
13 infrastructure or connection asset."

14 It is pursuant to that order that the document my
15 learned friend took the tribunal to in bundle {L/2/28},
16 the other schedule --

17 THE CHAIRMAN: Is that order in this --

18 MS DAVIES: No, the second CMC order is not, I am afraid, in
19 today's bundle.

20 THE CHAIRMAN: Can we just go on to the rest of that
21 paragraph.

22 MS DAVIES: "If no such document has been disclosed for a
23 given project, give disclosure of all documents relevant
24 to the allocation of that project (or part thereof) as
25 an --

1 THE CHAIRMAN: As an.

2 MS DAVIES: If we could go on to the next page: {G/7/7}

3 "... infrastructure or connection ... and identify
4 the specific references ...

5 "To the extent it is not clear from the documents
6 identified in subparagraphs (a) and (b) above, provide a
7 concise explanation as to why NGET has come to
8 particular conclusions ..."

9 But what my Lord also sees here is there was no
10 order. Grid were ordered to do that, but there was no
11 order requiring any of the defendants to respond to that
12 explanation. It is that order which led, as I say, to
13 the document which is in bundle {L/2/28}, which is the
14 schedule where, as my Lord can see from the heading, it
15 comes from their second disclosure statement and it is
16 a schedule purporting to identify the documents they
17 rely on to establish the proportion of each project that
18 is allocated as an infrastructure or connection asset.

19 Then they go through, for each project, the exercise
20 that the second CMC order, paragraph 12, identified they
21 were required to do.

22 This schedule was served on 19 January 2018. As
23 I said, the second CMC order -- and no other order, in
24 fact, required the defendants to engage with this
25 schedule. What was happening in parallel --

1 THE CHAIRMAN: Sorry, required the defendants to engage with
2 this schedule?

3 MS DAVIES: We were not required to respond to it --

4 THE CHAIRMAN: You were not required to?

5 MS DAVIES: No, there was no order requiring us to respond
6 to it.

7 THE CHAIRMAN: Sorry, I misheard you.

8 MS DAVIES: What was happening separately was that further
9 iterations of the appendix 2 document were being
10 produced, and we produced, as I indicated a moment ago,
11 an iteration of that on 9 July 2018, which included the
12 non-admission at paragraph 1.2, maintained the
13 non-admission, in relation to the
14 infrastructure/connection asset proportion.

15 So that is how the position was at the point at
16 which the order of Mrs Justice Rose required witness
17 statements to be served. So witness statements in this
18 case were due to be served on 10 October 2018. So we
19 have had two iterations of the appendix 2 process, in
20 both of which we had made a clear non-admission. The
21 defendants had served this document, but our position
22 had been maintained in the schedule responding to
23 appendix 2 as being one of non-admission.

24 So in our submission, there should be no doubt --
25 I mean, the suggestion that Grid had understood, that we

1 in some way agreed with the infrastructure or
2 connections split, which is made in my learned friend's
3 skeleton, is impossible to understand on the basis of
4 the pleadings. The non-admission was clearly there. My
5 learned friend was entitled to take the position that
6 the documents proved it per his column, if he wanted to,
7 and not serve evidence, which is what they did, and so
8 no factual evidence came forward to support any of the
9 explanation in the schedule. He is perfectly entitled
10 to do that and to try and make his case on the
11 documents. All fine.

12 What then happened is that we did, in September of
13 this year, seek to actually narrow the non-admission.
14 That is why we were serving the revised schedule that we
15 served in September of this year, and that is the
16 schedule in tab 14.

17 So what we were actually seeking to do through this
18 was, instead of maintaining a non-admission for 108
19 projects, which was the pleaded case up until that
20 point, we in fact indicated in relation to the vast
21 majority of them that we admitted the
22 infrastructure/connection split and, to give an example,
23 just turning on to the second page of this document,
24 {F/31.1/2}, Woodhead. We see the column to the right:

25 "The Prysmian Defendants do not take issue with the

1 proportion of infrastructure assets in the project based
2 on ..."

3 This document.

4 There are numerous other examples. There remain in
5 this schedule 36 non-admissions. My learned friend took
6 you to a couple of examples, Newby-Nunthorpe and
7 West Thurrock, number 22. But when I say we have not
8 changed our position, the position was of non-admission
9 and the non-admission is maintained in this schedule.
10 What we have added, I accept, is an explanation which
11 did not exist previously in this schedule as to why
12 there was a non-admission. But it remains
13 a non-admission. We do not have access to the material.
14 We are simply saying the evidence that you have adduced
15 on this does not -- as far as we can see -- cause us to
16 admit. Those points are points, as my Lord put to my
17 learned friend Mr Turner. Had this schedule simply said
18 "non-admission", those are all points of submission in
19 relation to the documents, which is the evidence on
20 which my learned friend had sought to rely, which
21 I could have just made in my closing submissions.

22 THE CHAIRMAN: Yes.

23 MS DAVIES: It is no more a positive case than a submission
24 by reference to the evidence that they are seeking to
25 rely on to prove an aspect of their case.

1 What we certainly had not anticipated is that some
2 nearly -- what, over two years after the date for which
3 evidence should have been served, that my learned friend
4 would seek to try and improve upon the evidence which he
5 had already adduced, which is the documents and the
6 explanation he had given, by seeking permission to
7 adduce fresh evidence in the form of the statement of
8 Mr Roberts, which came the day his skeleton was served.

9 THE CHAIRMAN: Yes.

10 MS DAVIES: My learned friend says there is no prejudice.

11 There is prejudice here. That skeleton came a matter of
12 weeks before this trial starts. This is not a light
13 trial, I am sure my Lord appreciates from the written
14 openings. Bundles were produced late, unfortunately,
15 the electronic bundles only became available, certainly
16 to me and my juniors, at the end of September. We had
17 hoped we would get them before. We are a relatively
18 small team. We are all hands to deck. Suggesting that
19 on top of that we can try and work out how we address
20 Mr Roberts' additional statement, plugging gaps in the
21 evidence that my learned friend should have adduced back
22 in May involves no prejudice at all to us, I am afraid
23 is simply not correct.

24 Of course, I accept there is a balancing exercise
25 here for the tribunal. There always is when there are

1 late applications. But, in our submission, this is
2 a very late application, for which there is not actually
3 a proper explanation. It has come about because the
4 claimants did not consider in addressing the evidence
5 that they needed to adduce evidence to address this
6 issue. They considered at the time that they would rely
7 on the explanation they had given in the documents, and
8 all we did in our schedule was -- perhaps that was naive
9 on our part --

10 THE CHAIRMAN: I think, if I may say so, if one was taking
11 a straightforward approach to this, on the one hand, you
12 rely on the strict legal position, which you are
13 obviously entitled to do, but on the other hand,
14 Mr Turner says that this is the kind of litigation,
15 where, if people are advancing or putting together --
16 identifying an aspect of the case which is genuinely in
17 dispute, they say so, which is covered, if you like, by
18 what underpinned Mrs Justice Rose's order. That, if you
19 like, is the context in which modern litigants are meant
20 to behave; everyone is meant to be quite open in the way
21 in which disputes are identified, and if you do have
22 a dispute in relation to one aspect of the claim, you
23 come out of the woods and make your position clear.

24 MS DAVIES: We would submit, with respect, my Lord, that we
25 did do that because we entered a non-admission

1 throughout. We are not trying to change our position,
2 say we now deny something we admitted. We always made
3 it clear that it was for them to prove.

4 THE CHAIRMAN: Yes, and I think that is a perfectly good
5 point, if I may say so, Ms Davies. I mean, I think you
6 did not admit it and taking, if you like, a very
7 conventional approach to the way in which pleadings
8 work, that is certainly one thing. We will rise, when
9 you finish, just for a moment or two, to discuss it
10 between ourselves. I am not myself convinced that that
11 is consistent with what Mrs Justice Rose anticipated
12 would happen in relation to this particular issue,
13 although I quite understand your submissions on the
14 point.

15 MS DAVIES: With respect, my Lord, that has never been
16 suggested before. The non-admission has been on the
17 pleadings going back to 2017. There was a specific
18 discussion about the disclosure that needed to be given
19 in relation to this at the second CMC, although I should
20 make clear I was not present at that CMC so I cannot
21 explain the context of that order, but there was no
22 suggestion at that second CMC that the non-admission we
23 put in was deficient. There has never been, until now,
24 a suggestion by my learned friend that in some way we
25 have failed to comply with the order of Mrs Justice

1 Rose.

2 THE CHAIRMAN: Yes.

3 MS DAVIES: And the difficulty we now face is, you know, the
4 claimants had decided to address this point. It is
5 quite clear from the context the claimants had decided
6 to address this by reference to their schedule and the
7 documents. They chose not to serve any factual
8 evidence. They have served an awful lot of other
9 factual evidence but they chose not to do that,
10 notwithstanding the express non-admission in the
11 schedule.

12 As I say, had we not added our explanation in this
13 document and simply left it to closing and said, "Well,
14 that document does not establish that," we are perfectly
15 entitled to do so and there could be no question of
16 additional evidence coming in at that point.

17 What they are trying to do is plug a gap in a way
18 that causes difficulties for us and that's why we oppose
19 it.

20 THE CHAIRMAN: Thank you very much. Mr Turner.

21 Submissions in reply by MR TURNER

22 MR TURNER: Very briefly, Ms Davies says formally that there
23 was a specific obligation on Prysmian to respond to the
24 detail that had been given by National Grid and
25 I accept -- I have seen how she has explained it --

1 that's correct. However, that does not make
2 a difference. This is still a document produced within
3 the context of the approach to case management laid down
4 very clearly by the judge in October 2016, where she
5 told all of the parties the way that this case will
6 proceed is that we wish to flush out factual disputes
7 and we wish specific engagement to take place. That was
8 the overall philosophy.

9 Secondly, there is this point: the pure
10 non-admissions that Prysmian gave in December 2018
11 followed the clarity of the explanations that we had
12 given in great detail in January of the same year. You
13 have seen both of those. What they should have done is
14 to respond to the detail which had been given at the
15 beginning of that calendar year, but they did not do
16 that and that was contrary to the spirit in which the
17 litigation was being run.

18 Third point: Ms Davies says that the new development
19 in her pleading narrows the dispute between the parties.
20 It does not narrow it. For some entries it is true that
21 they say we are no longer pursuing this point but for
22 very many others they introduce a new positive set of
23 reasons and detail, and the key point is that that could
24 have been provided far earlier than it was. It could
25 have been provided after January 2018, in response to

1 National Grid's document.

2 It says that the asset management team's views in
3 many cases are not verified by witness evidence. Had
4 that, for example, been said earlier, it obviously would
5 have been addressed by the witness evidence that was
6 served in October 2018, and that is why we say, to the
7 extent that there was a slip, it is understandable in
8 the general approach to case management adopted by the
9 judge.

10 Finally, on the issue of prejudice, I listened
11 carefully to what Ms Davies said and what it boiled down
12 to was still what was there in the skeleton, that she
13 has a lot to do, but this is a 14-page document giving
14 confirmations that were previously given and amplifying
15 the reasons in that document; this is not something
16 which on that ground carries any significant weight.

17 THE CHAIRMAN: Thank you very much. We will rise for five
18 minutes.

19 (3.33 pm)

20 (A short break)

21 (3.40 pm)

22 JUDGMENT (submitted for approval)

23 MS DAVIES: (inaudible) I do not actually have a view at the
24 moment, obviously, as to whether that is either
25 necessary or how long it might require. I will reflect

1 on that in light of my Lord's ruling, and if we have to
2 come back about the scheduling of Mr Roberts, we will.

3 THE CHAIRMAN: Yes. The reason I said that was not so much
4 that I was trying to bounce you into a timing, it was
5 more noting that, because of the way the timetable
6 works, there is time at the end of that week.

7 MS DAVIES: Yes, I completely understand that but I hope you
8 understand why I --

9 THE CHAIRMAN: I do. I do.

10 Yes, Mr Turner.

11 MR TURNER: My Lord.

12 THE CHAIRMAN: You have the permission you seek. What else
13 is there on the agenda, if anything?

14 MR TURNER: I think we have now run to the end, my Lord.

15 THE CHAIRMAN: Yes.

16 MR TURNER: It only remains for me to say, I believe, that
17 we will, of course, liaise constructively with each
18 other at all levels --

19 THE CHAIRMAN: Yes.

20 MR TURNER: -- in preparation for the trial and with the
21 tribunal as well, particularly about the developing
22 situation with COVID.

23 May I raise only one specific -- this is, I think,
24 my own failure of recollection: the confidentiality
25 order and what was going to be done there. We talked

1 about certain variations needing to be made.

2 THE CHAIRMAN: Well, we have treated your application as
3 being one under paragraph 6.4, so we will give you the
4 permission that you need -- is the way to formulate the
5 order, I think.

6 MR TURNER: My Lord, on that one, yes, but in terms of the
7 confidentiality order and the application to settled
8 parties more generally ...

9 THE CHAIRMAN: Oh, our position is that we are just not
10 going to make an order. That seemed to us to be the
11 sensible way forward for this. We have in place the
12 existing Rose order and we will just continue on the
13 basis of that. Nobody suggested that there was anything
14 of substance to be included in a new order.

15 MS DAVIES: No, the only point we will need to reflect on
16 today's order is the point that we can each put to the
17 other side's witnesses (Overspeaking), without being in
18 breach of the schedule.

19 THE CHAIRMAN: Yes. Sorry, I lost track of that.

20 All right. If there are any further things that you
21 need to raise with the tribunal over the course of the
22 next week or so, please do.

23 We have the very good fortune of starting our formal
24 reading on Monday, so we will be starting to think about
25 this case even more deeply than we have been thinking

1 about it up until now.

2 MS DAVIES: (inaudible) My Lord, if, obviously, the tribunal
3 requires any further hard copy documents, they should
4 just let the parties know.

5 THE CHAIRMAN: Thank you.

6 MS DAVIES: I think it's fair to say that the chronological
7 bundles bear no resemblance to chronological bundles,
8 so -- and just to give the flag to that, actually
9 starting at bundle M1 and working through is not going
10 to give any sensible assistance to the tribunal.

11 THE CHAIRMAN: Actually, as you have raised that, just
12 looking at the reading list that you have given us, the
13 way it has been done is by -- I am not suggesting that
14 anything very elaborate should be done about this but
15 you have just given us a list of categories of document
16 to read. I think we have all read your skeletons and
17 I have looked at occasional other bits of other
18 documents, but is the suggestion that we start at the
19 beginning and move through to the end of the list or has
20 any thought been given as to the appropriate order in
21 which we should read?

22 MS DAVIES: My learned friend and I can, of course, liaise
23 in relation to that.

24 THE CHAIRMAN: Can I just put it like this: I know how --
25 and you have obviously made submissions on the point

1 just now. I know what it is like preparing a case at
2 this stage and I do not want you to spend a lot of time
3 on this but if you were able to give a few minutes'
4 thought to whether there is a sensible order for us to
5 read in, that would be extremely helpful from our point
6 of view.

7 MS DAVIES: Just to explain: I don't know how familiar the
8 tribunal is with the Magnum system but the witness
9 statements at least have been hyperlinked, so that,
10 insofar as the tribunal wants to look at any underlying
11 contemporaneous documents that the witnesses are
12 referring to, that is the easiest way of doing it.

13 I certainly would caution the tribunal against
14 starting at M1, tab 1, and trying to work through
15 because that really is a very difficult exercise --

16 THE CHAIRMAN: I certainly do not intend to do that.

17 Speaking entirely for myself, when I am doing a lot
18 of reading, I prefer to read in hard copy because I find
19 it very tiring reading on the screen all the time and,
20 certainly for the exercise over the next week, I will be
21 using the hard copy bundles.

22 MS DAVIES: I simply wanted to make the offer that the
23 parties will provide anything further in hard copy.

24 THE CHAIRMAN: Thank you very much. We will reflect on
25 that.

INDEX

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

Submissions by MR TURNER..... 45

Submissions by MS DAVIES..... 78

Submissions in reply by MR TURNER..... 92

JUDGMENT (submitted for approval)..... 94

Submissions by MR TURNER..... 100

Submissions by MS DAVIES..... 133

Submissions in reply by MR TURNER..... 144

JUDGMENT (submitted for approval)..... 146

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8