Neutral citation [2008] CAT 26

IN THE COMPETITION APPEAL TRIBUNAL

Case Number: 1099/1/2/08

Victoria House
Bloomsbury Place
London WC1A 2EB

8 October 2008

Before:

VIVIEN ROSE
(Chairman)

Sitting as a Tribunal in England and Wales

BETWEEN:

NATIONAL GRID PLC

Appellant

- v -

THE GAS AND ELECTRICITY MARKETS AUTHORITY

Respondent

supported by

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

Interveners

RULING ON ADMISSIBILITY OF EVIDENCE AND DISCLOSURE

APPEARANCES

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

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

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

Mr Christopher Vajda QC and Miss Kassie Smith (instructed by Reed Smith LLP) appeared on behalf of Siemens plc.

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

1. By an Order of the Tribunal dated 23 May 2008, Capital Meters Limited ("CML"), Siemens plc ("Siemens") and Meter Fit (North West) Limited and Meter Fit (North East) Limited (together, "Meter Fit") were granted permission to intervene in this appeal. Statements of Intervention on behalf of each intervener were filed with the Tribunal on 27 June 2008. At a Case Management Conference held on 22 September 2008 ("the CMC"), the Appellant ("National Grid") objected to certain passages in the Statements of Intervention and supporting evidence lodged by the Interveners. National Grid's appeal challenges the decision by the Respondent authority ("the Authority") published on 21 February 2008 in which the Authority found that National Grid had abused its dominant position in the market for the provision of domestic-sized gas meters ("the Decision"). At the CMC, National Grid argued that the disputed passages should be excluded because they go outside the proper scope of the appeal by criticising aspects of National Grid's conduct which were not found to be abusive in the Decision. Further information regarding the facts at issue in these proceedings can be found in sections 1 and 2 of the Decision, available on the Authority's website.

2. It was common ground between the parties that the Tribunal has a discretion whether to allow the points in contention to be raised by the Interveners. National Grid urged that the discretion should be exercised in a way which preserves the appellate nature of these proceedings, as set out in the Competition Act 1998, rather than which expands the matters in dispute beyond the parameters of the Decision. The Interveners emphasised the flexibility of the Tribunal's approach to the role of interveners, as evidenced in the Competition Appeal Tribunal Rules 2003, S.I. 2003 No. 1372, and argued that the exercise of the Tribunal's discretion should be based on principles of relevance and fairness.

3. I fully accept that interveners have an important role in proceedings before the Tribunal, although the exact form and extent of that role will depend on the nature of the proceedings. The current proceedings relate to an infringement of section 18 of the Competition Act 1998 and Article 82 of the EC Treaty resulting in the imposition of a substantial fine. The Notice of Appeal takes issue with many different aspects of the Decision including the definition of the relevant product market, the existence of dominance as well as the characterisation of National Grid's conduct as abusive and the

level of the fine imposed by the Authority. The Tribunal must balance the need to treat all the parties fairly with the need to ensure that the proceedings remain within manageable bounds. The Tribunal is particularly concerned to prevent the proliferation of what counsel for Siemens referred to as "satellite litigation" around facts which are not germane to the issues which need to be decided.

4. There were six areas covered by the Statements of Intervention which National Grid alleged strayed beyond the appropriate bounds of the appeal. I deal below with each aspect of National Grid's challenge under the relevant subject matter heading.

Bundling of maintenance

5. The first area of dispute concerns the fact that National Grid's contracts prevent the competing meter operators ("CMOs") from providing maintenance services for National Grid meters. The Decision found that the bundling of maintenance exacerbates the foreclosure effect of the premature replacement charges ("PRCs") because National Grid's maintenance of its legacy meter stock (i.e. those meters in place before the introduction of competition to domestic gas metering), leads to it replacing meters in the course of a maintenance visit. This replacement meter will then be supplied under National Grid's new and replacement meter service agreements ("N/R MSAs"), rather than by one of the CMOs: see paragraphs 4.21 and 4.81-85 of the Decision.

6. The Interveners accepted that their complaint about the effects on their ability to compete of National Grid's bundling of maintenance did go further than the Decision. The Interveners argue that the bundling of maintenance has a foreclosing effect more generally because it reduces the amount of work available to the CMOs – if they were able to provide maintenance services for National Grid legacy meters they would have a greater density of calls for their engineer workforce to carry out and thus be able to operate their workforce more efficiently. CML's Statement of Intervention thus alleges (at paragraph 38) that due to the effect of the MSAs, in particular the exclusion of maintenance, "CML is not able to achieve the density of operations required in order to efficiently undertake the metering work on offer under [its contract with British Gas]". Siemens asserts in its Statement of Intervention (at paragraph 44(b)) that the bundling of maintenance "has also deprived Siemens of valuable transactional work which would

have improved significantly the mix of its activities and therefore its efficiency and profitability". The inability to build sufficient density of work because maintenance work is not available is also referred to in the witness statement of Mr King on behalf of Meter Fit (paragraphs 33(a) and (b)).

7. In my judgment, these allegations come very close to alleging that bundling of maintenance is a separate abuse from the abuse found by the Authority, although the Interveners all denied at the CMC that this was their intention. The effect that they allege – that the bundling of maintenance reduces the overall amount of business available to them – is a significantly different economic effect from the aggravation of the foreclosure effect arising from replacements carried out during maintenance visits. The Decision focuses on the effect of bundling on the likelihood of the gas supplier replacing meters in excess of the number allowed by the glidepath. That effect does not call for an examination of the economics of providing metering services or the ability of the CMOs to compete with National Grid more generally in the provision of maintenance services.

8. I therefore uphold National Grid's objection to the Interveners raising this point. This means that the following passages of the interveners' Statements of Intervention and supporting evidence are inadmissible:

   (a) **CML's Statement of Intervention:**

      i. the fourth bullet of paragraph 14 (headed "*Bundling of maintenance*"), except for the first sentence;

      ii. the fourth and fifth sentences of paragraph 38 (from the sentence beginning "Further, due to the effect of the MSAs…" to the end of that paragraph);

   (b) **Witness statement of Mr Hoskin on behalf of CML:** paragraph 17 and the corresponding part of the exhibit referred to therein;

   (c) **Siemens' Statement of Intervention:** paragraph 44(b);

(d) **Witness statement of Mr Lee on behalf of Siemens:** paragraphs 42 to 47 and the last sentence of paragraph 76.6;

(e) **Witness statement of Mr King on behalf of Meter Fit:** paragraph 33(a);

(f) **Meter Fit's Statement of Intervention:** paragraph 9(iii) is intended to be a summary of Mr King's evidence and so should be read in the light of the ruling in relation to that evidence.

9. National Grid also complains of another passage in Siemens' Statement of Intervention which refers to National Grid's "control of the Legacy [meters] installed base" as one of the major barriers to entry to the relevant market (paragraph 20 of the Statement of Intervention and paragraph 37 of Mr Lee's witness statement). As Siemens pointed out at the CMC, this point forms part of the case on dominance rather than abuse.

10. The Decision deals with barriers to entry and expansion at paragraphs 3.66 to 3.74. The Authority lists the features of the market which make entry and expansion on a significant scale very difficult in a short space of time. This list includes the need for potential rivals to achieve economies of scale and density to be able to compete effectively. The Authority concludes that new entrants have not established sufficient scale in a short space of time to act as an effective constraint on National Grid. The Authority also records that, during the administrative phase of the Authority's investigation, CML and Siemens raised the problem of achieving meter work densities. Taking the Decision by itself, I would agree with National Grid that there is nothing which requires or justifies an exploration of work densities and the scale economics of the CMOs' metering businesses.

11. In the Notice of Appeal, National Grid asserts first that very substantial entry has already occurred and secondly, that major gas suppliers can ensure market entry by putting large contracts out for tender to competitors. The extent of the market entry that has taken place must, as a matter of fact, be capable of ascertainment without too much difficulty. Whether that degree of market entry is properly regarded as large or small is a matter for the Tribunal's judgment in due course.

12. However, in paragraphs 287 to 298 of the Notice of Appeal, National Grid then raises squarely the question of the scale of operation a new entrant must have in order to achieve sufficient economies of scale and density. Those paragraphs put in issue, in the context of National Grid's challenge to the finding of dominance, whether the flow of maintenance activity that arises from the installed meter base affects the economies of density of National Grid and its competitors.

13. If National Grid wishes to pursue the points raised in paragraphs 287 to 298 of the Notice of Appeal, Siemens is entitled in my judgment to counter this by its own submissions and evidence as to the actual effect it says the installed legacy base has on the economics of their operations. If National Grid is content to restrict its case on barriers to entry to the points raised in paragraphs 283 to 286 of the Notice of Appeal, then there would be no need, in my judgment, for the Tribunal to determine the issues raised in paragraph 20 of Siemens' Statement of Intervention.

14. For the moment therefore it would not be right to prevent Siemens from responding to the case that National Grid is making on barriers to entry.

Impact of the "policy meter replacement provisions" in the MSAs

15. National Grid also submits that the Interveners are seeking to widen the case made in the Decision in respect of the policy meter replacement provisions in the MSAs. These are the provisions whereby National Grid is entitled to instruct gas suppliers to replace a certain number of legacy meters where there are concerns about the accuracy of those meters.

16. The Decision criticises these provisions only because the meters replaced pursuant to such instructions count towards the gas suppliers' "free" allowance, and so limit their ability to carry out their own discretionary replacements without incurring PRCs: see paragraphs 4.55 to 4.58 of the Decision. The Decision does not attack the provisions in themselves and does not criticise National Grid for the way in which it operates the provisions. Looking simply at the Decision, it would not be open, in my judgment, to the Interveners in this appeal to raise additional complaints about the way in which the policy meter replacement provisions work.

17. However, the Interveners quite fairly point to how National Grid has dealt with policy replacements in its Notice of Appeal. In paragraphs 428 and 429 National Grid asserts that its policy replacement schedules "have given suppliers considerable flexibility as to which Meters to replace, enabling them to plan their work in a way that achieves the necessary density…".

18. Thus it is National Grid that appears to be going beyond rebutting what the Authority has decided and putting forward a positive case that the policy replacement provisions benefit the CMOs. Paragraph 428 cross refers to Section 2 of the Notice of Appeal. That section, headed "*The Facts*", comprises 197 paragraphs of what National Grid describes as an "explanation of the relevant factual context for this case" (paragraph 171). In paragraphs 32 to 44 in that section, under a heading "*The practical requirements of economic Meter installation/replacement*", National Grid makes several statements about how CMOs organise their business and how they expect to recover their sunk costs. Finally, in paragraphs 458 to 461 of the Notice of Appeal, National Grid raises issues about the how the current MSAs have "obvious advantages for planning the work of CMOs efficiently" and compares this with an age-related approach which would, National Grid contends, have had significant disadvantages.

19. At the hearing, Mr Turner QC on behalf of National Grid denied that it was mounting a positive case that the policy meter replacement provisions are beneficial for CMOs (see Transcript, 22 September 2008, p. 76). In view of that, it is entirely unclear to me at present why National Grid has included paragraphs 32 to 44 in the Notice of Appeal and what its case is as set out in paragraphs 428 and 429 and paragraphs 458 to 461 of the Notice of Appeal. I am not prepared therefore to exclude some of the passages in the Interveners' pleadings and evidence to which National Grid objects until this is clarified.

20. I have considered the passages which National Grid submits should be excluded on this ground and conclude as follows:

    (a) **CML's Statement of Intervention:** the first bullet point of paragraph 14 does not appear to me to go beyond what is permissible, namely for CML to support the Authority's case that the fact that policy replacements count

towards reaching the glidepath aggravates the effect of the alleged narrowness of the glidepath.

(b) **Witness statement of Mr Williams on behalf of CML:**

i. paragraphs 21 to 23 appear to set out uncontentious matters as to how the policy requirement works and should therefore remain;

ii. paragraphs 24 to 31 deal with the problems allegedly encountered by CML and British Gas in handling the policy requirements. In my judgment these raise challenges to National Grid's conduct which go beyond the Decision but may be legitimate as responses to National Grid's apparent case on how policy replacements affect CMOs. I am therefore not prepared to exclude them at present;

iii. paragraphs 32 and 33 deal with the effect of National Grid's right to "step in" and replace policy replacement meters if the gas supplier does not do so. Paragraph 2.100 of the Decision states that in November 2005, National Grid invoked this right in relation to 197,373 meters on British Gas' replacement schedule. However, in the key paragraphs in the Decision where the Authority considers the effect of policy replacements on foreclosure, the Authority does not refer to the "step in" right as something which exacerbates foreclosure. An examination of whether National Grid should have the right to "step in" or of the reasons why the gas suppliers were not able to make other arrangements to replace the 197,373 meters affected, would be time consuming and would take the case into areas currently not in dispute. In my judgment therefore these paragraphs should be excluded.

(c) **Siemens' Statement of Intervention:** paragraph 21 (other than the first sentence) goes beyond what is permissible – for the Tribunal be able to determine whether the averment that "Siemens was, and is, not able to deploy its resources efficiently or as profitably as it intended" is true would

be a substantial task in itself, requiring examination of past and current business plans and financial information which are likely to be highly sensitive. This would take the Tribunal into areas which are not currently relevant and which would substantially expand the scope of the appeal. The same conclusion applies in relation to paragraph 42.

(d) **Witness statement of Mr Lee on behalf of Siemens:**

i. paragraphs 19 to 32 appear to be a legitimate response to paragraphs 32 to 44 of the Notice of Appeal. I am not therefore prepared to exclude them;

ii. paragraphs 53 to 64 also arise as a response to the case that National Grid appears to be making in paragraphs 428 and 429 of the Notice of Appeal. If National Grid confirms that it is not relying on those paragraphs to aver that policy replacement arrangements are beneficial to CMOs, these paragraphs in Mr Lee's statement should no longer be required.

(e) **Witness Statement of Mr King on behalf of Meter Fit:**

i. paragraph 24 raises issues about the reasons why Meter Fit has been unable to meet the demand created by National Grid's policy replacements. This is outside the scope of this appeal and should be excluded;

ii. paragraph 51, in so far as it responds to paragraph 428 of the Notice of Appeal, may be unnecessary if National Grid clarifies its case on the benefits of policy replacement work for CMOs and should be excluded if National Grid withdraws paragraph 428;

iii. paragraph 51, in so far as it responds to paragraph 459 of the Notice Appeal, may not be necessary if National Grid withdraws paragraphs 458 to 461. I am not prepared to exclude it at present. The same

applies to the reference on page 17 of the witness statement to Exhibit NA 1 to Mr Avery's witness statement.

(f) **Meter Fit's Statement of Intervention:** paragraph 9(iii) is intended to be a summary of Mr King's evidence and so should be read in the light of the ruling in relation to that evidence.

Linear nature of the glidepath

21. National Grid submits that Siemens' assertion that the "linear nature" of the glidepath has anti-competitive effects goes beyond what the Authority found in the Decision. This is because the glidepath does not reflect the fact that the age distribution of meters is uneven so that in a particular year there may be a higher than average number of meters coming to the end of their useful life. The glidepath also does not take account of the geographical variations in workload. National Grid asserts that paragraph 43 of the Siemens' Statement of Intervention and paragraphs 69 to 72 of Mr Lee's witness statement should be excluded on this ground.

22. National Grid asserts that there is nothing in the Decision which takes issue with the shape of the glidepath although there are clearly issues with the setting of a glidepath at all (rather than a simple charge depending on the age of the particular meter) and of course with the width of the gap between the glidepath and the point at which PRCs become payable.

23. It is true that the Decision does not cite the uneven age or geographical distribution of meters as an aggravating factor increasing the foreclosure effect of the PRCs. But Siemens points to paragraph 440 of the Notice of Appeal where National Grid asserts "there is nothing to suggest that the rate of replacement of Meters under the glidepath differs from what would be expected under normal competitive conditions". National Grid further states that there is no "reason to suppose that the glidepath artificially limits rates of Meter replacement".

24. It would appear therefore that Siemens' point about the linear nature of the glidepath could fairly be seen as meeting the point asserted by National Grid in paragraph 440 by putting forward evidence that, in fact, the replacement of meters *would* be different

from that envisaged by the glidepath because of the uneven age and geographical distribution, and that these factors *do* provide "reason to suppose" that the glidepath limits the rate of Meter replacement.

25. In so far as National Grid seeks to mount a positive case that the rate of replacement of meters under the glidepath is no different from the rate that would occur if gas suppliers were entirely free to determine the rate at which to replace legacy meters, it is in my judgment legitimate for the Interveners to argue that this is not so. I do not therefore consider that it would be right to exclude these points from the Siemens' case. Again, if National Grid confirms that this is not part of its case, these paragraphs would in my judgment no longer be legitimate.

Danger to the continued presence of CMOs

26. National Grid argued that the indications in the Interveners' pleadings and evidence to the effect that the foreclosure effect of the MSAs might jeopardise the viability of their continued presence in the market went beyond what the Authority had found. The Interveners have withdrawn some of the passages to which National Grid objected, namely paragraphs 23 to 26 of Mr Hoskin's witness statement, paragraph 78 of Mr Lee's witness statement and the last two sentences of paragraph 46 of Siemens' Statement of Intervention. In addition, in my judgment the following passages fall to be excluded on this ground:

    (a) **CML's Statement of Intervention:** paragraph 39;

    (b) **Siemens' Statement of Intervention:** the last sentence of paragraph 21.

27. I do not consider that paragraph 77 of Mr Lee's witness statement on behalf of Siemens is objectionable on this ground though the sentences that refer to the bundling of maintenance must be read subject to the paragraphs above concerning maintenance.

Price comparisons between CML and National Grid meters

28. The Authority found that the rental charges for domestic credit meters ("DCMs") under the Legacy MSA contracts are, and have been, higher than those offered by the CMOs. This meant that by restricting the number of meters that gas suppliers are likely to rent

from CMOs, the MSAs have harmed customers because gas suppliers cannot pass on the lower costs, improved service and/or better metering technology that CMOs could provide: see paragraphs 4.111 to 4.116 of the Decision. In the Notice of Appeal, National Grid describes the price comparison as "misleading and uninformative" (paragraph 606) and then in paragraphs 607 to 618 sets out its critique of the Authority's approach.

29. National Grid now submits that CML has gone beyond what is permissible by first putting forward an alternative way of comparing the prices of the CMOs and National Grid and secondly by extending the price comparison to pre-payment meters ("PPMs") as well as DCMs.

30. Price comparison is clearly an element in this case and in my judgment, since National Grid has put in issue the comparison undertaken by the Authority as part of its appeal, it is legitimate for CML to put forward a price comparison which supports the Authority's conclusion that CMOs' prices are cheaper but which uses a different method from that used in the Decision to show this. I therefore find that National Grid's criticism on this element is misplaced.

31. National Grid argued that in the event that CML was allowed to rely on this comparison, certain disclosure should be ordered to enable National Grid to understand and respond to the model. Mr Rayment on behalf of CML indicated at the hearing that CML accepted that this was the case. I will therefore refrain from making an order in relation to disclosure and leave it to the parties to work out what National Grid reasonably needs to see in order to respond to this new model.

32. However, I accept that to extend the price comparison to PPMs when it is clear that the Authority limited its case to a comparison of DCM prices is a step too far for the Interveners. That opens up areas of dispute which are not covered by the Decision and asserts matters on which the Authority did not rely in coming to its findings of abuse. I therefore uphold National Grid's submissions as regards the price comparisons for PPMs. The result of this is as follows:

(a) **Witness statement of Mr Hoskin on behalf of CML**: in the Summary Tables in paragraph 13 the three columns relating to PPMs are excluded;

(b) **Exhibit TPH 1 to the witness statement of Mr Hoskin**: the comparative pricing model is limited to a comparison of DCMs.

33. It would be helpful to the Tribunal and the other parties if CML were to re-serve the relevant material at TPH 1 to reflect this ruling.

Whether "payment completion" is a normal feature of competition in the gas metering industry

34. In its conclusion on abuse in the Decision the Authority states:

> "4.185 The Authority does not consider it to be a *per se* abuse to enter into long term contracts for meters which include the potential for charges to be levied on the replacement of meters. In particular, the Authority recognises that the use of charges may be necessary and appropriate to provide for the recovery of ***customer specific sunk costs***, and that the provision of domestic sized gas meters can result in some customer specific sunk costs …
>
> 4.186 However, the specific charging provisions in the Legacy MSAs that relate to the replacement of meters, and their cumulative effects, do not represent a necessary or proportionate means of addressing this issue. Indeed, the early replacement provisions in the contracts of competing operators, and in [National Grid's] own N/R MSAs, are very different in form and likely effects from those in the Legacy MSAs. [National Grid] has not provided objective justification for the provisions in the Legacy MSAs or the N/R MSAs". (emphasis in original)

35. The Decision does not, as National Grid appears to assume, conclude that "payment completion" provisions are "normal competition" within the meaning of the well known dictum from the judgment in Case 85/76 *Hoffmann-La Roche & Co. AG v Commission of the European Communities* [1979] ECR 461 at paragraph [91]. On the contrary, the Authority notes in paragraph 4.9 of the Decision that dominant undertakings may be deprived of the right to adopt a course of conduct which would be unobjectionable if adopted or taken by non-dominant undertakings. Further, the Authority states that where a regulatory regime and an undertaking with a large amount of market power have affected the market, there may be no existing state of "normal competition" to provide a useful counterfactual against which to measure the conduct: see paragraphs 4.11 and 4.89 of the Decision. But the Authority was prepared to consider a counterfactual in which payment completion could be achieved by charges

imposed on replacement of individual meters when assessing the effect on competition of National Grid's provisions.

36. It is therefore National Grid, rather than the Authority, which has raised the issue of whether payment completion represents normal competition: see paragraphs 467 onwards of the Notice of Appeal. National Grid alleges that the Decision is "fundamentally flawed" because the Authority does not clearly articulate in what way the PRC provisions constitute methods which are different from normal competition, in the sense used in the *Hoffmann-La Roche* judgment.

37. In my judgment, the parties should not be side-tracked into a discussion of whether payment completion terms are an aspect of "normal competition" or whether it was incumbent on the Authority to establish that they were not "normal competition" before finding that they were abusive. That is not the test that the Tribunal must apply and, as the Authority noted in the Decision, it is difficult to decide what "normal competition" is in this market, given its history and current structure.

38. The starting point is that the Decision held that (i) the PRCs were not abusive in themselves, (ii) the way they are structured in the Legacy MSAs has a serious foreclosure effect and (iii) a comparison with the CMOs' contracts and National Grid's own N/R MSAs indicate that other, more proportionate arrangements were available for dealing with the perceived customer specific sunk costs issue, so that the MSA provisions were not objectively justified. I agree with National Grid that the Interveners should not be permitted to argue that, because they may choose to offer contract options without PRCs, National Grid's conduct in insisting on PRCs is *necessarily* abusive. But the terms of the contracts offered by the CMOs are still relevant by way of comparison in relation to the Authority's finding that the PRCs are not objectively justified.

39. I therefore find as follows:

    (a) **CML's Statement of Intervention:** paragraphs 21 to 23 are admissible provided that they are not interpreted as challenging the existence of PRCs

per se or as asserting that the only appropriate counterfactual is one where there are no PRCs;

(b) **Witness statement of Mr Hoskin on behalf of CML:** paragraphs 18 and 19 are useful background information supporting the Authority's case on proportionality and should remain.

40. National Grid sought further disclosure in respect of this point in the event that paragraph 18 of Mr Hoskin's witness statement was not excluded. Since the CMOs' contract terms are of limited relevance in this case, I do not consider that National Grid needs to have access to highly sensitive information about the circumstances in which the different contract options apply or how many contracts have been signed by its competitors and with whom. It is enough that there is evidence as to what the terms of the contracts are.

41. If National Grid is concerned that some of these contracts might not actually be in use and so should be left out of consideration in determining objective justification, CML should write to National Grid indicating whether a minimum number of meters are covered by each kind of contract. I cannot see at present that any further evidence than that is either necessary or desirable at this stage.

Conclusion on admissibility and disclosure

42. In a number of instances I have concluded that passages to which National Grid objects are relevant only because the Notice of Appeal itself appears to put matters in issue which are not covered by the Decision. To that extent, the remedy is in National Grid's own hands. National Grid should inform the Tribunal, either at the handing down of this ruling or as soon as possible thereafter, whether it wishes to pursue those parts of its Notice of Appeal which I have indicated extend the scope of these proceedings beyond the issues raised in the Decision. I will then be in a position to draw up a final order setting out which paragraphs in the pleadings and evidence are to remain and which are to be excluded. A draft of that order will be circulated in advance of being made.

43. National Grid applied for disclosure of different classes of documents in the event that some of the passages which it challenged were held to be admissible. Most of these requests are no longer relevant given the rulings on admissibility above. However, the parties should note that I am not prepared to consider further requests for disclosure of documents – particularly where the disclosure sought is voluminous and includes confidential internal documents – until I am satisfied that the parties have made a genuine effort to identify and narrow the range of issues between them and to agree a factual background adequate for the Tribunal's consideration of the issues properly raised in this appeal.

44. As I indicated in my introductory remarks at the start of the CMC (Transcript, p.2), there must be scope for the parties to agree sufficient basic facts about the economics of the metering business for the Tribunal to be able to determine this appeal. It may, for example, be common ground that policy replacements count towards the replacement levels permitted by the glidepath and that they thereby reduce to the corresponding degree the number of discretionary replacements which the gas suppliers can instigate without incurring PRCs. It might also be uncontentious that density of operations is important to building a profitable metering business and, perhaps, that it is more difficult to gain access to a customer's home to carry out a policy replacement than to replace a meter about which the customer itself has complained. The parties should try to identify areas of common ground and then consider carefully whether there is any further information which will be important to the Tribunal's deliberations but which cannot be agreed.

Request for permission to file additional submissions

45. National Grid included in its application a request for permission to file further written submissions and evidence to address three matters: (a) the price comparisons between National Grid's and the CMOs' metering charges to British Gas made at paragraphs 4.111 to 4.118 of the Decision; (b) the Authority's contentions as to the reasonableness of assumed achievable volumes of meter replacement at paragraph 4.73 of the Decision; and (c) any of the passages in the Interveners' pleadings and evidence that are found to be admissible in this Ruling.

46. The Authority did not oppose this part of the application though it raised concerns as to the timing of the service of these submissions which I discuss further below.

47. As to (a), I grant permission to National Grid to file a short supplementary submission, if so advised, including any necessary evidence relating to the price comparison in the Decision. These submissions and evidence should also now cover the price comparison made by CML as referred to in paragraph [32] above.

48. As to (b), I have some concerns about where this point is leading. The point arises in relation to the Authority's assessment of the amount of the total early replacement charges that a gas supplier would pay if it decided to replace more meters than "allowed" under the Legacy MSA glidepath: see paragraph 4.72 of the Decision. This is a purely arithmetical calculation based on the application of the contractual provisions to scenarios where a gas supplier decides to replace an additional 3 per cent or 4 per cent of its meters for the first three years.

49. In paragraph 4.73 the Authority goes on to say that the levels of replacement that it has posited in these scenarios are reasonable in relation to the actual levels of replacement that British Gas had contracted for ahead of its signing of the Legacy MSAs. Again, the actual levels contracted for must be a readily ascertainable fact. The Authority then states that under its contracts with the CMOs, British Gas had the right to require significant replacement over and above contracted volumes. This, the Authority says, "provides compelling evidence that CMOs were capable of providing for levels of replacement that are well in excess of those" arrived at using the scenarios posited in the previous paragraph and illustrated by Figure 7 in the Decision.

50. It is clear from paragraph 4.73 and from the subsequent paragraphs in the Decision that the Authority based its findings on the scenarios of 3 and 4 per cent additional replacement and not on any additional replacement levels that British Gas was contracted with the CMOs to undertake or could have required the CMOs to undertake. I do not regard paragraph 4.73, in particular the final sentence, as requiring or justifying an investigation into whether the existing CMOs could have undertaken the additional replacement work posited in the scenarios, still less whether they were capable of providing levels of replacement in excess of the figures posited.

51. As I stated in my introductory remarks at the CMC (Transcript, p. 2), the competence or otherwise of existing competitors in a market has little relevance to the question whether conduct of a dominant firm is abusive. I do not regard the question whether the CMOs could have undertaken 3 or 4 per cent more replacement work, or any higher percentage, as relevant to this appeal.

52. I therefore grant National Grid permission to file additional submissions on this point but they must have regard to the limited scope of the point as described above.

53. Finally as regards (c), I will consider this application further again, once National Grid has clarified its case as required by paragraph [42] above.

Timetable

54. Following the first CMC on 23 May 2008 the Tribunal made an order setting a timetable for the further conduct of the appeal, including the filing and service of pleadings and skeleton arguments leading up to the hearing to be listed for 15 January 2009. The parties complied with that order so far as possible before the issues considered in this ruling arose. What remains to be done is to set a timetable for:

    (a) the additional submissions to be filed by National Grid in relation to points (a), (b) and (c) discussed in paragraphs [45] onwards above;

    (b) a schedule of issues and finalised chronology to be prepared;

    (c) the parties to file skeleton arguments; and

    (d) an agreed bundle of documents to be prepared and served.

55. The Authority has expressed concerns that National Grid's additional submissions should be served in good time for them to be able to respond in their skeleton argument. I agree that there is no reason why the service of the additional submissions should be linked to the service by National Grid of its skeleton, particularly if the period between the service of the Appellant's and Respondent's skeleton arguments is truncated in the new timetable. The parties should liaise as soon as possible to arrive at a new timetable

bearing in mind that the hearing is fixed for 15 January 2009 and that the Tribunal will require a sufficient amount of time to prepare adequately for the hearing, having regard to the volume of the pleadings and complexity of the issues.

56. Finally, I have already mentioned that section 2 of the Notice of Appeal contains almost 200 paragraphs of factual material. There are aspects of this section of the Notice of Appeal which concern me. The first is that it appears to contain a mixture of material which is uncontroversial and can truly be described as background information on the one hand and material which is contentious and framed in terms of grounds of appeal on the other hand. As to the uncontroversial material, the Tribunal would find it useful if the parties could identify which paragraphs in section 2 are agreed and which are not. As to the alleged errors of fact which appear to be relied on by National Grid, these are described as appearing in the Table at Annex 3, in paragraphs 174 to 197 of the Notice or as in Section 4 of the Notice. Further, paragraphs 171 to 173 of the Notice refer to the pleading as setting out the "main" errors or to "some of the more material factual errors" thereby seeming to leave the door open for National Grid to raise other errors not currently mentioned in the Notice.

57. The Tribunal expects National Grid to clarify its position in its skeleton, making clear all the errors of fact it relies on as invalidating the Decision and indicating which aspects of the Authority's reasoning are said to be undermined by the alleged factual error.

Vivien Rose

Charles Dhanowa
Registrar

Date: 8 October 2008