

**IN THE MATTER OF ARBITRATIONS COMMENCED PURSUANT TO
THE ACCORD ON FIRE AND BUILDING SAFETY IN BANGLADESH AND
THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW
ARBITRATION RULES 2010**

PCA CASE NO. 2016-36

between:

INDUSTRIALL GLOBAL UNION AND UNI GLOBAL UNION
(the "Claimants")

- and -

AND

PCA CASE NO. 2016-37

between:

INDUSTRIALL GLOBAL UNION AND UNI GLOBAL UNION

- and -

PROCEDURAL ORDER NO. 5

(DOCUMENT PRODUCTION)

7 November 2017

The Tribunal

Mr Donald Francis Donovan (President)
Mr Graham Dunning QC
Professor Hans Petter Graver

Registry

Permanent Court of Arbitration
Tribunal Secretary: Ms Judith Levine

Pursuant to Paragraph 5.6 of Procedural Order No. 1 of 19 April 2017 and Paragraph 5.4 of the Terms of Appointment, the Tribunal issues the following Procedural Order No. 5.

I. INTRODUCTION

1. This Procedural Order addresses the Parties' 24 October 2017 applications for document production.

II. PROCEDURAL BACKGROUND

2. On 19 April 2017, the Tribunal issued Procedural Order No. 1, which set a schedule for document production between the first and second rounds of written pleadings and stated, at paragraph 5.2, that "the IBA Rules on the Taking of Evidence in International Commercial Arbitration (2010) shall provide non-binding guidance to the Parties and the Tribunal."
3. Procedural Order No. 1 further provided:
 - 5.5 If and to the extent that a Party objects to the production of requested document(s), that Party shall submit such objection in writing to the requesting party only. The requesting Party shall comment in writing on any objection and submit the completed Redfern Schedule to the Tribunal and to the PCA, with copy to the other Parties (in both Word and PDF formats).
 - 5.6 The Tribunal shall decide on any objections to production, and the Parties shall produce all documents for which no objection is sustained by the Tribunal...
4. In accordance with Procedural Order No. 1 and the revised procedural timetable agreed by the Parties, the Parties exchanged requests to produce documents in the form of Redfern Schedules.
5. On 13 October 2017, the Parties exchanged their objections to document certain requests.
6. On 15 October 2017, the Claimants requested the Respondents to provide the parameters and terms used to conduct the searches responsive to the requests to which they objected. On 18 and 19 October 2017, the Parties exchanged further correspondence on this issue.
7. On 20 October 2017, the Parties each produced certain of the requested documents, and exchanged their completed Redfern Schedules containing objections to the production of the other requested documents.
8. By letters dated 24 October 2017, both Parties submitted reasoned applications to the Tribunal for an order on production of documents, accompanied by their Redfern Schedules and additional documents.
9. By letter dated 25 October 2017, the Claimants submitted comments in response to the Respondents' letter dated 24 October 2017.

III. THE CLAIMANTS' REQUESTS

A. The Claimants' Requests

10. The Claimants initially made 21 specific document requests to the Respondents, which are detailed in the Redfern Schedule at **Annex I** to this Procedural Order. As noted in the Redfern Schedule, several of the original requests are no longer pursued. The Claimants seek orders in relation to Requests No. 1-2, 4-7, 9-11, 13, 16-19, and 21.

B. The Respondents' General Objections to the Claimants' Requests

11. Respondents submit first that the Claimants' requests, particularly Nos. 7, 9, 18 and 21 are too broad, contrary to Article 3(3) of the IBA Rules, seeking all documents connected to the Respondents' performance under the Accord, including in relation to remediation of factories that the Respondents argue are not relevant to this arbitration.
12. Second, the Respondents argue that the Claimants' definition of "Relevant Period" to encompass the period from the date each Respondent signed the Accord to the present is too broad and inconsistent with the Claimants' prior submissions.
13. Third, the Respondents argue that the Claimants are amending their pleadings via the document production process by too broadly extending the definition of "Supplier Factories" to all suppliers that the Respondents have ever listed under the Accord, instead of the ones identified in the Claimants' Notice of Arbitration.
14. Fourth, the Respondents object to the Claimants' general premise that they are disadvantaged by an "inequality of arms" that means the Claimants are unable to substantiate their allegations without broad document production. The Respondents argue that this leads to a reversal of the burden of proof, such that the Respondents are obliged affirmatively to disclose evidence that they have not breached the Accord as to every factory.
15. Finally, the Respondents argue that the likely volume of documents and excessive costs associated with, in particular, the Claimants' Request Nos. 6 through 8 are disproportionate and burdensome in nature.

C. The Claimants' General Reply to the Respondents' General Objections

16. Claimants submit, in the preamble to their Redfern Schedule, that their claims have from the very beginning extended to all of the Respondents' Supplier Factories. The Claimants argue that there is significant asymmetry between the Parties' respective abilities to access evidence because the identities of all Supplier Factories, and the commercial terms that the Respondents entered into with them, are not publicly available, thereby being only in the Respondents' possession. They further argue that their requests for information relating to factories no longer under the Accord or that have been de-listed are consistent with the continuing nature of the Respondents' Accord obligations.
17. With regard to the "Relevant Period," the Claimants argue that while the Respondents' current performance of their obligations may be relevant to damages, the relevant period for determining each Respondent's liability in these arbitrations is the period beginning on the day each Respondent signed the Accord through the date of filing of the Claimants' respective Notices of Arbitration. Claimants argue that the Respondents' objections to limit this "Relevant Period" would lead to a skewed dataset.
18. The Claimants submit that their Requests do not seek to reverse their burden of proof, nor place an undue burden on Respondents, considering that the Respondents have known all along the scale of these arbitrations.

IV. THE RESPONDENTS' REQUESTS

A. The Respondents' Requests

19. The Respondents initially made 24 specific document requests to the Claimants, which are detailed in the Redfern Schedule at **Annex II** to this Procedural Order. As noted in the Redfern Schedule, several of the original requests are no longer pursued. The Respondents seek orders from the Tribunal requiring the Claimants to produce the documents specified in Requests Nos. 6, 10, 15, 16, 17, 18 and 19.
20. Additionally, the Respondents seek an order from the Tribunal requiring the Claimants to disclose their proposed search terms and parameters to the Respondents and to conduct a reasonable search for, and produce, documents responsive to Requests Nos. 1, 2, 3, 4, 5, 21, 22 and 23.

B. The Claimants' General Objections to the Respondents' Requests

21. The Claimants object to the Respondents' definition of "concerning", "evidencing", "relating", "referring" and "reflecting" as overly broad. They also object to the Respondents seeking broad categories of "any and all" documents, without any limitation as to the applicable time period, arguing that such requests do not comply with the requirements under Article 3(3) of the IBA Rules.
22. The Claimants further argue that by requesting documents relating to Accord practice and Accord decision-making processes, the Respondents are contravening Article 3(4)(7) of the IBA Rules, as the Claimants are neither required nor able to search for or produce documents that are not in their possession, custody, or control, but that of third parties.
23. The Claimants also take issue with what they consider to be the Respondents' mischaracterization of certain of their arguments.

C. The Respondents' Reply to the Claimants' General Objections

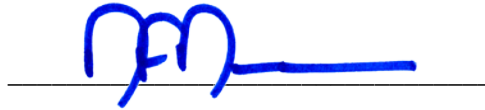
24. The Respondents clarify that unless otherwise specified, the time period applicable to the Respondents' requests is 13 May 2013 (the date the Accord was first signed) to the present. The Respondents also note that they have sought to modify their requests for "any and all" documents following the Claimants' criticisms, even though they consider it appropriate when the category sought is suitably narrow and specific.
25. The Respondents further argue that as members of the Accord Steering Committee, the Claimants are in possession of many documents concerning Accord practice and the Accord decision-making processes, which they have used in their claims so far, but that remain inaccessible to the Respondents. As such, the Respondents submit that the "Claimants should not be permitted to use their status as Steering Committee members as a shield to avoid providing Accord documents that are within their possession, custody or control."

V. TRIBUNAL'S DIRECTIONS

26. Before turning to specific requests, the Tribunal addresses four general issues.
27. First, for the purposes of document production and without prejudice to any findings on the merits, the Parties should apply the definition of "Supplier Factories" proposed by the Claimants – that is, "for each Respondent, each factory or supplier that it has listed pursuant to Article 19(a) of the Accord during the Relevant Period, whether Tier 1, Tier 2, Tier ½ or Tier 3, 'active' or 'responsible inactive,' and including factories that subsequently have been de-listed or terminated."
28. Second, again for purposes of document production and without prejudice to any findings on the merits, the Parties should apply, for the Claimants' requests, the definition of "Relevant Period" proposed by the Claimants – that is, from the date each Respondent signed the Accord to the present – and, for the Respondents' request, the definition proposed by the Respondents – that is, from the date of the first execution of the Accord to the present.
29. Third, the Tribunal understands that the Claimants have either undertaken or are considering whether to propose narrower search terms that would govern the Claimants' Requests 6 and 7. Having reviewed the Parties' competing submissions on these Requests, the Tribunal urges them to make every effort promptly to agree on search terms that will yield a manageable set of documents. It stands by to resolve the matter if they cannot.
30. Fourth, as to the Respondents' Requests 1, 2, 3, 4, 5, 7, 8, 21, 22, and 23, the Tribunal understands that the Parties have a provisional agreement, subject to a request by the Respondents to modify the search terms. Pending any further submission, therefore, the Tribunal enters no order on these requests at this time.
31. Finally, taking account of the prospect of undue burden, but recognizing too the value of broadening the sample set in order to ensure balanced information on relevant issues and material issues, the Tribunal directs that as to the Claimants' Requests 18 and 21, the Claimants may designate an additional 10 factories as to which the Request is granted.
32. Bearing in mind the above considerations, and having reviewed the Parties' respective positions on the outstanding specific document requests, and the requirements of specificity, relevance, and materiality in the *IBA Rules on the Taking of Evidence in International Arbitration 2010*, the Tribunal orders:
 - A. The Respondents to produce, by **21 November 2017**, the documents set out in Annex I that are in their possession, custody or control, and comply with such other directions as specified in this order and in Annex I.
 - B. The Claimants to produce, by **21 November 2017**, the documents set out in Annex II that are in their possession, custody or control or, where relevant, of their experts, and comply with such other directions as specified in this order and in Annex II.
33. The Tribunal will be available to entertain requests for any necessary clarification.

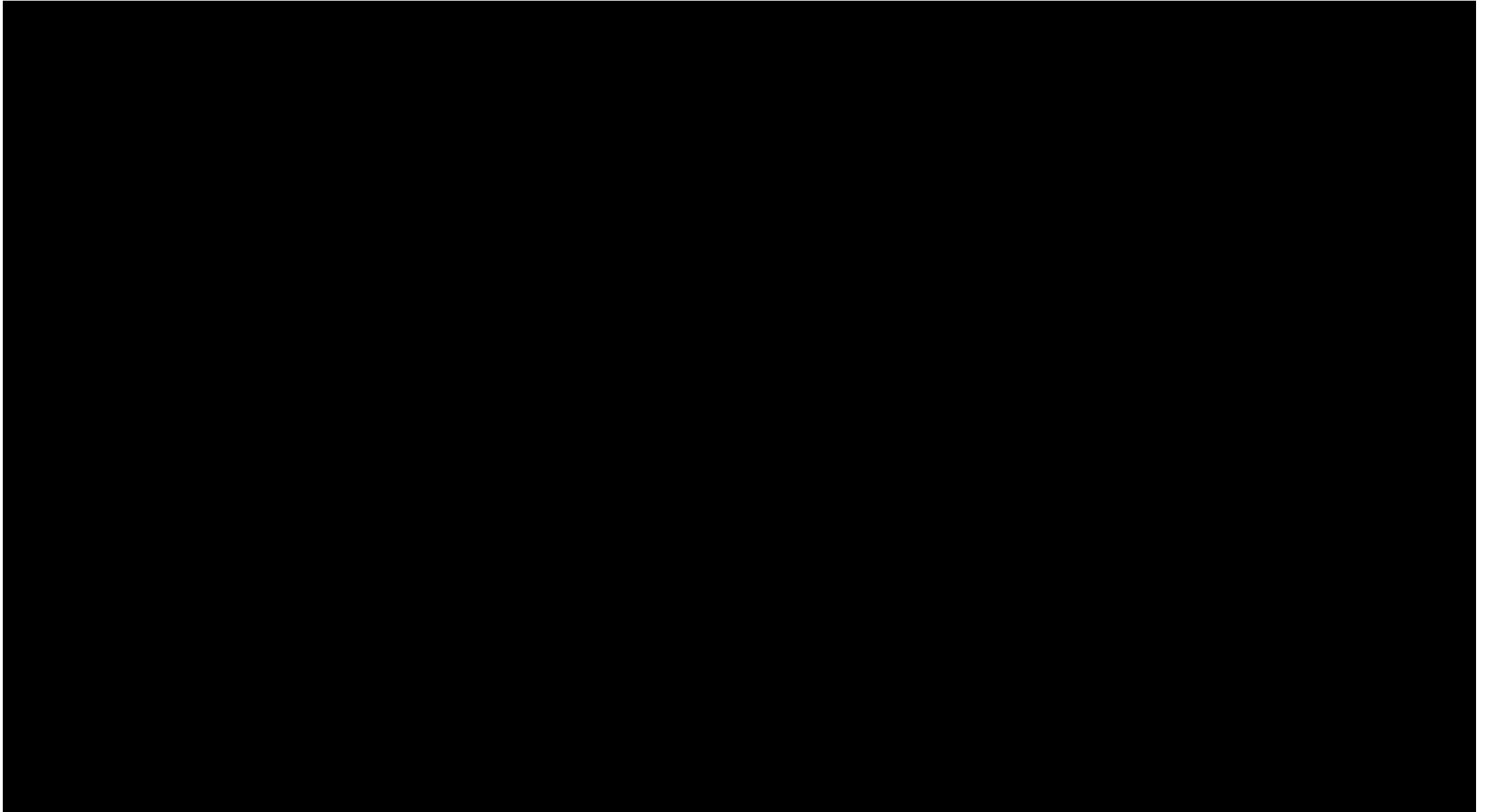
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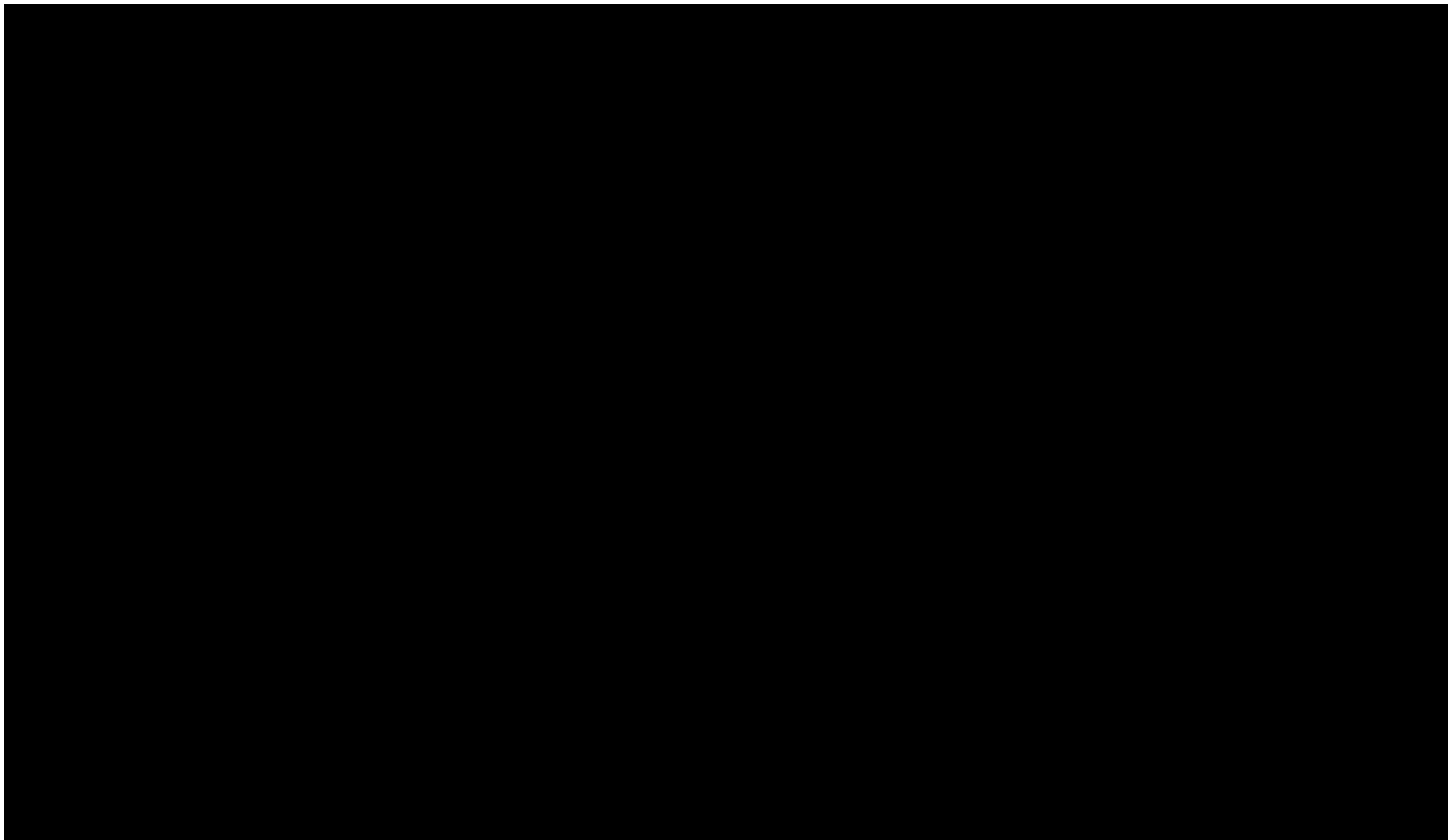
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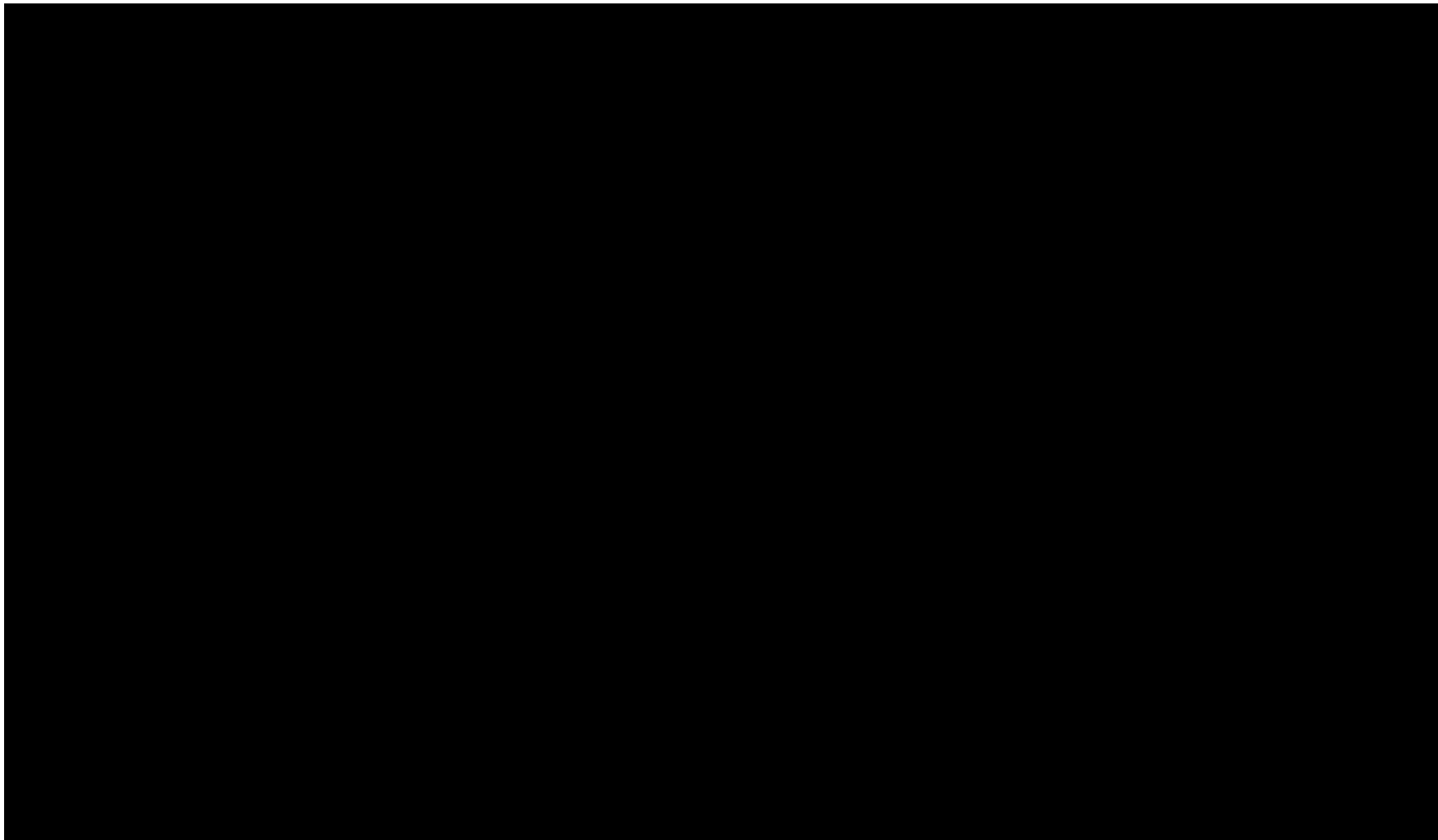


Mr. Donald Francis Donovan
Presiding Arbitrator

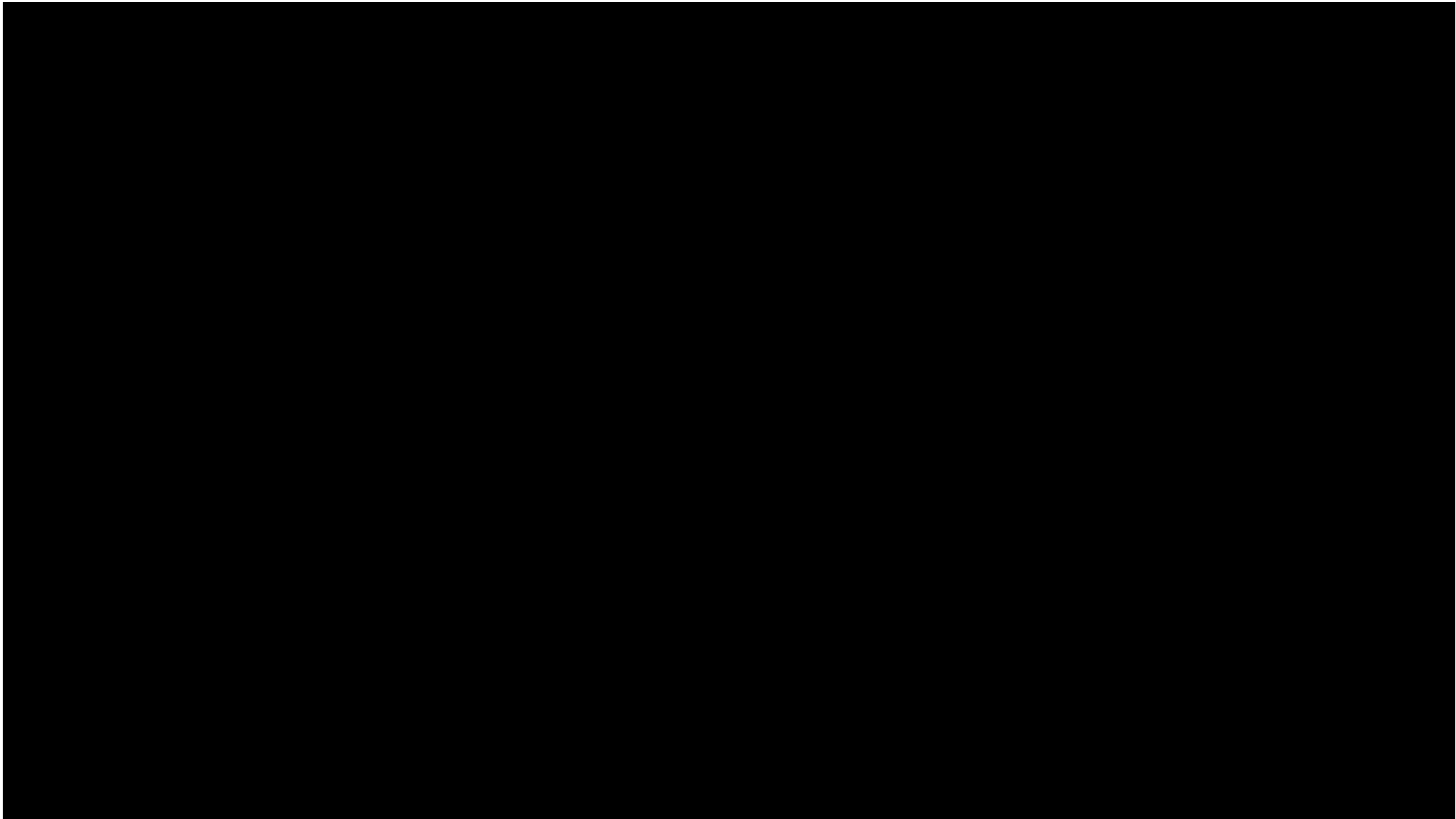
ANNEX I – THE CLAIMANTS’ REQUESTS FOR DOCUMENTS

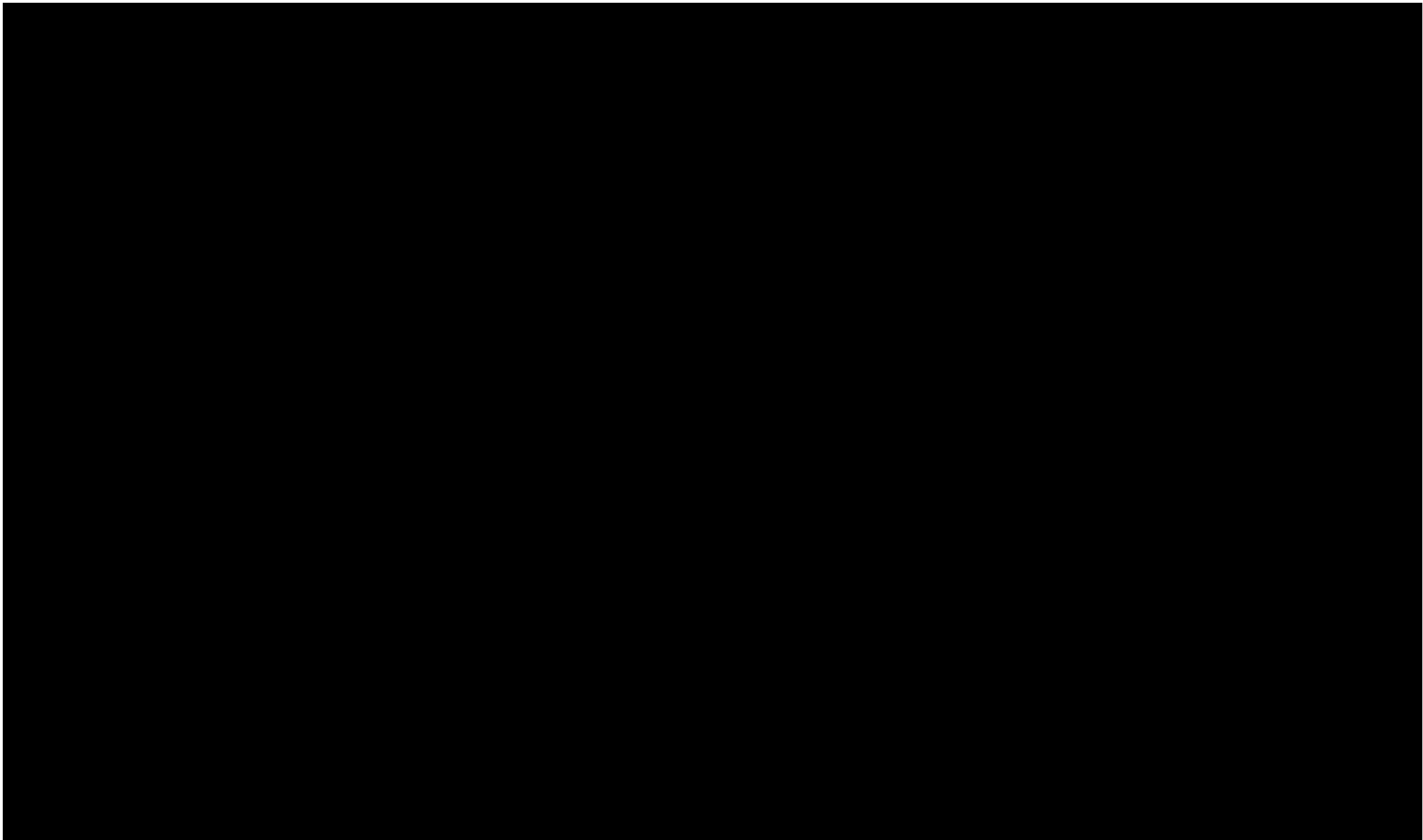


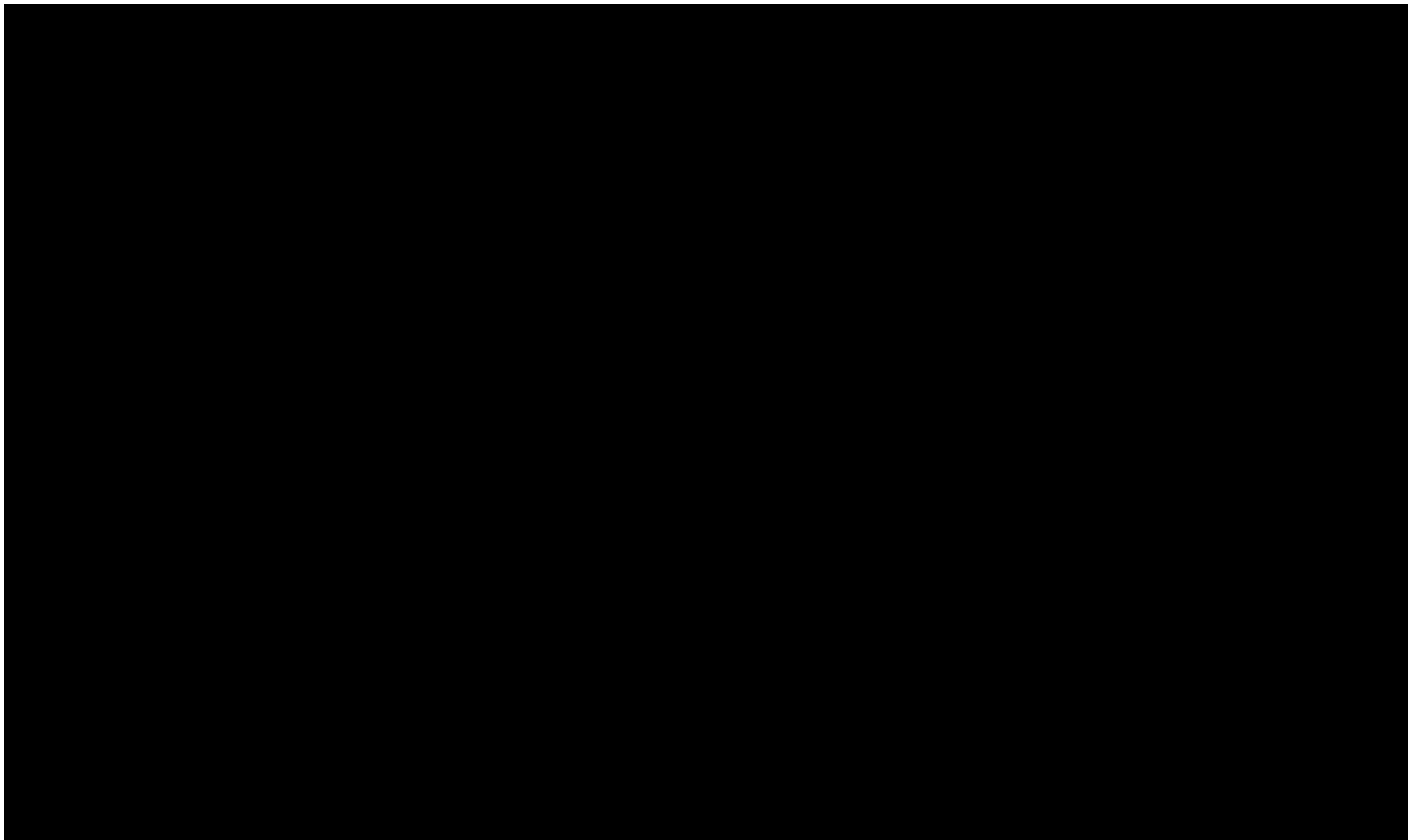


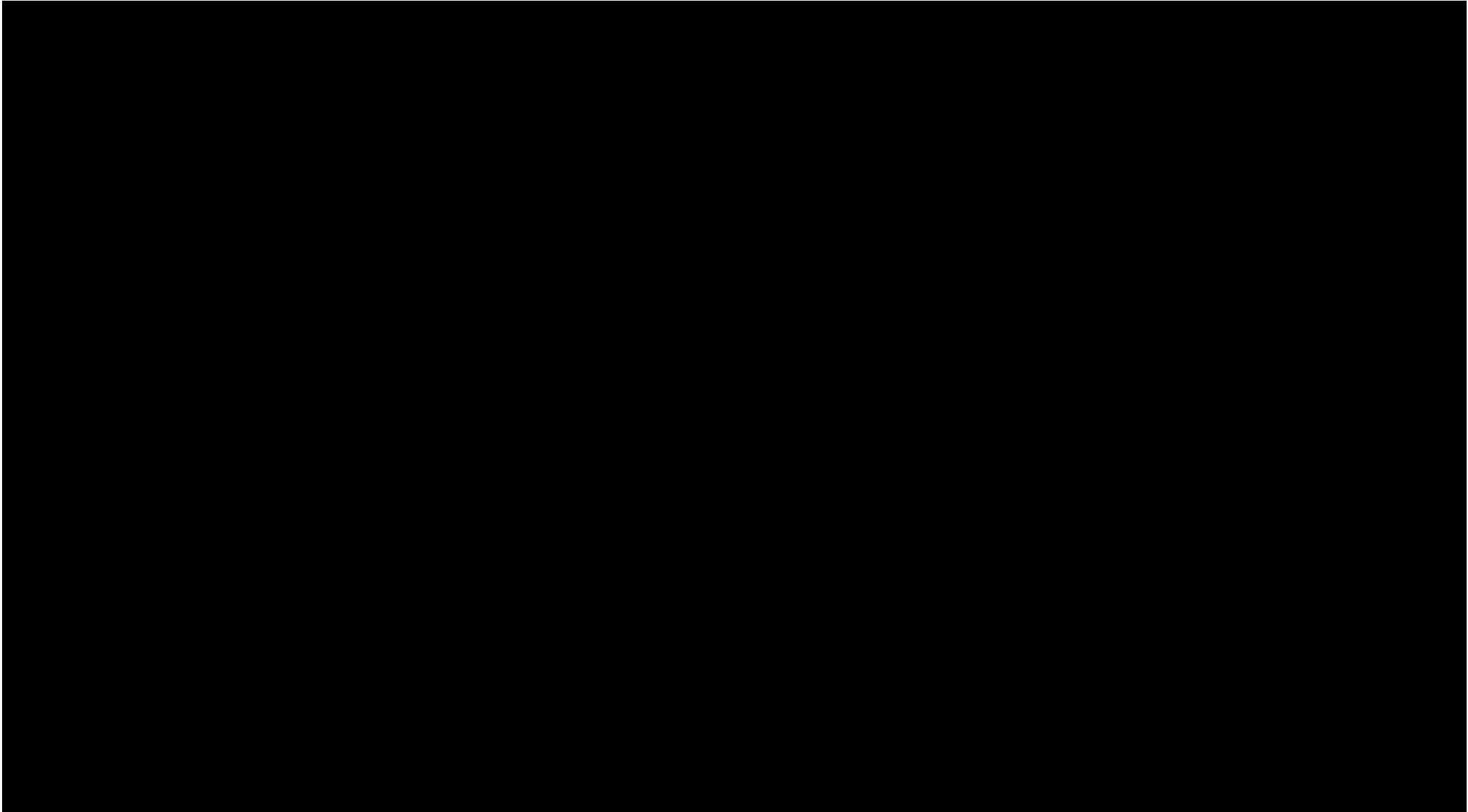


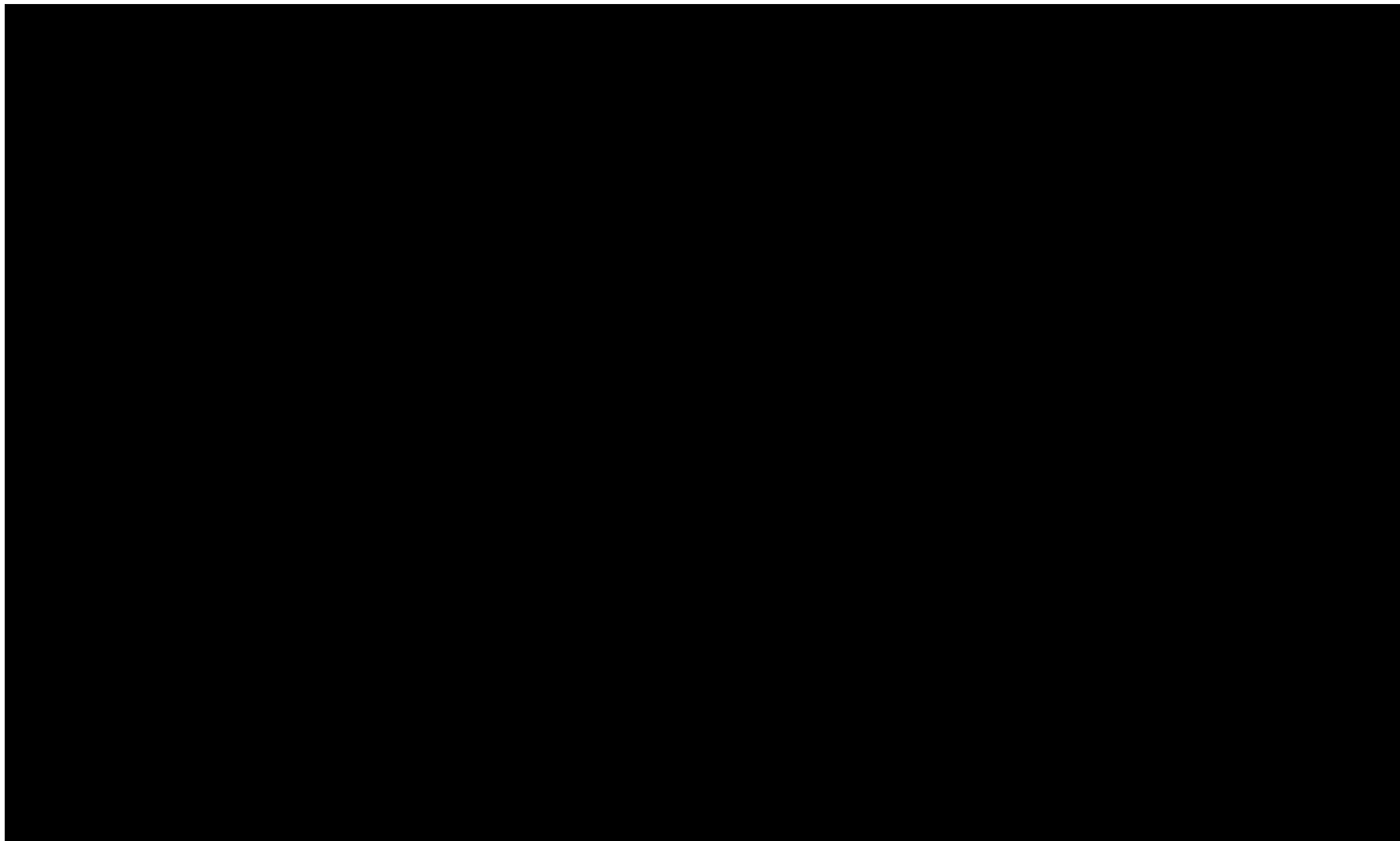


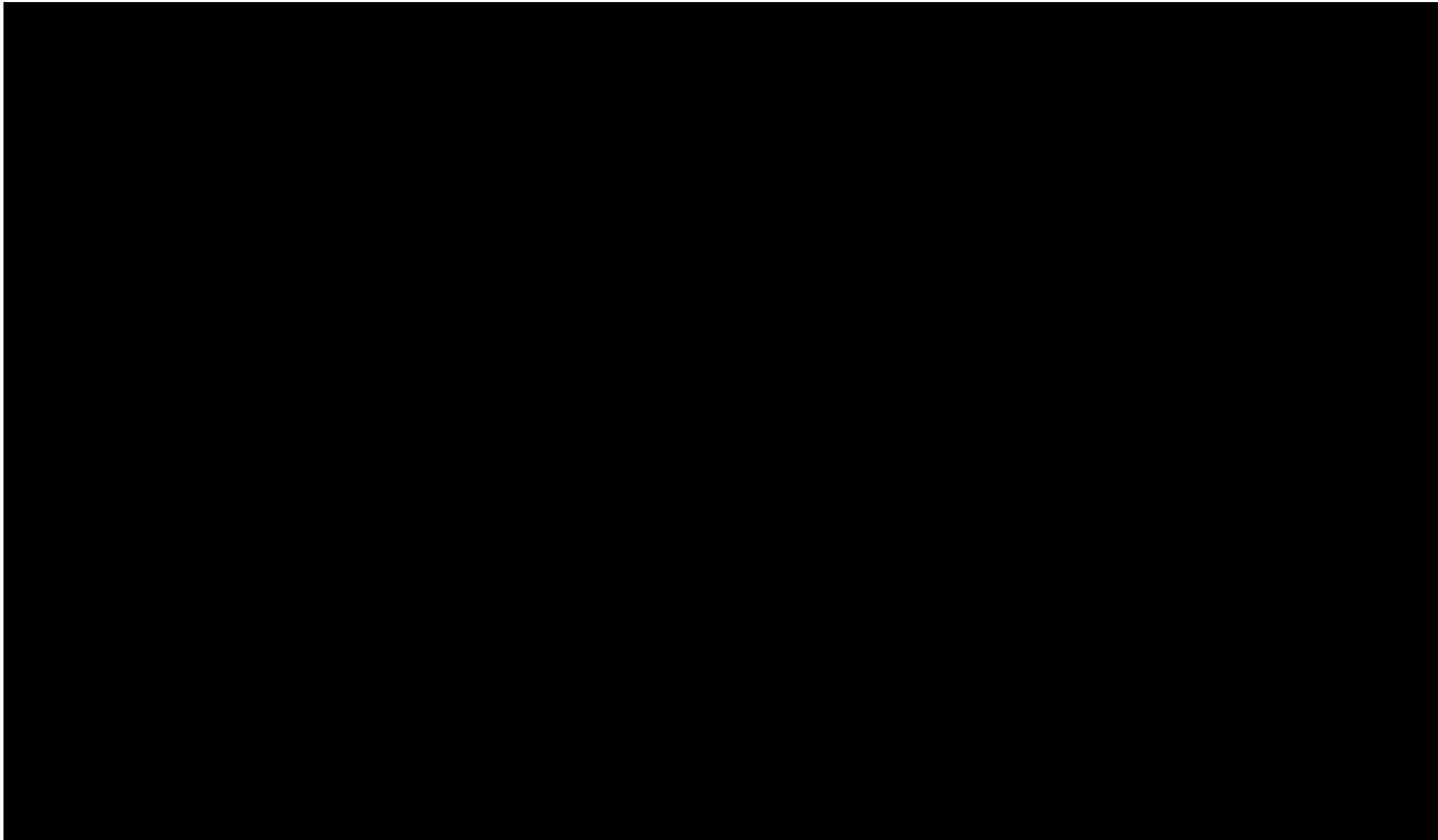


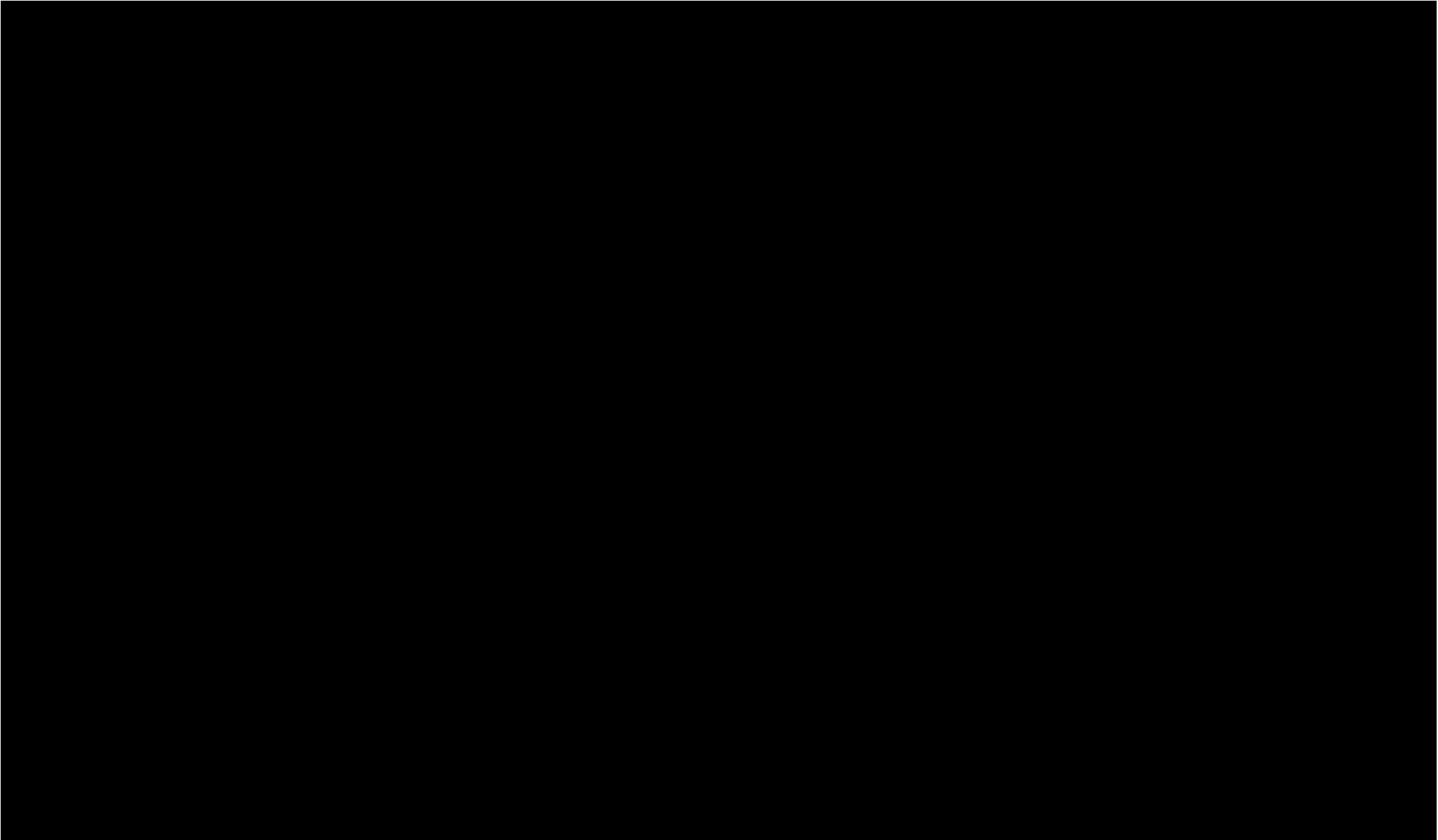


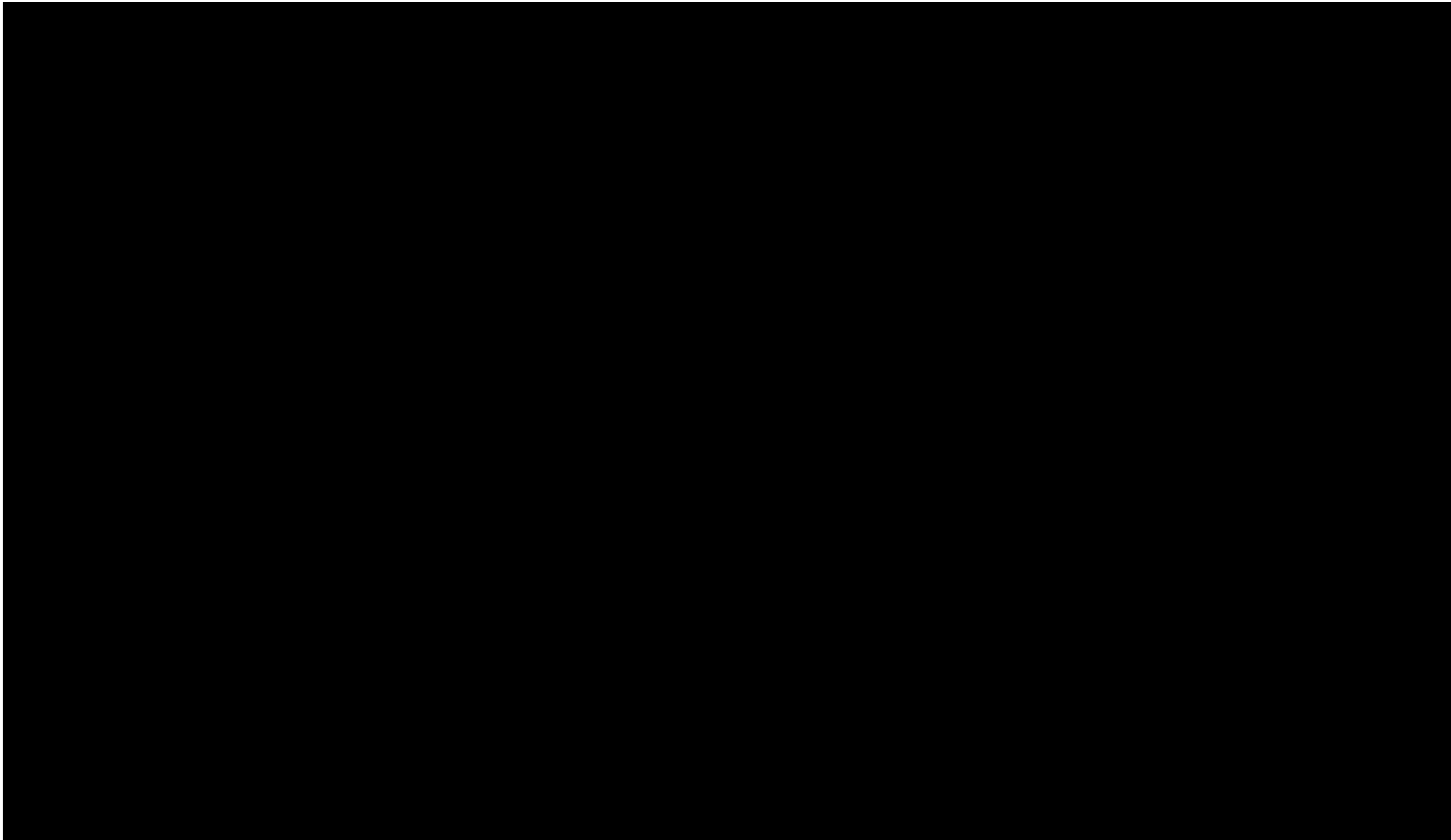


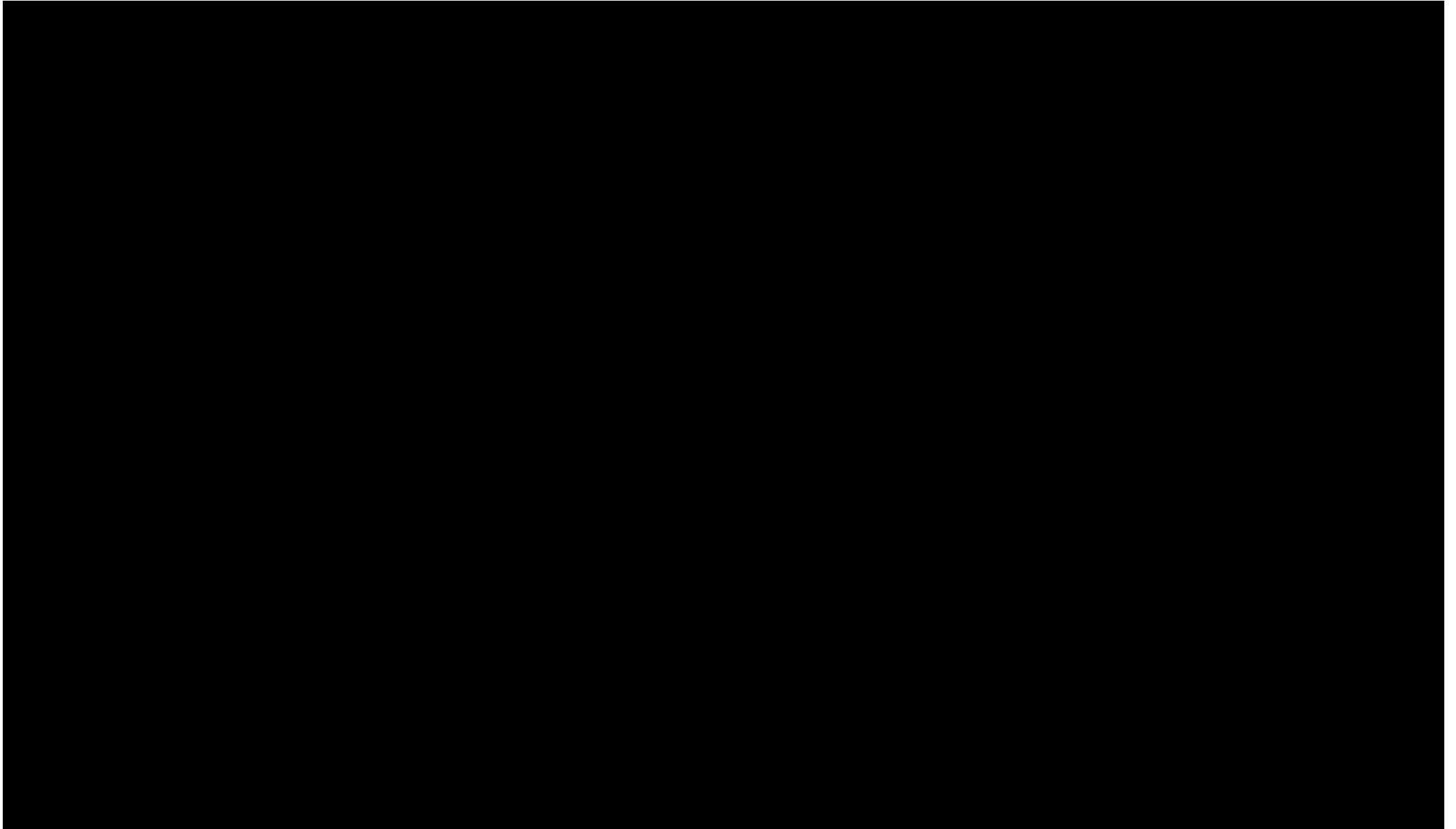


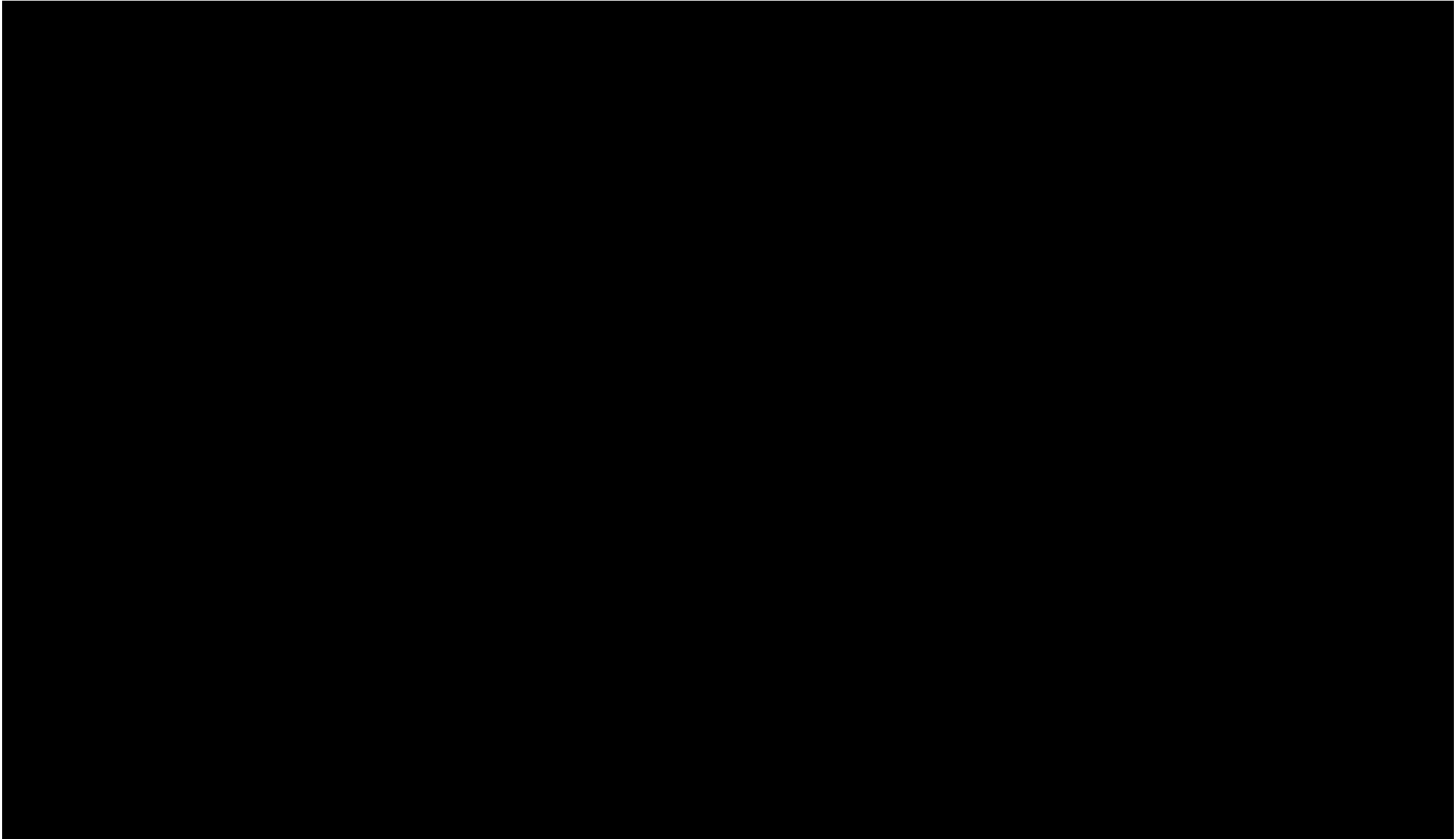


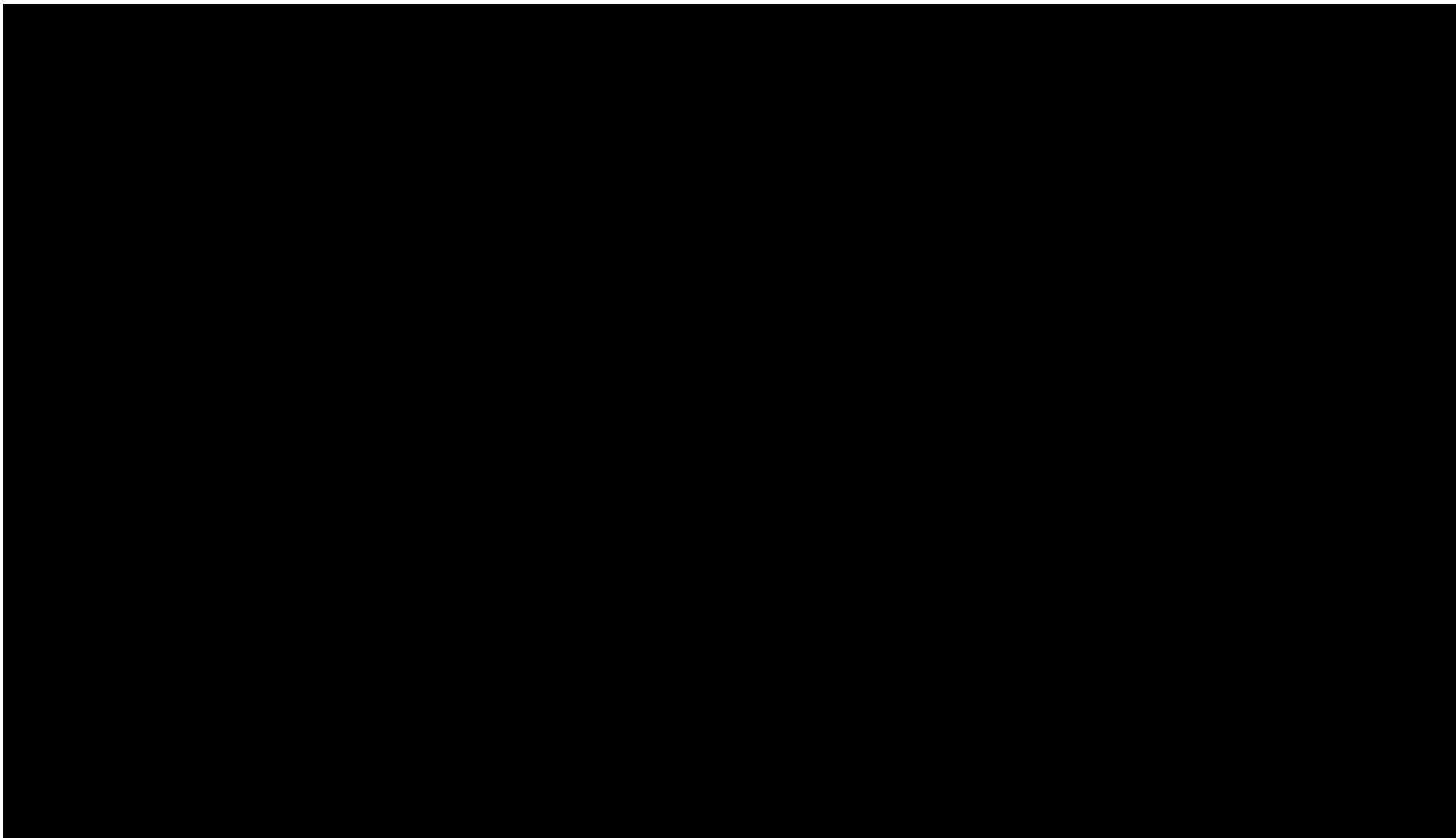


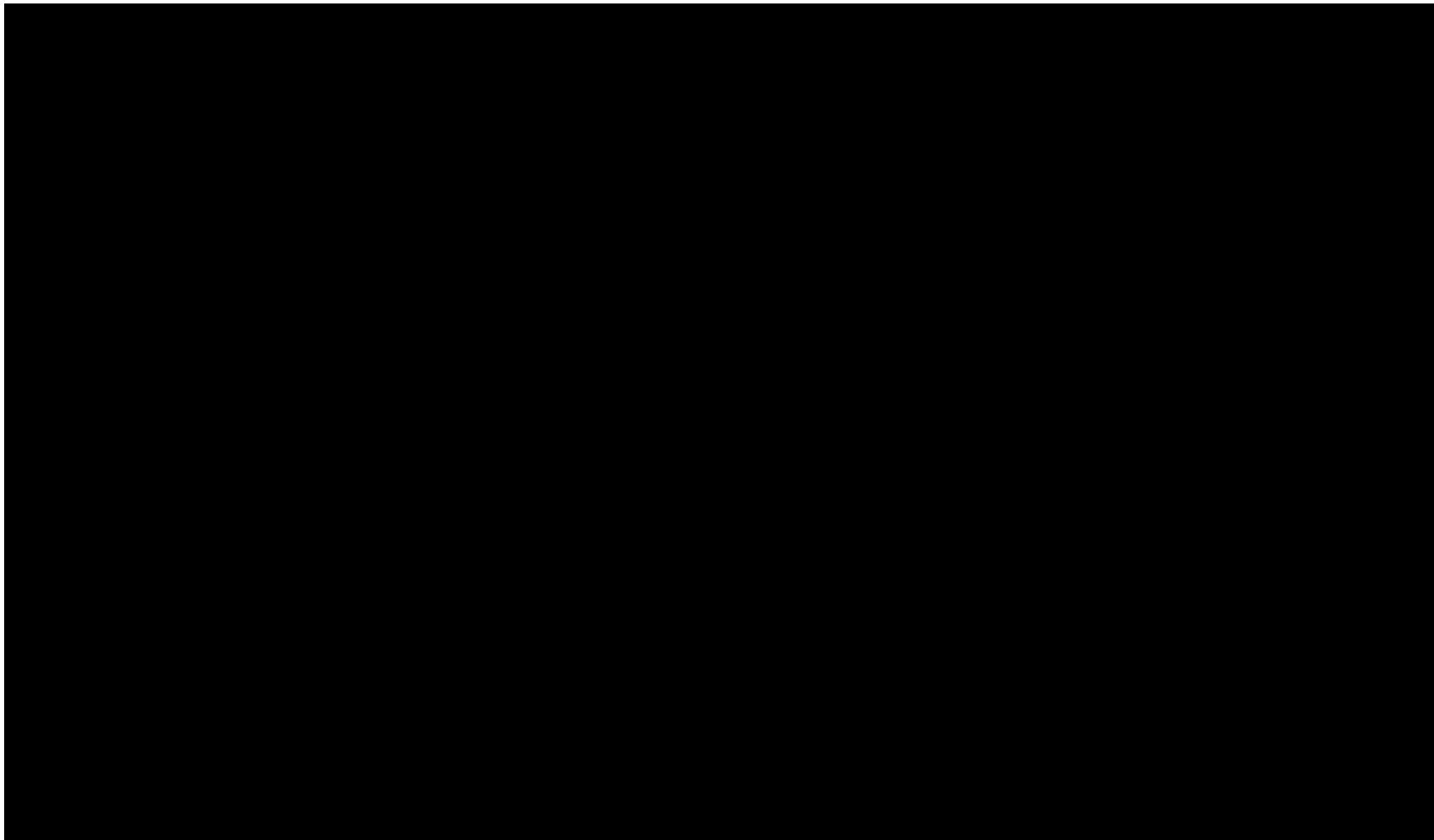


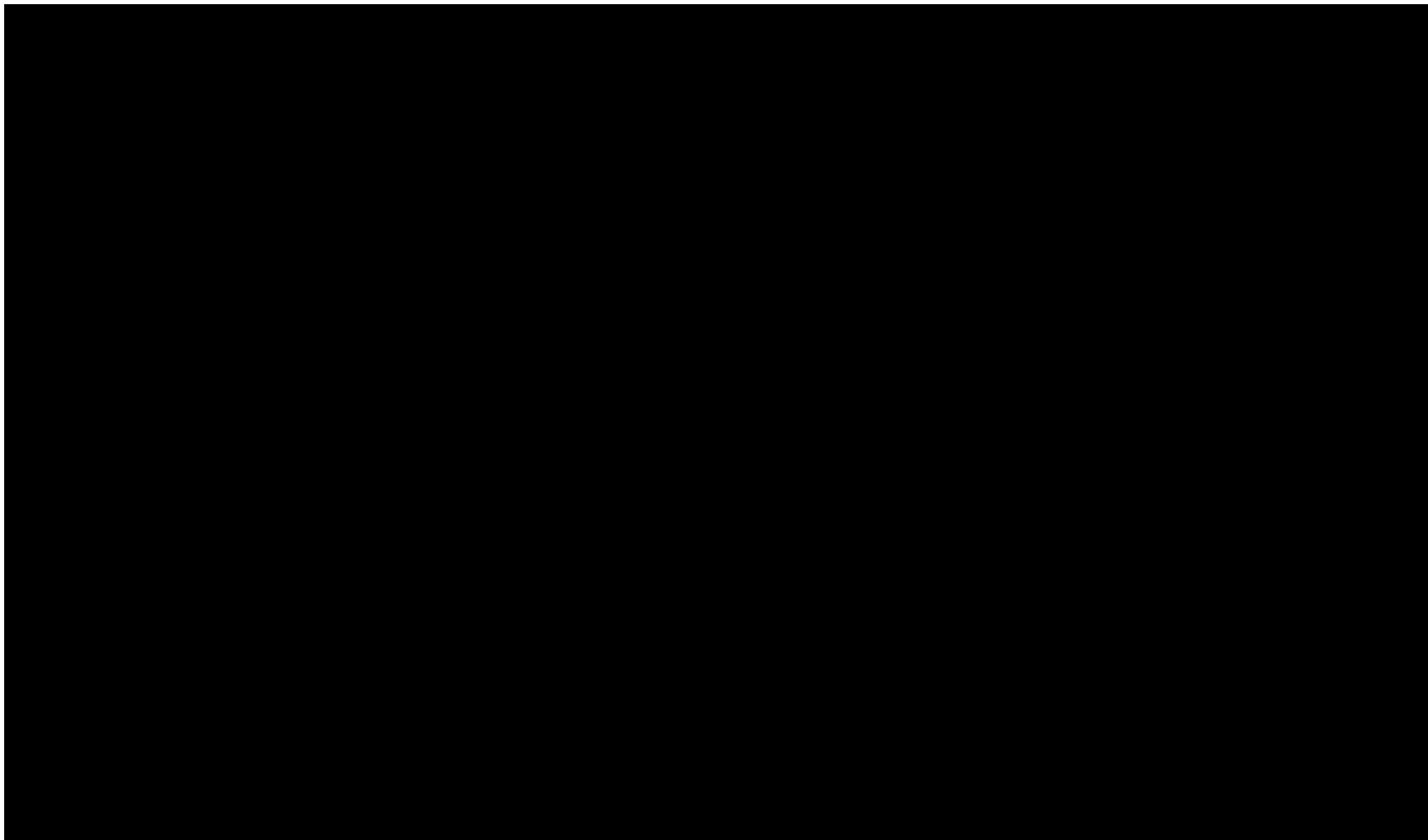


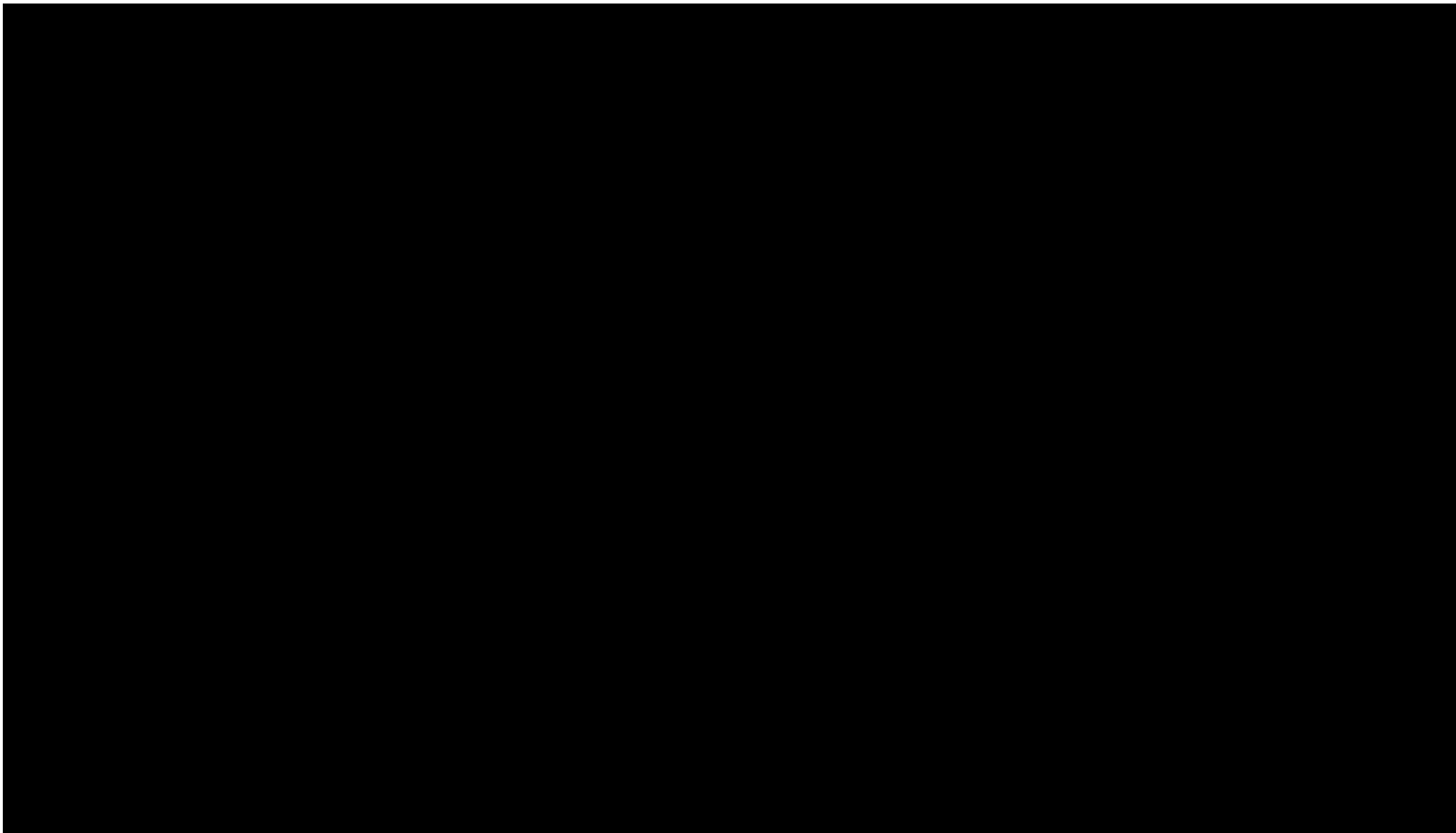


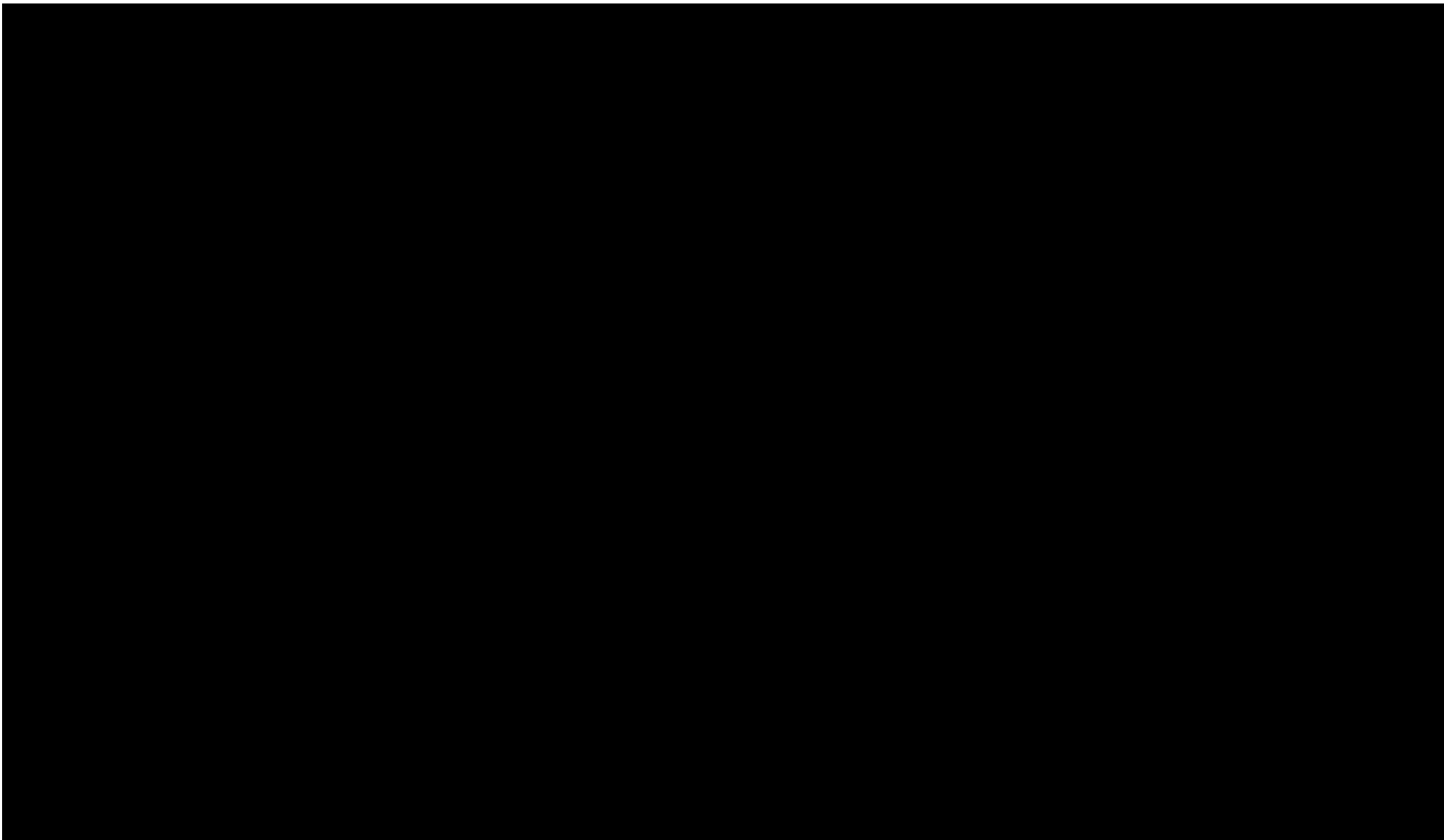


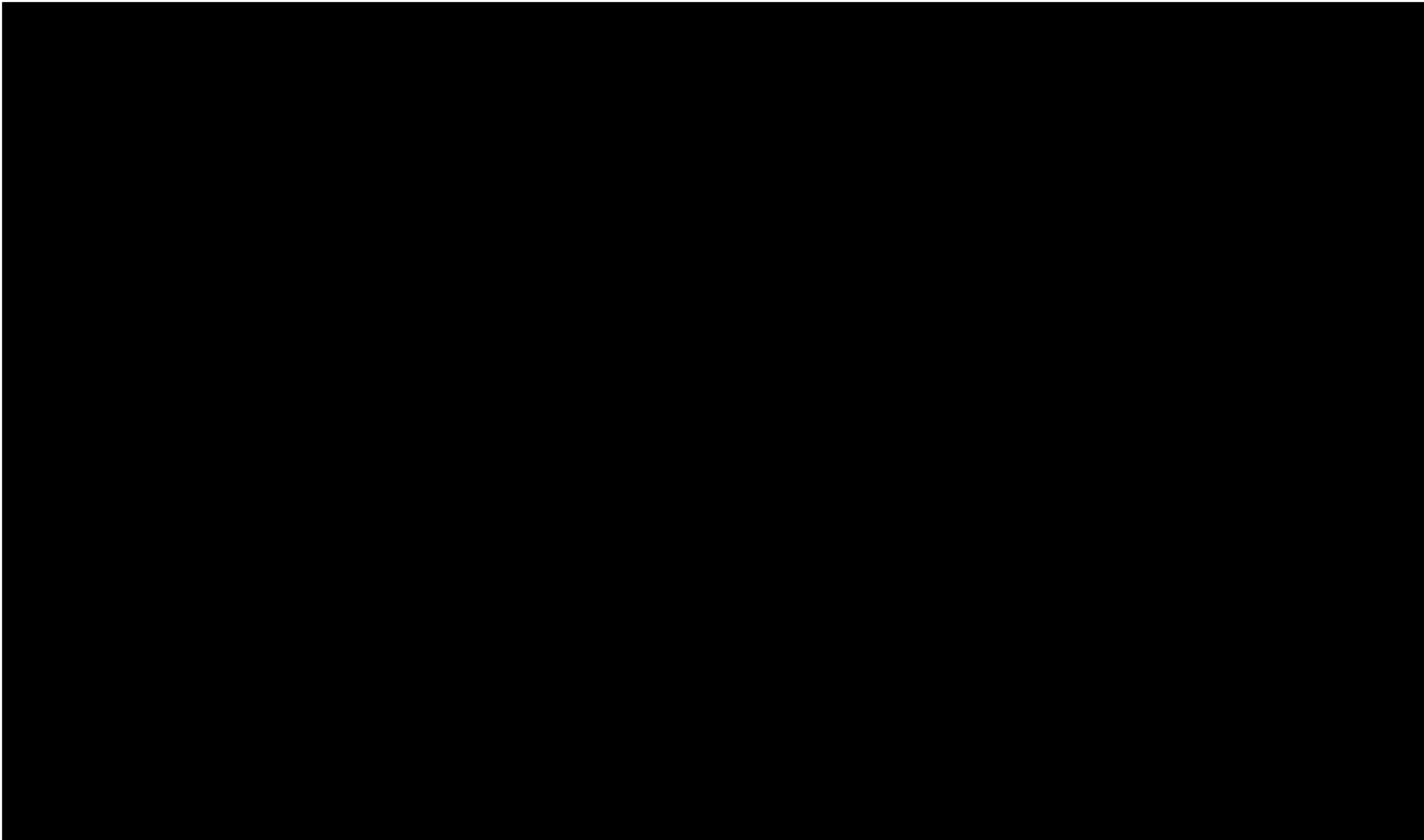


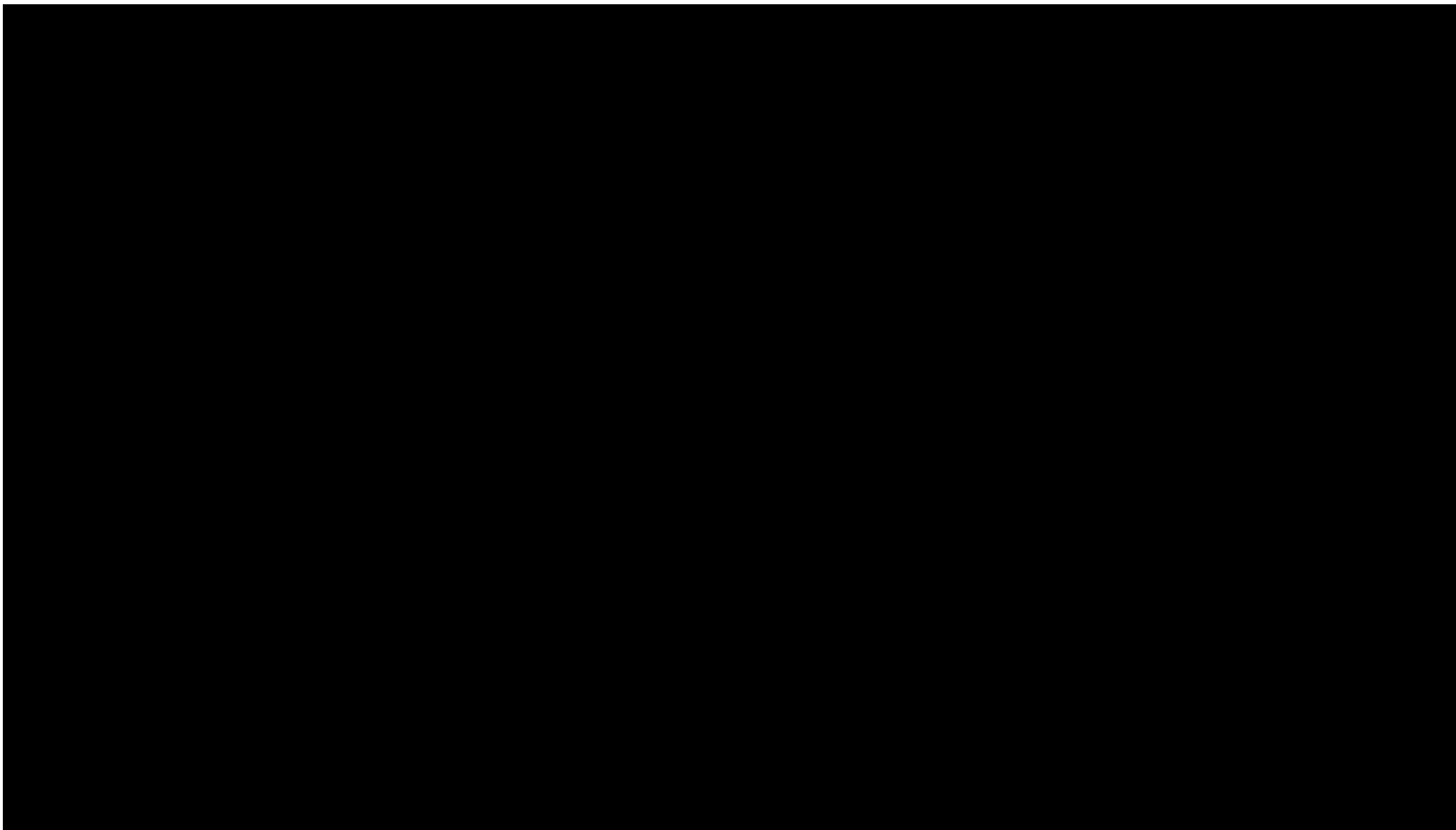


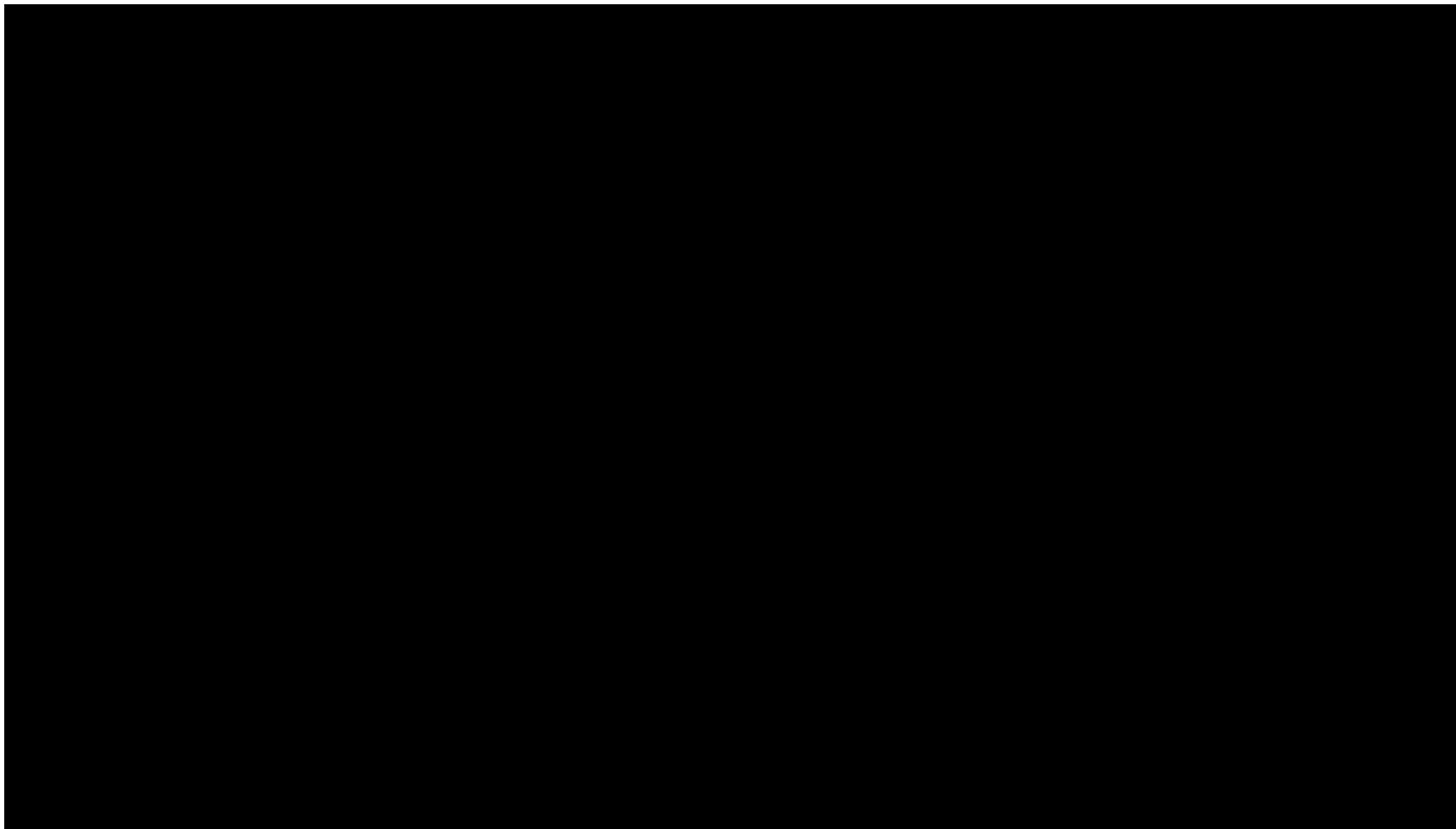


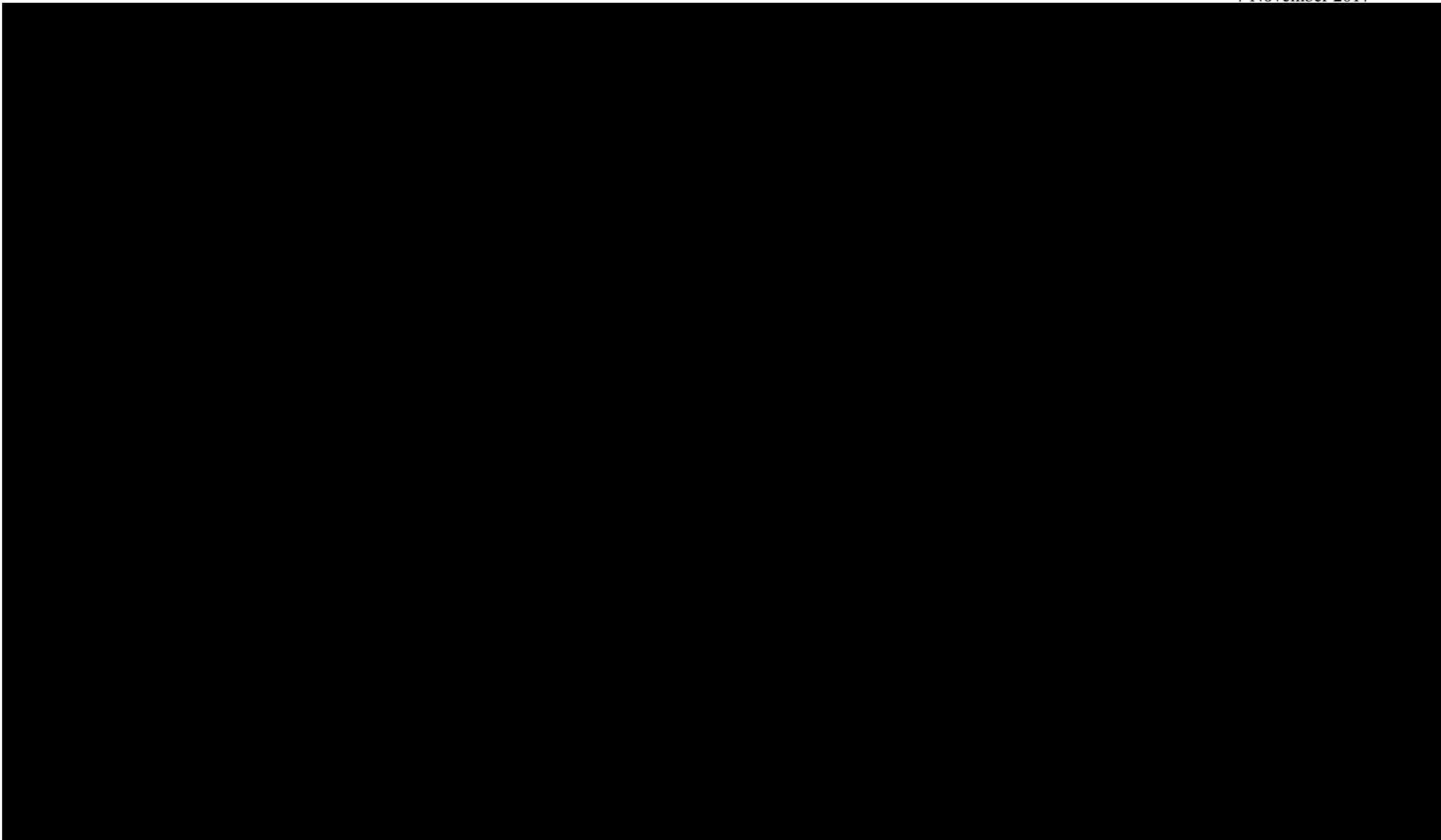


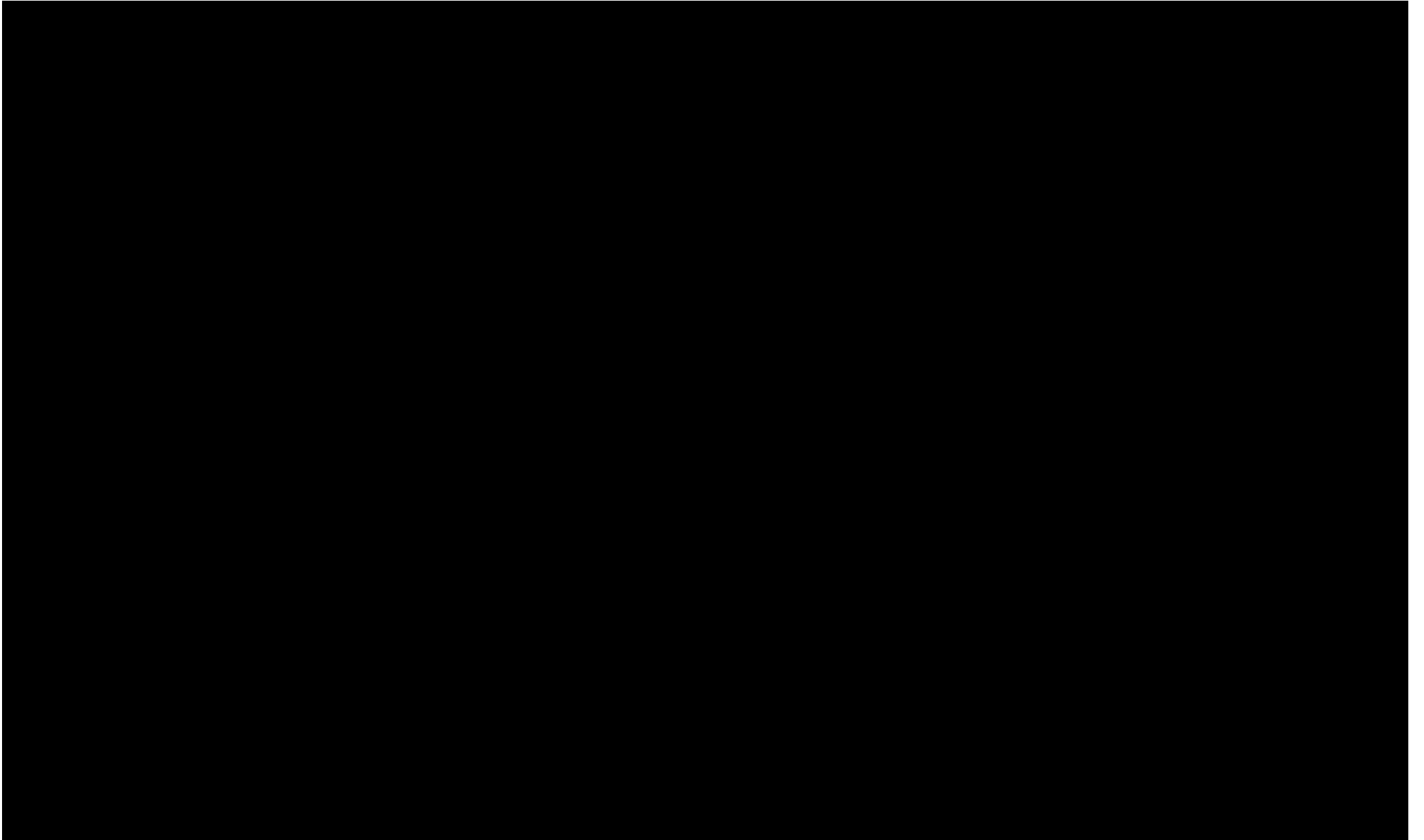


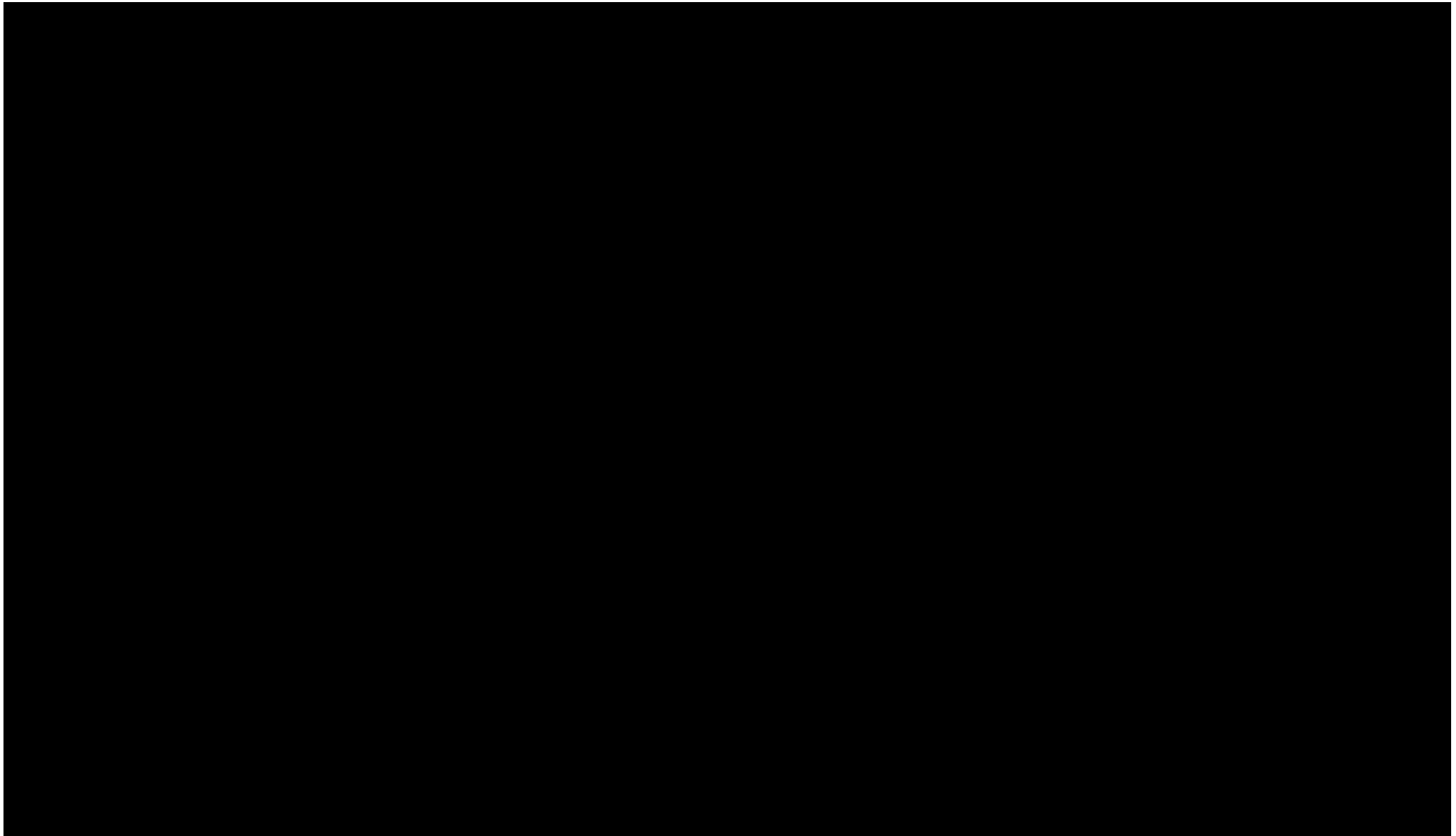


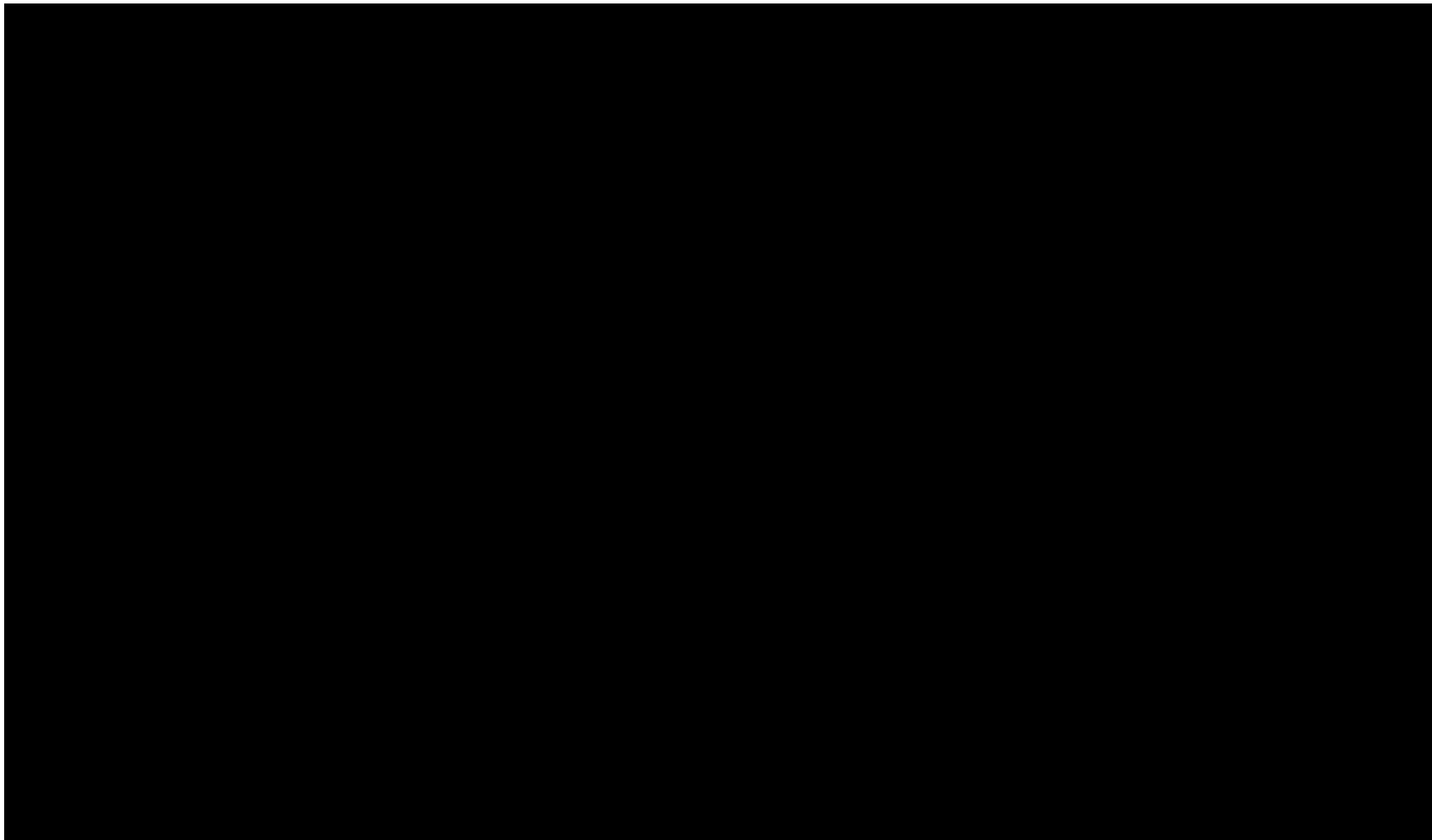


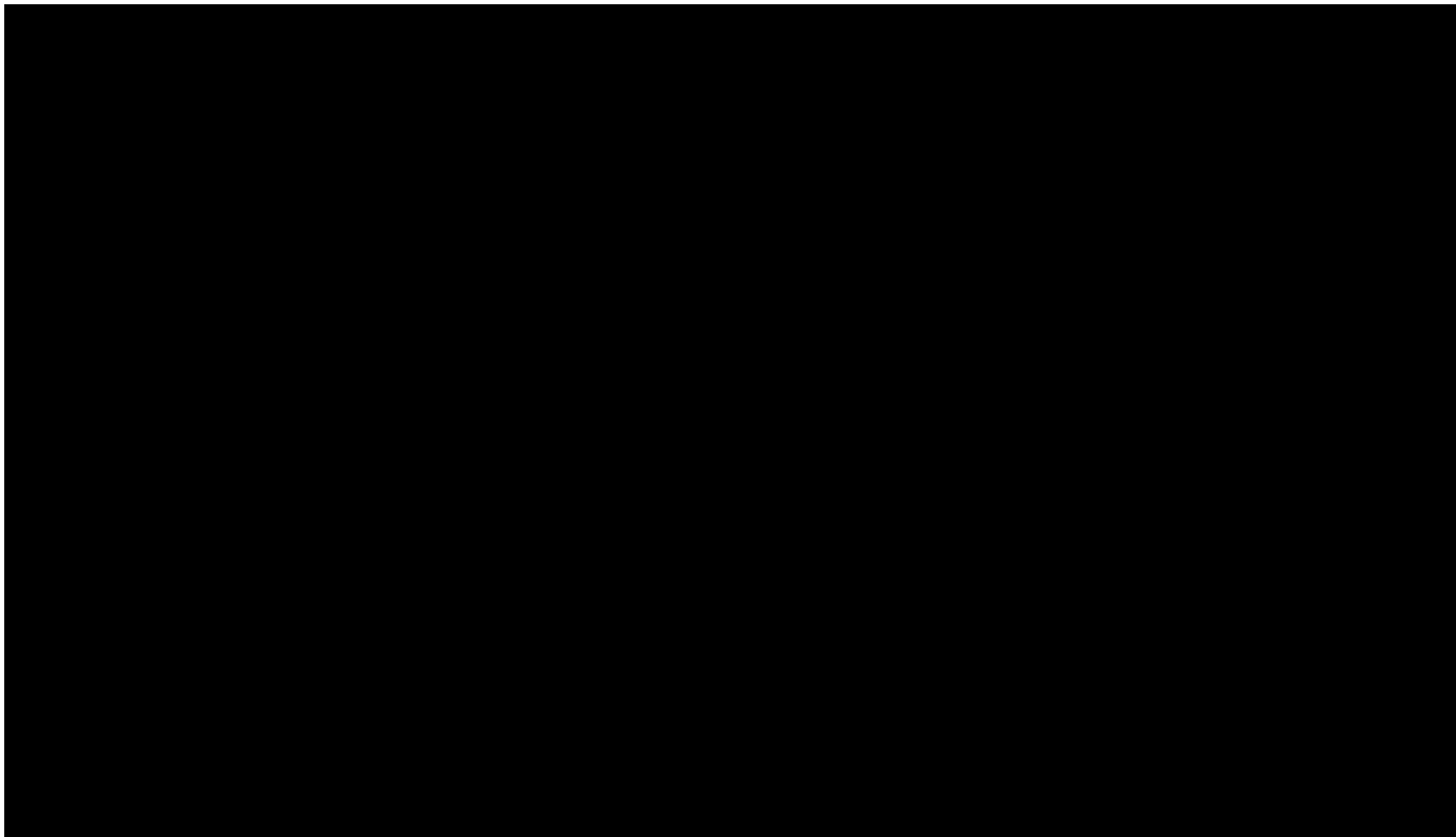


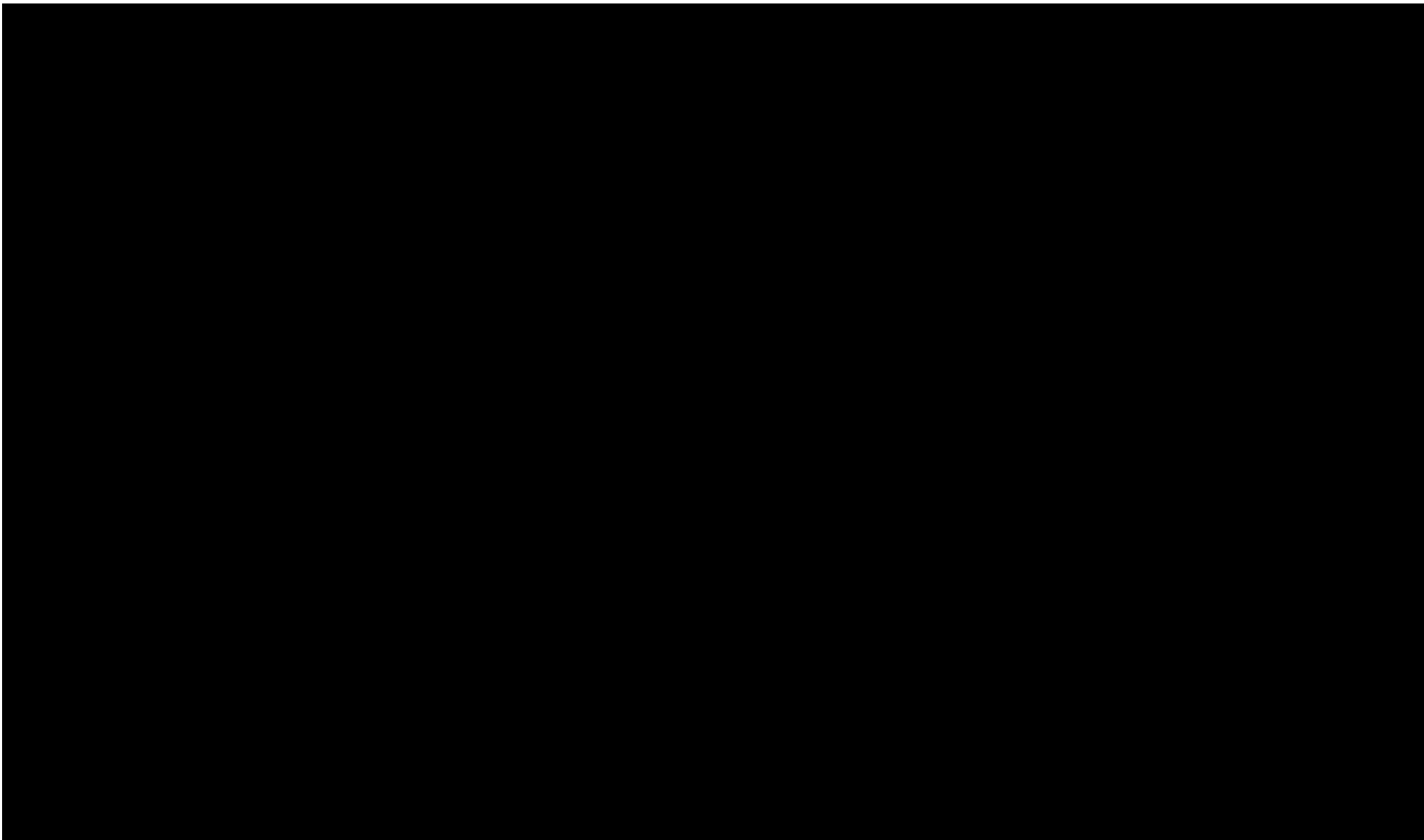


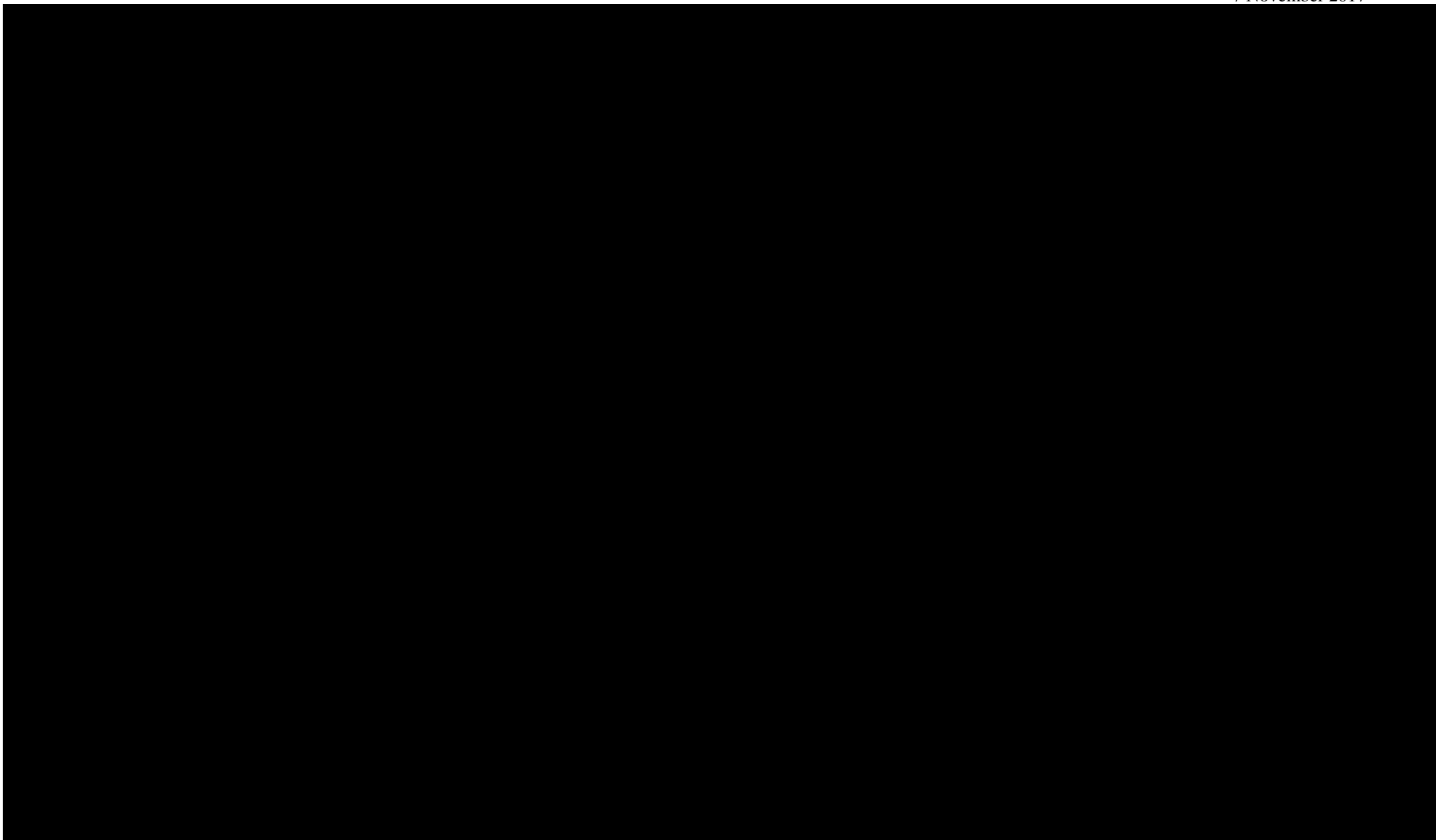


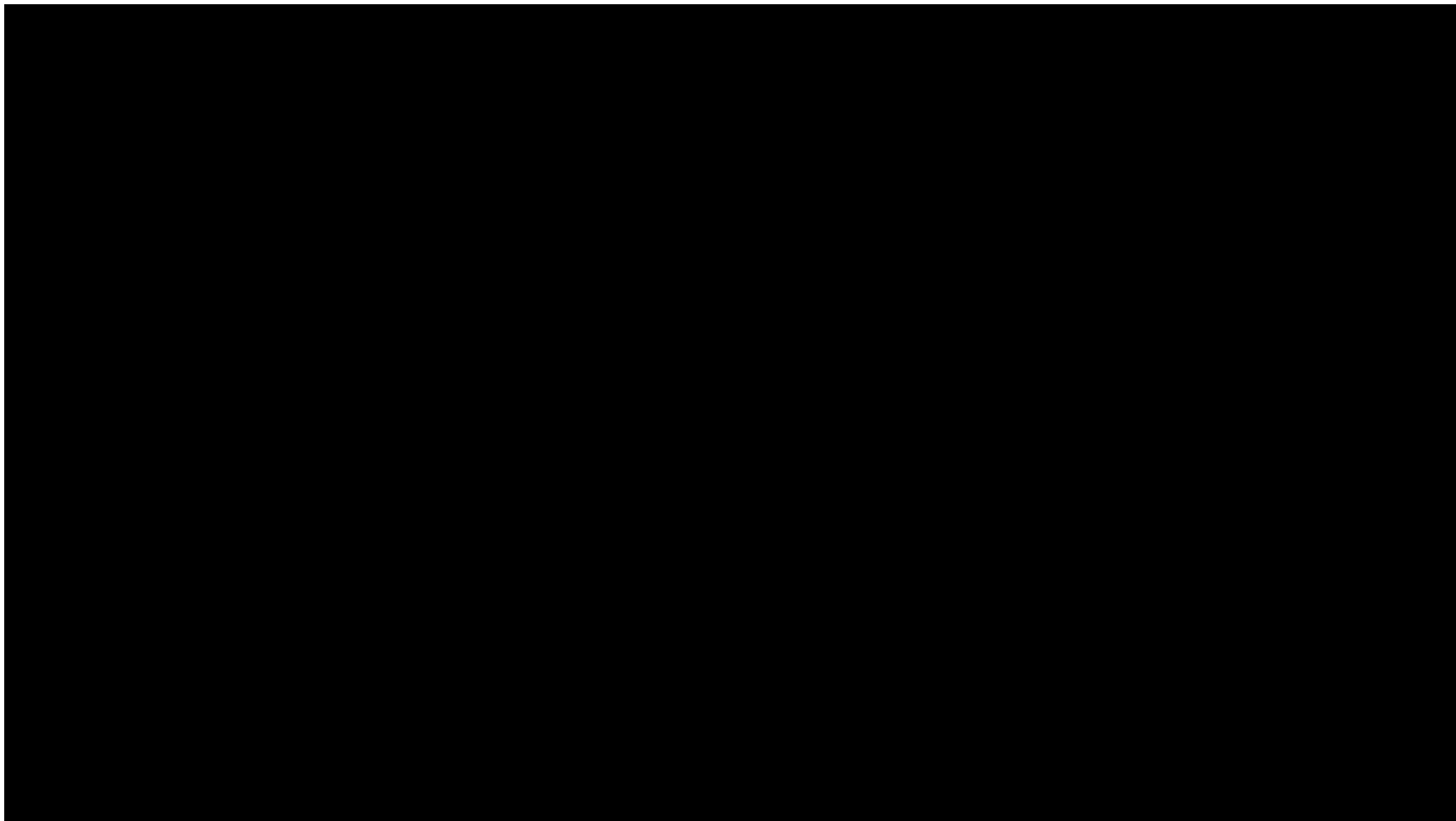


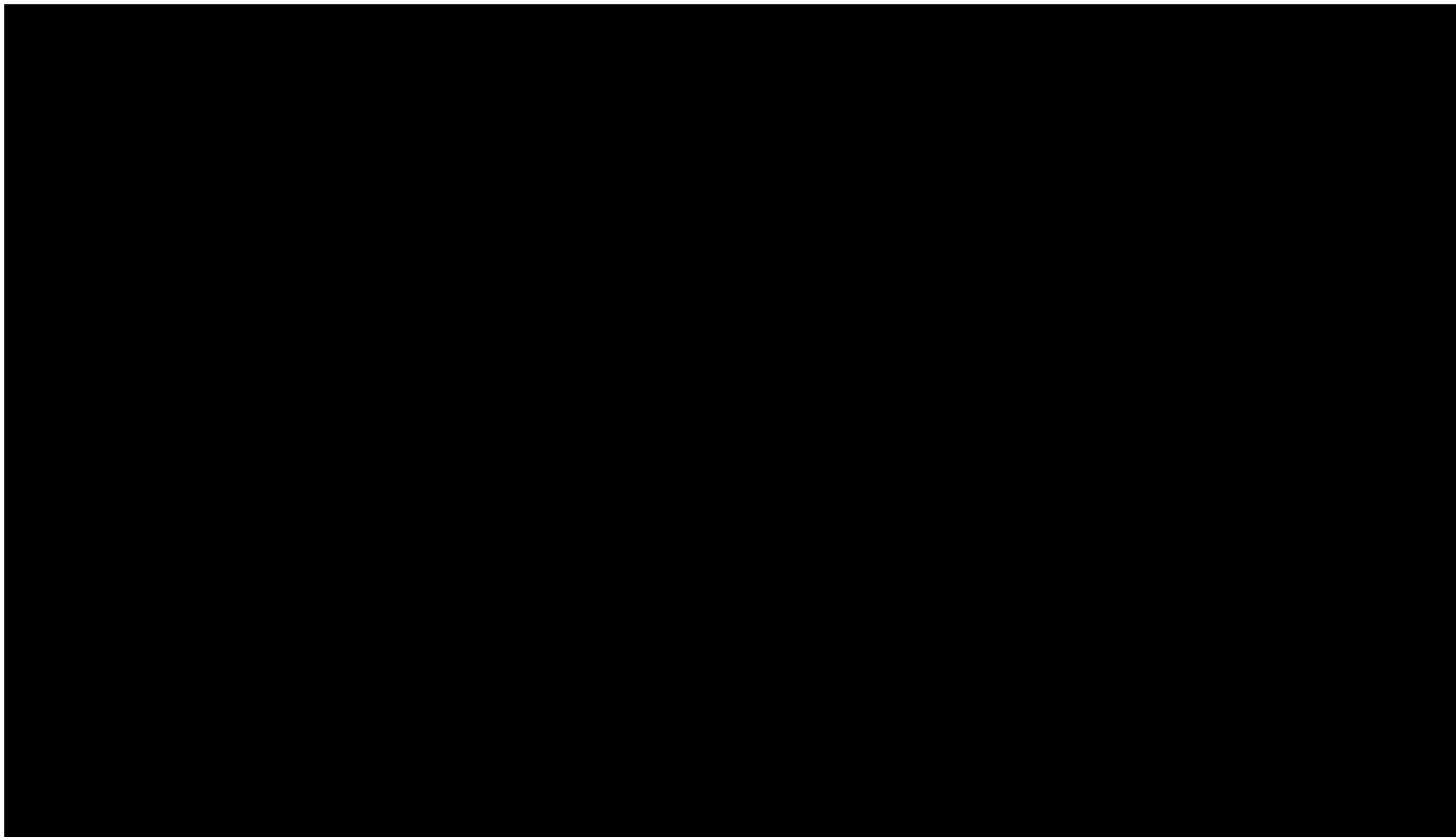


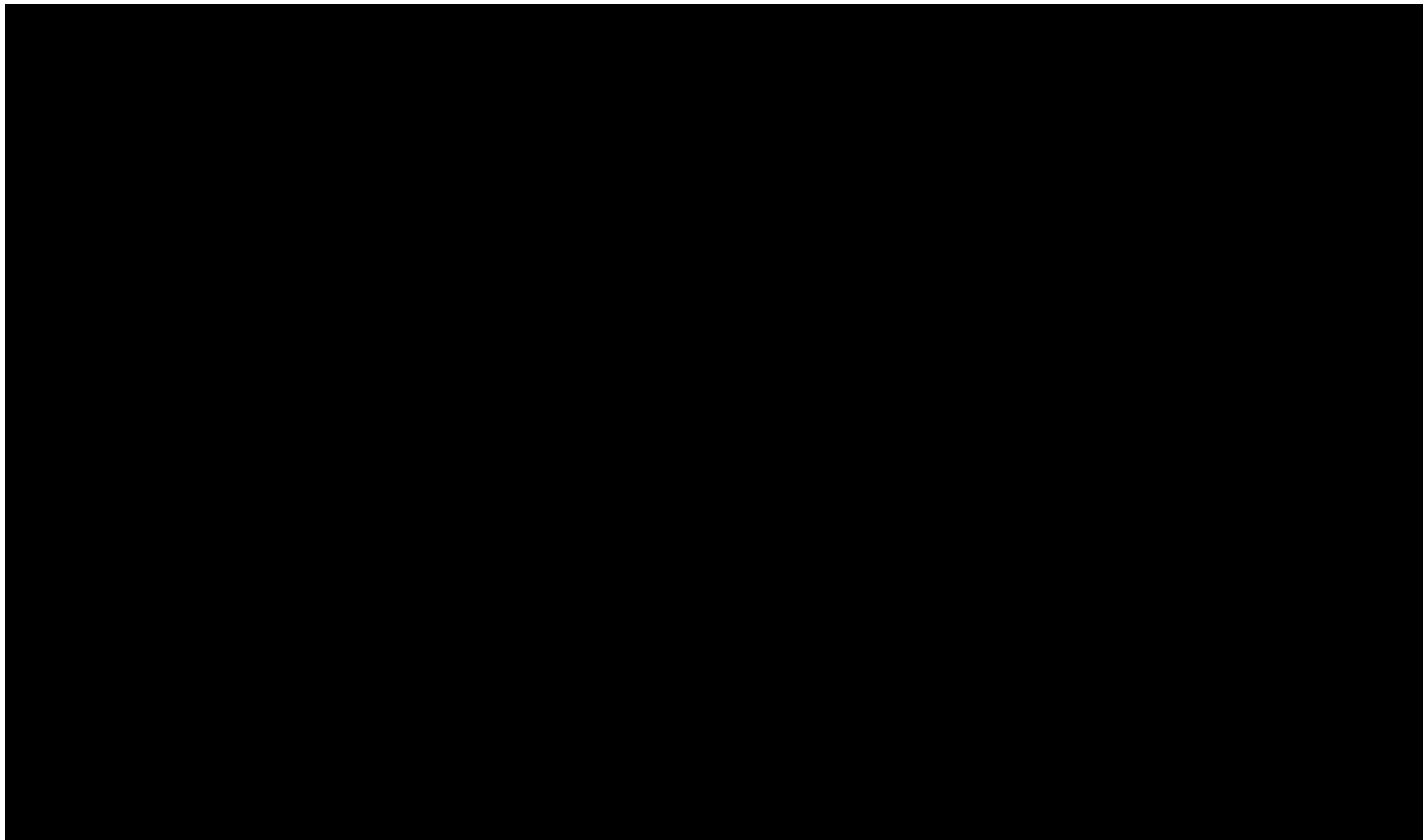


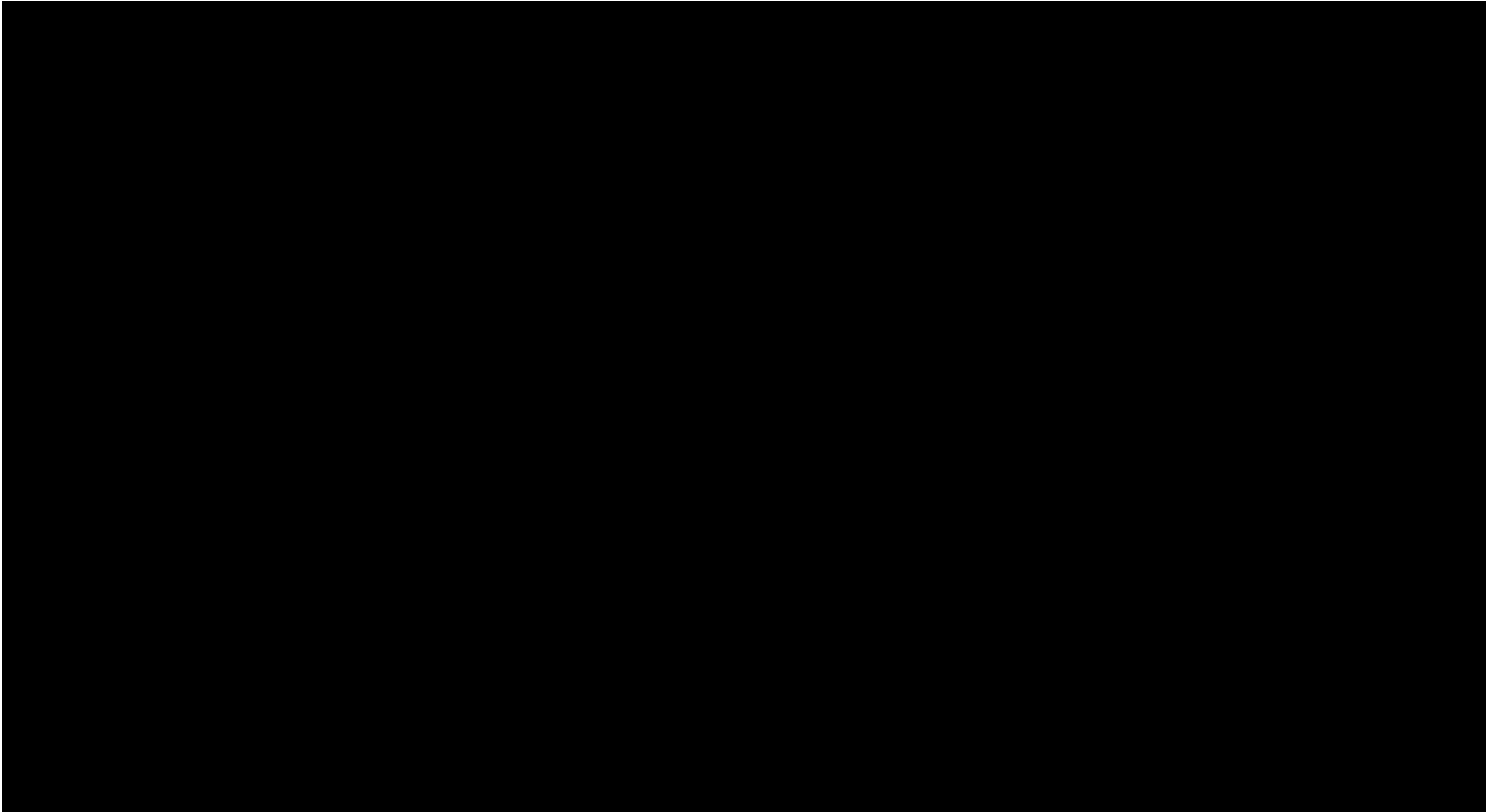












ANNEX II – THE RESPONDENTS’ REQUESTS FOR DOCUMENTS

