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IN THE COMPETITION
APPEAL TRIBUNAL

Case Nos. 1151/3/3/10
1168/3/3/10
1169/3/3/10

Victoria House,
Bloomsbury Place,
London WC1A 2EB

3 November 2010

Before:

MARCUS SMITH QC
(Chairman)

PETER CLAYTON
PROFESSOR PAUL STONEMAN

Sitting as a Tribunal in England and Wales

BETWEEN:

BRITISH TELECOMMUNICATIONS PLC
EVERYTHING EVERYWHERE LIMITED

Appellants

– v –

OFFICE OF COMMUNICATIONS

Respondent

EVERYTHING EVERYWHERE LIMITED
VODAFONE LIMITED
TELEFONICA O2 UK LIMITED
HUTCHISON 3G UK LIMITED

Interveners (Case 1151)

BRITISH TELECOMMUNICATIONS PLC
EVERYTHING EVERYWHERE LIMITED
VODAFONE LIMITED
TELEFONICA O2 UK LIMITED
HUTCHISON 3G UK LIMITED
OPAL TELECOM LTD
CABLE & WIRELESS UK

Proposed Interveners
(Cases 1168 and 1169)

CASE MANAGEMENT CONFERENCE

APPEARANCES

Mr. Graham Read QC, Miss Sarah Lee and Miss Maya Lester (instructed by BT Legal) appeared for the Appellant.

Mr. Meredith Pickford and Mr. Philip Woolfe (instructed by Regulatory Counsel, Everything Everywhere Limited) appeared for Everything Everywhere Limited

Mr. Javan Herberg (instructed by the Office of Communications) appeared for the Respondent.

Mr. Tim Ward (instructed by Herbert Smith LLP) appeared for the Intervener Vodafone Limited.

Mr. Robert O'Donoghue (instructed by Telefónica O2 Limited) appeared for the Intervener Telefónica O2 Limited.

Mr. Richard Pike (of Baker & McKenzie LLP) appeared for the Intervener Hutchison 3G Limited.

Miss Marie Demetriou (instructed by General Counsel, Opal Telecom Limited) appeared for the Intervener Opal Telecom Limited.

Mr. Daniel Beard (instructed by Charles Russell LLP) appeared for the Intervener Cable & Wireless.

1 THE CHAIRMAN: Good afternoon everyone. I hope you have received during the course of this
2 morning a note of issues from the Tribunal, which was intended really to structure this
3 afternoon's CMC. I hope we will be able to go through the issues one by one and perhaps
4 narrow points as we go through them. It seems logical perhaps for Ofcom to start the ball
5 rolling on points, followed perhaps by either EE or BT. Is that satisfactory? Mr. Herberg,
6 do please begin

7 MR. HERBERG: Sir, what I was proposing to do, subject to your guidance, was effectively to
8 walk through to give a preview of answers to all the questions. I think it may be common
9 ground that there is quite an inter-relationship between what you do with one appeal as to
10 what happens with the other appeal, and the proper course. What I was proposing to do was
11 to take you relatively shortly through what we say are the answers to the questions raised by
12 the Tribunal, and not go over the detail in my skeleton argument, which the Tribunal has
13 seen, which effectively is supporting material.

14 Sir, the place to start is probably to tell you about the status of the Court of Appeal hearing
15 in what we have been calling the 080 case, or case 1151.

16 THE CHAIRMAN: Yes, I am trying to call it 1151 now, because I find all these 08s rather
17 confusing.

18 MR. HERBERG: Having just about got the other ones into my head, I will try and make
19 adjustments for the new numbering.

20 Sir, the situation is that the date has now just been fixed. It is floating over 1st and 2nd
21 December, with a one day estimate. The position is that the hearing will be at the beginning
22 of December.

23 The second question you ask is as to the best estimate for when judgment in the appeal
24 might be expected. Sir, that is a difficult question. Obviously we would hope that the court
25 would give judgment before the vacation, it being an expedited matter. It has to be said that
26 there is absolutely no guarantee of that. We do not know who the court will be, what their
27 other commitments will be, or what they will think of it, how complex it is. There must be
28 a real possibility that judgment is not delivered before the short vacation, and therefore
29 there will be no judgment by the currently projected date of the commencement of the
30 appeal on 7th January.

31 THE CHAIRMAN: Yes, and even if the court were to move very quickly and give a judgment in
32 December, it would be the late end of December, which would not give the parties very
33 much time to adjust their positions if they needed to adjust them.

1 MR. HERBERG: Sir, that is right, and there are clearly at least some contingencies in which
2 adjustment would be required, substantial or otherwise. We, for our part – and I am sure the
3 court, having expedited it, will do its best to be quick – feel that the risk of proceeding with
4 the current dates and then finding at a very late stage in December that it was possible that
5 there was not going to be judgment is impractical, and therefore the January dates are not
6 going to be convenient or appropriate for the 080 appeal.

7 Sir, one then comes to the question of whether there are issues in the appeal to the Court of
8 Appeal in 1151 which are relevant to 1168 and 1169. You rightly note, as we point out,
9 there is evidence in 1169 that was not before Ofcom during the dispute resolution process.
10 There are two sets of evidence which fall into that category. There is, first of all, evidence
11 filed by BT in support of its appeal with its notice of appeal, and secondly there is evidence
12 filed by EE, Everything Everywhere ----

13 THE CHAIRMAN: Yes, indeed, and I see that BT make that same point in para.8 of their
14 skeleton.

15 MR. HERBERG: Indeed, sir, they do. Where the skeletons differ is that BT assumes that, as far
16 as we are concerned, the same issue will arise, the new evidence issue which is before the
17 Court of Appeal. As far as we are concerned, we do not, at the moment, anticipate that that
18 is the case. We have obviously looked at the evidence, and we are in the process of
19 working on the evidence filed with the two appeals, and we can see that there is a
20 significant difference in kind between that evidence and the evidence to which we objected
21 in 080, 1151, namely that this evidence is not raising new points which Ofcom did not
22 consider in the course of the determination, it is engaging with a decision that Ofcom made,
23 or it is not new material and will not cause Ofcom to have to develop new arguments in
24 response. Sir, we are not minded to object on the basis we did object in the 080 case to the
25 new evidence.

26 THE CHAIRMAN: I see that, and that is a very helpful indication. In a sense, it does perhaps
27 depend on what the Court of Appeal say in the 1151 appeal. Were, for instance, the court to
28 take an extremely rigorous view on the approach that Ofcom suggests, applying *Ladd v.*
29 *Marshall* to new evidence, one could see that points might be taken in relation to both BT's
30 additional evidence and EE's additional evidence.

31 MR. HERBERG: Sir, I accept that, and I should also indicate, that BT have suggested to me just
32 outside court that they, themselves, might, if they lose in the Court of Appeal, on a sauce for
33 the goose, sauce for the gander approach, want to object to EE's evidence on their appeal on

1 precisely that basis. So the fact that we are not taking the point does not necessarily mean
2 that the point will not arise *inter partes*.

3 So it seems sensible, and in any event I would suggest probably inevitable for timetabling
4 reasons, that that appeal also should not be coming on before there has been a possibility of
5 taking account of the Court of Appeal decision, whatever it is.

6 THE CHAIRMAN: That is helpful.

7 MR. HERBERG: We certainly are not seeking to, as it were accelerate, even if it were otherwise
8 possible, 1168 and 1169 to the extent that there will not have been an opportunity to take
9 account of the Court of Appeal decision. We anticipate that we can safely work on the basis
10 that if we do not get a Court of Appeal decision in December, then one would hope to get
11 one reasonably early in the new term in January. I am sure the court, having expedited the
12 appeal, recognising the urgency, would endeavour to provide a judgment as soon as
13 possible.

14 THE CHAIRMAN: Yes, it seemed very clear from Lord Justice Lloyd's note that he had well in
15 mind the need for not simply a quick hearing but a quick judgment.

16 MR. HERBERG: Sir, yes. That then leads to your third question, is the consensus of the parties
17 that 1151 cannot now be heard in January 2011. Sir, that is certainly our view and, as I
18 understand it from the responses of the interveners and EE, it seems to be the generally held
19 view. I will let BT speak for themselves, I am not entirely sure whether they do still
20 maintain that 080 could be heard in January. We certainly say that it could not be, both for
21 the timetabling reason connected with the Court of Appeal, but also for much more
22 substantial reasons connected with whether it is appropriate for it to be a test case at all.
23 It may be that at this stage I do not need to go into that detailed analysis, but it might help
24 just to sketch out the different types of reason as to why we say the 080 case would be
25 inappropriate to be the lead case whenever, whether in January or later.

26 THE CHAIRMAN: Not for the moment, I think, Mr. Herberg. Let us carry on through the
27 questions. We will certainly hear you if necessary on that.

28 MR. HERBERG: Question 4: "Are there are any other issues relating to case 1151 that need to be
29 resolved?" Sir, we do not think there are, subject to one potential issue connected with EE's
30 intervention, Everything Everywhere's intervention.

31 THE CHAIRMAN: This is the point that you make at para.11 and following of your skeleton?

32 MR. HERBERG: Sir, yes, it is. There is a question mark, if I can put it that way, as to whether
33 EE's intervention is an appropriate intervention at all, whether it comes within what should
34 properly fall within the scope of an intervention. I put it no higher than that in paras.13 to

1 15 of the skeleton argument. I understand again that BT may take the view that it is not a
2 proper intervention. We, for our part, as a matter of principle, do contend that it is not
3 appropriate for an intervention to raise grounds of appeal which are entirely separate and
4 new and not connected with the appeal in which they seek to intervene.

5 THE CHAIRMAN: That is a problem. Clearly it would be an issue that might have to be debated
6 if case 1151 were the lead case. It is rather less of a problem, I would anticipate, if either all
7 three cases are heard together or 1151 becomes the tail end Charlie.

8 MR. HERBERG: Sir, I accept that. I accept that on either of those two contingencies we think
9 the point falls. It is a matter for the Tribunal's discretion and, in the exceptional
10 circumstances of this case, even if all three were being heard together so that the question of
11 intervention was nominally a live one, it would be a fairly extraordinary result that EE were
12 entitled to prosecute their appeal raising the self same arguments which are in their
13 intervention but not entitled to pursue the intervention. They would run the spectre of the
14 Tribunal having to reach different judgments on the two cases, in one case the three
15 principles which Ofcom has adopted in reaching its decisions, in the other case holding that
16 those three principles are not appropriate, because that is the nature of the burden of EE's
17 intervention and of their appeal.

18 THE CHAIRMAN: Yes.

19 MR. HERBERG: Given the unattractiveness of that result we anticipate that the Tribunal would
20 be strongly minded to exercise its discretion exceptionally to allow this intervention even
21 though we would certainly want to place it on the record as a matter of principle we would
22 assert that interventions of this nature are not appropriate.

23 We think there may well not be other issues, or that may not be another issue that needs to
24 be resolved within your question 4.

25 THE CHAIRMAN: Thank you.

26 MR. HERBERG: So we then come on to issue 5 regarding cases 1168 and 1169: "Are there any
27 issues regarding interventions?" Sir, from our point there are not, we do not object to any
28 of the applications to intervene and it has not come to my notice that there are any
29 objections by other parties either.

30 THE CHAIRMAN: That is helpful. There was one point which we had reading through the
31 statements of intervention. It is, of course, a requirement that such statements indicate from
32 the Intervener which party they are supporting and why. Whilst that is tolerably clear from
33 most of the statements of intervention we did not think it was sufficiently clear from O2 and
34 3, and I wonder when their turn comes whether that position could be made clear orally

1 now. I do not want to hold things up by requesting further documentation, but I think that
2 might be helpfully dealt with there. Subject to that being clarified, that is helpful.

3 MR. HERBERG: There is then a question as to whether there are any issues regarding
4 confidentiality. From our perspective the answer is no. Clearly the confidentiality ring in
5 relation to 080 needs to be extended to cover the new appeals. There is an issue which has
6 arisen between interveners principally as to the extent which if a particular intervener
7 instructs, say, an external firm of solicitors whether the in-house solicitors should drop out
8 or not. We have no view on that and I leave the parties who take a view on that to develop
9 the matter.

10 Question 6: “Regarding cases 1168 and 1169, assuming the answer to question 2, which is
11 asking about the Court of Appeal in 1151, is it relevant, assuming the answer to that
12 question is “no”, and the answer to question 3 is “yes”, can cases 1168 and 1169 be heard in
13 January 2011 in place of 1151, sir, we say “no” very firmly as does BT and interveners,
14 although one or two expressing the hope that there might be some compression of the
15 timetable, no one says that strongly. We say these are complex and substantial appeals
16 raising new issues that were not in the 080 case, and with the best will in the world it is
17 simply not possible to accelerate the timetable to be ready for that time, and also the time
18 estimate will be inadequate, because they are bigger appeals than 080. The EE appeal
19 raises substantial fresh issues that are not currently in the 080 case, although they will be in
20 the intervention, which actually gives a problem for the hearing even the 080 case in the
21 existing slot.

22 THE CHAIRMAN: Yes, and indeed the issue we were discussing earlier about the implications
23 of the Court of Appeal decision.

24 MR. HERBERG: Yes, indeed, that as well.

25 THE CHAIRMAN: We will see what everyone else has to say but I am not feeling a great deal of
26 pressure to retain the January date at the moment but we will see what everyone else says.
27 Just so you know what we are thinking in terms of dates, should January be vacated, we
28 have identified a window of opportunity in April – we cannot do it sooner than that – the
29 weeks commencing 4th April and 11th April, and part of 18th April would be a slot that we
30 could manage. We may rise for you to debate that when we have gone a little further down
31 submissions from the parties. Obviously later dates could be canvassed also but, speaking
32 for ourselves, we would be quite inclined to go for April because it is reasonably soon but is
33 also a date where there is no prospect of the Court of Appeal not having decided the 1151
34 matter. I let you know that just to assist you.

1 MR. HERBERG: Well if it assists I can give an immediate answer to that which is that those
2 dates are convenient from Ofcom's side. They are convenient in two ways: one in that I can
3 do the case, but secondly, that does seem to fit in with a sensible timetable for bringing
4 whichever combination of cases, be it all three or be it two of the 0845 cases to a hearing
5 consistent with defences and responses to intervention and skeletons. Obviously it will be
6 more sensible to devise a timetable to fit the trial dates rather than seeking to go the other
7 way around, but the timetables that I was struggling with in my own head were ending up
8 with hearings in March so that gives us a longer period of time. We would be content with
9 that.

10 Question 7 then asks: "It seems common ground that 1168 and 1169 should be heard
11 together" and certainly no one appears to oppose that. Assuming that the answer to question
12 6A is "no", "should case 1151 be heard with, before or after cases 1168 and 1169?" Sir the
13 answer which we have given in our skeleton argument is "after". I would now put it as
14 "after" alternatively "with", but not before.

15 The reason we put "after" as our first preference is that it seems to us that 0845/0870
16 crystallises all the issues of principle which fall to be decided in these collective appeals,
17 and therefore it would be perfectly possible simply to hear those appeals and 0845 would
18 effectively work itself out as a result. I accept on the other hand that adding 080 will not
19 materially lengthen the size of the appeal, it might add an extra day – one would have to
20 look at that decision again and go through some of the arguments, but the evidence is
21 effectively common. There is a lot of additional evidence in 0845 but there is not additional
22 evidence in 080, so it will not add materially to the estimate. The other reason which we
23 had for being concerned about adding 080, which is that 080 was going to be beholden to
24 the Court of Appeal whereas 0845 might not, will be superseded by this timetable anyway.
25 We do not say there are dramatically strong reasons why 1168 and 1169 must be heard
26 alone ahead of the other case, 1151, but we do say strongly that it would be inappropriate
27 for 1151 to be heard first on the new timetable. The reason for that, unless you want me to,
28 sir, I will not go into in detail at this stage, is that effectively that case is not going to raise
29 all the issues for determination and that is not simply a matter of the question of the new
30 evidence to which we have not responded, it goes far beyond that. We have gone well
31 beyond Dobbs 1, 2 and 3 *** we are now at Dobbs 4, 5, and 6.

32 THE CHAIRMAN: Yes.

33 MR. HERBERG: Effectively all those new reports continue one would almost say dialogue, there
34 is a draft determination, there is a Dobbs 4 ** there is a supplemental determination, there is

1 Dobbs 5 ** there is a final determination and then there is notice of appeal and a Dobbs 6,
2 ** and it is effectively continuing, developing by iteration the nature of the arguments, and
3 we say it would be a complete waste of time to try and determine the case on the
4 background of 080 which, as it were stops that argument half way along.

5 THE CHAIRMAN: If we can provide you with this indication, if we are going to adjourn the
6 1151 case out of January then we are presently minded to hear it either at the same time as
7 1168/1169 or afterwards and not before. It may be that someone has something to say on
8 that point, in which of course we will hear them and allow you to reply. For the moment let
9 us leave it there.

10 MR. HERBERG: Sir, yes. In terms of at the same time or after, the only suggestion that I have
11 seen, I think Vodafone make the point on the evidence that it might be quite useful to, as it
12 were, tie them all up together so that if there were consequential issues on 080 then they
13 could be tied up together in the same disposal.

14 We do not ourselves see the likelihood of a hitch coming in 080 following the determination
15 of the other appeals. We do not see a positive benefit, but, as I say, we are willing to listen
16 to other parties on that, and subject to the Tribunal of course.

17 Then, sir, moving on to question 8, assuming that it is decided that the three appeals are to
18 be heard together after the Court of Appeal has handed down judgment, are there any case
19 management implications arising out of the fact that Ofcom has not substantively responded
20 to BT's evidence? That must be the fresh evidence in case 1151.

21 THE CHAIRMAN: Yes.

22 MR. HERBERG: Sir, we do not think that there are. If the Court of Appeal allows the appeal and
23 agrees with us, the position then is that the 080 case falls to be determined on the basis of
24 the limited evidence before Ofcom, and, we would say, the question of whether or not there
25 has been an error of law of fact or an error of discretion on the material before Ofcom. It is
26 entirely possible, as one of a number of alternatives, that Ofcom succeeds on that appeal,
27 but that on the other appeal, which engages with a much wider range of material, the
28 Tribunal takes a different view or comes to a different conclusion. That would not be
29 inconsistent, that would simply reflective of the fact that these are appeals from decisions of
30 Ofcom which were different decisions with different material before them.

31 If Ofcom is unsuccessful so that the court agrees that a wider range of evidence is
32 appropriate on appeal 1151, we, sir, will make the submission that the proper position for
33 the CAT to remit the matter to Ofcom. If it is matter which were not before Ofcom and
34 were not decided, again there is no real inconsistency in the two cases. Ofcom certainly

1 does not anticipate that it would be proposing to apply, in the light of the Court of Appeal's
2 judgment, to adduce further evidence or to amend its defence. It has effectively set out the
3 position which it believes is the appropriate position for it to take in relation to the
4 arguments. It is content for the case to proceed on that basis whatever the outcome of the
5 Court of Appeal.

6 THE CHAIRMAN: That is helpful, thank you.

7 MR. HERBERG: Sir, one then has a question of estimates. Just to tie it together, 1151 has an
8 existing estimate of eight days. 1168 and 1169 are certainly more complex, because the
9 existing arguments have developed further and there are further statements and expert
10 reports. As well as that there is the EE appeal which adds a completely new challenge
11 backed up by its own expert evidence to Ofcom's decision. In my skeleton, sir, we say 12
12 to 15 days. BT generally take the view that our estimates are slightly over-estimates, and
13 clearly the Partial Private Circuits appeal that you have recently heard, sir, the evidence was
14 got through rather quicker than was anticipated. We would certainly be content with an
15 estimate at the lower end of what we said, which is in the region of 12 days, but we
16 certainly think it would be prudent to keep at least that amount of time free. There are
17 potentially a considerable number of expert reports. In terms of numbers, I think we are up
18 to about seven experts, or seven true experts, with up to six reports each, and four or five in
19 the other cases, but also potentially a considerable number of other witnesses. Given the
20 sheer number of interveners, even if they strictly confine submissions to additional points,
21 we think in the region of at least 12 days is appropriate.

22 If the three are heard together, we accept that does not materially increase the estimate. It
23 might add another day. It might be sensible to allow for a day longer. That is, doing the
24 best one can at this stage, where we see the length of the hearing. That would certainly be
25 accommodated within the dates that you indicated, sir.

26 THE CHAIRMAN: Yes, that is very helpful.

27 MR. HERBERG: Sir, we do not, subject to the Tribunal, have any other matters.

28 THE CHAIRMAN: Thank you very much, Mr. Herberg. Mr. Pickford, would you like to go to
29 next, or Mr. Read?

30 MR. READ: BT probably would like to get their oar in at this stage. Sir, you should have had an
31 analysis table that we have handed up, which I hope has reached you.

32 THE CHAIRMAN: We have that.

33 MR. READ: We have done that simply to illustrate where the overlaps between the respective
34 appeals, as we see it, lie. As you can see, whilst there is obviously an overlap between BT's

1 appeal in 1151 and 1169, there is not so much overlap in the 1168 Everything Everywhere
2 appeal.

3 The second point I want to make on that before I come on to directly answer the questions,
4 is that Everything Everywhere's appeal does raise and introduce a significant amount of
5 new evidence that was not placed before Ofcom in the final determination in the 0845 and
6 0870 final determination. I can illustrate the point if you wish me to, sir, but I suspect you
7 probably do not.

8 That material ends up in the statement of intervention, and there is a significant overlap
9 between the statement of intervention put in in case 1151 by Everything Everywhere and
10 the material that it has used in its own appeal in case 1168.

11 As a matter of principle, BT says that is not a correct intervention, although obviously, if
12 the cases end up being co-joined, then the importance of that point is lessened, but we do
13 put a very firm marker down, particularly as, as things stand at the moment, BT is on the
14 point on drafting its reply in 1151, it would be a point that we would be making very
15 forcefully in the reply if we actually get to the stage of having to serve that, which may
16 change as a result of the discussions we are having today.

17 The other preliminary point that I do want to make so that it does not get lost in this is that
18 there are distinct differences between 1151 and the other two appeals. That is clear from
19 the final determination itself where Ofcom takes a different approach to its regulatory
20 preference in respect of 080 numbers, which are Freephone numbers, and those in 0845 and
21 0875 which are NTS numbers representing, we say, the Geographic call numbers.

22 Sir, there is an important difference, and I emphasise that point because of the suggestion
23 that it may be sensible to somehow let case 1151 be dealt with later. We say the problem is,
24 if one does that, it may not address all the issues in 1151, also, as a result of any decision in
25 1168 and 1169. That is important, sir, because we say that if 1151 has to go off it is
26 important to wrap the whole thing up altogether and not hope that by dealing with 1168 and
27 1169 one can end up with 1151 going away, because there is every chance that it may not
28 because of those differences.

29 For your note, sir, I would simply refer to the 0845 final determination, paras.4.63, 4.67 and
30 7.80 as examples where Ofcom, itself, draws differences between the two determinations.

31 That is located in BT1, tab 6.

32 Sir, can I now turn to the issues raised by the Tribunal. The first point is to update the
33 Tribunal that, in fact, a court has been selected. It is Lord Justices Mummery, Richards and
34 Aikens who will hear the appeal.

1 The point that BT would make is that certainly BT will be pressing very strongly at that
2 hearing for the Court of Appeal, even if it does not give its reasoned judgment, to at least
3 give an indication as to whether it is likely to allow the appeal or not. Sir, you will
4 appreciate that this is not a binary issue because there were two elements that were actually
5 involved in the Tribunal's judgment, the first being the matter of general principle and the
6 second whether, in the particular circumstances of this case, that actually the evidence
7 should still be allowed in under the accepted discretion that Ofcom accepts is actually there.
8 Sir, it may well be possible that BT loses on the general principle, and the Tribunal's
9 decision is overturned on that, but still wins on the exceptional circumstances position. In
10 that case it would not affect the evidence in the 1151 appeal before the Tribunal, but it may
11 very well affect the position on case 1168 and 1169, because, as Mr. Herberg has correctly
12 identified, if the genie comes out of the bottle BT may well be the one that is actually
13 employing it in its favour at that stage. I suppose that really emphasises the fact that,
14 whereas 1151 might still be able to proceed without its evidence being affected, there is a
15 possibility that 1168 and 1169 are actually affected by the Court of Appeal decision.
16 Sir, I put down a plea, I suspect it is going to fall on deaf ears, but I will put the plea down,
17 which is that because BT is going to ask in the Court of Appeal for the court to give an *ex*
18 *tempore* decision on whether to allow the actual appeal or not, for the reasons I have
19 explained, it may be possible as at 1st or 2nd December to identify whether or not the appeal
20 in case 1151 can still go ahead in January. That would, in effect, mean that for today the
21 Tribunal would leave the matter up in the air and have to take the decision at or around 1st
22 or 2nd December. I fully accept that the Tribunal may not feel that is a satisfactory position,
23 but I do put the flag down.

24 THE CHAIRMAN: One inevitably has some sympathy with that sort of submission because one
25 wants to keep trial dates which have been fixed long ago. For the reasons you have given, it
26 does seem an impractical course in this case, simply because it requires the Court of Appeal
27 to make a call on what is an important question quite shortly after argument, and then for a,
28 potentially, yet further case management conference to deal with the implications.

29 MR. READ: Sir, I have put the plea down.

30 THE CHAIRMAN: We will take it into consideration obviously.

31 MR. READ: Can I turn now to question 2. The point I think has already been made on BT's part
32 that as far as BT is concerned, it is quite clear that the Court of Appeal decision could easily
33 catch cases 1168 and 1169, and indeed catch them in a way that may not in the end catch
34 1151. So we do make that point saying that it is very interlinked.

1 As regards 3, I have made my submission on that. If the Tribunal thinks it is too
2 problematic to leave matters resting until 1st December then, yes, we agree that it cannot be
3 heard in January and therefore must be re-listed. Given the indication of the Tribunal for an
4 April date, we say that it is quite plain that the appropriate way of dealing with the matter is
5 to hear all three cases together. If that is done in April then at least there will be final
6 resolution on everything arising out of it. Like Mr. Herberg, we believe that, in fact, the
7 reality is that if the cases are heard together it will not actually add a great deal of time
8 having 1151 tacked into it. Although there are differences, those differences will not
9 considerably lengthen the material.

10 As regards 5, we certainly have no issues regarding the parties who have intervened, and
11 indeed in the case of Opal and Cable & Wireless, we say quite clearly they were making
12 submissions to Ofcom at the times the final determination shows and they have every right
13 to be, and indeed should be, joined as interveners.

14 As regards the confidentiality, yes, obviously transferring the confidentiality ring from one
15 to the other would be sensible. That may, I think, if the hearings are co-joined, mean that
16 Opal and Cable & Wireless probably need to be brought into the confidentiality ring for
17 case 1151 as well.

18 As regards the other point that Mr. Herberg alluded to, which is the question of
19 internal/external counsel, I will not say anything more at this stage because I do not know
20 whether it is actually going to be active within the course of this today or not, but BT does
21 have a fairly strong view on it, so I would want the opportunity to come back if the point
22 does arise.

23 THE CHAIRMAN: Very well.

24 MR. READ: Over the page, I think 6 is probably dealt with. The appropriate timetable we can
25 discuss obviously if the Tribunal rises. The only matter I would mention which really arises
26 out of case 1151 is that BT, as it stands at the moment, is supposed to serve a reply on
27 12th November and a skeleton argument on 19th November. The skeleton argument
28 obviously goes out of the window. We suggest, respectfully, that actually the reply would
29 be better dealt with in tandem with the other two cases as well. The reason why I say that is
30 because, obviously, as I have already indicated, Everything Everywhere's notice of appeal
31 overlaps substantially with its intervention, and we feel that it would be better to deal with
32 them all together rather than having a point here and a point there in separate replies. We
33 would say, ultimately, if the Tribunal is agreeable to the idea of all three cases being listed
34 together, that BT serves one single reply capturing both the statement of intervention points

1 and the Everything Everywhere points. It would effectively stand as BT's statement of
2 intervention as well within the course of the 1168 appeal.

3 Can I just pick up on the other points. I think 7 is really dealt with in what I have said.
4 Then 8: can I just put a marker very firmly down on BT's part. There are a large of
5 interveners and I think one of Mr. Herberg's fears about the length of this hearing may well
6 be the extent of the intervention that actually takes place by the interveners. Intervenors are,
7 in general, there to support stances taken by parties, and they are there not to duplicate
8 arguments but to add additional arguments. Certainly BT is concerned that when we
9 eventually get to a hearing on this there should not be massive interventions and massive
10 arguments by the interveners, because otherwise that will lengthen the hearing process. We
11 do put that marker down very clearly at this stage, because we think it is, in a case like this
12 with the number of interveners, quite important that that point is made very clearly.

13 As regards point 9, we have always believed that case 1151 could have been dealt with in
14 five days, although it was listed for eight. We still think that if all the cases are heard
15 together it should not significantly extend that. Mr. Herberg said 12 days. We would say
16 probably less than that, but it would obviously be more sensible to have the longer period
17 slotted in and if we go short, as for example we did in the Partial Private Circuits, then so
18 much the better. Obviously I am sure we can completely complete the case within that 12
19 day span.

20 Sir, on any other matters, can I mention one thing. You will recall this matter came up in
21 the Partial Private Circuits appeal, which is that there is another network charge control that
22 has been referred to Ofcom for dispute resolution and which we understand Ofcom has now
23 accepted. The problem is that, in the light of the submissions that were in the Partial Private
24 Circuits case, we have a two month period that is running at the moment. I do not know
25 whether the Tribunal can in any way help me on the plea that I made in that case of a
26 speedy resolution for it. If not, sir, I do warn that there will be a prospective appeal that is
27 linked to this that will also be put forward.

28 THE CHAIRMAN: Yes, Mr. Read, I will not give an indication, but the Tribunal will write to
29 you and to the other parties in the PPC case dealing with that point.

30 MR. READ: I am grateful, sir. That may mean that you have one less appeal to deal with.

31 I think those are all the points for BT.

32 THE CHAIRMAN: I am grateful, Mr. Read. Mr. Pickford?

33 MR. PICKFORD: Sir, thank you. Going through the Tribunal's agenda, I do not think there is
34 anything that we need to say on point 1. That has already been addressed by Mr. Herberg.

1 On point 2, we take some comfort in what Ofcom says in its skeleton that it is not going to
2 take any objection to our evidence. However, we hear what BT has said, we hear what the
3 Tribunal has said and we see the sense in timetabling the 1168 and 1169 appeals so that
4 they can take into account whatever the Court of Appeal has to say on the matter of
5 admissibility, so we do not take issue with that.

6 On point 3, it is indeed the consensus that case 1151 cannot be heard in the January slot and
7 we accept for the same reasons as I have just articulated that that extends to the 1168 and
8 1169 appeals.

9 As regards point 4, the issue that has been raised on the scope of Everything Everywhere,
10 the intervention, we say unsurprisingly very firmly that our intervention is entirely
11 legitimate. We note that no application has been made to strike out that intervention, and
12 we also note that it appears to be accepted by both Ofcom and BT that it would be entirely
13 academic to seek to do so, so as far as we are concerned that really is an end to the point
14 unless either BT or Ofcom want to revisit their stance in relation to some sort of strike out
15 application. But it would appear to be a waste of everyone's time to get drawn into that
16 given that the very same points are raised in our own appeal. I think I can say that there are
17 no points which are raised in our intervention which are not canvassed also in our appeal,
18 *mutatis mutandis*.

19 THE CHAIRMAN: Yes, that is Mr. Herberg's point, and I think in the light of that there is no
20 need for us to traverse a point which, as you say, is academic in these particular
21 circumstances, although I think the Tribunal would have considerable sympathy in another
22 case with what Mr. Herberg said.

23 MR. PICKFORD: Well obviously if it were raised we would wish to address it and to meet it, but
24 we do not need to.

25 THE CHAIRMAN: No, we agree it is academic.

26 MR. PICKFORD: Regarding issues on interventions, we certainly do not object to any of the
27 interventions; we do have one small comment to make in relation to them. It is appropriate
28 we would say in this case to distinguish between two different classes of intervener. There
29 are those interveners whose disputes were the subject of the determination by Ofcom, and
30 are now the subject of the appeal before this Tribunal, and taking Everything Everywhere's
31 appeal as an example, those parties would be BT, Vodafone, O2 and Hutchison 3G. There
32 is then a separate class of intervener, namely, Cable & Wireless and Opal and those are
33 parties that are indirectly affected. They are not directly affected in the same way as the

1 first class; they are indirectly affected because they say that the Tribunal's determination
2 may have repercussions for their own arrangements.

3 One then finds oneself in a situation where, taking the 0845 and 0870 appeals together, we
4 have three principal parties, BT, Everything Everywhere and Ofcom. We have three, if I
5 may call them that, first tier interveners, in the form of Vodafone, Hutchison 3G and O2.
6 Then we have the two, if I may call them that, second tier interveners. We say it is very
7 important that the second tier interveners do adopt a proportionate and responsible approach
8 in relation to their interventions and we very much welcome therefore in that regard, the
9 approach that Opal has taken in relation to Everything Everywhere's appeal, because it says
10 quite clearly in para. 6 of its letter of 1st November that it intends to intervene on one only
11 of the grounds of appeal raised by Everything Everywhere, and we commend that approach,
12 we think it is highly disciplined and proportionate of them and we would suggest that that is
13 reflected in the order that the Tribunal makes in relation to their intervention.

14 As regards Cable & Wireless, we equally commend their responsible indication that they do
15 not intend to duplicate anything anyone else does. We note, in fact, that they have not
16 adopted the approach that they previously have adopted in other appeals, which is to
17 combine forces with those other parties that share a similar position. We are not suggesting
18 that the Tribunal makes any order to that effect, but again it would be helpful I think for all
19 parties if a responsible and sensible course was adopted in relation to co-operation to make
20 sure there was no duplication of that sort. That is what we have to say on interventions.

21 On confidentiality it appears to us that no issue actually arises currently. There might have
22 been an issue in relation to H3G but they are not now proposing, as I understand it, to seek
23 to have both in-house counsel and external solicitors in the confidentiality ring, so no point
24 needs to be addressed to this Tribunal on this issue.

25 THE CHAIRMAN: We will see what is said, but that is helpful.

26 MR. PICKFORD: Certainly that was an indication that they expressly gave to us yesterday, and it
27 is on that basis that we prepared for this hearing.

28 Turning over the page to question 6, I think we have effectively already addressed 6A
29 which is we say the January slot is not suitable for any of the cases now. As regards an
30 appropriate timetable it is probably best to canvass the detail of those steps at the end of this
31 hearing. The one point that we do note is that BT has suggested, if I understand correctly,
32 that it should have a global right of reply that allows it to reply both in relation to its
33 intervention in our appeal and also seems to me, as I understand it, that we potentially do
34 not get an ability to respond to whatever they are saying in their statement of intervention in

1 our appeal as well, but it seems to be contemplated that they will have the last word, as it
2 were, as a final reply. We certainly would object if that was the course that was adopted.
3 But that kind of detailed procedural point is probably best left for further discussion
4 between the parties I would suggest.

5 On point 7 we very much align ourselves with Ofcom and indeed, sir, your comments, that
6 our initial preference would be certainly to hear cases 1168 and 1169 first, but we do not
7 have a very strong aversion to the 080 appeal, 1151, also being heard at the same time. We
8 agree with Ofcom we think it will extend the time estimate by one or two days at the most.

9 THE CHAIRMAN: In the light of that I must say it does seem sensible to have all three heard
10 together, particularly given Mr. Read's suggestion that there might loose ends left untied if
11 1151 were heard later.

12 MR. PICKFORD: Well we are happy with that, I certainly did not mean to suggest otherwise.

13 THE CHAIRMAN: No, I am grateful.

14 MR. PICKFORD: Turning to point 8, I think Mr. Herberg has already set out Ofcom's position
15 on that and I do not think there is anything further that we need to say ourselves.

16 THE CHAIRMAN: No, I think that is right.

17 MR. PICKFORD: Again, on the time estimates for the length of hearing, we very much align
18 ourselves with Mr. Herberg, we probably think that it would be sensible to aim for the more
19 generous end in case we cannot be quite as efficient as the parties were in the partial private
20 circuits' case. As I said, if the 1151 case is added that should only extend the time estimate
21 from perhaps 12 days to 14 days. Sir, unless I can be of any further assistance.

22 THE CHAIRMAN: No, thank you very much, Mr. Pickford.

23 PROFESSOR STONEMAN: Just a matter of making life simple, "Everything Everywhere" is a
24 terrible mouthful, do you have an acronym? Can we call you "2E" or something?

25 (Laughter)

26 MR. PICKFORD: "EE" I think would be ----

27 PROFESSOR STONEMAN: It is not a lot easier, is it? (Laughter)

28 MR. PICKFORD: -- an entirely suitable acronym.

29 THE CHAIRMAN: Not E squared then?

30 MR. PICKFORD: We will go with "EE" for the time being, thank you.

31 THE CHAIRMAN: I do not know if the interveners have a particular order, Mr. Ward, do you
32 want to go next.

33 MR. WARD: Simply because I am next along the row, sir, for no better reason than that. I was
34 just going to make very brief submissions on the question of the arrangements for trial.

1 These appeals obviously give rise to very considerable commercial uncertainty for the
2 MNOs, for my client, Vodafone, in particular, and it is anxious just to have these matters all
3 resolved as quickly as possible. Plainly, on the basis of what we have seen and heard the
4 January trial date is not realistic for either 080 or the 0845 cases. We do respectfully urge
5 that the right course is to hear all three cases together. By the time we have an April trial, as
6 you are currently positing, the 080 appeal will be a year old – I believe it was lodged on 6th
7 April. There will obviously be time for consideration after argument, and Vodafone is very
8 anxious to ensure that any loose ends that there may be are tied up as quickly as possible
9 and with the best will in the world, if it is left for Ofcom and possibly further argument
10 between the parties that may take yet further months to achieve. Those are the only points
11 we wish to make.

12 THE CHAIRMAN: I am very grateful, thank you.

13 MR. O'DONOGHUE (No microphone): Sir, I can put everyone in the room out of their misery
14 and disclose who we will intervene in support of in the appeals (Laughter). In 1168 we will
15 support EE (as they are now known) perhaps not on every single ground, but in principle we
16 support them, and it will be no surprise that on 1169 it would be in support of Ofcom, again
17 perhaps not on every single point.

18 Secondly, we would echo Mr. Ward's submissions on issues of delay. In fact the point goes
19 much wider, because as the Tribunal is aware we have two new interveners in these
20 proceedings. There are fixed line operators waiting in the wings to see what will happen.

21 BT, as the Tribunal is probably aware, has issued a replacement NCCN for 080 1007 which,
22 from O2's perspective at least is a clear act of circumvention of the original determination,
23 so there is clearly a much wider picture here and we would reiterate the points on delay

24 Sir, as to the conduct of the hearings, we do agree that as a matter of neatness there is
25 something to commend all three appeals being heard at the same time. We do envisage that
26 if that is not done there could be another outing in front of the Tribunal to tie up loose ends,
27 and that seems to us profoundly unsatisfactory.

28 Finally, on the scope of the interventions, we hear what Mr. Read has to say and, in all
29 fairness without divulging anything confidential, the Tribunal would probably have
30 understood that the cumulative effect of these excessive BT charges is of the order of a nine
31 figure sum. This is not a case where we are here out of academic interest, it is a substantial
32 commercial proposition, and we are conscious of our role not to duplicate, to be
33 proportionate, and it is not a sort of garden variety of case, there are very substantial real
34 implications for O2 and the other MNOs, and we will of course enter our submissions as

1 necessary but they arise in that particular, we say very significant, context, and I will say no
2 more on that. Unless I can assist further, that is O2's position.

3 THE CHAIRMAN: Thank you very much, Mr. O'Donoghue. Mr. Beard?

4 MR. BEARD: I appear for Cable & Wireless in this matter, just a mere marker perhaps in
5 relation to the description provided by Mr. Pickford of the different types of interveners.
6 He described ourselves and Opal as "tier 2" interveners, and we have obviously duly sat far
7 back in the Tribunal to reflect that.

8 It is worth noting, however, that one might anticipate that whilst there is quite a lot at stake
9 potentially for the MNOs who brought the dispute before Ofcom, one would also anticipate
10 that their submissions are likely to be something of a choral work with the lead voice of Mr.
11 Pickford, and the dulcet tones of Messrs. Donoghue and Ward coming in alongside. In that
12 regard Cable & Wireless, and I leave Opal to Miss Demetriou, are in a different position.
13 They are fixed line operators with a different perspective on these matters. There is a very
14 substantial financial interest for them. It is perhaps worth noting that they have introduced
15 ladder pricing in relation to the number ranges concerned, and the MNOs are not paying
16 that ladder pricing. So whilst the MNOs make great play of the fact that there is a
17 financial impact on them, it is equally true in relation to fixed line operators and whilst
18 some different issues may arise in relation to the particular circumstances of Cable &
19 Wireless it should not be underplayed how important the reasoning and out turn of this
20 decision is to them, and they will offer a counterpoint, not a chorus in relation to the two
21 appeals.

22 Of course, they will be conscious not to duplicate but it is important that they are able to put
23 forward material and to be heard properly in relation to both of these appeals. Thank you.

24 THE CHAIRMAN: I am grateful, thank you very much.

25 MISS DEMETRIOU: Sir, on behalf of Opal I endorse the remarks made by Mr. Beard. You will
26 have seen our applications to intervene in both cases. There are no objections from anyone,
27 I do not know if there is anything you wish me to say by way of explanation of our
28 applications, but in the same way as Cable & Wireless are affected Opal too has issued
29 ladder pricing which the MNOs are refusing to pay. Mr. Pickford said that these cases
30 may have repercussions for Opal and Cable & Wireless but in EE's and O2's own
31 correspondence they have acknowledged that in fact these appeals will be determinative of
32 whether or not the ladder pricing will in effect be paid, and be allowed to subsist. So it is
33 not question of repercussions, these appeals will be determinative of our position too.
34 Therefore on those grounds we apply to intervene and, as I say, there have been no

1 objections, so unless there are any questions from the Tribunal that is all I wish to say at this
2 point.

3 THE CHAIRMAN: Thank you very much. Mr. Pike?

4 MR. PIKE: Thank you, sir. Whilst Mr. Beard did not include me in the chorus on this occasion I
5 am very much singing from the same song sheet as Mr. O'Donoghue.

6 MR. BEARD: Sorry!

7 MR. PIKE: No problem. So just to put the Tribunal out of its misery again, we are indeed
8 supporting Ofcom in the BT appeal and supporting EE in the EE appeal.

9 On the point regarding confidentiality Mr. Pickford is right, it does not lie for determination
10 at this time. Thank you.

11 THE CHAIRMAN: Mr. Pike, thank you very much. So, Mr. Read, I do not think you need
12 respond on that. Before we rise, two points. First, having heard all these submissions it
13 does seem to us that there is a general consensus in favour of hearing all three appeals
14 together. Mr. Herberg, I do not know if you want to say anything more about that? I
15 suspect not, but if you wish to?

16 MR. HERBERG: No, I am content with that.

17 THE CHAIRMAN: We will rise now to consider what to do, but it might be helpful if, before we
18 do so, we could take as read that both Ofcom and BT have suggested that the April date is
19 satisfactory, no one else has said it is unsatisfactory, can we proceed on the basis that the
20 weeks in April are the alternative dates to the January dates for these appeals?

21 MR. PIKE: Sir, apologies, we are still trying to check those dates ourselves. We will try to check
22 them in the break but we are still waiting to hear.

23 THE CHAIRMAN: That is helpful.

24 MR. BEARD: I recognise the weight that is accorded to the convenience of interveners in
25 relation to the setting of matters, but I nonetheless rise just to say that there are certain
26 difficulties in relation to the week of 11th April in particular for Cable & Wireless and their
27 representatives. However, recognising the nature of our position it may be possible that
28 certain adjustments to the trial timetable could be made, depending on the length of time
29 that we are talking about there, such that submissions could be accommodated in any event.

30 THE CHAIRMAN: I am grateful. Are there any other points to be made on April dates? Very
31 well, we will rise now to consider what to do, but it would be helpful, I think, if the parties
32 could use the time to work out what a trial timetable might look like going to a hearing
33 commencing on 4th April. Thank you very much.

34 (Short break)

1 THE CHAIRMAN: We are grateful for the parties' submissions, and we have reached the
2 following conclusions as to how these cases are to be managed.

3 First, case 1151 and its trial date in January should be vacated and all three cases, 1151,
4 1168 and 1169 should be heard together. The date for the trial of all three cases will be
5 from 4th April to 20th April 2011. We have heard what was said by Mr. Beard about the
6 convenience of counsel, but given the large number of parties we feel it appropriate to fix a
7 date without convenience of the advocates in this matter.

8 With regard to hearing length we trust that those dates will be sufficient but, as Mr. Read
9 knows from the PPC case, the Tribunal will be prepared to sit flexible hours if it should
10 appear that we are falling behind at any time during the course of the hearing.

11 The applications of all interveners to intervene in the actions are permitted. We will say
12 nothing more by way of order in terms of how the interveners should intervene. We believe
13 that the rules and the practice of this Tribunal are clear and we are confident that all the
14 interveners will respect and abide by those rules and do not see the need to make any
15 particular order at this stage.

16 The confidentiality ring in case 1151 should be extended to deal with all three cases. We
17 trust the parties will be able to reach agreement as to the formulation of a proposed order
18 and perhaps such an order could be submitted to the Tribunal for its approval or comments
19 by close of business this Friday.

20 In terms of timetable, I appreciate that 15 minutes is not very long to deal with such matters,
21 and perhaps the best way forward there, rather than having a protracted debate now ---- I
22 am so sorry, Mr. Herberg, you were going to put me out of my misery.

23 MR. HERBERG: Sir, I was going to. The parties have got together. Fifteen minutes may not be
24 long but it seems to have been long enough on this occasion for a measure of agreement to
25 have broken out as to a timetable leading up to the hearing. Perhaps I can put it to you for
26 the Tribunal's consideration.

27 THE CHAIRMAN: Please do, Mr. Herberg.

28 MR. HERBERG: What is proposed is that Ofcom's evidence and defence in cases 1168 and 1169
29 be provided by 7th January next year. Then statements of intervention, again in appeals
30 1168 and 1169, be provided by 26th January. Then BT and EE's consolidated reply – in
31 other words, their reply in all three cases – be provided by 22nd February. That includes
32 evidence in reply and also of course any statements in reply.

33 THE CHAIRMAN: I understand.

1 MR. HERBERG: Following that, skeletons from the two appellants, again BT and EE, be filed
2 by 1st March. That gives a short period for them to respond to each other's appeals. Then
3 Ofcom's skeleton by 15th March, to be followed by the non-appellant interveners – in other
4 words, all the interveners apart from BT and EE in each other's case – to provide skeletons
5 by 22nd March. That will mean that all the skeletons will then be with the Tribunal, we
6 hope, a reasonable distance before the 4th April commencement.
7 Those were the directions that I think all the parties are content with. What we have not
8 sought to do at this stage was to analyse matters such as orders of speeches or precise orders
9 at the hearing, and it may well be that in due course further consideration will have to be
10 given to that or agreement can prevail. We thought at this stage that at least lays down a
11 timetable which seemed to us to be manageable and sensible.

12 THE CHAIRMAN: We are very grateful to the parties for using the time so efficiently. That
13 seems extremely sensible and we will make an order to that effect. Obviously all orders
14 made in case 1151 regarding procedure are vacated.

15 There is one further point that we would put down by way of a marker. Clearly we do not
16 know what the Court of Appeal will decide in December, but it seems to us that there may
17 be a need for a further case management conference depending on what the Court of Appeal
18 decides. That would probably best be heard at some point in January. It may be, depending
19 on what is said there, that certain elements of the procedure will have to be revisited then. It
20 seems to us that there is no point in trying to anticipate what may happen. If there is a need
21 for such a CMC it is obviously important to raise that matter as soon as possible late in
22 December or early in January, so that the matter can be dealt with as soon as possible so as
23 not to unduly inhibit or disturb the procedural timetable that you have laid down.

24 Is there anything else that we ought to be making a ruling on. Mr. Beard?

25 MR. BEARD: It may be a minor point, but given that Cable & Wireless will be an intervener in
26 1168 and 1169, under the normal operation of the Rules it would receive all the documents
27 that were lodged with the Registrar in relation to those matters, and obviously members of
28 the confidentiality ring will get the confidential versions. If all three appeals are going to be
29 heard together, however, it would seem sensible, unless there are specific objections, that
30 the interveners should have sight at least of the 080 documents in case there are matters that
31 are going to be cross-referred to at any point during the course of any hearing.
32 I thought it was sensible, whilst everyone is gathered here, just to raise that because it is the
33 sort of thing that might be easily resolvable in the circumstances.

1 THE CHAIRMAN: Before anyone else rises, our thinking was very much that it would be one
2 confidentiality ring for all three hearings. It may be that there are particular instances where
3 there are special points of concern, and we would expect the parties to deal with that
4 sensibly. The starting point in our view is that it is one ring applicable to all confidential
5 documents in all three cases.

6 MR. BEARD: Yes, I am sorry, it is a slightly prior point. The only documents that go to people
7 within the confidentiality ring are the ones that are deemed relevant in accordance with Rule
8 16. Of course, if you are only an intervener in two cases then the documents you would
9 receive under the confidentiality ring would only be the documents under 1168 and 1169. It
10 might be sensible, therefore, for the Tribunal to make provision that even though formally
11 Cable & Wireless are not an intervener in 1151, they should actually receive the documents
12 in the 080 appeal, because presumably there will be consolidated bundles by the time of the
13 hearing.

14 THE CHAIRMAN: I am sorry, that is exactly what I meant, the fact that we are hearing these
15 three appeals together implies a degree of inter-relationship which I think makes that order
16 entirely appropriate. So, yes, we are of the view that interveners in two out of three should
17 be, let us say, deemed interveners in all three cases.

18 MR. BEARD: Yes, as long as that matter is made clear in the order because the confidentiality
19 ring order, itself, will not do that.

20 THE CHAIRMAN: We will make sure that the order reflects that.

21 MR. BEARD: Thank you.

22 THE CHAIRMAN: I am very grateful to all the parties for dealing with the matter so efficiently.
23 Thank you very much.

24 _____