

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

IN THE COMPETITION
APPEAL TRIBUNAL

Case No. 1152/8/3/10 (IR)

Victoria House,
Bloomsbury Place,
London WC1A 2EB

27th April 2010

Before:
THE HON. MR JUSTICE GERALD BARLING
(President)

Sitting as a Tribunal in England and Wales

BETWEEN:

BRITISH SKY BROADCASTING LIMITED

Proposed Appellant

- v -

OFFICE OF COMMUNICATIONS

Proposed Respondent

- supported by

BRITISH TELECOMMUNICATIONS PLC
TOP UP TV EUROPE LIMITED
VIRGIN MEDIA, INC

Proposed Interveners

—————
Transcribed from tape by Beverley F. Nunnery & Co.
Official Shorthand Writers and Tape Transcribers
Quality House, Quality Court, Chancery Lane, London WC2A 1HP
Tel: 020 7831 5627 Fax: 020 7831 7737
(info@beverleynunnery.com)
—————

HEARING

APPLICATION FOR INTERIM RELIEF

APPEARANCES

Mr. James Flynn QC and Mr. Meredith Pickford (instructed by Herbert Smith LLP) appeared for the Proposed Appellant.

Miss Dinah Rose QC and Mr. Josh Holmes and Mr. Ben Lask (instructed by the Office of Communications) appeared for the Proposed Respondent.

Mr. Mark Hoskins QC and Mr. Gerard Rothschild (instructed by Ashurst LLP) appeared for the Proposed Interveners Virgin Media.

Mr. David Anderson QC and Miss Sarah Ford and Miss Sarah Love (instructed by BT Legal) appeared for the Proposed Interveners British Telecommunications PLC.

Mr. Daniel Beard (instructed by Milbank, Tweed, Hadley & McCloy LLP) appeared for the Proposed Intervener Top Up TV.

Mr. Keith Jones (of Baker McKenzie) appeared for the Proposed Intervener Orange Personal Communications Services Limited.

Ms Maya Lester (instructed by DLA Piper UK LLP) appeared for the Proposed Intervener Football Association Premier League.

1 THE PRESIDENT: Good morning. I have some papers here. Who is next up? Miss Rose, you
2 were going to say a few words in response to Miss Lester? I do not know whether you still
3 want to?

4 MISS ROSE: Yes. There are just two very short points to make. The first is that whatever
5 concerns the Premier League might have about the effect of this decision on the value of the
6 football rights, they cannot be described as urgent because the auction for the football rights
7 for the next three seasons has taken place and there is not due to be another one until early
8 2012. So, therefore, we say that the concerns of the Premier League are irrelevant to any
9 question of interim relief since the position will have crystallised one way or the other
10 before the auction for the next football rights takes place.

11 The only other point I wanted to make was that the question of the impact of Ofcom's
12 decision on the value of sports rights was considered very carefully by Ofcom in the
13 statement. Can I just give you some paragraph references (we do not need to turn them up)?
14 Paragraphs 1.11 (second bullet), 1.54, and then in Section 11 paragraphs 11.137 to 11.186
15 contains a detailed analysis of the question.

16 The other thing I wanted to say is that we have received something of a flood of paper this
17 morning from Sky, including some more factual data on which we obviously have not had
18 an opportunity to comment, and a note headed 'Issue arising from licence conditions and
19 relevant parts of Ofcom's pay TV statement'. This is a note which Sky sent us. They are
20 seeking a meeting to clarify the content of the minimum qualifying criteria. Now, that
21 meeting should have taken place last week, but was delayed because of this hearing. It was
22 then rearranged for today, but for obvious reasons has had to be put off. I do not know what
23 Sky are intending to say about this note, but this is an issue which is currently under
24 discussion between Sky and Ofcom.

25 So far as the new factual data they have just produced - this is the sheet headed 'Digital
26 television update - fourth quarter 2009' ----

27 THE PRESIDENT: I do not think I have got that.

28 MISS ROSE: Can I ask for copies to be handed up? (Same handed) This is a survey on the take-
29 up of digital television. What you can see is that we are in a situation where the take-up of
30 digital television is rapidly accelerating and where the window is closing. So, we see that as
31 at the end of 2009 the take-up of digital television was 91.4 percent, up by almost two
32 points in the quarter. Additional sets are also being converted - almost 69 percent of
33 secondary television sets converted. Then, looking at other findings, the first bullet - sales
34 of DTT enabled equipment reached 4.7 million units in the fourth quarter of 2009, the

1 highest quarterly sales so far. Then, the third bullet - number of homes relying on DTT as
2 their sole means of digital TV reception reached 10.1 million, according to survey results in
3 the fourth quarter of 2009 - almost 40 percent of all homes, up by 1.6 percentage points on
4 the third quarter of 2009.

5 Now, those homes at present have no option for viewing premium sports content, but if it
6 were possible to launch the premium sports channels on digital terrestrial television they
7 would have access to it immediately.

8 THE PRESIDENT: That is the 10 million.

9 MISS ROSE: That is the 10 million who rely on DTT as their sole means of digital TV reception.
10 You see the second to last bullet on that page - 9.2 million receive satellite pay TV services.
11 12.4 percent of homes have cable TV. So, you can see from that what a significant
12 opportunity the rapid and continuing expansion of DTT represents for premium pay TV
13 services and how important it is that that market should be allowed to develop now, at the
14 moment when it is coming to maturity.

15 That is all I wanted to say.

16 THE PRESIDENT: Thank you very much. Mr. Flynn?

17 MR. FLYNN: Sir, I do not know what Montaigne would say. We have handed up a note, which I
18 hope you have, which is a compilation of what was available yesterday and what has been
19 knocked up overnight, as it were. However, we have tried to respond, as best we can, to the
20 principal points that are being put to us in this document which I am not going to attempt to
21 read into the record. Perhaps I could first explain that, again in the time available and given
22 the complexities of the confidentiality ring, this is a version for the ring only. We have
23 sought, wherever possible, to identify confidential information and whose information it is,
24 but I cannot give any guarantee that that will have been done fully correctly. We are
25 suggesting to Ofcom and to the interveners that they indicate to Herbert Smith after the
26 hearing which bits are regarded by them – I should say also that sharper ears than mine
27 detected a certain release of confidentiality, as it were, yesterday by one or two of the
28 interveners, so they may have taken a different view on some of the markings in their
29 documents, but that is really for their judgment rather than ours. What I hope to do is to
30 avoid saying anything confidential until we get towards the end when I will have to respond
31 to some of the things said in closed session yesterday and in relation to the undertakings.
32 That is my proposed course of action.

1 The headings in this document go to the test for interim relief, the impact on Sky if no relief
2 is given, the impact on competition and the specific position of the interveners if relief is
3 given, and then some words about the undertakings. That is what I am intending to cover.
4 The first point goes to the test for interim relief. I am not going to weary you, Sir, with a
5 full recitation of all this, but we do say that Rule 61 says what it says and should be
6 interpreted in the light of what it says. We say that Ofcom's construction of this Rule is
7 simply misconceived. There is a difference in the language between what the Tribunal can
8 do under Rule 61(1), which includes the power to suspend, and Rule 61(2), which includes
9 the power to give directions in urgent cases. All of those are aspects of the power which is
10 set out in the heading to the Rule, the power to make interim orders and to take interim
11 measures.

12 Then we set out some points on the construction of the Rule. Ofcom's construction ignores
13 specific wording within the Rule, and it conflates, we say, the concept of urgency with that
14 of preventing serious and irreparable harm, when, if you look at Rule 61 as a whole,
15 urgency is actually a separate context, which may arise either in the serious and irreparable
16 harm context or when protecting the public interest is at stake. That is expressed as an
17 alternative.

18 We also address in so far as we can the point that Mr. Beard sought to make on Rule 61 and
19 said that our application was within Rule 61(2).

20 In the end, Sir, for reasons which we will come on to, none of this may matter in that we say
21 however you put the Rule, and whether you are taken to the European authorities or whether
22 you adopt a more flexible, or less flexible, domestic approach then we have made out the
23 necessary case. Let me take you through our points on that.

24 We say, secondly, and I am at p.3 of the note, that there is no basis for saying that you are
25 constrained to adopt construction which is consistent with the practice of the General Court,
26 and there is absolutely no legal constraint on you to do that. We are not in a EU context of
27 any kind, and you are not obliged to follow their practice.

28 We do not say that Sky is entitled to relief or there is a presumption in favour. What we
29 say, observing what has happened, is that the Tribunal's general practice has been to grant it
30 when it has been a matter of dispute and when it has not been a matter of consent between
31 the party and the relevant authority.

32 Then we note some of the points that have been taken against us by reference to either the
33 practice in the general courts judicial review jurisdiction or by cases in the Administrative
34 Court here, including BT's reference to the *Imperial Tobacco* case yesterday.

1 Now, obviously, those cases are arising in quite different contexts. You have your own
2 rules. They have their own rules. Here you are not in a judicial review context. In the
3 context of Sky's appeal, this is a full appeal on the merits. We do insist on the fact - and I
4 will come back to that -- We do insist on the fact that this appeal is not against a finding of
5 law-breaking, of infringement (which it is in the European context). We are not seeking to
6 disturb the benefit of a measure applying to third parties, which is the *Monsanto*
7 jurisdiction. It is not a question of seeking to overturn legislation on grounds of
8 compatibility with community law or any other matter, which was the *Imperial Tobacco*
9 case.

10 What we are concerned with here - and I do not need to hammer home what Sky thinks
11 about this - is definitely a novel use of a power which has dramatic effects. It introduces
12 full-scale economic regulation which has a profound effect on Sky's business and
13 effectively turned it into a regulated utility. We quote one of the interveners, saying
14 precisely that to the press, quoted the day the hearing began:

15 "Sky is now a regulated business. Jeremy Darroch and Andrew Griffiths are
16 basically now a regulated management team".

17 They can enjoy the taunts, but we say that is a matter that the Tribunal should be able to
18 scrutinise very carefully before it becomes a *fait accompli*.

19 If we run through some of the points which have been made against us, Ofcom urged on
20 you the submission that there should be a presumption against the grant of interim relief
21 because they carried out a thorough painstaking analysis, and that it had taken what it
22 believed to be - and no doubt it does - a necessary and a proportionate decision. Then, they
23 say that the Tribunal is at a significant disadvantage in assessing these issues. Now, we say
24 that it would be pretty surprising if they came to the court saying anything other than that
25 they had done a very careful job, but you do have to recognise that the purpose of appeal is
26 to enable that job to be scrutinised and whether or not Ofcom is correct is not a matter
27 which the Tribunal should be presuming at this stage. The purpose of interim relief is
28 precisely to hold the ring to decide who is right. Since, as I said (I think probably on the
29 first day), while disobliging things have been said, it is not seriously contended that we do
30 not meet the arguable case test. Then the Tribunal is right and should move on to consider
31 the different impacts on Sky on the one hand, and on competition, and on consumers in the
32 other.

33 One submission I must deal with - and Ofcom were on notice that we intended to put in this
34 further authority and the purpose for which it was put in - is the *Ashworth Hospital*

1 *Authority* case. You see, sir, the quotation that we set out in our note at para. 8.1, which
2 comes from para. 42 of that judgment. There it is quite clear that Lord Justice Dyson is
3 saying, as a matter of general principle, that the purpose of a stay in judicial review is clear -
4 it is to suspend the proceedings that are under challenge pending the determination of the
5 challenge; it preserves the status quo; it will aid the judicial review process and make it
6 more effective, and so forth. I will not read it all on to the record.

7 “However, the Administrative Court routinely grants a stay to prevent the
8 implementation of a decision that has been made, but not yet carried into effect, or
9 fully carried into effect”.

10 Then he gives the example of planning permission which is objected to.

11 Miss Rose, yesterday, said this case was not considering the issue of whether the regulatory
12 decision is included in the status quo. What the court was really concerned with was
13 whether it had jurisdiction to grant a stay in relation to a decision that had actually been
14 implemented. It is true that is the context in which the case arose because what this is about
15 is a Tribunal’s order for the discharge of a mental patient. However, the court was
16 concerned with the question whether there was any point or jurisdiction in staying the order
17 if the patient had either, despite the discharge, remained in the hospital or (in the example
18 given in argument) had even left it -- Did the court have the jurisdiction? The court was
19 dealing with first principles in working out whether it had such a jurisdiction.

20 If I just briefly show you that, sir? I do not think these pages are paginated, but if you look
21 at para. 32 within the judgment you will see a heading ‘Is here a jurisdiction to grant a
22 stay?’ Lord Justice Dyson recites the facts and the power, and the competing arguments
23 from Mr. Walker at para. 34. He quotes authority at para. 35. “We have been referred to
24 two authorities --“ I do not need to quote Mr. Walker’s argument at para. 34. He says at
25 para. 35,

26 “We have been referred to two authorities where the scope of the power to order a
27 stay is discussed.”

28 One of those is the *Avon* case in the Court of Appeal. He refers to that and he contrasts that
29 then with a Privy Council case at para. 36. At para. 38 he says,

30 “It will be seen that there is a conflict between these two authorities as to whether
31 the court has power to grant a stay of administrative decisions. This court is bound
32 to follow *Avon*, but, in any event, the present case is not concerned with the
33 decision of an administrative body, but that of a court”.

1 Then you see the argument by Mr. Fleming for the Authority who are saying that the
2 Tribunal has no jurisdiction to grant a stay if the order for discharge has been implemented.
3 Lord Justice Dyson addresses that question. "So does the court have jurisdiction?" He does
4 not see a difference between the case where the patient has voluntarily stayed in the hospital
5 or where the patient has left. He points to the rules. Then he makes the statement that we
6 rely on in para. 42 before going on to apply it after that to the specific context of the mental
7 health legislation.

8 So, we say it is perfectly clear that what he is doing is setting out a general principle there
9 that is to apply. That is what the purpose of a stay in judicial review proceedings is. It is to
10 suspend the proceedings under challenge pending the determination of that challenge and it
11 preserves the status quo and has the benefits that he there identifies.

12 We say it would be strange, actually, if, in the present context, the decision under challenge
13 was to be treated as part of the status quo. This really would deprive the substantive appeal
14 of its effectiveness - all the more so, we say, when in this case Ofcom was unwilling to
15 engage with us on interim relief before the decision was taken, saying that it was premature,
16 and that we might indeed like the decision. We say it would be pretty ironic if it was
17 premature prior to the decision and then too late immediately after it, because the decision
18 then became part of the status quo. That would be unfair and it is also, we say, confused.
19 Importance was attached to the status quo by the Tribunal in the *Genzyme* case, and I do not
20 need to go back over that. You will remember that on the one hand the President of the
21 Tribunal in that case, and it is set out in 8.4 of my note, in relation to the suggestion that
22 *Genzyme* should be required to supply new third parties, said, "I am not prepared to make
23 an order regarding supplies to third parties, that goes beyond the preservation of the status
24 quo". Contrast that with his statement that the Tribunal was not prepared to run the risk that
25 Healthcare at Home might be constrained to withdraw from its activities. The supply by
26 *Genzyme* to Healthcare at Home was part of the status quo. If the suspension had had the
27 effect of forcing Healthcare at Home out of the market that would have undermined the
28 utility of the Regulator's decision which we fully agree is also part of the process with
29 which you are engaged. Preserving the status quo does require both preserving the utility of
30 the appeal, and that, itself, requires preserving the utility of the decision.

31 The status quo point, we say, is of particular importance when you are assessing the
32 interveners' evidence in this case. The current state of the market, the status quo, we say
33 the suggestions they are making that the market will be fundamentally different next year

1 from this year are not credible, they are not borne out by the evidence, and we will go over
2 some of that.

3 We do make the point that this decision has been three years in the gestation, and it will
4 now require a relatively short period of time. It is a relatively short period of time in the
5 scheme of things in which that should be scrutinised.

6 Sir, we talk about *Monsanto* in point 9 of the note. I do not think I need to go over that in
7 any great detail. That case, which was relied on quite heavily at one point, was an
8 injunction to prevent a third party from trading. What *Monsanto* was seeking was the
9 suspension of an authorisation of a third party with which it had no relationship to trade in a
10 particular product. We say in 9.2 that in this case we are not in any way seeking to prevent
11 any of the interveners in this case, or anyone else, from trading, and we do not seek to
12 invoke the jurisdiction of the Tribunal to place any restrictions on third parties at all. What
13 we are trying to do is to preserve Sky's competitive freedom, subject to the significant
14 undertakings which it is willing to offer, should the Tribunal consider those necessary.

15 Reference was also made to *Microsoft* – para.10 of the note. That, of course, is a General
16 Court case and it also turns on some pretty specific facts about the nature of the abuse and
17 the products which were at issue in that case. Firstly, and I have said it before, and I will try
18 not to say it again, that was an infringement case. Microsoft was found to have broken the
19 law and that it should stop doing so. We do say that is a big difference. Mr. Anderson
20 yesterday suggested that the context of a decision under what is now Article 102 was
21 perhaps more serious than the current decision, because it would involve the imposition of a
22 penalty, as the *Microsoft* certainly did, and that it would potentially expose the addressee of
23 the decision to damages actions. We say that is a fallacious argument.

24 It conflates the consequences of finding the breach, which are possible fines and potential
25 damages actions with the conduct itself. In fact, if there is an appeal of the infringement
26 decision the fine will not have to be paid and damages actions are likely to be stayed. The
27 real question is what happens in the interim period.

28 Here you have a case where the conduct is not deemed to be so serious as to be a breach of
29 the law, but we do say that the effect of the decision on Sky is every bit serious as to be a
30 breach of the law, but we do say that the effect of the decision on Sky is every bit as serious
31 as an infringement decision, and it is essentially a confiscation of property rights. It is an
32 interference with Sky's ability to deal with its valuable assets as it chooses, subject to
33 compliance with law.

1 Lastly on *Microsoft*, I think, *Microsoft* would have been a very different case, and it is clear
2 from the judgment that it would have been decided differently, and I well remember the
3 hearing on this issue. If it had been thought either that Microsoft, in effect, had to give
4 away its programmes by giving the inter-operability information, it would have allowed the
5 producers of computing work group servers effectively to see inside the black box and work
6 out how it worked, the order would have been very different. The court was satisfied that
7 simply by giving the inter-operability information the computing working group servers
8 people would not have access to that code. Here the Crown jewels are being required to be
9 made available to rivals.

10 We say that the intellectual property cases in Community law are actually the closest
11 analogy supporting the grant of interim relief here, and we point to *IMS* and the *Magill*
12 case, and note two things: firstly, that the court in *Magill* was influenced by the fact that the
13 Commission had adopted a decision which raised some delicate questions about the scope
14 of Article 86, as it then was in a previous life. That is a similar consideration here. We also
15 say in relation to our argument about how s.316 should be applied, we do point to the fact
16 that internal thinking at a senior level within Ofcom took the same approach. It is said
17 against us that that never became a policy, but we say, nevertheless it is a serious indication
18 that what we have to say about it should have some resonance.

19 A lot has been said about financial harm, para.11 of the note. We say taking the European
20 cases as high as you like, irreparable financial loss is not totally irrelevant, but it may be
21 insufficient in itself without something else, such as risk of the change to competitive
22 structure which cannot be reversed. You see that in *IMS*. We do say that in this case the
23 necessary irreversible change in the competitive structure is found and Sky's evidence on
24 that point is persuasive.

25 We could go on about this. You note yourself, Sir, that the *IMS* judgment was somewhat
26 confused on the position of irreparable financial harm. I merely pointed out on the first day
27 that he said that the stated rationale for that was that normally it can be compensated in
28 damages. Mr. Hoskins then got up and read the rest of the paragraphs. I know what they
29 say. The judge says he cannot determine at an interim level whether *IMS* could get relief in
30 Germany, although he was pretty sure they could not get damages from the Commission,
31 but they were going to survive until trial of the action. I know what he says. I note also that
32 he goes on to say that *IMS* could, according to the Commission, include financial guarantees
33 in its licences, so minimising or reducing the risk of irreparable damage. We point to other
34 commentators saying that the distinction between, as it were, pure financial damage and

1 other harm to competition is a somewhat illogical matter. In any event, we say there is no
2 good reason why irreparable financial harm should not be a good basis or a serious factor to
3 be taken into account for the grant of interim relief, and that would be consistent with the
4 English law position.

5 I have two more points on the test, on the considerations that should apply and which you
6 weigh in your mind, sir. A crucial one is that the interests of specific competitors cannot be
7 taken as a proxy for the public interest. IMS notes that at those paragraphs to which we
8 refer. There are a large number of potential suppliers of the relevant product. The particular
9 circumstances of any individual third party, particularly, as we have already said, where
10 they are not already receiving supplies and so, not part of the status quo now - are
11 essentially irrelevant. I will not say much more of what is in para. 13. You should not be
12 placing too much weight on certain of the evidence. It is a very different position from that
13 of Health Care at Home in the *Genzyme* case, for the reasons I have given.

14 Lastly on this aspect, the imposition of major changes to business operations along with the
15 risk of being unable to re-establish the position if the appeal should succeed is recognised
16 by the authorities, including *Genzyme*, as giving rise to a risk of serious irreparable damage
17 sufficient to ground a claim for interim relief. Ofcom, I think, sought to persuade you that it
18 would have to be proved to a certainty. For it to be irreparable you had to prove that it
19 could not be restored and that difficulty or risk was not sufficient. We point out that the
20 Tribunal in *Genzyme* expressly says that it is true that such changes could perhaps be
21 unscrambled in the event that *Genzyme* were successful (para. 91). What is required is that
22 there is a risk that they could not. We say that that risk is a strong one. Sky wishes to
23 determine its own commercial policy and it certainly does not wish to wholesale to all
24 comers.

25 The next paragraph, para. 15, looks a bit strident because it is all underlined. I think that is
26 probably just a formatting error. I can read it with the volume turned down a bit. It is
27 striking, we say, that Ofcom is saying to the Tribunal that it can adopt a decision of this type
28 and of this magnitude and that the only basis on which that decision should be suspended is
29 if the effect of the decision is potentially to drive the principal subject of the decision out of
30 business in the interim period because you cannot second-guess their determinations. We
31 say that is a pretty high way of putting the case, and that you are not constrained to any such
32 approach. I think it is clear - and the Tribunal's guidance says so anyway - that the rules
33 should be interpreted with sufficient flexibility to do justice in a particular case. The
34 suggestion that I think was coming through yesterday was that you either have to show an

1 overwhelming case on the merits or an imminent demise. We say that is just too
2 heightened. If you have got an arguable case and urgency to the extent that it is relevant
3 under 61(3), then you are entitled to take an overall assessment of the position, the impact
4 on the applicant if you do not grant the leave, and the impact on competition if you do.
5 So, with that, sir, I turn to the impact on Sky if no relief is given. Sir, I am at para. 16 of
6 the note.

7 We do say that the way Ofcom has put this case in this hearing shows why close scrutiny of
8 the decision is needed and that it has not been an even-handed approach. Sky, in my
9 submission, is far better placed to determine what the effect on its business will be of the
10 Ofcom decision. Yet, Sky's evidence has been treated exceptionally dismissively, whilst at
11 the same time the no more authoritative views of both persons within Ofcom and of the
12 interveners have been simply taken as face value and gospel. I lost count of the number of
13 times - and I have not been over the transcript to find out - that Miss Rose said that Sky had
14 no evidence in support of its points when it relied on the evidence of Mr. Darcey. It seemed
15 that Mr. Darcey's evidence was not evidence unless it was underpinned by evidence. Mr.
16 Darcey is the Chief Operating Officer of Sky. He knows his onions. In a case like this
17 where you are dealing with prognostications about the future, it is hardly surprising that, in
18 places, he has to rely on his genuine and his honestly-held views, as to what is likely to be
19 happening. You just cannot do anything else. In our submission the views that Ofcom
20 have about the future are no more weighty, and are just as speculative, if he is speculating.
21 Everyone is looking into an uncertain future and saying, "How is this going to play out?"
22 Our own view is that in certain aspects of this, Ofcom is unduly sanguine.

23 The harm which Sky anticipates is set out under the various categories with which you are
24 now pretty familiar, sir, the first one being that implementation of the wholesale must-offer
25 will lead to a significant change in Sky's business operations which it will be very difficult
26 to unscramble and will lead to irretrievable damage to its negotiating position, so
27 formulated if, if that is satisfied on the evidence, that is a valid basis for granting interim
28 relief under any of the tests that have been put forward to you.

29 I have already said that it does not avail Ofcom to say, "Oh, well, Mr. Darcey only says it
30 will be difficult. It will not be impossible". What both Mr. Darcey and Mr. McWilliam
31 make quite clear is that Sky faces very real risks and considers that they are likely to lead to
32 an irreversible alteration to its bargaining position and its commercial position once the
33 wholesale must-offer is in place. Mr. Darcey says that his views are informed by the fall-
34 out from the dispute with Virgin. That relates to just one retailer and only to basic channels.

1 People said, "Oh, Sky gloried in it. Sky put out adverts saying, 'We're having a
2 magnificent bust-up with Virgin now that these fabulous channels ---'" I think Miss Rose
3 said, thank God, she could not see them (which we might share) . But, they are now
4 available on Sky.

5 Sky, of course, tries to mitigate the problem and address its customers in such a period as
6 best it can. But, that does not undermine the serious adverse effects on its reputation which
7 arose then, and, therefore, what Sky believes would be even more serious, if it were to arise
8 again, particularly when what would be at issue would be the removal of premium channels
9 and from potentially many retailers. We say that this is about reputation and not simply
10 about customer numbers. Of course, Sky did well in attracting new customers in the
11 period. But, Sky is also concerned about how it is perceived not just by consumers, but by
12 consumer groups - reliance was placed on the material from Consumer Focus (which was
13 handed up to you, I think, on the first day) - politicians, industry, commentators and so
14 forth. This has the ability to create serious long-term effects which should not be under-
15 estimated. We are not saying that if there were to be a dispute with another retailer that at
16 that point the other retailer would not be harmed either. The point is - and the thing to focus
17 on - is the harm to Sky. What Sky says about it - because that is what affects Sky's
18 incentives and how it would expect to behave - and what both Mr. Darcey and Mr.
19 McWilliam quite clearly say - is that they would not wish to repeat the Virgin incident.
20 They learnt a lesson from that. We say that Ofcom just cannot challenge the truth of that
21 view or genuinely held position, or fasten on the words 'would not wish' which were not
22 (sort of) carefully crafted in the small hours by leading counsel who actually had, I am
23 ashamed to say, nothing to do with the witness statement at all. What he says is, "We
24 would not wish to repeat it". I do not think you should read that as, "We would not wish
25 to", but as, "We are perfectly prepared to, should we need to". Mr. Beard's reciting of
26 tabloid chaff about Sky being a gorilla or bombing people's villages does not help you put a
27 spin on those words either.

28 Multiple retailers as a result of the wholesale must-offer obligation. When on her feet Miss
29 Rose said a number of times that Sky had never expressed a concern that the wholesale
30 must-offer would have allowed it to sell to a lot of people, which would exacerbate the
31 adverse effects of cessation. That just is not right. Sky's evidence is clear on that. I will be
32 coming back to those. The suggestion that Sky could simply blame the regulator, I think, is
33 a suggestion that consumers are rather more sophisticated than Sky believes. The consumer
34 simply says, "Look, I have had these channels. They have now been taken away from us. I

1 am going to blame someone. I am cross about that”, and when he rings the retailer, they are
2 likely to say, “Well, sorry. Nothing we can do about it. It is a problem with Sky”.

3 THE PRESIDENT: Mr. Flynn, just thinking aloud, how would it pan out -- If interim relief were
4 granted with your undertakings, and contrary to the suggestions of the interveners and
5 Ofcom you have reached some agreement with other people, having negotiated in good
6 faith, but then won the appeal, would you be in a similar position then in terms of having
7 effectively wholesaled to a few people? How would that be different - other than
8 presumably the price? The price would be different, one assumes.

9 MR. FLYNN: When you say, “Would it be different?” Would we be any more willing to
10 withdraw?

11 THE PRESIDENT: Yes.

12 MR. FLYNN: No. That is the point of the evidence. Sky simply would not want to place the
13 flack -- the fall-out from ----

14 THE PRESIDENT: You would have the consolation - although you have won your appeal - that
15 you have a better price in place.

16 MR. FLYNN: We would have the possibility to re-negotiate, would we not? It could be price. It
17 could potentially, in some cases, and depending on who it is, move to a platform access
18 deal. What Sky would not want to do is to take the channels away from those consumers
19 and face the backlash. (After a pause): Your hypothesis is that we might give the
20 undertakings but we might also enter into other deals. Of course, those would be deals with
21 people whom Sky had chosen to contract with -- had satisfied itself as to security concerns,
22 as to actually an ability to handle the channels appropriately from their technical and
23 marketing perspective and so forth. So, that would be a relationship that Sky would hope to
24 be comfortable with. It is not wholesaling to all-comers at a particular price and on ‘one
25 size fits all terms’, if you like. So, what we say about withdrawal certainly goes to anyone
26 else that we might enter into a deal with in the interim.

27 If there is suspension, say, on the terms of the undertakings, of course, Sky would be free in
28 relation to anyone else who approaches them to enter into a platform access self-retail
29 arrangement. That could be a matter of discussion, but if that were not available and a
30 sufficiently – I say “attractive”, I mean satisfying the sort of criteria I have just sought –
31 attractive proposition were available then Sky might well enter into a wholesale deal.

32 THE PRESIDENT: You mean under the undertakings – I had better not say what they are.

1 MR. FLYNN: The first undertaking would apply. If we enter into a wholesale deal then that is
2 not confidential, I think; if we enter into a wholesale deal and we are wrong then there will
3 be compensation in relation to price.

4 What is being said about it is, "How can you be concerned? Because you have expressed a
5 willingness to wholesale how can Sky be concerned about being obliged to do so?" I think
6 you probably have the points on that. We say that is fundamentally wrong. We would
7 prefer ideally to self-retail, because Sky thinks that it is actually the best at securing and
8 retaining customers on whatever platform the channels are supplied, and its poor experience
9 with Virgin Media is an example, as to which Mr. Darcey points in his witness statement. If
10 a retail deal is not available Sky has always said that it would be willing to consider a
11 wholesale arrangement.

12 We do ask you to bear in mind throughout this that is, of course, a major part of Sky's case
13 that it fundamentally contests Ofcom's views and those of the interveners as to the motives
14 and course of the negotiations, such as they are, that have been carried on over the last few
15 years with wholesale, as it were, on the agenda. I think I have already said, the fact that Sky
16 is willing to entertain the possibility of wholesale, particularly with people who, as it were,
17 are ready to go, does not mean that it is willing to do that to the world, and still less on these
18 terms.

19 At 24.4 we remind you that Sky has explained that it would be extremely cautious about
20 wholesaling to distributors over the open internet. Whether that is with large household
21 name companies like Google and Yahoo or the plethora of small internet operators who Sky
22 does expect to have approaches from.

23 I can summarise this by saying I think possibly the penny is beginning to drop. In the
24 decision we say that Ofcom does not seem to appreciate the scope of this. We now think
25 the difficulty is possibly beginning to be appreciated, and it was certainly appreciated by
26 Mr. Anderson, who was suggesting a variant possibility for interim suspension, I fully
27 recognise in the further, further, further alternative, but nevertheless he did spend some time
28 on that suggestion.

29 We say that they cannot criticise our tracker data. They show what they show, which is
30 serious long term adverse effects on reputation.

31 Litigation: we do not see why that is a incredible option at all. If Sky terminated supply
32 then a court might be persuaded under Article 102, or something like it, that it had an
33 arguable case. The application of Article 102 or Chapter II is not in any way affected while
34 the decision is current or if it were to strike down. This is no form of exemption from

1 competition law. Anyone who wants to make a true competition law, an *ex post*
2 competition law case against Sky can do so, and it can do so now. That is, in short, why we
3 say that our evidence is appropriate and meets the standard for being sufficiently
4 compelling as any of the cases, such as *Genzyme* or *IMS* and *Magill*.

5 Then we come on to the devaluation point. Sky has genuinely serious concerns – and I am
6 on p.16, Sir, if you are with me – about the impact in consumers’ eyes of the perception of
7 the worth of these premium sports channels in which so much has been invested over so
8 many years if they are discounted by the rivals. We say that it is only to be expected that
9 they will be because of the level of prices that have been suggested by Ofcom.

10 A lot has been made of this undercutting point, and I do not think I can go over everything.
11 What has been said is that there will be no undercutting for like for like packages and what
12 there may be are cheaper entry level packages. The suggestion, or indeed the understanding
13 of that must be that Sky does not offer what you might call an entry level package. That is
14 not right. It is in the evidence and it is well known to Ofcom that Sky does offer stand-
15 alone packages of a single channel – Sports 1 or Sky Sports 2 – and so what would an entry
16 level package be that was different? I think Mr. Anderson talked about Sky’s mixer, and so
17 forth. No, Sky offers stand-alone channels. Sky Sports 1 and Sky Sports 2 are available
18 without any buy-through or need to get a mix or anything of the sort.

19 THE PRESIDENT: That is in Mr. Darcey’s second statement?

20 MR. FLYNN: Yes. It is the very last page of his witness statement, p.10:

21 “I note that Top Up TV suggests that it provides more flexible packages than Sky.
22 However, it is not correct that Sky sports channels are only available as a buy-
23 through of a minimum basic package of channels. It has been possible to purchase
24 Sky Sports 1 and Sky Sports 2 on a stand-alone basis since September 2009.”

25 Mr. Pickford is pointing out that the phrase used in the decision on this issue is “zero mix
26 packages”. That, just for your note, is p.45, para.1.239 of what I take to be annex 7, the
27 pricing annex. That gives a table called figure 6, the top line of which is “zero mix”. As I
28 say, this point is well known to Ofcom.

29 THE PRESIDENT: The effect of that is to make good your original point questioned by the
30 others about the effect ----

31 MR. FLYNN: What, in this respect, is an entry level package? If you can get the channel – if
32 Sky already sells it, it is not part of a huge package, there is no requirement for buy-through,
33 or anything, so what is meant by “entry level”, other possibly than it should be available
34 cheaper.

1 The note that was handed up to you yesterday from Ofcom suggested that there simply
2 would not be a margin, or it would be an 84p margin, based on the price set in the decision.
3 That is the Ofcom note headed “Ofcom note on the allegation that the decision would
4 devalue Sky’s channels”. There at 3(a) on the first page it says, “Retailers will not be able
5 to undercut the price that Sky charges, the wholesale price is £17.14, while the incremental
6 retail price charged by Sky to its satellite customers for these channels is £18”, and they
7 draw from that the inferences that there is a very, very slim margin, as Mr. Anderson called
8 it, and they say that this underpins Ofcom’s statement that entry by any firm will be
9 challenged.

10 We say it is really quite extraordinary that Ofcom should have put this figure forward. That
11 figure is Sky’s incremental price derived from what it costs you if you have a package of
12 basic channels and you ask for Sky Sports 1 and 2 to be added to your package. That is
13 where that margin comes from. That, of course, understates the fact that some of the profit
14 will already be built into the price for the basic package.

15 The actual figures in the decision – and I suppose it would be sensible just to look at that,
16 Sir – you can see figure 137, para.10.217. If you have that, Sir, you will see that the table,
17 figure 137, sets out the wholesale prices available under the Wholesale Must-Offer remedy.
18 You see the wholesale prices set out in the left hand of those columns, £10.63 for Sky
19 Sports 1 or Sky Sports 2 and £17.14 for the bundle. That is where the £17.14 figure in
20 Ofcom’s note comes from.

21 What Ofcom has determined is that the appropriate retail margin for anyone taking the
22 Wholesale Must-Offer are the figures in the right hand column. The retail margin for the
23 bundle of Sky Sports 1 and Sky Sports 2, which the decision envisages, is not 84p, or
24 whatever it might ----

25 THE PRESIDENT: 86p was the -----

26 MR. FLYNN: No, it is not, Sir, it is £18.91, that is the point. We are not talking about pence
27 here. The retail margin, as the table says, is £16.74 for Sky Sports 1, £17.03 for Sky Sports
28 2, and £18.91 ----

29 THE PRESIDENT: For the two of them.

30 MR. FLYNN: Yes, for the bundle. If you just turn the page back to 10.214, you will see how
31 Ofcom get there:

32 “... we have decided to set wholesale prices for the Core Premium Sports products
33 on the basis of Sky’s costs (reflecting a retailer as efficient as Sky) but at lower
34 scale ...”

1 They have taken a scale, as you see at the end of that, of 1.5 million subscribers after ten
2 years. You see those comparisons worked through in the tables from that. That is the basis
3 on which they have calculated that such a retailer needs a margin of the levels set out in
4 figure 137. It needs a margin ----

5 THE PRESIDENT: To cover his additional costs, that is reasonable.

6 MR. FLYNN: That is the margin they need to play with and they work back from that to get ----

7 THE PRESIDENT: Whatever price they choose.

8 MR. FLYNN: -- the wholesale price under the offer, reckoning that ----

9 THE PRESIDENT: Does that carry the assumption that they will need to charge the total of the
10 two, £17.14 and £18.91?

11 MR. FLYNN: That envisages that the final price to the viewer, as it were, will be the two.

12 MISS ROSE: Sir, I do not know if I can perhaps help. I think Sky may have slightly
13 misunderstood the point that we were making. As Mr. Flynn rightly points out, what is
14 being identified at figure 137 is the retail margin – in other words, the costs that Ofcom has
15 calculated an efficient retailer, but with a smaller scale than Sky, will need to incur on top
16 of the wholesale price in order to retail.

17 What Mr. Flynn is missing is that the point we were making is that Sky's own retail price
18 makes it obvious how difficult it will be for such a retailer to compete with Sky. The figure
19 that we were referring to ----

20 THE PRESIDENT: The £18.

21 MISS ROSE: Yes, that is the incremental retail cost for a Sky customer buying sports channels 1
22 and 2. If you go to para.4.147 of the decision ----

23 THE PRESIDENT: It is probably helpful, Mr. Flynn, to understand this.

24 MR. FLYNN: Yes, let us hear what Miss Rose has to say.

25 MISS ROSE: At 4.147 it says:

26 "Figure 22 details subscriber numbers for different pay TV providers split by
27 which packages they buy."

28 Then we see the pricing. The subscriber numbers are confidential, but not the prices. If we
29 look at Sky Digital the basic package is £18, Basic plus Sports, £36, so the implied
30 premium over basic is £18. The point that we were making ----

31 THE PRESIDENT: That is where you get your £18.

32 MISS ROSE: That is the £18, it is Sky's retail price, the additional retail price for buying Sky
33 Sports 1 and 2, and the point we were making is that that makes it very difficult for another
34 operator to compete because we have set the wholesale price at only £17.14. The point that

1 is just being made by Mr. Flynn makes our point even more forcefully, because when you
2 look at how we have calculated the costs that an efficient retailer will have to incur to enter
3 this market you can see just how challenging it is going to be for another competitor to
4 compete with Sky on price.

5 Can I just pick another factual point which Mr. Flynn has just made which, with respect, is
6 not entirely accurately presented. It is at para.27 where he makes the point that Mr. Darcey
7 at para.30 of his second witness statement said that Sky already offer stand-alone packages
8 of just Sky Sports 1 or Sky Sports 2. In fact, we can see how many subscribers subscribe to
9 that package. I understand it is confidential, be not afraid, the figure will not be read. If
10 you take up the statement, it is footnote 1175. It is accompanying para.8.91. We say:

11 “Sky introduce zero mix in September 2009. After one month total number of
12 subscribers was”

13 There you see the figure. That reflects the fact that this package is ----

14 THE PRESIDENT: I do not see the figure, because I am looking at the non-confidential version.

15 MISS ROSE: Can I perhaps ask somebody to write it down and give it up.

16 THE PRESIDENT: If someone could hand it up, please. (Same handed) Thank you very much.

17 MISS ROSE: This is in the context, of course, of Sky having 10 million customers. That figure
18 reflects the fact that this package is not promoted or marketed in any way.

19 MR. FLYNN: Sir, we were not missing that point. As I had already said, it is not comparing like
20 for like. It is apples and pears to put on one side the wholesale price and on the other Sky’s
21 incremental price when the channel is being bought as part of an upgrade to a package,
22 which is what has just been described to you. You start with a basic and you add the mix
23 and it costs you £18.

24 If you look at – it may be that you will not want to do this – annex 7, para.1.239, which has
25 a figure showing ---- It is the table that I have already mentioned to you, the zero mix, and
26 that shows a retail price for the zero mix, in other words, nothing else and Sky Sports 1. It
27 shows a retail price of £27.

28 THE PRESIDENT: Yes, I see.

29 MR. FLYNN: There you will see its retail price, and at the end you see a percentage taking it –
30 you cannot make much of that because, as Mr. Darcey’s witness statement says, it has only
31 recently been introduced. It is there. The fact is that it is there.

32 THE PRESIDENT: Yes.

33 MR. FLYNN: The proper comparison, Sir, we maintain is the margin that Ofcom considers is
34 appropriate. Fully accepting that that margin is set by reference to the expected costs of the

1 hypothetical retailer, nevertheless we contest that. That is set out in our application and
2 now somewhere around the bottom of 16, top of 17 of my note. We set out in our
3 application why we contest the basis on which those prices have been calculated and the
4 inappropriateness of the costs model that Ofcom has taken. In any event, the discount from
5 the rate card price that is implicit in these regulated wholesale prices is, as we say in the
6 note, 23.4 per cent for either of the sports channels on a stand-alone basis or 10.5 per cent as
7 a bundle. I know that figure is set out in a table which does not seem to be noted here. It is
8 Figure 127 at para. 10.6 within the statement. I do not know if you want to put a flag in that
9 or just make a note of it, sir, but it confirms the figures that we have just given and it
10 confirms ----

11 THE PRESIDENT: Perhaps I should just glance at it.

12 MR. FLYNN: It just gives you a working-out of the percentage reduction from the rate card
13 price. Figure 127 at para. 10.6. That gives you some of the data that we have just been
14 over. It may be you have the same colours as mine. If you have a green bar, that is the new
15 wholesale price as you see. Those are the figures we have just been over. Below that, you
16 will see a reduction from cable rate card. Those are the percentage reductions - 23.4 for the
17 stand-alone and 10.5 for the bundle that I have just mentioned. Basically, if that is the sort
18 of margin that the person taking advantage of the offer is meant to have, then it is hard to
19 see how they could not make some discount at retail level.

20 MISS ROSE: I am so sorry. I do think Mr. Flynn needs to be very careful what he is saying. He
21 is implying that the reduction from the rate card price is in some way a margin for the
22 retailer. The rate card price is the current wholesale price that Sky charges to Virgin. What
23 Ofcom has done is to re-calculate what it considers will be an appropriate wholesale price,
24 taking into account the costs which you have just seen - the retail margin - which an
25 efficient retailer would have.

26 THE PRESIDENT: You have not worked it out on the basis of the cable rate.

27 MISS ROSE: No. So, the question of them previously over-charging very significantly at their
28 wholesale rates, which is why we have reduced their wholesale rates somewhat (although
29 less than we originally proposed), that has nothing to do with the margin that a retailer
30 could make. I am concerned that Mr. Flynn's submissions on this may be inadvertently not
31 completely accurate.

32 THE PRESIDENT: So, we are looking at two different things.

1 MR. FLYNN: The margin is the margin that we have just been over -- the £16 to £18 sort of
2 figure. I just give you by way of illustration the discount from the cable rate card price.
3 That is something Virgin has to play with now. That is accepted by Miss Rose.
4 Then we go through the evidence that you have had as to what is going to happen on retail
5 prices. Firstly, if I take it just in this order: Top Up, we say, is quite a good example
6 because what Top Up says is that we are very nimble. They have said a number of times,
7 "We are extremely nimble. We are low cost. We can nip around where the behemoths are
8 unable to tread without breaking everything." They do not actually deny any intention to cut
9 prices.
10 Virgin - and we have just seen what the reduction from the cable rate card price amounts to
11 - has a phrase (and if ours is carefully languaged then certain that is too): it is very unlikely
12 that the result will be that the retail price offered by rival retailers will undercut Sky's prices
13 to the degree suggested. So, that certainly suggests that there might be some reduction. He
14 then goes on to say, well, if people choose to reduce prices, that is not through the decision.
15 We contest that because we say that it might well be because, as we say, Ofcom actually got
16 the sums wrong. We make the cable rate card discount point that we have just already had.
17 BT also, yesterday, suggested that whatever these entry level packages were, Sky does not
18 have them.
19 These interveners are, of course, not the only show in town, I think was the phrase used
20 earlier. There may be other shows coming to town, shall we say? They may have much
21 lower cost models. It does not cost you very much to put channels up over the internet. We
22 give the example of Apple, which could retail them over the internet via i-tunes on
23 computers, or by something called Apple TV, which I must confess I have never watched.
24 What was said about that yesterday was that Sky could put something in the minimum
25 qualifying criteria about this in relation to look and feel that could go to advertising. I do
26 not know if you want to go back to that paragraph in the statement, but we quoted some of it
27 there. The sense of that paragraph to Sky is that actually Ofcom might be concerned about
28 such a condition when it says that the overlay of interactive content is a key area for
29 innovation in the TV sector, and "We would expect Sky to set out any specific requirements
30 it has in its reference offer". Sky had taken that to mean, "Be careful when you go there".
31 Miss Rose said that that would be something that Ofcom would have to be the arbiter of,
32 and Sky would have to appeal any decision that it considered to be wrong in principle. We
33 give that as an example of the kind of difficulties that Sky is faced with - and there are
34 many of them - in interpreting the decision and formulating the reference offer.

1 MISS ROSE: If Mr. Flynn is going to make that point, I do think he ought to show you the whole
2 of that paragraph.

3 THE PRESIDENT: Did I not look at it yesterday when you were making submissions?

4 MISS ROSE: Sir, it starts with the words, “Whilst it may be reasonable for Sky to include such
5 requirements in its reference offer --“ and it also goes on to say, “We recognise that Sky
6 may have obligations between rights holders and may have guidelines on how the Sky
7 brand can be co-located with other contents”. So, it is making it very clear that Sky could
8 reasonably include such provisions. All it is saying is that it needs to be in the reference
9 offer.

10 THE PRESIDENT: Yes. I do remember reading it. Thank you.

11 MR. FLYNN: Sir, you will remember that the paragraph does not say anything about advertising
12 as such, and the point that was being made to you yesterday was that it was already clear
13 from the statement, as it were, that that might be something that goes into the reference
14 offer. That simply is not how Sky reads that paragraph.

15 THE PRESIDENT: I must say, I got the impression in an interchange with Miss Rose that Ofcom
16 would probably lean against any restrictions on other advertisements, and so on, on the
17 same page. I know she was not making a decision, but I did not get the impression that it
18 was going to be necessarily something that obviously would be banned.

19 MISS ROSE: Absolutely, sir. When you said, “Would lean against restrictions --“ I think you
20 may have meant the opposite.

21 THE PRESIDENT: Sky's ability to impose any restrictions ----

22 MISS ROSE: Yes. There is no suggestion coming from Ofcom that we would have an objection
23 to Sky wishing to restrict its content in that way.

24 THE PRESIDENT: I see. I got a slightly different impression.

25 MISS ROSE: No, sir. There is no suggestion from Ofcom that that would be a problem for
26 Ofcom. Ofcom is open to the notion that it is up to Sky to set its own conditions for the sale
27 of its services provided they are reasonable, fair, and non-discriminatory.

28 THE PRESIDENT: Yes. But, when we talked about Yahoo and Google, and so on, who
29 obviously go in for a lot of advertisements, I got the impression that - and I may be wrong. I
30 will have to look at the transcript - you were indicating that you would not necessarily
31 regard it as reasonable to try and ----

32 MISS ROSE: That was not the impression I was seeking to give, sir. I am sorry if I gave that
33 impression. I had hoped our note gave the opposite impression.

1 THE PRESIDENT: Yes. Well, what you were submitting did. Then we looked at the paragraph,
2 and then ----

3 MISS ROSE: There is no indication from Ofcom that we would have an objection to that sort of
4 restriction in principle, but I cannot go any further than that because I would have to look at
5 the detail.

6 THE PRESIDENT: Of course, yes.

7 MISS ROSE: But, Ofcom's position is simply that the terms have to reasonable, fair and non-
8 discriminatory - and that includes Sky protecting its own brand against devaluation
9 obviously. The same is true, of course, about the quality. One of the points that is being
10 made is that they could be undercut by people seeking to offer lower quality services.
11 Again, this is obviously an area where it would be reasonable for a party to be able to
12 restrict the wholesaling of its brand. That is the whole point of the MQRs.

13 THE PRESIDENT: Yes.

14 MR. FLYNN: That just rather makes our point. It came as a surprise to us. We interpreted what
15 Miss Rose said yesterday the way that Miss Rose has just interpreted it, but it was a surprise
16 to us in the face of what we had seen in the decision - that they were leaning the way that
17 they are leaning. That is the point that we are making there.
18 If prices do fall it is said, "Well, you will just be able to push them back up again". That,
19 first of all, supposes that the supply relationships will be able to be terminated. "We will
20 get the customers back to push the prices up". For the reasons we have been over, that is
21 not what Sky would expect to happen. In any case, we do not think we have the freedom to
22 put up prices because of the impact on perceptions of worth.

23 There has been a certain amount said about Sky's offers and so forth. Sky's evidence is
24 absolutely clear - that it does not offer material discounts on channels as introductory offers.
25 It is very careful not to devalue its own channels. The win-back offers which are quite
26 expensive are targeted, and they are focused on those likely to return. It is not a general
27 thing that is available to all churners because if you have that, then suddenly everyone
28 knows -- You only have to cancel to get a better deal, and that is not really the way to run
29 the railroad.

30 A lot has been said also about the fact that the channels are available at £6 on mobiles. The
31 point about that is that it does not devalue the channels on television. It is a lower price
32 because basically we are watching it on a smaller screen and with a tinny speaker - if you
33 can hear it at all. It is not the same as watching it on television. So, the fact that it is £6 for

1 mobiles is not a devaluing point, and it is certainly not giving the channels away or
2 undermining their value.

3 Sky's basic position is that it has tried to position itself and the prices which are charged for
4 its channels as giving value for money. In other words, you get a good deal because the
5 content is so good. If prevailing prices are steeply discounted, not surprisingly customers
6 would think they were not getting value for money. If they can get it for 20 percent less
7 somewhere else they will simply think that Sky has been over-pricing. That is not a good
8 thing. Lower prices, as Mr. Beard says, are good for consumers if they are real lower prices
9 - but not if they are brought about by unsustainable and artificial competition. Here, we do
10 say that the lower prices which we do expect to emerge if the wholesale must-offer is taken
11 up will harm Sky. It will harm investment in sport, and sport itself, and, ultimately, the
12 consumers. That, to an extent, is the point that the Premier League is making in intervening
13 here. These effects could start to happen. Irreversible changes could start to happen now if
14 there is rapid take-up of the wholesale must-offer. The impact on investment on sport and
15 so forth could start to happen now. So, they are well-founded to make that point.

16 I am going to try to pick up the pace. Costs of re-acquiring customers. We have talked
17 about the legal test. If it came about, Mr. Darcey's evidence is that there would be material
18 numbers of customers who would not return to Sky. That is actually a reason he is giving in
19 context for why Sky would be unwilling to withdraw supply in the first place. It leaves
20 customers stranded on platforms without access to Sky's channels. That is a serious loss
21 that Sky would not wish to bring about.

22 In relation to the costs that Sky gives, we say Ofcom has no basis for questioning. Those are
23 a real and genuine estimate. It must be remembered that Sky is not, even now, as part of the
24 status quo, the only game in town. There is Virgin. So, the last point made in that
25 paragraph is probably the one we were on earlier, sir. There is a possibility that we would
26 be able to reach deals with other parties with which both were content.

27 In relation to the actual numbers, the example given in Mr. Darcey's witness statement at
28 para. 16 has been characterised as Sky putting its case at its highest. It is not. It is just an
29 illustration. It is perfectly possible that the numbers could be far greater than that. We say
30 that rivals are likely to cut prices and the people that they are going to target - and it is a
31 matter of logic, but it is also what is suggested by the evidence you have heard - are the
32 people who want to watch, and who have already shown that they want to watch, Sky
33 Sports 1 and Sky Sports 2 (Sky's existing customers). We say that Ofcom's estimate of

1 likely consumer take-up are just estimates. So, the numbers given in Mr. Darcey's
2 statement could be several times bigger. We just do not know.

3 Mr. Beard handed up a table. I am not going to go into that in great detail. The premise of
4 the table -- the basis of it is, "Well, Sky is not giving account for the benefit that it will get
5 for the wholesale revenues if people take out the wholesale must-offer". However that is
6 false logic. It is a bad counterfactual because what Sky would be doing, but for the
7 wholesale must-offer, is either taking the full margin because it would be retailing, or it
8 would get a better wholesale margin than is available under the Ofcom terms if it is able to
9 negotiate a deal without the constraints of the wholesale must-offer prices. So, in fact,
10 being confined to the margin under the wholesale must-offer is a detriment. We also say
11 that the estimate of £10 loss -- Well, even Ofcom says it is £17. It is a figure on the low
12 side.

13 MR. BEARD: I am sorry. Just to intrude there, I think in relation to that figure Mr. Flynn is
14 making the same mistake as was being adverted to earlier by Miss Rose. He is referring to
15 the table at 10.6 of the Decision, Table 127. Those figures are, of course, costs - not profits.
16 It is notable, in fact, that Sky here, in these submissions, is not suggesting that the £10 per
17 month net retail difference in relation to churner's customers is in any way wrong in that
18 table.

19 MR. FLYNN: I cannot respond to that. I do not know where Mr. Beard got his numbers from - or
20 all of them. The main point is, as I say, that it is false logic.

21 Financial loss. We can probably move over that more quickly because I think that is just, in
22 a way, repetitive. We refer to the loss of revenue from Virgin - £7 million in Ofcom's
23 estimate, and Virgin's estimate too. Loss we incur from other operators who we would be
24 willing to trade with, but at higher prices than those coming out in the Decision. We note
25 that nobody has offered to indemnify us. It is not surprising, but they have not. We do say
26 that they do expect to suffer financial loss. We go back over the revenue from new
27 customers.

28 Basically it is being said that this decision is good for Sky. There is a figure in the Decision
29 that Sky can expect to earn £600 million over the next five years (according to Mr.
30 Pickford), and that really Sky is turning down that opportunity by challenging the decision.
31 Sky simply rejects that. We would not be here if Sky thought it was going to earn £600
32 million over the next five years. The fact that the analysts' comment, or some of it,
33 indicates that the Decision was not as bad as they were expecting really just does not get us
34 anywhere, we say.

1 On the red face test, and the difficulties with preparation for the appeal, we are not
2 advancing that as a basis for suspension. We are pointing out - and I think it is a fair point -
3 that actually Sky will have far more work than anyone else in this room, including Ofcom,
4 because it is Sky who is going to have to deal with any number of approaches from any
5 number of retailers, negotiate with them, and work out what the obligations are under the
6 wholesale must-offer whilst doing everything else. Now, everyone else may be involved in
7 similar things, but only for themselves - except that Ofcom is going to have some work.
8 Everyone else just has their own position to look out for. Sky will be dealing with a large
9 number of requests. I can tell you that they are coming in, and not all the names that have
10 been mentioned in the course of the proceedings -- Requests are coming from people who
11 have not been named in the course of the proceedings, if I can say that. There are lots of
12 requests coming in.

13 Miss Rose has already mentioned the note that Sky has put to Ofcom for a meeting which
14 has now had to be postponed twice because of the duration of this hearing. We have handed
15 that up - but it is only to show you that these are issues which Sky considers are difficult or
16 unclear in the conditions. This note is handed in within the confidentiality ring. You see the
17 headings. You see the matters that are raised. I do not need to go through all that. These
18 are very significant matters which Sky first needs clarification; and, secondly, will need to
19 implement in its wholesale must-offer, reference offer, and minimum qualifying criteria.
20 What Sky will be suggesting to Ofcom is that if, and to the extent, clarification is given that
21 will require an amendment to the conditions so that the clarification is available to
22 everyone. This is an internal matter between Ofcom and Sky. This is actually a formulation
23 of the offer and should be available to the world.

24 Sir, I am now turning to impact on competition and grant of relief at p.23. As we see it,
25 Ofcom's case on harm to competition if interim relief is granted seems to make four points.
26 A lot has been made of the importance of the start of the football season and the World Cup.
27 I think you have our points on that. There is nothing special about this football season.
28 There is nothing particularly in the fact that it is the World Cup. We say an examination of
29 the data shows that it is not the spur that has been suggested.

30 The next point is that this is a key moment because of digital switchover. That is the
31 relevance of the Ofcom note that you were handed earlier, sir, headed, 'Digital Television
32 Update 2009 Q4'. Mr. Darcey gave the figure of 88 percent. In fact the Ofcom figure to
33 the end of the last year is 91.4 percent. That is 91.4 percent of take-up. This is 91 percent
34 of homes have switched. What is meant by 'switching' in this case is that it is a positive

1 choice. As you said, sir, you actually have to buy something -- you have to buy a Freeview
2 box or you have to buy a set which is enabled for Freeview. When you do that you are in
3 fact making a choice. You are saying, "Well, now, what am I going to have? Is it going to
4 be free television or is it going to be Sky (or Virgin, indeed)?" At that point, people are
5 making a choice. It is not as if something happens in the middle of the night and suddenly
6 they have got DTT. They have actually had to go out and buy the kit. They have made a
7 choice. 91 percent of them have chosen to do this. The remaining 7 percent - because it is
8 only expected to be a total of 98 percent of the population at the end of the process - if it is
9 as much as that -- Mr. Darcey says that they have demonstrated a limited propensity to pay
10 for television. Those are not people you can expect to want to pay for television. So, the
11 people who are about to switch over are not, as it were, a sort of obvious target market to
12 sell Sky Sports to. These are people who have effectively chosen not to go down that route.
13 We say that there is no particular window of opportunity there. We say again that it is just
14 not the logical target market, and that new entrants are likely to focus on Sky customers -
15 not the idea of people who do not seem to have any interest in pay television.

16 The third matter seems to be the roll-out of super-fast broadband. That does not seem to be
17 especially urgent in that BT say they do not expect to be able to distribute linear channels
18 by IPTV until March of next year, and that, anyway - I hope I am not straying into anything
19 I should not be here, but Mr. Anderson will tell me - they are going to need DTT anyway
20 because IPTV will only have a certain amount of coverage. Ofcom's evidence is that BT
21 has already committed to invest in super-fast broadband back in the summer of 2009. That
22 is not contingent on the imposition of the wholesale must-offer.

23 The last point seemed to be the importance of bundling packages. As we heard it, the
24 argument is essentially that Sky is at an unfair competitive advantage because its business is
25 unregulated whilst the other two elements in the triple play are regulated. We say that if
26 Sky has an advantage of such magnitude, then ex post competition law can be relied on, but
27 that no-one is going to be subject to the triple play regulatory control other than Sky. We
28 say that effectively it is mission by Ofcom.

29 As regards the interveners, I think I will surely have to go into confidential session, but the
30 general point - and one I have already made - is that the interests of particular competitors
31 are not to be confused with the interests of consumers or with competition. Secondly, we
32 say as a general point that any reliance on expenditure that was committed before 31st
33 March when the decision came out cannot be taken into account as a reason not to give Sky
34 interim relief. That was taken at the parties' own risk in the fact of the possibility that the

1 decision could have said something completely different from what anyone was expecting,
2 as indeed it did on films, for example. They had no idea what the prices were going to be
3 and they would have known also that there was a clear risk of appeal and indeed an
4 application for interim measures. So in so far as we are talking about anything that was
5 signed up in hope then we say that cannot be laid at Sky's door.

6 I think at that point, Sir, the remainder of what I have to say will, I think, have to be in
7 confidential session.

8 THE PRESIDENT: We will just take a ten minute break while that is happening and carry on
9 thereafter. I am afraid we are going to go into Camera after this short break, so only those
10 are in the confidentiality ring should come back in.

11 (Short break)

12 (For proceedings in Private, see separate transcript)

13 _____