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IN THE COMPETITION
APPEAL TRIBUNAL

Case Nos. 1192/3/3/12
1193/3/3/12

Victoria House,
Bloomsbury Place,
London WC1A 2EB

31 May 2012

Before:

VIVIEN ROSE
(Chairman)

JONATHAN MAY
STEPHEN WILKS

Sitting as a Tribunal in England and Wales

BETWEEN:

(1) **BRITISH SKY BROADCASTING LIMITED**
(2) **TALKTALK TELECOMMUNICATIONS GROUP PLC** Appellants

– and –

THE OFFICE OF COMMUNICATIONS Respondent

AND BETWEEN:

BRITISH TELECOMMUNICATIONS PLC Appellant

– and –

THE OFFICE OF COMMUNICATIONS Respondent

CASE MANAGEMENT CONFERENCE

APPEARANCES

Mr. Meredith Pickford and Miss Alison Berridge (instructed by Herbert Smith LLP) appeared on behalf of British Sky Broadcasting Limited, and (instructed by Towerhouse Consulting Limited) appeared on behalf of TalkTalk Telecommunications Group PLC.

Mr. Tim Ward QC (instructed by BT Legal) appeared on behalf of British Telecommunications PLC.

Mr. Josh Holmes (instructed by the Office of Communications) appeared on behalf of the Office of Communications.

Mr. Julian Gregory (instructed by Everything Everywhere Limited) appeared on behalf of the potential Intervener Everything Everywhere.

Mr. Nicholas Gibson (instructed by the Competition Commission) appeared on behalf of the Competition Commission.

1 THE CHAIRMAN: Good afternoon ladies and gentlemen. Thank you all for your submissions
2 and letters which we have read carefully. We thought it might be helpful if we indicate
3 where we have reached with our thinking on some of the issues that are on the agenda,
4 without prejudice, of course, to the parties being free to make whatever submissions they
5 think appropriate on any of the issues.

6 I hope you have some written notes, which is what I am going to say, which we have
7 produced in written form in order to save your scribbling.

8 On consolidation it seems the parties are all agreed that it would be better not formally to
9 consolidate these appeals but rather to case manage them together so far as possible. We
10 will therefore leave this point on one side for the time being.

11 As far as interventions are concerned, we have received applications to intervene from three
12 potential parties. Sky and TalkTalk have applied to intervene in the BT appeal in support
13 Ofcom. BT has applied to intervene in the Sky/TalkTalk appeal in support of Ofcom.
14 Everything Everywhere has applied to intervene in both appeals though on one ground only
15 in each of the appeals and in both appeals their intervention will be in support of the
16 respective appellants.

17 None of the parties has raised any objection to any of the interventions but the Tribunal still
18 wishes to exercise its control over these proceedings in accordance with Rule 16 of the
19 Tribunal's Rules.

20 So far as BT's application to intervene in the Sky/TalkTalk appeal is concerned, we accept
21 that since the appeal concerns the prices that BT is allowed to charge for the services that
22 Openreach supplies it has a sufficient interest in the appeal and that it probably has
23 something to add to the proceedings before the Competition Commission.

24 As regards Everything Everywhere's applications to intervene we are not at the moment
25 minded to allow those applications. So far as the Sky/TalkTalk appeal is concerned the fact
26 that EE are customers of BT for the services that are the subject of the price control does
27 not, it seems to us, necessarily amount to a sufficient interest in the appeal to justify their
28 intervention. So far as the BT appeal is concerned, EE propose to limit their intervention to
29 one part of one of the grounds of appeal namely the ground in which BT contends that
30 Ofcom erred in relation to its allocation of testing costs for copper lines dealt with in paras
31 155 onwards of the notice of appeal. As we understand it, that issue alleges two errors
32 made by Ofcom in the attribution of the costs of testing copper lines. If corrections are
33 made to the two alleged errors in the manner that Bt suggests then the costs of WLR

1 +SMPF (which is what EE buys) goes down by a considerable amount and MPF costs goes
2 up by a considerable amount.

3 Again, we are not convinced that the price to be paid for a particular service bought by the
4 would-be intervener might be affected by the result of the appeal is sufficient interest for the
5 purposes of Rule 16. It is obvious to the Competition Commission that its decision on this
6 issue will affect the balance of between those operators who use WLR and SMPF on the
7 one hand and those who use MPF on the other hand. We would therefore of course listen to
8 submissions from counsel about what EE has to add to the analysis of the issue, given that
9 BT is pursuing this point.

10 As regards Sky and TalkTalk's application to intervene in the BT appeal is concerned, we
11 are on balance minded to allow this. They have stated in their notice of appeal that they
12 account for 75 per cent of the retail broadband market not served by BT or Virgin. Further
13 they make the important point that there is an interrelationship between their appeal and the
14 BT appeal, although the extent of the overlap seems to be limited. Clearly, if the
15 Competition Commission comes to the provisional conclusion that some of the grounds of
16 appeal in both the BT and Sky/TalkTalk appeals should be upheld, the Commission will
17 need to consider how to adjust the price control in a way which properly reflects all the
18 findings in both appeals. We can see that Sky and TalkTalk's contribution would be
19 important at that stage. We also note that the Commission has indicated that it finds it
20 useful to have submissions from industry participants supporting the price control as they
21 may be able to shed light on matters to supplement the arguments that Ofcom can put
22 forward.

23 Although we are therefore minded to allow them to intervene in the BT appeal, we are
24 concerned that Sky and TalkTalk's application to intervene is not focused on any particular
25 elements of the BT appeal. We would expect them to limit their intervention to those issues
26 in the BT appeal which are of particular concern to them and to which they can really make
27 a useful contribution. We note the comments that the Competition Commission have made
28 in their submissions for today's hearing that Statements of Intervention are only useful if
29 they are concise and focused and we endorse those comments.

30 On the matter of a confidentiality ring, all parties seem to be agreed that there is a need for a
31 confidentiality ring. The parties' views were varied as to whether there should be a joint
32 ring covering both appeals. We note BT's concern that if there are experts instructed in the
33 Sky/TalkTalk appeal whose evidence is directed at an issue which is not relevant in the BT

1 appeal there is no need for that expert to see all the information in the BT appeal in order to
2 prepare his or her evidence.

3 A preliminary question for the parties is whether they are content (subject to that point
4 raised by BT) for the evidence and material disclosed in the course of one of the appeals to
5 be used by the parties in the other appeal in so far, of course, as it is relevant to an issue
6 raised in that other appeal. If the parties are generally content to proceed on that basis then
7 it may make sense to have a joint ring and if one party wants to limit the access of a
8 particular external adviser to some of the information released that can be dealt with by an
9 appropriate provision in the order relating to that individual.

10 There is also a question mark raised by the draft order prepared by Sky and TalkTalk as
11 regards the inclusion of the material from the Wholesale Broadband Access appeal in the
12 ring set up to cover the BT appeal. This relates to Ground 3 of the BT appeal which raises
13 three challenges covering matters which are being considered in the WBA appeal which is
14 currently before the Commission. We will come back to that appeal later but if the result of
15 our deliberations is that the third tranche of issues in the BT appeal should effectively be
16 stayed pending the disposal of the WBA appeal, it seems to us that it would be premature to
17 include the material from the WBA appeal in the confidentiality rings for these two appeals.
18 Sky and TalkTalk have produced a draft order setting up the ring, and the ring clearly needs
19 to be set up and running as soon as possible so that material can be disclosed to advisers.
20 We therefore would invite Sky and TalkTalk to take on the task of preparing a draft order to
21 cover both appeals; which order does not refer to the WBA material and which lists all the
22 individuals that all the parties want included. It would be excellent if we could make the
23 order by close of play tomorrow with as many names included as possible and with as many
24 signed undertakings lodged with the Tribunal as possible so that disclosure can start.

25 Turning to pleadings, timetables, and the reference of questions to the Competition
26 Commission. Again, parties have given varied responses on this matter.

27 Dealing first with the BT appeal, it does seem to us at the moment to make sense to leave
28 the third tranche of issues that overlap with the WBA appeal in suspension until that appeal
29 is disposed of.

30 Looking then at the first two grounds of appeal in the BT appeal, the questions for
31 determination today (apart from the applications to intervene) are the timetable for the
32 pleadings, the preparation of the questions to go to the Commission, the timing of the
33 making of that reference and the deadline for that reference.

1 At the moment we see considerable force in BT's concern that this appeal should not be
2 delayed to await the reference of the questions in the Sky/TalkTalk appeal, although it may
3 well be that it makes sense to have both references end at the same time. That remains to be
4 seen. Indeed, it seems to us that there is an advantage for both appeals in having the BT
5 appeal questions referred as soon as possible since (assuming that the same panel is
6 appointed by the Competition Commission to consider both references) they can get
7 underway with the initial stages of the inquiry. This means that we are currently minded to
8 order the service of the defence within a short period from now rather than wait until the
9 defence in the Sky/TalkTalk appeal is required.

10 We realise that proceeding straight away with the reference of the questions in the BT
11 appeal may mean that the questions have to be amended later on depending on what
12 happens with the overlapping grounds in the WBA appeal. Parties may want to consider
13 that.

14 It seems to us that what we need to do today therefore in the BT appeal is to set a date for
15 the service of the defence and the statements of intervention. Ofcom has proposed 29th June
16 as the deadline for the service of its defence and we will hear submissions about that. We
17 would propose giving Sky/TalkTalk a further week to serve their statement of intervention
18 with the usual encouragement to avoid duplication.

19 As far as a date for the parties to agree questions to be sent to the Competition Commission
20 we would invite BT to provide a set of agreed questions also by 29th June. BT has served a
21 draft of questions with its notice of appeal, but these do not follow the tried and tested
22 format that has been used in other references. The questions need to identify as precisely as
23 possible which element of the price control that it is alleged would be affected by the issue
24 being resolved in BT's favour. It may be that there is a need therefore to have separate
25 questions for the different elements in Ground 1 of BT's appeal rather than lumping them
26 altogether, if those different challenges to different parts of the costs affect different
27 elements within the price controls. The question should also cross refer much more closely
28 to the relevant passages in the notice of appeal to limit the issues that the Competition
29 Commission is invited to consider.

30 So far as the period for the reference is concerned, the Commission has indicated that it will
31 need six months, and we will hear any submissions that the parties wish to make on that.
32 The Sky/TalkTalk appeal is more complicated because some of the grounds of appeal are
33 expressed in provisional terms to be finalised once the considerable amount of disclosure
34 sought by Sky and TalkTalk from BT and Ofcom is made. The appellants anticipate that

1 they may wish to amend their notice of appeal – perhaps substantially – once they have had
2 an opportunity to analysis the material disclosed.

3 All the parties, including Sky and TalkTalk, seem agreed that there is little point in Ofcom
4 representing its defence to the notices of appeal as currently drafted and that the timetable
5 should rather set a date for disclosure, then for the amendment of the notice of appeal if
6 such amendment is necessary, and then for the service of the defence and the preparation of
7 the questions for the Commission. The date proposed for the defence is 14th September
8 Sky and TalkTalk have also sought an order that they have permission to amend their
9 notices of appeal once disclosure is given. BT has objected to this open ended permission
10 being granted in advance. We are reluctant to give such permission in advance, although
11 we do not envisage that there will be problems with the grant of permission, particularly if
12 the parties consent to any proposed amendments.

13 Some of the parties have suggested that, since the reference to the Commission of the
14 questions in the Sky/TalkTalk appeal is going to be delayed by these issues, it would make
15 sense to make the reference before the defence is served. Experience in these appeals
16 indicates that that may turn out to be a false economy in terms of time but that may be
17 something that we can revisit when we are further along with this appeal. We note that the
18 Commission had indicated that it really needs to have the pleadings in place before it can
19 start meaningful work on the reference.

20 So far as the timetable for progressing the Sky/TalkTalk appeal is concerned, therefore, it
21 appears that the necessary steps, subject to outstanding questions about interventions, are,
22 first, disclosure to take place by BT and Ofcom; second, the lodging of a draft amended
23 notice of appeal within a certain period following the completion of disclosure, together
24 with an indication as to whether the parties consent to the amendments; third, the service of
25 the defence by Ofcom within a certain period following the finalisation of the amended
26 notice of appeal; fourth, the preparation by Sky and TalkTalk of draft questions to be
27 referred to the Commission, and the same comments that I made in relation to BT's draft
28 questions also apply to the draft that Sky and TalkTalk provided; fifth, the service of
29 statement of intervention by BT; and six, the reference of the questions to the Commission.
30 Turning to disclosure, in annex C to their notice of appeal Sky and TalkTalk list 21 classes
31 of documents of which they seek disclosure from BT and/or Ofcom in relation to their
32 grounds of appeal.

33 Ofcom have, in their letter of yesterday's date, set out their response on each of the classes
34 of document sought from them and provided an annex listing what documents they are

1 prepared to disclose. They say in their letter that they are in a position to provide this
2 disclosure as soon as the confidentiality ring is in place, subject only to the redaction of
3 references in the documents to products not covered by the price control review. They say
4 further that if Sky and TalkTalk do not consider this disclosure adequate, Ofcom are
5 prepared to consider further representations.

6 BT has also responded in detail to the request for disclosure in their letter of 28th May. In
7 relation to some of the items in Sky and TalkTalk's annex they say that they are prepared to
8 disclose the documents or that they do not object to Ofcom disclosing the documents. In
9 relation to some others, they say that the documents are already disclosed in Mr. Dolling's
10 witness evidence in the BT appeal: for example, items 12 and 14. The parties may wish to
11 consider whether there is anything that needs to be done in relation to these documents in
12 order for them to be available for use in the Sky/TalkTalk appeal as well – perhaps they can
13 be referred to in BT's statement of intervention in that appeal.

14 In relation to some classes of documents, BT's response is that the documents will not
15 actually give Sky and TalkTalk the information that they seem to think that they will get
16 from the documents, or that the precise disclosure sought is disproportionate and includes
17 highly commercially sensitive information. They suggest, for example, in relation to items
18 4, 5 and 6 that the appellants' expert witness on line length should attend BT's offices to
19 examine one of the databases that they have asked for. Similarly, in relation to items 7, 8
20 and 9 BT say that the appellants' experts on cumulo rates should meet representatives from
21 BT to discuss how to glean the information they want from the model of which disclosure is
22 sought.

23 In relation to other classes of documents, Ofcom and BT say that they are prepared to
24 disclose those elements within a broader request which they consider to be relevant to the
25 issues raised by the appeal.

26 Clearly there is much work for the parties to do to implement what is proposed by BT and
27 Ofcom, and for Sky and TalkTalk then to assess whether they are satisfied with what is
28 ultimately disclosed.

29 We would welcome the parties' submissions about whether there is anything that the
30 Tribunal can usefully do in relation to this exercise in addition to setting up the
31 confidentiality ring as quickly as possible.

32 Clearly, if there is going to be a dispute about disclosure then this needs to be identified by
33 the parties and referred to the Tribunal as quickly as possible for resolution.

1 We would welcome submissions on whether we should set a deadline for the parties to
2 inform us that disclosure is complete so that we know when the time for amending the
3 notice of appeal has started to run.

4 With those introductory remarks we shall proceed. It may make sense to deal with the
5 applications for intervention first, since our decision on that will affect the timetable that we
6 set for the next steps in both appeals. I do not know whether the parties have discussed
7 amongst themselves who is going to speak first or what they want to address. Mr. Pickford?

8 MR. PICKFORD: Madam, tentatively I was going to speak first, potentially on some of the
9 issues, but I think on the question of applications to intervene it will probably fall to Mr.
10 Gregory to speak first. His is the only application, as I understand it, that is currently not
11 one that the Tribunal approves of.

12 THE CHAIRMAN: Yes. Mr. Gregory?

13 MR. GREGORY: Madam, I represent Everything Everywhere, who compete in the market for
14 broadband and fixed calls. We purchase the WLR and SMPF services as a wholesale input
15 into downstream products. As a result, these appeals could affect the costs that we pay and
16 therefore the prices that we charge customers in the downstream market. All three of the
17 services are also bought by our competitors in that downstream market for broadband and
18 fixed voice services. So these appeals could also affect the wholesale input prices that they
19 pay, and as a result the downstream prices that they offer to their customers.

20 The appeals can affect the relative costs of the different wholesale services and the different
21 operators downstream rely on the different wholesale services to differing extents for the
22 purposes of providing the same competing services downstream. As a result, these appeals
23 could very well affect the relative competitive position of Everything Everywhere in the
24 downstream market. That, we say, clearly provides us with sufficient interest to intervene.
25 Interventions have previously been allowed in other telecoms cases on the basis that the
26 appeal will affect the wholesale charges paid by the operator. I was involved in the MTR
27 appeals where Telefónica was allowed to intervene essentially on the basis that its costs
28 would be affected, or could be affected, by the appeals.

29 We appreciate that intervention should not slow down or make appeals unwieldy. Our
30 intervention will not do that. Our application is for an extremely focused intervention on
31 only Ground 1 of the Sky and TalkTalk appeal, and only Ground 1, part 7 of BT's appeal.
32 In making submissions, if our intervention was allowed, we would be very happy to
33 undertake to ensure that we do not duplicate the submissions of the other parties, and
34 therefore only add additional points.

1 THE CHAIRMAN: What is the Ground 1 of the Sky/TalkTalk appeal?

2 MR. GREGORY: Sky says that Ofcom has incorrectly forecast the volume of these services and,
3 as a result, overestimated the wholesale input charges.

4 THE CHAIRMAN: And which element of the price control would be affected then by ----

5 MR. GREGORY: The price control for all three services. BT's appeal ----

6 THE CHAIRMAN: What is it that you are going to say over and above what Sky and TalkTalk
7 are going to say?

8 MR. GREGORY: At the moment it is slightly difficult to say that because one of the main points
9 that Sky makes is that Ofcom's reasoning is deficient, so it has not clearly spelt out in the
10 statement the basis on which it has made these forward looking forecasts, but this is one of
11 the issues where Sky has asked for disclosure of the documents, and the way that the
12 procedure is intended to run is that the documents will be disclosed so that Sky will have a
13 better understanding of Ofcom's reasoning. Sky would then submit an amended notice of
14 appeal and at least on the latest timetable I saw we would have two weeks after that to
15 submit our statement of intervention. Given that we would not be intending to duplicate
16 Sky's submissions and only make supplemental points it may well be that that statement of
17 intervention would be very short.

18 I think the point for us is that allowing intervention, so long as we do not duplicate, it does
19 not bring with it any costs; it would only bring with it a potential benefit to the extent that
20 we are able to add some sort of different perspective to that already put forward by the main
21 appellants. We say that we are able to do that. Unlike the appellants we are a relatively
22 small operator in the market. We have made focused submissions on the two issues on
23 which we made the application during the consultation process.

24 We note that, as far as we are aware, none of the parties has objected to our application to
25 intervene and, as is said in previous telecom cases limited interventions on the basis that the
26 intervener does not duplicate have been allowed in these cases.

27 THE CHAIRMAN: The difference with you is that you are supporting the industry participant, so
28 you are in a different position from the position of Sky and TalkTalk in the BT appeal
29 where they are supporting Ofcom and it is generally recognised by the Commission that
30 sometimes industry participants supporting the price control can add something, make
31 points that Ofcom, for whatever reason feels it cannot make, but you are not in that position
32 here. It is not just a question of whether the fact that you are a purchaser of these and it
33 could affect your downstream price gives you a sufficient interest. It is what you are going
34 to add to Sky.

1 MR. GREGORY: Well our interests are different because, as I said, the different operators use
2 the different services to differing extents for the purposes of providing the same competing
3 service downstream, so our interest in terms of the relative costs of the wholesale charges is
4 different to that of the other parties. As I said, we also have the perspective of being a
5 smaller operator in the industry. Our market share is, I think, less than 5 per cent, whereas
6 the other parties are large.

7 THE CHAIRMAN: Well why is that a point in your favour?

8 MR. GREGORY: It adds to the fact that we have a different perspective. My understanding is in
9 relation to the BT appeal that in previous rounds in BT's appeal the point on which we are
10 intervening concerns how Ofcom has allocated costs between the different wholesale
11 services, and my understanding is in previous rounds Ofcom has consciously decided to
12 smooth the costs over the three different services, precisely for the purpose of encouraging
13 smaller competitors.

14 THE CHAIRMAN: So why are you then supporting BT in that appeal?

15 MR. GREGORY: I am not familiar with the consultation documents that we put in, but we did
16 put in a detailed consultation document on the point to Ofcom, and as I have said, we are
17 not going to put in documents which simply repeat the submissions made by the parties, and
18 so it may well be that what we put in is extremely short. We will only put in material if it is
19 actually additional to the material that is already before the Tribunal and the Commission.
20 Madam, those are the submissions I had on the intervention.

21 THE CHAIRMAN: Yes, thank you very much, Mr. Gregory. Mr. Pickford, are you then going
22 to address us on the other matters.

23 MR. PICKFORD: Madam, we have a few small points to make in relation to interventions, but
24 they simply concern the timetable, so it may be convenient to deal with those when we
25 come on to timing issues at the end.

26 THE CHAIRMAN: Perhaps we should deal with this issue by issue. Is there anybody else who
27 wants to say anything about interventions.

28 MR. PICKFORD: Madam, as I say, our only point on interventions concerns how long we
29 suggest we need in order to file ----

30 THE CHAIRMAN: No, I mean does anybody want to say anything about whether interventions
31 should be allowed or not allowed? All right. Who wants to say anything about the
32 confidentiality ring issues? Mr. Pickford – can I just see a show of hands, who else wants to
33 make submissions about the confidentiality ring.

1 MR. WARD: I am sorry, madam, I was talking to my client and I missed the beginning of what
2 you said. I did not want to make submissions on the intervention, we would like to make
3 submissions about the confidentiality ring.

4 THE CHAIRMAN: All right, I will consider your hand as having been put up.

5 MR. WARD: Yes, thank you.

6 THE CHAIRMAN: Yes, Mr. Holmes as well. That is pretty much everyone. Yes, Mr. Pickford,
7 what do you have to say about the confidentiality ring?

8 MR. PICKFORD: Madam, I should be able to keep my submissions relatively short. I think in
9 essence we were in agreement with the Tribunal but it would be helpful if I could articulate
10 why we say that the Tribunal's approach is the right one to offer some potential
11 counterbalance to the submissions that I anticipate you may hear from my learned friend,
12 Mr. Ward.

13 In relation to whether there should be a composite order covering the two LLU appeals, we
14 say that any other approach is simply going to be unworkable, and the reason for that is
15 because there is an overlap between the appeals on a number of points, and we anticipate
16 that our response to BT's appeal on a number of issues, for instance, cumulo rates, is going
17 to be that BT are wrong because we are right in relation to what we say in our appeal.

18 THE CHAIRMAN: But their point on cumulo rates is a tiny point about they accidentally put
19 forward a wrong figure and they corrected it and Ofcom did not take on board their
20 correction of that figure. That does not mean you are going to go wading in in your
21 intervention with all your cumulo rates point from your own appeal I hope.

22 MR. PICKFORD: It does in this sense, madam, because we say the general approach that Ofcom
23 took to cumulo rates was wrong at the very beginning, but they adopted BT's bespoke
24 model and we say they should have adopted a model which was more closely aligned with
25 the model that the VOA adopted.

26 THE CHAIRMAN: Yes, that is the point that you make in your appeal.

27 MR. PICKFORD: Yes, and we say that is actually a complete answer to BT's appeal, because the
28 mistake that they are keen to ensure that Ofcom corrects, the alleged mistake, only arises on
29 their approach. If we are right then their mistake is irrelevant. It is simply one
30 illustration ----

31 THE CHAIRMAN: If you are wrong on your appeal, have you got anything to say in their appeal
32 as to why that mistake should not be corrected?

33 MR. PICKFORD: Madam, I would have to take instructions on that because we have not yet
34 [considered that?].

1 THE CHAIRMAN: That would be the thrust, I would hope, of your intervention to consider that
2 question.

3 MR. PICKFORD: It would, and I can come on to develop other points in relation to overlap, but
4 where our response on a particular issue to BT's appeal is to say: "BT may say that, but we
5 have our point on the other side of the ledger", we do not need to repeat those points *ad*
6 *nauseam* in relation to BT, we can simply cross-refer to our own appeal, but we need to be
7 able to do that and therefore we need to be able to say: "The answer to BT in relation to
8 question X is what we say in our appeal". Our appeal will depend on a large quantity
9 potentially of confidential information that is disclosed to the confidentiality ring, so there is
10 a simple practical matter that we will not be able to say: "See our grounds of appeal X, Y
11 and Z" unless there is a confidentiality ring, because otherwise we will be referring to
12 information which is not before the Tribunal in the other appeal. It is a very simple point.

13 THE CHAIRMAN: I think you are eliding two issues there, Mr. Pickford. There is a question
14 which I raised about whether information available in one appeal should be available to be
15 used in both appeals, and that is something that we would have to direct should happen. It
16 is not something which can be brought about just by having a joint confidentiality ring. The
17 joint confidentiality ring, or separate confidentiality rings, is more to do with what is the
18 extent of the overlap of the people who are going to be included in them. But I do not think
19 that one resolves that initial question of "is the information in one appeal to be used in the
20 other appeal by means of having a joint confidentiality ring". The 'jointness' of the
21 confidentiality ring has to follow on from that earlier point. But what I gather you are
22 saying is that you consider the parties should be able to use the information from one appeal
23 and the other and there is no reason not to have a joint ring.

24 MR. PICKFORD: I quite appreciate that there is a distinction between the substantive issue,
25 madam, which you have raised about whether you should be able to rely on information on
26 one appeal in the other, and the more formal issue about how one goes about facilitating
27 that through the directions that the Tribunal gives. We say that if you are with me on the
28 fact that we should be able to rely on information in one appeal in response to another
29 appeal then it follows necessarily from that that the confidentiality ring should be joined,
30 although it should be some order which effectively achieves an equivalence to that, because
31 otherwise the kind of practical problems I have just raised will occur. So, yes, it is correct
32 my submissions are addressed principally at the substantive issue where we say it would be
33 impractical and, indeed, unworkable, not to allow us to cross refer to information, which is
34 obviously all concerning the same price control, these are all issues that Ofcom itself

1 considered in the round together, and it would be deeply artificial to segment them at this
2 stage so that we were in some way hampered from being able to say that the answer to BT
3 on point X is simply what we say in our notice of appeal. It is worse than that because what
4 it will do is probably precipitate us having to intervene to make the points fully in our
5 intervention as intervening points, in order to get the same points across, which will in itself
6 cause collateral arguments about what is the legitimate scope of intervention, when it will
7 be far preferable, and far more efficient simply to be able to say see what we have said
8 already and then potentially we have a one sentence response. That is my point on these
9 two appeals.

10 On the use of information from the WBA appeal, we entirely agree that that issue may
11 never need to be addressed if, indeed, the WBA appeal is currently stayed and it depends
12 obviously on what happens in the future in relation to that appeal, whether the question of
13 an overlapping confidentiality ring arises.

14 THE CHAIRMAN: You mean the WBA ground in the BT appeal?

15 MR. PICKFORD: Yes, I am sorry, the overlap grounds, the grounds that BT relies upon in its
16 LLU appeal that duplicate grounds that it raised in its WBA appeal as I understand BT's
17 position, it is not only our position that effectively those matters should be stayed. It seems
18 to be BT's position as well and as I understand it, it was the Tribunal's position also. We
19 can cross the bridge of what the confidentiality arrangements need to be in relation to that
20 appeal if and when those matters are revived. We do not actually have to deal with that
21 today and so that matter can sensibly be parked until another occasion.

22 On that particular issue of the confidentiality rings, those are my submissions. I do have
23 further submissions to make on the overlap between the appeals – I gave you one
24 illustration.

25 THE CHAIRMAN: Yes, but I do not want to hear those at the moment. What about this point
26 that BT have made that there are some of your experts who may not need to see the whole
27 range of information in the BT appeal in order just to give their evidence on line length or
28 whatever in your appeal.

29 MR. PICKFORD: Madam, we could possibly have an order that carves out further information to
30 certain experts; that is certainly a possibility. We would suggest that that is not the most
31 desirable course. Just to illustrate and give a practical example: in our team we might, and
32 have in the past have a meeting of everyone who is within the confidentiality ring in a
33 particular appeal, and experts may ask each other questions and you try to get to a common
34 understanding on certain points. Now, if we have different experts who are carved out

1 differently one has to constantly ask oneself about the information. If it were me I would
2 have to say: “Now is this information that I know via the BT appeal?” “Is this information I
3 know via the TalkTalk appeal, and can I necessarily mention this with that person there in
4 the room rather than that person?” Obviously the parties always have to have a separation
5 of people, so there are those within the confidentiality ring and those that are not, and there
6 will be occasions obviously we cannot share information with our client, that is inherent.
7 But when you start to subdivide confidentiality rings the whole thing risks becoming
8 unworkable, and so we say it would be preferable, unless there were very, very strong
9 reasons because there is a particular person who there are very grave concerns about
10 disclosing information to, that they are not officially shut out of the confidentiality ring.
11 Obviously we can say – and we would be willing to undertake – we will not give
12 information to any expert to whom it is not relevant. I can take instructions on that but I
13 cannot see why we would not be willing to give that undertaking to give some comfort to
14 BT. The problem comes if you actually have a formal ruling that you are in danger of
15 breaching, if you are trying to have a meeting with a number of your experts at the same
16 time.

17 THE CHAIRMAN: And would Sky and TalkTalk be prepared to take on the task of producing a
18 draft order with everybody’s people?

19 MR. PICKFORD: We would, madam.

20 THE CHAIRMAN: Yes, thank you very much. Mr. Ward?

21 MR. WARD: Madam, thank you. The starting point for BT is that of course by their nature these
22 appeals involve a very large quantity of sensitive information and, of course, we are happy
23 with the practice of the Tribunal to protect that through confidentiality rings. But even a
24 confidentiality ring is axiomatically a form of invasion into confidentiality, albeit on a
25 controlled scale and subject to the supervision of the Tribunal. Therefore, we do submit
26 that the starting point is that BT has some very important interests here which do need to be
27 properly protected.

28 Starting with the question of whether or not we would consent to the use of material in one
29 appeal in the other, insofar as relevant we would agree that that is an appropriate course,
30 largely for the reasons that Mr. Pickford gave. But the driver behind our proposal that
31 there be two separate confidentiality rings is really the second point that you made, madam,
32 in your opening remarks, namely the concern about the proliferation of people having
33 access to large quantities of BT’s confidential information that they do not need, for the
34 specific task on which they are instructed.

1 One needs to put this into context a little. Of course, this is the second round of this LLU
2 litigation. One fears there may be other rounds in the future and, of course, as this Tribunal
3 knows, there is a great deal of litigation in this sector at the moment. Of course, the same
4 people appear both as counsel, as solicitors and as experts and one has to be mindful of the
5 kind of cumulative effect of this information being in circulation with the best will in the
6 world and without seeking to imply any breach at all of confidentiality rules – of course
7 not. So I do not have a specific concern of the kind that Mr. Pickford said I would need to
8 come with. One hopes that that will never arise.

9 The serious point is simply this: given the strength of BT's interest, it is reasonable to say
10 that, for example, an expert on line length who has solely given evidence on line length
11 need not gain access to the rest of the confidentiality ring. I heard what Mr. Pickford said
12 about the practical problems that might engender, but in my respectful submission they are
13 relatively minor weighed against the really important confidentiality interests that really are
14 at stake and, of course, Mr. Pickford said "we would be happy to give an undertaking" in
15 effect to the same effect albeit without the benefit of the Tribunal's order. If that is the case,
16 and if the undertaking would truly be adhered to, then it is hard to see what the reason is for
17 not putting it in the confidentiality ring. Why is the undertaking less onerous than simply
18 adhering to the unambiguous terms of the confidentiality ring which, of course, carries
19 weight with all who sign it, and does offer the attraction that it is potentially enforceable if
20 indeed the worst were to happen?

21 Turning to the third issue, which was the WBA related grounds, as you say, madam, there is
22 agreement that those grounds should not proceed for now. We will know the Competition
23 Commission's position on 11th June and, as we have said, at that stage BT will give an
24 indication as to how and if it proposes to advance those grounds. So for now there is no
25 need at all for the experts who are engaged in the WBA case to join the ring. I think there is
26 common ground on that point.

27 Unless I can assist further that is all I wanted to say on this particular point.

28 THE CHAIRMAN: Thank you very much. Mr. Holmes, have you anything to add?

29 MR. HOLMES: Madam, very briefly. First, we endorse the Tribunal's hope that this can be done
30 quickly; we think it can and should be done during the course of tomorrow. We agree that
31 the material should be cross-available in the two appeals, that seems eminently sensible, and
32 it would solve the difficulty as we see it, that the Tribunal identified in relation to the
33 Dolling exhibits, which are offered as a substitute for disclosure. Finally, we agree that the

1 reference to the WBA appeals should be left out of the confidentiality order for now given
2 the uncertainty of where that ground of BT's appeal will go.

3 THE CHAIRMAN: Thank you. Yes.

4 MR. PICKFORD: Those instructing me have pointed out one further practical consideration
5 which I did not address you on which is when the Competition Commission writes to us and
6 writes us letters that concern a number of issues, if we really are to have effectively a
7 number of confidentiality rings with different experts in each one that creates real problems
8 in relation to redactions because we are going to have to create maybe five different
9 bespoke versions of letters depending on whose particular information is concerned, so that
10 is another practical issue that those behind me have asked to be joined to your attention.

11 THE CHAIRMAN: Yes, so it seems that where we have got to is that everyone is content that we
12 make a direction that information material used in one appeal is available for use in the
13 other appeal. Everyone is agreed that the third ground of appeal in the BT appeal which is
14 the issues that overlap with the WBA appeal should be effectively stayed so that there is no
15 disclosure with regard to those grounds, and that none of the experts or other people whose
16 involvement solely relates to those grounds need to be included in the ring at the moment.
17 The area where we are not quite agreed is whether there should be some mechanism for
18 limiting disclosure of some very sensitive information to those people in the ring who are
19 particularly concerned with that information. So we will ponder on that for a moment, but it
20 may be that there are practical ways that can be sorted out in correspondence between the
21 parties if this problem actually arises in relation to either a particular individual, or a
22 particular very discrete element of information such as the VOA model or the various
23 databases where it can be said, as regards this chunk of information, that this is only to go to
24 X, Y and Z within the ring. But I suspect that that might be a more practical way of dealing
25 with it than try and draft some provisions in to the ring and it may be then that the inclusion
26 of a person in the ring is expressed to be subject to what has been agreed by the parties in
27 correspondence between them; we might give some further thought to that, but I hope that
28 that will not delay our setting up the ring at least including all those people for whom there
29 is no such issue, or the disclosure to the ring of all the information other than that in which
30 there might be such an issue.

31 As far as pleadings and timetable, and reference to the Commission are concerned, we will
32 rise briefly now and deliberate on the question of Mr. Gregory's submissions.

33 MR. GREGORY: Madam, if I may, those instructing me have just been helpful enough to add a
34 couple of points about what our intervention may add. On Sky Ground 1 this concerns the

1 forecast of fixed voice volumes in the future. There is some competitive interaction
2 between fixed and mobile services. Everything Everywhere is the leading mobile operator
3 and therefore we have mobile related data that is potentially relevant to forward looking
4 fixed volume forecasts.

5 The detail of why we have a different perspective in relation to BT's Ground 1.7 is that Sky
6 and TalkTalk provide their downstream services by buying MPF whereas EE does it by
7 buying WLR and SMPF, and the appeal could affect the relative costs of these two
8 competing strategies.

9 THE CHAIRMAN: Yes.

10 MR. GREGORY: And those two points are obviously in addition to the fact that they could also
11 have a direct monetary impact on our costs.

12 THE CHAIRMAN: Yes, thank you. So the point about you are the leading mobile provider and
13 there might be an effect on your ability to provide ----

14 MR. GREGORY: The Sky Ground 1 concerns, among other things, Ofcom's forecast of the level
15 of fixed voice services in the future. Fixed voice services compete to some extent with
16 mobile voice services, and as the leading mobile voice operator Everything Everywhere has
17 data which is relevant to forward looking voice forecasts which the fixed operators do not
18 have.

19 THE CHAIRMAN: I see, so for example, if you had forecast that more people were going to
20 move over to mobile traffic that might affect the forecast fixed line volumes?

21 MR. GREGORY: That is my understanding.

22 THE CHAIRMAN: Very well we will come back at 10 past 3 and deal with timetable issues.

23 (Short break)

24 THE CHAIRMAN: Two matters arise to be resolved that we have heard submissions on from the
25 parties. We have heard submissions now from Mr. Gregory on behalf of Everything
26 Everywhere, but we are not prepared to allow Everything Everywhere to intervene in these
27 appeals. We do not consider that they have a sufficient interest. The fact that the price of
28 the service that they buy might change and that this might affect their downstream price
29 does not seem to us sufficient to justify their intervention in the appeals. Certainly it is not
30 sufficient that it will affect their competitors' prices.

31 We are also not convinced that the information that they hold as a mobile operator as
32 regards future forecasts for fixed line traffic, which is one of the issues in the Sky/TalkTalk
33 appeal, justifies their involvement in these appeals. We are sure that Ofcom has as much
34 information about mobile call traffic as it needs to determine these matters.

1 We also do not accept that their intervention will not add to the costs or the time taken by
2 these appeals, because when an intervener wishes to intervene on behalf of the appellant,
3 time has to be allowed for that statement of intervention in support of the appellant before a
4 defence can be drafted, and the reference questions will be delayed then to take account of
5 that as well.

6 So our conclusion on that is that we are not satisfied that there is a justification for allowing
7 Everything Everywhere to intervene.

8 As far as the confidentiality ring is concerned, we will make a direction that information
9 and material available in one appeal can be used by the parties in the other appeal. We will
10 also stay any proceedings in relation to Ground 3 of the BT appeal, which are the matters
11 which overlap with the wholesale broadband access appeal.

12 As far as the issue about limiting disclosure of some information to people to be included in
13 the confidentiality ring is concerned, what we propose is this: we are not, as currently
14 advised, going to make any order for disclosure, and so disclosure in so far as it is taking
15 place at the moment is voluntary on the part of BT.

16 The confidentiality ring will be drawn up with the names in the schedule of the people to
17 whom the parties wish to be made of all the information that is disclosed into the ring. If,
18 on looking at those names and in considering the information which it is going to disclose,
19 BT takes the view that a particular item of information should not be disclosed to a
20 particular person on that list, then they should write to Sky/TalkTalk or whoever the party is
21 on whose behalf that person is included in the list and say, "We do not want that piece of
22 information to go to that person because we do not consider it is relevant to what that
23 person is concerned with in these appeals and it should not be disclosed to him or her". If
24 Sky and TalkTalk agree then there can be an undertaking given in correspondence to the
25 effect that the material will not be disclosed to that person. If there is no agreement
26 between them then BT can decline to make voluntary disclosure of that item, and if
27 Sky/TalkTalk still want that item they will have to come and seek it from the Tribunal. In
28 our view, it is better for the matter to be dealt with in an *ad hoc* way like that than to try and
29 put some encompassing wording in the order setting up the ring. However, if, in drafting
30 the terms of the ring, Sky and TalkTalk make some reference to that mechanism in some
31 way then we will consider that wording to see whether it encapsulates what we have just
32 suggested.

33 With that, let us now move on to the pleadings, timetable and reference of questions to the
34 Competition Commission. Dealing with the BT appeal first, the proposed deadline for the

1 defence is 29th June. If anyone has got something to say about that get ready to say it. The
2 proposed deadline for the Sky/TalkTalk statement of intervention is then a week after
3 29th June, 6th July. BT to draft a set of agreed questions, also by 29th June. Obviously, if
4 questions are not agreed then we will have the ones that are agreed and a statement as to
5 where the areas of contention are. That should enable us then to refer the questions to the
6 Competition Commission. As far as the deadline that the Competition Commission have
7 said that they want, the suggestion has been six months.

8 Mr. Pickford, you are on your feet. What would you like to say?

9 MR. PICKFORD: Madam, as I have foreshadowed in my earlier submissions, we do have
10 something to say about the timing of our statement of intervention. The Competition
11 Commission in its written submissions for today noted that the approach that had been taken
12 in relation to interventions in the WBA appeal was something of a model for interventions
13 in terms of it being focused and concise. That intervention was our intervention. It was
14 Sky and TalkTalk's intervention in relation to BT's appeal. The purpose of my submissions
15 is not one of self-congratulation, it is to make the point that we were permitted three weeks
16 for that intervention. The reason for that was actually to be able to pare down so that we did
17 not find ourselves in a situation – obviously we have to work simultaneously to some extent
18 with Ofcom working out what we are going to say.

19 We then need to try to work out, in the light of what Ofcom said, what we no longer need to
20 say. From experience that tends to take longer than a week. We were allowed three weeks
21 previously. We would say that even three weeks, when it comes down to the work that is
22 involved, is quite difficult, but we would certainly ask for at least two weeks. Our
23 preference would be three weeks to enable us to ensure that we were hopefully put up the
24 some kind of intervention that the Competition Commission approved of last time around.

25 THE CHAIRMAN: Because your statement of intervention is in support of the defence, as it
26 were, it is not then going to be referred to in the questions – is that right? The questions are
27 usually drafted in terms of, “Has Ofcom erred in doing X, Y and Z for the reasons set out in
28 paras.(a), (b) and (c) of the notice of appeal?”

29 MR. PICKFORD: Madam, that would certainly ordinarily be the case. There is the slight
30 complication in this case, and I have to say that I have not given it thought beyond it having
31 just been raised now, which is that, as I said earlier, some of our responses to BT will be to
32 say, “BT's point is all very well, but actually our point over here on the same issue trumps
33 it”. We do not necessarily need those matters to go into the reference questions, as long as

1 it is understood by all parties that ultimately that argument will be one that we are entitled
2 to advance by virtue of our appeal.

3 THE CHAIRMAN: The practical concern is that what we want to be sure of doing is referring
4 the questions to the Commission before the Olympics descend and summer holidays and
5 everyone says nothing further can possibly be done now until September.

6 MR. PICKFORD: Indeed, madam, and subject to that proviso we would obviously be very happy
7 for the reference questions to go off straight away. Plainly, a pure intervention has to be
8 within the four corners of the appeal, as raised. The complicating factor is that we have got
9 two appeals on the same issue. As long as it is understood by all parties that we are
10 permitted to say in our intervention, "See what we are saying on our appeal on this issue",
11 and if we are not foreclosed from that because it is not expressly put into the questions on
12 BT's reference, then there does not seem to be a problem.

13 THE CHAIRMAN: I think what I am asking is – and I will ask this of Mr. Ward as well – are we
14 confident that if we give you until 20th July we are going to be able by that date or very
15 shortly after to send the questions to the Commission?

16 MR. PICKFORD: My response would be that I cannot see any reason why we should not be able
17 to do it. The issue that I have just raised about the overlap is one that BT and Sky and
18 TalkTalk and Mr. Ward and myself can discuss now is a point of principle. We would
19 submit that it should be possible to make a reference directly afterwards. That should not
20 delay matters.

21 THE CHAIRMAN: Does it have to be directly after the statement of intervention or can it be
22 before the statement of intervention?

23 MR. PICKFORD: Ordinarily in these proceedings it is directly after the statement of
24 intervention.

25 THE CHAIRMAN: Let me hear from Mr. Ward. Who is here for the Competition Commission?
26 Mr. Gibson. Yes?

27 MR. WARD: Madam, I put my cards on the table: our concern on this point really is of course
28 the time that BT will enjoy for its statement of intervention in the Sky and TalkTalk case. I
29 actually, respectfully, do share some of Mr. Pickford's concerns about the need to have
30 enough time to tailor the submission in the light of Ofcom's defence to meet precisely the
31 kind of concerns that the Competition Commission outlined in its written submission. So
32 we do have some sympathy for his submission that, strictly on an equal treatment basis,
33 three weeks would be a lot more desirable.

1 As to the question of when the reference should be made to the Commission, of course the
2 case falls to be determined on the basis of the grounds of appeal. The grounds of appeal
3 ought to be capable indeed on their own of giving rise to the questions to be referred. We
4 take on board the criticisms the Tribunal had of the first draft that we attempted to do, and
5 we will most certainly try again. We are neutral as to whether the draft goes off at the time
6 of the defence. It is clearly worth seeing Ofcom's defence, because it may even be that that
7 will narrow some of the issues. If we are right in some of our grounds of appeal they are
8 actually highly technical, and it is at least possible that they really are just mistakes, or it
9 may be that there is argument to be had.

10 THE CHAIRMAN: There is also the technical point that the definition of a specified price
11 control matter, one of the elements of that definition is that the matter is in dispute between
12 the parties, and one cannot really know that before the defence is served.

13 MR. WARD: And for these purposes the parties are, of course, BT and Ofcom. Sky and
14 TalkTalk's role as intervener is, of course, to provide supporting yet distinctive arguments
15 to Ofcom's defence and not to broaden or vary the issues actually at stake in that appeal.
16 That is of course for them to do in their own appeal.

17 I do not think the additional time that Mr. Pickford requests is an insuperable obstacle. It
18 still takes us to 20th July, assuming no slippage, and even if somehow there is a little
19 slippage it ought to be possible to get in under the wire, as it were, before August.

20 Again, if the Tribunal has a concern about that then we would be more than happy with a
21 ruling being made at the stage of the defence.

22 Obviously, the driver of BT's submissions today is to get these issues resolved as quickly as
23 possible. I appreciate that we are going to have to come on at some stage to the question of
24 the timing of the Commission's determination vis-à-vis the Sky and TalkTalk appeal, but I
25 will address you on that when that is convenient.

26 THE CHAIRMAN: Yes. If we go for 29th June for the defence and also for BT to produce
27 agreed questions, and then 20th July for the Sky and TalkTalk statement of intervention,
28 then it may be that we can be working on the text of the agreed questions and get those off
29 to the Commission and they might not need to await the statement of intervention.

30 MR. WARD: Indeed, it is not the worst thing in the world if there then turns out to be a need to
31 make some small amendment later. The notice of appeal primarily sets out the issues in the
32 case.

1 THE CHAIRMAN: It sets out the issues in this case. The defence indicates which of those issues
2 is in dispute between the parties and then one knows what are the specified price control
3 matters.

4 MR. WARD: It is hard at this stage to see why the statement of intervention should lead to the
5 need to reformulate the issues. I do not say it is impossible and that is why it that may be –
6 it may be – that the issues, with hindsight, need to be varied. Of course, Mr. Pickford and
7 his team will be hard at work no doubt on the statements of intervention during the period
8 when the questions are being formulated in any event.

9 THE CHAIRMAN: Yes.

10 MR. WARD: Madam, what is pointed out to me is that, of course, if the deadline for the
11 questions is the same as the deadline for service of the defence, then we will be formulating
12 the questions without actually knowing what Ofcom are going to say, although, of course,
13 they will themselves know. It may therefore make sense actually perhaps to set that
14 deadline just one week later in the sense that we can try and reach agreement with Ofcom,
15 but then we can see whether what they are suggesting does make sense in the light of the
16 defence they serve. That need not take weeks, but it would enable us to, if you like, give it
17 a health check before it goes to you.

18 THE CHAIRMAN: So we are looking at 29th June for the defence. Draft agreed questions
19 provided by BT by 5th July, and the Sky and TalkTalk statement of intervention by 20th
20 July, and we would hope to send the reference to the Commission by, at the latest, 21st July.

21 MR. WARD: We would be content with that. As I said, I would like to address you on the
22 question of when the Commission is going to determine the issues, but whenever that is
23 convenient of course.

24 THE CHAIRMAN: In your appeal or in the other appeal?

25 MR. WARD: In our appeal.

26 THE CHAIRMAN: It is convenient now.

27 MR. WARD: For us, the simple driver is of course that BT would like to have relief if it succeeds
28 at the earliest possible stage. To give you just an indication of scale, the most valuable of
29 the points that BT has raised is worth approximately £200 million per year in these charge
30 controls alone. In fact, it is wider because the RAV adjustment point actually has
31 potentially wider implications. Just in these charge controls alone, it is worth £200 million.
32 We have seen that the timetable for the TalkTalk appeal is likely to be around three months
33 behind ours, give or take a few weeks depending on how things turn out. That means that in
34 very rough terms, if we were to succeed on that one point which is just one of our grounds

1 but undoubtedly the biggest, that delay could cost £50 million in terms of loss of adjustment
2 to the charge control recognising the difficulties that there are over retrospection.

3 Of course, there is an equal and opposite strategic interest for Sky/TalkTalk to argue, as
4 they do, that this should all await the outcome of their appeal. In our respectful submission,
5 it is important to distinguish between asking the Commission to decide, in essence, whether
6 there are the errors within the specified price control questions that are going to be raised,
7 and then a separate question about what should then be done. Of course, Ofcom says that it
8 might be undesirable to amend the charge control twice, and of course it is also true that at
9 least the subject matter of some of these issues overlaps in the way that the cumulo point
10 does, the one that you were speaking about earlier.

11 In our submission, all of that is for another day, and it would be wrong to now accede to the
12 proposition that some or all of BT's appeal should be delayed whilst the Sky/TalkTalk
13 appeal works its way through the system at potentially very, very large and irrecoverable
14 cost, and of course the consequent distortion of competition that goes with that. I can see
15 that at the end of the day it may be that BT has succeeded on some relatively small point
16 that is worth just a few pence, and it may be that there are still very large points alive in the
17 Sky/TalkTalk case. That would obviously be different too if I am back here in nine months'
18 time saying that there is £50 million at stake in the next three months.

19 The other thing I would ask you to bear in mind is that, of course, the Sky/TalkTalk case is
20 obviously going to evolve, because they have asked for a large amount of disclosure, and a
21 large amount of disclosure has been consented to. The very purpose of that is to enable
22 them to reformulate their case. We know from last time in the last LLU proceedings that
23 there were issues that dropped out altogether. There were new issues that came along. That
24 is not a criticism, it is just the reality of this kind of litigation, and it reflects the fact that
25 some of their grounds of appeal say, "We do not really know what was going on because of
26 the relatively limited information on the face of Ofcom's determination". That is not a
27 criticism of Ofcom either.

28 What it means therefore is that Sky/TalkTalk's appeal is essentially a moving target, and the
29 overlaps that exist now may resolve away, they may become greater, we simply do not
30 know. Our submission is that the right course today is to order that the Commission should,
31 in the usual way, be given a period of time. We have no objection to the six months that
32 they have asked for. It can then determine the issues that BT has raised in its appeal. We
33 might formulate the questions it is to be asked in a way that implicitly accepts that there
34 may be another point to come later. So to take this cumulo point, for example, if we are

1 right that there is an adjustment in our favour it is wholly independent to the point that
2 Mr. Pickford makes, or his clients make, but if they are right there may be an adjustment in
3 their favour. One might want to draft with that in mind, but the question the Commission is
4 being asked to decide is: has BT correctly identified any errors here and, if so, what is the
5 remedial effect of that error? If the answer is something very small, that would be one
6 thing, but if the answer is something very, very big, like £200 million a year, we would like
7 at least the opportunity to be back here before you saying that even though the
8 Sky/TalkTalk appeal has some way to run we should get the benefit of that time.

9 THE CHAIRMAN: Yes. At the end of the day - the end of your day - you want keep open the
10 possibility that although everyone has said, it is not really convenient to alter this price
11 control twice, but if it is worth a huge amount of money, actions override the inherent
12 reluctance that everyone one might have to amend the price control?

13 MR. WARD: Absolutely, and it may be that everyone ----

14 THE CHAIRMAN: Is what you are saying then that you want some more public determination
15 by the Commission of the merits of your grounds of appeal and the scale of any adjustment
16 that should be made to be published by them, rather than what we usually have, which is a
17 confidential provisional view as to ----

18 MR. WARD: That is not actually what I had in mind. What I was proposing essentially is that
19 the BT appeal should proceed in the absolutely ordinary way through to determination by
20 the Commission. Of course, what then happens is that the Commission, having answered
21 the questions, the answers come back to this Tribunal and then, if the parties have
22 succeeded on any points, the Tribunal makes a direction to Ofcom and Ofcom amends the
23 charge control with a forward look. That is the ordinary mechanism.

24 I am accepting of course that if BT were to succeed whilst Sky and TalkTalk's appeal was
25 still pending, there would be an argument before you about whether or not BT should have
26 the benefit immediately.

27 THE CHAIRMAN: The trouble with that though is this, is it not: if they report and they say, yes,
28 your point on cumulo rates is right and therefore there should be an adjustment of X in one,
29 say, up, they have then determined that reference and have completed their task. If then
30 they say in the context of the Sky/TalkTalk appeal, "We uphold Sky/TalkTalk's ground of
31 appeal on cumulo rates", and that means that cumulo rate costs go down, then is there some
32 way that they can be asked to come up with an adjustment that takes into account both those
33 findings in a situation where they are, whatever the English translation of *functus officio* is,
34 because we are not allowed to use Latin any more?

1 MR. WARD: I think the answer to that, in my respectful submission, is that when one sees these
2 as two appeals that are running in parallel, there are two sets of questions going to the
3 Competition Commission, they need to answer them both, and on the basis of those
4 answers, this Tribunal has to make directions to Ofcom. Of course the Commission merely
5 answers the questions in front of it. So to take your example, if, on the basis of our cumulo
6 point, the Commission were to say that BT is correct and the consequence of that is that the
7 price control should go up 25p, and then six months later they decide that Sky/TalkTalk are
8 correct and the consequence of that is that the price control should go down £1 then one can
9 easily imagine you being invited to make a direction to Ofcom that the price control should
10 go down 75p. It is simply the net effect of ----

11 THE CHAIRMAN: Yes, one suspects that it is never actually going to be that simple, but my
12 concern is that what you suggest is that there is then something which we usually manage to
13 avoid, which is a further iteration of the appeal in front of the appeal, putting aside any
14 judicial review stage, whereas the one good thing about how this process has worked thus
15 far with the appeals is the speed at which one has been able to implement the determination
16 of the Competition Commission and put in place a revised price control because the
17 Commission have taken the time not only to decide where there are errors, but also to say
18 how they should affect the price control.

19 Can I just cut this short perhaps. I think one cannot gaze into a crystal ball and see where
20 we are going to be at the time when the Competition Commission issue their provisional
21 findings in your appeal. I think we then will be at a better stage to see what they say about
22 that, perhaps to have a discussion or a case management conference as to where they are
23 with the other appeal, and what the best way to proceed from that stage is.

24 MR. WARD: Madam, that sounds, if I may say so, a very satisfactory proposal. The driving
25 force behind my submission is that we should not be held up simply because of the Sky /
26 TalkTalk case. By its nature the appeal has not crystallised, and it may be that that is the
27 way forward, but the concern we have is that those provisional findings should not
28 necessarily be delayed either, but if the Commission is given one overall deadline of some
29 time next summer, obviously there is a concern that what we will get is one lot of
30 provisional findings in, say, April.

31 THE CHAIRMAN: Well I think everything that we have said so far this afternoon should
32 indicate that we are with you as regards getting the BT appeal off to the Competition
33 Commission and not waiting for the Sky/TalkTalk appeal. I have not understood Mr.
34 Pickford to be arguing anything to the contrary, I do not know, if there is somebody who is

1 going to argue to the contrary but of course we will hear them, but we certainly understand
2 your concerns.

3 MR. WARD: If I may, just finally, the concern is that if a direction is given today for a single
4 deadline for the Competition Commission in the best part of a year's time, that in a sense
5 builds in delay and that might – as things turnout – might prove to be avoidable. We do not
6 know and we cannot know, but we just do not want it built in right at the beginning.

7 THE CHAIRMAN: I understand. Mr. Gibson, do you have anything to say?

8 MR. GIBSON: Yes, madam. It would be helpful to start by establishing the perspective the
9 Commission takes in managing this process. If I might say, the starting point for us is to
10 consider the end point, so we can design the process we are dealing with as a whole. We
11 also have regard to the fact that, whilst we respect the fact there are two individual appeals
12 here, they are in respect of one charge control. That consideration does govern our
13 thinking, not only as to the consequences of our final determination for the charge control—
14 a matter that Mr. Ward has suggested perhaps could be dealt with after everything we say
15 by the Tribunal—but also as to our internal processes about how we get to that end point. It
16 is that second point that I think rather cuts against the suggestion that all of this can be left
17 to be dealt with another day and we should just proceed with BT's appeal without thinking
18 about how the two appeals interrelate.

19 The Commission's objective in all of this is to come up with a process that is the most
20 efficient, not only for the parties, and having regard to the financial implications for all of
21 the parties concerned, but also for consumers in terms of how this may play out with the
22 consequences on the charge control, and also internally for how the Commission can
23 produce the best result in terms of quality of decision-making and having regard to its
24 limited resources.

25 So with those limited remarks in mind, I think it might be helpful to talk through where we
26 come from on this. I do not think it is a controversial proposition to suggest that time should
27 start running after the close of pleadings. I underscore that because we have been talking
28 today about when the reference should be made and when the questions should come to the
29 Commission. In principle, the Commission has no objection to the questions coming to it
30 earlier than when time actually starts running for it to determine its process. We think there
31 are useful preparatory steps we can take, but we would invite the Tribunal to consider the
32 possibility that it would be better to have close of pleadings in both cases defined so that we
33 can see how we are going to be dealing with the process as a whole. We have been
34 considering close of pleadings in terms of BT's appeal but ideally we would like to have the

1 close of pleadings of both cases as the starting point because that allows us to manage our
2 process better.

3 THE CHAIRMAN: But I do not see that this idea of making a reference now that time only
4 starting to run when the pleadings are closed, how that is consistent with the rules which say
5 that the reference has to set the deadline by which the Commission has to determine the
6 questions, answer the questions, and it should be within four months. What do you actually
7 envisage the order saying?

8 MR. GIBSON: It is perhaps the way I am describing the position. If I can return to the idea that
9 what we are really looking at is the end point. If the order has regard to the fact that we are
10 dealing with a complex matter here where one of the appeals may be proceeding at a slower
11 rate and determines the end point in the body of your order taking account of that, then
12 really what I am talking about is trying to enlighten you as to the way in which we will deal
13 with the two appeals internally.

14 THE CHAIRMAN: Well what we envisage happening is that we send the BT questions, as we
15 have indicated, before the summer break with a six month deadline, you at the Commission
16 can get on with familiarising yourselves with the price control and the issues raised by the
17 BT appeal. The big unknown at the moment is how long this disclosure exercise is going to
18 take in the Sky/ TalkTalk appeal, how contentious - if it is contentious at all - that is going
19 to be, how long the pleadings are going to take to be finalised then so when we can get the
20 questions off. Now, suppose that that is all resolved in three months' time, say, then we will
21 have the question: can we then refer those questions giving a three month deadline to that so
22 that they both end at the end of the six month period set in the BT appeal because the
23 groundwork that would need to be undertaken ordinarily for the Sky/TalkTalk appeal has
24 already been done. Now, it may be at that stage three months is too short, let us extend
25 everything by another month so it is seven months and four months or something, and then
26 we might have to hear Mr. Ward saying: "No, no, that costs us too much money, we have to
27 have the correction to the price control now". But at the moment we do not know what end
28 date we are going to be able to set in the Sky/TalkTalk appeal because we are not nearly
29 there yet with that appeal, and so I am not quite sure what your submission was as to what
30 we should do with the BT appeal. Are you saying that we should not refer the questions
31 now, or that we should not set an end date in the order?

32 MR. GIBSON: No, madam, sorry. We have before us a provisional suggested timetable put
33 forward by TalkTalk and Sky. I hesitate to speak to their timetable, but I think, whilst we
34 cannot be absolutely certain how long the process will take to achieve disclosure and to

1 allow for any amendments and the consequential pleadings in that process, the parties do
2 seem to have a reasonable degree of consensus on roughly how long that might take, and it
3 seems to be that people are shaping up for something like readiness to refer questions in the
4 Sky / TalkTalk appeal sometime in late September or early October, with a view to a six-
5 month duration taking us to early April. I do not apprehend that that is unduly
6 controversial, and that I suggest would be the more sensible basis to work from when
7 designing the overall period for the Commission's determination. With respect, the approach
8 that you advocate of giving us six months that may be extended subject to seeing what
9 happens in TalkTalk both overstates the ease with which one can adjust one's procedures
10 later on, and understates the time that is actually taken deal with a discrete second appeal
11 which, in its own right, will raise a significant number of complicated issues. The
12 groundwork which one can do, with respect, is actually fairly limited. We do not, of course,
13 deny that the members will derive significant benefit from having an opportunity to read
14 into the materials. They can, of course, read the present state of the papers in the Sky /
15 TalkTalk appeal, they can receive technical teach-ins from Commission staff and with the
16 benefit of input from everybody else. But the majority of the Commission procedure is
17 predicated around bilateral meetings and then a significant amount of time carefully to
18 consider what has been said in the bilateral meetings, and carefully draft provisional
19 determination and then build in a proper amount of time for people to consider all that.
20 Regrettably, the realities of that procedure are such that there is little opportunity to flex
21 those timings significantly to compress the second appeal were it to come to us later, We
22 would like to emphasise that point: that there is only limited scope - I would have to take
23 instructions from those who are more familiar with designing these procedures - to take a
24 week here, a week there to try and shave things off. I should stress that the Commission has
25 no desire unduly to prolong these matters, both from its own internal perspective, just
26 because it has so many things on its plate, but also from the more important perspective of
27 seeing that the entirety of this process should be completed in a timely fashion having
28 regard in particular, to the Judgment of the Court of Appeal that prevented retrospective
29 adjustments. We have all this in mind, and it is purely with a desire to make sure the
30 process is dealt with as efficiently as possible that we make these submissions.

31 In summary, it may be a case of not wishing to have too much haste for lack of speed, if I
32 can put it that way.

33 I think it may be helpful to touch on the particulars of why we say that, if I can assist the
34 Tribunal in this way. We would endorse the suggestion that it is particularly important to

1 consider these efficiency concerns when one has regard to the end point. We would say that,
2 whilst it may be a matter for you ultimately to determine, having heard submissions from
3 Mr. Ward in due course, as to whether or not you should have two potentially contradictory
4 adjustments to a charge control within a relatively short space of time, we also have that in
5 mind: that is one of the reasons why we should say that the end point is the same. But,
6 more importantly, also because we do not agree that all of this can be put off for another
7 day for Mr. Ward to make submissions on that subject. We think there is a desirability of
8 dealing with the cases together from the outset of the process, and that is really what I was
9 hinting towards when I made my earlier submissions to this effect. We think that the
10 journey to the end point is an important factor to bear in mind as well. There are some
11 useful steps that can be taken, as I said, at the beginning of the process, but there are
12 limitations on what the Commission can do in terms of both practical limitations and
13 potentially substantive ones as well.

14 If we have two appeals dealing with the same subject matter that require two sets of
15 bilateral meetings, there is obviously an inefficiency in having repetitive processes that can
16 be cut down. For the want of a 10 week delay, it could be cut down considerably by having
17 one set. There is also, more importantly, the fact that if one has two overlapping appellate
18 processes in front of us at the same time with the same parties involved there is a likelihood
19 that we will have a situation where we are considering the remedies part of the process in
20 the BT appeal at the very time when we are considering the substantive part of the process
21 in the Sky/TalkTalk appeal.

22 THE CHAIRMAN: Can I just be clear, Mr. Gibson, what is it that you are suggesting then that
23 we do in relation to these appeals?

24 MR. GIBSON: The ideal position would be that we agree the end point that is likely to be arrived
25 at by reference to what we think is going to happen in the Sky / TalkTalk appeal now, and
26 give directions on that basis, and that appears that is leading us towards an early April date.
27 We can then make the BT appeal reference now to ensure that any benefit that can be
28 derived from an early reference is taken, but we recognise the limitations on what can be
29 done with BT appeal mean ----

30 THE CHAIRMAN: I see.

31 MR. GIBSON: -- that you are actually going to end up with the same determination point for
32 both references, and that was what I was going to give you more particular ----

33 THE CHAIRMAN: So what you are saying is that we should make the reference in the BT
34 appeal now, we should set a date for the Competition Commission to determine those

1 questions as April of next year, on the basis that in due course that April date will be the
2 appropriate date to set for the Commission to determine the questions in the Sky/TalkTalk
3 appeal as and when we get to the stage of referring those questions. Is that what you are
4 submitting?

5 MR. GIBSON: Yes, madam, but I think in order to understand why we say that because we
6 understand that there is an obvious degree of urgency which would suggest that we should
7 be progressing the BT appeal more quickly, and I just want to make some very brief
8 submissions as to the practical implications of doing otherwise for us.
9 There is the possibility of substantive overlap which other people have touched on already.
10 The possibility of the cumulo rate point has been highlighted, but there may be others. We
11 cannot know until we delve into the detail of this exactly what substantive overlaps there
12 may be, not only at the micro level (by looking at particular parts of the charge control in
13 isolation) but also stepping back and looking at the macro level (to see how one adjustment
14 may impact overall on the charge control). It is important to think of it in the round. That is
15 certainly the way that my colleagues at the Commission approach a charge control dealing
16 with different questions from multiple appellants: they think about it in the round and about
17 the impact it is going to have as a whole. There is a substantive issue there. But the
18 practical issue, as I said, is perhaps most evident when you consider the way the remedies
19 process might work if you had a dissonance between the two timings in this process.
20 The remedies process is already a challenging process, given the time constraints in this
21 appellate regime. From our experience in previous appeals, it depends very heavily on the
22 co-operation and the engagement of the parties throughout this process. There are two
23 points that particularly strike me as problematic, if we have two different paces for the
24 appeals.

25 The first is that the parties' instinct, as we understand it, is to be reluctant to engage fully
26 with a remedies process in respect of some questions if they do not actually know what may
27 be happening in respect of other questions. So there is an understandable caution (related, I
28 would suggest, to our own view that things should be dealt with in the round) to engage
29 fully in a process without knowing what the implications may be for a later remedies
30 process.

31 But it also has implications for the parties' resources. The parties, if they are trying to
32 respond to us in relation to substantive issues in the ongoing Sky / TalkTalk appeal, will
33 therefore be constrained in the degree to which they can properly engage in our process in
34 the BT appeal in dealing with remedies. This is not a point to be underestimated,

1 particularly in relation to Ofcom which obviously, as a public body, has particular resource
2 implications. Mr. Holmes will be able to speak to them, but we apprehend that that will be a
3 particular issue for Ofcom, but also likely to be an issue for all parties because they will be
4 pulled in two different directions with teams that are necessarily focused because they are
5 dealing with the same underlying subject matter. We consider, therefore it would be a
6 likely distraction and a difficulty for us in managing the remedies process in BT if we had
7 not actually finished the substantive error identification process in TalkTalk. Our fear is
8 that the worst case scenario would be that it would disrupt both processes and lead to further
9 complications.

10 I have in mind there may also be a legal issue - I would not want to put it any higher than
11 that - in relation to the obligation under s.195(5) for the Tribunal (and thus also for the
12 Commission in thinking about how it is going to answer the Tribunal's questions) in
13 stepping into Ofcom's shoes in determining what should be done by way of remedy. There
14 is a degree of artificiality I would suggest in stepping into one shoe at a time, if I can put it
15 that way, when Ofcom would not consider only part of a charge control, or some aspects of
16 a charge control: Ofcom would consider the charge control in the round. Whether or not
17 there is a good legal point there, it just underscores the practical considerations that I have
18 outlined previously.

19 One final point on this matter - the essential problem here is a road block, if you like, in
20 relation to TalkTalk's appeal. I do not use that in a pejorative sense; I do not denigrate for
21 one moment BT's legitimate concerns about confidentiality and the need to resolve those
22 properly. But that road block I think should not be used as a reason to derail the very
23 carefully calibrated processes the Commission has internally. I think that it is just a fact that
24 we should be doing all the parties can to expedite and remove that road block so that we can
25 get the Sky / TalkTalk process moving as quickly as possible, and then we can resolve both
26 matters at a pace to the mutual satisfaction, we hope, of all the parties.

27 MR. WILKS: Mr. Gibson, I think we have some considerable sympathy with your idea of aiming
28 at an end point because clearly these two appeals are closely related. However, if we were
29 in a position for the BT appeal to be referred, say, on 1st August, you are suggesting that it
30 would then take eight months in effect, until 31st March or 1st April when that BT appeal
31 was resolved, which would be a concern, but you may want to comment on that.

32 Secondly, I would be interested in just some reassurance that you would not have thought
33 from the Commission's point of view that there would be any problem in one panel and one

1 team handling both appeals. I know that is a question for the Chairman, but that would be
2 an issue that would concern us.

3 Also, I would be interested in your response, if the first appeal were to be made, say, early,
4 August, whether you would actually need six months for the second appeal or whether,
5 having done a certain amount of work as the chairman suggested, on the BT appeal,
6 whether the Sky / TalkTalk appeal might be handled in a more expeditious fashion.

7 MR. GIBSON: Sorry, I was just taking instructions; I was listening to your final question, I do
8 apologise. I think if I can take the middle point first because I think that is the one that can
9 be dealt with most briefly. The Commission obviously has considerable sympathy with the
10 view that the same panel should deal with both appeals and will do its utmost to ensure that
11 that is the case. I cannot commit the Chairman to that course of action now, but that is
12 certainly our very real intention and one would hope that there is a good chance of
13 achieving that. That intention was, if you like, implicit in the fact that I accepted that in
14 having a BT appeal early we will get some teaching and learning of the underlying subject
15 matter.

16 The other two questions you raise in relation to taking eight months overall for the BT
17 appeal, and whether one might be able to truncate the second appeal if one has already had a
18 head start on the underlying material I think may be usefully dealt with together.

19 The eight-month period is predicated not so much on needing eight months to deal with
20 BT's appeal. It is predicated on, as I have said, first of all the desirability of dealing with
21 both remedies process at the same time. That is the most obvious part of the process that
22 needs to be dealt with at the same time. But the provisional determination and the bilateral
23 hearings we think would be more efficiently dealt with at the same time as well. So it is not
24 so much that we want to have a long time to deal with BT's case because there is anything
25 intrinsically more difficult in that, but because we think that would be the most efficient
26 way of dealing with things in the round.

27 The additional complicating factor is if we had the appeal sent to us in August of course
28 there is always the issue of the summer holidays, and that is even more complicated by the
29 travel difficulties in central London attendant upon the Olympics and Paralympics. We are
30 all doing our best to keep business as usual; I do not want for one moment to suggest that
31 we are going to be downing tools and enjoying what little sunshine we may have just simply
32 because the Olympics are on, far from it. We will be doing our best to move forward but we
33 have to recognise that many members have to come in to London: there are travel issues and
34 also accommodation issues in coming in for group meetings throughout that period. In the

1 normal course, one would probably be looking for some extension of the period from the
2 normal six months because of the summer period and the Olympics, so that is one reason
3 why we need a little bit longer for the appeals.

4 Probably the best way of shaving down from eight months would be, as you suggest in your
5 third point, to try and deal with the second appeal more quickly. It is difficult for us to
6 know exactly how much scope there is to do that. But I am instructed by one of the staff
7 members of the Commission who has most familiarity with trying to run these processes, so
8 we have the benefit of his wisdom of having dealt with all of the appeals to date, and he
9 says it may be possible to deal with the second appeal in fewer than six months, having
10 regard to your very sensible remarks. Five and a half months I think would be comfortable.
11 We would obviously try and do things more quickly. Obviously, the objective of hitting the
12 end date set out in the directions would not preclude the possibility that we can deal with
13 things more quickly. For example, if we find no error, then obviously the remedies process
14 falls away to some degree. We would still need to receive submissions on the provisional
15 determination before we arrive at a final determination, but removal of the remedies process
16 is one way that we may be able to contract that timescale further. But we would not want to
17 commit to an unrealistic timetable at the outset, because the most efficient way to plan is to
18 know the total time is from the outset rather than have to plan for a shorter time and then
19 have to come back for extensions. That does not lead to an efficient process. So, with that
20 point in mind, we say perhaps shaving down five and a half months for the second appeal
21 may be an achievable goal, but we would have difficulty shaving much beyond that because
22 the BT appeal would be somewhat slowed down in its early phases by the intervention of
23 the Olympics and the summer holiday period.

24 If I can assist you further I would be happy to.

25 THE CHAIRMAN: No, thank you very much.

26 MR. HOLMES: A few points do arise out of what Mr. Gibson has said, if I might now claim the
27 opportunity to say a few words?

28 THE CHAIRMAN: Yes.

29 MR. HOLMES: We have considerable sympathy with the idea that these two appeals should be
30 concluded at the same point, primarily because of the undesirability of having a fluctuation
31 in the level of the price controls at the end of the process, depending on the happenstance of
32 which appeal ends first, so one might find - one simply cannot know at this stage - that the
33 price control has to go up and then down again, and that would not be the best result for
34 anyone.

1 We also have sympathy for the work planning points raised by the Commission and the
2 possibilities that there may be areas of overlap, although it appears to us that they are
3 perhaps more in relation to subject matter than specific arguments; it is hard to say at this
4 stage. We are, on the other hand, somewhat concerned that there are a number of
5 uncertainties at this stage which make it very hard really, to know what the appropriate end
6 point is, and in particular we have a disclosure process which may or may not be contested,
7 followed by an amendment to a notice of appeal which may or may not be contested, and
8 which may have implications, depending on its scope, for the timing of the defence. So at
9 this stage to try to fix an end point by reference to that moving target strikes us as somewhat
10 problematic, and so while obviously the Commission needs some certainty for the purposes
11 of its work planning, we are on balance, I think, attracted by Mr. Ward's submission that it
12 may be preferable to wait and to see and make modifications as necessary at a later stage. It
13 may very well be that the appropriate course will ultimately be to have a determination in
14 both appeals at the same time at more or less the moment that is being suggested by the
15 Competition Commission. It just appears to us that it is a bit early to say now, and one
16 supposes that the Tribunal, and also the parties, will be sympathetic to applications from the
17 Competition Commission which may need to be made in due course if it turns out that the
18 difficulties of managing these two appeals in parallel do require an extension to one or other
19 on the basis of the date of the reference that is proposed in July or early August in the BT
20 appeal.

21 THE CHAIRMAN: Thank you very much. Briefly, Mr. Pickford, because I want to move on to
22 the timetable in the Sky/TalkTalk appeal, or is that what you are going to talk about?

23 MR. PICKFORD: I was going to address you, madam, on what we have just been discussing,
24 because I have not made any submissions on it at all. I can deal with it by reference to our
25 appeal because issues concern the overlapping ----

26 THE CHAIRMAN: Well the issue that concerns me is the issue that Mr. Holmes has just raised
27 which is there is so much uncertainty in relation to the scope and timing of your appeal, that
28 to try and anticipate how that appeal is going to pan out when setting the deadline for what
29 appears to be a more straightforward BT appeal may create a problem for BT without
30 necessarily resolving the position for Sky/TalkTalk because we do not know when that
31 reference is going to be made and when an appropriate end date for that reference is going
32 to be.

33 MR. PICKFORD: Madam, there are some extremely important issues here and I would like to
34 address you on them.

1 THE CHAIRMAN: Yes.

2 MR. PICKFORD: In relation to that practical question one possible way through would be not to
3 determine at this hearing what the final date of the BT reference is going to be. We could
4 have a CMC shortly before that reference is due to be made when our appeal will be much
5 further progressed, and we hopefully should have got through all of the disclosure issues,
6 and we could potentially set an appeal date then rather than now.

7 If one wants to set a date now it appears that there are two alternatives. It could either be a
8 contingent date, i.e. a date made by reference to whatever date - ultimately the date in our
9 appeal. Clearly there are disadvantages to that from the Commission's perspective because
10 it wants to know where it is so that it can plan accordingly. Alternatively, there is the
11 approach that has been advocated by Mr. Gibson that one can, with some reasonable degree
12 of certainty, estimate when it is likely that the Sky/TalkTalk appeal will be ready to be
13 referred and one can determine an end date on that basis. Now it might need to be flexed by
14 a week or two if there are matters that delay it that we are currently unable to anticipate, but
15 that would at least give the Competition Commission the broad measure of certainty that it
16 requires within a margin of error of potentially a couple of weeks.

17 So, madam, those are the three practical ways forward.

18 THE CHAIRMAN: So what you are saying is that we do not actually have to decide today
19 whether it is going to be six months for the BT matter ----

20 MR. PICKFORD: No.

21 THE CHAIRMAN: -- because we are going to be referring those questions towards the end of
22 July by which time we will at least know how smoothly the disclosure exercise in
23 Sky/TalkTalk is going, how far along we are with the amendment of the notice of appeal in
24 Sky/TalkTalk, if that process is all then embroiled in bitter arguments in front of the
25 Tribunal about pieces of information, then we will be in one situation. If it has all gone
26 smoothly so that we can envisage sending questions off just after the summer, we are in a
27 different situation.

28 MR. PICKFORD: That is right, madam. There is no necessity to take this decision today. We
29 will have better information in a month or two's time, and therefore it would be best for the
30 Tribunal to take its decision with the best information that will be available to it at the time
31 it needs to take it. That would be our primary position, but obviously I will advance the two
32 alternatives if the Tribunal would prefer.

33 If I could step back a moment, we do have submissions to make about why we say it is
34 essential that the end point for these appeals, at least on the overlap issues, is the same.

1 With respect to Mr. Ward, with his usual eloquence he has put forward a very persuasive
2 case for why the BT appeal should get on, we say in fact he is in danger of leading all the
3 parties and the Tribunal into a cul-de-sac and a very difficult place if we go down his route.
4 Perhaps I could explain to the Tribunal why that is: we say there is a significant overlap on
5 a number of the points, and I will come on in a moment to develop, by reference to BT's
6 appeal, where the points have overlap.

7 THE CHAIRMAN: Can we just be aware of the time and we have got to get finished this
8 afternoon, if your submission is that we should leave the date uncertain at the moment and
9 deal with that point when we come to refer the questions, do we then need to hear what you
10 want to say about why it is so significant to have the end date?

11 MR. PICKFORD: As long as the Tribunal is not determining at this point that issue of when the
12 end date is.

13 THE CHAIRMAN: Why do you not just move on for the moment to discuss what the timetable
14 should be in the Sky/TalkTalk appeal and then we might take a short break and think about
15 where we are with the timetables for those appeals and what we are going to decide today?

16 MR. PICKFORD: Madam, I am very content with that. I have laid down my marker that we
17 would have points to make about it and therefore it would not be appropriate for the
18 Tribunal to decide it in the absence of hearing those.

19 On our timetable we originally put together an indicative timetable to hand up to the
20 Tribunal. It might be appropriate for me to do it. I have already handed it to my learned
21 friends. (Same handed) We were trying to be comprehensive in relation to this. On my
22 copy I have been keeping up to date with what the Tribunal has said in relation to BT's
23 appeal, but unfortunately what you have in front of you does not quite do that because we
24 have not been able to replicate it.

25 In relation to the first issue, which is disclosure, I did have some submissions to make to
26 you about the disclosure that we require and the need for - even if disclosure is to be at this
27 stage voluntary - some timetable to be set in relation to the voluntary part of the disclosure.
28 Ofcom said that it can provide documents by 1st June (that is tomorrow) as long as the
29 confidentiality ring is set up. It may be at this stage impractical to imagine that the
30 documents will be provided on the same day, but as I understand it they could provided
31 presumably on the next working day which would be next week, subject to what Mr.
32 Holmes says. I see he is frowning at me, so it may be ----

33 THE CHAIRMAN: The first step at the moment is not something that we are going to order,
34 because I am not sure how much of that is in contention. We cannot just order that the

1 annex C documents are handed over. This is something that has got to take place without
2 our order at this stage.

3 MR. PICKFORD: Madam, I am able to take you through each of the items on our annex and
4 explain what the situation is in relation to them.

5 THE CHAIRMAN: I am sure you are, but we have not got time this afternoon to hear argument
6 on all those different items, and as to whether the practicalities of Mr. Johnson and Mr.
7 Stephens going and having meetings with representatives is practical or whether that is
8 likely to resolve things. That is not something we can deal with now. What has got to
9 happen is that the confidentiality ring has got to be set up, there has then got to be
10 disclosure by BT and Ofcom of such documents as they are prepared to disclose.
11 Sky/TalkTalk have then got to decide, "Is that effectively everything that we want? If it is
12 not, is the rest of it worth fighting about or will we make do with that?" Then once
13 disclosure is either completed voluntarily to everybody's satisfaction or some narrower
14 class of documents which is seriously in dispute has been identified and the Tribunal's
15 ruling sought and given, from that point on that is when you need your time to consider
16 whether you want to amend your notice of appeal.

17 MR. PICKFORD: Madam, with respect, in relation to the voluntary nature of disclosure, that
18 does not need to preclude the Tribunal from setting a timetable in relation to it. In relation
19 to High Court proceedings, ordinarily there would be a time set for the disclosure by each
20 party. Each party gets to decide, within the requirements of the CPR, what documents they
21 are going to disclose. At that point there are no arguments about the specifics or whether
22 they have disclosed enough. There is nonetheless an order from the court saying, "You
23 have got to do this stage by that point in time", albeit that it is voluntary. I am not asking
24 that the order has to say to the parties that they must disclose the specific items in annex C,
25 it is that the parties must provide the disclosure that they have said they are willing to
26 provide by a certain date.

27 THE CHAIRMAN: So let us say, BT and Ofcom to provide disclosure - does that then deal with
28 the meetings of Mr. Johnson and Mr. Stephens and your expert, your line length man, going
29 to interrogate those three databases?

30 MR. PICKFORD: It may or it may not. We anticipate that there is still something between us
31 and BT in relation to that issue. I hear what the Tribunal said, that they do not want me to
32 address you on it at the moment because of the lateness of the hour, so obviously there is a
33 limit to how we can go with that issue today. We can obviously try to progress matters off-

1 line as far as we are able to do so. There is certainly a coming together of our positions, but
2 on certain issues it would probably better to say that there is a measure of disagreement.

3 THE CHAIRMAN: All right. Let us say that we manage to set up the confidentiality ring by
4 tomorrow for the non-contested people. Then BT and Ofcom to provide disclosure of the
5 documents that they have indicated in their correspondence that they will disclose by ----

6 MR. PICKFORD: We had understood, and I may have made a mistake, that Ofcom had
7 originally indicated 1st June.

8 MR. HOLMES: If it would assist, there were two caveats that we expressed. One was the
9 establishment of the confidentiality ring. The other was the point that BT has raised about
10 some of the documents containing what they refer to as “out of scope information”, that is
11 to say information relating to other products and services which are not the subject of the
12 price control. The scope of that is something that I am as yet uncertain of, and it may take
13 some time and some liaison between Ofcom and BT in order to determine how those
14 redactions should take place and within what time frame. We absolutely support Mr.
15 Pickford’s submission that there should be a cut-off point by which voluntary disclosure
16 should come to an end so that applications can be made and we can try and hit the 13th July
17 time which has been proposed for the notice of appeal. This is not at all by way of
18 obfuscation, but just as a practical matter, it may well take a week after 1st June. I do not
19 have instructions as to how long it will take.

20 THE CHAIRMAN: Can we say that, provide disclosure of the documents that you say you will
21 disclose as soon as practicable so that the ones about which there is no controversy you can
22 hand over as soon as you can ----

23 MR. HOLMES: I believe it can be done tomorrow, madam.

24 THE CHAIRMAN: It could be done tomorrow if we have got the confidentiality ring set up - as
25 soon as practicable, and by no later than - if we said the end of next week would that help
26 with the redactions?

27 MR. HOLMES: I think we are somewhat in BT’s hands here, because our intention is to raise the
28 scope of the redactions with them in relation to the documents in question.

29 MR. WARD: Madam, there are two separate things here: disclosure from BT, which I can
30 address you on whenever that is convenient - but as to Mr. Holmes’ point, yes, BT are
31 happy to try and meet with Ofcom I think tomorrow to try and work out this problem of the
32 out of scope information to enable Ofcom to make its disclosure as quickly as it can.
33 For that part of the disclosure exercise the end of next week is obviously practicable. One
34 never knows until one starts just how technically demanding those kinds of exercises will be

1 because of course the model still has to work despite the changes that are going to be made.

2 I am thinking primarily of Ofcom's ----

3 THE CHAIRMAN: What about such voluntary disclosure as you are going to make?

4 MR. WARD: The BT disclosure is of a slightly different kind. What BT has offered is three
5 different things. There is, I think, a small amount of pre-existing material that can simply
6 be disclosed. Very much in the spirit of the generous co-operation, BT has also offered to
7 actually draft some new documents to produce some summaries that will actually help
8 Sky/TalkTalk; and, as of course we have indicated, to have some meetings as well.
9 I did speak to Mr. Pickford about this earlier and he indicated that he might want a series of
10 meetings, at least in respect of line length. Clearly this is not the same process as merely
11 attaching some spreadsheets to an email and sending them out into the confidentiality ring.
12 That is why we actually asked for until 18th June, which is two weeks from Monday, which
13 is effectively two working weeks, because of the double Bank Holiday next week.
14 Obviously we would be very happy with an order that says we do it as soon as practicable,
15 but it just is not a neat and tidy exercise of handing over something that already exists. I
16 hope that really is, as much as anything, a reflection of the fairly constructive approach that
17 BT has taken to finding ways that will actually help Sky/TalkTalk.

18 THE CHAIRMAN: Mr. Pickford, if you have got some information as soon as possible from
19 Ofcom and from BT and the rest of it wrapped up by 18th June, so that at that stage you
20 knew that either you were in a position to crack on with amending your notice of appeal, or
21 you thought there were some extra bits that you want that you will have to come to the
22 Tribunal to get an order for, does the 13th July deadline for the amended notice of appeal ----

23 MR. PICKFORD: Madam, I would just need to take instructions to ensure that what I am about
24 to say is something that is approved of by my clients. However, on the basis of what I have
25 just heard it would appear to be that the documents, in so far as there are actual physical
26 documents that currently - Mr. Ward says there is a few of them and Mr. Holmes has
27 referred to documents that they have ----

28 MR. HOLMES: I believe so.

29 MR. PICKFORD: -- if they could all be provided as soon as possible and no later than the end of
30 next week - we are just talking about the documents at the moment, that would be by
31 8th June - that would enable us to have dealt with that particular aspect.
32 We are welcoming of Mr. Ward's or BT's provision of further information which he says he
33 can provide by 18th June, and we are content with that date. Also if the parties can attempt
34 to have arranged, and had, the meetings that they need in order to interrogate the database

1 also by 18th June - obviously that is subject to co-operation between the parties, but if they
2 can try to have achieved by 18th June as well - then I think the Tribunal is right that we
3 would be well on the way to knowing where we stand and therefore have a more realistic
4 view of the end date for our amended notice of appeal.

5 MR. WARD: May I just add something, madam.

6 THE CHAIRMAN: Just wait one moment. (After a pause) Yes?

7 MR. WARD: Just two things: just regarding the question of meetings, as I said, there has been a
8 suggestion they may want a series of meetings, I obviously want to reserve BT's position as
9 to how relevant and/or proportionate that might be. Plainly we can use best endeavours to
10 meet within that window, and let us hope the matter can go constructively.

11 Another just practical suggestion which actually links back to the previous topic we were
12 discussing, namely about the setting of the deadline for the Commission in the BT case, it
13 may well be that a case management conference should be fixed in effect now for some
14 time at the end of June where one could deal with that issue and one could deal with any
15 issues that do arise in respect of this disclosure. I hope there will not be, but obviously we
16 have a strong interest in making sure these issues get resolved quickly.

17 THE CHAIRMAN: I do not think the end of June is going to work, because what we need to
18 know before we decide this issue about setting the deadlines is not only whether disclosure
19 is complete, but whether there is going to be any dispute about the amendments to the
20 notice of appeal.

21 MR. WARD: Madam, that may be right, it may be wishful on my part to roll all those things into
22 one imagined hearing.

23 I suppose the driver in my submission was to not allow those issues to drift into the autumn.
24 I hear the practical value of Mr. Pickford's suggestion, which is that we do not need to
25 decide what the Commission will do, when the Commission will finish, by today, but we
26 would like that to be decided on a concrete date. I am sorry, I did not mean to take you
27 back into that issue. I actually thought there was a useful connection between the two.

28 MR. GIBSON: Madam, if I may just say very briefly: on the subject of a possible June CMC, that
29 time would also be an appropriate moment perhaps to consider how to deal with the WBA
30 cross-over issues, because of course the WBA final determination is due on 11th June.

31 THE CHAIRMAN: Yes, there will be that final determination, and then there has to be a period
32 in which the parties have to decide whether they are going to seek to bring judicial review
33 proceedings in the Tribunal against that, and that may or may not have been decided by the

1 end of June. If they are, then we will have to set a timetable for resolving those issues.

2 These things have got endless sorts of complexity.

3 MR. GIBSON: There are going to be all sorts of procedural fun and games, I appreciate that, but
4 I was just flagging that as a potential benefit of having a June CMC.

5 THE CHAIRMAN: Let us try to set some kind of timetable in both these appeals so far as we can
6 by the rapidly approaching end of today. Where I am saying is confidentiality ring by 1st
7 June, BT and Ofcom to provide disclosure of the documents that they have said they will
8 disclose as soon as practicable, and by no later than 8th June, and to complete disclosure in
9 the form of whatever meetings are going to take place by no later than 18th June. Of course,
10 it is always open to the parties to come back if these things do not prove possible, but let us
11 get some kind of structure of the steps. I am not interested in the dates at the moment, just
12 the steps.

13 MR. WARD: I am sorry, I understood Mr. Pickford is able to accept that in so far as BT is
14 drafting new documents it is going to produce new material, but he would be happy for 18th
15 June to be the deadline for ----

16 THE CHAIRMAN: Yes, so it is disclosure of the pre-existing documents as soon as practicable,
17 but by 8th June, disclosure of other material ----

18 MR. PICKFORD: In relation to the new documents it might ----

19 THE CHAIRMAN: Wait a minute - other material by 18th June. Then the next step would be
20 Sky and TalkTalk to inform the Tribunal by close of play, say, two days later, three days
21 later, whether they regard disclosure as complete and therefore are moving to consider
22 amendments to their notice of appeal or whether they are going to seek further disclosure
23 from BT and Ofcom.

24 MR. PICKFORD: Madam, yes. I said I would take instructions, and indeed we are content with
25 that subject to one proviso, which I do not think should be problematic, which is that we
26 would wish for there to be liberty to apply in the meantime if, in discussions between
27 ourselves and BT, it is apparent that there is a particular sticking point when each party has
28 set out its position. It would be sensible to try and bring that forward as soon as possible. It
29 might be that consideration of it has to be wrapped up with other points later on. If there is
30 clear blue water between us on one particular issue it might be sensible for us to write to the
31 Tribunal and say that the Tribunal will need to consider issue X, and there would be no
32 point in waiting until after 18th June in order to do that.

33 THE CHAIRMAN: All right, so there will be liberty to apply for that amongst other purposes.
34 Then we have got to the end of disclosure, which will either be once you have had a chance

1 to consider what has happened by 18th June, or once we have resolved any issue. Then we
2 can set a period from that date, which is a date as yet unknown, for the service of the draft
3 amended particulars of claim. How long do you need from the completion of disclosure to
4 decide whether to amend your notice of appeal?

5 MR. PICKFORD: We had originally sought six weeks for that. It may be the case, and because
6 we have a strong incentive to get our appeal on as soon as possible, that we can do it more
7 quickly than that, and we would aim to. For instance, if we could do it in five weeks we
8 would do it in five weeks.

9 THE CHAIRMAN: If we set a deadline there is nothing to stop you from doing it earlier.

10 MR. PICKFORD: Yes.

11 THE CHAIRMAN: So then six weeks from completion of disclosure for the notice of appeal, and
12 then the next step is what usually goes in tandem, which is the preparation of the defence
13 and the preparation of the questions. Mr. Holmes, how long would you need for the
14 defence?

15 MR. HOLMES: Madam, the slight difficulty is that unless we know when the date for the
16 amended notice of appeal falls, we will not know which side of the summer vacation we are
17 which affects the availability of people. You will see that from 13th July we thought
18 14th September was realistic, taking account of August and the Olympic period. If those
19 two periods still fall between the amended notice of appeal and the defence, then a two
20 month period would be required. If, on the other hand, and we certainly hope that that is
21 not the case, we find ourselves later on and we are through the Olympics and we are
22 through the summer then a shorter period may be possible, but it is very hard to say at this
23 stage.

24 THE CHAIRMAN: I agree with that, and I think that the most we can realistically expect to
25 achieve today is to get to the draft notice of appeal. Again, we do not know whether that is
26 going to be contested. If we get that far in the order that we make following this CMC we
27 will then take matters forward once we have got to that stage.

28 MR. PICKFORD: Madam, I think we are anticipating that there is going to be a CMC at about
29 the time when that is complete, and we can consider the issue of Ofcom's defence then. So
30 there will be another opportunity to address that issue.

31 MR. HOLMES: Madam, sorry, I know we are running out of oxygen, but one last point: on the
32 amendments, we have suggested that they could be brought forward and then, if no one
33 objects within seven days thereafter, they would be allowed. I do not think any party has

1 objected to that and it would meet your suggestion at the beginning that it would be not by
2 default but depend on a failure to object.

3 THE CHAIRMAN: I think when you lodge with the Tribunal the draft amended notice of appeal
4 you would also indicate whether the other parties consent to that.

5 MR. PICKFORD: Certainly, madam. Whilst I am on my feet, there was one very minor point in
6 relation to the drafting of the order.

7 THE CHAIRMAN: Which order?

8 MR. PICKFORD: The order that you are considering at the moment - which was in relation to
9 the information that BT is going to provide us. I have no strong views on how it is
10 expressed, but it might help clarify matters if it is disclosure by 8th June, and it is the
11 provision of further information by 18th June. That is what I understand BT are proposing
12 to give us and that would help distinguish, from BT's perspective and ours, what we are
13 talking about.

14 MR. GIBSON: I hesitate to rise for two reasons: first, I am conscious that this is very much the
15 last gasp of oxygen, and also because it is not normally the Commission's place to presume
16 to engage in matters of procedure prior to an appeal coming to us. But I am conscious that,
17 given the need to calibrate the two appeals, the time taken to get TalkTalk's appeal to us is
18 actually potentially a constraining factor on the amount of time we will have to resolve that
19 appeal.

20 With that in mind, I make this very short submission, which is that, as I had understood the
21 provisional timetable outlined here, para.3 seemed to indicate that disclosure would finish
22 on 18th June. Paragraph 6, as I understand it, projected to have an amended notice of appeal
23 by 13th July. I have not checked my diary but I think that is about three and a half weeks
24 between end of disclosure and amended notice of appeal. I would submit that that is a
25 better timetable to be working towards than a six week period, because that additional time
26 is actually going to have a knock-on impact for the Commission's ability to engage in its
27 procedures in what it regards as an efficient fashion.

28 I say no more than that, but I do not think one should be looking at individual parts of the
29 procedure without looking at the knock-on impact for the way that the determination would
30 happen as a whole.

31 THE CHAIRMAN: I understand what you say, Mr. Gibson, but it is Sky/TalkTalk who are
32 saying that they need six weeks ----

33 MR. GIBSON: With respect, madam, this is Sky/TalkTalk's provisional timetable, and in this
34 they suggested they need three and a half weeks. I am not quite sure what the difference is.

1 THE CHAIRMAN: If you would let me finish. They are the ones who are trying to bring this
2 appeal on and they are the ones who are disadvantaged by the weeks slipping by with the
3 price control as they say not corrected. So we have to assume that if Mr. Pickford says that
4 he needs six weeks, then that is going as fast as he can. Mr. Pickford, have you got
5 anything to say about why you are not sticking with 13th July?

6 MR. PICKFORD: Madam, the reason is this: we think that it is possible that we will need up to
7 six weeks in order to amend. In an effort originally to try and find some kind of timetable,
8 but definitely finished before the August vacation, if we were actually going to get an order
9 for disclosure today that we could rely on so that we knew that we had all the information
10 that we required, we were seeking to compromise to push our notice of appeal forward. As
11 we are not in that situation, we say that the sensible order is that we have up to six weeks.
12 However, as I have said and as the Tribunal has made note, we have a very strong incentive
13 to amend as soon as we can and we shall.

14 MR. GIBSON: Madam, I defer to their ----

15 THE CHAIRMAN: I think we have heard enough, Mr. Gibson.

16 MR. GIBSON: I hope the same indulgence is shown when we explain our constraints on our
17 ability to do things.

18 THE CHAIRMAN: We are going to rise now briefly and decide what to do. We will come back
19 at 4.50.

20 (Short break)

21 THE CHAIRMAN: On the question of the deadline for the reference for the determination of the
22 questions by the Commission in the BT appeal, we consider that the arguments for and
23 against having the same end date for the determination of the questions in both the appeals,
24 come what may, are finely balanced. We understand both the importance to BT of having
25 an early resolution of its appeal, but also the importance to the Competition Commission
26 and to the industry of having an orderly adjustment to the price control, and we bear in
27 mind, of course, that there are many companies whose business is significantly affected by
28 adjustments to the price control beyond those who are represented in court today so we
29 consider it is premature to decide that issue now.

30 The order that we will make, therefore, in the BT appeal is as follows:

- 31 (i) the defence to be served by 29th June,
32 (ii) draft agreed questions to be lodged with the Tribunal by BT by 6th July,
33 (iii) the Sky/TalkTalk statement of intervention by 20th July; and

1 (iv) also by 20th July the parties to lodge written submissions as to the deadline to
2 be set for the Competition Commission to determine the reference questions,
3 and by reference to "the parties" there I mean the Competition Commission as well if they
4 wish to make submissions in that regard.

5 As far as the Sky/TalkTalk appeal is concerned, there are too many unknown quantities still
6 around for us to be able to progress as far with that appeal as we have been able to progress
7 with the BT appeal, so the order that we make in that appeal is as follows:

8 (i) BT and Ofcom to provide disclosure of all pre-existing documents included
9 in Annex C to the notice of appeal which they are prepared to disclose as
10 soon as practicable, and no later than 8th June.

11 (ii) BT and Ofcom to provide further information, explanations and material as
12 requested in Annex C which they are prepared to provide as soon as
13 practicable and no later than 18th June.

14 (iii) Sky and TalkTalk to inform the Tribunal by no later than close of play on 20th
15 June whether they regard disclosure as now complete, or whether they will be
16 applying to the Tribunal to seek further disclosure, and I interpolate in that
17 latter event you will then have to set a mini-timetable for dealing with any
18 such application.

19 (iv) Sky and TalkTalk to lodge with the Tribunal draft amended notice of appeal
20 within six weeks of the completion of disclosure with an indication whether
21 the parties consent to the proposed amendments and, if not, indicating which
22 elements are in contention.

23 Those orders are in addition to our making an order on the confidentiality ring that we
24 discussed earlier. Also, to be clear, the order in the BT appeal only relates to the first two
25 grounds of the BT appeal. The third ground which relates to the matters which overlap with
26 the WBA appeal are stayed until further order of the Tribunal.

27 MR. PICKFORD: Madam, could I just briefly clarify two matters?

28 THE CHAIRMAN: Yes.

29 MR. PICKFORD: On the provision of our amended notice of appeal, I had understood the
30 suggestion from Ofcom to be that permission should be granted if there is no objection
31 taken within seven days. As currently phrased by the Tribunal I think we are being asked to
32 provide an indication as to whether the parties object, at the same time as we are supposed
33 to be providing the amended notice of appeal itself, which would mean we would have to
34 provide a draft to the other parties earlier than we are providing it to the Tribunal, which

1 obviously makes life a bit difficult. I had understood that we would have six weeks and
2 then there would be a further week thereafter in which any other party could seek to object;
3 that was Mr. Holmes' suggestion ----

4 THE CHAIRMAN: Yes, I am sorry, you are right, yes.

5 MR. PICKFORD: -- which I suggest is more practicable.

6 THE CHAIRMAN: Yes, so that needs to be a fifth point then:

- 7 (v) Sky/TalkTalk to notify the Tribunal one week later whether the parties
8 consent to amendments and, if not, indicating which elements are in
9 contention.

10 But what we want to receive is a single letter setting out the position rather than a whole
11 slew of letters from the parties.

12 MR. PICKFORD: Yes, we can consolidate the position attaching the correspondence.

13 THE CHAIRMAN: Yes, and then at that point, if there are no disputes then that can be regarded
14 as finalised. If there are disputes we will then set a timetable for resolving those disputes,
15 but we do not expect, necessarily, the parties within that one week to formulate definitively
16 what their objections are.

17 MR. PICKFORD: Or, rather, the reasons in support of their objections.

18 THE CHAIRMAN: Yes, the reasons.

19 MR. PICKFORD: They are going to have to formulate their objections.

20 THE CHAIRMAN: Yes, they would formulate their objections, but we would not expect within
21 that week them to provide effectively a response to the application to amend which would
22 have effectively been made by Sky/TalkTalk.

23 MR. PICKFORD: Thank you.

24 MR. WARD: I am sorry, madam, one point of clarification, I understand Mr. Pickford has
25 referred previously to amendments to the notice of appeal but also supplemental evidence
26 and I assume that is to be brought forward on the same timetable.

27 THE CHAIRMAN: Yes.

28 MR. PICKFORD: There was a second point, madam, which was in relation to the reference to
29 the provision of further information by BT and Ofcom by 18th June, just for clarification
30 that deadline of 18th June includes also the initial meetings between BT and Sky?

31 THE CHAIRMAN: Yes, well those will have to have taken place before the information and
32 explanations and materials are provided.

33 MR. PICKFORD: So long as it is clear to all parties that that is what is contemplated.

1 THE CHAIRMAN: Yes, what is contemplated is that by 18th June you should be in a position to
2 say either: "We have got everything that we want", or at least "We are prepared to live with
3 what we have and we do not seek anything more so now we are moving on to amending our
4 notice of appeal."
5 MR. PICKFORD: Indeed.
6 THE CHAIRMAN: Or to say: "No, there are these things that we cannot manage without so
7 please can we apply for a formal order for disclosure of those matters."
8 MR. PICKFORD: Thank you.
9 THE CHAIRMAN: Thank you very much everybody.
10 _____