

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

**IN THE COMPETITION**  
**APPEAL TRIBUNAL**

Case Nos. 1205-1207/3/3/13

Victoria House,  
Bloomsbury Place,  
London WC1A 2EB

30<sup>th</sup> October 2013

Before:  
**THE HON. MR. JUSTICE ROTH**  
(Chairman)  
**STEPHEN HARRISON**  
**PROFESSOR COLIN MAYER**  
(Sitting as a Tribunal in England and Wales)

BETWEEN:

**BRITISH TELECOMMUNICATIONS PLC** Appellant

- and -

**OFFICE OF COMMUNICATIONS** Respondent

AND BETWEEN:

**(1) CABLE & WIRELESS WORLDWIDE PLC**  
**(2) VIRGIN MEDIA LIMITED**  
**(3) VERIZON UK LIMITED** Appellants

- and -

**OFFICE OF COMMUNICATIONS** Respondent

AND BETWEEN:

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

- and -

**OFFICE OF COMMUNICATIONS** Respondent

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

**H E A R I N G D A Y T W O**

## A P P E A R A N C E S

Mr. Rhodri Thompson QC, Mr. Graham Read QC, Ms. Sarah Lee, Mr. Ben Lynch and Ms. Georgina Hirsch (instructed by BT Legal) appeared on behalf of the Appellant, British Telecommunications PLC.

Mr. Meredith Pickford and Mr. Julian Gregory (instructed by Herbert Smith Freehills LLP) appeared on behalf of the Appellants (1) British Sky Broadcasting Limited and (2) TalkTalk Telecommunications Group PLC.

Ms. Dinah Rose QC and Mr. Tristan Jones (instructed by Olswang LLP) appeared on behalf of the Appellants (1) Cable & Wireless Worldwide plc, (2) Virgin Media Limited and (3) Verizon UK Limited.

Mr. Pushpinder Saini QC, Ms. Kate Gallafent, Mr. Hanif Mussa and Ms. Emily Neill (instructed by the Legal Department, Office of Communications) appeared on behalf of the Respondent.

---

1 THE CHAIRMAN: Mr Saini and everyone, we will take a short break when we have finished  
2 your opening before the evidence starts. We have been sent a helpful little schedule I think  
3 about the order in which cross-examination will take place, but slightly unclear from that.  
4 Is it the case that Ofcom is not intending to cross-examine any of the BT witnesses?

5 MR. SAINI: None of the factual witnesses.

6 THE CHAIRMAN: None of the factual witnesses, thank you.

7 MR. SAINI: That is right, sir. Sir, members of the Tribunal, there are a total of nine points that  
8 are taken, nine grounds that are taken against Ofcom. I am going to deal with some of them  
9 in more detail than others, but I promise to touch on all of them. May I go immediately  
10 then, in the time I have, to ground one, which is construction. May I ask the Tribunal,  
11 please to turn in bundle E of the core bundles to the legislation, first of all, at tab 5. This is  
12 the UK legislation, the Communications Act 2003. You were taken to this briefly  
13 yesterday, but I do need to focus on this. At p.35 (numbering in the middle of the page at  
14 the bottom) you will see in subsection 3 of s.151 the definition of network access.

15 THE CHAIRMAN: Yes.

16 MR. SAINI: I will hold on until everyone has got to that. Top right hand it is 141, bottom middle  
17 it is p.35.

18 THE CHAIRMAN: Yes, we have got it, thank you.

19 MR. SAINI: I am obliged. The Tribunal will be familiar, from having looked at Condition HH3  
20 yesterday, that there are two elements. It applies to each and every charge, but it must be a  
21 charge which is for network access. You will see the expansive definition in subsection 3 of  
22 network access. Our simple and first submission is that connections and rentals fall clearly  
23 within the definition of network access because the definition is not limited to  
24 interconnecting as a whole, in other words a whole service which will give you end to end  
25 connectivity, but includes within the definition any sub-components. That is made clear by  
26 the definition in subsection 3(b):

27 "any services, facilities or arrangements which— (i) are not comprised in  
28 interconnection; but(ii) are services, facilities or arrangements by means of which a  
29 communications provider or person making available associated facilities is able,  
30 for the purposes of the provision of an electronic communications service (whether  
31 by him or by another), to make use of anything mentioned in subsection (4)"

32 Then we have the further explanation in subsection (4) which I will not read. But in our  
33 submission, connections and rentals both together and on their own and the WES and BES  
34 services, all of those items fall within the definition of network access.

1 I believe that Mr. Thompson's submission yesterday was that in order for something to  
2 count as network access it must be something which independently can provide you with  
3 communication. We say that is not what the definition provides.

4 Just while we are in this core bundle, it is worthwhile flicking back, if the Tribunal would  
5 please go back into tab 1 to the Access Directive. I am looking at the amended version.

6 Would the Tribunal please go to Article 2 p.8 (top right hand corner) under "Definitions". If  
7 the Tribunal has Article 2(a) you will see a definition of "access" there. Does the Tribunal  
8 have that?

9 THE CHAIRMAN: Yes.

10 MR. SAINI: You will see the definition is expansive, and it also is clear that access includes  
11 effectively sub-elements: physical infrastructure, ducts and masts and items which on their  
12 own would not provide connection because they have to be combined with other items. But  
13 the definition of "access" there is very wide and would certainly include connections.  
14 Indeed, if one goes down about six or seven lines one sees:

15 "It covers inter alia access to network elements and associated facilities which may  
16 involve the connection of equipment by fixed or non-fixed means".

17 So we say that the UK law definition of network access (which we have just looked at at  
18 s.151(3)) is very wide and in any event that is to be read consistently with the Access  
19 Directive definition which is even wider or perhaps more explicit. So we say whether one  
20 considers a BES or WES circuit as a whole, whether one considers connection, whether one  
21 considers rental, or whether one considers mainlink, all of those items, together or  
22 separately, fall within the definition of network access. Another way of putting it is that  
23 items which amount to network access will be necessary for access to a network but may  
24 not be sufficient. The Tribunal will recall that in addition to the definition of network  
25 access -and we perhaps can look back at the Condition in tab 12 in this same bundle at HH3  
26 p.494 - the Tribunal will recall that there is a reference to "each and every charge" and there  
27 is important wording there: "offered, payable or proposed". May we just focus on that for  
28 the moment as well: "offered, payable or proposed" for network access.

29 There are two limbs. First of all, the actual item itself, be it connection, rental or mainlink,  
30 has to be network access. That is satisfied. But we have also got to show that there is a  
31 charge offered, payable or proposed. If one goes to bundle BT17. This is just one example  
32 of the Openreach price list. There are various versions of this document scattered amongst  
33 the bundles. If one looks at the first page, this is a price list for BES 100 Mbit connection,  
34 various prices, and the dates. Then over the page one sees the BES 100 Mbit rental charges.

1 So clearly BT itself separately offers charges for connection and rental. No doubt it has  
2 given some thought to the structure of those charges and why one will pay a certain amount  
3 for connection and one will pay a certain amount for rental.

4 THE CHAIRMAN: Then mainlink a page on, I think.

5 MR. SAINI: That is right, it carries on. One sees at p.12 there are charges for mainlink there.

6 This point is important in another respect, which is that BT has complained that it never  
7 knew that connections and rentals would be separately assessed and therefore there was  
8 some violation of the principle of legal certainty. We say that argument does not get off the  
9 ground, first of all because Condition HH3 is very clear. It is not as if the interpretation that  
10 we are placing upon Condition HH3.1 is not the obvious one. Secondly, BT itself has, from  
11 day one (by day one I mean from the time of the imposition of these conditions), always  
12 separately identified charges for rental, connection and mainlink. Therefore, it would not  
13 have been surprising that Ofcom would have expected them to be able to justify these  
14 separate prices according to Condition HH3.1.

15 That is what I want to say on ground one because we say --

16 THE CHAIRMAN: You say that is the end of it.

17 MR. SAINI: That is the end of the point. It is important, however, to look at ground 2, because  
18 ground 2 has rather shifted in its nature over time. We had originally understood ground 2  
19 to be a freestanding argument based upon the economic relevance of connection and rental  
20 separately. Now, and I make no criticism in this regard, it seems to be part of an argument  
21 in relation to construction.

22 As I understand the argument in relation to construction, it is said that for some reason (and  
23 in the time that Mr. Thompson has had available he did not have a chance to articulate this)  
24 that whatever may be the correct construction of Condition HH3 (and we have just been  
25 through what is the obvious construction) somehow the Tribunal should be diverted from  
26 that construction because it would not be economically meaningful to separate connection  
27 and rental charges. That may be the way that the construction argument works.

28 THE CHAIRMAN: It might be a bit more sophisticated than that. I think what is being said is  
29 even though the ordinary meaning of the words looked at in a vacuum – or not in a vacuum  
30 but, as you point out, against the statutory definition - is as you have suggested, one should  
31 interpret against the background that would be in the knowledge of everyone who is  
32 interested in this and that would include the economic reality of how things operate. That is  
33 the way I understood the way it was put.

34 MR. SAINI: If I may deal with it in those terms. Ofcom did consider this question, and we will

1 look at the Determination in this regard in a moment, but our primary argument is once the  
2 construction is clear it cannot matter what the experts say - that is Mr. Maldoom and Mr.  
3 Harman in particular - about whether that makes any economic sense. One cannot  
4 reinterpret condition HH3 when its construction is clear in order to satisfy what the experts  
5 say is the economically sensible purpose of HH3, but perhaps I can just show the Tribunal  
6 why that, on the economics is not even that straightforward. If I can take you to part of the  
7 Determination which I emphasise is not disputed in any respect, but it is just intended to  
8 demonstrate that connections and rentals themselves separated them, and that requiring cost  
9 orientation to be separately established in respect of each is economically meaningful.  
10 If the Tribunal could go, please, to bundle B where one finds the Determination and if I can  
11 ask you, please to start at p.69. There are some parts of this which are confidential, and they  
12 are highlighted - I will not read those but I will ask the Tribunal to read those to themselves.  
13 If one goes to p.69, between 8.56 and it goes over various pages to 8.62 and there are  
14 particularly confidential charts that are prepared there, Ofcom considers - although in our  
15 primary submission it is not relevant - the separate question, which is the focus of Ground 2,  
16 which is: is separating connection and rental charges a meaningful exercise. Between 8.56  
17 and 8.62 Ofcom considers evidence that has been submitted by the CPs as to their  
18 purchasing patterns. The point is very simple and it is summarised in 8.57, if I may read  
19 that:

20 "If cost orientation were assessed on an aggregated basis, this would allow BT to  
21 charge a high price for service A (relative to costs), and a low price for service B  
22 (relative to costs). While in aggregate prices might be similar to costs, those who  
23 bought relatively more of service A would be disadvantaged relative to those who  
24 bought relatively more of service B, and both groups of CPs would face distorted  
25 price signals."

26 That is not just a theoretical point because then Ofcom goes on to describe the purchasing  
27 patterns of Sky, Virgin, CWW, and one can see in rather vivid terms, when one looks at the  
28 charts at pp. 71 to 72 the substantial difference in purchasing patterns. So, if I happen to be  
29 a CP that does not need to buy a connection because I have a legacy circuit I should not  
30 have to pay an inflated price for rental.

31 THE CHAIRMAN: Can you help us - you may need to take instructions - the other CPs we have  
32 heard little about - how many are there, because of course this condition applies ----

33 MR. SAINI: Perhaps someone will pass me a note about the other CPs. I cannot tell you off the  
34 top of my head, Sir, but I am sure someone behind me will be able to tell me.

1 THE CHAIRMAN: They are obviously affected by this as well, even though they are not parties.

2 MR. SAINI: The point, in effect, was made by you, Sir, yesterday when Mr. Thompson was  
3 addressing you, which is after the first year, at least, after the initial period (which is dealt  
4 with in 8.58.1 at the bottom of p.69) when I am somebody who just needs to buy a rental  
5 because I have paid my one-off connection charge, I am entitled to the benefit of a cost  
6 orientation condition. It should not be an excuse to say that "I am going to overcharge you  
7 for rental because when I aggregate rental and connection charges generally overall you  
8 might be getting a good deal, or across the market might be a good deal there". So there is a  
9 real problem there. I emphasise, and this is important when one comes to the expert  
10 witnesses, that one can spend a lot of time on Ground 2, and there are very detailed expert  
11 reports on Ground 2, which is: what are the economics of cost-orientation and is it  
12 economically meaningful. We invite the Tribunal to approach that evidence with caution  
13 because, first of all, because if they are right on Ground 1 it is completely irrelevant and so  
14 waste of time and money and, secondly, in fact, on the basis of the material the Tribunal has  
15 between these pages, and I emphasise none of this is contradicted, without going anywhere  
16 near the expert evidence the Tribunal can see that there is an economically meaningful  
17 distinction between connection and rental charges.

18 MR. THOMPSON: Sir, I do not think I should let that comment go. There is obviously detailed  
19 evidence from Mr. Harman, Mr. Maldoom and Mr. Coulson on this area, and I do not want  
20 to make submissions now, but I think it would be overstating it to say that none of this is  
21 contradicted. I do not want to interrupt Mr. Saini, but certainly Mr. Coulson does look at  
22 the issue of the blend between connections and rentals. It will be the matter of witness  
23 evidence from the CPs, and Mr. Harman makes a number of points. I am not proposing to  
24 go into them, but just to put in a caveat that we do not necessarily accept what has just been  
25 said.

26 THE CHAIRMAN: Are the tables, the bar charts, in figures 8.2 to 8.6, which is not a matter of  
27 expert evidence, it is just a matter for BT's evidence. I did not see, but I may have missed it,  
28 in BT's evidence that it said those are wrong.

29 MR. THOMPSON: I do not think it is said that they are wrong. What the significance of it is  
30 may well be a matter we did not discuss because they are a fairly rough and ready sort of  
31 statistic and it would be possible to make comments on that and I do not propose to do it  
32 now.

33 THE CHAIRMAN: Well, they are not rough and ready they are percentages of bill revenue. I  
34 understand the interpretation may be challenged. The way I understood Mr. Saini's

1 submission, and he will tell me if I have got it wrong, is that what is shown in the figures is  
2 not challenged as being wrong, and what is said in 8.58.2 about not everyone paying a  
3 connection charge is not challenged. That is the way I understood it.

4 MR. SAINI: That is as far as it gets.

5 THE CHAIRMAN: I think the interpretation, the relevance of it, is, I accept, a matter of hot  
6 debate.

7 MR. THOMPSON: I have been referred in particular to para. 119 of the reply, it refers to Mr.  
8 Coulson's evidence on this issue but again I do not want to take up time as you are working  
9 on a tight timetable.

10 THE CHAIRMAN: Right, well, we will note that, thank you.

11 MR. SAINI: Sir, just to make it clear, I am not making any more of a point than the factual point  
12 which is, as far as we are aware, the figures which are set out in these pages and in the  
13 charts have not been disputed.

14 Just to finish on Ground 2, we say it is not relevant but, even if it were relevant it is  
15 economically meaningful given the way the market works to look at connections and rentals  
16 separately.

17 Ground 3, a rather amorphous ground because it contains a rag bag of specific complaints  
18 about particular years but then on to a broader legal certainty complaint, and I am going to  
19 look at the specific complaints by reference to the defence in a moment. It needs to be  
20 made clear what BT's case is not, as I understand it, and I need to say this because its  
21 pleadings, with respect, and its skeleton are not clear in this regard. We do not understand  
22 BT to be saying that any representation was made by Ofcom to the effect that, in assessing  
23 cost orientation, connections and rentals will be aggregated. That is not their case. They  
24 identify no such representation and, in addition to that, there is no evidence from them that  
25 they relied upon any such representation, so there is not a legitimate expectation case, as  
26 one would call it. Rather, the complaint appears to be that Ofcom was advised, in advance  
27 of BT having this condition imposed upon it, to set out the methodology it would adopt in  
28 assessing cost orientation. That seems to be the general argument.

29 Just dealing with that argument first of all, we say that that approach flies in the face of the  
30 way the condition works, and the best way to examine this is to take up the analysis of the  
31 condition itself in the PPC Judgment, and I will take you to this because I do not believe  
32 that anyone disputes that this is the correct way to approach the condition. It is in tab 9 of  
33 bundle E, and I will find the section where the Tribunal talks about the three stages, which  
34 we looked at yesterday. It is what I call the "burden" section.



1 THE CHAIRMAN: The three elements of the condition. 66?

2 MR. SAINI: It is actually the section, which one of my Juniors will find, where the Tribunal  
3 looks at what BT has to do, and I will summarise it this way and we will find it in a  
4 moment. What BT has to do, it bearing the burden, it has to demonstrate to Ofcom's  
5 satisfaction, how its prices are cost oriented. If it fails to do that then Ofcom has to do its  
6 own best to try and look at the issue of ----

7 MR. THOMPSON: I think it is para. 249.

8 MR. SAINI: I am obliged, that is the passage I had in mind. The Tribunal will be familiar with  
9 249. Stage 1 is it is for BT to decide how to allocate common costs, and to adopt an  
10 appropriate method. Stage 2: if Stage 1 has been failed it is for Ofcom to do its own best.

11 THE CHAIRMAN: I think we know what you mean. There is a slight confusion of terminology  
12 - they use Stage 1, 2 and 3 in 245, and I think you are dealing with para. 249 where they  
13 break down Stage 2 into three steps.

14 MR. SAINI: I was mistaken because my note was on 245, which is a different issue. First, it is  
15 for BT to show how it is satisfying the cost orientation obligation. There was no obligation  
16 upon Ofcom in advance to specify if BT could not show how cost orientation was going to  
17 be achieved. There was no obligation on Ofcom to set out a methodology in advance as to  
18 how it would go about assessing cost orientation and, indeed, you saw the provisions of the  
19 Directive yesterday, which made it clear in Article 13 of the Access Directive, that in fact it  
20 is open to an NRA to adopt a different cost methodology than that adopted by a CP with  
21 SMP. So there is no obligation upon Ofcom to identify in advance what methodology it  
22 was going to use. However, and in any event, and I take you to this now because it is  
23 relevant now to Mr. Pickford's submission, if one stays in this judgment and one goes to  
24 p.81, to para.278, Mr. Pickford only read part of this yesterday, but it was established in the  
25 *PPC* case (and I do not believe anyone here disputes it for the purpose of these proceedings)  
26 that even if DSAC itself was not well-known it was reasonably well-known in the context of  
27 communications regulation. That was a finding that was made in the *PPC* case. No one  
28 suggests that finding was wrong and, indeed, it is noticeable that in this present appeal BT  
29 does not suggest that it had no idea that DSAC would be used. Its argument is that, in fact,  
30 it is not a problem with DSAC. The problem is the lack of aggregation.  
31 So just dealing broadly with the legal certainty complaint, the first point is there was no  
32 obligation upon Ofcom to specify in advance the default methodology it would use if BT  
33 has failed at stage 1.

34 THE CHAIRMAN: I am sorry to interrupt you, but are we not confusing two things?

1 Methodology would be something like DSAC.

2 MR. SAINI: Yes.

3 THE CHAIRMAN: In fact, you can say Ofcom did know but your point can fairly be, 'There was  
4 no obligation on Ofcom to tell BT that we would use DSAC. They could have proposed  
5 something else and, if that had been appropriate, Ofcom might have been satisfied'. That is  
6 methodology. What they are talking about is which charges have to be cost orientated.

7 MR. SAINI: Absolutely.

8 THE CHAIRMAN: That is not methodology. That is to what actually what the condition means.

9 MR. SAINI: Indeed.

10 THE CHAIRMAN: I think they are saying, they may be wrong, but they are saying that it was  
11 not clear, and it should have been made clear, that they would have to do it for connections  
12 and they have to do it for rental separately. I do not see that as a methodology point.

13 MR. SAINI: You are quite right, Sir. The answer to that point, as you have explained it, Sir, is  
14 that, first of all, looking at the condition itself and BT's own conduct in separately pricing.  
15 We say it is absolutely clear what the condition requires. Secondly, and this was the first  
16 point I made in dealing with Ground 3, it is not BT's case that there was any representation  
17 by Ofcom.

18 THE CHAIRMAN: No, you have said that.

19 MR. SAINI: So we have a clear construction. One can only depart from that construction if  
20 Ofcom have made a contrary representation but they are not saying there was any contrary  
21 representation made. That is the broad legal certainty complaint but then there are more  
22 specific complaints. It is hard to see how they are legal certainty complaints but I need to  
23 deal with them. Just two of them were, in the time available, dealt with by Mr. Read  
24 yesterday. I need to alert the Tribunal to them because the Tribunal is going to have to give  
25 a decision on them. One sees, if one goes to the Defence in Bundle A at Tab 4, and it  
26 begins at p.73, para.167, what BT have done -- there is an introduction at 167 but if one just  
27 flicks over the page to p.75 and look at "*WES 10 rental 2008/2009*", and if one goes ahead,  
28 we have dealt with sequentially each of these discrete complaints that are made about  
29 Ofcom's decision that there was overcharging in respect of specific products in specific  
30 years. Mr. Read took you to one example yesterday, which I believe was the WES 10  
31 example - and just so that we have a cross-reference, I believe it is p.385 - if one can have  
32 that open in Bundle A and if one has the Determination open as well, and if one goes to  
33 p.385, a specific example that Mr. Read picked on yesterday ----

34 THE CHAIRMAN: Just a moment. Bundle B, p.385.

1 MR. SAINI: Bundle B, p.385, and it perhaps begins at 383. I appreciate that Mr. Read was  
2 dealing with this in a hurry yesterday and it is not his fault, but this is just one example of a  
3 number of complaints about particular services in particular years. What we have done in  
4 the Defence is that we have dealt with each of the complaints and explained why Ofcom  
5 decided that, in this case, WES 10 2008/2009, why even though there had been  
6 overcharging in one year of the five in issue, there was still nevertheless a reason to make a  
7 finding of overcharging. When one looks at the complaint that has been made in respect of  
8 each of these and, in particular, if one looks at the Defence, what it comes down to, Sir, is  
9 that BT is just essentially inviting this Tribunal to disagree with Ofcom's conclusions  
10 without identifying either an error of fact or an error of law. So if one takes the WES 10  
11 example, which we have been looking at at p.383 and which we deal with in our Defence at  
12 para.172 and following, Mr. Read's point yesterday was, fixing on the table at 14.14 at  
13 p.385, his essential complaint was that BT were generally compliant with the DSAC  
14 requirement but then in 2008/2009 there was an aberrant year and they exceeded DSAC,  
15 and there is a figure of 129% there. His argument was essentially, "You should have let us  
16 off for that year because generally for this service, if one looks between 2006 and 2011,  
17 generally we complied with DSAC".

18 THE CHAIRMAN: I am not sure that is quite a fair way to characterise it. This does seem to me  
19 a methodology point. It is nothing to do with aggregation. We are within rental.

20 MR. SAINI: Indeed.

21 THE CHAIRMAN: It is saying the way you then apply a DSAC test should not be mechanistic,  
22 and I think Ofcom accepts that as a general principle, and in deciding whether there is  
23 compliance one should look at more than just one year when applying this test, because  
24 what you are doing is compliance with a condition. The condition does not say DSAC in  
25 each year. To focus exclusively on the DSAC in one year if the years before and years after  
26 the pricing was not in excess, is a mechanistic application of a DSAC test. That is the way I  
27 understood it.

28 MR. SAINI: That is the way we understand it as well, Sir, but if one looks at the substance of the  
29 reasoning, at pp.383 to 384, Ofcom is not proceeding from a finding that there was charging  
30 in excess of DSAC for 2008/2009 straight to a finding of overcharge. It does look at the  
31 evidence. In fact, one sees at 14.215 BT is asked to supply specific evidence that explains  
32 away the problem with DSAC for 2008 and 2009 and then the evidence that is brought  
33 forward in 14.216 is considered. The highest it was put yesterday by Mr. Read was that, in  
34 fact, the prices for that year were so high because there was a staggered increase in prices

1 over that year and that had been discussed with Ofcom, but it is not suggested that Ofcom  
2 had approved that increase in prices and accepted that if there was such an increase in prices  
3 this would provide some kind of immunity to BT from a finding of a breach of the cost  
4 orientation condition. So what Ofcom was doing is they were saying, "There is an  
5 excessive charge there. We recognise in the prior and following years you have not  
6 exceeded DSAC, but can you explain why in this particular year there was pricing in  
7 excess?" So we are showing an open mind and asking for persuasion.

8 There is also the point separately, Sir, which is that (and again I do not think this is  
9 disputed) overall, and one sees this at several points in the Determination, when deciding on  
10 the question of overcharge we have considered the magnitude and duration generally and  
11 the circumstances in which DSAC has been exceeded. If I can just give you one example of  
12 that, if one stays in this Determination and goes to p.337 at 14.19. So magnitude and  
13 duration is expressly considered in each case. So what Mr. Read is inviting the Tribunal to  
14 do in this case, and we say this applies not for WES rental in 2008/2009, he is effectively  
15 inviting the Tribunal to take a different view as to the facts.

16 PROFESSOR MAYER: Could you just explain how you think this principle, as set out in 14.19,  
17 is in fact applied in the case of Table 14?

18 MR. SAINI: I am sorry, Sir, I did not hear that.

19 PROFESSOR MAYER: Can you just explain to us how you think the principle, as set out in  
20 14.19, is actually implemented in relation to the case of Table 14.19?

21 MR. SAINI: Certainly as far as the magnitude is concerned, one can see in the table - I am just  
22 going to find the reference - back at p.385, one sees the extent by which DSAC has been  
23 exceeded.

24 THE CHAIRMAN: It is 14.220.

25 MR. SAINI: That is right, Sir, just at the bottom of the table.

26 THE CHAIRMAN: I was just looking at some of those points.

27 MR. SAINI: Sir, we have considered that factor.

28 PROFESSOR MAYER: In terms of the duration, the point was made, both in relation to DSAC  
29 and the ROCE calculation, that if you average over the period it looks quite modest.

30 MR. SAINI: That may well be right if one could find a good reason for the excess charge in 2008  
31 and 2009, but the reason appeared to be for 2008/2009 three price increases in that  
32 particular year. But your point is a better one, Sir, and that is essentially Mr. Read's point,  
33 that if one does an averaging one might see a price below DSAC. But the specific points  
34 that were made by BT in this regard, and it is important to assess the case on the basis of

1 what Ofcom was told at the time ----

2 THE CHAIRMAN: I think Professor Mayer's point goes a bit further, which is you say you will  
3 consider the duration. It is not very clear from 14.220 whether Ofcom did take account of  
4 the position in other years.

5 MR. SAINI: Sir, if one goes to 14.223 and 14.225 ----

6 THE CHAIRMAN: Then you are thinking about 2008/2009, yes, what the position was in  
7 2008/9.

8 MR. SAINI: The fact is that we have not closed our minds to considering the position over  
9 various years. The fact that we decided that ultimately the position over various years does  
10 not provide an excuse for 2008/2009 does not suggest any error on the part of Ofcom. We  
11 were inviting BT to say, "Can you explain why 2008 and 2009 is an aberrant year?" If they  
12 had come up with an explanation then they may well have been given the benefit of the  
13 doubt, but they did not come up with an explanation.

14 At 14.237, if one goes over the page, if I can read that at p.389, top of the page:

15 "We therefore consider that while BT perhaps could not have known for sure that  
16 its price rises over the period up to June 2008 would lead to the failure of the  
17 DSAC test in 2008/09, it could have reasonably identified the material risk that its  
18 charges would fail the test based on the information it had, but it did not reduce its  
19 prices in response to this risk and indeed increased its prices."

20 Then the Tribunal will see the wider strategy point at 14.238 to 14.240. So Ofcom did  
21 listen to BT's points in relation to the wider strategy. This is the point that Mr. Read was  
22 making yesterday.

23 Related to this point, and one sees it referred to on this very page, and this was Mr. Read's  
24 point of yesterday in relation to averaging, if one looks at 14.241, BT complained that there  
25 was no averaging done. If one goes back to 9.221 in the Determination, p.128 - this was the  
26 second specific matter that Mr. Read addressed you on yesterday - there are two separate  
27 points that arise here. His first complaint was that in the PPC Determinations Ofcom had  
28 said it was going to compare average charges and look at claims. Ofcom then took a  
29 different approach based upon what was said by the CAT in the DSAC case. The first point  
30 to make is that it is not BT's case that it relied upon what was said in the 2009 PPC  
31 Determinations and structured its targets or pricing from 2009 onwards on the basis that it  
32 could show cost orientation on an averaging base. This is a hypothetical point. It is not said  
33 by Mr. Read or by BT that, because of any representation made in the PPC Determinations  
34 as to averaging, from 2009 onwards BT conducted itself in a particular way.

1 Secondly, there is a more basic point at 9.222, which Mr. Read did not read to you  
2 yesterday, which is that Ofcom has not closed its mind to looking at the position before and  
3 after the years where there has been a breach of DSAC.

4 What Ofcom was doing, one sees overall in 9.225 at p.129, was taking the approach which  
5 was commended by the Tribunal in the PPC case, which is that a price in excess of DSAC is  
6 intrinsically excessive but it is always open to come forward with some evidence as to why  
7 DSAC has been exceeded.

8 Ms. Rose has identified in bundle CW12 what was in the provisional Determination about  
9 the specific year, the notice of appeal bundle. It is tab 12, which is the Draft Determination  
10 of 9<sup>th</sup> February 2012, and this very issue, the one year point, is at 13.58. This is specifically  
11 concerning WES 10, which we have been looking at, and one sees that Ofcom explains:

12 "However, as charges only exceeded DSAC for one year, if BT were able to supply  
13 us with specific evidence that demonstrates that it reasonably expected its charges  
14 in 2008/09 to be below unit DSAC, we may conclude that there was not  
15 overcharging in this year. As yet it has not provided such evidence."

16 That effectively remained the position.

17 I have just picked two points there, Sir. WES 10 was the averaging point. In the passages I  
18 have shown you in the Defence, which I do not have time to go through at the moment,  
19 para.172, p.75 of bundle A, and following, we have dealt with each of the individual  
20 complaints year by year.

21 I have just been passed a note in relation to the Chairman's earlier question, which is that  
22 there were over 100 CPs in the relevant years, so it is a substantial number.

23 Sir, I am going to turn to Ground 4 now, which is important because it is quite fiddly. To  
24 be absolutely clear what the complaints are, these are accounting adjustments, and I just  
25 want to summarise what we understand the issue to be before the Tribunal starts to hear  
26 evidence about this. There are effectively four points. There is transition equipment costs,  
27 excess construction costs and two elements of provisioning costs, the first element being  
28 level of provisioning costs for certain years, and the second element being allocation. I  
29 think, Sir, you were asking Mr. Read yesterday whether or not there were these two  
30 elements of provisioning costs. We understand there are these two elements.

31 There are four issues and I want to summarise what I understand the complaint to be and  
32 also summarise what our answer is to these points.

33 The first point, excess construction costs: in summary, the issue was as follows. BT had  
34 claimed as against Ethernet rental services certain excess construction costs. It is common

1 ground that those costs should not have been claimed as against Ethernet rental services.  
2 The issue arose as to how much to take out of the cost base. BT was asked by Ofcom, "Can  
3 you please provide a figure?" BT provided a figure, Ofcom relied upon that figure for  
4 excess construction costs, and now, by way of appeal, never having mentioned the point  
5 before, BT says, "Sorry, we gave you the wrong figure". We say that is not the basis for an  
6 appeal.

7 What is the error by Ofcom? Ofcom has relied upon a figure that BT gave. There was no  
8 error of fact or error of law there. What BT are doing is coming along to say to the  
9 Tribunal, "Actually, we gave the wrong figure, can you please correct it?" It is a surprising  
10 proposition that that can form a ground of appeal.

11 THE CHAIRMAN: If this were an arbitration that may be, but there is a public policy in this, that  
12 the determination should be correct. If it is accepted - no one is suggesting it is a criticism  
13 of Ofcom - that it turns out through no bad faith that there was a mistake, and it is accepted  
14 there was a mistake, there is no argument about it, why should it not then be corrected? I  
15 suspect if that was the only ground in the whole appeal the appeal would be over in an hour  
16 and possibly we would not be here at all. It might go to questions of cost perhaps, but to  
17 say that this is cast in stone, even if it is clear that there is something wrong, and it is in the  
18 public interest for effective regulation and all the objectives that Ofcom has to pursue that it  
19 should remain ----

20 MR. SAINI: My point is only this, Sir - I completely see the sense of what you say, if the figure  
21 is wrong then it should proceed on the basis of the correct figure - there has to be some  
22 finality and some certainty. BT has to explain how its own error can be shoehorned into the  
23 bases for an appeal. I say no more than that. It may be that the other CPs have a complaint.  
24 They are entitled to some finality and certainty once a determination is there. If Ofcom has  
25 relied upon figures which BT has provided and those are used in a determination, the  
26 principle of finality ----

27 THE CHAIRMAN: If they had evidence that they had been prejudiced in some way significantly  
28 by this ----

29 MR. SAINI: I think it is the difference between 15 and 11 - is that right?

30 THE CHAIRMAN: We were given a figure of £15 million ----

31 MR. SAINI: The difference is between the figures of £15 and £11 million. The second issue is  
32 transmission and Mr. Read introduced what the essential issue is here yesterday, which is  
33 that between 2006 and 2007 transmission equipment costs were recovered through upfront  
34 circuit connection charges, but for accounting purposes were capitalised and depreciated

1 over the life of the underlying equipment. So Ofcom wanted to find a basis for comparing  
2 the prices of connection charges with the underlying costs of provision. In other words,  
3 removing the depreciation and capital costs. Here, this is an issue of methodology. Ofcom  
4 came up with a methodology as to how it was going to do this. One needs to look at the  
5 Determination itself in this regard at p.258. I believe this is the passage that you, sir, put to  
6 Mr. Read yesterday at --

7 THE CHAIRMAN: It is p.266 it starts.

8 MR. SAINI: 266 it begins and it is para.13.130, which I think you put to Mr. Read yesterday. I  
9 believe that the ultimate complaint that BT have in this regard is: yes, they did not make any  
10 observations upon the adjustment that Ofcom was proposing at the time, but in fact it is only  
11 after the Final Determination and for the purposes of preparing this appeal that they  
12 discovered the particular methodology that was being used. On this issue there is a simple  
13 factual point. We say (and this will be a matter of evidence in due course) that well in  
14 advance of the Final Determination we provided to BT the model which we had used, a  
15 model which was based upon the methodology adopted in BT's own RFS, and therefore  
16 they had every opportunity to comment had they wished to. Therefore, with respect to Mr.  
17 Read he is wrong when he says that the first that BT came to know about the particular  
18 methodology used was after the Determination.

19 THE CHAIRMAN: Yes, he accepted, I think, that you provided the model. As I understood it,  
20 he was saying that it is all very complicated. They had not, as it were, explored the model  
21 to discover this point.

22 MR. SAINI: But it is BT's own model; it is the model used in BT's own RFS. Therefore again, if  
23 there is any fault there, it is in BT in not taking issue with Ofcom's reliance upon BT's own  
24 methodology at this stage.

25 THE CHAIRMAN: BT can, presumably, when they get in the Provisional Determination,  
26 question an adjustment (we have not yet looked at any of the correspondence). There is  
27 quite open communication in my impression between BT and all their providers and Ofcom  
28 for clarification if it not clear quite what is being done.

29 MR. SAINI: Indeed. Absolutely. So this is not a question of a simple factual error which has  
30 been corrected; this is a dispute as to the methodology which Ofcom has adopted, and it is  
31 not Ofcom's own methodology. The methodology that Ofcom adopted was using BT's own  
32 approach to depreciation in its RFS.

33 MR. HARRISON: Excuse me, that is slightly different. It was actually BT's own model, not the  
34 methodology, the difference between the two. It was actually the physical model that was



1 used by Ofcom so they just ran different assumptions through the model in order to generate  
2 the information?

3 MR. SAINI: Rather than guessing the answer, I will get very clear instructions on that.

4 MR. THOMPSON: Certainly, sir, that is not our understanding, but perhaps both of us can reflect  
5 on it with those behind us to find out what the true position is.

6 MR. HARRISON: Sorry, my point is that that is different from the methodology point, using the  
7 same methodology but using a different physical model creates a different complexity.

8 MR. SAINI: I have been provided with instructions, sir, in relation to your question. The answer  
9 is that it was not BT's model; it was BT's methodology.

10 MR. HARRISON: Right, thank you.

11 MR. SAINI: In any event, sir, this is an example of an area where there are equally valid views as  
12 to how one would go about finding a way to expense connection charges in a particular year  
13 when those connection charges were paid. There are various different ways in which one  
14 can do that. What is happening in this appeal is that, BT never having mentioned this point  
15 before despite having an opportunity, have now come up with another way. We say that is  
16 not an appropriate basis for this Tribunal to interfere with Ofcom's approach.

17 May I deal with the first limb of provisioning costs, which is the question of allocation of  
18 provisioning costs. The Tribunal will be aware of this: provisioning costs are essentially  
19 those costs that relate to the processing and planning of new orders for services. The  
20 complaint here in relation to allocation is that, we say, it is not a matter of an error but an  
21 allocation methodology which BT itself used in its RFS. BT now says that allocation  
22 methodology was inappropriate. We say that adopting a framework to the RFS – a  
23 framework that no-one disputes – BT needs to explain why it adopted this particular  
24 methodology and why it was inappropriate. Ofcom says that BT has not done that.

25 If one looks at the defence, sir, this is dealt with in more detail at bundle A divider 4  
26 para.206 p.87. I will show you this, just so that the Tribunal has in mind before the  
27 evidence what exactly the dispute is in relation to this issue of allocations. It only concerns  
28 one year: 2008/2009. We have summarised the dispute at 204. So BT is asking that for  
29 2008/2009 - it says that in its RFS it has allocated provisioning costs to rentals, and it wants  
30 to allocate them now to connections. If one looks at 206, top of p.88 under (a), the simple  
31 point that Ofcom made there was that BT's own account and approach was to allocate these  
32 costs to rentals.

33 THE CHAIRMAN: The DAM is BT's model, is it not?

34 MR. SAINI: That is right, Detailed Attribution Methodology. It was really for BT to explain

1 why they had made some error in their own methodology. Absent showing some error there  
2 was no reason to depart from that particular allocation. This is part of a broader point, sir,  
3 which is that it is very dangerous (and this is why the RFS framework exists) to allow BT to  
4 start changing its allocations in its RFS because everyone relies upon those. It is only in  
5 certain exceptional circumstances that one can depart from that.

6 The substance of the case, sir, that is put in Mr. Coulson's evidence is summarised at (ii)(b)  
7 in the middle of p.88. It comes to no more than this, which is that because you are going to  
8 be altering some figures in any event, you might as well alter these as well.

9 Can I also correct a typo in the middle of that page where it says: "On appeal BT has  
10 presented no evidence that was incorrect to allocate provisioning costs to connections." It  
11 should say "to rentals". I apologise for that. So they allocated to rentals and then now they  
12 want to re-allocate to connections. But they would need to explain why it was obviously  
13 inappropriate for them to make the original allocation to rentals. We say they have not done  
14 that.

15 May I deal with the last bit of provisioning costs, which is not allocation but level of  
16 provisioning costs. This concerns three years: 2006/7, 2007/8, 2008/9. The essential  
17 complaint made by BT is that its own regulatory financial statements did not capture a  
18 sufficient amount of Ethernet provisioning costs in various years, and that BT should be  
19 allowed to allocate to those particular years greater sums by way of Ethernet provisioning  
20 costs.

21 It is important in this regard to look at the Determination, and in particular the table that Mr.  
22 Read showed you yesterday to put the point in context. Provisioning costs, Ofcom begins to  
23 deal with them at p.308, bundle B para.13.352. One sees at the first paragraph where the  
24 issue is summarised that no aspect of the provisioning costs component was allocated to  
25 Ethernet services. Then BT goes on at 13.353 to say it is an error. If one goes over the page  
26 to the passage under 13.357 under the table, Ofcom there has some sympathy with BT  
27 because it does say in the very last four or five lines:

28 "Based on the information available to us we consider it is possible that the  
29 provisioning cost component in 2006/07 and 2007/08 did not capture provisioning  
30 costs associated with Ethernet services. But the evidence available to us does not  
31 allow us to reach a clear conclusion on this point."

32 So we did not know; there was not sufficient evidence before Ofcom at that point. Before  
33 we look at the new evidence that is being put forward, I should just explain the context here.  
34 It looks like there may well have been an under-claim for costs as regards provisioning

1 costs. Maybe, because one can see that is in the table. However, we do not know where  
2 else those costs may have been claimed. They may have been claimed in another regulated  
3 service. So Ofcom could not be sure that BT had not already been paid those costs  
4 elsewhere, or claimed those costs elsewhere.

5 What happened, sir, is that in order to deal with this deficiency in evidence we have  
6 completely new evidence from Mr. Coulson. May I ask the Tribunal to go to the particular  
7 passages that Mr. Read took you to yesterday, and ask you to look at some more parts of  
8 that evidence. It is Bundle D, Divider 14, and it begins at 3.14, p.12. The particular part I  
9 want to focus on is at 3.29 and 3.30 at p.15 after the table, Table 3.1. He is saying at 3.30,  
10 this is all postdating the Determination, that he has now reviewed the computer system  
11 known as ASPIRE and concluded that prior to 2008/2009 component CL501 was not  
12 allocated to Ethernet services. A small amount of cost from other services was allocated to  
13 Ethernet services via other components. So this is completely new evidence. It is the kind  
14 of evidence that BT should have put before Ofcom. But it is not as straightforward as it  
15 might seem because, Sir, BT now say in their skeleton argument and in their pleading,  
16 "Well, Mr. Coulson has now made the position clear. It is safe for this Tribunal just to go  
17 ahead now and assume that the adjustments to be made to the level of provisioning costs are  
18 right and that there is no dispute". We say that that would be a rather unsafe thing to do for  
19 the Tribunal. If I could ask the Tribunal to look at our skeleton argument at p.32, paras.101  
20 and 102. Sir, this is a correction that BT wants to make to its RFS, so we set out at  
21 para.101, first of all, the problems with allowing these adjustments to be made consistently  
22 with the framework but, more importantly, Sir, at para.102, Mr. Coulson has not explained  
23 where these missing costs went. So were they being allocated to other products? This is  
24 para.102. Where else have these costs gone?

25 Our position, Sir, is that we are not opposing Mr. Coulson's evidence but we do take issue  
26 with the suggestion by BT that there is no factual dispute here and the Tribunal can simply  
27 go ahead and decide that Mr. Coulson's adjustments are correct when Mr. Coulson has not  
28 explained, or apparently done any investigations, as to where else these costs may have been  
29 claimed.

30 THE CHAIRMAN: Are these not matters that he can be asked about?

31 MR. SAINI: We can ask him about it but we have simply set out there these particular matters to  
32 deal with the assertion by BT that no one is disputing any of this anymore. What is  
33 particularly important, Sir, is if you look at the point in 102(d), is that if these costs are  
34 being allocated to other products, some of those products might be products which are in

1 regulated markets. So it is not just simply a question of taking a figure and adding it back in  
2 to Ethernet. One has to see where did that figure come from; what are the impacts on the  
3 market where that figure came from, where it apparently was allocated? So it is not that  
4 straightforward. One way that the Tribunal could deal with this issue is that if the appeal  
5 were otherwise successful in any respects, the Tribunal could say, "This is an issue upon  
6 which the Tribunal does not feel comfortable, on the basis of the information that Mr.  
7 Coulson has supplied, because there are these unanswered questions, and that in this  
8 specific regard the matter can be remitted to Ofcom to reconsider this particular sub-aspect".  
9 That is one way of doing it. But what we do say, Sir, is it is unsafe - if we are not going to  
10 get any more evidence from Mr. Coulson - for the Tribunal to proceed on this basis.

11 THE CHAIRMAN: What slightly disturbs me about this, Mr. Saini, is this evidence was put in, I  
12 think in February - so the point would have been clear when it was pored over, when you  
13 prepared your defence - why this was not then explored through correspondence at the time,  
14 making the very points you made in your 102.

15 MR. SAINI: Our position was, we were not opposing this evidence being introduced. It was a  
16 matter for the Tribunal and the other parties. That is how we put it in our Defence.

17 THE CHAIRMAN: You say it is a matter for the Tribunal. The Tribunal does not, as I indicated  
18 at the outset, reject evidence when parties are as well represented, in particular, as they are  
19 here, if nobody has objected. So it is not a matter for the Tribunal. It is a matter for the  
20 Tribunal if somebody does oppose it, of course. Then we decide in our discretion. So the  
21 evidence comes in. You were not opposing it. It begs these questions, is the point you are  
22 making. There may or may not be a good answer. Why this is raised only now in the  
23 skeleton and not raised in correspondence in the many months that have passed between Mr.  
24 Coulson's evidence or report and the preparation of the skeleton, in which case some of  
25 these points may have been answered to your satisfaction; some of them you might be able  
26 to show on the basis of an answer, indeed, that the question you raise is an extremely good  
27 one and is a firm reason why the adjustment should not be made. But to leave us in a  
28 situation of saying, "There are all these uncertainties, so if you think there is something in  
29 this, which we are not challenging, remit it", with the possibility of yet another appeal, I  
30 suppose, if it is said it is done wrong. That seems deeply unsatisfactory.

31 MR. SAINI: Sir, I take the point. The reason that we have raised these issues is because BT took  
32 the point in its reply that this evidence was undisputed. We do not dispute the evidence.  
33 We say it is incomplete. I take your point, Sir.

34 THE CHAIRMAN: I see exactly what you say. We can all understand it. My point is why are

1 you saying it only now?

2 MR. SAINI: It perhaps could have been said earlier, Sir, but we certainly do not accept that the  
3 evidence can be safely relied upon. Sir, that is essentially what I want to say about the  
4 provisioning costs level point. If I can deal then with the question, which will take a bit  
5 more time, which is Ground 5, which is the power to order repayment, the issue that Mr.  
6 Thompson spent most time on yesterday. I want to make a preliminary point before going  
7 to the legislation, and that is that the whole basis of the argument that somehow this order  
8 for repayment violates the EU law principle of retrospectivity is misconceived because the  
9 principle of retrospectivity is not engaged here. The obligation upon BT to ensure its prices  
10 were cost orientated is now simply being enforced.

11 THE CHAIRMAN: Yes, we have got that point.

12 MR. SAINI: No more than that. What I am going to do is, rather than begin with the European  
13 legislation, I am going to look at the domestic legislation, first of all, in particular the power  
14 to order repayment, and then explain why, when one goes to the provisions of the Directive  
15 (which Mr. Thompson did not have time to go to yesterday) why s.190, insofar as it permits  
16 on its face orders for repayment of money prior to the date of the dispute, that accords  
17 perfectly with the provisions of the Directives.

18 THE CHAIRMAN: Did not the Court of Appeal in *PPC* uphold a repayment going well prior to  
19 the referral of the dispute?

20 MR. SAINI: It did but I assume that Mr. Thompson would say that that is because his point was  
21 not argued in that case.

22 THE CHAIRMAN: So it is plain ...?

23 MR. SAINI: Absolutely and I think at some point, and it may be in the notice of appeal, that  
24 point is made. But I just need to establish, Sir, not just for the purposes of the repayment  
25 point but also the interest point, why ----

26 THE CHAIRMAN: They upheld the payment of interest as well.

27 MR. SAINI: I cannot remember whether or not there was any dispute about interest.

28 THE CHAIRMAN: I do not know if it was disputed but it was part of the ----

29 MR. THOMPSON: Sir, it was paid at the contractual interest rate that the contract provided for  
30 within the contract, so it was actually paid pursuant to the contract, the repayment.

31 THE CHAIRMAN: Thank you.

32 MR. SAINI: But you are right, Sir, that there was an order for payment substantially predating  
33 the notification of dispute. I need to identify, first of all, what exactly the argument is that  
34 we are meeting. As I understand the argument, and I apologise for perhaps repeating this

1 unnecessarily, as I understand the argument now the argument is that the power to order  
2 repayment is only operable in respect of periods after the lodging of the dispute with  
3 Ofcom, and to get a date for that, if we have the Determination handy, if one goes to the  
4 start of the Determination at p.8, as I understand Mr. Thompson's argument, one sees in  
5 paras.1.4, 1.5 and 1.6 particular dates. So for 27<sup>th</sup> July and 7<sup>th</sup> November his argument is  
6 that Sky cannot make any claim for repayment in respect of sums paid prior to 27<sup>th</sup> July,  
7 similarly for CWW and Verizon the November 2011 and February 2012 dates in 1.6. So it  
8 is only from that time forward.

9 The starting point then, Sir, if we put the Determination away, is s.190. This is in Bundle E,  
10 Divider 5, p.41. We read s.190, Sir, after (and I think Mr. Thompson accepts this) we have  
11 gone through a process where Ofcom has correctly accepted the dispute under s.185. That is  
12 a dispute which goes back to a period of time well before the date of lodging and has  
13 resolved that dispute. I believe it is common ground that there is nothing on the face of  
14 s.190, and in particular s.190(2)(d), which confines an order for repayment to payment of  
15 sums postdating the lodging of the dispute. On its face, the purpose of s.190(2)(d) is to give  
16 effect to a determination as to a proper amount of a charge and the dispute itself, it is  
17 accepted, will be looking into a period of time prior to the lodging of the dispute. So on its  
18 face it applies to historic payments. What Mr. Thompson has to do is to demonstrate that  
19 the plain and obvious construction of s.190(2)(d) is one the Tribunal should not adopt  
20 because there is something in the common regulatory framework which would suggest that  
21 one has to read into s.190 some wording which limits Ofcom's powers to award payments or  
22 to make adjustments, limits the power to sums that were paid after the lodging. We say  
23 that, in fact, the opposite flows from the Common Regulatory Framework. I want, first of  
24 all - staying in this bundle - to take you to the Framework Directive, which is at divider 3. I  
25 do not believe you were shown this yesterday, but it certainly was referred to in passing by  
26 Mr. Thompson. If one goes to recital 32, please - depending on which version one is looking  
27 at, if one looks at the consolidated version it is p.8, and the earlier version it is p.37, but the  
28 material language is the same, if I can just read it:

29 "In the event of a dispute between undertakings in the same Member State in an area  
30 covered by this Directive or the Specific Directives, for example relating to  
31 obligations for access and interconnection or to the means of transferring subscriber  
32 lists, an aggrieved party that has negotiated in good faith but failed to reach  
33 agreement should be able to call on the national regulatory authority to resolve the  
34 dispute. National regulatory authorities should be able to impose a solution on the

1 parties. The intervention of a national regulatory authority in the resolution of a  
2 dispute between undertakings providing electronic communications networks or  
3 services in a Member State should seek to ensure compliance with the obligations  
4 arising under this Directive or the Specific Directives."

5 Two particular points flow from that recital. First, the emphasis on national regulatory  
6 authorities being able to impose a solution, and secondly, the solution that is imposed must  
7 be one that seeks to ensure compliance with the obligations arising under this Directive.

8 We say, with respect to Mr. Thompson, that one of the solutions that will be imposed to  
9 ensure compliance with obligations under this Directive is an obligation to make good any  
10 sums which have been overcharged in breach of a cost orientation obligation. If one stays  
11 within this Directive and one goes to Article 20 itself and recital 3:

12 "In resolving a dispute, the national regulatory authority shall take decisions aimed at  
13 achieving the objectives set out in Article 8. Any obligations imposed on an  
14 undertaking by the national regulatory authority in resolving a dispute shall respect  
15 the provisions of this Directive or the Specific Directives."

16 We say again that an obligation to make repayment or to return an overcharge is respecting  
17 the provisions of the Directives. We say not only would it be respecting the provisions of  
18 the Directives and, in particular, the provision concerning cost orientation to require  
19 repayment of the principal, but if there has been a cost of money as a result of an  
20 overcharge, then one would expect the national regulatory authority to also be able to  
21 require a payment of interest.

22 Just stopping there for the moment and going back and bearing in mind s.190 I ask the  
23 question: does s.190 do more than - and inappropriately more than - any Directives provide  
24 for? We say "no", it does exactly what the Directives provide for. It allows a repayment,  
25 without limit as to time, when that repayment is necessary in order to give effect to a cost  
26 orientation condition. There is nothing inconsistent there. What is important, Sir, and this  
27 goes back to the PPC case in the Court of Appeal, is that Lord Justice Etherton found a  
28 home for s.190, not in the provisions that we were looking at, but they are also a home, but  
29 in Article 13(3) of the Access Directive, with which you will be familiar and which refers to  
30 adjustments to prices.

31 Just by way of reference, whilst we have this bundle open, it is worth me just identifying  
32 that part in Lord Justice Etherton's Judgment. It is in tab 11 in the same bundle, p.19, para.  
33 83. After having rejected a submission that I had made, if I can go to the last five lines -  
34 this is considering the discretion of s.190, Lord Justice Etherton observes as follows:

1 "It is, however, consistent with a discretion to make such order for repayment as will  
2 best achieve the objectives of the Act and the CRF on the particular facts of the case.  
3 Support for that is to be found in the word 'adjustment' in s 190(2)(d), which is likely  
4 to have been intended to reflect the power of a NRA under Article 13(3) of the AD  
5 to require prices to be adjusted 'where appropriate'."

6 So there Lord Justice Etherton was focusing on Article 13(3) as being the origin of the  
7 190(2)(d) power, but one can also see that the Framework Directive and, in particular,  
8 recital 32, the ability to impose a solution on the parties, also provides a legislative basis. So  
9 we say there is nothing in the domestic legislation nor in the Community legislation which  
10 will provide support for Mr. Thompson's submission that orders for repayment can only be  
11 in respect of sums paid after a dispute has been lodged. Were there to be such a limitation  
12 one would expect there to be express wording to this effect, because otherwise one has the  
13 rather absurd position which is that it is open to an overcharging entity, an entity which has  
14 SMP, to keep the benefit of substantial overcharges over time, those overcharges having  
15 been made in breach of an SMP condition.

16 Mr. Thompson said that is not right because, in fact, someone could bring civil proceedings  
17 against that person. But what is clearly intended by these Directives is that although the  
18 ability to bring civil proceedings is recognised the responsibility to ensure compliance with  
19 obligations under the Directives is primarily that of the NRA, and the NRA is given this  
20 policeman role to intervene when there is a dispute. It is hard to see how that policeman  
21 role can be properly fulfilled if, in fact, the main and most obvious remedy is not available  
22 to the NRA, which is requiring a return of overpaid sums.

23 Sir, I am going to turn now to Ground 6, which was not dealt with in any detail by my  
24 friend yesterday, but I can deal with it equally shortly, by asking the Tribunal to look at our  
25 skeleton at p.42, because the point essentially is a simple one. I can summarise what the  
26 issue is. It is said by BT that there was an error in the exercise of Ofcom's discretion when  
27 it required a repayment of charges, so assuming that BT is wrong on all of its other points, it  
28 still says that there was an error in the exercise of the power to order repayment.

29 THE CHAIRMAN: We have read the skeleton, you deal with the jurisdiction point. Given the  
30 limit on your time, I think we would appreciate if you could leave yourself enough time to  
31 deal with the Sky TalkTalk point ----

32 MR. SAINI: Certainly.

33 THE CHAIRMAN: -- about, as it were, FAC+.

34 MR. SAINI: I will do that. I was only going to mention one point, which is if one looks at para.



1 128 of the skeleton where we cite the PPC case, we submit that the correct approach is that  
2 once there has been a finding of overcharge it is up to BT to displace a presumption that  
3 there should be a return of the money, no more than that.

4 There are two points which have been made by Mr. Pickford. The first is what I call the  
5 FAC v DSAC point, and secondly the RAV point, and I want to spend more time on the  
6 FAC v DSAC point.

7 If I can explain first what I believe to be common ground between the parties in relation to  
8 this issue. We do not say that Condition HH3.1 itself dictates which manner of allocating  
9 common costs is appropriate. There is nothing in the language itself that dictates which is  
10 the appropriate manner, and the Tribunal in PPC said as much.

11 We also believe that it is common ground that neither the DSAC test nor Mr. Pickford's  
12 aggregate FAC test applied to either individual services or a subset of services sharing  
13 common costs, will establish that there has been an over recovery by BT of common costs.  
14 There is no test which is going to establish that other than one, which everyone agrees is  
15 impossible, which is a grand combinatorial test. So neither the DSAC test which Ofcom  
16 used, nor Mr. Pickford's aggregate FAC test will conclusively demonstrate whether there  
17 has been over recovery by BT of its common costs.

18 MR. PICKFORD: That is not quite common ground in that there is a difference obviously  
19 between theory and we say practice but I do not want to develop that further.

20 MR. SAINI: I was going to come to that point which may reflect the qualification that Mr.  
21 Pickford wants to make which is that Mr. Myers accepts that the approach based on FAC is  
22 more likely to prevent over recovery of common costs than an approach based on DSAC,  
23 and the reference to that is Mr. Myers' witness statement, core bundle D, para. 129.  
24 Ofcom's essential position here is that, having decided in 2004 not to impose a price control  
25 on these AISBO markets, it would have been inconsistent with that decision to adopt a cost  
26 measure when looking at cost orientation which effectively mimicked a price control. We  
27 say in substance that the test Mr. Pickford wants to put forward to prevent over recovery of  
28 common costs is essentially the same as a price control which was imposed in this market in  
29 2008. Indeed, it appears to be common ground between the parties that, from 2008  
30 onwards, when a specific price control was imposed upon this low bandwidth AISBO  
31 market, Mr. Pickford and his expert appear to accept they do not need the aggregate FAC  
32 test.

33 So what we say in substance is happening here is that Sky and TalkTalk are putting forward  
34 a test which is analogous to a price control in circumstances where Ofcom deliberately

1 rejected, in 2004, a price control. Therefore, considerations of regulatory certainty would  
2 not permit Ofcom to depart from that position.

3 There is a lot of evidence as to whether or not the DSAC test or the aggregate FAC test  
4 would promote one or other types of efficiency – productive efficiency, dynamic efficiency,  
5 and allocative efficiency. We say that those are not relevant questions for this Tribunal.

6 The question for this Tribunal is: would it have been lawful for Ofcom, given what it  
7 decided in 2004, to essentially depart from that and to assess cost orientation according to a  
8 form of price control?

9 I need to take you, sir, both to the Determination and in particular to a passage of Mr. Myers  
10 evidence where this point is summarised. May we go, first of all sir, to bundle D divider 13.  
11 I am taking you here because this does quote the relevant parts of the Determination as well,  
12 so you will not need to jump around the bundles. At para.71 p.32 Mr. Myers explains as  
13 follows:

14 "Both the proposed FAC test on a group of WES and BES services and a price  
15 control on WES and BES services involve imposing restrictions on prices and cost  
16 recovery across a group of services and both involve the use of CCA FAC as the  
17 cost standard against which charges are restricted (see paragraph 59). The FAC  
18 group test proposed by the first Houpis report, in effect, therefore amounts to the  
19 retrospective imposition of a (cost-plus/rate of return) price control, because it  
20 would limit the level of charges for the group of WES and BES services to FAC  
21 over the Relevant Period."

22 May I just stop that there for the moment and go over the page to para.73, after describing  
23 Mr. Houpis' report, Mr. Myers says:

24 "These broad types of consideration are consistent with those that I normally  
25 expect to be assessed when designing the baskets for a price cap. Indeed, when  
26 determining the appropriate basket design in the 2009 LLCC, these were the types  
27 of considerations that Ofcom took into account."

28 So Ofcom's essential position is that it rejected a price control in the Determination. If the  
29 Tribunal has the Determination handy it is para.7.63. You will have it in mind because I  
30 think you spent some time yesterday with Mr. Pickford looking at it. It is the paragraph  
31 about competition in the Determination. We may as well look at it.

32 THE CHAIRMAN: By the Determination, you mean the LLMR?

33 MR. SAINI: The 2004 LLMR, I apologise. It is in bundle E tab 12 p.19 in the manuscript at the  
34 bottom of the page. You will recall there that Ofcom expressly decided not to impose a

1 price control because it wanted to see first of all what the impact was on the competitiveness  
2 of the market - that is the wholesale AISBO market - before considering whether a price  
3 control was necessary. When in fact the market was next reviewed --

4 THE CHAIRMAN: Just to interrupt you, because I asked Mr. Pickford about that, it is the  
5 wholesale market, is it not, that they are referring to?

6 MR. SAINI: That is right. What happened then, and I do not think we have looked at this so I  
7 will just ask you to look at this as it is in the same bundle, if one goes to tab 13 which is  
8 what happens in 2008, which is the BCMR review, and if one can go to p.9 para.1.39,  
9 having seen what had happened over the last four years and in particular perhaps I can ask  
10 the Tribunal to look at the opposing page, p.8, 1.29, it noticed that in the wholesale market  
11 BT had been earning very high revenues, if one looks at 1.31, high market share, etc. Then  
12 at 1.39 Ofcom concluded that it was now necessary to extend a charge control to cover low  
13 bandwidth AISBO services. Ofcom's essential position is that between 2004 and 2008 it  
14 had decided to go for the less restrictive form of market intervention which was cost  
15 orientation. I am not saying it is a soft option, but it is obviously less restrictive than a price  
16 control. The price control had not worked. What was anticipated in 7.63 did not happen  
17 and therefore it was now going to intervene to impose a price control which turned out to be  
18 an RPI minus X type price control. That decision was made because, as explained in the  
19 2004 LLMR and as cited by Mr. Myers in para.75 of his statement, at that time if I may read  
20 it at 75:

21 "Based on its forward-looking assessment of market conditions in the 2004 LLMR  
22 Statement, Ofcom considered that the type of tight restriction on cost recovery that  
23 is provided by a price control was not appropriate for Ethernet services at that time  
24 (see paragraph 49). Rather, in the light of the *'relatively early stage of*  
25 *development'* of the AISBO market, it considered that the appropriate regulatory  
26 response to BT's SMP was to give time for the effects of the other regulatory  
27 remedies imposed in 2004 to impact".

28 So Ofcom's primary position, sir, is that the test proposed by Mr. Pickford and supported by  
29 Dr. Houpis, this aggregate FAC test, will essentially mimic a price control in circumstances  
30 where an explicit decision not to adopt a price control had been made earlier. Indeed, the  
31 fact that there is a mimicking is established by the acceptance by Sky and TalkTalk that  
32 from 2008 onwards, when a price control was imposed, they do not ask Ofcom to apply an  
33 aggregate FAC test. The aggregate FAC test is doing the work that the price control  
34 imposed in 2008 is doing thereafter.

1 Sir, the primary reason being one of regulatory certainty, there is a second reason as well,  
2 which is less important, which is that if the Tribunal were to say: in fact, it is open to Ofcom  
3 and Ofcom had effectively a blank page to devise a form of price control using aggregate  
4 FAC. Ofcom's case is, (supported by Mr. Myers' evidence) that in fact there are good  
5 reasons, based on economics, why it would not be appropriate for cost orientation to be  
6 interpreted using the aggregate FAC test. That is essentially what has been called in the  
7 skeleton arguments the trade-off between static and dynamic efficiencies. But we say, as in  
8 the case of the dispute between the experts on the meaningful nature or not of connections  
9 and rentals, the Tribunal does not have to get into that, because Ofcom's approach was not,  
10 when it was assessing cost orientation for the purpose of the Determination, that we are  
11 going to adopt DSAC because economically we are today making a decision in 2012 that it  
12 is the best test, we are saying that it is the test that everyone knows we are going to use, and  
13 it would not be open to us to use a different test such as the aggregate FAC test. So we  
14 submit that the Sky and TalkTalk case fails on this fundamental ground of legal certainty.  
15 BT would have had an unanswerable complaint if Ofcom had adopted the aggregate FAC  
16 test, because they would have been able to say with substantial force: this is effectively a  
17 price control of the type you rejected in 2004.

18 PROFESSOR MAYER: Could I just clarify that point because as I understand it, the objection to  
19 that is: it could be essentially a price control; it is not in effect if you allow for the rate of  
20 return to be correspondingly higher. So that it does not necessarily follow that by imposing  
21 an aggregate FAC that you are forcing a price control regime.

22 MR. SAINI: Sir, I accept it does not necessarily follow, but there is a more basic practical  
23 problem as well, which is in terms of how this test would apply. As I understand it, the way  
24 that Mr. Pickford articulated it yesterday, first of all DSAC is applied, then the aggregate  
25 FAC test is applied. If the aggregate FAC test is failed, then it is open to BT to come along  
26 to Ofcom and say: actually, although we seem to be over-recovering common costs there is  
27 this other aspect of our business. But it only needs to be articulated to explain how difficult  
28 that is going to be.

29 How is BT ever going to be able to do that without doing what is called in the documents  
30 the grand combinatorial, which is it shows every single other of its thousands of services,  
31 brings them before Ofcom and says: actually, there is another service – let us say retail line  
32 rental – which shares some common costs here; we are under-charging on that? It is  
33 practically impossible. So it is all very well for Mr. Pickford to say that this will assist in  
34 ensuring that there is not over recovery of common costs, he may well be right on that.

1 How is it practically to be implemented? How is BT ever going to be able to comply with  
2 that? It is just not physically possible given the number of services that are provided.

3 PROFESSOR MAYER: It could be argued that it cuts both ways in terms of there is a  
4 requirement to demonstrate that there is not an over-recovery of common costs and on the  
5 other hand there is a requirement on BT to demonstrate that the higher return is justified.  
6 So one could argue that one has to balance those two arguments.

7 MR. SAINI: That is a fair observation, sir. Can I make one other point as well before I leave this  
8 particular issue, which is that Mr. Pickford spent a lot of time yesterday going through *PPC*  
9 and explaining why what he was saying was consistent with *PPC*. What he failed to  
10 identify, sir, is that the very issues the Tribunal were considering in *PPC* was: what is the  
11 appropriate metric to use to avoid over-recovery of common costs? That is why they picked  
12 DSAC, and they decided that DSAC was the only available measure to use to avoid over-  
13 recovery of common costs. They were not doing anything else. There was no other  
14 measure available.

15 To be fair to Mr. Pickford, no-one put forward the aggregate FAC test which Dr. Houpis has  
16 come up with now. Therefore, there is nothing in *PPC* which deals with that. But *PPC* was  
17 dealing with the only practical way of enforcing or supervising Condition HH3 or its  
18 equivalent.

19 PROFESSOR MAYER: But the argument goes that it is only relevant to think about FAC in  
20 circumstances where you are aggregating across more than one service. If it is just one,  
21 DSAC and FAC are basically boiled down to being the same. So the issue did not arise in  
22 *PPC*, but it does arise here.

23 MR. SAINI: I think there may be, with respect, a misunderstanding on Mr. Pickford's part that  
24 the issue did arise in *PPC*, because in *PPC* the trunk costs were shared with many others.  
25 There were common costs in trunk shared with many other services. Therefore, the issue  
26 did directly arise. There was not just one service with one set of costs. There were common  
27 costs in *PPC*. It was decided that DSAC was the only practical way of supervising the  
28 condition where there was a substantial number of services where common costs  
29 overlapped. There was not just one service in issue in that sense.

30 MR. PICKFORD: To be clear, my case is not that there were no common costs in the *PPC* case.  
31 My case is that the only allegation of an overcharge was in relation to a single service.

32 MR. SAINI: And BT were saying that this particular service shares common costs with other  
33 services. The Tribunal were then asking how do we come up with a measure which will  
34 make sure that there is not an over-recovery of common costs for the particular service we

1 are dealing with, which was trunk, and it was decided that DSAC was the only available  
2 metric.

3 It is important that I underline this point, sir, which is that there can be a substantial  
4 economic dispute as to whether or not aggregate FAC is better for the market than DSAC.  
5 A large part of Dr. Houpis's reports and also Mr. Myers' response deal with that issue. I do  
6 caution the Tribunal in terms of getting involved in that dispute because Ofcom's position is  
7 that it simply was not open to it to come up with a completely new effective price control  
8 when looking at compliance with what was imposed in 2004. It just simply was not open to  
9 it.

10 Sir, there is one last point I want to deal with in relation to the aggregate DSAC point before  
11 turning to ----

12 THE CHAIRMAN: The aggregate FAC point?

13 MR. SAINI: The FAC point, I stand corrected, before dealing with the RAV issue, which is that  
14 Mr. Pickford relied substantially upon the fact that in respect of Kingston - you will recall  
15 the Kingston Communications - there was a cost orientation condition imposed upon  
16 Kingston, yet that was to be observed using CCA-FAC. In fact, there were very special  
17 circumstances that dealt with that issue. Can I ask the Tribunal, please, to look at our  
18 skeleton argument at p.55, para.163. It is the bottom of the page at (iii). We accept that in  
19 some circumstances DSAC is not used to assess compliance with the cost orientation  
20 condition. When we have done that, and Kingston is a particular example where DSAC  
21 was not used (see bottom of the page) we made it clear to Kingston that we would not use  
22 DSAC, and in Kingston's case it was because Kingston did not want to have imposed upon  
23 it onerous cost accounting obligations which would have required it to report DSAC data.  
24 So we said specifically to Kingston that when you are complying with cost orientation and  
25 when you are complying with your cost accounting obligations, you can use a standard  
26 other than DSAC. We say, if anything, that supports the position that when something other  
27 than DSAC is going to be used Ofcom have made it clear.

28 Can I deal very briefly in the last two minutes I have with RAV, can I ask the Tribunal,  
29 please, to go to the Determination, bundle B, p.282, para.13.217. The approach taken, as  
30 one sees in 13.217, to determining charges for copper access products was the RAV  
31 approach, which was different to the asset valuing approach which BT used in its RFS.  
32 Having considered the views of the parties, 13.220, the conclusions of Ofcom at 13.225  
33 were that it would be wrong for Ofcom to depart from BT's RFS, which is prepared on a  
34 CCA basis without a RAV adjustment.

1 This is a matter of policy because, as explained in 13.226, at the time that BT was preparing  
2 its RFS and at the time that it was meant to be complying with its cost orientation  
3 obligations for 2004 and following, Ofcom did not require any RAV adjustments to be  
4 reflected in BT's accounts. So between 2004 and 2009 Ofcom had no such requirement,  
5 and if one goes over the page to 285, from 2009 and following Ofcom made it expressly  
6 clear that a RAV methodology would not be used. We say in those circumstances it would  
7 have been grossly unfair to effectively move the goalposts and say to BT, "We know that  
8 consistently with Ofcom policy you have been preparing your RFS without a RAV  
9 adjustment, but now, when it comes to assessing either compliance with your cost  
10 orientation or indeed repayment, we are going to move the goalposts, rework your accounts  
11 and require a RAV adjustment". That would have been an unlawful step to take because it  
12 would have been contrary to the principle of regulatory certainty.

13 That is all we have to say about the RAV adjustment.

14 Sir, can I finally say in relation to Ms. Rose's appeal that in relation to interest, in so far as it  
15 is not clear already from our written submissions, Ofcom does not support, or seek to  
16 support, the reasoning in the Determination in relation to interest. That is the first point to  
17 make.

18 Secondly, although Ofcom is not going to make any submissions as to the particular facts  
19 and as to whether or not interest should be awarded in the circumstances, the legal approach  
20 to the question of interest which would Ofcom would put before the Tribunal is that that is  
21 reflected in the Gamma decision.

22 Sir, I have taken that at quite a pace. If there is any specific point that you would like me to  
23 address in more detail at any point I am happy to do that.

24 THE CHAIRMAN: Thank you, you have done a very fine job of keeping to time, Mr. Saini. We  
25 are grateful and we will take a ten minute break.

26 (Short break)

27 MR. THOMPSON: Sir, I will call BT's first witness, Mr. Edward Dolling.

28 Mr. EDWARD DOLLING, Sworn

29 Examined by Mr. THOMPSON

30 MR. THOMPSON: Mr. Dolling, can I ask you first to take Core Bundle C, which I think is being  
31 looked out for you now, and you turn to Tab 7 within that bundle?

32 A Yes.

33 Q There we see a witness statement with your name on it. If you go to the end of p.31 we see  
34 a signature.

1 A I do, yes.

2 Q Is that your signature?

3 A It is my signature.

4 Q Is there anything in this statement that you wish to correct at all?

5 A Yes, there is just one typographical item on para.103. The second line of para.103, the  
6 reference ED1-7/11 should read ED1-6/11.

7 Q With that one correction, do you adopt this statement as your evidence?

8 A I do.

9 Q I wonder if you could also be given another bundle, which is BT35, which is one of the  
10 reply bundles that BT served in this case. I hope we have a BT35 down there.

11 A We do not appear to have a 35, I am afraid.

12 THE CHAIRMAN: You should be given one.

13 MR. THOMPSON: If we just look at Tab 1, that is the same statement. Do you see that?

14 A It is.

15 Q Then afterwards there is a series of tabs which I think are all the exhibits or all the elements  
16 of your exhibit to your statement.

17 A Yes, they are.

18 Q Mr. Dolling, if, in the course of giving your evidence, you want to refer to any other  
19 documents but do not know where they are located in the rather large array of volumes we  
20 have got over there, do say and then someone will try and help you find where they are.

21 A Thank you.

22 MR. THOMPSON: If you just wait there, you will be asked some more questions.

23 THE CHAIRMAN: Yes, Ms. Rose.

24 Cross-examined by Ms. ROSE

25 MS. ROSE: Good afternoon, Mr. Dolling. I want to ask you some questions on behalf of Cable  
26 & Wireless, Virgin and Verizon. BT is a public limited company, is it not?

27 A It is, yes.

28 Q And as such its primary purpose is to provide value to its shareholders, is it not?

29 A No, it is the provide value to a number of stakeholders. Among those are the shareholders  
30 but I would also say the employees and customers and obviously society as a whole.

31 Q You say "society as a whole" but, of course, as a senior employee of BT you have a  
32 fiduciary duty, or the senior officers of BT, have a fiduciary duty to its shareholders, do they  
33 not?

34 A We have a fiduciary duty to the shareholders among others, as I said.



- 1 Q Of course it is in the interests of the shareholders that BT should maximise its profits and  
2 pay a decent dividend, is it not?
- 3 A I guess that is one definition, yes, that we should maximise our profits and pay a dividend  
4 but, if we are looking at finances, it would also be the cash flow; it would also be our  
5 reputation in the market; it would also be our compliance, and our position that we hold a  
6 corporation within society. So it is not solely just profit.
- 7 Q If BT is found by Ofcom to have overcharged communications providers and is required by  
8 Ofcom to repay very large sums, which could be hundreds of millions of pounds, that has an  
9 adverse effect, does it not, on BT's cash flow and profits?
- 10 A Yes, that would have an adverse effect but I think that is part of the compliance with the  
11 relevant regulation or legislation.
- 12 Q And it could potentially have an adverse effect on BT share price, if it was a large  
13 repayment?
- 14 A If it was a large repayment, yes, it could have an adverse effect on BT's share price.
- 15 Q Of course you have mentioned BT's reputation. Equally, if BT is found to have overcharged  
16 in very large amounts that could have an adverse effect on BT's reputation as well, could it  
17 not?
- 18 A Yes, it could.
- 19 Q Which in itself could affect the share price?
- 20 A Yes, reputation could affect the share price.
- 21 Q So it is one of the duties of people who work for BT to seek, by any legitimate means, to  
22 minimise the extent of any overcharge which is found to have been charged by BT, is it not?
- 23 A Seek to minimise? Sorry, can you clarify? To seek to minimise any payment?
- 24 Q Yes. If there is a dispute raised against BT by communications providers, where they are  
25 complaining of an overcharge, one of the key duties of those who are involved in  
26 responding to the dispute is to do what they can to minimise the extent to which BT is found  
27 to have overcharged, is it not?
- 28 A Yes, that is correct. We would seek to minimise as much as we could within the law and  
29 legislation and what is seen to be professionally fair. We have a professional reputation as  
30 well as being employed at BT.
- 31 Q Yes, of course, what you could do would be within the law but provided you are taking  
32 legitimate steps it is something that you would consider you had a duty to do, to minimise  
33 BT's liability?
- 34 A Yes, that would be a legitimate step and that legitimate step would be judged in the light of

1 the legislation, reputation and my own professional judgement, not just necessarily straight  
2 interpretation of the law or a particular regulation.

3 Q We can see, can we not, in this dispute how BT has very vigorously contested allegations of  
4 overcharge, has it not?

5 A Yes, we have and the other side also seek to maximise those and I think it is quite fair and  
6 actually happens and it is within the legislation.

7 Q Yes. I want to make it clear to you, Mr. Dolling, I am not suggesting there is anything  
8 improper in BT behaving in that way and, indeed, there is nothing improper in the  
9 communications provider in seeking to demonstrate, as far as they can, that they have been  
10 overcharged. It is simply that companies will act in accordance with their own commercial  
11 interests, will they not?

12 A Companies do act within their own commercial interests but their commercial interests do  
13 not just stop at cash flow.

14 Q Of course one way that BT can reduce the amount of an overcharge is if it can demonstrate  
15 that its particular costs of providing a service were higher than they were originally shown  
16 to be in the RFS. That is correct, is it not?

17 A I think the interpretation I would give it is if the costs are in fact higher than were stated in  
18 the historic RFS and we could demonstrate that to the satisfaction of whichever body is  
19 considering it and making a judgment on it, then, yes, that is what we would do.

20 Q So if you can find instances where that is reasonably arguable you have every incentive to  
21 do so if there is a dispute, do you not?

22 A If we can find areas where that is both reasonably arguable and, in our professional  
23 judgment, a fair argument then, yes, we will take that course.

24 Q Again that is not a wicked thing to do. It is simply the logical thing to do if you are  
25 resisting a dispute, is it not?

26 A I guess "wicked" is a matter of opinion.

27 Q It is just the obvious thing to do. Indeed it could be said that you would be negligent if you  
28 did not try and do it.

29 A It could be said, yes.

30 Q Of course, BT has a significant discretion, does it not, in the way that it allocates its costs as  
31 between different services?

32 A I do not think we have a discretion as to how we allocate the costs or, for that matter, assets  
33 between services. We have a duty to act within certain principles to identify how we can  
34 actually make that allocation in a fair way, which again is then tested by such things as the

1 audit, the processes and systems that we have to ensure that we do this in a fair, cost causal  
2 and objective manner.

3 Q I think you would accept, would you not, that there is not a single fair or cost causal manner  
4 to allocate costs between different services? Is that not right? There is not one unique  
5 correct way of doing it?

6 A I think that is one unique way of actually doing it, inasmuch as you have to arrive at that  
7 after taking judgments as to the benefit or disbenefits or equity of a particular attribution of  
8 method. So there are many attribution methods that can be used, using the evidence that we  
9 have and the data we have. We have to actually take a decision which is then the cost causal  
10 method that I would believe fairly reflects the attribution to be used.

11 Q Yes, I think we might be slightly at cross-purposes. Of course you have to take a decision  
12 and once you have taken a decision that is BT's assessment of the cost attribution to a  
13 particular service. But before you get to that point you have to make a series of judgments,  
14 do you not?

15 A We do have to make a series of judgments which we take a great deal of care and  
16 professionalism over making, and we have the systems and processes to back it up which I  
17 have actually written in my evidence, such as methodologies ... group, advice from others  
18 and often a consultation with Ofcom.

19 Q In relation to those judgments, in many circumstances there is not just one correct answer.  
20 Reasonable people could take different views on the allocation, could they not, in many  
21 situations?

22 A I can say that when we take a decision there is one correct answer because one of the  
23 attribution methodologies is superior to the other options that we actually adopt.

24 Q I want to suggest to you, Mr. Dolling, that that is really not correct and it is not consistent  
25 with your own witness statement.

26 A My witness statement sort of states that there are different methodologies and that we  
27 actually take great care in actually selecting the appropriate attribution methodology. So by  
28 definition in the end the one that we choose at that particular time was the one that we feel  
29 is the most fair and agrees with the principles of, as I have said, cost causality and  
30 objectiveness.

31 Q Can you take your witness statement, please, para.54. We see the heading at para.53, "The  
32 framework for setting cost attribution methodologies". Yes?

33 A Yes.

34 Q Then you explain at 53 that accounting separation requires the development and use of cost

1 attribution methodologies under which BT allocate to apportion revenue costs, assets and  
2 liabilities to activities or wholesale segments in a given market or technical area. Then you  
3 have set out a quotation from BT's current cost financial statements. Do you see that?

4 A Yes.

5 Q Do you accept that this quotation is a correct summary of the process?

6 A Yes.

7 Q If we look at it, you say: "As far as possible, revenues, costs, assets and liabilities are  
8 directly associated with a product group", and so forth, and then the next paragraph:

9 "The amounts of revenue, cost and capital employed attributed to markets, services  
10 and components depend critically on the methods of attribution adopted. Typically, in  
11 a fully allocated accounting system, a range of attribution methods is available. In  
12 selecting appropriate attribution methods with appropriate non-financial data for use  
13 within the attribution models employed in the production of these Current Cost  
14 Financial Statements, BT has had to make certain estimates and exercise its  
15 judgement, having regard to the regulatory accounting principles, including cost  
16 causality and objectivity, in order to comply with the requirements of the Primary  
17 Accounting Documents".

18 Yes? So there are exercises of judgement that BT has to make?

19 A Yes, your question is that there are exercises of judgement, that is I think what I have said  
20 before. Yes, we exercise our judgement in a professional way according to the principles  
21 and arrive at the most appropriate cost causal allocation or attribution methodology.

22 Q In some situations there may be two equally appropriate attribution methodologies, might  
23 there not?

24 A I have never come across where there is two equally appropriate where we have to get to the  
25 point of flipping a coin. No, if we come to that, as I have said, we have our AC group and  
26 our methodology group. Where we cannot make a decision because we have not had  
27 sufficient evidence it is up to me, my colleagues in my team, to actually test further those  
28 attribution methodologies until we can make a decision as to the appropriate one.

29 Q Indeed, in different years BT has sometimes changed the way that it attributes costs to  
30 different services, has it not?

31 A It has because times change, economics change.

32 Q And judgements change?

33 A Judgements change as to what is appropriate. So, for instance, if a piece of machinery is  
34 used across the country in different instances and it is fully utilised and, because the market

1 changes, we find that some of the equipment at a later date is not being fully utilised, then it  
2 may be appropriate to allocate maintenance costs on a basis of utilisation as opposed to a  
3 unit of the piece of machinery.

4 Q You have the advantage when you are making these judgements that you have access to all  
5 the relevant information, do you not?

6 A I think "advantage" is the wrong word. We are experts and we are making enquiry and  
7 investigation in BT and we have that facility such that we can arrive at the most appropriate  
8 attribution methodology. I do not see that as an advantage.

9 Q But you have access to all of BT's internal data, do you not?

10 A I think it is absolutely necessary that I do have access to BT's internal data. I do not see that  
11 is a ----

12 Q Other communication providers who are seeking to understand whether they have been  
13 overcharged by BT do not have that advantage, do they?

14 A No, they do not have that but that, I think, is the same in the nature of any financial  
15 information and financial information that is publicly available in the RFS, but it is publicly  
16 available in the statutory accounts and everything else.

17 Q They only know what BT chooses to publish about its costs and revenues and allocations,  
18 do they not?

19 A Yes, but the regulation, and I can go through the tabs in my witness statement if need be,  
20 sets out both the Primary Accounting Documents where we give an overview; the detailed  
21 and secondary accounting documents; the detailed attribution methodology, which is  
22 several hundred pages, and there is a transparency principle that is required by Ofcom such  
23 that any relatively informed financial and regulatory person, from the information we have  
24 published, would be able to reproduce the regulatory accounts and attribution, and that is  
25 one of the points which is tested by the auditors.

26 THE CHAIRMAN: So the point you are making is not just what BT chooses to publish but there  
27 are quite detailed obligations on what you have to publish?

28 A Yes, and quite often I would be asked by the auditors to expand or submit data, for instance,  
29 for a more detailed attribution methodology.

30 MS. ROSE: Of course, one of the key sources that the communication providers rely on is the  
31 regulatory financial statements, is it not?

32 A Yes, the regulatory financial statements as a whole, not what is commonly known, the 100  
33 or so pages of the CCA regulatory financial statements, but the PAD, the detailed attribution  
34 methodology, the valuation for CCA and the documentation detailing the LRIC and DSAC,

1 several hundred pages of documents.

2 Q Can we just go now to your witness, para.6. At para.6 you criticise Mr. Scott, and you say  
3 that he makes a number of serious allegations against BT:

4 "For example, at paragraph 19 he states that,

5 '... there is a perception amongst a number of industry stakeholders that when BT  
6 delays and then restates its RFS, it does so because it wishes to hold back  
7 publication in order to revise certain numbers in its RFS to suit its own commercial  
8 ends, particularly to assist its position in the context of a dispute or regulatory  
9 review.'

10 This is simply not true and it is unfortunate that this apparent perception is  
11 (allegedly) held by the (unnamed) stakeholders referred to by Mr Scott."

12 You say then that his allegation is baseless and unfair, and you say:

13 "There has never been any communication to me by any "stakeholder" of this  
14 nature and no one has directly complained to me that they suspect BT of delaying  
15 or restating its Regulatory Financial Statements ('RFS') to suit BT's own  
16 commercial ends."

17 It may be that nobody has complained directly to you, but you are aware that they have  
18 made complaints to Ofcom, are you not?

19 A I'm not aware of any particular individual complaint that has been made to Ofcom.

20 Q Can I ask just ask you to take up bundle CW2, please. There are tabs A, B and C in this  
21 bundle, and then behind tab C there is another tab that is numbered 4. Do you have that?

22 A I do.

23 Q You see this is a document covering UKCTA. What is UKCTA?

24 A It is the organisation of competitive telecoms operators.

25 Q It is a response to Ofcom dated 9<sup>th</sup> December 2011, do you see that?

26 A Yes.

27 Q "Call for inputs: Review of costs orientation and regulatory financial reporting in  
28 telecoms", and if you go to p.16, you see the heading "Reliability"?

29 A I do.

30 Q "Our confidence in the Regulatory Financial reporting regime covering BT has  
31 been severely dented in recent years with two restatements and a massive asset  
32 revaluation, all of which benefited BT at a time when the company was subject to a  
33 charge control review and series of commercially sensitive overcharging  
34 investigations. We firmly believe the timing of these changes by BT was no

1 coincidence and Ofcom has proved powerless to intervene. Instead it chose to  
2 make adjustments to the BT supplied figures, demonstrating that Ofcom also has  
3 deep reservations about the figures produced.

4 BT's ability to bend and flex the figures to suit their own commercial ends is a  
5 deep cause for concern and an audit regime which apparently signs off each  
6 iteration, regardless of that fact that it may completely contradict the previous set  
7 of numbers covering the same product areas highlights the chronic weaknesses in  
8 the current framework. While we firmly believe BT is best placed to own/produce  
9 data, we believe the incentives on BT to change the numbers should be removed,  
10 with the accounts produced in a more independent and sterile environment, for  
11 example, produced by a ring fenced independent body. A board of independent  
12 overseers should be required to make some of the fundamental attribution  
13 decisions. The board could have appointed to it a majority of independent  
14 members who had the final say in how the accounts are derived. The current  
15 situation is untenable as we have little confidence that numbers presented each  
16 year will still be relied upon six months later as the possibility of restatement or  
17 Ofcom adjustment are now commonplace."

18 Is it your evidence that you are unaware of these concerns that have been expressed in such  
19 trenchant terms in this document?

20 A This document is a call for inputs for a fundamental review of telecoms reporting. A call  
21 for inputs allows Ofcom to, I guess, get a short list or, in fact, a long list of the items that it  
22 may then consult on. This is a matter of opinion in here, and, as I have said in my witness  
23 statement, I have never had a direct complaint, either written or verbal, said to me as to the  
24 lack of reliability of the regulatory financial statements from any of the CPs.

25 Q Mr. Dolling, that was not actually my question. My question was: is it your evidence that  
26 you are unaware of the concerns that are expressed in that passage?

27 A I think there are concerns here that are expressed that are ill-founded, and ----

28 THE CHAIRMAN: No, I think what you have been asked, Mr. Dolling, is not whether they are  
29 right ----

30 A I have read this document before, yes.

31 Q You have read it before, yes.

32 MS. ROSE: You have?

33 A Yes.

34 Q When did you read this document?

1 A Yes.

2 Q When did you read this document?

3 A I can't remember. I've been involved in this review - I can't give you a date when this  
4 was ----

5 Q This is a document from 2011. Would you have read it at the time?

6 A Probably after that.

7 Q Perhaps in 2012?

8 A It may well have been, I can't remember specifically.

9 Q Before you wrote your witness statement?

10 A Yes.

11 Q You see, in your witness statement, Mr. Dolling, at paras.6 and 7, you seek to give the  
12 impression that Mr. Scott is making up these concerns on the basis that they have not been  
13 directly reported to you, but you were aware that these were concerns of stakeholders all the  
14 time, were you not?

15 A Stakeholders always have concerns. I am judging whether they are valid concerns, and I  
16 think Mr. Scott actually colours these concerns any way that appears favourable to him, and  
17 I don't think it's a balanced view.

18 Q That is not the point, is it, Mr. Dolling. You say in para.6:  
19 "... it is unfortunate that this apparent perception is (allegedly) held by the  
20 (unnamed) stakeholders ..."  
21 implying that Mr. Scott is making up the assertion that these are actually concerns for  
22 stakeholders, but he was not making that up, was he?

23 A I'm reflecting. What I've said is that I haven't had a direct complaint or view put to me by a  
24 CP.

25 Q But you did know that that complaint has been made to Ofcom?

26 A This isn't a complaint, this is actually ----

27 Q I do not mean a formal complaint. You knew that that concern had been expressed to  
28 Ofcom?

29 A I know there are concerns, and to be honest there is an adversarial type relationship between  
30 CPs, Ofcom and ourselves. It is the nature of, I guess, regulation

31 Q So you did know that those concerns had been expressed to Ofcom, did you not?

32 A Yes, I had read this document, yes.

33 Q But you did not feel that it was necessary to say that in your witness statement?

34 A No, because I think Mr. Scott is colouring the view of those concerns. For instance, where



1 this document that you have quoted to me goes into the fact that we have made a statement  
2 as a restatement due to a revaluation, it is a perfectly revaluation. We had changed  
3 contractors for our civil engineering and found that the evidence of the costs to dig holes in  
4 the road - i.e. add duct - was now different from that which was previously held. I have a  
5 duty to actually give the most up to date and cost causal information in the regulatory  
6 accounts, and that is what we followed. So there is an implication here that the restatement  
7 is some sort of falsification where it isn't, it's actually an improvement in the regulatory  
8 accounts. That is what I am trying to reflect when I say that Mr. Scott's view is unfortunate  
9 and a misperception.

10 Q Why did you say that this apparent perception is "allegedly" held?

11 A Because he didn't name the individuals.

12 Q You knew that perception was held because you had already read this document?

13 A Yes, but as I'm saying it's allegedly held, and it's incorrectly held.

14 Q In your next paragraph, para.8, you criticise para.13 of Mr. Scott's first witness statement.  
15 Can we take a look at that paragraph. It is at tab 17 of this bundle. What Mr. Scott is  
16 addressing here is the delays in BT producing its RFSs, is it not?

17 A He is.

18 Q He says:

19 "BT has a poor track record in meeting its publication deadline for producing its  
20 annual regulatory accounting output. The RFSs are due no more than four months  
21 after the end of the financial year, which means they are due by 31<sup>st</sup> July each  
22 year."

23 That is a regulatory requirement, is it not?

24 A It is, except where there are extensions to that date.

25 Q "However, the RFS are more often than not late, sometimes by months."

26 A Mr. Scott is incorrect. In 2006 there was an extension to the date of publication, so we were  
27 not late in 2006, and they delays are being caused by, as you said, restatements or other  
28 information that is actually a balance of getting the most correct information into the  
29 accounts and the most reliable information into those.

30 Q He has got a table here where he identifies all the years from 2000 to 2012 - right?

31 A Yes.

32 Q You say he is wrong about 2006?

33 A Yes.

34 Q But you do not say he is wrong about the publication date in any other year, do you?

1 A No.

2 Q So on the basis of that table, BT was late after 31<sup>st</sup> August in all but three years since the  
3 year 2000 - that is right, is it not?

4 A Yes, it is.

5 Q Can we just go back to your witness statement. You say at para.13 that accusing BT of  
6 various delays is misleading. It is not misleading, is it, it is correct?

7 A Sorry, which paragraph?

8 Q Paragraph 8 of your witness statement?

9 A Mr. Scott was actually suggesting that the delays were purposeful to assist BT in such  
10 things as charge controls or disputes.

11 Q Where does he say that in para.13?

12 A He doesn't in para.13.

13 Q So why is para.13 misleading? It is not, is it?

14 A Sorry, which tab was it again?

15 Q It is tab 17.

16 A He says that what stakeholders require is reliable information, which we endeavour to give  
17 all the time. That has meant we have had a delay in publishing the regulatory accounts.

18 Q Paragraph 13 of his witness statement is not misleading, is it, Mr. Dolling?

19 A He had put there that we don't have a good record in meeting the publication dates. That's  
20 correct, but it's because, as I have said, we have endeavoured to ensure the quality of the  
21 regulatory financial statements and in some cases the direction that defines what we have to  
22 finally publish has actually come after the date of 31<sup>st</sup> July. So there are various  
23 circumstances that have led to the delay but at all times we endeavour to deliver reliable  
24 information, and if that causes some delay I have to judge in the times I was responsible  
25 whether that delay is sufficiently warranted to assure the quality of the information, so since  
26 I have been here in charge for the 2009 accounts onward to 2013, I have delivered 2010,  
27 2012 and 2013 accounts on time.

28 Q You see, the problem is for the CPs that if the accounts are late the CPs are not able to  
29 interrogate the information that BT is required to publish - that is right, is it not? They have  
30 less opportunity to do that?

31 A That is correct, but given the dates we are not talking here of months and months. The  
32 balance as to whether we can get the information into a more reliable, robust form, and  
33 cause a slight delay is balanced against, as I said, the quality of the detail in the RFS. I don't  
34 see that maybe delaying to 13<sup>th</sup> August, or even to the end of September would actually give

1 the CPs a problem in analysing the data.

2 Q So you do not think that the dates are very important then?

3 A I do think the dates are very important inasmuch as we have to get the information into the  
4 public domain as soon as possible, but a few weeks' delay I see as something I can judge  
5 against the quality of the information.

6 Q You call Mr. Scott "misleading" again in your witness statement, do you not? If you go to  
7 para. 18 you quote him, where he says:

8 "In order to satisfy its regulatory financial reporting obligations BT itself determines  
9 how it adheres to its various cost orientation obligations and regulatory reporting  
10 obligations, establishes its own models and cost allocation methods, and publishes its  
11 own RFS."

12 A Yes.

13 Q Then you say:

14 "The word 'determines' in this context gives a misleading impression of freedom of  
15 choice on BT's part. It would be more correct to say 'identifies' how it complies with  
16 those obligations, because acting in accordance with those obligations means there is  
17 no discretion in the sense of BT having a free choice, there are only structured  
18 judgments as to which approach will best meet the obligations."

19 This is a point that you and I were discussing a little earlier. Do you know where Mr. Scott  
20 got that word "determines" from?

21 A I don't. My reading of Mr. Scott's witness statement implied that we had a free choice, and  
22 we do not have a free choice. I was trying to indicate here the difference of "identifies" and  
23 "determines". We have to identify the most appropriate - if we are discussing cost causality,  
24 or attribution methodology - the most appropriate method, not as Mr. Scott implies, that we  
25 have a free choice to choose those which might benefit us.

26 Q The language he is using in that paragraph, that you call "misleading", is language that was  
27 used by Ofcom, did you know that?

28 A I didn't, no.

29 Q Can you take up bundle CW2, tab 2. You will see that this is an Ofcom consultation  
30 document, do you see that?

31 A I do.

32 Q "Review of Costs Orientation and Regulatory Financial Reporting in Telecoms"?

33 A Yes.

34 Q This is, in fact, the call for inputs which we looked at the response to a little earlier, and we

1 see this again is a document from November 2011. Can you go to p.8? Do you see para.  
2 2.9?

3 A I do.

4 Q It says:  
5 "Currently BT itself determines how it adheres to its various cost orientation  
6 obligations and regulatory reporting obligations, establishes its own models and cost  
7 allocation methods, and publishes its own regulatory financial statements."  
8 That is virtually identical to the paragraph of Mr. Scott that you criticised as misleading, is  
9 it not?

10 A It is. However, I think I was trying to indicate in my witness statement my interpretation of  
11 Mr. Scott's implication that we had a free choice by his use of the word "determines", which  
12 we don't have.

13 Q It is clear that you and I are going to disagree over the extent of the breadth of judgment and  
14 discretion that BT has in deciding cost orientation, but will you agree that, at the very least,  
15 it is not fair to call Mr. Scott "misleading" when he is adopting the language used by  
16 Ofcom?

17 A Then he gives the context in which uses the word rather than the word "determines" himself,  
18 which I find misleading.

19 Q The context was a paragraph that is almost verbatim, a paragraph from an Ofcom  
20 consultation document.

21 THE CHAIRMAN: I do not think it is worth a lot of time on.

22 MS. ROSE: In your witness statement you refer to the restatements that BT has made of its case,  
23 and you identify five occasions on which BT has restated its RFS. The first of these is at  
24 para. 103 of your witness statement, is it not? "The September Re-statement of volume and  
25 revenue data relating to PPC services in 2006/07" - yes?

26 A Yes.

27 Q That is the first occasion on which BT seeks to re-state the RFS, is that correct?

28 A To my knowledge, yes.

29 Q And it did that in June 2008, did it not?

30 A It was re-stated when we were publishing the 2008 accounts, it re-stated 2006/07, yes.

31 Q That was after BT was aware of the PPC dispute that had been raised by various  
32 communications providers, was it not?

33 A Yes, it was.

34 Q The Thus complaint was, in fact, made in 2007, was it not? Were you aware of that? Sorry,

1 not the complaint made, but the letter informing BT that Thus intended to raise a complaint?

2 A The original Thus complaint, yes.

3 Q This re-statement related directly to the costs and revenues that were the subject of the PPC

4 complaint, did it not?

5 A It did.

6 Q And it had the effect of significantly reducing BT's revenues from PPCs, did it not?

7 A It did reduce the revenues from PPCs, yes.

8 Q Therefore it had the result that it significantly reduced the over charge and the amount that

9 BT was ultimately liable to repay to the CPs, did it not?

10 A It did, and I think what has happened here, because of the complaint, and because of a lot

11 more detailed investigation in BT, the volumes in this case were further looked at and it was

12 found there was an error in the data that we were using for volumes. These were accepted,

13 the re-statement was accepted when it came to Ofcom's next price determination. They were

14 reviewed independently by consultants that we employed. They were also reviewed by

15 Analysys Mason, who were appointed by Ofcom, this is a valid re-statement. When we are

16 re-stating what we are doing we are re-stating a previous year to make it comparable to the

17 year that we are actually publishing.

18 Q You also refer, if you go to para. 115 of your witness statement, to the significant increase

19 in July 2010 in the net replacement cost of duct and copper access network assets - yes?

20 A I do, yes.

21 Q Looking at the question of the revaluation of duct, this was announced at the end of July

22 2010, was it not?

23 A Yes.

24 Q This had the effect of reducing the overcharge on Ethernet services, did it not?

25 A I am not sure.

26 Q BT first knew about the Ethernet disputes in October 2009, did it not?

27 A It did.

28 THE CHAIRMAN: When in 2009?

29 MS. ROSE: October 2009.

30 A This re-statement arose because of a commercial decision that BT had made to consolidate

31 all of its civil engineering subcontractors into one more economic contract with Carillion

32 Talent. We, that is myself and my team, have to value the network under CCA terms. That

33 is how much it would cost to rebuild. Obviously the evidence of now one consolidated

34 supplier, they were able to actually tell us after investigation with them that the discount we

1 would get, the theoretical discount for building out the whole of the network, was a lot less  
2 than we had been applying before, which was our previous estimate. Having done the  
3 revaluation which was then audited, and we had a clean audit, we re-stated the year before  
4 accounts to be aligned with it.

5 THE CHAIRMAN: Would that be a convenient moment?

6 MS. ROSE: I am almost finished, I will be about two more minutes. (To the witness): If we can  
7 go on in your statement to para. 121, there we see the heading: "September 2011 review of  
8 methodology to calculate LRIC, DLRIC and DSAC and re-statement of 09/10".

9 A Yes.

10 Q These are the re-statements which related again to Ethernet services, did they not, and which  
11 were considered and rejected by Ofcom in its Decision in this dispute - Yes?

12 A That's correct, yes.

13 Q As you explain at para.124 of your witness statement?

14 A Yes.

15 Q Again, these are re-statements made by BT after it was aware of the Ethernet dispute,  
16 correct?

17 A They were, and again I would say that a lot of these disputes lead to a lot of in depth, drains  
18 up review of allocation methodologies or, in this case, the calculation of LRIC and DSAC  
19 and at that point we found that there was an inconsistency where some of the metrics, such  
20 as FAC was appearing to be higher than DSAC in some of the calculations which just does  
21 not make logical sense when we reviewed and that is what we found. So we then had to go  
22 back and find in the models, and the assumptions that we had made, and how this is  
23 happening, and it has been extensively discussed in a dot C and dot L inquiry.

24 Q If Ofcom had accepted these re-statements, again they would have significantly reduced the  
25 extent of BT's overcharge, would they not?

26 A Yes, they would.

27 Q And therefore significantly reduced BT's liability in relation to this dispute?

28 A You would have, and I think that is what we are trying to illustrate by actually getting the  
29 regulatory financial statements in to a position where they are robust, and a fair decision  
30 can be made.

31 Q You have explained that the effect of raising a dispute is that it leads to an intensive review,  
32 what you have called a 'drains up' review. There has never been an occasion, has there, as a  
33 result of that drains up review where, in the course of a dispute resolution, BT has  
34 discovered an error in its account that means that the extent of its overcharge is significantly

1 higher than it had previously thought?

2 A No, but there have been occasions in the regulatory financial statements where we make  
3 changes that could be seen not to favour BT, i.e. they reduce costs of regulatory products,  
4 which I have pointed out from para. 131 onwards.

5 MS. ROSE: I have no further questions.

6 THE CHAIRMAN: Mr. Pickford - you may have some questions?

7 MR. PICKFORD: No, I have no questions.

8 MR. READ: I have four questions in re-examination. I do not know whether you ----

9 THE CHAIRMAN: We may also have some questions, I think we will take a break and we will  
10 come back at 10 past 2. That means, Mr. Dolling, as you may appreciate, that you must not  
11 discuss the case, or your evidence with anyone over lunch.

12 A I appreciate that.

13 THE CHAIRMAN: 10 past 2.

14 (Adjourned for a short time)

15  
16 THE CHAIRMAN: Yes, Mr. Read?

17 MR. READ: Sir, just before I ask the four questions that I said I was going to ask of this witness,  
18 I wanted to mention Karen Wray's position, because if I have understood what my learned  
19 friends have said, she is not going to be cross-examined by anyone, and if that is the case I  
20 would like to release her sooner rather than later because she has childcare issues.

21 THE CHAIRMAN: Yes, sure. No, we have no questions for Miss Wray, so if nobody else does  
22 she is free to go.

23 MR. READ: I am grateful for that, sir.

24 Re-examined by Mr. READ

25 Q Mr. Dolling, you were asked about the delay in publishing and you were taken to para.13 of  
26 Mr. Scott's statement, bundle E, tab 17. I do not think you need to look at it because you  
27 can probably remember what it involved, and you said that various circumstances led to the  
28 delay. Can I ask you to look at BT11, tab 28, and just explore this for one year. That, as  
29 you can see, are the proposed changes to BT's regulatory financial reporting framework,  
30 which is a consultation document dated 23<sup>rd</sup> June 2003. If one looks, for example, at  
31 para.1.2 on the first page it sets out the proposals falling into four categories including the  
32 introduction of a significant new layer of regulatory financial information provided to  
33 Ofcom. That is delivered on 25<sup>th</sup> June 2005. Can I ask you to look at another folder, which  
34 is BT15, tab 43. That document ought to be Ofcom changes to BT's regulatory financial

1 reporting framework, which we see from the bottom there is issued on 31<sup>st</sup> August 2005.  
2 Then over the page at 1.2 we see the summary of the changes, including the introduction of  
3 a significant new layer of regulatory information. How did this sort of requirement from  
4 Ofcom impact on your ability to produce the RFS?

5 A As you probably are aware, each year Ofcom consult on the contents and then direct on  
6 what should be published and the modifications thereto. That is often relatively late  
7 because the process is just a long process of consultation, which puts ----

8 Q Who is that consultation with?

9 A A consultation is with any member of the public actually, including ourselves, BT.

10 Q Sorry, I interrupted you.

11 A In this particular case it was rather difficult to comply with the date of publishing on  
12 31<sup>st</sup> July, because the final direction was not published until 31<sup>st</sup> August. So that it almost  
13 impossible ----

14 Q Would you be in a position to publish RFS before you have had an opportunity to consider  
15 the final statements by Ofcom?

16 A In fact we can't, because this directs the publication, so we can't publish after this is  
17 published. It's often the case, if you note over the years, that we have published relatively  
18 late because it is just a very long and complicated consultation process from Ofcom.

19 Q When you get the final statement what sort of time period are we talking about before you  
20 can get to publishing the RFS?

21 A It depends. It depends on whether there are significant changes, but just reading the  
22 documents often would involve maybe ten working days and then clarifications thereon. In  
23 some cases it would require publications of new markets - I am trying to think of an  
24 instance - the new geographic market, for instance. That may take weeks of work to  
25 identify the costs that are relevant to a particular geographic market as opposed to a UK  
26 wide market. So it's one of those questions that it just depends what's required, but it does  
27 take a significant amount of time.

28 Q Thank you. You were asked about your statement in para.103 about the restatement in  
29 particular to 2006/07. You have given two explanations there for the result of the  
30 restatement. Can I ask you to go to bundle DF1, and I want to ask you about tab 8, which is  
31 Ofcom's statement about changes to BT's 2007/08 regulatory financial statements. You  
32 have it there, do you?

33 A I do.

34 Q If you go to what is the second numbered page, which I think is in fact the fourth page in,



1 we see at para.1.7 a summary of the objectives, including matching revenues and costs, in  
2 the box down, and reporting on Lease Line, addressing some of the findings set out in  
3 Annex 13 of the Business Connectivity Market Review which includes "improve and  
4 describe the basis on which revenues are calculated to more closely match external billing  
5 practices". Was any of the restatement in 2006/2007 as a result of that statement? (After a  
6 pause): I am sorry, if you want to read it to the end.

7 A I am sorry, it is quite a long statement. Yes, it is the reporting of the service of the ...

8 Q So just, as you have obviously taken some time for the question, the question was  
9 essentially how did that impact in any way upon the restatement?

10 A We had to recalculate the volumes and therefore the revenues for particular PPC services.

11 Q Thank you. A final question, you were asked about the letter from UKCTA ----

12 A Response.

13 Q That is it, yes, which I think was at volume CW2, Tab C4.

14 A Yes, I have it.

15 Q You were asked questions about p.16.

16 A Yes.

17 Q It was specifically put to you the statement at the end there, the suggestion that:

18 "A board of independent overseers should be required to make some of the  
19 fundamental attribution decisions. The board could have appointed to it a majority of  
20 independent members (drawn from outside BT Group) and have the final say in how  
21 the accounts are derived, although BT would remain responsible and accountable for  
22 the output produced. The current situation is untenable as we have little confidence  
23 that numbers presented each year will still be relied upon six months later as the  
24 possibility of restatement or Ofcom adjustment are now common place".

25 Just on what they are actually putting forward there, namely a board of independent  
26 overseers to take the fundamental attribution decisions, has Ofcom implemented that at all?

27 A No, it has not been implemented at all but they had not reached the end of this consultation  
28 and direction, but we have had various workshops with Ofcom. It has not been something  
29 that has been pursued or discussed.

30 MR. READ: Does the Tribunal have any questions of Mr. Dolling?

31 THE CHAIRMAN: Yes. Mr. Dolling, you have been, I think, a director of regulatory finance  
32 since early 2008.

33 A That is correct.

34 Q It is obviously quite a big job and you describe in some detail the multiplicity of obligations

1 and reporting and so on that BT is under that you have to cope with, and also how you will  
2 have meetings with Ofcom to discuss methodologies and so on. You are nodding. You  
3 need to say "yes".

4 A Yes, yes, sorry.

5 Q There is a transcript.

6 A Yes, that is correct.

7 Q Would it be fair to say that if equally this process of communication exchange is not all one  
8 way, that if something that Ofcom is proposing you do not understand you can ask Ofcom  
9 for clarification?

10 A Yes, that is correct. It has been general practice that I have regular monthly meeting with  
11 their director of competition finance, not the previous one, the current one, and that gives us  
12 the opportunity and I can get emails from him, so, yes, communication goes both ways.

13 Q The Determination or Decision, which is what this case is all about, which came in  
14 December 2012, was preceded by a draft or provisional Determination on which everyone  
15 was allowed to comment.

16 A Yes.

17 Q There might have been a few because it is a different dispute. Is that provisional  
18 Determination and then Ofcom's analysis of it, or response to that, something that your  
19 department would have been involved with?

20 A Yes, that is reviewed within my team and within the rest of the regulatory affairs in the lines  
21 of business.

22 Q Yes. Can you look at the final Determination, which is in Core Bundle B, if someone can  
23 kindly give that to him, and if you go within that very long document to p.266.

24 A Yes, p.266.

25 Q You see under the heading there "Transmission Equipment Costs".

26 A Yes.

27 Q "Our Provisional Conclusions".

28 "We proposed to make two adjustments in relation to transmission equipment costs,  
29 one for the period 2006/07 to 2009/10 and another for 2010/11".

30 Then Ofcom summarises here what it had proposed. For 2006/07 to 2009/10, the first of  
31 those, because the costs are recovered through the connection charge but the assets are  
32 capitalised and depreciated over other equipment life, and they say in 13.124:

33 "We proposed to remove the depreciation and capital costs associated with  
34 transmission equipment and replace them with an estimate of the cost of expensing

1 the equipment in the P&L in the year of purchase so that both revenues and costs were  
2 recognised upfront. The figures for depreciation and MCE were provided by BT".

3 Then:

4 "We estimated the cost of expensing the equipment in the P&L each year by  
5 apportioning BT's annual additions from the asset register to services on the same  
6 basis as the apportionment in the RFS".

7 You see that?

8 A Yes.

9 Q That was explained in the provisional conclusions and, as we see from the next page,  
10 13.130, BT does not comment on a transmission equipment adjustment in that regard. They  
11 say that because some of the other proposals you did comment on.

12 A Yes.

13 Q You disagreed with. Can you help us, because at the moment I am not clear, why it was  
14 that you do not see anything to complain about or criticise when you receive the provisional  
15 conclusions, but now the Tribunal is being told by BT that actually the way the adjustment  
16 is being made by Ofcom, because they followed their provisional conclusions, is wrong?  
17 Why was not that pointed out at the time?

18 A I think it was just the understanding the calculations that Ofcom had actually done. I do not  
19 think we have disagreed with the principle of replacing the depreciation with a capitalised  
20 cost, but it was the calculation of how it was applied to the connections. So I think it was  
21 just a delay in the understanding of the analysis which obviously took some time.

22 Q What was the difficulty you had in understanding?

23 A I cannot say in detail. I was not involved in whatever discussions there were probably in  
24 trying to understand this detail and whether there were any with Ofcom, but I had previous  
25 experience of understanding the models and calculations are actually done. It takes quite  
26 some time to understand to look at across desk, or over the phone or via email, how these  
27 were done.

28 Q It was put to you in, I think it came about February, the draft for comment ----

29 A Yes.

30 Q -- if ... wants to comment, if there is something showing these specific adjustments, if there  
31 is something you do not understand or is not clear, one would expect that you would ask  
32 Ofcom, "We are struggling to reach a view on this because we cannot quite follow what we  
33 have done". But you did not.

34 A Okay. I am sorry, I cannot comment because I was not involved specifically in the analysis

1 that was done. It was done within my team but not specifically by me.

2 Q Who did it?

3 A This was led by one of my direct reports, Tom James, and his team, who did the analysis.

4 Q You see, we have got no evidence from him.

5 A No.

6 Q When one looks at the draft that was sent to you, it does seem to explain the general  
7 approach which is now said is wrong. At the moment, for my part, I am having difficulty  
8 understanding why that was not understood or queried over the time that you were given it  
9 specifically for the purpose of considering what was being prepared.

10 A Again I can only say that I cannot specifically comment on this one but other examples, in  
11 consultation that has recently taken place on fixed line access, I and three and my people are  
12 working on an Ofcom model for probably about a month, so three man months, and they  
13 discovered an error in the Ofcom model. So these things do take quite a lot of detailed  
14 analysis so I am afraid I cannot comment.

15 Q I think it came to you in about February and I think one sees that early on, the start of this  
16 statement, on p.9, at para.1.8, that the drafts came later from Verizon but the drafts came in  
17 February and you were given until April to comment. I can see it might take a month, it  
18 might take a couple of months, but surely that would be enough time, would it not, to  
19 consider this and seek clarification, if need be, to understand what is being done?

20 A I will have to make an assumption that the analysis continued after this date and that is  
21 when the aberration was sort of spotted.

22 Q Yes, that is the assumption as to when it started.

23 A Yes.

24 Q Is there anything more you can say about that?

25 A I am afraid there is nothing more I can add.

26 MR. HARRISON: On the provisioning costs that was an issue as well, you changed your  
27 methodology - if you turn to p.310 of the Determination. While you are looking, there are  
28 two issues relating to the provisioning costs, one is one of methodology, the other is  
29 calculation. Dealing with the methodology it explains how you moved from allocating -  
30 para.13.361. It explains how you move from a methodology of connections rather than  
31 rental services, and a change in methodology. Could you explain the type of logic? Having  
32 explained how you go through and make sure you make the right choices and so on in the  
33 earlier part before lunch, what was the sort of thinking behind that sort of change?

34 A The provisioning cost related to exactly that. It was the cost related to the provisioning.

1 These were mostly capitalised, so what would happen it would be depreciation and it was  
2 felt that from a cost causal way that depreciation should apply to this element of the service,  
3 provisioning.

4 Q The decision to link it at one point with connections, which I can understand is distinct from  
5 ongoing rentals, so given the nature of the cost what would cause that type of change in  
6 your methodology?

7 A One of two things, either the analysis that is done within my team, and they would come  
8 back and say that they felt there was an improvement, and we would go through the various  
9 process ... or the methodology group, or when we nearly finalise the regulatory accounts  
10 and we do that a month nine run, and estimate month 12, you will see that we do a post-  
11 events review, and that review would actually see if there were any massive changes, and it  
12 could have been spotted in that, because this is quite a difficult one because actually you are  
13 taking an event which takes place at one point in time, provisioning. The accounting  
14 standard, not the RFS the accounting standard, for equipment that you would use you would  
15 actually capitalise that equipment at that point, at that point it would not hit your profit and  
16 loss account. Then you would depreciate over the life of the equipment because from an  
17 economic point of view, that the accountant is looking at, that service is provided over a  
18 time, whereas we have to look at particular elements of the service, and one element of the  
19 service would be the provisioning, as opposed to the ongoing rental, so there is a decision to  
20 make, whether it would be better and more cost causal to actually put it to the provisioning  
21 or to the rental and that is why Ofcom then come on to make this adjustment to say the cash  
22 cost, as opposed to the depreciation cost, should be taken into account at the provisioning.  
23 So there is a slight almost tension between what is normal accounting practice, which we  
24 are required to follow and what you are trying to follow for cost causality purposes.

25 Q I see, so this is similar to transmission cost - I just thought the adjustment was the way it  
26 was allocated between the cost relating to the connections, a decision being made that it  
27 should be done on a rentals basis. I did not realise that you were re-stating and re-  
28 capitalising. Perhaps I have misunderstood it then?

29 A We are not re-capitalising, we are just actually allocating the depreciation either to----

30 Q I see, so you are allocating it to that, and therefore, as far as you are concerned, was it a  
31 reasonable judgment for you to have made? Is this just a better judgment, or was the first  
32 judgment just wrong?

33 A I think this was a better judgment. As I previously explained as we go along the dynamics  
34 of it, at one point we can consider something a better judgment and move on, and there are

1 various uses for that.

2 Q Okay, fine. The second question: if you look on the opposite page, p.309 we can see the  
3 actual provisioning costs which go to the heart of the miscalculation-type argument. You  
4 can see there that the provisioning costs, particularly in the later years, prima facie look to  
5 be significantly lower than in the later years, which is actually what Ofcom say in 13.357.  
6 Prima facie it looks as though they have been misstated. Having again had the opportunity  
7 you did not get back to this before the final determination was made. What would have  
8 been the difficulty in doing that, just so I can understand why is it not a case of: "That  
9 looked wrong, what has caused it to be wrong, therefore that is the right answer." What  
10 would have caused the delay?

11 MR. READ: Sir, I would not want the question put on a false basis because there is quite a lot of  
12 material about what BT actually said to Ofcom on provisioning costs in the bundles after the  
13 April 2012 response. I do not want to interrupt the flow of cross-examination but I think  
14 probably one needs to go through that as well rather than simply on the assertion that BT  
15 never got back to Ofcom.

16 MR. HARRISON: Sorry, I apologise. (To the witness): On something like that why would that  
17 not be straightforward and easy to demonstrate?

18 A Yes, because the complexities of the allocation system we would have to check whether it  
19 was influencing or actually impacting anything else. That is really all I can add.

20 Q A follow-on from the question I have is in your department actually predicting some of  
21 these costs you mentioned doing, I think, a period 9 before the end because you produce  
22 your accounts quarterly as you go along as well ----

23 A Yes.

24 Q -- so the build-up of these, there is clearly a major exercise finalising the annual numbers,  
25 but identifying problems in advance perhaps you could explain how you go about doing  
26 that, and why a problem like this would not manifest itself earlier?

27 A First of all, we go through all of the changes that might have happened ... my witness  
28 statement and cost allocations are very dependent on organisational unit ..., where  
29 somebody works, which department. Obviously departments evolve and change over time,  
30 so we have to check all of those and make sure they are allocating it to a certain department  
31 - just because somebody has moved a department they may be doing the same job, the job  
32 may have moved. There is then a whole review of market driven changes which I alluded to  
33 slightly earlier with things where demand patterns have changed, where we can do an  
34 allocation on an averaging basis for the UK we can now no longer do that. All these sort of

1 things are spotted up front.

2 Also, each year there is a lot of informational changes. So, for instance, a lot of allocations  
3 are done on a square footage basis, and we will review that from time to time, how much  
4 space in an exchange a particular piece of plant would have and reconciling those back to  
5 the totals and seeing that if we are using new or different information it is still reflecting the  
6 same sort of cost causality as we have had previously and is still relevant. So we do all of  
7 those reviews.

8 Why this would not have been spotted? I think because the actual result, this would almost  
9 be a post-review, once we have got the results, and this was not spotted at that time.

10 MR. HARRISON: Fine, thank you.

11 PROFESSOR MAYER: Could I, if I may, ask you to turn to p.385 of the Determination and look  
12 at table 14.14 which refers to the WES 100 rental. What I would appreciate understanding a  
13 little better are the factors that give rise to - if you look at the third line of the table - the  
14 considerable variation in the DSAC estimates. I would appreciate having some indication  
15 as to what are the main factors that give rise to that type of variation in the distributed stand  
16 alone cost?

17 A First, the distributed standalone costs, the whole model that works out the DSAC costs is  
18 actually based on the Aspire model which does the FAC allocation, so there is the cost  
19 causal allocation. First, the first variant would be if the resulting components would have  
20 actually resulted in a different cost and that could be because the comparative volumes from  
21 market to market, product to product have actually changed, because what we are doing is  
22 distributing or allocating a bucket of costs according to relative volumes. So, first of all the  
23 component cost could have changed and that would be, I think, the reason that there is such  
24 variability.

25 Q So you think it has more to do with changes in the volumes of the various ----

26 A Yes, and it is not just the volumes within - we are looking here at the WES so this is not  
27 just the volumes with in the AISBO market, it could be the volumes across the whole of the  
28 regulatory - in fact it could be the volumes across the whole of BT. If I give an example: if,  
29 for some unknown reason, our retail business grew 10 times next year but the wholesale  
30 business stayed the same, then a lot more overhead cost and the overhead components  
31 would be allocated to the retail because the cost causal nature, i.e. there are more overheads  
32 being spent managing a much larger retail sector. I know that is almost impossible because  
33 if our retail sector grew so would our wholesale sector, but it is the combination of that type  
34 of change that would lead to these changes in DSAC.

1 Q And if we compare with line 4, the variations in DSAC look quite large in relation to FAC,  
2 is this less of an issue in relation to FAC than it is in regard to DSAC?

3 A The variations are still quite ----

4 Q Yes, if you look, for example, at 2010/11 there is a very substantial variation in the DSAC  
5 and not as large a FAC. Is there a reason why the DSAC variations might be ----

6 A I think in 2011 that is because we had the change of the DSAC methodology.

7 Q So the methodology changed?

8 A The methodology changed, because we had discovered there was an anomaly where the  
9 FAC was actually larger than the DSAC which is a nonsense from an economic point of  
10 view, and went back and did it he analysis and it was where there was split relationships, for  
11 example, allocating exchange costs and we went back to one straight relationship, a cost  
12 variability rather than splitting it on two.

13 Q Right, so there was a problem identified in the DSAC cost allocation in 2011, and did you  
14 then go back and re-do the earlier figures as well??

15 A No, in that case I don't think the DSAC was re-stated, I'm not quite certain of that, actually.

16 Q Right. Is it common to find problems like this in the DSAC analysis?

17 A The DSAC analysis is quite a prescribed analysis. So unlike the cost causal relationships in  
18 the FAC accounts where we can change them to be more appropriate and more cost causal,  
19 as economics change, as volumes change, as the markets change, the calculation of DSAC  
20 was actually laid down some time ago and has not changed, because it is the test as opposed  
21 to an accounting to show a cost. So yes, these anomalies do occur from time to time with  
22 DSAC.

23 Q So when you say it is a test rather than an accounting, does that mean that there can be a  
24 divergence between the rules that are applied for the test as against what underlying  
25 accounting principles would suggest?

26 A No, because the underlying accounting which allocates all the costs, in this case, to  
27 components and therefore into the cost categories that the DSAC deals with, which cost  
28 variability curves relate to which the DSAC is based on, are based on the FAC accounts. So  
29 as the FAC accounts evolved, changed, or as we said restated, they would be changed and  
30 the FAC would be recalculated and the model stays constant. But some of those changes  
31 could throw up an anomaly in the model. So we would then have to go back and look at the  
32 model to actually find where the anomaly is occurring. So it may have been that perhaps a  
33 certain component, for instance, was receiving very little cost and is now receiving a lot,  
34 and it was an anomaly that was immaterial before so we didn't see it and now it throws a lot



1 of cost in that particular element and becomes larger and more obvious.

2 Q If there is not then an anomaly or a problem identified in the DSAC calculations, would you  
3 expect in general for the DSAC and FAC to move quite closely together, or would you be  
4 alerted to a concern if they were not moving?

5 A Yes, I would. We do various checks. We have got a FAC to LRIC or FAC to DSAC ratios  
6 and check it over to see if there's anything ridiculous. So I never thought of it in that  
7 particular way but that is what we're doing really; we're checking whether there's a large  
8 variability and then we go back to discover why that variability has actually happened.

9 Q Thank you very much.

10 MR. HARRISON: From a management of the business point of view, given the sensitivity and  
11 the importance of these numbers, what does the business get actually managed on as it goes  
12 along, in monitoring its responsibilities in this area? What does it actually use?

13 A OK, well I guess there's a combination. There's obviously the application of any price  
14 control, and in some of the period there was a price control, which we were able to monitor  
15 to the penny. There is a price control statement that shows how the price control works.  
16 Then when the pricing of a product or a product range is being reviewed, changed, reduced,  
17 increased, we look at the DSACs. The problem with the DSACs, as I said, is the test. So  
18 we may be looking at a price change in May and how DSACs are not complete and  
19 published until July.

20 Q Sorry, that is what I was getting at. So in the intervening period, what are you using as your  
21 measure?

22 A Well just last year's DSACs and if there's any specific concern, and an example would be  
23 there was a concern in the broadband market the year before last and we did a lot of work to  
24 try to estimate the DSACs before the year end. We can't do that with any great level of  
25 certainty, but we can look at the direction they are moving, so we can look at the start, the  
26 direction and then predict where --

27 Q Sorry, if you will bear with me, you said you would start with last year as an indication of  
28 the DSAC. Given the rapid nature of the change in the market, the one thing you are certain  
29 of is that last year's is going to be - you know, you are going to be different from last year.  
30 Therefore, when you do it do you model your budgets through into your DSAC model? For  
31 example, at the start of the year, do you run your budgets into a DSAC model?

32 A No, it would be an ideal solution if we could have it. As you know, budgeting is done at a  
33 reasonably high level, so at turnover less employment costs, engineers and that sort of thing,  
34 whereas to do the FAC allocation we look at - there is a possibility of 60,000 ledger codes.

1 There's usually 20,000 that are active. Of those 20,000 there's then 700 sort of  
2 organisational unicodes. So the budgeting just isn't done at the level of detail such that I  
3 could run ASPIRE, which is the model that does the FAC which the DSAC would rely on.  
4 The budgeting is not done at sufficient detail that I can actually do that. We're looking at a  
5 new system and replacing the system now to see if we can actually get an element of  
6 forecasting in.

7 Q So, the logical conclusion being therefore that you cannot, in a sense, warn the commercial  
8 side as you go along with the structure that you have got at the moment, that you could be  
9 over or under pricing or whatever as you are going along. So it is very much as you  
10 describe it, a year end test which you eagerly await to see what the result is?

11 A That's correct.

12 Q Thank you.

13 MR. READ: Could I just ask one quick question arising out of that. Could I ask you to look at  
14 the Decision which I hope you should still have in front of you at p.379 table 14.13. We see  
15 there that this is the BES 1000 connection that the DSACs go up quite substantially between  
16 the years 2006/2009-2010. My question is simply this: to what extent are you actually in a  
17 position to say what caused those particular movements in those DSACs today?

18 A Without doing a very large amount of detailed analysis to show the variants, I couldn't  
19 actually tell you.

20 THE CHAIRMAN: Does anyone else want to ask any questions arising out of the Tribunal's  
21 questions? Thank you very much, Mr. Dolling, you are released.

22 A Thank you.

23 Witness withdrew

24 MR. THOMPSON: Mr. Lynch is going to be the next witness. Sir, if it is convenient may I  
25 please call Miss Stephanie Norman.

26 MISS STEFANIE MARGARET NORMAN, Sworn

27 Examined by Mr. THOMPSON

28 Q Miss Norman, could I ask you please to take up core bundle C and turn to tab 6, please.  
29 There should be a 19 page statement there. Is that your statement?

30 A Yes, it is.

31 Q On the last page, is that your signature?

32 A Yes.

33 Q Are the contents of that statement true to the best of your knowledge and belief?

34 A Yes.

1 Q Could I ask you, please, also to take up bundle BT34 tab 3, that should also be a copy of  
2 your statement. Could you just confirm that your signature is on the last page, please, and  
3 that it is your statement?

4 A Yes, it is.

5 Q Thank you. Sir, could I ask for that to stand as evidence in chief. If you wait there, there  
6 will be further questions for you.

7 A Thank you.

8 Cross-examined by Mr. PICKFORD

9 Q Miss Norman, good afternoon. I am going to ask some questions on behalf of Sky and  
10 TalkTalk. In your role at BT you are responsible for dealing with compliance issues?

11 A That's correct, yes.

12 Q You are particularly well placed to speak to the BT undertakings under the Enterprise Act  
13 2002?

14 A Yes, that's correct.

15 Q It is by far the main part of your evidence in section C of your witness statement.

16 A That's correct.

17 Q You have been chosen by BT as the best placed person to speak to those issues?

18 A Yes.

19 Q You exhibited the original undertakings to your witness statement and we see that at para.15  
20 footnote 16 if you want to look at your statement in core bundle C, if that is convenient for  
21 you.

22 A Which tab, sorry?

23 Q Tab 6. It is probably most convenient if you look at it in core bundle C because we are  
24 going to be also looking at the other bundle, and then you can keep both open together.

25 A Tab 6, OK.

26 THE CHAIRMAN: That is yours, that is your statement?

27 A Yes, that's my statement.

28 Q You are being asked to go to para.15 on p.9.

29 A Sorry, I do apologise. Yes.

30 MR. PICKFORD: You say a copy of the original undertakings is exhibited to this statement as  
31 exhibit SN2. There is then a footnote and we see that is in BT R2 tab 5 which has now been  
32 renamed BT34, which was the yellow bundle that we had before and you have been taken  
33 to. To the best of my understanding you did not exhibit an updated version of the  
34 undertakings, did you? You exhibited the original version?

1 A That's correct.

2 Q Did you check that what you said about the undertakings was consistent with the version of  
3 the undertakings that you exhibited to your statement, and also with the updated version?

4 A Yes, to my knowledge, yes.

5 Q Could we please go to para.17 of your witness statement. You say:  
6 "The Undertakings ensure that the way that BT does business is fair to customers  
7 who buy wholesale access type services from BT. The Undertakings required or  
8 require BT to: [I will skip to (c)](c) allow Openreach to make its own commercial  
9 business decisions, and ensure that the rest of BT cannot inappropriately influence  
10 those decisions;"

11 Then you say at (f):  
12 "make sure that commercial information about Openreach's and BT's other  
13 wholesale regulated products is not shared with downstream parts of BT, unless it  
14 is also shared with other customers;"

15 You obviously stand by that?

16 A Yes, that's correct.

17

18 Q Then if you could go, please, to para.58, in the middle of that paragraph you note that:  
19 "However, Openreach as a result of the undertakings is a functionally separate and  
20 commercially autonomous part of BT."

21 You stand by that?

22 A Yes.

23 Q If you could go then, please, to the undertakings themselves, they are BT34 at tab 5, and on  
24 the front page, p.1, we see:  
25 "AS means the Access Services division referred to in these Undertakings as AS,  
26 to be established by BT in accordance with section 5 of these Undertakings."

27 That is Openreach, is it not?

28 A Yes. Yes, that is correct.

29 Q If you could turn, please, to p.21, and you see here at clause 5.38 the following:  
30 "Save as set out in section 5.41, no employee or agent of BT (including its external  
31 advisers and sub-contractors), who is not working for AS shall:  
32 5.38.1 directly or indirectly participate in the formulation or making of, or  
33 influence or attempt to influence, the Commercial Policy of AS except through  
34 such mechanisms and processes that are also available to other Communications

1 Providers; or

2 5.38.2 have access to Commercial Information of AS held by any employee or  
3 agent of BT working for AS unless it is of the nature that would be provided to  
4 other Communications Providers in the ordinary course of business."

5 It is that clause, 5.38, you sought to reflect in your evidence in the witness statement that I  
6 just took you to a moment ago, is it not?

7 A Yes.

8 Q If we just look back at the definition of "Commercial Policy", which is referred to in 5.38.1,  
9 that is back in the Definitions section on p.4, we see that it means:

10 "'Commercial Policy' means policies and plans in relation to SMP Products or, in  
11 the case of section 8.6, relating to products and services described in section 6.1.2,  
12 and which relate to any or all of the following in relation thereto:-

13 a) product development,

14 b) pricing,

15 c) marketing strategy and intelligence,

16 d) product launch dates,

17 e) cost,

18 f) payment terms,

19 g) product specific forecasting, or

20 h) network coverage and capabilities."

21 So that is pretty well everything, is it not, in terms of the key elements of an Undertakings  
22 commercial policy?

23 A Yes.

24 Q If we go back to 5.38, at the beginning of 5.38 there is a "saving", and it says, "Save as set  
25 out in s.5.41"?

26 A Yes.

27 Q If we can turn to look, please, at 5.41 that says:

28 "As referred to in section 5.38:

29 5.41.1 sections 5.38.1 and 5.38.2 shall not apply to the nominated individuals (if  
30 any), and individuals occupying the roles and functional areas (and their relevant  
31 external advisers, sub-contractors and agents) listed in Part A of Annex 2."

32 You chose not to mention that saving in your evidence - that is correct, is it not, you do not  
33 mention that saving in your evidence anywhere?

34 A No, I don't believe I do.

1 Q But you were obviously aware of it when you produced this statement?

2 A Yes, yes, indeed.

3 Q So to that extent your evidence is not entirely accurate, is it?

4 A I think the point I was trying to make was, I suppose, to differentiate between market facing  
5 units within BT and so those that we would class as communication providers in the same  
6 way that we would class communication providers such as Sky and TalkTalk and other  
7 areas. Clearly the undertakings allow certain people within BT, if they have the relevant  
8 annex to partake a function, to kind of influence the commercial policy of Openreach.

9 Q Let us have a look, shall we, at who can influence the commercial policy of Openreach.  
10 Would you go, please, to annex 2, p.52 of the document. This is Part A, Annex 2, and it  
11 lists all of those other parts of BT who are allowed to participate in the formulation or  
12 making of or influence Openreach commercial policy under the Undertakings, and we see it  
13 includes anyone on the Board - that is correct?

14 A That's correct.

15 Q Any member of any of the Board Committees?

16 A That's correct.

17 Q Group Strategy?

18 A Yes, correct.

19 Q Group Commercial Policy Forum?

20 A Correct.

21 Q Group Financial Control?

22 A Correct.

23 Q Group Reporting, Planning and Analysis?

24 A Correct.

25 Q Group Corporate Finance, Commercial and Regulatory Finance?

26 A That's correct.

27 Q The BT Board, starting with the Board, has responsibility for the overall strategy of BT  
28 Group, does it not?

29 A Yes. Yes, it does.

30 Q And it approves strategic plans as proposed by the Operating Committee?

31 A Yes.

32 Q And the Board has oversight of operating and financial performance?

33 A That's correct.

34 Q We also saw, as one of the other parts of BT that is able to influence Openreach's strategy,

1 the Group Strategy. Could I take you, please, to the additional documents bundle, we have  
2 there a description of what Group Strategy does. It is a bundle labelled AD, and it is tab 12.  
3 Do you have tab 12?

4 A Yes, thank you.

5 Q We see here a description of the Group Strategy part of BT taken from BT's website, the  
6 career centre, about us, and it says in the first sentence:  
7 "Group Strategy's principal role is to help the BT Group maximise long term value  
8 for shareholders."  
9 In essence that means maximising profits, does it not?

10 A That's correct.

11 Q You cannot be a shareholder in BT Retail alone, can you?

12 A No. No, you can't.

13 Q You cannot be a shareholder in Openreach alone, can you?

14 A No, no.

15 Q If you want to own shares in BT you hold them in BT Plc?

16 A Yes.

17 Q Is that correct?

18 A That is correct.

19 Q Group Strategy's key job then is to try to maximise the combined profits of all of BT's lines  
20 of business taken together - that is correct?

21 A That's correct.

22 Q That is ultimately what shareholders care about?

23 A Well, shareholders also obviously care about the compliance of the organisation reputation,  
24 the reputational brand impact of their organisation, but, yes.

25 Q When Openreach puts its prices up for the services that BT Retail buys, for every £1 of  
26 extra costs for BT Retail, that is an extra £1 for Openreach, is it not?

27 A Yes, in effect.

28 Q They just net out, but when Openreach puts up its prices for other CPs who buy services  
29 that is likely to generate additional profits for Openreach, is it not?

30 A Yes, that's correct.

31 Q In particular, if Openreach puts up its prices on BES products that does not affect BT Retail  
32 at all, does it, because BT Retail does not buy BES?

33 A Well, if BT Retail doesn't buy BES then clearly it wouldn't.

34 Q If we could look then, please, at the second sentence of what Group Strategy does, it is said:

1 "This involves ensuring that the BT Group can sustain competitiveness in all its  
2 markets."  
3 That obviously includes making sure that BT Retail remains competitive in all its various  
4 retail activities?  
5 A Yes.  
6 Q Then if you look at the third sentence:  
7 "This requires us to take a longer term view of how markets are developing and  
8 how we devote resources to safeguard our future."  
9 "Safeguarding our future" effectively means safeguarding BT's position in the markets in  
10 which it operates, does it not?  
11 A Yes.  
12 Q That will necessarily include markets in which BT is dominant?  
13 A Yes.  
14 Q The fourth sentence states:  
15 "Also, we operate across the Lines of Business, working with their respective  
16 Strategy teams to build a route-map for the Group's development."  
17 So what it is saying here is that one of the special features of the Group Strategy Team is it  
18 is able to decide on a holistic approach and work with the respective Strategy Groups of  
19 different parts of BT to achieve its aims - that is fair, is it not?  
20 A Yes, within the confines of the Undertakings, yes.  
21 Q The Undertakings do not actually prevent it from doing that at all, because it is within one  
22 of the accepted classes of person that we saw listed in para.5.41 of the Undertakings?  
23 A That's correct. I suppose the way it works in reality, there is a difference, I suppose,  
24 between the work that Group Strategy does, and what Group Strategy can't do, it can't pass  
25 on the plans of Openreach to the rest of BT because that, in itself, would cause a problem  
26 and be a breach, or potentially be a breach of the undertakings.  
27 Q It can take that information for itself, can it not? It is allowed access to the information  
28 because we saw that ----  
29 A Yes.  
30 Q It is accepted in both parts of para.5.38, information and also influencing policy?  
31 A That's correct.  
32 Q Group Strategy does not need to pass on that information to other parts of BT Retail to  
33 develop strategies that benefit BT overall, does it? It can do it itself?  
34 A I must confess, I am not really *au fait* with what Group Strategy has actually done in the



1 past, but theoretically, yes.

2 Q You have given evidence to the Tribunal that you say Openreach is a commercially  
3 autonomous part of BT?

4 A Yes.

5

6 Q And I am exploring how accurate that statement really is with you?

7 A Yes. Openreach sets its commercial policy. Clearly at a group level there is an element of  
8 oversight, but the Undertakings also allows Openreach to have control of its own capital  
9 expenditure and to set the prices in the way that it wants to set, obviously with regard to  
10 overall Group Strategy.

11 Q Yes, so it is not really oversight because Group Strategy can say to Openreach, "We think  
12 you should set your prices in this particular way"?

13 A That is not how it actually works in reality.

14 Q But they were permitted to do that under the undertakings.

15 A They are permitted to influence. They are not permitted to actually say, "This is what you  
16 should do". I think there is a difference between influencing our strategy and telling  
17 Openreach what to do.

18 Q There is no prohibition on it in the undertakings.

19 A No, the undertakings allow them to influence. I suppose they can influence.

20 Q What I am putting to you is the undertakings do not prevent the Strategy Group saying, "We  
21 really think that you should pursue this particular strategy".

22 A The undertakings do not prevent that. That is correct. Whether it would be in Openreach's  
23 overall interest to do that I suppose is a completely different matter.

24 Q We saw in the explanation of Group Strategy that it can work across the lines of the BT  
25 business.

26 A Yes.

27 Q They are conveniently shown on the next page of the additional documents bundle. So we  
28 see principally BT Group is divided up into BT Retail, BT Global Services, BT Wholesale  
29 and Openreach. That is correct, is it not?

30 A Yes, that is correct.

31 Q So I suggest that if there was any part of BT that was capable of devising a pricing strategy  
32 that assisted BT in maximising its shareholder value, or protecting its position in a retail  
33 market, and implementing that strategy, the part of BT that would be able to do that would  
34 be Group Strategy, would it not?

1 A Yes.

2 Q That could include devising wholesale pricing strategies that are helpful to BT?

3 A We have to look at the way that the pricing was done within the constraints of the  
4 regulation, not only in terms of the undertakings but the other regulations that we have, and  
5 so there are a number of constraints on the way that we can price to make sure that we do  
6 not actually abuse any dominant position that we have.

7 Q Of course. Obviously you are under various obligations of law and I am not currently  
8 asking about those. What I am trying to investigate with you is BT's institutional structure  
9 and the extent to which the undertakings, which you relied upon very heavily in your  
10 statement, actually prevent BT from acting in a way that is beneficial to its retail arm in  
11 terms of the decisions it takes for Openreach. Now, in addition to the Group Strategy  
12 function, we also saw that exempted were any relevant external advisers or agents, or any of  
13 those sorts of persons who act for any of the other parts of BT. They are also exempt from  
14 the undertakings, are they not, in relation to para.5.38? You are welcome to go back and  
15 have a ----

16 A Yes, in relation if they are advising any of the people in Annex 2 Part A.

17 Q Yes. So just to take an example, it would be quite open to BT to employ McKinsey &  
18 Company or some other strategy consulting group, and seek their advice on how to develop  
19 an advantageous pricing strategy across all the lines of BT's business?

20 A As you say, the undertakings do not necessarily prevent that but that is not how it works in  
21 reality.

22 Q Unless Openreach were an entirely separate undertaking from BT Retail, with separate  
23 shareholders, you cannot really get around the problem, can you, that Openreach is not in  
24 fact autonomous? You suggest it is autonomous but the reality is its strategy can be  
25 influenced by the Group Strategy and Group Strategy can take account of the profitability of  
26 that for BT Retail. That is correct, is it not?

27 A From a strict reading of the undertakings but, as I say, we have a number of obligations  
28 outside the undertakings to make sure that we do not abuse our dominant position and, as I  
29 say, the ability to influence does not actually mean to say that Openreach takes kind of note  
30 of that. Openreach in itself makes those decisions. It is Openreach pricing board that  
31 approves the pricing decisions. It is the Openreach pricing board and the Openreach  
32 investment board that actually takes the decisions about where its money is spent. So whilst  
33 there might be influence it is the Openreach decision making process that actually decides  
34 the prices, the strategy and, indeed, the investments that Openreach makes.

1 MR. PICKFORD: I have no further questions, Sir.

2 THE CHAIRMAN: Ms. Rose?

3 MS. ROSE: No questions.

4 THE CHAIRMAN: Any re-examination?

5 MR. THOMPSON: Sir, just a few very brief questions.

6 THE CHAIRMAN: Yes.

7 Re-examined by Mr. THOMPSON

8 MR. THOMPSON: Could you have a quick look at para.13 of your statement? You refer there to  
9 the TSR and then at para.14 you refer to the undertakings, and we have looked at those.  
10 Please look at the first page of the undertakings, which is BT34 Tab 5. You will see those  
11 start with a familiar "whereas" and then you will see:

12 "Ofcom considers it has the power to make reference to the Competition Commission.

13 "BT has offered undertakings to Ofcom in accordance with section 154...

14 (c) Ofcom, instead of making a reference to the Competition Commission, has  
15 decided to accept BT's undertakings".

16 You were then asked questions about para.5.38 and then the exceptions to para.5.38, 5.41,  
17 and then, in particular, Annex 2. Are you aware of Ofcom ever having raised any concerns  
18 about para.5.38?

19 A No, I am not aware.

20 Q Are you aware of Ofcom ever having raised any concerns about para.5.41?

21 A No, no.

22 Q Are you aware of Ofcom ever having raised any concerns about Annex 2?

23 A No. No, I am not aware.

24 Q You were then asked some questions about Openreach changing its prices. Just to be clear,  
25 is Openreach allowed to change its prices differently in relation to other CPs and in relation  
26 to Downstream BT?

27 A No, no, our equivalence of inputs obligation means that our prices are our prices and those  
28 prices apply to external CPs and internal CPs.

29 Q You were asked questions about Group Strategy. Are you aware of whether or not Group  
30 Strategy is allowed to set the specific prices that Openreach decides to set?

31 A No. No, indeed they do not. As I mentioned, the pricing of Openreach products and those  
32 pricing decisions are taken by the Openreach pricing board.

33 MR. THOMPSON: Thank you very much. I have got no further questions, Sir. Does the  
34 Tribunal have any questions?

1 THE CHAIRMAN: No, we have no questions. Thank you very much, Miss Norman. You are  
2 released.

3 (The witness withdrew)

4 MR. THOMPSON: We will return to Mr. Read now. Thank you.

5 MR. READ: Sir, the next witness is Mr. Jones. I do not know whether the Tribunal wanted a  
6 break at all or we will carry straight on? I am quite happy to carry straight on with Mr.  
7 Jones.

8 THE CHAIRMAN: We will go straight on.

9 MR. READ: In that case I will call Mr. Jones.

10 Mr. WILLIAM FREDERICK JONES, Affirmed

11 Examined by Mr. READ

12 MR. READ: Mr. Jones, can you take Core Bundle C, please, and can you turn to Tab 2. One  
13 sees there a statement by you and if one goes to p.18 one sees a signature.

14 A Yes.

15 Q Then there is an annex that follows afterwards. Is that your first statement in this matter?

16 A It is.

17 Q Do you adopt it as your evidence?

18 A I do.

19 Q If you go on in that same bundle to Tab 5 we see another statement by you and on the final  
20 page, p.8, we see your signature. Is that your signature?

21 A It is.

22 Q Do you adopt that as your evidence as well?

23 A I do.

24 Q Could you also, just simply for reference, have ready BT17, and if we look at Tab 1 of that  
25 bundle we see the same statement. Can you see that?

26 A I do.

27 Q The material behind that are your exhibits bundle?

28 A That is correct.

29 Q I think also in BT34, Tab 1, that also is your statement and I think you have one exhibit to  
30 that which is behind.

31 A That is correct.

32 MR. READ: If you would just like to wait there, Mr. Jones, you will be asked some more  
33 questions.

34 THE CHAIRMAN: Yes, Ms. Rose.

Cross-examined by Ms. ROSE

1  
2 MS. ROSE: Good afternoon, Mr. Jones. I am going to ask you some questions on behalf of  
3 Cable & Wireless, Virgin and Verizon. It is right, is it not, that you were in charge of  
4 setting and monitoring the prices of base products from 2006?

5 A I became base product manager in January 2006. I was responsible as a product manager. I  
6 had a virtual team and was a pricing specialist, but I was part of that virtual team.

7 Q And WES was added to your responsibilities in 2007?

8 A That is correct.

9 Q Initially, as I understand it, there were two separate reference offers for BES and WES and  
10 they were consolidated in 2009. Is that right?

11 A That is correct. In 2009 we introduced Connectivity Services which encompassed both BES  
12 and WES and some of the other Ethernet products.

13 Q So from 2009 we have a single set of terms and conditions for Connectivity Services. Is  
14 that right?

15 A That is correct.

16 Q You have exhibited the BES contract at BT17 in Tab 2. If you could just turn that up.

17 A Yes, I have it.

18 Q If you just go to Clause 5 in this contract, it bears the heading "BT Equipment".

19 A Yes.

20 Q We are told at 5.2 that: "The Communications Provider agrees to allow the installation and  
21 use of BT equipment at the Communications Provider's Site, prepare the Site, provide a  
22 suitable place, conditions, connection point and electricity for BT Equipment to each Site,  
23 and obtain all necessary consents". Yes?

24 A Correct, yes.

25 Q Then at Clause 6: "Connection of equipment to the service. Any equipment connected to  
26 the Service must be (a) technically compatible with the service and not harm the BT  
27 Network, Service or BT Equipment", must be "connected and used in line with any relevant  
28 instructions or laws; and connected and used in line with any relevant standards". Those  
29 clauses are talking about the connection of a particular site to BT's Network, are they not?

30 A They are indeed. Physical interconnections.

31 Q Physical connection and that involves the installation of equipment. Yes?

32 A Yes, it does.

33 Q So somebody would have to go to the site and install it?

34 A An Openreach engineer would install the equipment.

1 Q BT would have an engineer attend at the site and install the equipment, obviously at both  
2 ends?

3 A Yes, that's correct.

4 Q And then plug it in?

5 A Correct.

6 Q The service that is provided, if you look at clause 3.1 – you see clause 3 is headed  
7 "Provision of the service"?

8 A Yes.

9 Q "BT agrees to provide the Communications Provider with the Service on the terms of this  
10 Contract."  
11 Then Schedule 2 defines the service, is that right, "Service provision for a backhaul  
12 extension service"?

13 A Yes, that is correct.

14 Q There are different variants of the service, and then we are told that the service may be used  
15 for connection between and then various different locations, yes?

16 A That's correct.

17 Q So what you are providing is a connection between the communication providers' network  
18 and your network, correct?

19 A For BES that's correct.

20 Q And you are providing that over a period of time that they rent that service for?

21 A Yes.

22 Q Clause 12 of this contract deals with charges. Can we just go there. If you go to clause  
23 12.5, that deals with the rental for the service, does it not?

24 A It does.

25 Q So rental will commence on the operational effective date which will be payable in  
26 accordance with BT's invoice. Then the connection charge is dealt with separately at 12.6,  
27 yes?

28 A That is correct.

29 Q That is due on the operational effective date and payable in accordance with BT's invoice.  
30 So the difference is the connection charge is a one-off charge, is it not?

31 A It is, yes.

32 Q Only payable at the beginning of the contract?

33 A It is.

34 Q And the rental charge is a periodic payment?

1 A Yes, the rental charge would be quarterly billing at one point, and then mostly it has gone to  
2 monthly.

3 Q Originally quarterly now monthly?

4 A Now monthly billing.

5 Q The minimum period of this contract is one year, is it not?

6 A In this case, yes.

7 Q If you then wanted to renew this contract for a second year you would only have to pay the  
8 rental charge, would you not?

9 A The rental charge was ongoing for the entire life of the circuit; you didn't actually renew the  
10 contract; it was a contract would continue until the customer ceased service.

11 Q But you would not have to pay the connection charge?

12 A The connection charge wouldn't come in again, no.

13 Q If you go now to your witness statement at para.24 we see the first statement which is tab 2  
14 in core bundle C. You see the heading "Connection and Rentals"?

15 A Yes.

16 Q You say:

17 "Apart from in the above situations, WES and BES 'Connections' are always  
18 bought with 'Rentals'. Moreover, a connection charge could never be incurred  
19 without a rental charge also being incurred and vice versa."

20 That is not quite correct, is it? It is not correct that you cannot incur a rental charge without  
21 a connection charge?

22 A Not for a circuit, to order a circuit.

23 Q The point is that after the first year you will incur rental charges but no connection charges,  
24 will you not?

25 A But you will have had the connection charge at the commencement of the service.

26 Q Yes, but the minimum period of the contract is one year. If you then extend the contract  
27 there is no connection charge?

28 A The minimum of the period of the contract was one year but there was no maximum, so the  
29 contract continued. There was only ever one connection. The rentals could continue for a  
30 number of years until the customer chooses to cease it. There was no annual charge  
31 associated with connections.

32 Q The connection charge could just be a basic connection charge, could it not?

33 A I'm sorry, I don't understand.

34 Q There is not just a single connection charge, is there? Let us say you have a particularly

1 difficult site where you need to build extra equipment.

2 A OK, within the service we offer a connection charge, if we needed to provide fibre specific  
3 for that, we would raise excess construction charges.

4 Q So that would be an additional one-off charge on top of a basic connection charge?

5 A It would be.

6 Q For the same circuit?

7 A For the same circuit or a number of circuits if a number of circuits would be installed at the  
8 same time.

9 Q Let us just keep it simple. Looking at one BES circuit, when you are connecting it there is a  
10 basic connection charge but there may be an additional charge on top for excess  
11 construction?

12 A There could be, yes.

13 Q Which is also a one-off?

14 A That is a one-off, yes.

15 Q There could be another charge, an additional charge for time related charges, could there  
16 not.

17 A Yes, if the customer wanted us to work over the evening we would charge them extra for  
18 that.

19 Q So that would be an extra charge for the extra service you are providing at the point of  
20 connection?

21 A Yes, to represent the additional cost of bringing people in overnight.

22 THE CHAIRMAN: That would be for a much quicker connection?

23 A No, not for a quicker. For example, it could be for a bank or a retail outlet where they didn't  
24 want us to work during the working day. So they may want us to come in Sundays, or they  
25 may have a network change where they wanted to change overnight.

26 MS ROSE: At the time that the WES service was introduced there were some communications  
27 providers who already had circuits on the older LES system, were there not?

28 A That's correct.

29 Q They had paid a connection charge under the old framework for LES?

30 A Correct.

31 Q When WES was introduced they could migrate those circuits on to WES, could they not?

32 A Part of the early undertakings was to allow customers to migrate their BT retail circuits  
33 from the LES circuits on to WES or BES circuits. There was a migration fee associated  
34 with that, but not a connection fee.



1 Q There was no connection charge?

2 A It was a records change within the BT systems rather than any physical change.

3 Q That was about £35 I believe?

4 A Yes, £36.

5 Q So it was a tiny fraction of the connection charge?

6 A Yes, it represented the costs en masse of migrating the circuits over on to the Openreach

7 systems.

8 Q Because in that situation there is no connection?

9 A There was no physical work, there was no additional electronics.

10 Q Just coming back to para.24 of your witness statement --

11 THE CHAIRMAN: Just before that, about how many customers approximately came into that

12 category? Can you remember?

13 A I can't remember exact numbers. It was in the order of – we started off with about 20-odd

14 customers. I think when it became the point of migration we went up to about 60

15 customers, but there were a lot of very small players, so I think there was about 60

16 customers.

17 MS ROSE: May we just come back to para.24 in your witness statement. You say:

18 "I do not address the charge for Mainlink separately because the Mainlink charge

19 is a type of Rental charge (albeit charged on a radial distance basis, as explained

20 more fully in the Annex to this statement at paragraph 24)."

21 Just to be clear, you can have a BES circuit that has no mainlink in it at all, can you not?

22 A That's correct, if it's in the same exchange area, both ends are in the same exchange area

23 there will be no mainlink.

24 Q Or you could have a BES circuit that does include a mainlink?

25 A That's correct.

26 Q If you have got to go from one exchange to another?

27 A Correct.

28 Q Where there is a mainlink, the charge for the mainlink is charged per metre, is it not?

29 A It is indeed.

30 Q So when you say a connection charge could never be incurred without a rental charge, and

31 mainlink is just a kind of rental charge, you will often have a connection charge incurred

32 without a mainlink charge, would you not?

33 A A percentage of our circuits had no mainlink associated with them.

34 Q So you could have a connection charge without a mainlink charge?

1 A Maybe, but there would be a rental for the circuit.

2 Q Equally, the amount of mainlink, where you do have a mainlink charge, will vary from  
3 circuit to circuit? It is not a fixed figure?

4 A No, it's based on the radial distance between the two exchanges up to typically 25 km.

5 Q At para.25 of your witness statement you say:  
6 "However, saying that connections and rentals are 'bought together' makes them  
7 sound like they are somehow distinct. In reality, they are not. They are two parts of  
8 the charge for a single service. The charge is simply split into an upfront charge  
9 (the Connection) and a continuing charge (the Rental) for the whole Ethernet  
10 service being purchased (e.g. a BES 100)."  
11 In fact, those two charges are describing two different things, are they not, connection and  
12 mainlink? They are two different concepts?

13 A They are two elements of pricing of how we chose to commercially charge for the circuits.

14 Q Connection is the installation of the circuit, is it not?

15 A Connection represents an upfront initial cost of the circuit, yes.

16 Q Rental is the value of being able to use the capacity on that circuit for a period of time, is it  
17 not?

18 A There is the ability to actually look at connections/rentals in terms of total costs of  
19 ownership, and therefore there is the ability to change the ratio of connection prices and  
20 rental prices generally.

21 Q Sorry, I am not asking you about prices; I am asking you about the service. The service you  
22 are providing in rental is capacity over a particular piece of fibre or copper wire for a period  
23 of time, is it not?

24 A For that monthly charge for example, yes.

25 Q That is the different from the service you are providing with connection. There you are  
26 providing an installation.

27 A We're charging for the installation of that circuit.

28 Q Yes, and that is the service that you are charging for, the installation of that circuit.

29 A Yes, at that point that installation, with the rentals following.

30 THE CHAIRMAN: That is presumably why LES customers migrating were not charged, because  
31 they did not require the installation?

32 A Yes, that's correct. It was to charge, to pay for the records change, to change the  
33 designation of the circuits.

34 Q So they got something else which was less expensive, less labour intensive, which was the

1 migration, so they paid a separate migration charge because they are getting something else.

2 A And then they would be paying the WES or BES rentals rather than the LES rentals that  
3 they previously paid.

4 MS ROSE: At para.26 of your witness statement you discuss some hypothetical communications  
5 providers who are purchasing circuits, different situations, yes?

6 A Yes, correct.

7 Q You say:

8 "CP1 might purchase a WES 100 (the price being made up of Connection and  
9 circuit Rental charges). CP2 might purchase a WES 100 with Main Link (meaning  
10 a Connection charge and two Rental charges, one being the circuit Rental charge  
11 and one being the Main Link Rental charge). CP3 might purchase a WES 100  
12 where an Excess Construction Charge is also required (which is a one-off charge  
13 with the provision of the circuit). CP4 might purchase a WES 100 and have it  
14 installed out of normal hours and be charged TRCs (a one-off charge associated  
15 with the provision of the circuit)."

16 We can add to that CP5, can we not, somebody who has migrated from LES who does not  
17 pay connection at all but only pays the migration charge?

18 A This paragraph is talking about the placing of a new circuit. As I said earlier, there is an  
19 example of customers who had existing LES circuits that were migrated rather than  
20 connections.

21 Q So those are five different examples and then you say:

22 "The total cost of ownership ("TCO") in each case would, of course, be different,  
23 reflecting the particular options chosen and the particular circumstances of the  
24 individual customer, but each would be obtaining essentially the same service from  
25 BT, a WES 100 circuit."

26 I am going to suggest to you that actually each of these customers is obtaining a different  
27 service from BT.

28 A No, if you use WES 100 as an example, if we move forward a couple of months they're all  
29 paying WES 100 rental charges and there is no difference in terms of how that circuit  
30 arrived --

31 Q We are not looking forward a couple of months; we are looking at it at the outset. One  
32 customer is obtaining a basic WES circuit connection and rental, that is one kind of service.  
33 That customer does not obtain the service of mainlink, do they?

34 A They do not need that service, so no.

1 Q The second customer has also got main link so they have an extra service which is the  
2 capacity on the main link - right?

3 A Yes.

4 Q The third customers have another extra service which is that their particular installation  
5 required excess construction?

6 A That's correct.

7 Q And that was an extra service and extra construction?

8 A To facilitate the installation of the service.

9 Q Yes, and they paid for that?

10 A And they paid for it, yes.

11 Q And the fourth customer also had an extra service which is an out of hours installation?

12 A That's correct.

13 Q And the fifth customer has had a different service because they did not need collection  
14 because they were simply migrating from WES?

15 A Yes.

16 Q So there was just the change in the records?

17 A Change in the records and billing charges.

18 Q So is the reality not that the reason each of these customers are paying a different price is  
19 actually they are all paying for different services?

20 A They are paying for different charges associated with the provision of the service, at that  
21 point the connection ----

22 Q We have just been through the differences in the services they are each obtaining, and I  
23 think you accept that there are those differences?

24 A In relation to the installation, yes. In terms of the ongoing rental they all become the same.

25 Q They are all paying the same ongoing basic rental, yes.

26 A Yes.

27 Q But they are also paying different charges for different services?

28 A At the installation point, yes.

29 Q Paragraph 27 you say that in your experience some customers wanted low connection  
30 charges as this helped them to finance their network roll-outs?

31 A Sorry, where ----

32 Q Paragraph 27, last sentence - do you see that?

33 A Yes.

34 Q In your experience some customers wanted low connection charges as this helped them to

1 finance their network roll-out. So we have established that you have got some customers  
2 who already had networks before the WES came in?

3 A That's correct.

4 Q Now, they are not interested in low connection charges, are they?

5 A They could be because they may have some circuits, but they still need extra circuits  
6 around.

7 Q Let us assume you have somebody who has a pretty well developed network, so most of  
8 their costs are rental costs, are they not?

9 A Yes, that would be correct.

10 Q So they are not interested in low connection costs, are they?

11 A Not necessarily, no.

12 Q On the other hand, you might have a new start-up communications provider who has no  
13 network at all?

14 A That's correct.

15 Q They are very interested in low connection costs, are they not?

16 A Correct.

17 Q Because they have to start all of their circuits from scratch, so they are going to have to pay  
18 a load of connection charges in year one, in order to get their network up and running?

19 A Correct.

20 Q So the balancing of costs between connection and rental is pretty important, is it not, in  
21 terms of the competition between those different types of communication provider?

22 A It is important and our customers are varied in terms of their needs.

23 Q Similarly, of course, you have some communications providers who need a lot of main link,  
24 and others who do not need so much - right?

25 A That's correct.

26 Q And for them the relative pricing of main link, as compared to the basic rental charge is very  
27 important, is it not?

28 A Mainly it becomes a percentage cost to customers, and whilst there is no hard and fast, in  
29 terms of individual CPs requiring main link or not, the same CP may require long circuits  
30 with a high percentage of main link, others in other cases may require a circuit in the  
31 exchange with no main link.

32 Q So you have different CPs who have different profiles of network, right?

33 A That's correct.

34 Q So you have some CPs who need a lot more main link than others overall?

1 A Typically, yes.

2 Q And therefore if there is not a balance between the pricing of main link and rental that may  
3 distort competition between those groups of CPs may it not?

4 A I couldn't say.

5 Q Well, if the main link was relatively very expensive that would be a disadvantage relatively  
6 to the customers who needed a lot of main link, would it not?

7 A The Ethernet technology allows customers, if they have a lot of main link to aggregate  
8 circuits up into bigger pipes and get cost savings there, so some customers did have long  
9 distance with many circuits, but they would find other services to use for the main link.

10 Q You have explained this yourself, if you go to para. 55 of your witness statement, you say:  
11 Openreach's customers were a very disparate community and CPs wanted different  
12 things. "For example, some customers had very short circuits and were happy with  
13 prices under which the first 5 kilometres were free, but this was not the case with  
14 other customers who had longer circuits. This all had to be balanced against Ofcom's  
15 focus on ensuring the right price structure ..."  
16 and so on. You were accepting the point, I think, that I have just put to you?

17 A That's correct. "... the first 5 kilometres were free" relates to the BES pricing, which is the  
18 BT retail pricing scheme, where they did not charge for the first 5 kilometres, Openreach  
19 charge from the first metre.

20 Q In para. 58 of your witness statement you refer to some slides that were presented by Neil  
21 Nasralla of Ofcom in December 2006?

22 A That's correct.

23 Q Mr. Nasralla was an engineer, was he not - a technical expert?

24 A Mr. Nasralla turned up representing Ofcom at the Ethernet customer forum each month. I  
25 don't know his ----

26 Q You do not know his qualifications?

27 A -- qualifications, but he represented Ofcom.

28 Q He was not a lawyer, was he?

29 A I don't know.

30 Q Can we just go to your second witness statement?

31 A Yes.

32 Q It is tab 5 of the same bundle, para. 8?

33 A Yes.

34 Q You are here discussing Mr. Scott's statement and talking about what he says about

1 difficulties in raising disputes. You say:

2 "The first 'alleged difficulty' raised by Mr Scott relates to 'information asymmetry'  
3 between BT and CPs (paragraph 23). More specifically, Mr Scott points to  
4 difficulties in raising the THUS complaint in 2007 where BT's RFS were only  
5 available in full in August 2008. Although I recognise that the RFS were not  
6 available at the time of the price increases ... I do not believe that was an obstacle to  
7 raising the complaint, as indeed THUS did."

8 You would accept, would you not, that it is more difficult to identify whether you have been  
9 overcharged if you do not have full information about the revenues and costs?

10 A Yes, I do.

11 Q And, therefore, more difficult for the CPs without the RFS?

12 A Yes, I do.

13 MS. ROSE: I have no further questions.

14 MR. PICKFORD: No additional questions from me.

15 MR. READ: Just one question in re-examination.

16 Re-examined by Mr. READ

17 Q There were a series of questions put to you about distinct services and customers paying for  
18 different services. Can I ask you, as the sort of proverbial man at the shop front if you like,  
19 what do you see as the service or services provided?

20 A The service or services provided for me is the BES 100 or the WES 100 which gave the  
21 customers a point to point circuit of 100 MB. It allowed them to transmit data.

22 Q Just so we are clear, if you look at paras. 24 and 25 of your first statement, you deal there  
23 with connections and rentals - do you see?

24 A Yes.

25 Q Can you just read that again?

26 A Sorry, which paragraph?

27 Q 24 and 25?

28 A (After a pause): Yes.

29 Q Has anything you have been asked today made you change your view on those at all?

30 A Not at all.

31 MR. READ: Thank you. Does the Tribunal have any questions?

32 THE CHAIRMAN: Just on that last point you say: "a connection charge could never be incurred  
33 without a rental also being incurred and vice-versa." "Vice-versa" being therefore a rental  
34 charge could never be incurred without a connection charge ----

1 A Correct.

2 Q -- being incurred. But I thought you said in answer to Ms. Rose that for the LES customers  
3 they did not pay a connection charge they paid a migration charge?

4 A A migration charge.

5 Q So in that case a rental charge is being incurred without a connection charge?

6 A My apologies, a connection or a migration charge. In that specific case I was relating more  
7 to a new circuit being provided rather than existing.

8 Q Mr. Jones, you have provided us with your first statement a very helpful annex on the  
9 technical background which I, for my part, greatly appreciate, although one slightly drowns  
10 in all the abbreviations which seem to permeate this industry, but you have explained it, if I  
11 may say so very well. Looking at that annex which starts on p. 19 under tab 2, you talk  
12 about the history and then on p.22, para. 13 do you have that?

13 A I do.

14 Q "During the period to which the DE&S relates" - "DE&S" is - can you just remind us what  
15 that refers to?

16 A The Dispute and - I'm sorry, I can't remember the ----

17 Q Ethernet Service as I understand it?

18 A Yes.

19 Q They were available at different bandwidths, and you set out the bandwidths. Have I got it  
20 right that up to and including 1000Mbit/s that is what you call low band width?

21 A Under the regulatory regime that becomes low bandwidth, up to and including 1000.

22 Q Yes, so that is what we call "low band width" and then "high band width".

23 "CPs could purchase backhaul circuits from Openreach, or alternatively could  
24 provide backhaul themselves or buy from another infrastructure provider."  
25 Who are the providers you have in mind there?

26 A There are a number of customers who provided backhaul. Some of our customers, our CPs,  
27 such as Virgin Media offered a wholesale backhaul, and other companies, such as GEO  
28 Networks, at the time was not a customer of ours but they provided wholesale backhaul  
29 services to customers.

30 Q If you could be given core bundle E, please and if you go in that to tab 13, that is an extract  
31 from the 2008 Business Connectivity Market Review, the BTMR, and if you go in that  
32 document to p.8, you will remember that in 2004 Ofcom determined that BT had significant  
33 market power, SMP, in all bandwidths in the AISBO market, and now, come 2008, they are  
34 looking at the position again. They say at 1.28:



1 "We have concluded that BT has SMP in the low bandwidth AISBO market  
2 outside the Hull area. This conclusion is based primarily on BT's persistently high  
3 market share (73% by volume in 2006) ..."

4 So the other 27 per cent, would that be people like GEO networks?

5 A Yes, players like Colt, for example, who have got their own networks in the City of London,  
6 and other players, such as Cable & Wireless, would itself be ----

7 Q Then they say in 1.29, dealing with high bandwidth:

8 " We do not consider that BT, or any other operator, has SMP in this market.  
9 While still relatively high at around 38% to 40%, BT's market share has been  
10 falling and there is no evidence to indicate that this trend will reverse in the near  
11 future. In addition, there has been significant entry in the market in the recent past,  
12 and we are aware of likely future entry."

13 This is obviously entry between 2004 and 2008. Can you help me: what are they referring  
14 to there?

15 A These high bandwidth circuits, 2.5 GB and 10 GB, there were very few of them, handfuls,  
16 in the early days in 2004 and 10s, a few hundred in 2007 going into 2008. Openreach had a  
17 very small market share of that. It grew slightly, so I think it's relating to the fact that the  
18 volumes were a lot of operators providing these services

19 Q Such as?

20 A Again, Colt would be a player, and customers like Cable & Wireless, for example, would be  
21 providing their own services. This would typically be provided to finance and large data  
22 players who connected to data sites together.

23 Q Then they go on to say that very high revenues can be earned from these circuits, and I  
24 think that reinforces what you have just said that they are high value circuits and CPs are  
25 generally to sink the high costs required to provide them, so they were, if I have understood  
26 it rightly, expecting that others, therefore, might want to come into that market?

27 A Yes, and they would be provided also as part of a vertical solution, a data store back-up, so  
28 for some customers who were offering a turnkey solution the circuit was part of that major  
29 contract.

30 Q Yes, thank you.

31 MR. HARRISON: On p.12 of your witness statement you explain the difficulties in using RFS as  
32 a price structure in setting prices. It is para.14, just so you can refresh your memory.

33 Basically you said you did not use it because it was too late and you had to wait too long,  
34 and you used the management accounts in order to enable you to do that. Can you perhaps

1 explain to me exactly what that involves and what the big differences would have been at  
2 the end between the management accounts and the RFS statements?

3 A The RFS statements, as we heard earlier, there was a delay in publishing them and because  
4 it was such a nascent market in 2005/6/7, there was not the stability to understand the costs,  
5 and the variables were too great to use them, so we couldn't really use RFS at the time. The  
6 management accounts we used allowed us to look at metrics such as eBits and payback  
7 periods. They allowed us to look at the commercial costs and benefits of the case. In 2006  
8 a lot of our work was really around bringing together the disparate elements of the BT  
9 portfolio into a coherent set of portfolios, so we used benchmarks such as the WES and  
10 BES from wholesale to look at the rest of the portfolios. So we were trying to bring a  
11 portfolio view together. The RFS also was just a single year, and our cases were built on a  
12 three or five year commercial view with a forward looking forecast of our best view of  
13 volumes at the time.

14 Q During that period, because, as you say, it was difficult, the judgment on overall  
15 profitability then, that is the basis on which you were monitoring. Did that flag up to you  
16 during that period of time any suggestions, therefore, that you were going to be in breach of  
17 the cost orientation requirement?

18 A In 2006 we were looking at the portfolio of the Ethernet and the BES and WES portfolio in  
19 totality. What we recognised is that the cost of the higher bandwidth circuits, so what was a  
20 very high bandwidth, the 1 GB circuits, the 1,000 MB circuits, the cost of electronics had  
21 dropped rapidly from 2004/5 and 6 as they became more established, and therefore we  
22 knew that those costs were falling, therefore we should bring down the associated prices.  
23 We completed a review during 2006, a rebalancing of the portfolio which looked at the  
24 connection costs, the high bandwidth costs and brought those down, but there was a  
25 subsequent increase in the 10 MB rentals which increased. So we were looking at it very  
26 much as a portfolio view, but recognising the relativity of the different elements within the  
27 product set.

28 Q During this period of time as well you refer in the evidence to regular meetings with  
29 Ofcom?

30 A Yes.

31 Q As regards the pricing condition, what was the nature of the discussions you had during  
32 those meetings about fulfilling your pricing condition?

33 A For me personally, my regular meetings were around the portfolio positioning of the  
34 product sets, and also very explicitly that we were on a journey rather than coming to an

1 absolute price point and it was an exercise in rebalancing. I believe we were very open in  
2 terms of what we were trying to achieve. We recognised that the time we would get more  
3 granular information, more robust information, as we deep-dived into our costs. At a point  
4 towards the end of 2006 it was about rebalancing and recognising some factors, such as  
5 electronic costs reducing.

6 Q Thank you.

7 THE CHAIRMAN: There is just one other thing I forgot to ask you. I think I can work out the  
8 answer, but if you can just confirm I have got it right, you were taken to the exhibit to your  
9 first statement in which you provide the contract terms. I do not know if you have still got  
10 that there. It is BT17, and it is tab 2 - do you have that? It is not the core bundle. You  
11 made the point that it is an ongoing contract with a right to terminate after a year. The  
12 prices in the price list, is it right that you can change your prices on, is it, 90 days' notice?  
13 What I am looking to see is there anything whereby you can change the prices under this  
14 ongoing contract?

15 A Yes, for existing prices we gave 90 days' notice. For new products and new prices, it was  
16 28 days. For changing prices it was 90 days.

17 MS. ROSE: Clause 17.

18 THE CHAIRMAN: Clause 17.1(b). Then the customer can terminate under 2.2, I think, on two  
19 months' notice. That seems to be how it works?

20 A Yes, on an individual circuit basis.

21 THE CHAIRMAN: Any questions arising out of any of the Tribunal's questions?

22 MS. ROSE: I just have one question: let us say that a customer who had a BES circuit  
23 terminated their contract and then, a month later wanted to reactivate it. The connection  
24 was all in place, but they terminated the contract and then wanted to reactivate it. Would  
25 they have to pay a fresh connection charge or just the rental?

26 A We would look at that as a brand new circuit and we would charge a new connection and a  
27 new rental. We would not keep the old electronics or fibres reserved once the circuit has  
28 ceased. So it would be a new connection and a new rental.

29 THE CHAIRMAN: Mr. Pickford?

30 MR. PICKFORD: Sir, yes, I had a couple of questions arising out Mr. Harrison's questions, if I  
31 may. You explained in 2006/7 that from a pricing point of view you were looking at the  
32 pricing of the group of Ethernet products?

33 A Correct, sir.

34 Q As a portfolio?

1 A Correct.

2 Q You described it as a "journey"?

3 A In terms of the discussion we had with Ofcom we said that we said we were on a pricing  
4 journey.

5 Q What was the end point, what was the destination you had in mind for that journey?

6 A The destination was that we would have incorporated all of the circuits within the Ethernet  
7 portfolio, which goes beyond WES and BES circuits. We would have understood the costs  
8 of those and the relativities of the costs and the underlying cost elements.

9 Q In terms of the level of costs for that group, what were you aiming at?

10 A I didn't have a target personally.

11 Q Thank you.

12 MR. THOMPSON: I think just arising out of those last two questions, I am sorry to trespass on  
13 the Tribunal's time, you were asked about the journey you were going on, and you were  
14 asked about the discussions that took place. Throughout those discussions that took place  
15 and the journey that you went on, what was BT's concern about the pricing that it was  
16 actually producing?

17 A In 2006 and into early 2007 the concern was the – a number of concerns. One was the  
18 understanding the costs from a bottom up approach; secondly was really the risk in terms of  
19 the volumes. It was a nascent market and we couldn't easily predict what would happen  
20 with the volumes. So they were the sort of main concerns. Sorry, I may have lost the  
21 thread of your question.

22 Q I think it is fair to say that in your statement you mention the equivalence of inputs  
23 obligation. Were those the only factors that you had in mind when you were looking at the  
24 pricing discussion?

25 MR. PICKFORD: Sir, we seem to be leading here.

26 THE CHAIRMAN: I think that is a fair comment.

27 MR. THOMPSON: There we are. For what it is worth, sir.

28 THE CHAIRMAN: Thank you very much, Mr. Jones, you are released.

29 A Thank you.

30 Witness withdrew

31 THE CHAIRMAN: As you are not calling Miss Wray her evidence stands. There is no request to  
32 question her. I think she was the last witness of the day.

33 MR. THOMPSON: She was the last witness of the day. We do have Mr. Cox here if the  
34 Tribunal wants to start with him. I am just very conscious, though, that I am not very keen

1 to have him hanging overnight if we thought that cross-examination was likely to take more  
2 than 40 minutes.

3 THE CHAIRMAN: I have no idea how long it might take.

4 MS ROSE: Sir, I think, given the pace we have been going at, I cannot guarantee that it will be  
5 less than 40 minutes. I would suggest it is probably better to leave it for a fresh start  
6 tomorrow.

7 THE CHAIRMAN: I think it is better to have a fresh start. There is nothing wrong with finishing  
8 early. We will start at 10 o'clock tomorrow morning.

9 Adjourned until 10.00 a.m. on Thursday 31<sup>st</sup> October 2013

10

11