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IN THE COMPETITION
APPEAL TRIBUNAL

Case No. 1205-1207/3/3/13

Victoria House,
Bloomsbury Place,
London WC1A 2EB

18th March 2013

Before:

THE HON. MR. JUSTICE ROTH

(Chairman)

(Sitting as a Tribunal in England and Wales)

BETWEEN:

BRITISH TELECOMMUNICATIONS PLC

Appellant (Case 1205/3/3/13)

- and -

(1) CABLE & WIRELESS WORLDWIDE PLC

(2) VIRGIN MEDIA LIMITED

(3) VERIZON UK LIMITED

Appellants (Case 1206/3/3/13)

- and -

(1) BRITISH SKY BROADCASTING LIMITED

(2) TALKTALK TELECOM GROUP PLC

Appellants (Case 1207/3/3/13)

- and -

OFFICE OF COMMUNICATIONS

Respondent (Cases 1205-1207/3/3/13)

*Transcribed from Tape 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*

CASE MANAGEMENT CONFERENCE

A P P E A R A N C E S

Mr. Rhodri Thompson Q.C., Mr. Graham Read Q.C. and Mr. Ben Lynch (instructed by Bird & Bird LLP) appeared on behalf of the Appellant in Case 1205/3/3/13.

Mr. Tristan Jones (instructed by Olswang LLP) appeared on behalf of the Appellants in Case 1206/3/3/13 and on behalf of Level 3 Communications Limited, a proposed intervener.

Mr. Meredith Pickford (instructed by Herbert Smith Freehills LLP) appeared on behalf of the Appellants in Case 1207/3/3/13.

Mr. Hanif Mussa and Miss Emily Neill (instructed by the Office of Communications) appeared on behalf of the Respondent.

1 THE CHAIRMAN: You have had an agenda, of course, and I am grateful to the parties for the
2 discussions you have had which have led to a proposed agreed order, although of course not
3 quite everything has been agreed.

4 If we perhaps take the agenda and the draft directions that have been prepared: first, that
5 the proceedings be treated as proceedings in England and Wales and that seems clear. Then
6 from the agenda if we perhaps follow a slightly different order and deal first with point 4 –
7 the hearing together of appeals, I think that is common ground and I am satisfied they
8 should be heard together. It is appropriate to direct that the evidence in any one appeal may
9 be relied on in the other two appeals, and that right will include relying upon the
10 submissions made in the other two appeals, and there be a common confidentiality ring.

11 On that basis, I think one can then proceed to the question of intervention. I think it is
12 common ground, and seems to me right, that BT should have permission to intervene in the
13 other two appeals brought by the communications providers and, parking for a moment the
14 position as regards Level 3 Communications, that the CPs should have permission to
15 intervene in BT's appeal. I am not at the moment clear that there is any good reason given
16 the directions that have just been made on the basis on which the appeals will be heard
17 together for the one group of CPs to intervene in the appeal of the other and vice-versa. The
18 evidence will be there, they can make submissions, but I do not see at the moment that they
19 need to be interveners, and that was, I think, flagged in, as what was proposed as backstop
20 directions. Is there anyone, either on behalf of Cable & Wireless, Virgin and Verizon or, on
21 the other appeal, for Sky, TalkTalk who wants to urge the Tribunal to give their clients
22 permission to intervene in the appeal of the other?

23 MR. JONES: Sir, no, on behalf of Cable & Wireless, and those associated CPs, no, that
24 application was simply made in the event that you had taken a different view of the
25 requirements.

26 THE CHAIRMAN: Yes, that is what I thought. Does the same apply ----

27 MR. PICKFORD: Our position is the same, subject of course to the hearing of the appeals
28 together which obviously has been ordered.

29 THE CHAIRMAN: Which has now been ordered, yes. What about Level 3? I was not quite
30 clear. Of course, they have an interest and, no doubt, so do many others who purchased
31 BES and WES services. It is said they will have the same legal representatives and legal
32 team. What actually is it proposed they would wish to do if they are given permission to
33 intervene.

1 MR. JONES: Sir, the concern is to be able to participate fully within that consortium of CPs in
2 addressing the issues, in formulating the evidence and in light of that they wish their
3 intervention to be put on a formal footing so that they can participate in that process.
4 It is absolutely right that it is not intended that they would have separate legal representation
5 or that their intervention would add any cost or complexity to the proceedings.

6 THE CHAIRMAN: When you say “addressing the evidence” they will not be making any
7 different submissions, from what you say, from the others similarly represented.

8 MR. JONES: They will not be making any different submissions before the Tribunal, it is more
9 the internal process of that consortium of CPs in deciding what evidence is necessary and in
10 addressing BT’s case.

11 THE CHAIRMAN: Why can they not help the others without being formal interveners?

12 MR. JONES: As I have said, in light of their intention to be involved in that group, they are
13 seeking to be put on a formal footing before the Tribunal and to be on the record.

14 THE CHAIRMAN: Are they proposing to put in separate evidence?

15 MR. JONES: Not at this stage, although it is possible that some of the issues which have been
16 addressed by way of expert evidence by BT could be addressed from within the internal
17 expertise of some of the CPs. We are in the preliminary stages of investigating that, so I
18 can say no more than it is possible that Level 3 may have some internal expertise which
19 none of the others have.

20 THE CHAIRMAN: Yes. So they would then be intervening only in the BT appeal, that is the
21 position, is it not? That is what they are seeking?

22 MR. JONES: In the BT appeal – they are also seeking permission to intervene in the Sky and
23 TalkTalk appeal. I understand from Mr. Pickford that there is no objection to that. That is
24 only because there is a potential for overlap between the issues in that appeal.

25 THE CHAIRMAN: But if they are going to intervene in that appeal they will be the only
26 intervener ----

27 MR. JONES: In light of the decision that you have given, if that is not necessary we would not
28 pursue that.

29 THE CHAIRMAN: So it is just the BT appeal?

30 MR. JONES: It would just be in the BT appeal.

31 THE CHAIRMAN: I do not know, for BT, do I look to Mr. Read or Mr. Thompson on this.

32 MR. THOMPSON: We are a bit of a double act, but I think I was given the job of speaking
33 today. In relation to Level 3 I think we would simply adopt the point that you, Sir, made by
34 way of opening remark. On our calculation we think there are potentially 167 people

1 broadly in the position of Level 3, although that may be an approximate figure, but we think
2 it is certainly over 100 depending on how exactly you count heads. We do not see anything
3 distinctive about Level 3. It seems to us Mr. Jones' remarks this morning are at a pretty
4 *sotto voce* level in terms of explaining what exactly Level 3 would add to the party, indeed,
5 whether they would do anything at all. They can obviously be called on as witnesses if they
6 have any useful information to add which the parties can rely on, subject, of course, to the
7 control of the Tribunal on unnecessary evidence. The specific reference made in the written
8 document to the fact that there is an indication by Ofcom in parts of the Decision that BT
9 should give effect to this in relation to other CPs we would say is of no legal effect and does
10 not require Level 3 to intervene to support or oppose that point, which is not indeed the
11 subject of the appeal. So we certainly do not see any pressing need for Level 3 to be a
12 party. I am not sure whether Level 3 would be intervening in Cable & Wireless's own
13 appeal, and if so on what basis and whether it would add anything useful in relation to that,
14 or is even claimed to do.

15 So in general we think it is a pretty lame application, and were the Tribunal minded to allow
16 it we would say it should be on an extremely restrictive basis, but we really think that
17 primarily that indicates that there is no need for this at all, and the issues will be fully
18 ventilated by the parties already before the Tribunal, who reflect a wide range of opinions
19 and no doubt can take account of any position of non-appellants if that is thought to be
20 appropriate or relevant to any issue before the Tribunal. Sir, I think that is our basic
21 position.

22 THE CHAIRMAN: Yes. Do you want to respond to that in any way?

23 MR. JONES: Very briefly, sir. On the question of the reference in the Decision to BT being
24 expected to take account of the Decision in any future disputes, that of course goes to the
25 question of sufficient interest. In the light of your indication, I did not address that broadly.
26 They have an interest, and it is a matter for your discretion, of course. They do not seek to
27 intervene in the Cable & Wireless appeal. Their concern is on the broader issues raised in
28 BT's appeal.

29 THE CHAIRMAN: Thank you. I will not give permission for them to intervene. If the other
30 CPs can put in evidence from Level 3 or anyone else they think appropriate, it seems to me
31 an intervener is going to make separate submissions supporting its distinct position, but if
32 essentially it is aligning itself with what is said by other parties, there is no need for the
33 separate status of an intervener. They will be able to talk to it and gain its input, and, as I
34 have just said, if it wishes, if there is evidence from it that is useful, no doubt they will seek

1 to put it in. It is not their appeal, and although of course I recognise that they have an
2 interest and are affected and therefore can apply for permission to intervene, I am not
3 satisfied there are any good grounds for allowing that intervention in this case, so they will
4 not be interveners.

5 The next thing is confidentiality. There I think we are grateful to BT who have produced a
6 draft order, and if we could please look at that, I think that this is just mechanics really
7 because we are all agreed between the parties, and it is clearly right, there should be a
8 confidentiality ring and there is a fairly standard template of how these are drawn up. In
9 para.2(b) I think it makes it unduly complicated to define "Relevant Advisers" in that way.
10 It seems to me that those who are not merely listed in part A but who have also given an
11 undertaking in terms of part B are covered by para.3 of the draft order, namely that the
12 disclosure is only to relevant advisers who have signed the undertaking. Otherwise one gets
13 in a slightly circular position in actually drawing up the order, because the order, when
14 drawn up, has to have a list in part A of named individuals. So it seems to me that
15 para.2(b)(i) can simply say, "listed in part A of the Schedule to this Order". The point that
16 they have to sign the undertaking is covered by para.3. Is that acceptable? Thank you,
17 Mr. Thompson, who is nodding.

18 Then if you supply the list for part A, because without a list the order cannot be drawn up,
19 you are always, of course, able to agree to further named parties being added, and if there is
20 agreement the Tribunal can be expected to ratify any such agreement by amending the order
21 as necessary.

22 The only other comment I had on the draft is that at para.5 we need to have a date, and that
23 can only be after the order has been drawn up. I imagine you can in the next couple of days
24 supply the names. Mr. Thompson, will your clients have, as it were, the currency of the
25 order?

26 MR. THOMPSON: I think there were one or two fine tuning issues about who was within the
27 group, but I think they have now been resolved. I think Ofcom had a particular concern
28 about its own employees, and there was some question about the in-house legal team, but I
29 think that has been resolved. I think it is going to be easy to ----

30 THE CHAIRMAN: If we said 5 pm on Thursday is that going - no, para.3 is the disclosure, is it
31 not? So you want an order first. If you can supply the draft by 5 pm on Thursday, then I
32 will make the order on Friday, because I am not here on Thursday, if it is sent to my clerk in
33 the Rolls Building. In that case can the disclosure be made by 5 pm on Friday if the order is

1 made in the morning? You will need to have, of course, the undertakings, will you not?

2 That can be done in the meantime.

3 MR. THOMPSON: I think so. BT are nodding. I have not seen whether the other parties are
4 nodding, but I shall leave it to them to cry out ----

5 THE CHAIRMAN: What I am suggesting is that I get the draft with names completed by the end
6 of Thursday, and make the order on Friday morning, and the disclosure of the unredacted
7 copies takes place by 5 pm on Friday. Is that realistic? If there is no dissent I shall take that
8 as agreed.

9 MR. THOMPSON: It looks like all the relevant advisers should be able to do that.

10 THE CHAIRMAN: I think Friday is the 22nd. What is the last bit of that paragraph, “and in the
11 case of any other pleading in any other document”? I did not quite follow. Paragraph 3 of
12 the order is para.3 of the order.

13 MR. PICKFORD: I am sorry, Sir, I did not write it, but as I understand it the basis for that is that
14 the first part of para.5 deals with pleadings and documents served thus far in the
15 proceedings, and my understanding is that the second part of it is intended to require parties
16 to continue to comply with the order thereafter in terms of service of documents, but Mr.
17 Thompson ----

18 THE CHAIRMAN: I thought para.3 says that, does it not?

19 MR. THOMPSON: Sir, I see what you are saying, we could lose the wording after “5pm on 22
20 March 2013 ...”

21 THE CHAIRMAN: Yes, para.3 governs the position going forward. The only reason you need
22 the extra bit is that some things have already been served and therefore we need a date.

23 MR. THOMPSON: I am not responsible for this drafting, I should have to ----

24 THE CHAIRMAN: Well, it makes it unduly confusing.

25 MR. THOMPSON: Can I just turn to those who wrote it and see if they are happy? Yes, I think
26 they are happy.

27 THE CHAIRMAN: So with those small amendments the draft is approved and I direct I be given
28 a revised draft with the names in schedule A.

29 MR. THOMPSON: Yes, and I think BT will take carriage of the order.

30 THE CHAIRMAN: That is helpful, thank you. I think we then come on to the next item, the
31 future conduct of the appeals.

32 MR. PICKFORD: Sir, before we come to that issue, I do not know whether now is a convenient
33 moment to address one point overhanging from the draft directions as to the deadline for
34 service of non-confidential versions of pleadings after confidential versions. You may have

1 seen in para.5 of the draft directions there is a suggestion, indeed, a requirement in the order
2 that non-confidential versions of pleadings should be served within two working days of
3 confidential versions. The reason for this is to ensure that those parties who are not in the
4 confidentiality ring are able properly to participate and give instructions during the course
5 of the appeals because often there can be relatively tight timetables, and if a non-
6 confidential version is not produced for a week or more thereafter that eats into that party's
7 timing potentially for providing its own responses.

8 Ofcom originally raised a concern about the two working day requirement and then has this
9 morning said: "We are no longer concerned because we see, as it is drafted, the requirement
10 does not apply to us". That is an oversight in the drafting. The requirement should
11 obviously apply to everyone, so their objection is still a live one. They point out that they
12 say it would be very difficult for them to comply within two days because they have to seek
13 the consent of other parties first before disclosing any information.

14 What we would say in relation to that is if the Tribunal considers it appropriate we would be
15 quite happy for there to be a further provision in the order requiring that those who assert
16 confidentiality in relation to information that Ofcom may provide in its pleadings and
17 evidence should do so to Ofcom within a matter of, say, one working day to enable Ofcom
18 then to swiftly turn around a non-confidential version of the pleading or the evidence. It
19 may require Ofcom to be given perhaps three working days rather than two working days
20 afforded to other parties. But we do stress that it is important there is some provision that
21 constrains the time in which non-confidential versions have to be provided otherwise my
22 clients would be ----

23 THE CHAIRMAN: No, I understand. Two working days for the appellants, that is as I
24 understand it, not objected to by anyone. The question is Ofcom, and Mr. Pickford
25 recognises that Ofcom might need a little bit longer and Mr Pickford suggested three
26 working days – what is the position with Ofcom?

27 MR. MUSSA: I can take instructions on that?

28 THE CHAIRMAN: If you would, please.

29 MR. MUSSA: (After a pause) I am instructed that as long as any claims for confidentiality are
30 made within one working day Ofcom will be content to serve its documents within four
31 working days.

32 THE CHAIRMAN: Yes.

33 MR. MUSSA: If that were acceptable.

1 THE CHAIRMAN: Well, I will say four working days. So it is two working days as regards the
2 appellants, four working days as regards Ofcom on condition that the relevant parties have
3 notified Ofcom of the parts of the document for which they claim confidentiality within one
4 working day.

5 The next paragraph in the draft, para.6: “Ofcom to serve a fully confidential version of the
6 statement within two working days of the confidentiality ring” that should not be a problem
7 because you have one, so that can stand.

8 Then para.7, yes, absolutely, we do not need every party re-serving documents that have
9 already been served, so I shall include that in the directions.

10 MR. PICKFORD: Sir, given that all the other parties are serving their confidential documents by
11 Friday afternoon, it might be convenient if Ofcom also did so in relation to the fully
12 confidential Statement.

13 THE CHAIRMAN: Yes, if you are happy with that, so by 5 pm on 22nd. We then come to the
14 future conduct of the appeals. No one is suggesting that they raise specified price control
15 matters, that is within s.193, so that is disposed of; it does not need an express direction.

16 Then we come to defence and general timetable.

17 Before coming to that, the question of preliminary issues was raised, I think by BT, on the
18 basis that two of the grounds in BT’s appeal really are fundamental to the whole
19 determination of the dispute. It was raised not with great force is the impression I got,
20 although that may not do justice to your position statement, Mr. Thompson, Mr. Read, but I
21 did not get the impression there was a clear and determined application to have preliminary
22 issues – what is your position? Have you discussed it with Ofcom?

23 MR. THOMPSON: We have not discussed it with Ofcom and your impression is a correct one.

24 We see these two issues as very important ones of wide application to the interpretation of
25 the CRF and s.185 and following of the Act and, surprisingly, particularly given the
26 common position that Ofcom and BT took in the case that I was involved in, *The Number*,
27 surprisingly not an issue that has been debated so far as we can see in the many cases before
28 the Tribunal or the Court of Appeal in this area. So in one sense they are crying out for
29 determination on a test basis, and this is a very obvious candidate for it given the scope of
30 the determination and the amount of money at stake. But BT is aware from its long
31 experience of these cases that there can be an advantage, and it is an advantage that the
32 Court of Justice itself recognises in the exercise of its jurisdiction over issues of Community
33 Law, that there can be advantages in finding facts before determining these questions and,
34 indeed, we see considerable force in the particular facts of this case as illustrating what we

1 see as the wrong-headed approach that Ofcom has taken to the exercise of its jurisdiction,
2 both in terms of the Ground 1 point: “The definition of the relevant market” and the way
3 that it has interpreted Condition HH3.1, we would say without reference to its own market
4 definition, and the basis on which the condition was imposed, which we see as a pretty basic
5 error by Ofcom. Secondly, the interpretation of Article 13(3) of the Access Directive,
6 which we see as the only conceivable basis for Ofcom to have made the very large
7 repayment order that it has made in this case and that issue does not appear to have been
8 construed by any previous Tribunal or Court of Appeal and we would say there is a pretty
9 plain answer there. So those are important points, but we are not pressing for them to be
10 resolved as preliminary issues now, though obviously in the end it is a matter for the
11 Tribunal as to whether or not it thinks it would be an expeditious way to deal with this case,
12 to deal with those points, as it were, relatively in the abstract, or whether it agrees with
13 BT’s current position which is that it would be good to at least have some idea of the factual
14 position before embarking on such fundamental questions of law. So that is our position at
15 the moment.

16 THE CHAIRMAN: Ofcom, you are not urging, are you, for a preliminary issue?

17 MR. MUSSA: We are not, Sir, urging that either Ground 5 or Ground 1 be taken as preliminary
18 issues. The reasons for that are as follows. In relation to Ground 5 we can see that there
19 might be a case management benefit in the event that BT were correct, because if I have
20 understood it correctly, it is an argument to say that Ofcom had no power to make directions
21 for repayment in this particular case, and that may be dispositive of a number of the issues
22 in the appeals, indeed it may be dispositive of the appeals altogether. The reason why we
23 do not say that should be taken as a preliminary issue is that we consider Ground 5 to be
24 wrong and therefore the other grounds of appeal will have to be dealt with at trial in any
25 event.

26 In relation to Ground 1 we do not see a case management benefit as such because even if
27 BT is correct that there has been some error in the construction of the relevant condition, the
28 relief it is seeking from the Tribunal are directions to be given to Ofcom as to the correct
29 amount of any repayment that has to be made. In order for the Tribunal to afford such relief
30 it will necessarily have to determine the other issues that are raised in the appeals, including
31 issues as to appropriate adjustments to cost data, for example.

32 THE CHAIRMAN: I see, well, I will stop you there because I would be very reluctant to order a
33 preliminary issue unless it is supported by the parties anyway, who are far more on top of
34 everything involved in these appeals than certainly I am at this stage. There is also the point

1 that if they are fundamental issues they may go on possibly on further appeal. If then it
2 turns out BT is wrong, one is then back having to hear all the other issues even later after
3 the event than necessary. So I think that we need not have argument about what is involved
4 in them, I think we are probably better off taking everything together.

5 MR. THOMPSON: Yes, I only wanted to add, perhaps rather obviously, that until we hear what
6 Ofcom says by way of defence, BT's position is necessarily a provisional one, obviously
7 depending on what Ofcom says.

8 THE CHAIRMAN: Yes, well, you can always reply in due course.

9 MR. THOMPSON: Indeed.

10 THE CHAIRMAN: But certainly at this stage we will proceed on the basis there will be no
11 preliminary issues and we will timetable accordingly, because obviously it has a significant
12 effect on the timetable. I do think that a further CMC will be useful when we are dealing
13 with three heavy appeals being heard together and quite a lot of expert evidence. Given the
14 consensus appears to be that to direct that the hearing should be only 10 days would be
15 risky, and that it is wise to timetable on the basis of a third week, which means this case will
16 be heard in the Autumn and not before the summer. I think it is highly desirable that the
17 CMC should be before the summer holiday. It can be at the very end of July, but if we put
18 that in, as it were, as a date to work towards, we can then look at the directions for the other
19 pleadings on that basis.

20 When I say a third week, I hope it will not require 15 days, and one possibility is that the
21 openings and evidence are concluded and then there is a week's break and we come back
22 for three days or so of submissions, which will give you a chance to pull the points together,
23 put in any written closings if you want to and it will mean that oral closings can be shorter.
24 That may be a sensible way in which to proceed. That is something that we can look at
25 further at the next CMC, but I think we should think of this in terms of two weeks, a one
26 week break, and then the third week.

27 I do not think it is going to be possible to fix a date today because – this has arisen rather
28 recently, given the date that the Tribunal put forward, which clearly does not work because
29 that is too early and too short – we need to liaise with the other two members of the
30 Tribunal. What we will be looking at is a direction that it be heard on the first available
31 date after whatever, and that to be raised by the Tribunal with the parties after we have
32 consulted the other two Tribunal members. I would expect a hearing in October or possibly
33 into November.

1 With that, can we then look at defences and other pleadings. Ofcom has asked for a further
2 eight weeks, as I understand it, to serve its defences, which is a long time, even for very
3 heavy appeals. I do not under-estimate the amount of work involved, nonetheless it is a
4 very long time, Mr. Mussa, and threatens to preclude a CMC at the end of July.

5 MR. MUSSA: Sir, in our respectful submission, an extension of eight weeks would not preclude
6 a CMC at the end of July. In our submission, the only pleadings and evidence that will need
7 to have been finalised before the CMC are the statements of intervention. There is no
8 reason why the CMC cannot take place before replies and reply evidence has been put in.
9 The parties will know as at the date of the CMC what they intend to do by way of reply. It
10 is not the function of replies to raise or put new matters in issue, Sir. So the parties can be
11 fully informed as at the date of service of statements of intervention and the evidence in
12 support of the scale of these proceedings. So, Sir, the timing of the CMC, in my respectful
13 submission, is not an objection to the extension that Ofcom has requested.

14 We have handed up today, Sir, it may not have made its way to you, a short skeleton which
15 sets out ----

16 THE CHAIRMAN: Yes, that is why we started just a few minutes late, because I was reading
17 that.

18 MR. MUSSA: We have set out in para.6 onwards our reasons for why we seek this extension,
19 and why we say that the objections that are taken to it are not well founded. I will not
20 rehearse those matters, Sir, because you have read our skeleton.

21 I appreciate the point that an eight week extension is a significant extension that is being
22 sought. We are here faced, however, with three appeals contending for rather different
23 positions, although I accept that there is an overlap on the interest issue as between
24 Mr. Pickford and Mr. Jones. The appeals, even by the standard of the technical and
25 complex appeals before this Tribunal, are of a very significant scale. Ofcom has no
26 intention to unduly delay responding to the appeals, but we do say that the special position
27 of the Regulator ought to be taken into account. Those who are responding to that evidence
28 and who are likely to be giving evidence in these proceedings will be internal employees of
29 Ofcom, who already have full time commitments. They are not external experts who are
30 brought in specifically to produce evidence in response.

31 THE CHAIRMAN: Yes, although Ofcom has sometimes complained that these Telecoms
32 appeals take too long in this Tribunal.

33 MR. MUSSA: Sir, every case must be judged by its own facts. There is of course an interest in
34 expedition, but there is a stronger interest in ensuring the just resolution of the proceedings.

1 In my respectful submission, Ofcom ought to be granted an extension to enable it properly
2 to respond to the appeals that have been put in and to assist the Tribunal.

3 THE CHAIRMAN: You will be granted an extension. It is a question of quite how long.

4 MR. MUSSA: Yes, Sir. We have asked for eight weeks, Sir, which would take us to 30th May.

5 Obviously the Tribunal has a broad discretion in terms of the times it is permitted to allow,
6 but that is the best estimate that we have produced at present. It may be, Sir, a week or
7 possibly two shorter than that might still be feasible, although it would put us under a lot of
8 pressure, but beyond that, Sir, we would be in real difficulties.

9 THE CHAIRMAN: Yes, thank you. Mr. Jones, yes?

10 MR. JONES: Sir, the other factor relevant to the timetable, which is why I rise now, is my
11 clients' request for six weeks to put in their statements of intervention after Ofcom's
12 defences. The reason for that, put simply, is that we intend to minimise the amount of
13 expert evidence which we rely upon it, and of course to minimise the costs associated with
14 that. At present BT has put in three expert reports. Ofcom will be responding to those, and
15 we wish to make sure that we have time to look properly at Ofcom's response before having
16 to incur large sums in instructing our own expert. Of course, those preliminary steps will
17 take place before Ofcom's defence, but the intention, put shortly, is to minimise the extent
18 to which that has to happen.

19 Sir, looking at the timetable, Ofcom, if it has eight weeks, would go until 30th May for its
20 defence. Six weeks further on my request would take us to 11th July, and replies would then
21 be due four weeks after that on 8th August. Sir, in the light of your indication that it would
22 be helpful to have a CMC before the end of July, we see the force in that. We also see that,
23 contrary to Ofcom's position, in fact it would be sensible for reply evidence to have been
24 served before that CMC, so that all issues can be dealt with together. In the light of that,
25 Sir, I would suggest that the only way of managing all those things would be to reduce
26 slightly, by a week, the time which Ofcom seeks, and by a week the time which I am
27 seeking. That would give time to have the reply evidence on Thursday, 25th July. It is only
28 shortly before a CMC, which could then be fixed at the end of that week, but at least would
29 give some sight of the reply evidence before a CMC.

30 Sir, I make that as a practical suggestion.

31 THE CHAIRMAN: So you say that would take your evidence to 4th July, if you had five weeks?

32 MR. JONES: No, in fact, it would take Ofcom until the 23rd, and I think it would take us to
33 27th June. Then four weeks for reply, which would be Thursday, 25th, although one could
34 shave a couple of days off that, Tuesday, 23rd, and then have a CMC at the end of that week.

1 THE CHAIRMAN: We could have a CMC at the beginning of the following week, on the 29th or
2 30th.

3 MR. JONES: Yes, indeed.

4 THE CHAIRMAN: I think that Mr. Mussa, under pressure, said that, although not entirely happy,
5 Ofcom could cope with that. That would sound to me a sensible suggestion. What is the
6 position of the other parties, if we start with BT, Mr. Thompson?

7 MR. THOMPSON: Sir, to be honest, we are pretty unsympathetic with Ofcom's position. We
8 say that six weeks is the rule which has been laid down by the CAT as a specialist Tribunal
9 and that this should be the norm. It is obviously a matter for you, Sir, as to whether to
10 extend, but we do think that Ofcom should be familiar with the facts and the legal basis for
11 its decision in this case after such a long delay. We are concerned about the risk to the
12 timetable, and indeed we are concerned that Ofcom should be putting pressure on the
13 appellants in terms of the timetable for their pleadings by seeking extra time for its own
14 pleadings. It does not seem to us a very appropriate approach.

15 THE CHAIRMAN: Looking at the dates, if you are intervening in the other appeals, if you were
16 to have five weeks for intervention that would be sufficient, would it not?

17 MR. THOMPSON: Yes, Sir. We are not concerned about the timetable. I think we have
18 suggested four and four for the statements of intervention and reply. It is simply a question
19 how long Ofcom should have. We have suggested an additional three weeks, I think Mr.
20 Jones is suggesting an additional seven. We certainly would not have a problem extending,
21 say, to the end of April, but whether they really need to the end of May, or anything like it.
22 But a six week extension, presumably, would be to the middle of May and at the moment
23 we are not really persuaded, and we think given, as the Tribunal has already said, this is
24 supposed to be a quick four month dispute resolution procedure, and we were tightly tied to
25 a two month period for our notice of appeal, we do not really see why Ofcom needs nearly
26 four months to put in its defence on a case that it is obviously heavily seized of the matter
27 and where we do not really see why the fact that its counsel may not have been instructed
28 until now is a good reason for an extended period for putting up a defence. So that is our
29 general position. We obviously hear what the Tribunal says.

30 So far as our availability in July is concerned, both Mr. Read and I would have some
31 difficulties in the last two weeks in July until 28th, but I am back again on Sunday 28th, so I
32 would be able to appear in that week at the end of term if that was convenient to the
33 Tribunal. So that is our position.

34 THE CHAIRMAN: Yes, thank you. Mr. Pickford, is there anything you want to add?

1 MR. PICKFORD: Very little. Our position is obviously fairly well aligned with that of BT. The
2 only points I would make, and I think we are probably nearly there already, is that we
3 consider it would be highly undesirable for there to be a CMC prior to the service of
4 reply ----

5 THE CHAIRMAN: You do not have to persuade me of that.

6 MR. PICKFORD: I am grateful, Sir. On that basis we seem to be approaching something that is
7 workable. The only other point to make is that there does need to be a reasonable number
8 of days, I would suggest perhaps three or four working days, between the service of the
9 reply evidence and the CMC so that it can all be digested and properly understood, because
10 we need to make sure that the directions for the rest of the trial are suitable and sensible
11 ones.

12 THE CHAIRMAN: I take the point that Mr. Thompson has made that this is supposed to be an
13 expeditious procedure but the issues are quite complex issues on which a lot of new
14 evidence has been put in and I think Ofcom does need time to respond. I would have
15 curtailed them further had that been necessary to achieve a CMC at the end of July because
16 I am firmly of the view that all the pleadings should be in before the CMC, but I think it
17 does, in fact, work, to have the defences by 23rd May, statements of intervention by 27th
18 June, and reply on 18th July and to fix the CMC for Tuesday, 30th July and that will give
19 time for the replies to be properly considered. Maybe I have got that wrong, have I? That
20 gives only three weeks, does it not? I think then the replies have to come a week later, they
21 would have to come on 23rd July. Anything you want to say about that, Mr. Thompson?

22 MR. THOMPSON: It does rather illustrate the concern I had that the effect of Ofcom's, in my
23 submission, rather unmeritorious application for an additional eight weeks, doubling its
24 time, is putting pressure on the other parties in relation to their pleadings on what is a
25 perfectly reasonable timetable. In my submission there is no real reason why Ofcom should
26 not go forward a week, and then we maintain the timetable for the statement of intervention
27 and the replies, but it is obviously a matter for you, Sir.

28 THE CHAIRMAN: You will have two months to do your reply to the defences.

29 MR. THOMPSON: Both Mr. Read and I are away for that additional week, so 18th July will, in
30 effect, be the deadline.

31 THE CHAIRMAN: Well, you have another team supporting you, of able Juniors. I think those
32 will be the directions that I make.

33 MR. THOMPSON: I am grateful.

1 THE CHAIRMAN: The next matter that we go to is expert evidence. The position at the moment
2 is BT has three experts and they seem to cover different areas. Sky and TalkTalk, you have
3 an economist, you have the accountant. I was not quite clear why you need another expert in
4 addition.

5 MR. PICKFORD: Sir, the reason why we have those three experts is that we have, as you have
6 correctly ascertained, an economist, Dr. George Houpis, who is the main economist who
7 provides the economic background to our main Ground 1. We also have Mr. Thomas
8 Robinson, who provides accountancy expertise, and provides a number of calculations. We
9 have a third expert, a second economist, Mr. Robert Francis, and his particular expertise is
10 in relation to corporate finance theory and other associated matters and he is providing
11 evidence on the issue of the appropriate interest rate, whether it be cost of capital, cost of
12 equity or cost of debt.

13 THE CHAIRMAN: But he is just going to the rate of interest, is he not?

14 MR. PICKFORD: He does go to the rate of interest, but we say it is an important point.

15 THE CHAIRMAN: That is the only issue he is addressing, is it not – the rate of interest and
16 whether it should be compounded?

17 MR. PICKFORD: Not merely whether it should be compounded but additionally whether it
18 should be compounded and, critically, what the appropriate rate of interest is. We provided
19 a full set of pleadings on that, and indeed we supported our position with expert evidence
20 because we thought it would be sensible to do so, but we note that other parties, Cable &
21 Wireless, have not felt the need thus far to put in expert evidence on that issue. But he is
22 there for that issue and so we would obviously have some difficulty if we were not able to
23 rely on him in relation to that point.

24 THE CHAIRMAN: We are dealing with rates of interest all the time in the courts in very large
25 claims without expert evidence.

26 MR. PICKFORD: Sir, if the Tribunal ultimately takes the view that it is a matter that does not
27 require expert evidence we can address that appropriately at the CMC at the end of July.
28 Certainly, our position is that our call for the cost of equity is supported by his expert
29 evidence and, indeed, there have been a number of suggestions in some of the cases that
30 deal with interest, that it is appropriate to have full evidence on the particular issue of the
31 rate of interest and why the particular rate of interest claimed is the appropriate one, for
32 example, the point is made by their Lordships in *Sempra Metals*. So we have sought to
33 provide, as I said, a full case on that issue and currently our case does depend on it. So if

1 we are not able to advance that evidence that puts us in some difficulty because that is the
2 basis on which our pleading is currently put. We would obviously need to amend.

3 THE CHAIRMAN: The threshold question, of course, is whether Ofcom should have ordered the
4 payment of interest.

5 MR. PICKFORD: Yes.

6 THE CHAIRMAN: If you lose on that then this evidence falls away.

7 MR. PICKFORD: That is correct, and it may be that the rate of interest will not ultimately be in
8 issue. Once we have seen what Ofcom says in its defence it may accept that whilst it did
9 not award interest and will no doubt explain the reasons for that, that if it had awarded
10 interest it would have been appropriate to award it at the rates we seek, in which case the
11 matter will not be an issue.

12 THE CHAIRMAN: It is only on that question of what rate that Mr. Francis' evidence is relevant,
13 is it not?

14 MR. PICKFORD: Yes. That rate and the fact that we seek it on a compound basis.

15 THE CHAIRMAN: You probably do not need an expert to say that compound is more realistic.

16 MR. PICKFORD: That was belt and braces given that he was already addressing the issue of
17 interest in any event.

18 THE CHAIRMAN: I do not know to what extent, and it may be that nobody knows at this stage,
19 it might give rise to disputes. One possibility is that this is held over, that the Tribunal
20 decides the question of whether interest should be awarded and then, following the
21 Judgment, if it was successful, if the parties cannot agree on the rate that can be raised at a
22 consequential hearing.

23 MR. PICKFORD: We would be content with that, Sir.

24 THE CHAIRMAN: I raise that simply out of concern which, again, you know more about what
25 the real issues are that are going to take up a lot of time than I do, that we do not get into a
26 whole other area of expert evidence on this somewhat narrow point when there will be quite
27 enough to deal with it seems to me at the main hearing. But, as I say, I have raised it, I have
28 not reached a view.

29 MR. THOMPSON: I only rise to make the point, which I do not think will surprise you, Sir, that
30 the rate may be contested.

31 THE CHAIRMAN: Yes.

32 MR. THOMPSON: Even if Ofcom does not contest it, it may well be an issue that BT will want
33 to look at fairly closely given the sums of money involved.

1 THE CHAIRMAN: I understand that, and it may well not be agreed. Mr. Thompson, can you
2 help me? Do you think it would be sensible in terms of managing the case to hold this over
3 until after there is a decision as to whether interest should be paid at all, or do you think it is
4 better - it is almost a reverse of a preliminary issue, it is postponing one issue, parking it
5 until after the rest is determined?

6 MR. THOMPSON: I have not taken instructions on that issue, I can do if it would assist, Sir. At
7 the moment I would have thought it was something that could certainly be held over to the
8 CMC. We have not opposed Mr. Francis' witness statement – expert report, and we are
9 obviously looking at it carefully.

10 THE CHAIRMAN: It might then involve another expert coming in, possibly not – possibly one
11 of yours can deal with it, but it is a whole other area.

12 MR. THOMPSON: Yes, can I just ask those behind me whether they have any views?

13 THE CHAIRMAN: Yes.

14 MR. PICKFORD: In relation to the question of holding over the interest, the only potential
15 difficulty in relation to that is as follows: whilst it is true that in part Mr. Francis' evidence
16 goes to the rate, another aspect of his evidence goes to whether it is appropriate and
17 necessary from an economic perspective for interest to be awarded to ensure that BT has
18 proper economic incentives to comply with its cost orientation obligation. In essence, his
19 point is that if interest is not awarded BT always has the incentive to breach the obligation
20 because the worst that can happen is it has to pay money some years later and if it does not
21 have to pay interest on it then it is better off for doing so. It is a relatively simple point.

22 THE CHAIRMAN: Do you need an economist to say that?

23 MR. PICKFORD: If that central point is conceded by BT, then no.

24 THE CHAIRMAN: Well, it will not be conceded but it is a submission, is it not, that carries the
25 force of the submission and whether it comes through an expert or through counsel I am not
26 sure makes any difference, does it? You have made the point yourself just now in a
27 sentence.

28 MR. PICKFORD: It is a point we do make in submission, we say it is supported in economic
29 theory as well.

30 THE CHAIRMAN: No doubt Dr. Houpis could add something about it, could he not?

31 MR. PICKFORD: On that particular issue he could obviously. We would need to make some
32 amendments to our case to ensure that it was reflected appropriately.

33 THE CHAIRMAN: He is obviously free to make that point and can do so I am sure rather than
34 having a whole other expert to deal with it.

1 MR. THOMPSON: Sir, we see the force of that. We make a number of points about the
2 economic incentives issues, particularly Dr. Maldoom, so there will no doubt be some
3 debate about that.

4 So far as the specific issue about interest is concerned, we are perfectly happy for it to be
5 parked. It would obviously be a commercial issue between the parties if certain findings
6 were made and so we are perfectly happy for the issue of any rate to be held over if that was
7 thought to be suitable by the Tribunal, so we are quite happy for that.

8 THE CHAIRMAN: It seems to me if there were to be potentially an appeal from the Tribunal's
9 judgment, I do not think the rate of interest is going to be the sort of thing that is the subject
10 of an appeal, so I do not think it is going to affect that.

11 MR. THOMPSON: I hope not. It is certainly a somewhat dry topic.

12 THE CHAIRMAN: Well, it is not only that but it is not the kind of point that really would go on
13 an appeal. So Ofcom, what is ----

14 MR. MUSSA: We are content for the issue of the rate to be held over if that is thought
15 appropriate.

16 THE CHAIRMAN: I think we will do that because I think it ensures that we keep the hearing
17 within bounds. We will say that the question of the rate and whether it should be
18 compounded is held over for a further hearing insofar as it arises following Judgment and if
19 not agreed, and therefore Mr. Francis' report is not admitted for the main hearing, but Dr.
20 Houpis can file a supplemental report dealing with the issue of economic incentives. Can he
21 do that within a couple of weeks? They work together at the same consultancy, he may just
22 need to take parts of what Mr. Francis said and say: "This is what I say too."

23 MR. PICKFORD: Another possibility is, given that our case is quite clearly set out and Mr.
24 Francis' evidence is quite clearly set out on it, and on the assumption that Dr. Houpis is
25 unlikely to diverge greatly at least from what Mr. Francis says, we could potentially deal
26 with it in a paragraph in Dr. Houpis' reply evidence if the Tribunal were content with that.

27 THE CHAIRMAN: No, I think it is better if we get it in at the outset and then BT and Ofcom can
28 respond to it. But I would have thought you can serve that within a week, can you not?

29 MR. PICKFORD: The only thing we do not know is Dr. Houpis' availability. We do not know if
30 he is able to produce a witness statement for us at a week's notice.

31 THE CHAIRMAN: Well, he has Mr. Francis' help in preparing it.

32 MR. PICKFORD: I do not know whether the two of them are, for instance, possibly both in court
33 or in some other jurisdiction, as economists often are in these high flying consultancies. I
34 think it might be difficult potentially.

1 THE CHAIRMAN: I will give you two weeks on the basis people know what is coming and I am
2 sure within two weeks, with modern communications, whichever country they are in, that
3 can be done. That is, I think, 1st April – that is Easter Monday – can you do it by the end of
4 28th March? I would have thought you can.

5 MR. PICKFORD: We will certainly endeavour to do so. If there is an issue we will obviously
6 write to the Tribunal ----

7 THE CHAIRMAN: By 28th March you have permission to apply if there is a problem.

8 MR. PICKFORD: I am grateful.

9 THE CHAIRMAN: As far as the other matters, experts' meeting, joint statements and so on, I
10 think those are things that we can visit at the next CMC when everything is in. I think it is
11 desirable that experts of like discipline meet and prepare a joint statement, and that there
12 will be such a direction but in terms of fixing a date for it I think that can be done probably
13 in July because that can come at some point in September.

14 MR. PICKFORD: We certainly agree with that.

15 MR. JONES: There is one other matter in relation to experts which is the number which my
16 clients ----

17 THE CHAIRMAN: You have not put in any at the moment?

18 MR. JONES: None at the moment.

19 THE CHAIRMAN: But you might want to do so on your statements of intervention?

20 MR. JONES: That is right, in relation to BT's appeal and, of course, BT has the three, and we
21 hope to put in fewer than three, and it may be that we put in none. It all depends on whether
22 there are issues not addressed by Ofcom's evidence in relation to ----

23 THE CHAIRMAN: Why do you need three? What would the three be?

24 MR. JONES: The three areas addressed by BT's experts and those may be most conveniently set
25 out in BT's own position statement for today on p.6. Our hope is, of course ----

26 THE CHAIRMAN: I know they put in three and I have not queried that because of the way in
27 which Dr. Maldoom's is put, but I think you should be able to manage with two, and really
28 there are two areas of expertise, there is economics and there is accountancy.

29 MR. JONES: Certainly, we see the force in that, and if it turns out ----

30 THE CHAIRMAN: If you feel for some reason you cannot do that you can apply.

31 MR. JONES: Yes.

32 THE CHAIRMAN: But we will restrict you to two at the moment.

33 MR. JONES: I am grateful for that.

1 THE CHAIRMAN: Ofcom, as regards experts, you are using in-house expertise, I think you
2 indicate is your present position? You are not tied to that.

3 MR. MUSSA: Our present intention is indeed to use in-house expertise insofar as concerns the
4 economic issues and the accountancy issues. Obviously the interest issue now seems
5 largely to have been parked. We have included in para. 13 of the draft directions
6 permission to rely upon the reports of three experts if necessary. The reason we asked for
7 that provision to be included was twofold. First, as the Tribunal has already appreciated
8 Ofcom's experts are in a slightly different position in that they, themselves, have been
9 involved in the process of coming up with the determination, and so may well be giving
10 evidence of fact as well as evidence in the nature of opinion evidence, and we were
11 concerned that there was not an undue restriction applied in that respect. But the request for
12 three was also designed to ensure that if we needed to address interest ----

13 THE CHAIRMAN: Well, that you do not, so can you manage, do you think, with two?

14 MR. MUSSA: If I can take instructions? (After a pause) I am instructed we should be able to
15 manage with two and of course ----

16 THE CHAIRMAN: You can apply, that permission to apply extends to you, so it will be no more
17 than two experts from Ofcom and no more than two from CWW, Virgin and Verizon. Mr.
18 Pickford, you wanted to say something?

19 MR. PICKFORD: Yes, Sir. I do not know whether we have now reached the stage where we
20 need to address paras. 14 and potentially 15, or whether you, Sir, are content with those
21 directions.

22 THE CHAIRMAN: 14 ----

23 MR. PICKFORD: If I might explain our position in relation to para. 14. Certainly, it would
24 apply with additional force now that we have been reduced to two experts in support of our
25 main appeal. What we seek is the ability to rely, if so advised, on one further expert in
26 response to BT. The reason for that is because experts do, to some degree, have particular
27 areas of specialism, and we do not know, as yet, whether Dr. Houpis feels able to speak to
28 all of the issues that are addressed by Dr. Maldoom, and Mr. Harman in relation to their
29 expert reports.

30 There are also two further considerations that are relevant. One is that there is to some
31 degree now an equality of arms issue. BT has three experts and we say it would be
32 somewhat unfair if it had three experts both for its own appeal and to respond to ours but we
33 were constrained to two experts both for our own appeal and to respond to theirs.

34 THE CHAIRMAN: You are making common cause to a certain extent with the other CPs?

1 MR. PICKFORD: To some extent, but we obviously have our own particular position.

2 THE CHAIRMAN: Yes, but some of the expert areas, so in a sense there are going to be four.

3 MR. PICKFORD: The other consideration is that obviously the directions we had sought in
4 relation to the provision of statements of intervention and replies, were contingent on our
5 understanding, certainly our hope that we would be able to have some division of labour to
6 ensure that one person was working on BT's appeal whilst another person was working on
7 our appeal to ensure that we were able to meet that relatively tight timetable, and we will
8 not be able to do that if we are not potentially allowed one extra person who can address
9 BT's issues, because otherwise our expert will have to be dealing potentially with both
10 appeals at the same time, because it may not be sufficient to merely have the four additional
11 weeks in order to provide the reply evidence. So for those reasons, we say ----

12 THE CHAIRMAN: Your experts should presumably have a look at Dr. Maldoom's evidence,
13 should they not?

14 MR. PICKFORD: They have had an opportunity to review it briefly, yes.

15 THE CHAIRMAN: And to know whether it is in their area of expertise to respond to - that is
16 something you would work out very quickly?

17 MR. PICKFORD: I don't have instructions at the moment as to whether my clients are content on
18 the basis of what they have been told by their expert that he has sufficient expertise to deal
19 with all the various issues that arise in relation to this.

20 THE CHAIRMAN: I am surprised about that because it is not about producing the response, it is
21 just knowing whether you have the competence to produce it and I would have thought that
22 in a couple of weeks one is able to work that out.

23 MR. PICKFORD: Certainly our position is that it would be helpful for the smooth running of the
24 provision of our case to enable us to have a further expert in order to address BT's appeal as
25 opposed to our own appeal. We do not think it should unduly elongate the proceedings to
26 allow us that equality of arms, as against BT because obviously they will be dealing with
27 different issues and, insofar as cross-examination is required on them, it is merely a
28 question of one person leaving the box and the other person going in and addressing those
29 further points. We do not consider it is anyway disproportionate to permit us to have the
30 three experts that BT is also permitted.

31 THE CHAIRMAN: The expert evidence you might wish to put in on BT's appeal will come with
32 your statement of intervention, will it not?

33 MR. PICKFORD: That is correct.

1 THE CHAIRMAN: That is when you will deal with that. You have put in the expert evidence on
2 your appeal. There will then be a defence from Ofcom, a statement of intervention from
3 BT, and anything you want to do by way of answer to that would be with your reply, would
4 it not?

5 MR. PICKFORD. That is correct, Sir, but ----

6 THE CHAIRMAN: So your expert will have completed his work on the BT appeal by the time of
7 the statement of intervention. Obviously it will be starting off now and then wait and see
8 what is said by Ofcom in their defence by their experts.

9 MR. PICKFORD: The practical consideration, Sir, is although obviously we have a further four
10 weeks, the reality is that they will need to address both at the same time if they are the same
11 person. BT is able to spread its economic evidence amongst two particular people, and is
12 able to marshal its resources accordingly. We will be required to provide all our economic
13 evidence through one person which imposes an additional and we say unfair burden on us,
14 relative to BT in providing that evidence, but particularly given the four weeks that we seek
15 for replies is in the knowledge that we also have four weeks during the intervention period
16 where we can also be working on those replies as well.

17 THE CHAIRMAN: Yes, BT are also asking for this, is that right? As drafted, Mr. Thompson,
18 you want a fourth expert?

19 MR. THOMPSON: If I can just clarify what the position is? I had understood the basis for this
20 was a sort of precautionary basis waiting for the other parties who had not yet pleaded,
21 because we did not know what they were going to say, and I think it was originally Sky's
22 idea. But Mr. Pickford now puts it on the basis of needing to deal with BT's case on an
23 equality of arms point. In my submission, that is a somewhat slim basis given that Sky is
24 simply an intervener on BT's appeal against Ofcom, and Ofcom itself seems content to have
25 only two experts. So it is difficult to see why Sky might need three to intervene in the BT
26 appeal.

27 So far as BT's own position goes, we are perfectly happy, given the indications from the
28 Tribunal, to do our best with Dr. Maldoom, Mr. Harman and Mr. Coulson, to deal with the
29 issues that you, Sir, have indicated are essentially ones of economics and accountancy. We
30 do not really see that the Tribunal needs to be detained by the equality of arms point which,
31 to us, is a somewhat artificial one, given that Sky is an intervener rather than a counterparty
32 to BT. That is our position, Sir. We would be content to do without this and simply have
33 our three experts.

1 THE CHAIRMAN: This is sought, as I understand it, for Sky and TalkTalk. Mr. Jones, you are
2 not putting this, as I understand it – is that right?

3 MR. JONES: No, that is right, sir.

4 MR. PICKFORD: Just to be clear, the reason for the difference between us and Cable & Wireless
5 et al is that obviously they have permission to select their own experts now to deal with
6 BT's appeal, whereas we selected our experts for the purposes of our appeal, so we are at a
7 disadvantage relative to Cable & Wireless already in relation to that point. Indeed, they
8 have two experts. They are permitted two experts to address BT's appeal.

9 THE CHAIRMAN: So are you.

10 MR. PICKFORD: Yes, but the experts we already have are the experts that we chose for the
11 purposes of providing evidence in relation to our appeal.

12 Sir, it comes down, I think, most fundamentally to the equality of arms point, and in
13 response to the suggestion that we are merely interveners in an appeal, of course BT is
14 merely an intervener in our appeal. We are both appellants, we are both interveners in each
15 other's appeals. BT has been permitted three experts – two economists and one accountant
16 – in order to deal with the issues both in its appeal and ours, and we say that it would be
17 unfair on us for us to be constrained to merely two experts – one economist and one
18 accountant – to deal with both the issues in our appeal and theirs.

19 THE CHAIRMAN: I am not persuaded at the moment that Sky and TalkTalk need an additional
20 expert. I am told that, for reasons not entirely clear to me, Dr. Houpis and Mr. Robinson
21 have not yet had the opportunity to consider whether they feel comfortable in responding to
22 the expert evidence put in by BT, which I think was served around 21st February. If, on
23 looking at that evidence, they then consider that really there are areas of either economic or
24 accountancy expertise that they do not feel comfortable with, such that an additional expert
25 is needed to address those, then Sky and TalkTalk should make an application to the
26 Tribunal, specifying what that area is, for permission to put in additional expert evidence
27 addressing that particular area. That can be done in writing, and I will not specify any time
28 for that, and the other parties can comment. At the moment it seems to me, given that not
29 only are they intervening in the BT appeal, but so also are the other CPs who will have
30 expert evidence and there should be some sensible pooling of expertise to keep this hearing
31 within reasonable bounds. So at present I will not make that direction, but, as I say, an
32 application can be made, but I would then wish to know what is the area of expertise that
33 that additional expert seeks to address, and his or her report would be on that point. That is
34 para.14 dealt with.

1 Paragraph 15, I do not quite follow that one at the moment.

2 MR. MUSSA: No, Sir, the suggestion, as I understand it, was made on a protective basis in the
3 event that para.14 was maintained. We do not pursue para.15, Sir. We have been granted
4 liberty and there will be a further CMC in any event.

5 THE CHAIRMAN: Right. On disclosure, I saw what is said in your skeleton this morning, I
6 have not gone into the detail of that. What is the position now on disclosure? Is any
7 direction sought today?

8 MR. MUSSA: That is a matter for Sky and TalkTalk.

9 MR. PICKFORD: Sir, the position is that we wrote to ask for disclosure and/or further
10 information from Ofcom. Ofcom have now said that they are quite content to provide that
11 information subject to, firstly, having it – obviously we do not ask them to provide anything
12 they do not have; and secondly, subject to consent from BT. BT has currently stayed silent
13 on this issue and reserved its position, so it would be helpful to understand what BT says in
14 order to know what we need to do and whether we need to press the point.

15 The only other issue that arises in relation to the question of consent is, as I understood it
16 from Ofcom's skeleton, and obviously I only had an opportunity to read it very briefly this
17 morning, that there seemed to be some suggestion that if BT did not consent then that would
18 be a breach of s.393 of the Communications Act 2003. We do not follow that point. In so
19 far as the Tribunal were to make an order requiring the disclosure by Ofcom, that would
20 appear to us to fall within one of the exceptions.

21 THE CHAIRMAN: Let us just see, first of all, whether BT does consent.

22 MR. THOMPSON: Well, Sir, I think the tone of your initial remarks on this was entirely
23 appropriate. At the moment, as I understand it, Ofcom is investigating whether it has
24 material falling within the scope of these fairly technical areas. BT has been considering
25 whether it thinks Ofcom may have material within these areas. If it does, then the question
26 will arise as to whether or not Ofcom is happy to disclose it, and BT will have to consider
27 whether it is happy. At the moment the whole thing is up in the air and premature. BT is
28 not seeking to prevent an effective conduct of this appeal, but at the moment I do not think
29 either the issue of whether Ofcom has actually got the documents or whether it is relevant to
30 this appeal and whether it raises issues of confidentiality, I do not think any of those issues
31 have been bottomed out, either by Ofcom or by BT. I am hopeful that this can all be dealt
32 with by sensible discussion, but I do not think it can be dealt with this morning.

1 I think that is as far as I can take it really. I am aware that some internal discussions are
2 going on at BT at the moment, but they are fairly detailed and they have not come back to
3 me yet. I think the same is happening at Ofcom but obviously Mr. Mussa can assist on that.

4 THE CHAIRMAN: Obviously if Ofcom has not got it then that is the end of that, but if Ofcom
5 has documents and then BT says, "Oh, we do not consent to some of them", we do not want
6 to have another hearing to deal with any issues and it is far too late for this to be left to the
7 end of July. Beyond that I do not think I can make any useful comment.

8 MR. PICKFORD: We have a slight difficulty obviously if BT does not have apparently
9 instructions in order to address this issue. I can explain the basis for the request. Sir, if you
10 have our ----

11 THE CHAIRMAN: I do not know if you need to explain that. I am just trying to understand, this
12 request was made when?

13 MR. PICKFORD: It was first flagged in the evidence of Mr. Robinson, who explained that he
14 required further limited information in order to provide estimates of the cost adjustments
15 that we say should be made by Ofcom under Ground 1.

16 THE CHAIRMAN: Was a letter sent to Ofcom?

17 MR. PICKFORD: A letter was sent last week. The cover letter to the Notice of Appeal also
18 flagged up that we would be making such an application, and obviously drew attention to
19 the request in the expert report of Mr. Robinson. The issue was one which was well flagged
20 up, but so far the problem is that no party has been able to say what its position is in relation
21 to it, which obviously makes our life a little difficult in pursuing it, because we do not
22 actually know whether there are any objections that would or could be taken. We do have a
23 concern that it should not be left to be kicked into the long grass, because that would be
24 highly unsatisfactory.

25 THE CHAIRMAN: Yes, I understand that.

26 MR. PICKFORD: Sir, the relevant annex to the report, if it assists, is annex D.

27 THE CHAIRMAN: You will have to give me a file number, I think.

28 MR. PICKFORD: I am afraid I do not know what file numbers the Tribunal has adopted, but it is
29 ST1 for our appeal. That is what we have called the bundle, but I know the Tribunal has its
30 own numbering system.

31 If one goes to tab 4 of the Notice of Appeal to find his report, and if one goes to p.54 of his
32 report, he explains in one page why he requires certain information and what further
33 information he requires. As he explains, the reason why he needs the further information is
34 that whilst he has information on products that were in dispute that has enabled him to

1 provide new calculations, there were certain products that were not in dispute, but are
2 nonetheless relevant to the way in which Sky and TalkTalk say the cost test should be
3 applied, and he needs equivalent information in relation to those products in order to refine
4 his overall calculations. He identifies the specific products that he requires information on.
5 It is no different to the type of information that he already has been provided with in
6 relation to other products, and so he has simply highlighted the particular points that he
7 requires in order to provide better estimates for the purposes of his report.

8 We cannot see how it should be particularly controversial, particularly because the
9 information will only be released in the confidentiality ring. We cannot see what the
10 objection is, but we do have a concern that we are effectively being blocked from advancing
11 the application by BT in particular, it would appear, saying that it does not know what its
12 position is.

13 MR. THOMPSON: Sir, if I can just respond to that, we would not accept that at all. We were
14 copied into a letter which apparently was sent by email at 12 o'clock last Wednesday which
15 sets this out, a letter from Herbert Smith to Ofcom. As we understand it, Ofcom is
16 considering the matter and has not reached a concluded position. We are obviously aware
17 of what has been said in relation to the confidentiality ring, and indeed we put it forward.
18 So we accept that issues of confidentiality can be dealt with within the ring. We do not see
19 why there is any need for some sort *in terrorem* order to be made against BT on the basis
20 that it may act unreasonably. We would not say there was any presumption we are going to
21 act unreasonably. It is simply not a matter that needs to be dealt with today, and nobody is
22 in a proper position to deal with it. We know that Sky wants this information and Ofcom
23 are addressing it.

24 THE CHAIRMAN: What is the basis of BT thinking it might not be prepared to consent?

25 MR. THOMPSON: I think it is mainly a question of whether any of this material is actually
26 available and, if so, whether it is relevant.

27 THE CHAIRMAN: If it is not available, if Ofcom has not got it, then there is no problem, but if
28 and in so far as they have it what is the basis of BT not giving consent to disclosure within
29 the confidentiality ring?

30 MR. THOMPSON: I think it is purely a question of until we know what there is, we are, in
31 principle, potentially concerned about relevance.

32 THE CHAIRMAN: The position is that the independent expert has explained that he thinks it
33 would be of assistance in making his calculations more accurate. *Prima facie*, therefore, it
34 is potentially relevant, and other than conducting a very detailed review of his report and

1 saying whether he has exaggerated or is misconceived in his approach, one would take the
2 view that it is sufficiently relevant that if Ofcom has it then it should be provided.

3 MR. THOMPSON: It may be that I am the wrong person standing up, because this is essentially
4 a matter between Sky and Ofcom and Ofcom has to resolve the position.

5 THE CHAIRMAN: Ofcom has said, as you saw in their skeleton, that in so far as they have it
6 they will disclose it. They are only concerned about consent from BT. It is not a matter
7 with Ofcom, subject only to the point about the date, which I do not think is material. It is a
8 matter for BT. I just do not understand on what basis, if Ofcom have it and the expert
9 sought it, BT is not prepared to consent.

10 MR. THOMPSON: I think, in principle, we are prepared to consent. Without knowing what – it
11 is a pig in a poke point really.

12 THE CHAIRMAN: This is the information asked for, in so far as it is there. It is spelt out what it
13 is. I think you know exactly what it is.

14 MR. THOMPSON: I am not actually clear what issue is actually before the Tribunal that needs to
15 be resolved. I do not know whether the Tribunal is intending to make a direction in relation
16 to information that may or may not exist, or what exactly is at issue between the parties.
17 There does not seem to be any presumption about an issue.

18 THE CHAIRMAN: The direction will be that in so far as Ofcom has this information it shall
19 disclose it within the confidentiality ring by, and then there is a question of the date. That is
20 the issue. Whether one therefore needs to have a look at whether that takes one out of s.393
21 or not, it may be that the concern of Ofcom – perhaps we should look at s.393(1), and it
22 may be that there will be no problem. You said, Mr. Pickford, that there is provision in the
23 section.

24 MR. PICKFORD: Yes, Sir, s.393(1) provides that:

25 “Subject to the following provisions of this section, information with respect to
26 a particular business which has been obtained in exercise of a power conferred
27 by ...”

28 this Act, amongst others –

29 “... is not, so long as that business continues to be carried on, to be disclosed
30 without the consent of the person for the time being carrying on that business..”

31 Obviously if BT consents then we are fine, even under 393(1). Then:

32 “(2) Subsection (1) does not apply to any disclosure of information
33 which is made ...”

34 then for a whole series of purposes. The first of those is:

1 “(a) for the purpose of facilitating the carrying out by Ofcom of any of their
2 functions.”

3 We would say that if Ofcom is engaged in litigation concerning one of its Decisions and it
4 is ordered by the Tribunal to disclose information, that is for the purpose of its carrying out
5 one of its functions.

6 THE CHAIRMAN: Are we within (e)?

7 MR. PICKFORD: I was going to go on to say that in addition to that we are also within (e).

8 THE CHAIRMAN: These must be civil proceedings brought by virtue of this Act, are they not?

9 MR. PICKFORD: Indeed.

10 THE CHAIRMAN: “Civil proceedings” are not defined, but it surely must include those in the
11 CAT.

12 MR. PICKFORD: Certainly that is our position, Sir. I am not aware of any appeals before this
13 Tribunal, whether under the Communications Act, the Competition Act or the Enterprise
14 Act or any other provision, where confidentiality provisions that are imposed upon
15 Regulators prevent them disclosing information which is ordered by the Tribunal.

16 THE CHAIRMAN: Perhaps Mr. Mussa can help on this. If I make an order, does that relieve
17 Ofcom of its concerns under s.393(2)(e)?

18 MR. MUSSA: Sir, I am instructed that it will do. The reason for the position we adopted in our
19 skeleton was essentially for the avoidance of any doubt. Obviously, the consequences of a
20 breach of s.393 are serious and ----

21 THE CHAIRMAN: So you need an order, I understand that. I think the sensible thing is to say
22 that, subject to date, in so far as you have this material you disclose it within the
23 confidentiality ring. What should I do about date, Mr. Mussa?

24 MR. MUSSA: Our proposal, Sir, is that in the first instance you allow us two weeks. We at
25 present do not know whether we hold information falling within those categories, and also,
26 importantly, how long it will take us to provide the information. If the Tribunal was to
27 afford us two weeks with liberty to apply in the event that there were unforeseen
28 circumstances, that should hopefully deal with the timing issue.

29 MR. PICKFORD: Sir, if it assists, we are quite content with that.

30 THE CHAIRMAN: I shall make that order.

31 MR. THOMPSON: Sir, can I just say, I think the alternative route was being whispered from
32 behind that we are happy to consent, subject to liberty to apply, but it may be that the order
33 will ----

34 THE CHAIRMAN: I think it would be easier if I make the order.

1 MR. THOMPSON: Exactly, with both parties having liberty to apply. That would perhaps be
2 sufficient. If BT for some reason did have a concern – I think it is only the fact that nobody
3 quite knows what this information is that leads BT to be somewhat cautious.

4 THE CHAIRMAN: I will say within two weeks, with liberty to apply, and within the
5 confidentiality ring. It is only to Sky and TalkTalk – is that right. It is not being sought by
6 you?

7 MR. JONES: That is right, Sir.

8 THE CHAIRMAN: The further CMC we said will be on 30th July. I do not think we are going to
9 have – we can leave it as it is except that I think it would be helpful if the parties prepared a
10 list of issues for that CMC, by which I mean not issues to be determined at the CMC, I
11 mean a list of issues for the main hearing. It could be called a provisional list of issues
12 because it might have revision before the actual hearing, but I think it will help that CMC if
13 we all have a list of issues that are going to have to be determined at the main hearing. If
14 the CMC is on Tuesday, 30th July, perhaps that can be prepared by 4 pm on 26th July. Let
15 us call it provisional list of issues. At that CMC we will consider expert meetings and
16 expert statements and timetabling. Clearly well before that we will have a date for the
17 hearing.

18 That takes one to the next and last item. I do not know whose suggestion this is,
19 18th November. Ofcom, 16th September, CWW mid to late October.

20 MR. PICKFORD: It is Sky and TalkTalk, and BT's suggestion. The purpose of directions was to
21 record agreement where possible, and then to indicate contrary positions.

22 THE CHAIRMAN: Why does it need so long?

23 MR. PICKFORD: Sir, the position was this: it was suggested by Ofcom and I think Cable &
24 Wireless and others, that there should be a sequence for skeleton arguments which began
25 with the first skeleton arguments being served two months ahead of the hearing. Obviously
26 that skeleton argument will need to be prepared. There was an implicit three week period
27 between each of the skeleton arguments. So assuming that three weeks was required to
28 prepare the first one and assuming that those preparing it were not required to prepare it
29 during the August vacation, that would mean the first skeleton argument being prepared
30 some time in mid to late September for a hearing then beginning mid to late November.
31 We consider that that suggestion for exchange of skeletons is possibly a little over-
32 generous, and possibly two weeks between each of the skeletons, if they were served
33 sequentially would be quite adequate.

1 THE CHAIRMAN: I would have thought the five, three, one for skeletons – five weeks before
2 hearing for appellants, three weeks for respondents, one week for interveners would be
3 ample.

4 MR. PICKFORD: Yes, it depends a little bit on what the interveners say. It might be cautious to
5 have six, four, two, just because, if the interveners say rather a lot in each other's appeals,
6 then ----

7 THE CHAIRMAN: You will know all that by then, and these are only skeleton arguments. You
8 will have had all the pleadings.

9 MR. PICKFORD: Sir, I am in your hands.

10 THE CHAIRMAN: I think on that basis I do not see why mid-October does not work.

11 MR. PICKFORD: Mid or potentially late October, Sir, and that is allowing those that are
12 producing the first round of skeletons not to have to produce them during August.

13 MR. JONES: Sir, on the mid to late October date, which you will see was my clients' suggestion
14 and is what we had worked out would be the earliest it could come on, Sir, could I just state
15 that I would like to row back slightly from that only because it has subsequently become
16 apparent that my leader might have difficulties at the end of October. We would, if we are
17 lining up on one side, prefer it to go into November, but, Sir, availability is only one issue.

18 THE CHAIRMAN: There are a lot of people in this case. Everyone is going to have bookings at
19 different times.

20 MR. JONES: Sir, I fully appreciate that. Sir, on the timetabling of skeleton arguments, I would
21 just like to pick up on one of Mr. Pickford's points. My clients of course, their main
22 skeleton argument covering most of the issues will be in relation to their intervention in
23 BT's appeal. It may be in the light of that that the six, four, two timetable might be
24 preferable, only because there will otherwise be a short period between our skeleton on
25 those issues and the hearing. Sir, that may be a matter of more concern to other parties than
26 to my clients.

27 MR. THOMPSON: Sir, I do not know whether, in the light of that indication, which, in my
28 submission, is a helpful one, it might be appropriate for those sorts of skeleton arguments to
29 be in the three rather than the one, so that people putting in their substantive appeals - Sky
30 in relation to its appeal, BT in relation to its appeal, and Cable & Wireless in relation to its
31 appeal put in at five, and then there are responses and statements of intervention in
32 response, or interveners' responses at three, and then effectively reply skeleton arguments at
33 one. In my submission that might be the most convenient form, so that one would
34 hopefully be short supplementary skeletons.

1 THE CHAIRMAN: We do not need reply skeleton arguments, do we?

2 MR. THOMPSON: I do not think in that case it is really appropriate for the substantive skeleton
3 arguments on the interveners in relation to the cross appeals, if I may put it that way, it is
4 really appropriate for that only to come a week out from the hearing for the reason Mr.
5 Jones gives. Otherwise we are content to move forward. We were simply concerned to
6 ensure that there was time to finish this well in advance of Christmas, but if the matter can
7 go forward to, say, any date from the beginning of November then we would be content.
8 We had anticipated skeletons could be dealt with at the CMC, but if the Tribunal wants to
9 consider it now, that would be the position.

10 THE CHAIRMAN: Skeletons can be dealt with at the CMC, but the date for the hearing cannot.

11 MR. THOMPSON: No, indeed.

12 THE CHAIRMAN: And it is the relevance of the skeleton timetable to the hearing date is why it
13 is being raised now, so I am not going to direct a skeletons timetable now, we can deal with
14 that later. I am not at the moment sure why interveners' skeletons cannot come with
15 respondents' skeletons.

16 MR. JONES: To avoid duplication, Sir. I think the suggestion has come from previous cases
17 similar to this, and certainly in the partial private circuit case, which you will hear a lot of
18 reference to in this case, the interveners' skeleton came after Ofcom, and was very brief,
19 and only added in relation to areas where it needed to be added.

20 THE CHAIRMAN: Yes. I think what I will say, because it will depend a lot on availability of
21 the other two Tribunal members. I will say to be listed on first available date on or after
22 28th October and the Tribunal will be in touch with the parties' representatives once the
23 availability of the other members is clear to find a four week window in which we all have
24 the two weeks, one off and further days for closing submissions. Then the actual
25 timetabling of skeletons can be dealt with at the next CMC. Is there anything else that
26 needs to be dealt with today?

27 Thank you all very much for your assistance.

28