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IN THE COMPETITION

1112/3/3/09

APPEAL TRIBUNAL

Victoria House,
Bloomsbury Place,
London WC1A 2EB

1 October 2009

Before:
VIVIEN ROSE
(Chairman)
PETER CLAYTON
MICHAEL DAVEY

Sitting as a Tribunal in England and Wales

BETWEEN:

**CABLE & WIRELESS UK
(Leased Lines)**

Appellant

- and -

OFFICE OF COMMUNICATIONS

Respondent

- and -

**VERISON UK LIMITED
BRITISH TELECOMMUNICATIONS PLC**

Proposed Interveners

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

Mr. Richard Pike and Mr. Keith Jones (Solicitors, Baker & McKenzie LLP) appeared on behalf of the Appellant.

Mr. Paul Harris and Mr. Ewen West (instructed by the Office of Communications) appeared for the Respondent.

Mr. Paul Brisby (instructed by Towerhouse Consulting LLP) appeared on behalf of Verizon UK Limited.

Mr. Tim Ward and Mr. Robert Palmer (instructed by BT Legal) appeared for British Telecommunications Plc.

CASE MANAGEMENT CONFERENCE

1 THE CHAIRMAN: Good afternoon, ladies and gentlemen. I have some introductory remarks to
2 make on the various issues that we may need to canvass today. The first is the timetable for
3 the appeal and in particular the next step, which is the filing of the defence. This appeal
4 was lodged with the Tribunal on 2nd September and relates to a three year price control,
5 which comes into effect today. That is my understanding. Under the Tribunal's Rules
6 Ofcom is due to file its defence by 15th October, but due to its current heavy workload it has
7 requested an extension of one month until 16th November. This is opposed by Cable &
8 Wireless who have suggested a more modest extension of time is appropriate. We have
9 looked at the correspondence. We do not consider that the time that was allowed to Ofcom
10 in the *Carphone Warehouse* case should necessarily be taken as an indication of the
11 Tribunal's general approach, particularly since the time period allowed in that case included
12 the month of August. Our current view is that it is important to get this case moving
13 forward. However, we do recognise that Ofcom has a number of different matters that have
14 arisen at the same time.

15 We will be coming later on to the question of the drafting of the questions for the
16 Competition Commission, of which Ofcom has volunteered to provide a first draft. In our
17 view, it may be better for Cable & Wireless to take on the task of co-ordinating the drafting
18 of the questions so that Ofcom can devote its efforts to producing its pleadings. On that
19 basis we would prefer to set a shorter deadline for the service of the defence, but we will
20 hear argument on that point.

21 The requests for intervention: the Tribunal has received two requests for permission to
22 intervene, one from BT in support of Ofcom; and one from Verizon in support of Cable &
23 Wireless. Neither of the principal parties object to the requests. There seems to have been
24 some issue as to whether the permission to Verizon should be limited to written submissions
25 so that it does not take part in the oral parts of the proceedings. Our current view is that it is
26 difficult to see how an order limiting them to written submissions would work in the context
27 of the Competition Commission part of the investigation where the Commission's practice
28 is to hold plenary sessions and smaller hearings with one or more of the parties, and we are
29 not convinced at the moment that it would be helpful for us to try and impose some
30 limitation on the way that Verizon is able to put forward its points.

31 There is also some question over whether they intend to serve a statement of intervention or
32 some more informal document after the reference of the questions has been made. We are
33 keen for the moment that there should be a formal pleading from both the interveners setting

1 out the scope of their intervention, and we therefore propose to direct both of them to serve
2 formal statements of intervention.

3 As to the timing of those statements, the principal parties seem to be agreed that they should
4 have until two weeks after the service of the defence. That seems to us rather a long time
5 and we would prefer that to be done within one week of the service of the defence if that
6 was at all possible. We would remind the interveners in that regard that they must confine
7 themselves to the issues raised by the grounds of appeal, and we would expect them to
8 familiarise themselves with the Tribunal's past practice in this regard, both in s.192 appeals
9 and in the recent *National Grid* case.

10 On the question of confidentiality, there is now, as I understand it, an agreed draft of an
11 order establishing a confidentiality ring. We cannot make the order until we have the bulk
12 of the undertakings in. I am not sure where we are at the moment with that, but perhaps we
13 will come to that, but this should be dealt with as soon as possible as it is imperative that
14 disclosure of the material and the model takes place quickly. So we will make that order as
15 soon as we have the bulk of the undertakings in and anyone who comes along later will be
16 added in in the usual way.

17 BT have made the point in correspondence that since the only confidential information
18 contained in the model is their information, disclosure of the model should not be restricted
19 to their ring members but should be freely available within BT. It seems to us from a
20 reading of the undertaking in part B of the proposed order that this is covered by para.1 or
21 para.6, so perhaps the parties can consider that and come back to us if there is anything that
22 the Tribunal needs to do in that regard.

23 We also note that Cable & Wireless have reserved their position as regards any amendments
24 to the notice of appeal they may wish to make following the disclosure of the confidential
25 information. We encourage them to bring forward any application that they wish to make
26 as quickly as possible, but we do not at the moment consider it is feasible to set a particular
27 deadline for them to do so, and we certainly do not intend to delay the service of the other
28 pleadings until any such application has been dealt with.

29 On the specified price control matters there appears currently to be some disagreement
30 between Ofcom and Cable & Wireless as to whether all of the grounds of appeal are
31 specified price control matters. I understand that the parties are still debating this amongst
32 themselves and that there is nothing that you are asking the Tribunal to consider today.

33 However, from what we have seen of the correspondence, it seems that Ofcom are taking
34 the view that if an error is described in the notice of appeal as an error of law, that indicates

1 that this is not a price control matter. We have not, of course, heard any submissions on the
2 subject, but it might assist if we say that that has hitherto not been our understanding of the
3 regulations defining price control matters. Further, we doubt that the intention of the
4 legislature is that the appeal should become fragmented with some issues falling to the
5 Tribunal and others falling to the Commission, as appears to be a risk if we go down the
6 route of splitting up things in as much detail as is being suggested.

7 As to the timing of the reference, the Competition Commission has said that the reference
8 should not be made until the defence and statements of intervention have been served. Our
9 practice is generally that the reference is made only after the main pleadings have been
10 served, and at the moment we see no need to depart from that here, particularly of course if
11 there are going to be disputes about what are price control matters and what are not.

12 The Commission has also stated its view that a period of six months would be required to
13 determine the reference. It may be premature for us to say anything about that now.

14 As we have mentioned, Ofcom has volunteered to prepare a first draft of the questions to be
15 referred but, as I have said, given that they have urged us to grant them an extension of time
16 on the basis that their resources are very stretched, we wonder whether it would actually be
17 a better use of their resources if Cable & Wireless took the lead in drafting the questions.

18 In that regard we also would want to set a date after the service of statements of intervention
19 when the parties can notify us whether they have agreed the questions to be referred or, if
20 not, what the current state of the drafts is and what the main issues still to be decided are.

21 But we make it clear at this stage that the Tribunal retains ultimate control over the content
22 of the questions, so it is not enough simply for the parties to agree amongst themselves. We
23 have to be confident that the questions being referred are the right ones to enable us
24 ultimately to dispose of the appeal.

25 The only other matter is the letter that we sent on 29th September asking for ideas on
26 producing a document which links the grounds of appeal with the relevant parts of the
27 decision and also to demonstrate how they relate to the formal price control at annex 9 of
28 the decision. We have, just before we came in, been handed this table – I am not sure who
29 has produced that – which goes part of the way to doing that, but we will hear if anyone has
30 got any other or further ideas as to how to achieve that goal.

31 That is all I wanted to say by way of introduction. Mr. Jones, do you want to say anything?

32 MR. PIKE: Thank you, madam, it is actually Mr. Pike, I am here with Mr. Jones. Perhaps for the
33 transcript I should introduce all the legal representatives for the parties. I believe we have

1 Mr. Harris and Mr. West for Ofcom, Mr. Ward and Mr. Palmer for BT and Mr. Brisby for
2 Verizon.

3 To deal with some housekeeping first, you should have a copy of a small hearing bundle,
4 madam. That just has the written observations of the parties, some correspondence and also
5 a couple of authorities, but I think it is now agreed that nobody wishes to refer to those
6 authorities.

7 Madam, your opening remarks were very helpful indeed and we thank you for those. I also
8 would like to express our appreciation for the efforts the Tribunal is making to get to grips
9 with this case, because we do appreciate that it is a quite dry subject matter and quite
10 technical.

11 As you have noticed, we have handed up a table in an effort to address your letter.

12 THE CHAIRMAN: That is your table, is it?

13 MR. PIKE: It is. I must take responsibility for that, yes. It is only a first draft and it is just
14 supposed to address the tables in section 4 of the decision. It is not going to the price
15 control at this point. I just handed it up to see if the Tribunal had any comments or if the
16 Tribunal felt that it was going in the right direction. It is also, I should say, subject to
17 discussion with the other parties as well.

18 THE CHAIRMAN: When it say “Prices listed in the tables in section 4”, are there prices listed in
19 other sections of the decision which are also challenged, or is this effectively it?

20 MR. PIKE: Madam, I think that is it. I will need to just check that. My understanding is that
21 section 5 is AISBO, as it is called, and nothing in AISBO is challenged by C&W, so I think
22 this is probably it.

23 THE CHAIRMAN: Yes, I think this is very helpful. Two points that occurred to us, just having a
24 very brief discussion when we saw this, one was to go to the next stage and relate it to the
25 price control; and the other point was perhaps if we could have copies of the actual tables,
26 maybe with some kind of colour coding as to which parts of the tables – if we had a
27 different colour for A, B, C and D – are challenged. Clearly some are challenged by more
28 than one ground. Something as immediate as that would be helpful, I think.

29 Whilst we are on this table, I do not know whether the other parties have had more chance
30 to look at it than we have, or whether anyone had come up with any other idea about it.

31 Perhaps we will hear what you have to say on the other issues, Mr. Pike, and then go to that.

32 That looks as if it is certainly heading in the right direction.

33 MR. PIKE: Thank you, madam.

1 Moving on to the agenda, madam, as you have noticed in your introductory remarks, there
2 really is not much between the parties now on the directions to be made today, and perhaps
3 it would be best first to just go through those matters where, as far as Cable & Wireless is
4 concerned, there is no disagreement at all. First of all, on the timing of the reference to the
5 Commission, madam, we absolutely agree that it should be after the defence and statement
6 of interventions, and we are grateful for your indication that that is the Tribunal's initial
7 view too.

8 On the terms of the confidentiality order, madam, they are agreed, and for our part we have
9 collated all the undertakings except two, and we will provide those to the Tribunal after this
10 hearing. We agree that once the order is made it would be appropriate to disclose the
11 confidential material two working days after, as in the draft order. If it can be made today
12 then for some people that could be by Monday.

13 On the interventions, you will have seen, madam, that Cable & Wireless agrees that BT and
14 Verizon should be given permission and we respectfully agree with the comments of the
15 Tribunal, and we do not feel that it would be helpful to restrict Verizon to written
16 submissions.

17 On the first draft of the reference questions, madam, Cable & Wireless was content to
18 permit Ofcom to prepare the first draft and was grateful for Ofcom's offer to do so, but
19 equally, if the Tribunal considers it would be helpful – and I understand you are indicating it
20 would – then we would certainly be happy to do that. If that allows Ofcom's defence to be
21 filed sooner then all the better.

22 I think that covers all the points where there is broad agreement, so can I move on to those
23 issues that are slightly more contentious, first of all, the deadline for Ofcom's defence:
24 madam, we are grateful for your indication that you do not see the three months in the
25 *Carphone Warehouse* appeal as a precedent, and certainly, madam, that is Cable &
26 Wireless's view too.

27 We also do not agree with Ofcom's characterisation of the alleged similarities between the
28 Local Loop Unbundling appeal and this appeal. As we have set out in the written
29 observations, we think that actually they are much more limited. On the other hand, we
30 certainly do recognise that Ofcom has other appeals and has resource constraints and we are
31 content to have a modest extension. I am not going to say what "modest" should be. It is
32 whatever the Tribunal considers is appropriate. Whether that is two or three weeks or less,
33 I leave that to the Tribunal.

1 Just for completeness, again we were content to agree to two weeks for statements of
2 intervention but if they can done in one then, again, that is a clearly a benefit.

3 Finally, madam, on the question of whether the appeal includes any non-price control
4 matters, the parties have agreed between themselves, I believe, I certainly hope, that this is a
5 matter for another day after further discussion and some elaboration of Ofcom's objections.
6 I was going to make one comment that your remarks have foreseen really, which is that we
7 certainly do not agree that because a matter involves an error of law that means it cannot be
8 a price control matter. As far as we are concerned, madam, the definition of what is a
9 specified price control matter is by reference to the subject matter of what is in dispute, and
10 not the question of why it is in dispute – in other words, whether it is an error of law, error
11 of fact of an error of assessment.

12 Madam, unless I can assist you further, I think those are all my submissions.

13 THE CHAIRMAN: There was the other point that they have raised about these issues in the
14 notice of appeal which relate to lack of transparency in the decision. It might be that you
15 would also wish to consider, when you are debating this amongst yourselves, what role that
16 kind of issue has in the context of a merits review in which anything that is not currently
17 transparent as far as the reasoning is concerned is likely to become transparent during the
18 course of the Commission's investigation. I am anxious to avoid having a very small
19 number of potentially insignificant points for us to look at which are just going to divert
20 everyone's attention from the main battle ground which will be at the Commission's
21 premises.

22 MR. PIKE: Madam, I am grateful for that indication, and we will certainly take that on board.

23 THE CHAIRMAN: Thank you. Mr. Harris?

24 MR. HARRIS: Good afternoon, madam, members of the Tribunal; I propose to take the issues in
25 the order in which you, madam, raised them in your opening remarks. The first of those
26 was the timetable, and in particular the question of how much time should be permitted to
27 Ofcom for the service of its defence. As you have rightly stated, madam, there is a measure
28 of agreement between the parties, and I think in the mind of the Tribunal, namely that there
29 permitted to Ofcom at least a modest extension. From Mr. Pike's submissions a moment
30 ago, it seems that he might contemplate "modest" to be approximately two to three weeks,
31 and therefore arguably the battle ground is over whether it should be two to three weeks or
32 the four weeks that we request.

33 We take seriously, I should make very clear at the outset, our duties as a regulator, and we
34 also take conscious need of the requirement to act expeditiously, not just in this appeal, in

1 all appeals, but in particular in this appeal because, as you rightly pointed out in your
2 opening remarks, it is a price control matter of relatively limited duration that is just about
3 to or has just taken effect. We take that on board. Nevertheless, there are two further
4 equally weighty considerations, which is the need to act expeditiously has to be done so far
5 as is reasonably practicable and it has to allow Ofcom sufficient time in which sensibly,
6 realistically and, what is more, helpfully to all concerned to defend the appeal fully. There
7 is little point in hurrying if there is then a worse job, a less comprehensive, less sensible,
8 less reasoned defence. My respectful submission is that that is actually counter-productive,
9 particularly, I might add, in an appeal like this which, with the best will in the world, does
10 raise some fairly complicated detailed technical points. So we are conscious of the need to
11 act expeditiously, particularly in this appeal, but we also have regard to this counter-
12 consideration.

13 I can also submit, hand on heart, that Ofcom have given this matter anxious consideration
14 and in-depth consideration, as to precisely how much time do we come before you today to
15 ask for. We did think about two weeks, we did think about three weeks, we have settled on
16 asking for four weeks. This is not a request simply for the convenience of Ofcom, let alone
17 something as minor as just, for example, the convenience of counsel or counsel's
18 availability. This is not that type of request at all, this is a properly worked out timetable.
19 Ofcom has sat down and seriously and conscientiously examined, for example, the
20 commitments of other individuals who will be required for the defence of this task within
21 Ofcom – for example, specific individuals, and their specific and detailed work timetable on
22 the one hand; and on the other hand, Ofcom has also had detailed regard in the time since
23 the notice of appeal was lodged to the precise nature of the work that will be required in
24 order to defend this appeal. So that is wholly irrespective of any other appeal or any other
25 workload. Having taken that detailed and conscientious consideration, Ofcom has come to
26 the conclusion that what is required in this case in order to defend fully, sensibly and
27 properly is a period of four weeks and not less. That expressly does take into account, as
28 I hope was made clear in the written submissions, the fact that because there are common
29 issues Ofcom has already been commence work on some of them. That has not been lost
30 sight of. In other words, perhaps in a nutshell, this four week request, whilst respectfully is
31 a request, is not so much your run of the mill, "We would quite like a bit more time because
32 that would be handy", or, "It would really help us out", this is more of a submission that
33 Ofcom needs four weeks in order to be able, as helpfully as it can, to deal with the
34 substance of this dispute, given the detail and its substantive subject matter.

1 I will deal in a moment, if I may, briefly with the question of overlap. That is an important
2 consideration. Just to put in context as well the request for four weeks as opposed to two to
3 three weeks, which does not seem to be very controversial, the Competition Commission
4 has submitted, and you, yourself, mentioned in your opening remarks, madam, that the
5 reference period for its consideration of inevitably what will be referred is about six months,
6 and Cable & Wireless have said that they are quite content with that period. So to put the
7 request in a little bit of context – that is in their written submissions, madam – this is a
8 request for four weeks against the background of a reference period that is going to take
9 probably six months, and therefore should not be regarded as in any sense excessive. It
10 takes six months because there is a lot to it; because there is a lot to it we need four weeks
11 more.

12 I said I would move on the question of overlap. There is a measure of dispute between
13 ourselves and Cable & Wireless over quite what the substantive areas of overlap are. In a
14 minute I will just give you some examples of what they are. I do not want to get into the
15 detail for obvious reasons, but I will give you some examples of what they are. My
16 respectful submission is that what is more important for case management purposes is how
17 Ofcom, itself, perceives there to be areas of overlap. What I mean by that is that Ofcom is
18 the one that has to deal with both appeals in setting out its defences. Ofcom genuinely, and
19 as a result of the detailed consideration and anxious scrutiny that I referred to before, Ofcom
20 feels, with reason, that there is considerable overlap and analogy between the grounds of
21 challenge in the LLU appeal and the LLCC appeal – i.e. this appeal. It is because they see
22 that there is considerable overlap that they therefore feel the need for there to be either the
23 same staff in some cases dealing with both appeals, or at any rate similar staff who then
24 must liaise with each other closely and carefully in order to ensure consistency as between
25 their responses to the two sets of appeals. Ofcom does genuinely take that view and Ofcom
26 therefore has in place some overlapping staff and has in place mechanisms for ensuring that
27 there is communication and liaison between those staff who are not literally identical. It is
28 that need for extra liaison and communication that introduces this extra logistical difficulty
29 that necessitates this further time of the amount that I have already suggested.

30 It does not end, if you like, with operational staff or case officers. As I set out in my written
31 submissions, self-evidently the overlap progresses up the food chain, if you like. Plainly,
32 senior economists are going to have to be involved in sign-off and consistency and all issues
33 of similarity; senior accountancy personnel, the same. These are, quite simply, the same

1 people at Ofcom that will have to do it. Likewise, the same goes for senior legal personnel
2 and ultimately at director level.

3 THE CHAIRMAN: There seem to be two issues: there is the overlap of personnel, which is that
4 the same people will have to be involved in dealing with both the cases, regardless of
5 whether there is a substantial or less than substantial overlap in the issues of the case, given
6 that these are both telecoms appeals, both relate to particular areas with telecoms; but is
7 your point both that there is an overlap of staff and also that there is an overlap of issues?

8 MR. HARRIS: Yes, and I will in a minute elaborate with some examples of the overlap issues.

9 My first point is that because we perceive there to be a genuine need for overlap and liaison,
10 that is what is truly determinative. Put it like this: if we did not see a genuine need for
11 overlap and liaison, we would not be asking for more time because there would simply be
12 no reason. We would have other people who are not busy on this first appeal who would
13 not need to talk to the people who were busy on the first appeal, and they could just carry on
14 and do their work.

15 What is truly important is that this is how we perceive it. This is genuinely how we would
16 perceive it. This is how we are proceeding, and that is what gives rise to this logistical
17 difficulty. I repeat, deliberately, that this is not some back of the envelope sort of
18 consideration, “Oh, well, wouldn’t this be quite nice, it looks like they are more or less
19 similar”. It is nothing like that at all. We have sat down and we have thought long and hard
20 and we have thought, “There is this person who needs to do this, there is that person who
21 needs to do that, but that person is already doing the following things, then there is so and
22 so, and then it has got to go to sign off level”. So this is a worked out timetable, as
23 I submitted before.

24 As I have said now twice, I will just give you a flavour very briefly of what the common
25 issues are, so as to provide, if you like, a reasonable foundation for our belief, our genuine
26 belief, that this has similarities. There is a common theme within the two appeals, a
27 criticism of regulatory financial statements, there is a common theme about the allocation of
28 corporate overheads – indeed, that is common ground in my learned friend’s skeleton
29 argument, there is a common theme of criticising Ofcom’s alleged failure to have “utmost
30 regard”, or “take utmost account”, of various EC laws or guidelines. So that is a third issue.
31 A fourth issue is that there is common criticism of costs of capital having been assessed at
32 too high a level by Ofcom. I do not suggest for a minute that the precise nature of the
33 criticisms are identical between the two. It obviously could not be, but there is a great deal
34 of similarity. That is a fourth one. A fifth one is that there is criticism of how Ofcom has

1 used wrong and incremental costs to justify charges. I could go on. There are various
2 others in the list. If you would like me to, madam, I will.

3 The point is that there is a reasonable foundation for our belief, that is how we are
4 proceeding and that is the time that I respectfully request, but underlying that request is
5 effectively the submission that that is the time that we need, and I would therefore invite the
6 Tribunal to order four weeks additionally, so as to take us to 16th November.

7 Madam, that is what I have to say on the first issue of timetabling. Unless I can be of
8 further assistance on that issue I will take the others in much shorter order, if I may.

9 The second one was statements of intervention. We are very keen that there be formal
10 statements of intervention. We have no objection to there being no restriction on Verizon as
11 regards written or oral. Our point perhaps did not come out so clearly in correspondence as
12 it might have done. We are very keen that there should be no duplication, but Verizon is
13 obviously of that view, and in any event that is plain from the Tribunal's practice.

14 The next point is the confidentiality. We have with us today signed orders from relevant
15 personnel and we will hand them in, so that should be taken care of.

16 The next point was the BT model point. I am not sure there is really an issue about this.

17 We are obviously happy for BT to have the models, and we will have a detailed look at the
18 wording of the order to see whether or not that needs adjustment.

19 THE CHAIRMAN: I think the point is, are BT right in their surmise that the only confidential
20 information that there is in the model is BT's information?

21 MR. HARRIS: I believe that is right, yes. I am not sure there will be a need for any adjustment
22 to the order, and as far as we are concerned if the information that went into the models
23 came from BT then they can knock themselves out with it.

24 Cable & Wireless and question of amendments: you have kindly indicated that they should
25 be encouraged to provide any amendments as soon as possible and we heartily endorse that
26 sentiment.

27 The next point is the specified price control matters. That is an issue that is being dealt with
28 as we speak between the parties in correspondence. We anticipate that progress will be
29 made and will probably be made in fairly short order. We will keep the Tribunal posted as
30 required, and we would respectfully echo the comments that the Tribunal made in
31 discussion regarding the issue of transparency. If that could be clarified and elucidated
32 upon, as we have requested, then all the better.

33 The next point is the timing of the reference to the Competition Commission. It is our
34 suggestion, which I think is common ground, that that should be after the close of pleadings.

1 We are content with that; and we are also content, in the light of the Tribunal's indication,
2 that Cable & Wireless should take the lead in circulating a draft of the relevant questions.
3 That leaves only, as I have it listed, CAT's letter to Cable & Wireless regarding
4 clarification, if I can put it like that, of their appeal and this table. We were only handed it
5 moments before the hearing. That is no criticism and we are delighted that a start has been
6 made. We, ourselves, would welcome further clarification. We see this as being a useful
7 and a good start, and we look forward to Cable & Wireless taking this to the next stage
8 taking on board the comments that the Tribunal has made.

9 THE CHAIRMAN: As far as the timing is concerned, as I mentioned in my introductory
10 remarks, we are quite keen to set a deadline after the statements of intervention have been
11 served for the parties to notify us as to whether there has been agreement as to the draft.
12 Assuming that Cable & Wireless can make some progress fairly soon with the draft
13 questions, I would hope that Ofcom would be able to respond to those at the same time –
14 that exercise can run in parallel with the drafting of the pleadings, so that all being well we
15 will either have questions to refer soon after the pleadings have closed, or at least we will
16 have flushed out whether there are any issues that we need to decide at an early stage. What
17 I want to avoid is that we get to quite a late date because of the pleadings and only then do
18 we start finding out whether there are points of disagreement as a matter of principle on the
19 drafting of the questions.

20 MR. HARRIS: Madam, I can say that we would envisage it proceeding along the lines that you
21 have suggested, namely a degree of parallelism, if you like. Of course, it will be all the
22 easier to achieve that objective if we are given the additional four weeks for our defence
23 rather than two to three.

24 THE CHAIRMAN: Yes, thank you. Mr. Ward?

25 MR. WARD: Madam, as you will have seen BT applies to intervene to support Ofcom in this
26 appeal. The subject matter of it is of course of importance to BT as it concerns BT's own
27 prices. BT is anxious to ensure that it has that it has an opportunity to fully support Ofcom
28 in an effective and focused way. As Mr. Harris has already observed, that can, in truth, save
29 time in the longer run.

30 The subject matter of the appeal is in part directly concerned with the details of BT's own
31 cost accounting, so it is very likely that BT will have things to say which will be of great
32 assistance to the Competition Commission in this area. Of course, there is a very large
33 amount of detail involved in excavating those issues.

1 I also just want to echo what Mr. Harris said about the overlap with the LLU appeal,
2 because, of course, as he has so clearly explained, there is an overlap there in terms of the
3 issues, and rather, as in the case of Ofcom, BT, although a large organisation, has overlap in
4 terms of the personnel involved and must, of course, be careful to co-ordinate its
5 submissions in both cases.

6 If one takes one of the common issues, which is the allocation of corporate overheads, one
7 can see that various appellants are trying to stamp on the carpet so that the bump comes up
8 somewhere else, but sure enough the bump is going to be there somewhere. So for BT, it is
9 really very, very important that it gets the opportunity to fully make its case.

10 The focus of my submission is really in the time to be allowed after Ofcom has filed its
11 defence, because of course BT is not a principal party in this appeal. Like all interveners, it
12 finds itself having to walk a rather fine line. It wants to supplement Ofcom's defence
13 meaningfully, but of course must not repeat anything that Ofcom says. That discipline is
14 absolutely clear from the Tribunal's rules. What that will leave BT with the task of doing is
15 seeing what Ofcom's defence actually says and asking itself, "Where are we going to be
16 able to help here" – I would not suggest there will be any gaps in it, I am sure that they will
17 do far too good a job for that – but where is BT's discrete expertise really going to help, and
18 where are there areas which, frankly, BT need not address at all and can confidently leave to
19 Ofcom? Madam, your proposal was for a week. That is going to be tricky, given just how
20 densely detailed this appeal really is.

21 THE CHAIRMAN: How much possibility is there of liaison between counsel before the defence
22 is actually served as to who is going to deal primarily with what?

23 MR. WARD: There will be, of course, within the confines of respect for Ofcom's undoubted
24 independence, something that Ofcom is always keen to emphasise, and rightly so. I do not
25 mean to be disingenuous about that. I have absolutely no doubt at all that we will be
26 liaising, and that BT will take its own view about where it is likely to assist.

27 I did hear Mr. Pike say in his submissions that there was no objection to there being a two
28 week period. I do not need to push back any further than that. As Mr. Harris says, in
29 reality, by the time this case is over and by the time relief is granted, if it is successful,
30 months will have elapsed – six months in the Competition Commission, a week here or
31 there is not, in itself, going to make a difference – recognising of course that the Tribunal
32 will want to keep a tight control on all of the weeks so that they do not add up to months or,
33 heaven forbid, years. In my respectful submission, it may well save time and make the

1 interventions much more focused if we are allowed that little bit of extra breathing room to
2 assess BT's defence when it is served.

3 The only other thing I wanted to just mention is the question of confidentiality. In regard to
4 the Ofcom model, of course will talk to Ofcom and hope we can come to an agreement that
5 it can all be dealt with under the terms of the existing order. As you say, madam, that is, in
6 a sense, primarily a question for Ofcom to think about.

7 Unless I can assist further, those are the submissions for BT.

8 THE CHAIRMAN: No, I think that is very helpful, thank you, Mr. Ward. Mr. Brisby, do you
9 want to address us on any point?

10 MR. BRISBY: Thank you very much and good afternoon, madam. Verizon is respectfully
11 seeking the Tribunal's permission to intervene in these proceedings and you have our
12 request for Verizon's intervention in the bundle.

13 Verizon respectfully agrees with the proposed course outlined in your introductory
14 comments to the hearing, with thanks for those comments.

15 With respect to confidentiality undertakings, we have all of those today apart from that of
16 our counsel, Cassie Smith, who I understand is in a different forum today, and we are
17 content to deal with that matter in whatever manner the Tribunal sees fit, including
18 removing counsel and adding her in later if necessary, or by providing an undertaking later.
19 Unless the Tribunal wishes to hear further from me, Verizon has no submissions to make on
20 the other matters being discussed today.

21 THE CHAIRMAN: So you are content to put your statement of intervention in within a week
22 after the service of the defence?

23 MR. BRISBY: Verizon would be content with that, madam. We have some sympathy with
24 Mr. Ward's submission, but Verizon itself would be content with one week.

25 THE CHAIRMAN: Your job is more limited than theirs, no doubt.

26 MR. BRISBY: Yes, madam.

27 THE CHAIRMAN: Very well. Thank you very much. Mr. Pike, is there anything you wish to
28 say in response to anything you have heard?

29 MR. PIKE: Yes, madam, just a very small number of points. On the timetable for BT, I am not
30 going to push too hard on that, because we have made our point, but I would just say that it
31 is very important to Cable & Wireless that this matter is resolved as soon as practicable,
32 especially given the retrospectivity issues that are before the Court of Appeal at the
33 moment.

1 I would note though that in terms of not objecting to the six months for the Competition
2 Commission, that is obviously because it runs over Christmas and we take the point that the
3 Commission made there, that they will need more time because of that.

4 Also, in terms of the overlap with the LLU appeal, we do not accept that there is as much
5 overlap as Mr. Harris suggests, but I am not going to go into that any more. What I would
6 mention of course is that Ofcom did have the LLU appeal for about a month and a half
7 before they received our appeal, plenty of time to start working on it with no concerns about
8 the overlap.

9 I think there are a couple of points, madam, that I did not address in relation to your opening
10 remarks when I spoke the first time. Just to make to make it clear, from Cable & Wireless's
11 position, we do not object to BT having the whole of the model. Again, if it is only for their
12 confidential information it does not seem to make any difference whatsoever.

13 We are also quite keen to set a deadline by which the Tribunal should be informed as to
14 whether agreement has been reached on specified price control matters, and we certainly
15 agree that it should be done in parallel and therefore that the deadline should be set probably
16 just after the statements of intervention have been served.

17 Finally on BT, the only comment I had was on Mr. Ward's suggestion that there was an
18 overlap between the LLU appeal and the Cable & Wireless appeal in relation to corporate
19 overheads, and that we might be taking a different position and looking for a different
20 outcome there. I think I should point out that there is an overlap. In fact, it is an absolute
21 identity of interests on that one particular point. What both Cable & Wireless and Carphone
22 Warehouse are saying is that there appears to have been no allocation of overheads to
23 foreign businesses, in particular to these non-core business activities, and the result of that is
24 that there is a reduction in overheads for both Open Reach and BT Wholesale. It is the
25 same point, it is not the bump in the carpet.

26 Thank you, madam.

27 THE CHAIRMAN: In the sense that the bump in the carpet does not come up in the other appeal,
28 it comes up in some completely different place, which is not currently, I do not think,
29 subject to an appeal to this Tribunal.

30 MR. PIKE: I am not even sure you would have jurisdiction, madam. Thank you.

31 THE CHAIRMAN: Yes, thank you very much. I think we will rise for a few minutes and then
32 come back and let you know what we have decided. I will say we will come back at three
33 o'clock unless you are told that it will take us longer than that.

34 (Short break)

1 THE CHAIRMAN: We have considered all the submissions that have been made to us, and this
2 is what we propose to order. We will grant the permission to intervene to BT and Verizon.
3 We will accede to Ofcom's request for an additional four weeks for their defence. We will
4 also order the statements of intervention to be served two weeks after that. That means by
5 our calculation that the defence should be served by 10am on 16th November, which is a
6 Monday, and the statements of intervention by 10am on 30th November. Those, of course,
7 are deadlines and if anybody is ready and willing to serve their pleading before then there
8 is nothing to stop them from doing so.

9 We will ask the parties to notify us by the close of play on 4th December of the state of play
10 as regards the drafting of the questions. As we have indicated, we expect Cable & Wireless
11 to come up with a first draft as soon as possible, and for the parties to work on that in
12 parallel, so that we have made as much progress as possible by that time.

13 We have in mind that if there are issues to be resolved we will want to have a case
14 management conference on that before the Christmas break. It may be unnecessary, of
15 course, but experience shows that it is worthwhile pencilling something into diaries,
16 particularly during that very crowded time of year. So we would ask the parties to liaise as
17 soon as possible and let us know of a date in the week commencing 14th December which
18 would be convenient to pencil in just in case that is needed to resolve any issues. As I say,
19 it may not be necessary, but just in case it is.

20 We will make the confidentiality order this afternoon, if we have time, with the
21 undertakings we have had so far in, and we can add people as and when we receive their
22 undertakings. We will order that the disclosure of already served documents will take place
23 by 5pm on Monday, 5th October, which is two working days.

24 On the table provided in response to our letter of 29th September, we do not propose to set
25 any particular deadline for that, but as soon as the parties can provide an agreed document
26 along the lines that I have described in response to Mr. Pike's questions, then the more
27 helpful that will be for the Tribunal.

28 Is there anything else we need to cover before we rise? No. Thank you very much.
29