

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

IN THE COMPETITION
APPEAL TRIBUNAL

Case No. 1082/3/3/07

Victoria House,
Bloomsbury Place,
London WC1A 2EB

18th December 2007

Before:
MARION SIMMONS QC
(Chairman)

PROFESSOR PAUL STONEMAN
DAVID SUMMERS

Sitting as a Tribunal in England and Wales

BETWEEN:

RAPTURE TELEVISION PLC

Applicant

- v -

THE OFFICE OF COMMUNICATIONS

Respondent

Supported by

BRITISH SKY BROADCASTING LIMITED

*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. Michael Bowsher QC and Miss Elisa Holmes (instructed by Orrick, Herrington & Sutcliffe) appeared for the Applicant.

Mr. Christopher Vajda QC and Phillip Woolfe (instructed by the Director of Telecommunications and Competition Law, Office of Communications) appeared for the Respondent.

Mr. Peter Roth QC and Mr. Stephen Wisking (Partner, Herbert Smith) appeared for the Intervener, BSkyB.

HEARING

1 THE CHAIRMAN: Good morning. Before we start I have three matters to raise. The first
2 matter is timetabling – I hope you have agreed some sort of timetable – and we need to
3 discuss that before we start so we know how we are going to organise the day.
4 The second matter is that we understand that all parties are agreed that EPG services are
5 subject to the OFTEL 2002 Guidelines, and we are proceeding today on that basis, and I just
6 want to make sure that that is agreed by everybody so that there can be no dispute later
7 about that.
8 The third matter is really directed to Rapture. We note Ofcom and Sky’s objection to the
9 rehearsal by Rapture of matters for which permission to amend was refused. We are
10 unclear as to how Rapture now submit that they can have a further opportunity of raising
11 those matters. We do not wish today to go over ground on which we have already had
12 extensive submissions and on which we ruled in our Judgment on permission to amend the
13 notice of appeal and adduce further evidence. So without long submissions about that it is a
14 matter to be kept in mind.
15 Those are the only points that I am raising, so Mr. Bowsher?

16 MR. BOWSHER: I am obliged. Let me deal with the first point, timing. Obviously I have to
17 take a little longer – I anticipate being approximately two hours; I am not going to be
18 covering the whole of our written submissions, our written submissions are there to be read
19 and no doubt they will be read in due course. I intend to focus on what seems to me to be
20 the nub of the case. I anticipate to some extent my learned friends’ timings will depend a
21 little bit on how I go, how much interaction takes me beyond two hours, or where matters
22 develop. I think Mr. Roth hoped to be less than an hour, and I am not sure about Mr. Vajda.
23 Certainly all of us, I think, would hope to be able to deal with this matter today within
24 normal court sitting hours. One of the difficulties of this case is that while at heart it seems
25 to be quite simple it seems always to raise a number of byways, and we will try to keep to
26 the main road today but sometimes ----

27 THE CHAIRMAN: You cannot help going down lots of byways.

28 MR. BOWSHER: The byways do take time, particularly if you have to reverse out of them.

29 THE CHAIRMAN: It depends whether the byway comes back to the road.

30 MR. BOWSHER: That was scheduling – I have completely forgotten what the second point was.

31 THE CHAIRMAN: EPG services.

32 MR. BOWSHER: EPG services – thank you very much. Probably the clearest way, at least from
33 Rapture’s perspective, is that for the purposes of this case we accept – indeed, we would
34 contend that the 2002 Conditional Access Guidelines are the applicable guidelines. Of

1 course, there are subsequent guidelines. There is also a significant more general point that
2 EPG Services are not themselves conditional access services as defined.

3 THE CHAIRMAN: That is the point that we want to make sure that everybody is agreed,
4 notwithstanding that everybody is agreed that those guidelines apply to EPG services.

5 MR. BOWSHER: Yes, I think it is common ground. I will spend five minutes on this.

6 THE CHAIRMAN: Well hopefully you will not need to spend five minutes on this because
7 everybody will say “yes, we agree.”

8 MR. BOWSHER: EPG services are not conditional access services or access control services –
9 “CA/AC” to make some jargon up – but they are treated for this regulatory purpose as if
10 they were, at least for the purposes of this case. There are a number of points which might
11 arise which might raise some wider point. I do not want today to be making general
12 propositions which people in the future in this position might want to find ----

13 THE CHAIRMAN: But it is for the purposes of this case everybody is agreed.

14 MR. BOWSHER: Certainly that is our position; I do not believe anyone else will take a different
15 position. If there is a different position they might want to stand up now.

16 THE CHAIRMAN: We will hear from Mr. Vajda as to timetable and as to that. The third point?

17 MR. BOWSHER: On pleadings – it does not seem to us that the pleading points that are made are
18 really particularly substantial. What we have done, if I can hand up – the problem with
19 pleading points is that of necessity they can take quite a while to deal with. If I can hand up
20 three copies of a document which comes in two entirely distinct parts? (Document handed
21 to the Tribunal.) The first three pages you will see what it is – as I will be skating very
22 swiftly through the legislation but it is nonetheless important that I do go through it, it is
23 something my Junior has prepared to give us a quick thread through the legislation to see
24 where FRND started and finished. Four pages in is a table which picks up the Sky table
25 annexed to their skeleton and puts on a response. What we have done is identified where in
26 the accepted notice of appeal the argument arises.

27 To put it very briefly there are a number of points where similar arguments were in two
28 places in the amended notice, but the amended notice is not the one that we got permission
29 for. Similar arguments are in two different places and the Tribunal gave us permission in
30 one place and not in another.

31 THE CHAIRMAN: Because it was repetitive.

32 MR. BOWSHER: It was either repetitive or we put it in a slightly different way and the Tribunal
33 did not like the way we had dealt with it and so you quite appropriately struck it out in one
34 place but not in another. What we are relying on, as we sought to identify in this table, is

1 the one location where it is. This case has arrived to this hearing in the way it has done and
2 I hope we do not have to spend too long on the history of the pleadings in this case. What
3 we have sought to do in this skeleton is to keep the arguments as clean and discrete as they
4 are but that does sometimes mean that there will be coincidences or words that were used
5 which have been struck out of the accepted notice of appeal, but they still apply to the place
6 in the notice where permission has already been granted. It is the same argument. It is just
7 that in one place we have got permission; in another place we did not.

8 There are three specific issues perhaps I would address.

9 THE CHAIRMAN: You did not get permission because if it was already there, it was there, and
10 if you were trying to extend it then we can give you permission. That is why we struck it out
11 in one place, but not in another.

12 MR. BOWSER: We will have to see where it goes. It seems to us that the arguments we are
13 making are the arguments for which we have permission. They were, of course, developed
14 in certain places in the accepted notice of appeal and we have tried to stay within those
15 developments. We will have to see what others say. I have put in a written response. I do
16 not propose to go through it. It is there. If others want to say something about it, I may have
17 to come back to it in reply.

18 There are three specific issues I want to address. Firstly, discrimination. There is a separate
19 section in our skeleton argument on discrimination. I should emphasise - perhaps we did not
20 make it clear enough in the skeleton - that we are not pursuing a separate head of
21 discrimination because we were not given permission to do so. However, it is important to
22 understand what discrimination is about. It runs through, as the tribunal said in its judgment,
23 and is underlying most of this case. The legal test is FRND and D is discrimination - or, at
24 least, ND is non-discrimination. It is an important point to make when we are looking at
25 non-discrimination that one of the things that one has to do in looking at non-discrimination
26 is to not only treat matters that are similar in a similar manner, but also matters that are
27 different in a different manner. That is really all. We were trying to make a general
28 submission which reflects back. It was perhaps a little unfortunate the way we left it in, but
29 there we are. We are not seeking to make a general separate allegation. It is simply
30 reinforcing the general proposition we make about FRND.

31 The second point we would make is that there is an issue about the way in which we have
32 dealt with the relief. I will come on to relief at the end. There was a specific issue in the
33 judgment about the way in which we had sought relief. The Tribunal, probably correctly,
34 said that if the matter were to go back, the order could not be, "Look at duties including ---"

1 under the legislation. It should be all the duties or some of the duties, and not ‘duties
2 including’. Perhaps, again, unfortunately -- There is a difference, as it were, between a
3 forensic look and what the final order would be. What we are trying to do is say that, “They
4 have got these duties - the key ones are these for the matter of presentation today”. There is
5 a different issue as to what in the end the Tribunal decides to do. Probably the answer is
6 that if the Tribunal decides to remit, as we say it should, then it would probably have to say,
7 “Look at all the duties” and for which duties, see the judgment. The judgment will explain
8 which ones are more important than others. We are not seeking, as it were, to row back
9 against what the Tribunal said there. It is simply to make clear that there are some duties
10 which are more relevant to what we are talking about than others.

11 The third point is a point that Ofcom have made. This is not picked up in our table, but they
12 take issue with the way in which we have characterised the arguments as an allocation
13 between common costs and incremental costs. In our submission, that really is no more than
14 making the same -- We are simply making an argument, or casting an argument, which has
15 always been there. Indeed, it really lies at the heart of the case. This is the question as to
16 what extent the EPG charge reflects a reasonable contribution to the common cost. In
17 trying to say, “Well, what is the common cost and the incremental cost?” we are simply
18 using words to try and flesh that argument out. So, there really is nothing, in our
19 submission, in Rapture’s point that there is some new argument about the analysis of
20 common costs. For what it is worth, paras. 73 and 73(a)(1), amongst others, of the accepted
21 notice all concern our case that a key aspect of Ofcom’s error in this case was the failure
22 properly to analyse common costs - common costs and costs that are not common costs,
23 obviously. What one calls them is perhaps -- It is perhaps inevitable when one reaches the
24 end of this case that some terminology develops. I will comment in due course on some of
25 Ofcom’s terminology.

26 Those were the introductory points.

27 As always with three points, there is always a fourth. There is a general point made by Sky,
28 which we have not addressed in the table, that some of our skeleton looks suspiciously like
29 Leo Borwick’s witness statement which we have not been allowed to put forward as expert
30 evidence. In our submission, there is really nothing in that. It is not an argument in itself.

31 The reason why we were not allowed to call expert evidence is because it was said it looked
32 like submissions. With respect to wherever that hare started, it cannot be had both ways. If
33 it is submission, we are entitled to make it. The question is whether the submission falls in
34 one of the silos ----

1 THE CHAIRMAN: It is whether the submission requires back-up evidence. But, if it requires
2 back-up evidence, you have not got it.

3 MR. BOWSHER: We have not got the back-up evidence -- except in Mr. Henry's two
4 statements. We either have Mr. Henry's evidence or it is submission, or, if it is outside the
5 permitted silos in the accepted notice, then that is a different issue. The general blanket
6 point that we cannot run points which look a bit like Mr. Borwick is, in our submission a
7 very bad point. Indeed, I anticipate that what the Tribunal was rather expecting was that we
8 would be making some of those points by way of submission. Perhaps not all of them. We
9 have not made all of them. So, there we are. That was the other point I needed to make.

10 THE CHAIRMAN: Shall we ask Mr. Vajda how long he is going to take.

11 MR. VAJDA: Madam, what I have worked out, subject of course to interruptions and so forth
12 from the bench, if Mr. Bowsher is going to be about two hours, I would propose to be no
13 more than an hour and a half which would mean I would finish about three o'clock. Mr.
14 Roth has indicated that he will be forty-five minutes. He will finish at 15.45. That will
15 leave half an hour for Mr. Bowsher's reply. I think we are all very keen that we finish the
16 case today.

17 THE CHAIRMAN: We will try and finish today even if we have to sit after four-thirty.

18 MR. VAJDA: On the second point, as you know, we take the view that the 2002 guidelines do
19 apply to BPG. I am not going to mention anything about pleadings orally today. If there is
20 something to be done, we will probably put it in by writing. I have seen the schedule. I am
21 certainly not going to take time up on these points today.

22 MR. ROTH: You have heard from Mr. Bowsher that I will be an hour and from Mr. Vajda that I
23 will be forty-five minutes. As the interested party who is supporting Ofcom it does very
24 much depend on how Ofcom's submissions go, but I certainly cannot see that I will be any
25 more than an hour - indeed, maybe substantially less. On the question of the guidelines, yes,
26 we agree that they apply for the purpose of this case, subject only to this comment: namely,
27 as you have observed, they were drafted expressly for the CA and Access Control Services.
28 So, in interpreting their application to EPG services, that is a fact that needs to be born in
29 mind - that they do apply. One must not lose sight of that fact.

30 On the third matter of the pleadings, we put in that schedule. We have just received, literally
31 just before you walked in, this note from Mr Bowsher which we have not had time to digest
32 yet to see how far it goes. We have set out our concerns. Again, we will see how it goes.

33 THE CHAIRMAN: We will see how Mr. Bowsher deals with it.

1 MR. BOWSHER: Thank you. We would certainly reinforce Mr. Roth's point that one has to
2 have account of the fact that EPG is not a conditional service when looking at the ... You
3 already have a list of appearances, so I will not take up my allocation on that.
4 The starting point would be, in our submission, the simple point that in a competitive
5 market one would expect the price of service such as an EPG service to be in some way
6 related to its cost, but this is not a competitive market, which is why Ofcom sits at the heart
7 of a complex regulatory structure and the question for the Tribunal is really whether Ofcom
8 did enough. Our ending point is that Ofcom did not do enough, that in a number in its
9 determination it was happy to accept Sky's position without drilling down and testing what
10 was being said. In some cases on the basis of a lack of logic, in some cases on a strange
11 willingness to accept an unduly broad range of possibilities. This point does seem to get
12 quite tangled and at some points Ofcom seems to think that we are somehow contesting this.
13 The short point, which I think is common ground, and has always been, is that the correct
14 price whatever it is, has to lie between the incremental and stand alone cost making some
15 reasonable contribution towards common costs is may be the way of putting it. But just to
16 say the correct place lies somewhere in that band, when Ofcom accepts that that is a very,
17 very large band, does not mean that anywhere in that band is FRND, yet some parts of the
18 determination – indeed, it seems to us the conclusion of determination – seem almost to rely
19 on the proposition that anywhere in the band must be FRND, and we just find that
20 perplexing. Much of what Ofcom says in its skeleton, and I am not sure in the time I will be
21 able to go through all of the points that my juniors have been feeding me, much of what has
22 been said seems to us to be somewhat illogical and certainly unduly defensive – curiously
23 defensive – about the approach it is taking. It is a curious coincidence that today is the day
24 when the consultation is initiated by Ofcom into the operation of the pay-tv market. I went
25 on the website a couple of hours ago and there clearly are concerns about the way in which
26 an adjacent market – concerns about the imperfections of that market. We are in a different
27 but clearly related market and really the nub of this case is about the extent to which we – as
28 a free to air broadcaster, not part of the pay-tv market – have to “subsidise” is almost an
29 emotive word, but emotive words such as “free-riding” are used about us, to what extent are
30 we bound up in that problem in the pay-tv market. It seems odd to us, indeed it seems to us
31 that one logical position that Ofcom might take is that actually there is an adjacent problem
32 to the pay-tv market in the way in which EPG only uses – I draw a distinction between users
33 and consumers, users such as ourselves – there is a problem about this adjacent sector and
34 actually we would welcome the opportunity to go and have a look at this again properly. It

1 seems to us that if one is going to get to grips with the pay-tv market you might want to get
2 to grips with this particular problem at the same time. It struck us as a curiously over-
3 defensive approach being taken.

4 Having made that introductory observation, the documents that the Tribunal has are
5 extensive and perhaps, given the circumstances of the case, they have not been produced as
6 a single final bundle. I hope that we will be able to get our way around them. What you
7 should have are two supplementary documents' bundles – I do not think we need to get
8 them all out. What you have in there is to some extent a miscellany but you have the
9 skeleton arguments of all three parties, the witness statement of Mr. Henry, the accepted
10 notice of appeal – in other words, the one that we are working with – various other
11 documents which support some of the arguments made in the skeleton, but I think you will
12 find most of the documents one needs are actually in those two supplementaries. Then one
13 has the original pleading files for which perhaps we need to go to sometimes for example
14 for the Conditional Access Guidelines, the determination itself, Mr. Henry's first witness
15 statement. I do not think there are many other documents that I will be needing to look at –
16 there is one other decision, but I do not think there are that many documents in the earlier
17 files that I will be needing to go to but others may be in a different position. The only other
18 materials – I will be using the fourth edition of the grey book.

19 THE CHAIRMAN: I have the fourth edition.

20 MR. BOWSHER: Can I make a few observations to start with about the proper approach to this
21 hearing? I do not think I need to take too long on this. The starting point for the way in
22 which this Tribunal is to deal with the matter is Article 4 of Directive 2002 21 which, if you
23 have the grey book is p.1750, para.4628.

24 THE CHAIRMAN: Article 4?

25 MR. BOWSHER: Article 4. This is the overarching Directive, the Framework Directive for
26 Electronic Communications Networks and Services. If you look at Article 4(1)

27 “Member States shall ensure that effective mechanism exist at national level under
28 which any user or undertaking providing electronic communications networks
29 and/or services ...”

30 And then:

31 “... has a right of appeal against a decision to an appeal body that is independent
32 of the parties involved. This body, which may be a court, shall have the
33 appropriate expertise available to it to enable it to carry out its functions. Member

1 States shall ensure that the merits of the case are duly taken into account and that
2 there is an effective appeal mechanism.”

3 It is a slightly confusing sentence, because it is not quite clear where the merits are
4 supposed to be dealt with. I think it probably means they would have to be dealt with by the
5 Regulator and by the appeal body; it seems to be a general statement.

6 THE CHAIRMAN: It must have to be dealt with by the Regulator, the question is whether they
7 were properly dealt with by the Regulator, and if one takes a parallel on other cases before
8 this Tribunal where they have to consider appeal on merits, which is effectively why those
9 words are used in other places, what has been said is that if there is evidence which has not
10 been put before the Regulator, but could have been put or ought to be considered then that
11 comes before us and that is why you have Mr. Henry’s evidence, for example.

12 MR. BOWSHER: Yes.

13 THE CHAIRMAN: But it is not a complete rehearing with everybody putting in new things and
14 we rehearing it and ignoring what the Regulator said.

15 MR. BOWSHER: No, because the starting point is the determination.

16 THE CHAIRMAN: Yes.

17 MR. BOWSHER: But to go down to the national legislation it is an appeal on the merits and
18 therefore not an appeal by way of Judicial Review, it is not a *Wednesbury* test.

19 THE CHAIRMAN: It is an appeal.

20 MR. BOWSHER: But it is an appeal.

21 THE CHAIRMAN: Not a rehearing.

22 MR. BOWSHER: Well an appeal can be a rehearing and in general terms an appeal can be a
23 rehearing.

24 THE CHAIRMAN: But not normally.

25 MR. BOWSHER: But not normally, that is the point. It only becomes a rehearing if the
26 circumstances – whether the change of circumstances or perhaps the nature of the failure by
27 the court below, the Tribunal below are such ----

28 THE CHAIRMAN: Well the normal thing is they send it back to the original court if they think it
29 needs a rehearing unless it is very simple, if it is an obvious point.

30 MR. BOWSHER: Simplicity is one reason. There may be a number of reasons why you have to
31 do that. The point is that an appeal can be by way of a re-hearing, but it is not normally.
32 We would certainly say that given the powers that this tribunal has to send matters back, we
33 would emphasise that normally the answer here would be to remit. The question is how one
34 deals with the question as to what extent one should defer to the regulator. It is not a

1 question of deference in a Waynesburg approach, but clearly the Tribunal does not assume
2 that the regulator is wrong either. In our submission one has to look ----

3 THE CHAIRMAN: They have got a margin of appreciation if one uses that term. Within that
4 band, as long as what they have done is another way of doing it -- Well, there are two ways
5 of doing it, and they have taken one approach, then one has to have some deference to that,
6 or respect for it.

7 MR. BOWSHER: Yes. That is probably right. I do not think I need take that very much further.
8 The question then is: what is the legislative basis for what we are dealing with? Again, I
9 have set out -- There are a number of references in the skeleton to legislative materials.

10 MR. SUMMERS: While we have got that open, I wonder if it is helpful to look at Article 20 of
11 the same directive which is on p.1758, para. 1.

12 MR. BOWSHER: What I propose to do is produce a short list of paragraph references in the Grey
13 Book to the materials that are in the skeleton. If we are all working from the fourth edition,
14 that would be helpful. There are a number of references just to help one get around that
15 material.

16 Can I then move on to the legislative framework for which purpose one has to go back to
17 2002 19, which is only a few pages earlier, p.1722. The landscape note is there just as a
18 shopping list of where we are going. I will take this swiftly, really just to highlight where
19 the references are to be found. This is para. 4585, Article 5(1)(b). We are here concerned
20 with the powers of the national regulatory authorities with regard to access and
21 interconnection. If one goes to the second paragraph of 5(1),

22 “In particular, without prejudice to measures that may be taken regarding ... (b) to
23 the extent that it is necessary to ensure accessibility for end-users to digital radio and
24 television broadcasting services specified by the Member State, obligations on
25 operators to provide access to the other facilities referred to in annex 1, Part II on
26 fair, reasonable and non-discriminatory terms”.

27 Going down the tree, that is the top of the tree in terms of the legal hierarch where FRND
28 starts. Picking up Article 5(3) as well,

29 “Obligations and conditions imposed in accordance with paras. (1) and (2) shall be
30 objective, transparent, proportionate and non-discriminatory”.

31 Then the reference to Annex 1, Part II, which is at the top of p.1729, going back to the body
32 of the directive -- This, of course, is a slightly odd position because we are here back
33 dealing with conditional access systems. But, as the conditional access guidelines are

1 agreed as a plan, I think one has to again look at the conditional access provision which is
2 Article 6.1 on p. 1723.

3 THE CHAIRMAN: Apparently there is a problem because the bookshops have run out of any
4 copies of the Grey Book. We have the last copies of the Grey Book that can be acquired.
5 Are there any spare copies in here because the shorthand writers are not going to be able to
6 follow this unless they have it in front of them. (Handed) Thank you very much.

7 MR. BOWSHER: It is not the book that is a nightmare - it is the legislation.

8 THE CHAIRMAN: Absolutely. So, if they have it in front of them, they will understand what is
9 going on as they are listening to it.

10 MR. BOWSHER: What I was trying to do is run down the silo, as it were. Where Article 5 goes -
11 - then Ofcom goes back to Article 6 which is relevant because it is conditional access.
12 Therefore it is the legislative starting point for the guidelines.

13 “Member States shall ensure that, in relation to conditional access to digital
14 television and radio services broadcast to viewer and listeners in the Community,
15 irrespective of the means of transmission, the conditions laid down in Annex 1, Part
16 I apply ----“

17 If you kept your finger where we just were, back at p.1728, which is Annex 1, Part I, the
18 relevant part is Part II, (b) ---

19 THE CHAIRMAN: It is para. 4602 in brackets.

20 MR. BOWSHER: Part 1, 4601. Conditions for conditional access systems to be applied in
21 accordance with Article 6(1).

22 “Member States must ensure in accordance with Article 6 that the following
23 conditions apply ... (b) all operators of conditional access services, irrespective of
24 the means of transmission, ... offer to all broadcasts, on a fair, reasonable and non-
25 discriminatory basis compatible with Community competition law, technical
26 services ...”

27 That is the legislative requirement for these services to be charged for on a fair, reasonable
28 and non-discriminatory basis.

29 THE CHAIRMAN: If you look at the next page, Part II: other facilities to which conditions may
30 be applied ---- “(b) Access to EPG”.

31 MR. BOWSHER: Yes. Absolutely right. Other facilities to which those conditions may be
32 applied.

33 THE CHAIRMAN: That may be why everybody is now agreed that this defines the EPG.

34 MR. BOWSHER: Yes. Exactly. I am sorry. I was confused as to the point you were making.

1 THE CHAIRMAN: I think Mr. Roth pointed it out before.

2 MR. BOWSER: Indeed. One way or another, that is the legislative heading, as it were. That is
3 the Community obligation. One then goes down to the Communications Act 2003 which in
4 this tome starts – we are looking for s.73 – at p.909. I am skipping out some intellectual
5 working which is in the skeleton and there is probably more to be said about that. This is
6 then the domestic provision which sets out the starting point for the conditions that may be
7 applied regarding access. 73(1): “The only conditions that may be set under s.45 ...” can I
8 skip s.45 I do not want to go back? “... as access related conditions are those authorised by
9 this section.” 73(2) and then we have copied out in our little note:

10 “Access related conditions may include conditions relating to the provision of such
11 network access and service interoperability as appears to OFCOM appropriate for
12 the purpose of securing ...”

13 And then it says what the goals are to be – sustainable competition, greatest possible
14 benefit, and so on and so forth.

15 Then 74(1) specific types of access related conditions:

16 “The conditions that may be set by virtue of section 73(2) also include condition
17 which for the purposes of securing end-to-end connectivity for the end users of the
18 systems provided by means of electronic communications networks –

19 (a) impose obligations on a person controlling network access to any of
20 those networks ...”

21 Then 74(2):

22 “The conditions that may be set by virtue of section 42(2) also include such
23 conditions imposing obligations on a person providing facilities for the use of
24 application programme interfaces or electronic programme guides ...”

25 Here it arrives. “... as OFCOM consider to be necessary for securing ...” and then (b):

26 “that the facility for using those interfaces or guides is provided on terms which

27 (i) are fair and reasonable, and

28 (ii) do not involve or tend to give rise to, any undue discrimination against
29 any person or description of persons.

30 And there you have it; there is a definition of electronic programme guide over the page in
31 (3).

32 Again, FRND is the legislative requirement. That is then continued down in to various
33 regulatory documents of different types. We have given two references in the note one to
34 the continuation notice which, of course is the regulatory document relevant to Sky’s

1 operation at this time. We have given the notice – I do not propose to take you to it now, it
2 is in the original appeal document, and if I can give a comprehensive list of references in
3 due course that we have been referring to.

4 Likewise, the Code of Practice in Electronic Programme Guides, they all make the same
5 point – it is FRND rather than anything else is the starting point.

6 The points that we make therefore in our accepted notice, paras. 80 to 84, in our submission
7 are really just trying to put flesh on in general terms what is discriminatory, or non-
8 discriminatory, and it is important when one is considering the position of Rapture to
9 consider its position and its particular circumstances in considering whether or not it is
10 being discriminated against. It is discriminatory to treat it as being in a particular way
11 without having regard to its particular circumstances. That, of course, relates back to other
12 Community obligations which we referred to because to the extent that it is necessary to
13 treat Rapture in a particular way, to respect obligations of plurality and so forth. They all
14 mesh together and we have dealt with that in a little more detail in the skeleton. Those are
15 the legislative provisions; that is what the requirement is.

16 There are some new things which have arisen, which in Ofcom's submission seems almost
17 to take on a sort of *quasi* legislative status. We have something called "The Principle of
18 Competitive Neutrality" has been coined in the Ofcom skeleton. We are told that it is
19 necessary to protect Sky's investment incentive, although it is not quite clear which
20 investment incentives they are, whether there is the investment incentives that arose when
21 Sky first set up the platform many years ago, or some other investment incentive again is
22 not made clear. In our submission the proper way of protecting their investment incentives
23 is to analyse what the rate of return is and that is the beginning and the end of that. There is
24 not some further overarching principle of protecting investment incentives, you protect that
25 by doing a proper analysis of rate of return.

26 The analysis that Ofcom went through also seems to be based on something of a myth about
27 the way in which Rapture and Sky could operate – there is a sort of myth that somehow or
28 other you could reproduce a price that is the price, or is the notional price from a
29 competitive negotiated market. I am not today in my oral submission going to get into any
30 great detail about the facts of what happened. I do not think it is necessary for the Tribunal
31 to hear Mr. Henry or Miss McCormack about what happened – you have the documents.
32 There was a negotiation – I will look in a moment at the determination – not surprisingly
33 Sky in its position is in a position to say "No, we are not having it." We will look in a
34 moment but in the determination Ofcom's position seems to be "Rapture did not try hard

1 enough, or it did not have good enough arguments”. I am not criticising Sky here at all.
2 Sky is a commercial entity, if I was a commercial entity I would not go around submitting
3 to policy arguments.

4 THE CHAIRMAN: Is not the whole point of the dispute resolution procedure that if you have
5 negotiations and you do not get anywhere you can refer it? So why do we need to go into
6 the history?

7 MR. BOWSHER: Well, there we are.

8 THE CHAIRMAN: That is your point.

9 MR. BOWSHER: That is my point. I do not propose to burden the Tribunal with exciting cross-
10 examination of whose fault it was that the non-negotiations did not get any further. It is not
11 a surprise to me that Sky in its position says “no”, and Rapture says: “Well this puts us in a
12 very difficult position. Ofcom does not believe that Rapture is in a financial situation.

13 THE CHAIRMAN: What you are saying is you have not got two equal parties, you do not have
14 BP and Shell, or whatever it is, doing it, you have somebody who has a lot of resources and
15 somebody who has little resources.

16 MR. BOWSHER: Indeed.

17 THE CHAIRMAN: And one has to take that into account, but you get to a stage where those
18 negotiations break down, whatever the negotiations are and Ofcom decided that it would
19 accept the ----

20 MR. BOWSHER: The rate card price.

21 THE CHAIRMAN: And there we have it. Unless somebody explains to us why this is necessary
22 or relevant, it seems it is not the starting point.

23 MR. BOWSHER: That is very helpful because that encourages me. There is no sheet in here I do
24 not think – except maybe a back up sheet in case you were interested in it – that covers
25 negotiation in any detail, because it does not seem to me that that is really the point. Ofcom
26 is having to establish a proxy market price where there is not really an effective market and
27 whether it likes it or not that is its job. It is odd ----

28 THE CHAIRMAN: Only if they find that the price charged was not ----

29 MR. BOWSHER: FRND?

30 THE CHAIRMAN: Yes.

31 MR. BOWSHER: Exactly. If I could ask you to turn up the Ofcom skeleton, I do not know if
32 you have that to hand. It is in the supplemental file, if that is the way you have it, but you
33 may well have taken it out. It is tab 1 of the supplementary file.

34 THE CHAIRMAN: Yes.

1 MR. BOWSHER: I do not know what pagination you have, but I am using the pagination from
2 the supplementary file.

3 THE CHAIRMAN: I am not using the supplementary file so just give me the paragraph number.
4 Is it para.17.

5 MR. BOWSHER: Paragraph 17, it is p.7. If we are going to talk about new arguments, this is a
6 fascinating one:

7 “Ofcom submits that the Tribunal needs to consider Rapture’s arguments not only
8 in the context of the facts of the present case but also in the wider policy context.
9 Any decision made that Rapture need not contribute to the cost of the STB subsidy
10 would have wider application not only to all of the Sky Platform’s EPG listing
11 customers, but also to its CA and AC customers.”

12 I have to say we found that a little surprising, not least because we were told that this was a
13 small isolated case when we were dealing with the proportionate approach of dealing with it
14 and also because there is no hint as to what the wider policy context is, and also because it
15 makes exactly the point that I have just ventilated this morning that there seems to be a link
16 between policy issues about EPG listing customers and CA and AC customers. This is all
17 most puzzling. None of this policy context, as far as we can tell – not that we know what
18 it is – is dealt with in the determination. It may be that the wider policy context is “We did
19 enough and the Tribunal should not make us do any more”, and it is as simple as that. We
20 rather doubt it because that is not what the last sentence says. The last sentence rather
21 suggests that there is some bigger picture that we do not know about.

22 PROFESSOR STONEMAN: Just before we get too far into this I would like to gain some sort of
23 common definition of what we mean by “EPG Services”. In the first instance it seems
24 obvious that it is Electronic Programme Guide, but what we are actually talking about is not
25 Electronic Programme Guide alone, but also access, and I notice in the grey book, p.910,
26 where we were a little while ago ----

27 MR. BOWSHER: Page 910, that seems to be a statutory definition, does it not?

28 PROFESSOR STONEMAN: Under 3(a) and (b), at the top of the page here, it is “ the listing or
29 promotion “, so it is the listing of programmes, but then in addition a facility for “obtaining
30 access” it says “to the programme service or services listed”, and I am not sure whether that
31 is the programmes. So are we by “EPG” meaning the Electronic Programme Guide plus
32 access to the platform, or do we just mean the Electronic Programme Guide and access to
33 the platform is something different?

1 MR. BOWSHER: We are talking simply about the Guide and what it does. A programme guide
2 – Mr. Henry has helped me produce a programme guide, which you will recognise. There
3 is an electronic version of that which, if you have Sky or cable or whatever, you will be
4 familiar with and that is simply the listing or promotion of the programmes. When you get
5 to the right number you reach Rapture and you say “I want to watch Rapture” and it enables
6 you to go through that number to access Rapture that way.

7 PROFESSOR STONEMAN: But is that latter part also part of the Electronic Programme Guide,
8 because I can read the “Radio Times” and I can know what programmes are on without
9 turning on the television, and so I can know what is there, that is the guide without having
10 access to the programme.

11 MR. BOWSHER: That is right, but the service that it has provided does both bits, but it does not
12 provide anything to do with conditional access or interactive access.

13 PROFESSOR STONEMAN: Right, but it is two parts, one part is the actual guide and the other
14 part is the provision to supply those programmes via the Sky platform.

15 MR. BOWSHER: As I understand it there are different ways of doing that. In other countries
16 you can actually get some software and do your own electronic programme guide and give
17 it to whoever it is. In this country Sky or whoever, asks you to provide your next two
18 weeks I think it is of the “Radio Times” information , you give that and they put it in some
19 software, so they then have day by day what goes into the electronic programme guide. But
20 it is not just -----

21 THE CHAIRMAN: Can I help on this? It is very useful, you show us the Radio Times, and the
22 Radio Times is a list of programmes. If one then goes to the next stage one had – I forget
23 what it is called – there is a programme which you can get on the television, which was long
24 before this – Ceefax, yes – and that gives you the equivalent to the Radio Times on the
25 screen which you could not access. Right? So, you saw that BBC 2 was doing something
26 and you were interested in that programme and you wanted to watch about penguins, or
27 whatever it was, and you then went to BBC 2 and did it yourself. This definition in here
28 seems to take it one stage further because this definition says that electronic programme
29 guide means ‘a facility by means of which a person has access to any service which consists
30 of the listing or promotion, or both the listing and promotion and a facility for obtaining
31 access in whole or in part to the programme’. So, it is part of the electronic programme
32 guide, but it has gone one stage further than Ceefax.

33 MR. BOWSHER: There are two points there. I do not know if it still exists.

34 THE CHAIRMAN: They used to be numbers.

1 MR. BOWSHER: They used to be numbers which, in a sense, is the second bit of it. That would
2 enable you to do the accessing without ----

3 THE CHAIRMAN: You had to do it yourself.

4 MR. BOWSHER: You had to do it yourself and you had to know the numbers that referred to the
5 programme you wanted. What the EPG does is link up the programme that you want with
6 the number that does the trick.

7 THE CHAIRMAN: Yes. But, it is part of an electronic programme guide now, according to the
8 statute, that it is not just a list of the programmes, but it must also give you an ability to
9 access the programmes.

10 MR. BOWSHER: It is a service to customers which enables them to locate the channel and the
11 programme which they would otherwise have to locate -- It can be done. One of the points
12 in Mr. Henry's evidence - and maybe my children could do this, but I cannot - is that maybe
13 they could rig things up so that you could do it yourself. There are a number of ways of
14 doing it.

15 MR. BOWSHER: I am sorry. It is a facility for obtaining access in whole or in part to the
16 programme service, or services, listed or promoted ----

17 MR. BOWSHER: But it is not the only way. It is a service that is provided that enables you to
18 access ----

19 THE CHAIRMAN: Are you saying that it would be sufficient under this section if they gave you
20 the number and you did it yourself?

21 MR. BOWSHER: Sorry? Sufficient for what? I am sorry. I am not sure whether that would
22 constitute -- I suppose it would consist part of it. So, it might be an EPG. I do not think that
23 is really pertinent to today. The point is that that element of the service is part of the EPG
24 service. You can access the programmes yourself without the EPG. If you are up to it you
25 do not have to go through Sky. You can buy a free-to-air system, such as Mr. Henry has,
26 and do it yourself. You do not need the EPG at all. You can identify the channels for
27 yourself. But, what the EPG does is given the fact that there are hundreds of channels out
28 there, and it is no longer what it used to be in the easy days of two or three channels -- It
29 does the hard work for you, and tells you what programme is on when, and provides an easy
30 electronic means of enabling you to get your television tuned on to the right programme at
31 the right time. That is it.

32 THE CHAIRMAN: My question is whether you satisfy subsection (3)(b) if -- not you personally,
33 but whether you can satisfy subsection (3)(b) if all you do is give the number, or whether

1 the whole point of it is that it is a facility for obtaining access, i.e. that you can then, when it
2 comes up, press the Select button and you get into the programme.

3 MR. BOWSHER: To be honest, I do not know. I do not think that such a service exists. If it
4 does, I am not sure what the position is ----

5 THE CHAIRMAN: That is a service because you look down the list, you see whatever it is, you
6 press the Select button and you get the programme.

7 MR. BOWSHER: I am trying to work out -- This is not the service that Sky are offering here
8 though.

9 THE CHAIRMAN: Is it not? That, I think, is where the confusion lies because ----

10 MR. BOWSHER: That is the service to consumers, but we have to provide -- What we get is the
11 ability to list our programmes on their platform.

12 THE CHAIRMAN: But also the ability for the consumer to press the Select button and get
13 automatically on to your programme.

14 MR. BOWSHER: Yes. That is what the EPG does for the consumer, yes.

15 THE CHAIRMAN: Is that not part of the definition in subsection (3)(b)?

16 MR. BOWSHER: Yes. That is what the facility of obtaining access is.

17 THE CHAIRMAN: That is the difference between that and the Radio Times or Ceefax.

18 MR. BOWSHER: Yes. It does something which Radio Times did not do and Ceefax did not do.
19 But, it adds that element that those old numbers used to do.

20 THE CHAIRMAN: I think the question was whether that is part of the requirement for an
21 electronic programme guide or whether it is an add-on.

22 MR. BOWSHER: In the way it is defined it consists of (a) and (b). So, you need to have that
23 facility. The point is that it is helping you get there. Access is a rather funny word to use, in
24 a way, because you can get access without the EPG. You do not actually need it to obtain
25 access. It facilitates obtaining. The definition does not quite fit technical reality. It enables
26 you to access, but you could do it another way. It enables you to access in the way that you
27 have described by simply ----

28 THE CHAIRMAN: If you can do it another way you are not doing it as part of an electronic
29 programme guide.

30 MR. BOWSHER: Exactly.

31 THE CHAIRMAN: In order to provide an electronic programme guide -- Is it that facility that
32 has to be provided? If it is that facility that has to be provided, i.e. automatic access, then
33 that part of the electronic programme guide -- If all you have to do is provide the number
34 and that would be sufficient and provided the number is the facility for obtaining access,

1 then actually the automatic Select button provision is additional to electronic programme
2 guide.

3 MR. BOWSHER: The definition has both. So, as you say, you have to have the facility for ---- It
4 cannot be enough just to have an electronic version of Radio Times. You need to take the
5 second step.

6 THE CHAIRMAN: But is the second step just giving a number? Would that suffice? Or, is the
7 second step that you have to have a facility - a facility being ----

8 MR. BOWSHER: -- the automatic feature that you just press the button? That would involve
9 construing the word 'facility'. The reality is that the evidence is that there are only three
10 systems that do this, and the facility they all have is a button.

11 THE CHAIRMAN: Except, of course, for the definition. That is why it is an electronic
12 programme guide, because that is the facility that you can offer. I think Professor
13 Stoneman's point is as to whether there is an electronic programme guide plus automatic
14 access, or whether automatic access is part of what you have to provide in an electronic
15 programme guide.

16 MR. BOWSHER: Automatic access is the facility that fulfils that part of the definition.

17 THE CHAIRMAN: So, it is within electronic programme guide.

18 MR. BOWSHER: Yes. But, whether there is some other facility, I do not know. That is probably
19 not the UK market, or ----

20 PROFESSOR STONEMAN: It may be taking it a bit further than I was thinking. I was thinking
21 of not even the automatic bit. I just wanted to make sure that when we talk about EPG we
22 are all talking about the same thing - that is, it is a programme listing, plus access to the
23 programming. I am not too bothered myself whether it is automatic, or not, because I can
24 see that you can have a programme listing without access to the programmes. You yourself
25 have said that you can have access without electronic programme guide on top of it. So,
26 when we are talking about an electronic programme guide, does it cover both parts of it? Is
27 it a sort of bundles product? Or, are we just talking about one part? Or is everybody talking
28 about it in the same way - that is, the guide plus the access to the programme.

29 MR. BOWSHER: That seems to be the basis on which everyone deals with it. What it is not is
30 conditional access, or access control. It is not pay-tv. It is not interactive television.

31 PROFESSOR STONEMAN: No. No. That is fine. Could I just have that confirmed by the other
32 two?

33 MR. VAJDA: Yes, Professor, that is entirely correct. The important point to bear in mind is that
34 what you are getting under the EPG is access to the programmes - not access to the

1 platform. You need both (a) and (b) to be fulfilled so that you are within 74(2) of the
2 Communications Act.

3 MR. ROTH: You get access to the programmes but you will already have had to arrange access
4 to the platform.

5 MR. BOWSHER: Sir, it is two elements. It is the listing and promotion of the programmes and
6 (b) a facility for obtaining access. Those are cumulative requirements - not alternative
7 requirements.

8 PROFESSOR STONEMAN: Right. But as soon as you have access to the platform ---

9 MR. BOWSHER: That does give you access to the platform, yes.

10 PROFESSOR STONEMAN: The access to the platform gives you access to the programmes. Or
11 is it the other way round, are you saying?

12 MR. BOWSHER: No. You can have access to the platform via the EPG, but the question I think
13 you have asked is, "What do we mean by EPG?" The answer is given by s.74(2) which has
14 two limbs in it. The first limb is the listing. The second is the facility for obtaining access.
15 They are cumulative requirements. (b) there - where it says 'obtaining access' it means
16 access to the programmes in (b).

17 PROFESSOR STONEMAN: So, when you are talking about electronic programming, it does not
18 include -- Somehow you have pre-determined access to the platform.

19 MR. BOWSHER: Yes.

20 PROFESSOR STONEMAN: You see, when it comes to costs, whether the access to the platform
21 is charged into the EPG fee or ----

22 THE CHAIRMAN: Access to the platform or access to the programme?

23 PROFESSOR STONEMAN: The platform.

24 MR. BOWSHER: There is a slight difficulty that the way you are putting it confuses the
25 situation. One has to consider that there is access by the consumer and there is access by the
26 broadcaster. The broadcaster accesses the platform. The consumer accesses the channel.
27 The definition, I think, is intended to see this from the perspective of the consumer. What
28 the consumer needs is: "Where is the channel? What is on? Press the button". That is what
29 an electronic programme ----

30 THE CHAIRMAN: But you have to have access ---- I am not sure that that is quite right.

31 MR. BOWSHER: The consumer does not need access to the platform.

32 THE CHAIRMAN: He has to have some sort of way of getting on to that list. That list, as I
33 understand it, is the platform. Then he presses the button and has access to the programme
34 which is very different. BBC 1, BBC 2, etc. But he has got something before that which is

1 access to the list, which you either get through a Sky satellite thing or you get through
2 whatever-it-is-called.

3 MR. BOWSHER: I think there might be a slightly different terminological use of 'access'.

4 Access to the platform, I think in most of our documents, and I am conscious that a lot of
5 terms are not used consistently -- Access to the platform I think is generally used in these
6 documents as access by the broadcaster to get on to the platform, to have the benefit of
7 being on the Sky platform.

8 THE CHAIRMAN: When you look at the definition of 'electronic programme guide' it is
9 looking at it from the consumer's point of view, is it not?

10 MR. BOWSHER: Yes. Yes.

11 THE CHAIRMAN: It is saying that it must give you (a) the listing, and (b) the facility for having
12 got to the listing and decided what programme you want -- obtaining access to the
13 programme.

14 MR. BOWSHER: Yes. You can access the programmes without the EPG if you are a consumer.

15 The broadcaster accesses the platform, but that is a different -- It is not the same sort of --

16 THE CHAIRMAN: Sky, or whoever it is, puts their programme on the list, which is the
17 platform.

18 MR. BOWSHER: Exactly. That is what you are paying for.

19 THE CHAIRMAN: So, you are paying to get yourself on the list. What the list has to do is in the
20 definition of electronic programme guide.

21 MR. BOWSHER: Yes.

22 THE CHAIRMAN: It must give the consumer access to the list and give it a facility for obtaining
23 access to the programme on the list.

24 MR. BOWSHER: Yes. You can see the way it was charged. If you take the statement of
25 intervention -- Perhaps it would be useful to see it from Sky's perspective in the way they
26 were charging for these things. If you take the statement of intervention, Tab 1, and have
27 the statement of Emma McCormack -- This is the way they are charging for the
28 broadcaster's access - not for the viewer's access. Can I suggest that the Tribunal simply
29 reads paras. 25 to 35 because that actually summarises Sky's position as to how it charges
30 for these things? There is a fuller version of it at Tab 4, but I will come to that in a moment.

31 PROFESSOR STONEMAN: (Pause whilst read): Access to the platform I understood to be that
32 Rapture were able to transmit programmes via the Sky platform. For that, Sky do not
33 charge. That is free. However, should you wish to be listed in the EPG listing you have to
34 pay

1 MR. BOWSHER: That is right.

2 PROFESSOR STONEMAN: Is that the correct way of putting it?

3 MR. BOWSHER: Yes.

4 PROFESSOR STONEMAN: So, for the actual being on the platform there is no charge as such.

5 The EPG charge includes an amount to cover some of the common costs that come from

6 being on the platform.

7 MR. BOWSHER: Yes.

8 THE CHAIRMAN: What do you say the platform is?

9 MR. BOWSHER: Can I take you back? In our skeleton you start out by broadcasting from a

10 satellite which is not the platform itself. The services provided by Sky to broadcasters -

11 what we have defined as 'the platform' and so I want to make sure that I get the reference in

12 the skeleton so as not to make any inadvertent contradictions -- It is para. 8 ----

13 THE CHAIRMAN: In your skeleton at para 8.

14 MR. BOWSHER: The platform is not the transponder, or anything like that. The platform is the

15 suite of channels, as it were. Paragraph 8: "Sky provides a number of technical platform

16 services to broadcasters through its platform, including ----" and then we set out and

17 describe what they are. At para. 9, "A channel broadcasting through the Sky platform may

18 choose not to avail itself of any of the technical platform services". So, you can avoid

19 having any platform services, but the only way that the channel can then be viewed would

20 be if you go off and do it yourself.

21 So, the only platform service you specific use is the ability to be in the listing. It is the

22 benefit of being in the listing that you are using because it is that way that anyone bothers to

23 watch you.

24 THE CHAIRMAN: So, listing is part of the platform.

25 MR. BOWSHER: It is the platform service. The EPG is one of the platform services.

26 THE CHAIRMAN: Yes. (After a pause): But, in order to be an EPG you also have to have the

27 facility for obtaining access. So, in your para. 9 of your skeleton ----

28 MR. BOWSHER: You, the broadcaster, need to be able to have the right -- You need to buy off

29 Sky the ability to give to Sky your information for Sky to put it up. So, if you go through

30 the Sky set-top box you will see that Rapture is at whatever it is, and at ten o'clock it is

31 going to show whatever it is going to show. That is what you buy.

32 THE CHAIRMAN: That is not the whole of an electronic programme guide - EPG. Part of the

33 electronic programme guide, the EPG, is the facility for obtaining access.

1 MR. BOWSHER: Yes. Exactly. It is the right to be in there, and then the consequence that you
2 can then be picked up through the platform. Exactly.

3 THE CHAIRMAN: Not through the platform.

4 MR. BOWSHER: Sorry.

5 THE CHAIRMAN: Well, it is through the platform, but as far as the consumer is concerned ----

6 MR. BOWSHER: Through the box, from the consumer's perspective.

7 MR. ROTH: I do not know if I can help you. While the statement in para. 8 that Sky provides a
8 number of technical platform services to broadcasters through its platform is uncontentious
9 ---- then they set out some services. It does not actually tell you what the platform is. We
10 have defined the platform as Sky uses it at para. 19 of our skeleton which you have in that
11 first bundle at Tab 2. Rather than causing more confusion I hope this might bring some
12 clarity. We define it as 'the population of households in the UK and Ireland which have
13 installed set-top boxes supplied by Sky'. Set-top boxes includes the dish as well - the box
14 and the satellite dish. There are three main type: subscribers, former subscribers, and some
15 who just obtain the set-top box without taking out a subscription. There are, in total - and
16 these figures are not in dispute - about 8 to 8.5 million at the material time.

17 THE CHAIRMAN: So, you describe it as the subscribers ----

18 MR. ROTH: Viewers. A are the subscribers. B and C are ----

19 THE CHAIRMAN: -- people who do not subscribe but who can ----

20 MR. ROTH: They still have this, and therefore have the ability to watch programmes.

21 THE CHAIRMAN: But the platform is the viewers.

22 MR. ROTH: The population of views. The potential audience. The broadcaster gets to those
23 viewers (1) by arranging for a broadcast from a satellite which Sky has got nothing to do
24 with - Sky does not own the satellite; does not do the broadcasting; and (2) although in
25 theory a very technically adept individual who is on the platform could use their set-top box
26 and do something within it to access the programme. In practice, as Mr. Henry says, and
27 everyone agrees, that is not viable for commercial channel. So, by getting an EPG listing
28 such that someone on the platform can then see what the channel number is, he can press
29 the Select button and get to watch it.

30 THE CHAIRMAN: So, when we are looking at the definition here, the facility for obtaining
31 access is pressing that Select button.

32 MR. ROTH: That is the EPG definition that Professor Stoneman pointed to. Seeing what the
33 number is on the screen guide, and seeing Rapture is no. 298, or whatever it is, and then
34 being able to press your Select button at 298 to bring Rapture up on screen.

1 THE CHAIRMAN: Yes.

2 MR. ROTH: Those are the two ----

3 THE CHAIRMAN: You do not actually know it is 298, do you? You just press the Select
4 button.

5 MR. ROTH: There are various ways of doing it, yes.

6 PROFESSOR STONEMAN: That functionality, whereby you press the button and get the
7 programme, that is supplied by the set-top box; is that right?

8 MR. ROTH: That is supplied by the set-to- box.

9 PROFESSOR STONEMAN: Thank you.

10 MR. BOWSHER: I am not sure how far we need to get into it. In the Sky system the EPG does
11 run through the set-top box, but they are not -- Perhaps I will come back to it. There is a
12 danger that we spend too long on this. I do not think we need to spent ----

13 THE CHAIRMAN: What we have established, which I think is very helpful, is that the platform,
14 as used, really means the bundle of viewers.

15 MR. BOWSHER: Yes.

16 THE CHAIRMAN: It does not mean the EPG. What those bundle of viewers have rights to is
17 the EPG. Then, the question is: what is comprised within EPG? Clearly the listing is
18 comprised within EPG. So, that is the thing you see on the screen. Also comprised within
19 EPG is a facility for obtaining access. Whether that is a facility which gives you the number
20 298 so that you can put 298 in your little hand-held thing and it comes up, or whether it is
21 the Select button -- It may be both, or it may be either.

22 MR. BOWSHER: You said 'the right to access'. I would say it is the capability.

23 THE CHAIRMAN: All right. That is fine.

24 MR. BOWSHER: As you will have seen, not just on Sky, but on other platforms ----

25 THE CHAIRMAN: It is not on a platform ----

26 MR. BOWSHER: It is a funny phrase which is used. That is why I have said it is not the
27 satellite. The phrase makes it seem as if it is something to do with the broadcasting. It is
28 not. It is a capability - not a right. You are not necessarily paying for this ability or
29 facilities, or whatever it is.

30 THE CHAIRMAN: That is why I said it was a right because you do not have to pay for it.

31 MR. BOWSHER: Madam, that has been helpful - just to make sure that we are clear. Time does
32 march on rather dramatically, and I am not sure I will be able to keep within two hours at
33 this rate, I am afraid.

34 THE CHAIRMAN: I appreciate that.

1 MR. BOWSHER: Working on definitions ---- But, that has been helpful because certainly the
2 definitions are important.

3 What I wanted to do was to turn - I hope helpfully - the definitional process on its head by
4 looking at what is Sky saying that it is charging for? Really when it charges us, the
5 broadcaster, what are its charges and what is it charging for? What I have thoroughly
6 laboured, but I hope laboured appropriately, is that what we get in terms of access is not the
7 same as what the consumer gets in terms of access. That passage in Emma McCormack's
8 statement is as good a summary as anywhere - paras. 25 to 35 - of what is involved. The
9 reference in para. 27 is to an annex which is at Tab 4 to the Sky statement of intervention.
10 This not quite where the prices that we are talking about are, but it is an earlier change. It
11 highlights the distinction. What you see at Tab 4, p.1 are the different prices. It is obviously
12 the first two that matter. TV channels taking Sky's CA services. Do you have those? This
13 Bundle 4, Tab 4. Sky's statement of intervention. This was in 2003, but this is how Sky
14 explained the way in which the listing charges were fixed. Before January 2003 EPG listing
15 charges were £28,000. There was then a significant change when it went from £28,000 to
16 £75,000. This is the more detailed explanation at Tab 4 as to how that happened. There are
17 two prices that are relevant - TV channels taking Sky's CA services; TV channels not
18 taking Sky's CA services. You will see, rather counter-intuitively perhaps, the person not
19 taking the CA services is charged rather more, and the explanation for that is given in the
20 following document. The question which was being posed by Oftel - question 2 - "Please
21 summarise your reasons for considering that the level of charges is fair and reasonable",
22 that is the bottom of the first page. The reasons are then given on the second page:
23 "The reasons for the change to Sky's EPG charges are in summary as follows", again
24 perhaps it might be helpful if you were to just read "(i), (ii) and (iii) to yourselves, because
25 that really is the nub of it.

26 THE CHAIRMAN: (After a pause) What is meant by "In the clear" channels? Is that free?

27 MR. BOWSHER: That is another word for "free-to-air".

28 THE CHAIRMAN: (After a pause) It is very confusing, is it not, the use of the word "platform"
29 because that does not look like it is the consumer end.

30 MR. BOWSHER: It is a somewhat counter-intuitive usage, but there we are. That, to some
31 extent, explains the background to how we are where we are because of course the price we
32 are talking about here is 1,000 or something higher. There are perhaps two important
33 features. First, that Sky recognise that at least at the outset they say they were setting
34 charges at a low level to encourage entry, and I will come back to that. What they say now

1 is there are so many of these channels now, more are launching all the time, it is right
2 therefore that we increase our prices.

3 THE CHAIRMAN: Well it is right therefore that those people should pay for the original
4 investment.

5 MR. BOWSHER: Well for example it is not explained whether or not the investment has already
6 been paid ... pay for the original investment, there is not a direct analysis. What they do
7 say is that it is right that they contribute to the costs of the development. It is not quite clear
8 how that relates, but what they are saying is at this point it is right that we increase our
9 charges.

10 THE CHAIRMAN: If you read the last line:

11 "It is fair and reasonable that these channels make a contribution to the recovery
12 of the cost of development and operation on the platform via their EPG charge."

13 MR. BOWSHER: Certainly that is the reason that they put the charges up, yes.

14 THE CHAIRMAN: What they are saying is "Even if we have recovered, and it does not really
15 matter if we recovered or not, we ought now to be able to recover that cost that we have
16 absorbed from these other people, so that everybody shares equally at the end of the day."

17 MR. BOWSHER: Yes.

18 THE CHAIRMAN: Because you are a late entry, and the early entries paid for it, the late entry
19 should pay a bit more so that the early entries are not unfairly prejudiced by having late
20 entries.

21 MR. BOWSHER: I am not sure that is quite right because I do not think the early entries
22 benefited from a continuing low charge, but I am not sure quite how that worked. Certainly
23 it is right that a new entry now be charged substantially more than double as opposed to
24 what a new entry would previously have been charged; that is what they are saying.
25 The framework then for deciding the price, whether it be that 75,000 price or the price we
26 are dealing with here, is in fact the appropriate price is then the 2002 Guidelines, and I was
27 proposing to go to those next. I have to say we are running a little bit behind, but we may
28 have saved time in the long run. The conditional access 2002 Guidelines are in different
29 places; they were in the original appeal.

30 THE CHAIRMAN: Mr. Roth, I just wonder if the word the "platform" has changed meaning
31 during all of this. I am not sure if you have to answer it now, but I wonder if over the short
32 adjournment you could check.

1 MR. ROTH: I can check. I think that 2003 statement is, with respect, consistent with what I was
2 saying, that as the number of viewers with boxes and dishes has grown, it was the cost of
3 developing that population, persuading, marketing, supplying ----

4 THE CHAIRMAN: When it says in (2) “The platform has become far more successful”?

5 MR. ROTH: I think they just mean much bigger, many more people have got dishes.

6 THE CHAIRMAN: I just wanted to make sure that we have not changed ----

7 MR. ROTH: That is right, I think they say somewhere that they were not expecting – yes, it is in
8 the third sentence of (ii) of the three reasons.

9 THE CHAIRMAN: I tell you why I am confused, because if you look at subparagraph (2) on p.2
10 of this document, and the second sentence: “As a result, the platform now reaches more
11 than twice the number of households”. It may just be the way that it is worded, but if the
12 platform is the “households” effectively ----

13 MR. ROTH: Yes, it should be “now comprises” than “was expected”.

14 PROFESSOR STONEMAN: Even in subparagraph 1 there where it talks about “entry on to the
15 platform” that is definitely directed towards the broadcasters and not the consumers, and
16 therefore the meaning is different.

17 MR. ROTH: Yes, it is certainly encouraging broadcasters to get access to the platform.

18 PROFESSOR STONEMAN: That is not the same as onto the platform.

19 MR. ROTH: No, I take that point. I shall certainly check that over the short adjournment, but
20 that is my understanding of what it was meaning.

21 THE CHAIRMAN: It is rather confusing.

22 MR. ROTH: And it is important, yes.

23 THE CHAIRMAN: Anyway, 2002 Guidelines.

24 MR. BOWSHER: The 2002 Guidelines which I had attached to the notice of appeal.

25 THE CHAIRMAN: Where do you have it?

26 MR. VAJDA: Tab 6 of Ofcom’s defence.

27 THE CHAIRMAN: I have it.

28 MR. BOWSHER: We have gone into this in some detail in the skeleton and then there is a danger
29 that I simply say you have to read all of this. If I can just pick out key points ----

30 THE CHAIRMAN: We are going to have to read this.

31 MR. BOWSHER: You will have to go back and, I am afraid, read the whole of it.

32 THE CHAIRMAN: Yes, we do not want you to read it aloud to us now.

33 MR. BOWSHER: No. Can I just pick out, for the purposes of my exposition today, para.1.11
34 “The approach to regulation”, which sets out the starting point is the FRND starting point,

1 so that is the next step on the legislative chain, and this is probably as far as you need to go
2 in a sense. Paragraph 2.1 on p.7 is where one reaches the logical oddity, that FRND basis to
3 third parties: “In assessing fairness and reasonableness OFTEL will consider whether the
4 terms offered are consistent with those which would be expected in a competitive market,
5 and this is where the myth starts, that you are trying to construct what would happen in a
6 competitive market when there is not really one because at least as between broadcasters
7 such as Rapture and Sky – as Mr. Henry explains in his evidence – Sky, at least at the time
8 we are talking about is the only person you can deal with, it is the only open platform. So it
9 is not in any normal sense of the word a competitive market. So it is a slightly odd
10 problem, and what I would ask the Tribunal ----

11 THE CHAIRMAN: What about if you have a Freeview box?

12 MR. BOWSHER: Mr. Henry goes into that in his evidence. The numbers are all taken.

13 THE CHAIRMAN: You cannot get on to that.

14 MR. BOWSHER: Likewise with cable. It is dealt with briefly in our skeleton, but if I can just
15 give you ----

16 THE CHAIRMAN: So if Rapture is a free-to-air channel, I cannot access Rapture by buying one
17 of those free boxes?

18 MR. BOWSHER: Free boxes, you can access Rapture.

19 THE CHAIRMAN: No, but free boxes through Sky, but if I do not have Sky, I have gone out and
20 bought one of those little ----

21 MR. BOWSHER: Freeview.

22 THE CHAIRMAN: Freeview, yes.

23 MR. BOWSHER: Freeview is a closed system.

24 THE CHAIRMAN: So it does not give you provision to all free-to-air broadcasters?

25 MR. BOWSHER: No, likewise with cable. Again, there are limitations with cable, we will give
26 you the reference in the evidence. The point is that cable, which is now Virgin, of course,
27 has its limitations because it has to carry lots of other things, analogue television, telephone
28 and so on and so forth, so it has a fixed number of slots. Freeview has an even smaller
29 number of slots because all it is doing is at the moment exploiting a few intestacies in the
30 current analogue band. That will change when analogue television goes, there will then be
31 a much greater capacity, but at the moment both of those have finite capacity and are
32 therefore not open in a sense that anyone can get on to the platform – I am sorry, I am going
33 to avoid using that phrase – anyone can have access. That is getting a dish, directing it at a
34 satellite ---

1 THE CHAIRMAN: It has got a lot of free space.

2 MR. BOWSHER: Therefore it has as much free space as there are satellites, and if I want to point
3 it to a satellite that broadcast Rapture or a satellite which broadcasts Al Jazeera, then subject
4 to being able to hook it up, I hook it up. That is what you do.

5 THE CHAIRMAN: If the others want television masts, then it is more limited.

6 MR. BOWSHER: That is why there is, in that sense, a single realistic provider of access for
7 someone such as Rapture if you want to be on any platform at all because there are only
8 three, and only one of them is open.

9 One understand what OFTEL is saying in that statement, but it is a somewhat unreal
10 statement because we would like terms to be offered consistent with what we expect in a
11 competitive market, but there is not one and there never had been.

12 THE CHAIRMAN: Sometimes you have to work it out.

13 MR. BOWSHER: Sometimes you have to work it out. Indeed.

14 Paragraph 2.2: OFTEL will usually need to consider whether input costs are reasonably and
15 necessarily incurred in supplying the services in question. We say that is important. That is
16 the starting point for what, if I use a label for the moment, is the common cost/incremental
17 cost question. That is what one needs to do to decide to what extent the price charged
18 reflects the correct allocation of input costs. As I said at the beginning, it seems to us that
19 that to some extent is what this case is really about. As I said at the beginning, in a
20 competitive market one would expect the price of a service to be related to its cost.

21 THE CHAIRMAN: Can I look at the third sentence? "OFTEL's primary consideration is to
22 ensure that intra-platform competition ----" So, the intra-platform competition would be
23 competition between the viewers who can access through the Sky box and the viewers who
24 can access through other ----

25 MR. BOWSHER: No. That is to ensure that different broadcasters on a single platform -- This is
26 Ofcom's terminology - not mine. I think they draw a distinction between competition
27 between broadcasters on a particular platform ----

28 THE CHAIRMAN: When we say 'on a particular platform' we now know that that means the
29 viewers ----

30 MR. VAJDA: This is quite, quite important. What Ofcom/OFTTEL is saying there is that
31 effectively intra-platform competition is competition between broadcasters who are on the
32 same platform. So, the concern here is between, say, Sky and non-Sky broadcasters, both of
33 whom are on the Sky platform. That is what that is directed to.

34 THE CHAIRMAN: 'On the Sky platform' means the viewers who can access ----

1 MR. VAJDA: Yes, but we are looking at something which is two-sided -- When I am talking
2 about on the Sky platform - and I will elaborate on this when I make my submissions - we
3 need to sort out what is meant by EPG. But, when I am talking about 'on the Sky platform'
4 I am looking at it from the point of view of the broadcaster. What Ofcom/OFTTEL was
5 looking at here was to ensure effectively that Sky would not favour Sky programmes over,
6 say, free-to-air, BBC, ITV or other pay-tv ---- That is what this is concerned with.

7 MR. BOWSHER: The concern, I anticipate here, and this is where the doctrine of competitive
8 neutrality, I think, comes from, is that BBC1, if it is on the Sky platform, should not
9 somehow be hindered or unduly benefited by having an unfair charge put upon it, and affect
10 its competition against Rapture. Perhaps more realistically, Rapture against NTV, or
11 whatever, just to take an example.

12 THE CHAIRMAN: BBC1 News -- World News or whatever it is against Sky News.

13 MR. BOWSHER: These are probably all extremely bad examples because these guidelines are
14 drafted with conditioned access in mind and so the examples we should give -- The
15 draftsmen would have been having in mind conditional access or access control channels,
16 and we have just given lots of examples of none of those.

17 MR. VAJDA: That is not entirely correct. If I can just draw the Tribunal's attention to 2.13,
18 which actually expressly refers to the free-to-air broadcasters.

19 MR. BOWSHER: (After a pause): I do not know what that means, because I do not see how
20 you can be -- It starts by talking about users of conditional access as free-to-air television
21 broadcasts are not users ---- I am not quite sure what that can mean. I reiterate what I have
22 just said. I am not quite sure. The point is that there has to be neutrality between
23 broadcasters, and the charges for whatever you are charging for should not distort, and
24 whoever it is should not be burdened by an unnecessary cost - a cost that is not FRND.

25 MR. ROTH: Just to explain - Channel 4 and Channel 5 take conditional access, and so do the
26 ITV regional channels. So, ITV Yorkshire is different from ITV in the south-east. That is
27 through conditional access, although they are free-to-air.

28 THE CHAIRMAN: You can have conditional access even though it is free-to-air.

29 MR. ROTH: Exactly.

30 MR. BOWSHER: You learn something new. (After a pause): We just went out of order, did
31 we not? I hope that explains what we are talking about. So, there is intra-platform
32 competition and inter-platform competition, and the difference is relevant.
33 2.3 is OFTEL's definition of reasonableness. Again, this really develops our starting point
34 as to the common cost/incremental cost argument because, as you will see at the bottom of

1 this page, when considering what is reasonable the provider here must be the platform
2 provider of the access service, whatever it is, to the broadcaster, and should be able recover
3 its officially incurred costs over a reasonable period, and the services must, if technically
4 feasible, be sufficiently unbundled so that the broadcaster only pays for what it needs.
5 There is then a section dealing with treatment of risk, which I do not propose to go over
6 now. That is not to say that it is not important.

7 “Non-discrimination starts at 2.8. Again, can I go straight to 2.9? I would invite the
8 Non-discrimination does not necessarily mean that there should be no differences in
9 treatment between broadcasters, rather that any differences should be objectively
10 justifiable, for example by differences in underlying costs or the absence of a
11 material adverse effect on competition. Justifications for differentiation may also
12 include the degree of risk presented or an overall benefit to competition through
13 facilitating entry to platform. This would be considered on a case-by-case basis. For
14 example, an agreement entered into at the launch of a platform, and which hence
15 implicitly or explicitly involved the sharing of risk, could not be considered as
16 having been entered into ‘at a similar time’ as one signed at a different date, even if
17 the conditional access or access control services are similar”.

18 Then, discrimination between categories of broadcasters. My learned friend, Mr. Vajda,
19 has already drawn attention to the need to take account of the position of different
20 broadcasters.

21 2.15, if I can jump ahead, within any one category of broadcaster -- and I am not sure
22 whether it means only those categories above, or some other categories --

23 “OFTEL presumes that comparable terms and conditions to one would be available
24 to another similarly situated at the same time. When examining the prices charged to
25 different broadcasters within the same category, OFTEL expects that, where those
26 broadcasters are requiring different services, the prices charged should reflect,
27 amongst other things, any differences in the cost of providing those services”.

28 There is then a section, Chapter 3, on Terra-structures and how costs should be dealt with.
29 Can I just direct you to some paragraphs which you will need to look at? Paragraph 3.4,
30 3.5, which is where the incremental cost/common cost distinction is explicitly set out.
31 Willingness to pay is then where the negotiation point comes in at para. 3.7. Then, 3.17 is
32 where the commercial negotiation point again is developed. Some conditional access and
33 access control providers publish indicative prices” and so on and so forth.

1 “OFTEL considers that the publishing of indicative prices that can serve as the
2 starting point for commercial negotiation is helpful for all parties. However,
3 OFTEL emphasises that those indicative prices are not set by or approved by
4 OFTEL and that OFTEL would regard them as a starting point in negotiations, and
5 that OFTEL expects such negotiations to take place (as would be likely to occur in a
6 competitive market). OFTEL believes that it would be wrong to constrain those
7 discussions by indicating how far it may or may not be reasonable for the prices to
8 move during the negotiation process”.

9 There does seem to be something of an unreality, in our submission, in that paragraph. The
10 legal obligation on Ofcom is to ensure the price is FRND. This assumes that there can be a
11 commercial negotiation as if in a competitive market when we know that the problem is that
12 it is not a competitive market. Clearly it is trying to aspire to this proxy competitive market
13 that does not exist. But, in our submission, this really is where Ofcom here have gone
14 wrong. They have taken 3.17, as far as one can see when we look at the determination.
15 They have taken that aspiration - which may be a sensible aspiration - which is, “We would
16 like to model this market as if it were competitive and as if you could have negotiations”.
17 They have looked at what happened between Sky and Rapture. You have seen in the
18 evidence that they have had a discussion which went on, and it ended up with Sky
19 slamming the door and saying, “No”. They have said, “Well, that’s it. It’s as if it is a
20 competitive market”. But, it just is not. Where there is not a competitive market, what they
21 will have to do, in our submission, is to go on and look at whether or not a price is, or is not,
22 FRND. It is not enough simply to say, “Well, 3.17 invites us to treat matters as if they were
23 competitive when they are simply not”.

24 Can I skate rather swiftly through the determination itself?

25 MR. ROTH: Before we leave the guidelines, I think it would save time if you could just please
26 look at 3.9, 3.10 and 3.11. They do go right to the heart of the case. At 3.9 -

27 “A vertically integrated supplier may wish to subsidise consumer equipment to
28 promote take-up of its retail services. The question arises whether the subsidy may
29 be treated as a cost to be recovered via conditional access or access control charges,
30 or whether this should be borne entirely by the vertically integrated.

31 3.10 In principle, OFTEL considers that other broadcasters typically benefit from
32 such a subsidy (in terms of increased viewer base), so it is therefore reasonable to
33 expect them to contribute to the costs. Different broadcasters may benefit to
34 different extents, in which case their relative charges should reflect this”.

1 3.11 - each case is seen on its merits.

2 MR. BOWSHER: Interesting, but I did not look at it for a very good reason - it does not deal
3 with the EPG charges.

4 THE CHAIRMAN: But, also, increased viewer base unfortunately there is not choice because
5 you cannot get on to the others. You cannot choose between, "I'm going to get on to the
6 Freeview platform which gives me access to fifteen viewers", or, "I'm going to get on to the
7 Sky platform which gives me access to twenty viewers. Therefore if I want to go on the Sky
8 I have got to pay for that benefit". But, you cannot do that because the other ones are
9 closed.

10 MR. BOWSHER: Indeed. One can see that these guidelines were obviously looking forward to a
11 developing market. They seem to deal with things which might have been going to happen,
12 but they do not seem to have happened by the time these guidelines were placed. One can
13 see where this would all leave, and why they say what they say. But, in fact, one has to
14 deal with the market as it was. So, two important points arising out of that passage.

15 PROFESSOR STONEMAN: Can I just go back to something which you might have just said
16 very quickly as a reaction? This comes back to 3.9 and 3.10. You said it was very
17 interesting but it has nothing to do with EPG. Now, I thought we had agreed that these
18 guidelines did apply to EPG. That was the first thing we agreed today. Although they are
19 written for conditional access, we had agreed, I thought, that they covered all access. As far
20 as this case is concerned, they do apply to EPG.

21 MR. BOWSHER: Mr. Roth very carefully qualified his acceptance of that. It was a fair point.
22 Clearly, he knows these guidelines much better than I do. While they apply, in interpreting
23 them one has to bear in mind that EPG is not conditional access. They are different things.
24 One has to apply them therefore in a different manner, depending what the service involved
25 actually is.

26 MR. ROTH: This is where we went back to the Grey Book, p.910 at 3(a) and (b). That is where
27 we were an hour ago. I know we got terribly involved in all of that. It is a crucial issue to
28 this case of whether we are talking about an access charge, or not -- whether the EPG
29 embodies an access charge.

30 MR. BOWSHER: The EPG does not embody those access charges because they are distinct
31 access charges. We saw that in the Sky letter. There is a distinct access charge for
32 conditional access or access control charges.

33 PROFESSOR STONEMAN: No charge for accessing the platform of Sky customers. Is that
34 what you are saying?

1 MR. BOWSHER: (After a pause): Those who pay the conditional access or access control
2 charges are using consumer equipment in all sorts of ways. There are access cards, coded
3 cards, all sorts of stuff in there which they are using. That is what that consumer equipment
4 does. What the EPG does is a distinct thing. It is a device for the viewer to locate a channel.
5 It is quite different conceptually from conditional access or access control, which is all
6 about the way you use the channel and what you do with it, and there is all sorts of clever
7 stuff which it can do. All that an EPG does is enable you to locate that channel.

8 THE CHAIRMAN: It is more than that because it has to provide a facility ----

9 MR. BOWSHER: Locate and press a button, yes.

10 THE CHAIRMAN: Not locate like going into the Radio Times, but it has to give you something
11 more than the Radio Times.

12 MR. BOWSHER: It is locate and press a button. That is what you have to do. Locate and view.
13 That is all you do. You do not interact. It does not do any of the other things which the
14 conditional access or access control charges involve. That, in our submission, is what that
15 section is about. It is a different thing. I am not sure I can take it very much further.

16 PROFESSOR STONEMAN: Is that your submission?

17 MR. BOWSHER: The charges are different. I will come on to some of the detail of that.
18 Can I go on to the determination?

19 THE CHAIRMAN: Can I go back to 3.9 and 3.10? If you look the wording,

20 "A vertically integrated [we call that Sky. Yes?] may wish to subsidise consumer
21 equipment [that is the box and the satellite dish] to promote take-up of its retail
22 services. The question arises whether this subsidy, i.e. the provision of the box and
23 the satellite dish may be treated as a cost to be recovered via conditional access or
24 access control or whether this should be borne entirely by the vertically
25 integrated ----"

26 Then it goes on,

27 "In principle, OFTEL considers that other broadcasters ----" That is people who are
28 not asking for conditional access, or access control ----

29 MR. BOWSHER: That is other broadcasters other than the vertically integrated supplier.

30 THE CHAIRMAN: Other than Sky.

31 MR. BOWSHER: Yes.

32 THE CHAIRMAN: So, "In principle, OFTEL considers that other broadcasters typically benefit
33 from such a subsidy ----" I see. It is Sky that is broadcasting -- "-- typically benefits from
34 such a subsidy in terms of increased viewer base. So it is reasonable to expect them to

1 contribute to the costs". So, having said that Sky may bear that cost, it then says, "Well,
2 who should contribute to it once it is borne?" "Different broadcasters may benefit to
3 different extents in which case the eventual charges should reflect this".

4 MR. BOWSHER: We will come on to the application of this in due course. I am hoping that
5 this will become swifter and easier once we actually apply it to the actual case.

6 THE CHAIRMAN: The fact is that it looks as if they are really talking about access to control
7 charges and conditional access charges, and not EPG charges. I am not going to ask you to
8 answer this now. Maybe this is something that needs to be considered over the short
9 adjournment, but one writes in there, "All the EPG charges"? Or whether one is saying that
10 actually this is one of the things that does not apply and we should not be looking at it. But,
11 I think what probably the submission is is that you write in EPG charges there.

12 MR. BOWSHER: Can I come on to that? It will be easier to deal with that in the context of this
13 case. The important point is that one has to look at what the costs are and how they arise,
14 and what is then the FRND. That is the starting point. The important point, in my
15 submission, is to keep that in mind - that there are other accretions to FRND which have
16 come out of these guidelines, which, in my submission, while they may be useful tools, or
17 whatever -- the notion of a competitive market, and the notion of the negotiated price --
18 They are not the legal starting point here, and they are not the legal test that has to be
19 applied. They are simply set out in the guidelines as maybe something that the regulator
20 should be looking to. But, if what they do is end up taking this notion of the non-
21 competitive market or the notion of negotiation as being sufficient to meet their legal
22 requirements, in our submission, the regulator has failed because it has not done what it
23 should do. It has, as it were, taken as its comfort blanket that part of the guidelines, when
24 in fact that part of the guidelines do not in fact get to grips with what they have to do.
25 Can I go through the determination and pick out key points for what I wanted to deal with
26 today? The determination, again, is attached to Tab 2 of the defence ----

27 THE CHAIRMAN: You are using a non-confidential version, I think.

28 MR. BOWSHER: I am using a non-confidential version, I think. I have tried intentionally to
29 make sure that I am not using any confidential documents.
30 I imagine the Tribunal is going to reflect on some of this. If I can do some of this by just
31 passing up references and just highlighting why they are references? Can I start at p.21, the
32 heading 'Legal & Regulatory Analysis'? The first twenty pages I do not think we need
33 worry about. At 4.4 Ofcom tells us what the dispute is about. It then sets out some of the
34 legislative material and the 2002 guidelines - just for your reference, and so that you can see

1 the legal framework that Ofcom was working from. Then the heading at Section 5 - 'Was
2 Sky's EPG listing charge to Rapture fair, reasonable and non-discriminatory?' Again, I
3 know the Tribunal has looked at this before, and will no doubt wish to do so again. The
4 heading at p.31 is where one starts to get into the issue as to how to allocate the costs. You
5 see we have picked up in the materials what is necessary is to work out which costs ought to
6 be related to the charge. So, that is the heading: were the cost that Sky sought to recover
7 from EPG customers reasonably and necessarily incurred? That then goes on for some
8 time.

9 We pick up 'Consumer Equipment Costs'. The heading is at p.35. Rapture's view is then
10 set out. Sky's view is set out. Ofcom's view starts at p.37. This is where Ofcom starts to
11 consider taking a decision. This is the first building brick for the decision. At 5.54,

12 "The question of what amount, if any, of common costs associated with the
13 provision of set-top boxes, should be recovered from third party users of the
14 platform is not straightforward. In particular, there are a number of complex issues
15 which might arise in relation to set-top boxes summarised below. Ofcom does not
16 consider that it is necessary to investigate these issues behind this summary ----"

17 So, rather curiously, it identifies the fact that it might look into it. It tells you what they are.

18 "A proportion of the costs of set-top boxes could be argued to be attributable to
19 providing functions that are not relevant to free-to-air channels - e.g. encryption ----
20 "

21 There are other issues there. There are issues regarding the length of the subscription; costs
22 to do with installation of dishes; channels available on alternative platforms, such as
23 analogue, terrestrial, digital and cable ---- It is said it is not straightforward to assess the
24 relative ---- This is really the point that you were picking up earlier. It is only if you are
25 BBC1 that it starts to become relevant to consider where you are getting more viewers than
26 others.

27 At para. 5.54 - there are different kinds of set-top boxes doing different things.

28 At para. 5.55,

29 "In the context of this dispute, Ofcom has not considered it necessary to undertake a
30 detailed review of all these complex and inter-related issues. Ofcom considers that
31 for free-to-air channels which are not available on any other television platform,
32 such as Rapture, there is clearly a benefit from a large number of platform viewers
33 who are able, if they so choose, to watch that channel. In Ofcom's view it is
34 reasonable for such channels to make a contribution to the costs associated with this

1 larger platform - including the cost of set-top box subsidies - in return for access to
2 an increased pool of potential viewers.

3 5.56 Ofcom accepts that EPG customers should not be expected to contribute to
4 the direct costs of components of the Sky Platform from which they derive no
5 benefit. Whilst there are components of the Sky Platform that are not used by free-
6 to-air channels [and it gives examples] the direct costs associated with conditional
7 access and access control services comprise only a relatively small proportion of
8 total platform costs ... and are not included in Ofcom's calculation of relevant
9 common costs."

10 That, in our submission, does not really meet the point because they are dealing there only
11 with direct costs. There other costs involved here.

12 "Given that the majority of platform costs relate to the common cost of building up
13 a base of viewers ... it is reasonable to conclude that EPG customers are not
14 contributing towards the direct costs of other technical platform services from which
15 they do not derive a benefit".

16 That, in our submission, simply assumes that all costs of the other services are in those
17 direct costs, which does not seem to make sense.

18 THE CHAIRMAN: The other services are what? Conditional access and that sort of thing?

19 MR. BOWSHER: That sort of thing.

20 THE CHAIRMAN: That is outside EPG?

21 MR. BOWSHER: Well, it is in addition to EPG.

22 THE CHAIRMAN: Absolutely. "The relevant question then become what level of contribution
23 is 'fair, reasonable and non-discriminatory' and, in particular, whether the recovery of set-
24 top box subsidies was set at a level likely to price Rapture off the platform".

25 Well, we have an issue about where the set-top box subsidy should be classified at all, but
26 leaving that to one side that is, in a sense, fair enough. What then goes on is an analysis of
27 the set-top boxes. I will not read that out now because I will address this point in a slightly
28 different way.

29 If I can leap then to the next logical stage, which is the cross-heading on p.41. Having gone
30 through this analysis of common costs, and so forth, what Ofcom concludes is that it is
31 necessary to decide, "Were Sky's charged set between the 'floor' of the incremental cost of
32 providing the service and the ceiling of the stand-alone cost of the service?" We have just
33 seen where that links to. They have asked the question, "What is fair, reasonable and non-

1 discriminatory?” and they jump from that because what follows is a breakdown of common
2 costs. They go to this second question.

3 They deal with this surprisingly shortly. They simply identify the incremental costs, the
4 stand-alone costs and the conclusion in 5.74 is, “Well, the charge of £76,800 is between the
5 floor and the ceiling”. There is some stuff in Ofcom’s skeleton which seems to be shadow-
6 boxing with someone. The important point here is that it seems that Ofcom have taken, in
7 effect, undue comfort from that position. They have said, “Well, it’s between the floor and
8 the ceiling. That’s good”. Well, we accept it is between the floor and the ceiling. The
9 FRND price has to be between the floor and the ceiling, but it does not mean that any price
10 between the floor and the ceiling is FRND, and that is what we have described in our
11 skeleton as the core of the case. It seems that Ofcom’s position has been that as long as it is
12 between the floor and the ceiling we are all right. There are submissions in the Ofcom
13 skeleton which I am not going to spend time on, about why the price does not go over the
14 ceiling, and that is neither here nor there.

15 What they then do in the decision is look at rate of return. That goes on for a number of
16 pages. The conclusion is at p.46, para. 5.100. I am not going to read it out. What they have
17 effectively done is an analysis on what they say is the reasonable rate of return. They say
18 that the evidence before us does not support a finding that the listing charge was unfair or
19 unreasonable on the basis of excessive returns, given the way that they have looked at the
20 matter. This, in our submission is where they have really gone wrong in an important
21 manner, because they have then looked at the negotiation point. They have taken many
22 pages on the heading: “Did Sky offer Rapture a reasonable opportunity to negotiate a fair,
23 reasonable, and non-discriminatory EPG listing charge taking into account Rapture’s
24 circumstances.

25 What that then goes on with is many pages of analysis which have been gone over again in
26 some of the witness evidence that you have in witness statements. Ofcom’s view starts at
27 p.55. Paragraph 5.151, for example, Ofcom says it anticipates discussions, representations.
28 5.153 “Ofcom does not accept Sky’s view that a broadcaster’s inability to pay would not be
29 a significant consideration.”

30 Then 5.154:

31 “In Ofcom’s view the relevant issue is whether, in negotiations, Sky complied
32 with its regulatory requirement to treat Rapture as a purchaser of EPG listing
33 services in a fair, reasonable and non-discriminatory manner. Ofcom has assessed
34 whether the evidence suggests that Sky offered Rapture a reasonable opportunity

1 to demonstrate in commercial negotiations at the indicative rate card charge for an
2 EPG listing would have been unfair, unreasonable, or discriminatory. Ofcom
3 considers that Sky did provide Rapture with that opportunity ...”

4 And it refers back to the long chronicle of facts. Ofcom notes that arguments have been
5 made. It considers that the arguments were general in nature, and that Rapture failed to
6 provide Sky with any specific evidence to demonstrate the viability of the Channel was
7 materially affected by the EPG listing charge.

8 “On each occasion Rapture chose not to substantiate its arguments with
9 documentation about its business or any other objectively justifiable evidence
10 which would justify Rapture benefiting from a lower charge. In the absence of
11 such evidence Ofcom considers Sky’s behaviour in rejecting Rapture’s proposals
12 does not therefore imply an unwillingness to negotiate on Sky’s part that will lead
13 to an unfair, unreasonable and discriminatory outcome. Indeed, the evidence
14 suggests that Sky had no basis on which to justify a reduced charge to Rapture that
15 met with its obligations to offer terms on a non-discriminatory basis.”

16 THE CHAIRMAN: Does this not depend on what the dispute is?

17 MR. BOWSHER: I am sorry/

18 THE CHAIRMAN: If the dispute was you did not offer me an opportunity to negotiate, then you
19 would be looking at an opportunity to negotiate. If the dispute is in those negotiations they
20 did not offer a fair, reasonable, and non-discriminatory price, then you would be looking at
21 what is a fair, reasonable and non-discriminatory price.

22 MR. BOWSHER: Exactly. In our submission this is a blind alley really. The question is, is the
23 price FRND for Rapture in Rapture’s circumstances? This is a long section, which
24 effectively gives Rapture poor marks for its negotiating practices with a single provider of
25 service.

26 THE CHAIRMAN: It just refers to where it says what the disputes that they identified were, that
27 they are looking at.

28 MR. BOWSHER: Sorry, for this subheading?

29 THE CHAIRMAN: No, somewhere in this ...

30 MR. BOWSHER: The overall dispute that was referred to Ofcom?

31 THE CHAIRMAN: Well that Ofcom decided it was going to look at.

32 MR. BOWSHER: Yes.

33 THE CHAIRMAN: I do not think it is what was referred to Ofcom as much as how they defined
34 it.

1 MR. BOWSHER: How they defined it, yes, that is right. They tell you how they got there – I am
2 just looking for the paragraph. If we go to 381 of the determination, this is what went into
3 the competition bulletin.

4 THE CHAIRMAN: So the dispute is nothing to do with what happened in the negotiations.

5 MR. BOWSHER: We have seen the reference in the guidelines as to why negotiation seems to
6 have been thought to be relevant. 5.157 in the factual circumstances does not, in our
7 submission, take Ofcom's thinking any further.

8 All we have therefore so far is a view as to how common costs are to be dealt with and a
9 decision that £76,800 lies between the floor and the ceiling. What we are waiting for is a
10 decision that £76,800 is not only between the floor and the ceiling because we know FRND
11 has to be between the floor and the ceiling but does that, in fact, work.

12 THE CHAIRMAN: Well the question the Framework was addressing was whether the charges'
13 direction, the provision of the services between November 2005 and November 2006 are
14 fair, reasonable and non-discriminatory, so you have to look at what was charged and is it
15 fair, reasonable, and non-discriminatory. Where is that in here? Because one has to look at
16 those paragraphs and then you have to say "That is what is wrong."

17 MR. BOWSHER: I look forward to seeing how this is dealt with, but each bit of this dispute is
18 then dealt with in little components. Our case is that Ofcom have relied upon findings that
19 either do not reach the final conclusion that they should have done, they have not – in our
20 submission – gone to the point of actually identifying what is in fact the FRND. I have
21 shown you one point, which I will come back to, where in our submission they have set out
22 the sorts of matters which should have been considered in trying to identify what the cost
23 basis is – that was at para.5.54. They have identified some of the things they might have
24 done, but they have decided in this case they will not – that was para.5.54 which we have
25 been to. They have looked at excessive return. They have then, in our submission, taken on
26 board at great length matters which are not relevant and do not take the matter further
27 because they have clearly relied upon this negotiation point in their section 5.149 to 5.158
28 in support of their decision – otherwise why have they put it in?

29 If I take you through the remaining sections of the decision so that we can look at what they
30 did and did not take account of, the next section is: "Did Sky's EPG listing charge to
31 Rapture take into account all relevant factors including the service required, benefits to the
32 Sky Platform and willingness to pay?"

33 THE CHAIRMAN: Where are you reading that from?

34 MR. BOWSHER: Just above 5.159, just where we were.

1 THE CHAIRMAN: Otherwise the shorthand writers cannot follow.

2 MR. BOWSER: Yes, I am sorry. A whole load of things have just been thrown into this
3 heading – relevant service required, benefits to the Sky Platform, and willingness to pay.

4 THE CHAIRMAN: Then we go to p.59.

5 MR. BOWSER: The finding is at 5.168, or the view anyway. The structure of this is slightly
6 odd because there is a section here which is about willingness to pay, which runs from
7 5.168 to 5.171.

8 THE CHAIRMAN: There we go again, and then 5.173.

9 MR. BOWSER: If I can just go to 5.171:

10 “Ofcom has considered Rapture’s willingness to pay by reviewing its business plans
11 and actual financial results.”

12 **Analysis of Rapture’s wiliness to pay**

13 5.172 In order to assess Rapture’s willingness to pay, Ofcom has examined whether
14 or not the EPG listing charged levied by Sky of £76,800 was sufficiently high to
15 “price off” Rapture from the Sky Platform.”

16 So willingness to pay becomes, in effect, ability to pay. There is then a lengthy discussion
17 of different features. Paragraph 5.184 – I am just trying to pick out the conclusions as we
18 go:

19 “In Ofcom’s view the 2004 Business Plan does not suggest that Rapture was being
20 priced off the platform as a result of the proposed level of charges and that such
21 charges were clearly “affordable”.

22 Then:

23 **“Rapture 2005 Financial Projections**

24 5.185 Rapture has provided Ofcom with a set of financial projections dated May,
25 covering May 05 to December 07.

26 5.186 These projections included an assumed EPG listing charge ... A summary of
27 the projected profit and loss is shown ...”

28 We do not need to go through the details until 5.190:

29 “In paragraph 5.157, Ofcom has concluded that on the basis of Rapture’s
30 submission to Sky, Sky had no grounds on which to justify a reduced EPG listing
31 charge to Rapture. In Ofcom’s view even if Rapture had submitted details of its
32 business plan or financial projections The 2005 Financial Projections do not
33 extend beyond year three and Ofcom considers that it is not possible to determine
34 whether, on the basis of these projections, Rapture could afford to pay the

1 indicative rate card charge of £76,800 over the long term, particularly given the
2 rapid forecast rise in revenues over the short duration of the projections.

3 5.191 In addition, the 2005 Financial Projections are not supported by any details
4 of the business' strategy.

5 5.192 In summary, it is Ofcom's view that the 2005 Financial Projections do not
6 cover a sufficiently long period and are insufficiently detailed to support it to be
7 able to illustrate that Sky's indicative rate card charge would be unfair or
8 unreasonable in Rapture's case.

9 5.193 As stated these would not have provided a compelling case for Sky to
10 reduce its EPG listing charges in Rapture's case."

11 In our submission, that is back to front in various ways. The question is, is this price
12 FRND? Now, what they do is to say "Your financial projections do not go forward far
13 enough – "insufficiently detailed or supported to be able to illustrate unfair or
14 unreasonable", but that is really putting the burden the wrong way around. The burden is, is
15 this charge fair or reasonable for someone in Rapture's position? Not: has Rapture done a
16 good enough job in negotiating with Sky in showing that it is about to have to cease
17 broadcasting.

18 THE CHAIRMAN: "Or in providing information to us."

19 MR. BOWSHER: "Or in providing information to us". The burden is on Ofcom to establish.

20 THE CHAIRMAN: Well why do they do that? If they say "Give us your financial projections"
21 and these are the ones that are given, do they have to then say: "Actually, we want
22 something else"?

23 MR. BOWSHER: I would have to go back, I might have to look at that over lunch. There is
24 some material in the guidelines on handling a complaint. Perhaps it is more pertinent is to
25 look at what actually happened. In this case ----

26 THE CHAIRMAN: Do you not have to say they have read these projections wrongly, or on the
27 evidence that they had before them? They do not have to go out and invent the figures if the
28 figures are not given to them. Either they have to do some other investigation to decide
29 what to do or they can rely on what is given to them, and then when they rely on what is
30 given to them they have to interpret it correctly, and if you say "Actually, they
31 misinterpreted it ..."

32 MR. BOWSHER: That is why 5.192 is important because they do not cover a sufficiently long
33 period. We have seen the period they do cover ----

34 THE CHAIRMAN: It depends what they asked them to give.

1 MR. BOWSHER: This is a yearly charge and in our submission that is not really a coherent
2 issue, because the charge might change from year to year, particularly if we are talking
3 about new entry channels. This really goes to the heart of the question dealing with Rapture
4 as a new entry channel in its current position because a new entry channel is not going to
5 have long term projections; it is not going to know what is going to happen, but it does
6 know it is a new entry, and to say “You have not given the projections for a sufficiently
7 long period rather misses the point. Indeed, it might very well be that the FRND should be
8 an entry promoting level racking up if and insofar as the channel actually builds up an
9 audience and actually succeeds.

10 THE CHAIRMAN: If you are a start-up company, or a company that is having a new start-up
11 venture, and therefore in order to do that, and to raise funds or to justify to your
12 shareholders that they should be investing in this line your financial projections are not
13 going to just be for that year, they are going to be onward for either three years, five years,
14 seven years, ten years, depending what the situation and the sort of business is.
15 Now, the question is – I have not got it in front of me – the 2005 Financial Projections, I do
16 not know if we do have them, but they will be projections into the future, done in 2005, and
17 I do not know what period that they covered.

18 MR. BOWSHER: We do, that is paragraph 5.185 – it tells us that they went to this month.

19 THE CHAIRMAN: December 2007, to this month.

20 MR. BOWSHER: So it is two and half years.

21 THE CHAIRMAN: What is being said is that two and a half years is not a sufficiently long
22 period, so what you might say is: They should have come back and got a sufficiently long
23 period.

24 MR. BOWSHER: Well that is one point, but more specifically these are recurring charges. If one
25 is looking at a new entry broadcaster, the sensible way to do it is to look on a year by year
26 basis and see how it does. Why would one need to go beyond one year in fact, but why
27 does one need to go beyond two and a half years? In two and a half years’ time Sky or
28 Ofcom are going to be saying: “You have done terribly well”, or “done terribly badly”,
29 “Your FRND is now much higher than we might have thought it was going to be when we
30 originally looked at the ----

31 THE CHAIRMAN: So what you are saying is that two and a half years is sufficient, and it does
32 cover a sufficient period?

33 MR. BOWSHER: Yes, and it must on its face therefore be flawed, but I do not have a pleaded
34 case that invites you to get the accounts, the projections out and start grappling with them.

1 THE CHAIRMAN: You do not want us to do that, you want to say: “They are flawed and go
2 back to the drawing board”.

3 MR. BOWSHER: Yes.

4 THE CHAIRMAN: And you say that two and a half years is a sufficient period?

5 MR. BOWSHER: We say 5.192, when you look at the face of the examination.

6 THE CHAIRMAN: Because the market changes so rapidly in this area.

7 MR. BOWSHER: The market changes, the charge would be different, the charge would have to
8 reflect whatever Rapture had achieved in the meantime, because the FRND for a
9 broadcaster will not be the same from year to year necessarily.

10 PROFESSOR STONEMAN: From where does that point come?

11 MR. BOWSHER: Where does it come?

12 PROFESSOR STONEMAN: Yes, that the charge will be different each year.

13 MR. BOWSHER: It is about differentiation, it is about treating broadcasters properly in respect
14 of their circumstances, that is the core of our case from the outset. That is the non-
15 discrimination point, because the flip side of discrimination, or non-discrimination is that
16 you treat different people differently, so you ----

17 THE CHAIRMAN: Sorry, there is some negotiation between a person in Rapture’s position and
18 Sky in relation to the price. It is also in relation to getting on to that platform. Now, they
19 then enter into some agreement. The question is really: How long does that agreement bind
20 the price? You have an agreement, for example, that it is £3 a month for 12 months, or 18
21 months, or 24 months or whatever it is, and that may determine the period in which you
22 apply this test. It cannot be that every day you look at it because you have agreed to pay,
23 and when you are looking at what that price is over that period, and you have agreed that
24 period.

25 MR. BOWSHER: For this purpose it can only be the reference period for the dispute probably,
26 because the determination is simply dealing with a specific period which we just identified
27 over which are the charges FRND or not?

28 THE CHAIRMAN: Yes.

29 MR. BOWSHER: I am sorry, I have forgotten – it has just dropped out of my head – what the
30 period is, but that is the period we are looking at. But, as we have seen, these are recurrent
31 charges ----

32 THE CHAIRMAN: November 2005.

33 MR. BOWSHER: To 2006, is it not?

1 THE CHAIRMAN: And the period that was given in the Financial Projections was a further
2 year?

3 MR. BOWSHER: Indeed.

4 THE CHAIRMAN: To 2007.

5 MR. BOWSHER: All one need say about this, in my submission, is that in order to apply an
6 FRND price it must be fair, reasonable, and non-discriminatory for that broadcaster at that
7 time. If there was some case that a broadcaster fails in 13 months and there is some other
8 issue involved, but that is not what is being dealt with here, the question is what does
9 someone in Rapture's position – what is the fair and reasonable price for that broadcaster
10 that does not have a large audience at that point, does not have a large revenue at that point?
11 Its position may well change in the future, but for the period that we are talking about it is
12 shown the financial material, why should that not be sufficient?

13 THE CHAIRMAN: What I think you are probably saying is the period of 2005 to 2006, that is
14 the price period that you will hear. They gave projections for 2007. You have the prices
15 2005/2006 on the basis of those projections. If the situation is that when you come to look
16 at the 2006/2007 position the broadcaster has actually done rather well, then you will take
17 that into account in adjusting the prices thereafter.

18 MR. BOWSHER: Certainly one would expect – if I can put it this way, there is an indicative
19 rates' charge, and one would expect there will come a point at which the indicative rate
20 charge would apply, but one would be surprised if the indicative rate charge always applied
21 in the first year.

22 PROFESSOR STONEMAN: I just want to get it clear, there is something implicit, I think, in
23 what you are saying, and that is that what is fair, reasonable and non-discriminatory is that if
24 you have not got many viewers you do not pay very much. Now, that may be your stance,
25 but I have not seen that in any of the guidelines as a way to determine prices. I do not know
26 that is a characteristic of a competitive market and I do not think you have even made any
27 attempt to establish that as a necessary requirement for what is fair, reasonable and non-
28 discriminatory.

29 MR. BOWSHER: Well perhaps we can come back to that.

30 THE CHAIRMAN: Is that a convenient moment?

31 MR. BOWSHER: We are not on track, I am afraid.

32 MR. VAJDA: If it assists the Tribunal, we prepared a little table which we gave the other parties
33 yesterday and they agree it can go to the Tribunal, and I shall use that in my submissions. I
34 would like to hand that into the Tribunal now, and then I do not need to do it when I get to

1 my feet. I should emphasise, as one will see, the figures in **here** are confidential, and I will
2 not be referring to any of those figures in open court.

3 THE CHAIRMAN: Do you think that if we looked at that over lunch that might help us with the
4 submissions that are being made, is that why you are giving it to us now?

5 MR. VAJDA: Simply to save time, if the Tribunal wants to look at it over lunch fair enough. It is
6 to do with the costs in the platform model.

7 THE CHAIRMAN: Shall we say five past two?

8 (Adjourned for a short time)

9 MR. BOWSHER: Firstly, can I deal with a couple of matters of housekeeping? I said that I
10 would prepare something later with references on, but little did I know that those behind me
11 had already done it. I do not think we need to take it any further. It just provides references
12 in the Grey Book to what we have been talking about. I am not sure if it is particularly
13 helpful, but we will get some more copies. It is just an index to the Grey Book and other
14 places in the bundle where one finds documents which are not otherwise copied. We will
15 get some more copies provided to circulate.

16 There were a couple of points I wanted to come back on. Before I do that, in reality, I
17 rather fear that sitting at least within even normally extended hours we are likely to finish
18 with the best will in the world today.

19 THE CHAIRMAN: Our view is that if we are not going to finish today we should not try to go
20 on past four-thirty. In my experience that is unproductive.

21 MR. BOWSHER: Indeed. Better to be better prepared, there are all those diminishing returns.
22 What I would ask is this: there is clearly an interest in the Tribunal about what the correct
23 meaning of the term 'Sky platform' is. There is clearly also a very substantial difference
24 between Sky and Ofcom as to what it means. In the determination it is clearly used to refer
25 to some architectural or structural, or concepts which things run on. That is clearly not what
26 Mr. Roth was telling you from Sky's perspective. I do not, for the purposes of what I am
27 going to say this afternoon, need to specify what we say, but, not just for this case but for
28 the future, it does matter to get these things right. What I was going to ask, even if it may
29 mean making a short written submission out of order somewhat, if I can promote something
30 tomorrow in writing as to what we say the Sky platform should mean.

31 THE CHAIRMAN: The difficulty is that it is really not for this Tribunal, I would have thought,
32 to decide what the platform means. It is a factual thing as to what it is. We should not be
33 put in a position, I do not think, where we have to decide what it means.

34 MR. BOWSHER: Indeed. I cannot speak for the other parties. There is clearly a wider issue.

1 THE CHAIRMAN: It may be it will be resolved in this way: if there is a difference in this
2 document it is being used in this sense.

3 MR. BOWSHER: Can I put it this way: it is important to all the parties here that the Tribunal in
4 preparing its ruling, and in making its judgment, understands each party's perspective and
5 meaning of the term. I suspect that there will be three distinct meanings. I would also
6 anticipate that it is not necessary for the Tribunal to determine finally what it does mean for
7 the purposes of its judgment, although I would have to reserve my position on that and see
8 how we go this afternoon with some of the questions that evolve. But, nonetheless, it would
9 be inappropriate, I think, for the Tribunal not to have an appreciation of what the three
10 different perspectives were. You have already seen two, and it seems to me it would be an
11 unreasonable determination, and clearly Ofcom's and Sky's clearly cannot be the same.

12 THE CHAIRMAN: We will see.

13 MR. BOWSHER: We will see what they say, yes.

14 Can I pick up where I left off - well, a couple of steps back from where I left off? In the
15 Determination at the section starting at para. 5.159,

16 "Did Sky's EPG listing charge to Rapture take into account all relevant factors
17 including the service required, benefits to the Sky Platform and willingness to pay?"
18 That is the section. Just to remind you, that starts with the guidelines. Rapture says
19 at para. 5.163,

20 "Rapture has stated that it considers Sky has 'benefited substantially from the
21 presence of free-to-air channels which broadcast unique content ----"

22 Sky takes a different view. The Ofcom view, at 5.168, somewhat goes in a different
23 direction because rather than engaging with Rapture's position it really does deal with
24 willingness to pay rather than any other factor. It just deals with whether or not Rapture
25 would, or would not, be priced off the platform. Take, for example, para. 5.170. That is
26 why it led to this rather odd way that it ducks back and forward between Rapture's view.
27 So, it seems that the only element of that general question, "Did Sky's EPG listing charge
28 take account of all relevant factors?" -- The only element that Ofcom really engages with is
29 willingness to pay. I do not need to go over again what I was saying about the 2005
30 projections. We say that there is a problem there.

31 Can I pick up the point that Professor Stoneman made to me just before the break, which is
32 really, "What is the underlay for any point that a new channel might be treated differently
33 from any other channel?" Can I take you back to the 2002 Conditional Access Guidelines?

34 THE CHAIRMAN: We have got it.

1 MR. BOWSHER: I have been trying to take a note of your secret code number - to break your
2 code like a line-out, but I have failed so far to keep up!

3 Paragraph 3.7,

4 “Where a channel generates retail revenues, either through subscription, advertising
5 or otherwise, OFTEL considers that such revenue is a key indicator of ‘willingness
6 to pay’ and will expect a reasonably close linkage between retail revenues and
7 conditional access or access control charge. This not the only factor to be taken into
8 account ----”.

9 Then there is discussion about other attributes a broadcaster might be asked to consider.
10 That refers forward to 3.13 and 3.14. We will go there shortly. “OFTEL is not suggesting
11 that this ----“ I am not sure what ‘this’ is. The close linkage maybe.

12 “OFTEL is not suggesting that this should form the basis of a ‘formula’ between
13 retail price and conditional access/access control charges, but would expect the
14 agreements as a whole to be broadly reflective of the retail revenues expected by the
15 broadcaster when offering its service to the end user”.

16 So, firstly, expected retail revenues is one factor to go into willingness to pay.

17 Then, jumping to 3.13 and 3.14 - which we have already seen were sort of incorporated
18 backwards - 3.13 includes the number of viewers available through the platform -- that is
19 the second bullet in 3.13 -- The one above - any increase in revenues - is obviously about
20 the additional benefit of being available through this means. The short point is this: it seems
21 to us that while, obviously, the number of viewers and expected revenues come as a number
22 of matters, clearly included in that would be the perhaps self-evident point that a start-up
23 channel will start with relatively low revenues and relatively low viewers. It is not the point
24 that it is the start-up that matters; it is the point that it is small but hopes to grow. That is
25 why those are factors relevant to willingness to pay.

26 THE CHAIRMAN: Is 3.7 the real meat of the point as to the EPG charge? The last two and a bit
27 lines: “-- would expect the agreement as a whole to be broadly reflective of the retail
28 revenues expected by the broadcaster when offering a service to the end user”.

29 MR. BOWSHER: Yes. Retail revenues is a factor. I put it at the beginning to say that we looked
30 at cost, but we would expect the price to have a relationship with expected revenues, and
31 expected cost. But, yes. If something can have two meats, then it has two meats.

32 PROFESSOR STONEMAN: When you raised 3.9 and 3.10 earlier, you argued to us that they did
33 not apply to EPG - they only applied to AC and CA. Are you saying that 3.7 and 3.8 do
34 apply to EPG although they do not apply to 3.9 and 3.10?

1 MR. BOWSHER: I think probably that is right. That is because - and I am going to start getting
2 close to the nature of the platform here - it is about what this equipment is for. Let me pick
3 it up in a different way. If we go back to the list of things which Ofcom did not do in its
4 own determination in para. 5.54 -- We have seen this list already before. This was the list of
5 things that Ofcom decided it was not necessary to investigate. The point here is that when
6 we are dealing with, "What is conditional access and access control involve?" -- This is
7 probably not an exhaustive list, but, for example, it enables one to produce separate
8 channels of the type that regional channels, subscription channels, qualified access channels
9 (such as adult channels). Access control enables one to create an interactive facility. Now,
10 all of that involves consumer equipment for which you will have a subscription -- for which
11 there will be a subscription charge. That is what the access control and conditional access
12 charges are all about. Now, yes, there is a set-top box which enables one to use the EPG,
13 but it is a different sort of -- Once one has the set-top box -- once one has paid for it -- once
14 one owns it -- You do not necessarily have to buy it from Sky. Once one has it, the EPG
15 works. It is not a piece of equipment with a recurring involvement. So, when they are
16 talking about CA and AC the charges for that must involve an annual element from the
17 subscription to all these exciting new services.

18 EPG is a different thing. Yes, the set-top box lets you use it, but it is not the STB that you
19 got from Sky which lets you use it. It is not the only way of doing it. It is just a facility - a
20 means of doing what you are doing.

21 THE CHAIRMAN: Sorry. I thought you said earlier that if you have a Sky box you have access
22 to indefinite numbers of channels. If you have any other box it is limited and your client
23 cannot get on to the other boxes because it is closed.

24 MR. BOWSHER: No. No. I am trying to avoid the word 'platform'. There are three means of
25 delivery, if I can put it that way. Can I take you to our skeleton? We set this out, but it may
26 just help to have it in front of you. Paragraph 11 of our skeleton. Headed 'The
27 Marketplace'. Where we see the word 'platform', can we just accept that that is a
28 controversial word? There are three means of delivery here. 'Freeview' - para. 20 - is a
29 forty-channel platform that is transmitted via ground-based transmitters. So, there is a
30 physical limit on how many more channels there can be. We note that at para. 21.
31 Likewise with digital cable. These things come through a cable ----

32 THE CHAIRMAN: One hundred plus.

33 MR. BOWSHER: There is, again, a physical limit and I think we make the point here in the
34 evidence that there is little, if no, available spare capacity on cable at the moment. It may

1 be an unfortunate use of language, but when one looks at the physical means of delivery
2 from a satellite, the satellites have ---- The question is, "How many satellites can you
3 have?" Theoretically there is an open-ended number of satellites. Obviously it is limited by
4 the number of satellites that there are at any given time, but in theory that is an open
5 platform in the sense that any number of channels can broadcast from satellite. In this
6 country Sky is the only regulated platform ----

7 THE CHAIRMAN: The only provider who provides unlimited access.

8 MR. BOWSHER: But, to pick up these, potentially, thousands of channels you do not need a Sky
9 box. All you need is to go and get that thing there.

10 THE CHAIRMAN: And then you programme it yourself.

11 MR. BOWSHER: Yes. You programme it yourself to whatever channels you want. That is why
12 the word 'platform' is slightly unhelpful in a way.

13 THE CHAIRMAN: So, that is not a Sky thing.

14 MR. BOWSHER: That is not a Sky box. That is a kit. It is not Sky. It is just a piece of kit you
15 can buy from B&Q. So, when I was saying you can set it up to any channel you want,
16 obviously you would not be able to get any Sky channels on that ---- You can get Sky
17 News. You would not be able to get any of the CA or AC ----

18 THE CHAIRMAN: You would, but you would not ----

19 MR. BOWSHER: I do not think you would be able to get any of the access because part of ----

20 THE CHAIRMAN: You would not be able to get the ----

21 MR. BOWSHER: You would not have the card which enables you to ----

22 THE CHAIRMAN: -- intra-active.

23 MR. BOWSHER: I do not think you would be able to get the conditional access either because
24 you would not have the card which enables you to -- You have got to pay subscription to
25 that channel and all that sort of thing.

26 THE CHAIRMAN: But conditional access may be to a free-to-air ----

27 MR. BOWSHER: There is probably always an exception to any proposition that we put forward
28 here, but that does not matter.

29 THE CHAIRMAN: We dealt with that this morning.

30 MR. BOWSHER: I do not think that matters.

31 THE CHAIRMAN: We also ought to probably disclose that we have discovered that the three
32 panel members have different experience in the sense that one of us knows and uses both
33 Sky and Freeview. Another of us only uses Freeview and has never used Sky. A third of us
34 only used Channel 1, 2, 3, and 4, and has no personal experience of how you do this at all.

1 MR. BOWSHER: The good news is that two of you are using an EPG.

2 THE CHAIRMAN: But the third one does not know what that is. They know what it is but does
3 not use it every night.

4 MR. SUMMERS: ... what is the EPG on that. You say you have to programme it yourself, or it
5 comes with supplied software, or what?

6 MR. BOWSHER: Mr. Henry probably can explain better than I.

7 MR. HENRY: The EPG on equipment which is free-to-air is picked up automatically as they're
8 broadcast with every single channel. The difference between the Sky box and this box is the
9 EPG is transmitted and downloaded into the Sky box. It is available free-to-air. It does not
10 get downloaded into the set-top box. Just to clarify a simple point, you will not be able to
11 pick up any Sky cards that use encryption unless you have a Sky box. Does that help?

12 MR. SUMMERS: There are lots of channels. It says thousands of channels.

13 THE CHAIRMAN: If that is not accepted, we will deal with that later. (After a pause): We
14 will deal with it later. We will deal with how to deal with it.

15 MR. BOWSHER: Again, I do not think it matters. It may help just to understand what an EPG is.
16 It is a point I have made, but maybe it is worth making it again because it may be clearer
17 now. The way the EPG operates in this country is not the only way of doing it. If you were
18 a broadcaster, you could make up your own EPG with the correct software in the sense that
19 you would input your own future broadcast data into the software. It would create the EPG
20 which you could then use or deliver as necessary to whatever was the technical means that
21 was going to deliver the EPG. In this country, Sky takes your data and does it for you.
22 Insofar as we are talking about what is in the EPG service, that is something that Sky do.

23 THE CHAIRMAN: The broadcasters do it. I do not know how they do it in other countries, but if
24 a broadcaster did it, it would only be their ----

25 MR. BOWSHER: Exactly. It would only be their data, and it would then go into the bigger pot.
26 It is a question of who transmits that into an electronic format -- the Radio Times. Does
27 each channel do it individually and then give it in an electronic format to someone else, or
28 do you give the data to Sky? Do you give the data to Sky and let Sky, or Virgin Media, or
29 whoever, do that?

30 THE CHAIRMAN: It is the means of getting to the ----

31 MR. BOWSHER: If we are talking about what is done as part of the EPG service, well, that is
32 one thing that is done. Obviously, if you are trying to imagine the direct cost of the Sky
33 EPG service, that is a direct cost.

1 THE CHAIRMAN: Sky gets the data and has to do the programming, whereas in other places it
2 may well be that the programme is given to the ----

3 MR. BOWSHER: Rapture would do it itself and transmit it on to someone else who would then -
4 ---

5 THE CHAIRMAN: That is right. They would do it. Therefore that cost is in the broadcaster and
6 not in the ---- Yes.

7 MR. ROTH: I hope this makes this clear - I do not think this is controversial - the EPG that is on
8 the screen that you say - as it were, the Radio Times on screen - is broadcast by Sky through
9 one of the independent satellites broadcasts that as part of the EPG service. That is how you
10 get it on screen.

11 THE CHAIRMAN: Yes. But, that would happen however ----

12 MR. ROTH: It is done. Whether somebody else can do it is another point.

13 THE CHAIRMAN: It has to go back up to the satellite and down again.

14 MR. ROTH: Sky creates that programme, as it were, and broadcasts it.

15 MR. BOWSHER: There is a danger that when I try to be helpful I simply open up a can of
16 fascinating worms. Can Mr. Henry assist?

17 MR. HENRY: Can I just clarify that. It is partly right to tell the Tribunal that Sky broadcasts the
18 EPG. Every broadcaster broadcasts their EPG. All broadcasters, whether it is Rapture or
19 the BBC transmit the 'now and next' information with their channel. Part of the satellite
20 capacity that every broadcaster has to sign up for with one of the satellite providers has to
21 pay a fee that includes the capacity that is used just for the EPG. So, it is misleading
22 slightly to say that Sky transmits the EPG on of everybody else. They do not. I could quite
23 happily describe it all, but I am trying to be helpful ----

24 THE CHAIRMAN: I am not sure that this is actually pertinent to what we have to decide at the
25 end of the day - although it is very interesting to understand it as a background. Let us see
26 where we get to.

27 PROFESSOR STONEMAN: May I just ask one further question about the EPG? Is any value
28 added to it when Sky transmits it? Is there any form of editing of data from the various
29 people who provide EPG information? Do they provide a standardised form or is it simply
30 transmitted as received?

31 MR. HENRY: I could answer that for you since we had the EPG agreement. Sky does edit the
32 EPG to effectively check on quality, spelling mistakes or anything that might be
33 impermissible, so they do check the files that each broadcaster uploads on to the system.

1 But the broadcasters produce the EPG themselves, it is then just checked by Sky to ensure it
2 complies with decency rules, etc.

3 MR. ROTH: The answer to the question is “yes”, there are various things put in like “favourites”
4 menus, search facilities – those of the Tribunal who have Sky will know in using it – that
5 are incorporated in the way it works which you can see when you actually do it, so that is
6 added on to enable you to navigate through it effectively. I think that is all I will say for
7 the moment, otherwise we get very side tracked.

8 MR. BOWSHER: That covers some of the things from this morning. I just wanted to get to the
9 end of the determination I thought quickly, but it is not that quick, and then just to sum up
10 where we are in the determination. We have the evidence of willingness to pay – we were
11 at 5.193 of the determination and what I was simply showing is that willingness to pay
12 should involve a number of questions including what I will obviously call “new channel”
13 questions and I have shown, I hope, how that arises under the guidelines. The way it was
14 dealt with was, we say, in this rather unsatisfactory way, dealing with the financial
15 protections. The next heading is: “Was Sky’s EPG listing charge discriminatory?” That
16 starts at 5.205, the conclusion of which starts at 5.208. The starting point, we say, for
17 Ofcom’s view does not really reflect the guidelines because Ofcom really creates a problem
18 because it says: “The use of an indicative rate card charge” – and just taking out the middle
19 words of that paragraph – “is one which will help ensure that charges are not
20 discriminatory.” It may help, but there is a danger, in our submission, that if one starts with
21 a uniform rate card and say that is non-discriminatory, that rather misses the point. As I
22 have said there may be a number of circumstances why one actually has to start by
23 differentiating between different broadcasters, and it may very well be that there reaches a
24 point beyond which all broadcasters of a certain size, of a certain willingness to pay and so
25 forth all end up paying that charge, but that becomes in a sense the threshold which one
26 aspires to, and until one has reached that threshold in our submission it is discriminatory to
27 simply assume that the rate card is the starting place for a charge.

28 If you then turn the page, 5.210, 211, and 212 deal with these points of discrimination.

29 5.211 the determination says:

30 “... in the absence of an objective, economically verifiable justification for a lower
31 EPG listing charge, the evidence does not suggest that Sky’s treatment of these
32 broadcasters was discriminatory.”

1 But in our submission it really started from the wrong place because it assumed that you
2 needed somehow to depart from the rate card. It seemed to us that that was the wrong
3 approach. They say at 5.212:

4 “Ofcom has also considered Rapture’s argument that it was discriminatory to
5 charge small channels such as rapture the same EPG listing charge ... Under the
6 2002 Guidelines, non-discrimination implies that *comparable broadcasters,*
7 *purchasing comparable services at broadly similar times, should pay comparable*
8 *prices.*” The 2002 Guidelines identify all free-to-air broadcasters as a category of
9 user.”

10 Jumping ahead: “The Guidelines identify potential grounds for different prices”, and so on
11 and so forth. Then in 5.213: “Ofcom notes that the cost of providing an EPG listing service
12 for different channels is unlikely to vary significantly ...” 5.214: “The 2002 Guidelines
13 provided for an assessment of a channel’s willingness to pay in determining discrimination.
14 Ofcom’s analysis of this topic is set out [above]”

15 That was the analysis of other broadcasters as to whether they were able to pay.

16 “Ofcom has found that Sky did provide Rapture with a reasonable opportunity to
17 demonstrate that its willingness to pay objectively justified a lower charge than the
18 indicative rate card charge but Rapture failed to do so.

19 5.215 In Ofcom’s view it was not discriminatory for Sky not to have charged
20 Rapture a lower price than that charged to other larger channels.”

21 It seems to us that that whole passage really fails to grapple with what I will loosely call the
22 new channel problem, although it is not, strictly speaking, a new channel, it is probably a
23 small channel problem, it is simply not dealt with here because they say that there might be
24 such channels, but 5.212 – all broadcasters purchasing the same service at the same time
25 ought normally to pay the same price, but that does not deal with the question as to whether
26 small broadcasters with a different revenue stream, and we saw that was part of the
27 Conditional Guidelines, ought in fact to be entitled, that their FRND price ought to be
28 lower. 5.212 simply does not grapple with the position of a low audience, low revenue
29 broadcaster.

30 It is simply apparently sufficient for Ofcom in 5.213 to say the cost will always be the same,
31 or broadly the same, and 5.214 we are satisfied that Sky gave Rapture enough opportunity
32 to ----

33 THE CHAIRMAN: Do you say that that addresses the right question?

1 MR. BOWSHER: We say it addresses the wrong question effectively. 5.213 addresses the wrong
2 question and 5.214 simply harks back to the negotiation failed point, which I have already
3 shown in our submission Ofcom fluffed; they got the negotiation question wrong, so it
4 seemed to be saying: “Because the cost is always the same and because, as far as we are
5 concerned, Rapture did not negotiate well enough” or whatever it is, therefore we assume
6 that it was not discriminatory for Sky to charge the rate price to Rapture without
7 differentiation.

8 So we say here again, Ofcom really fluffed the question. They failed to ask themselves the
9 right questions, they failed ----

10 THE CHAIRMAN: What was the right question to ask themselves?

11 MR. BOWSHER: The right question was probably to go back to the 2005 projections – you do
12 not have all the material before you to determine this on the merits, all you can do is see
13 whether they did or did not. We see they had financial projections which they have simply
14 said did not go far enough or whatever. They either could have taken from Rapture’s
15 material, or probably established for themselves – they are, after all, the specialist expert
16 regulator – what the anticipated audience and revenue for a channel such as Rapture was
17 likely to be, given the fact it was a specific audience, it was not a universal audience
18 channel, and establish what – given its nature, consistent with what we have seen in the
19 guidelines about its revenue and audience expectations – and tried to take that as a starting
20 point. It ought to have had no real regard to the fact – it certainly should not have inferred
21 from the fact that Sky said “no, we are not lowering the price” that somehow or other the
22 price that Sky have stuck at was a fair negotiated price, that is just unreal, and that goes
23 back to the myth of the unreality of the competitive market.

24 But they should have gone through comprehensively the issues raised by the conditional
25 guidelines about the nature of Rapture’s position. It really goes right back to their cross-
26 heading on p.56, not just willingness to pay but all the other factors in the guidelines, which
27 we see they actually had in the determination – p.57, para.5.161 they have quoted both
28 passages I took you to earlier. They have the Revenue passage in para.5.159 and the
29 number of viewers’ passage in 5.161. So both of the two passages that I was saying to you
30 earlier really would lead you into an answer to the small channel question are in the
31 determination but they do not seem to have actually followed through those guidelines
32 themselves.

33 THE CHAIRMAN: This goes back to the point that I was grappling with before as to what
34 question they were answering.

1 MR. BOWSHER: Well we have seen the general question we say they were asking: “What was
2 the FRND price for 2005?” But they have all these guidelines that tell them all these factors
3 and yet when they come to the point in the determination when you expect them to look at
4 the factors, they actually list them in the determination but then take this rather strange
5 approach. It really is rather strange when you think about it , the 5.214 to go harking back
6 to the negotiation point at this point, when that has already been cleared away at an earlier
7 part of the determination, albeit not satisfactorily.

8 Now, of course, there may be other factors that are relevant. The last section starts at 5.216,
9 p.67, this picks up various points, some of which I have already alluded to about the way
10 things are done differently elsewhere. Then Ofcom goes into a question about the 2006
11 guidelines which we have not engaged with.

12 Can I just pause there and sum-up the headings, because it is helpful I think to go through
13 the determination and see where some sort of answer has been reached by Ofcom. 5.15 is
14 the first question on p.31 – were the costs reasonably and necessarily incurred in providing
15 the EPG listing service? Now, we have got specific points on that which I will come back
16 to as the cost allocation, but that is the first heading. The conclusion starts at 5.49 and it
17 runs for pages and pages and pages on to 5.69. The conclusion is actually expressed as the
18 last three paragraphs but you cannot really understand them without reading the previous
19 material. We say that the approach taken here really involves Ofcom seriously pulling its
20 punches – I will come back to that in relation to some specific points, but they actually
21 identify all the things they could and should have done, they identify all the features, for
22 example, there are a number of set top boxes that do many things far beyond what anyone
23 using the EPG service could possibly want. There is the basic set top box, and one of the
24 many things it does is enable you to use an EPG, but then there are Sky Plus boxes and so
25 forth which do more. Palpably the more advanced set top box is not providing any
26 additional value to an EPG only broadcaster – any additional facility.

27 The next heading is p.41, this is the floor and ceiling point, where they simply say: “Is it
28 between the floor and ceiling, they say “yes”. Well, yes, that is a step along the road, but
29 as I have already said and will come back to, that is not enough.

30 The next heading is: “Was Sky’s return on the Platform excessive?” and their conclusion is
31 at 5.100. Then there is: “Did Sky offer a reasonable opportunity to negotiate the point?”
32 That runs from 5.103 all the way through, and the conclusion starts at 5.149 to 5.158.

33 Again, I have made my submissions on that, we say it is inherently unsatisfactory the way
34 they have dealt with that.

1 The next heading is just above 5.159 -----

2 THE CHAIRMAN: Do you say it is “unsatisfactory”, or do you say it is irrelevant?

3 MR. BOWSHER: Well irrelevant. It is unsatisfactory the way they dealt with it on the facts. It is
4 irrelevant in the terms of the guidelines, you are absolutely right, sorry, you are quite right
5 to pick me up. So they were taking into account factors that were not relevant but they were
6 also doing so in a way that was not a sensible analysis of the facts given the relative
7 positions of Sky and Rapture.

8 The next heading is 5.159 which is “All the relevant factors” heading, which includes many
9 things including willingness to pay and somewhere here one would have expected the small
10 channel point to figure, but in fact it becomes an entirely an analysis of willingness to pay
11 and the financial projections’ question, and I have already dealt with that.

12 The conclusion is at 5.201 to 5.204 – again, I have said what we said about that. Then
13 there is discrimination – again a sort of second chance to make the small channel point
14 come good – they could have done it here, they could have done it again at the next heading
15 at 5.216 “Any other factors.” So they refer to the particular position of Rapture, and a
16 number of headings where they could have made that point good. The conclusions start at
17 5.208 for discrimination and 5.219 for other factors; again, in our submission they failed to
18 grapple with a point which they clearly should have done about the particular position, the
19 revenue and audience expectations of Rapture.

20 Then this is all drawn together in the summary on p.71, 5.247 – I am sorry, I am wrong that
21 summary relates backwards, the conclusion is at 5.250. The summary I referred to is the
22 summary of the 2006 Guidelines’ analysis. Page 72, para.5.250 – this is the conclusion, the
23 basis of the decision.

24 “Ofcom has concluded that Sky has satisfied the requirements of each of the
25 following components. Terms should be consistent with those in a competitive
26 market.”

27 I have made my submissions there. “Input costs should be reasonably and necessarily
28 incurred in providing the service.” I will come back to that presently. “Charges should be
29 set between the floor and ceiling and returns should not be excessive.

30 “The allocation of common costs should be negotiated between relevant parties,
31 and the rate card should serve a starting point for negotiations.

32 A range of factors should be taken into account in assessing the charges,
33 including the service required, benefits, the platform, willingness to pay.

1 “In assessing non-discrimination comparable prices should be offered to
2 comparable users for comparable services purchased at a similar time.”

3 That is all it says, it does not really add any more to what we have already seen, so each of
4 the individual criticisms I have made of the individual components of the decision in our
5 submission in their individual respects demonstrate that those links either involve asking the
6 wrong question or not coming to an appropriate analysis of the facts. In our submission that
7 conclusion really does not take anyone any further. I need to pick up some specific points
8 which are dealt with in the Ofcom materials in the case, which go to specific elements of
9 that. I have tried, in going through the determination, to pick out the specific aspects – the
10 failure to negotiate amongst others, and a failure to grapple with Rapture’s specific position
11 in our submission are really key areas where the exercise fails to start in the correct place
12 what is the FRND.

13 THE CHAIRMAN: Well, you say “failure to negotiate” and “failed to pick up Rapture’s
14 particular ...”

15 MR. BOWSHER: Yes.

16 THE CHAIRMAN: Failure to negotiate you say the reason is that?

17 MR. BOWSHER: The conclusion they had reached was not relevant to the question they were
18 supposed to ask.

19 THE CHAIRMAN: They took into account irrelevant considerations.

20 MR. BOWSHER: Effectively, and if it was relevant their analysis of the negotiations that took
21 place were simply unreal and it is simply not a sensible inference from the facts that if Sky
22 say to Rapture “That is the charge”, to say Rapture did not do a good enough job of
23 negotiating with Sky ---

24 THE CHAIRMAN: Are you saying that that is because they did not take account of uneven
25 bargaining positions?

26 MR. BOWSHER: Well that is a factor, they did not take account of the parties positions in that
27 negotiation that would be true, yes; that is a way of putting it.

28 THE CHAIRMAN: Is there anything else on that?

29 MR. BOWSHER: Those are the two key points. Then I want to come on to specific headings of
30 the correct approach to FRND, and the allocation of cost, as the basis of FRND, because
31 that is where I need to grapple with some of the economic arguments that are made. They
32 obviously relate to the headings. I have intentionally postponed them because they involve
33 getting into the Ofcom skeleton as well as the determination and they are they need to be
34 dealt with separately. What we will end up with, we say, is a picture where Ofcom have

1 established that the price is within the foreign ceiling – well, okay. For the various reasons
2 that we have seen they do not see any particular reason why Sky should have charged any
3 different price, and they made serious errors in establishing what the cost base was for the
4 calculation of the FRND price. Yes, it has to be within the floor and the ceiling, that is
5 really a red herring. Either the failure properly to grapple with the cost issue, or the failure
6 properly to grapple with Rapture’s specific nature, either in terms of its negotiating capacity
7 or in terms of its future revenue and audience. Either of those is sufficient in our grounds to
8 really vitiate the decision raised by Ofcom, because if either one of those two matters are
9 matters which Ofcom got wrong and it should have dealt with differently then the answer
10 could, and in our submission would, be likely to have been different. I have focused so far
11 largely on the negotiation and special position because that is something that you can really
12 get out of the face of the determination; I need to take the matter a little bit further when
13 coming on to the cost base – the economic question.

14 PROFESSOR STONEMAN: Can you remind me what the arguments were that Rapture put to
15 Sky and Sky refused to consider in your terms, as to why Rapture should be charged less.
16 If I remember correctly one of them was that you were going to bring lots of different
17 customers to the platform; I cannot remember what the others were. I do not remember in
18 the material that it actually said “If you do not charge us a lower price we will go bankrupt.”

19 MR. BOWSHER: Well, we did not say we would go bankrupt. There are two questions there:
20 the section on the negotiations between Sky and Rapture start at 5.120. there is no point in
21 my trying to give evidence on this, the determination, think really has to stand or fall on its
22 own merits here.

23 PROFESSOR STONEMAN: (After a pause) Well why not leave it on one side?

24 MR. BOWSHER: Can we leave it to one side?

25 PROFESSOR STONEMAN: Come back to it later on.

26 MR. BOWSHER: We did not say “If you don’t charge less we will go out of business”, but in
27 our submission what we were saying is “We are in the position we are in”, and certainly
28 when it came in front of Ofcom we were providing financial projections that showed the
29 need for there to be a lower price.

30 PROFESSOR STONEMAN: Is that not why you said you should have had a lower price, because
31 if they did not give you a lower price you would go out of business.

32 MR. BOWSHER: There are two stages: what you say to Sky, and what you say to Ofcom; they
33 are two different stages. Let me break that up in due course. I do not want to say something

1 – there are things that I have been told and things that are in the determination I do not want
2 to trespass too far.

3 The way of looking at the approach to cost, perhaps we could most conveniently start with
4 the Ofcom skeleton para.18 – I will come back to some earlier paragraphs in due course, but
5 I want to start by looking at the approach. At our skeleton on this – and it may be worth
6 keeping your finger in our skeleton at para.47 where we say: “The underlying error in
7 Ofcom’s approach was its failure to consider whether [the] charges were set at fair and
8 reasonable. In other words, it was not enough for Ofcom to identify that the charges fell in
9 [the] range.”

10 At para.50 we quote from the Ofcom defence, and this really begins to highlight the error.

11 “Ofcom says its ‘analysis of the Sky Platform Model indicated that there was a very
12 wide range of potentially fair and reasonable charges, because there was a very large
13 gap between the incremental cost of providing EPG services and the stand-alone
14 cost”

15 And we say that is simply a *non-sequitur*. All that says is that the floor and the ceiling are
16 widely set. It does not follow, which will be the necessary inference from this, that every
17 price before the floor and ceiling is FRND. This is indicative of what we say is the error
18 that Ofcom fell into when trying to take the next step to work out what the correct price
19 was.

20 THE CHAIRMAN: Is it right that what they had to work out was the correct price, or if you look
21 at the question that they set themselves it is whether Sky’s charges to Rapture are fair,
22 reasonable, and non-discriminatory?

23 MR. BOWSHER: Whether to verify that the price being charged was FRND, but the point I
24 make is the same point. It does not mean that every price between that range is potentially
25 fair and reasonable, all that means is that the range of potentially fair and reasonable prices
26 will lie somewhere within that broader range.

27 THE CHAIRMAN: But you have to be a bit more specific than that, because it may well be that
28 within that range the price would be FRND, subject to applying the test particularly to the
29 relevant part, because it may be that if you have a range of 1 to 10, 7 may be FRND to
30 broadcaster A, and 2 may be FRND to broadcaster B.

31 MR. BOWSHER: That is absolutely right.

32 THE CHAIRMAN: Everything in that range is potentially FRND. You then have to look to see
33 what ----

1 MR. BOWSHER: What is the FRND for that broadcaster? But while that is, with respect a good
2 point, it is a different point. The point I am making, if I look at the text of what they said,
3 what they are saying is that as the model indicates that there was a very wide range of
4 potentially fair and reasonable charges – singular range – because, and it is an important
5 linking word “because” there was a large gap between the incremental cost. They are not
6 making the point that you are making ----

7 THE CHAIRMAN: I think they are – “potentially fair and reasonable”.

8 MR. BOWSHER: No, the word “because” makes clear they are saying that because there is a
9 large gap between the floor and the ceiling there is a large range ----

10 THE CHAIRMAN: Actually a very large range ----

11 MR. BOWSHER: No, they say “wide range”, not potentially a large range”, “there is a wide
12 range”.

13 THE CHAIRMAN: “... of potentially fair and reasonable.”

14 MR. BOWSHER: Well in our submission that is not what the language says. What they are
15 saying is because there is a wide range between the floor and the ceiling there is a wide
16 range of prices that is FRND, and that simply does not follow on any view.

17 THE CHAIRMAN: So where does the word “potentially” in that come in on your analysis of
18 what they are saying?

19 MR. BOWSHER: All that is saying is really the point you are making that there may be more
20 than one FRND for different broadcasters, but that is different from what they are. They
21 seem to be saying here that because there is a large gap – incremental cost and stand alone
22 cost are simply outliers. There is simply no reason why all prices between the top and the
23 bottom are FRND.

24 PROFESSOR STONEMAN: Can I just interrupt here – have you come across the mathematical
25 terms “necessary” and “sufficient”?

26 MR. BOWSHER: Yes.

27 PROFESSOR STONEMAN: It is necessary that it is between the two limits but it is not
28 sufficient.

29 MR. BOWSHER: Indeed.

30 PROFESSOR STONEMAN: And if we accept that I think we can ----

31 MR. BOWSHER: That is what our position. It seems to us that Ofcom seem to be drawing a
32 different inference in their defence, and that is what we have sought to address. All we are
33 saying is you cannot accept any price between the two. They repeat this point, it seems to
34 us this seems to lie behind their thinking in para.18 of their skeleton, if I can move to that –

1 this is the multi-layered approach; this is a nice piece of terminology. “(1) Sky should be
2 able to recover its reasonable and necessary costs of providing ...” - that may be a
3 problematic term. “(2) The price charged by Sky should fall between the floor ... and the
4 ceiling.” We accept, and that is a necessary step, the last sentence of 18(2). They say that a
5 price that falls between the floor and ceiling is not necessarily FRND, it is then necessary to
6 check that it is not an excessive return. What they do not do though, it seems to us, when
7 you look at the back of the determination is that their actual approach, when you look at it,
8 and this is where one needs to go back to the determination – do you remember the list at
9 5.54 – there is a list of matters which they should have investigated, they say they could
10 have investigated but they did not, in order to try and identify what was the proper range of
11 FRND, because the range of what is potentially FRND is narrower, I accept that it must be
12 narrower than the full band between floor and ceiling. They know that they can do it, but
13 they do not do it, they simply say: “These are things we could do but for various reasons we
14 will not.” The problem is as we saw in the conclusion they do not link up the various
15 strands of the decision; and one suspects that the reason they do not is because they treat the
16 negotiation point, if the negotiations fail there is a sufficient answer for their result because
17 they actually did not do a good enough job of negotiating and the price did not come down,
18 and therefore it must be a competitive price and they took that as a sufficient approach
19 because they do not actually explain, in our submission, why they do not go through the
20 exercise that they canvass in para. 5.54 to try and narrow down that range.

21 THE CHAIRMAN: So are you saying that in para.18 they set it out correctly but they just do not
22 do it?

23 MR. BOWSER: They do not seem to do it.

24 THE CHAIRMAN: But they do set it out correctly there.

25 MR. BOWSER: They do seem to set it out correctly in 18(3), that is correct. Then, it seems to
26 us, they make an error in 18(4). Well it is a somewhat absurd example, they say Sky could
27 not charge one channel the stand alone cost and someone else the incremental cost, that is
28 not what we are saying, and that does not really help. Where there is evidence to justify
29 difference of treatment, different prices can be charged. Again, I have made the point
30 already. Again, I have made the point already what it seems to us they failed to do was to
31 take account of the particularities of Rapture and the proper differences. They repeat 18(5),
32 they still seem to be reliant upon the importance of negotiation, however unreal or irrelevant
33 that may be in 18(5). I do not think the last point takes it much further. 18(5) it seems to us
34 demonstrates that they have regarded that as really the end of the story and in our

1 submission negotiation does not tell you anything, it is not relevant, it is not a helpful part of
2 the analysis of what is or is not FRND given the relative nature of Rapture and Sky in this
3 case.

4 THE CHAIRMAN: In a way, the difference between answering this question subjectively and
5 objectively – the question they put to themselves. In other words they are saying is Sky's
6 charge between that period fair, reasonable and non-discriminatory, subjectively it is what
7 was put before Sky in the negotiations.

8 MR. BOWSHER: Okay – sorry, I was trying to think who the subject was – yes.

9 THE CHAIRMAN: Or objectively, do we look at it again?

10 MR. BOWSHER: I am not sure that was what they were thinking. The FRND is in our
11 submission plainly an objective test – that is not to say that there is not a range of objective
12 prices that are FRND, but it is plainly intended to be an objective test, not what Sky thought.
13 Maybe I can come back on that if I need to, but I do not think ----

14 THE CHAIRMAN: I am just trying to work out why the negotiations might be considered to be
15 relevant, and if it was a subjective test ----

16 MR. BOWSHER: Well, we will no doubt hear. It seems to us that they have failed to follow
17 through the analysis they should have done in doing what they even said they could have
18 done in terms of analysing the cost and then what they have done in terms of analysing
19 FRND in our submission they got wrong. This is where we get into the question about
20 common costs and incremental costs and so on and so forth, because the question here is
21 what is the raw material you use in order to try and establish what is the FRND, and the way
22 we put it – the way I said at the beginning – the key question is whether or not the price
23 being charged actually relates to a properly compiled basket of cost which it is proper for
24 Rapture to be required to pay.

25 There are probably two ways of looking at this. One is to consider this question as a
26 question of the definition as to what is a common cost and an incremental cost. That we
27 deal with from paras.55 to 65 of our skeleton argument, and again between paras. 90 and
28 98. It is put in slightly different ways. These are headings that come from the original
29 appeal which is why you have it in two slightly different ways. The second time we express
30 it as a failure properly to unbundle services and charges. But if I can go back to the earlier
31 passage, paras. 55 to 65 we set out there the argument that the set top box subsidy should
32 not form part of the common cost to which the whole calculation applies, and of course it
33 applies in two ways. First, because by inflating the common cost one skews the ceiling up
34 dramatically, but also if one is taking common cost as the starting point for one's analysis as

1 to what is fair and reasonable, you are also skewing that starting. So you skew both the
2 ceiling and the starting point for your analysis by putting too much into the common cost.
3 The way I was proposing to deal with this here, I obviously would invite you to look at this
4 matter and it may be sensible for the Tribunal to look at that passage particularly overnight
5 ,because it is an important part of what we say.

6 The way this is dealt with by Ofcom is, in our submission, rather revealing. If I can take
7 you to p.6, para.13(3) of the Ofcom skeleton. The question we are addressing here is to
8 what extent STB subsidy is a subsidy that is paid for the set top box, whether that is to be
9 treated as a common cost for the purposes of the calculation of the price.

10 It seems to us when one actually looks at this, there are really a couple of points that arise.
11 The text itself, 13(3) seems to demonstrate that they still have an erroneous view of this and
12 it is a rather strange contradiction in the paragraph.

13 “Although from a strict analysis of cost drivers the costs of STB subsidies are
14 driven by the number of subscribers and hence the cost of the STB subsidy might
15 be said to be incremental with respect to the number of subscribers.”

16 Leaving aside the lack of a main verb in that, we would agree with that except we would
17 replace the word “strict” by “correct”, we would put in a verb somewhere as well – or at
18 least a main verb. That seems to be the Ofcom starting point, that that is the strict answer.
19 The STB subsidy is an incremental charge, so if that is right we do not then understand why
20 you take the – this is a somewhat black and white question, if you can be “somewhat” black
21 and white.

22 “However, Ofcom considered that all broadcasters benefited from the STD
23 subsidy, therefore it is reasonable in principle for all broadcasters to contribute to
24 the cost of that subsidy.”

25 That is a contradiction with what has just been said. Now, it may be that there are issues
26 about benefits which would be externalities, they would be classic externalities which have
27 to be plugged into the overall analysis in some other way. But to try to justify your
28 approach to common cost by saying: “The strict answer is that they are incremental cost, but
29 we do not like that answer so we will call them common cost” that verges on the
30 *Wednesbury* unreasonable, it simply does not hang together.

31 THE CHAIRMAN: If you start with one subscriber, and there is only one subscriber then they
32 would have to pay the whole cost. If you got two subscribers, then you are saying there is
33 some sort of incremental ----

1 MR. BOWSHER: Because the cost of the subsidy is subsidy for each box that is purchased. So
2 every time there is a purchase the subsidy goes up by one, so the cost of the subsidy is
3 incremental. It is not much more difficult than that; that is the correct analysis. I will come
4 on to it presently, and to say that the correct analysis is X, but actually we want the opposite
5 does not, in our submission, seem to be logical.

6 PROFESSOR STONEMAN: I think we are going back to somewhere where we were this
7 morning about confusion between consumers and broadcasters. It can be incremental with
8 respect to the number of consumers, the number of people listening, or watching, but it can
9 be common to all the broadcasters. Given the number of listeners or viewers the cost is
10 incurred in supplying all of the services via the platform; in that sense it is a common cost, it
11 is a common production cost.

12 MR. BOWSHER: Well there are a number of ways of addressing that.

13 PROFESSOR STONEMAN: The example, thinking about it, when you came in this morning you
14 came past a reception desk. That reception desk serves all of the people in this building and
15 therefore it is a common cost to all of the organisations in this building. That is a common
16 cost spread across all of the organisations in the building. The more people that enter the
17 building, the more people we need on that desk and therefore the higher the common cost,
18 and that seems to be the same as saying something that would be a common cost to the user
19 and reflects the number of users or consumers.

20 MR. BOWSHER: Sorry, I understand your point, I am trying to recollect the clearest way of
21 demonstrating why it is clear that in terms of the 2002 Guidelines the incremental cost is
22 incremental by consumer, not incremental by broadcaster.

23 THE CHAIRMAN: Yes, but if you take the analogy from downstairs and the reception desk you
24 cannot say it is the incremental cost because each time somebody walks in somehow the
25 cost is divided between the number of people, so that you have five people walking in, you
26 have an incremental cost – one, two, three, four, five – going down, I suppose, because the
27 first one that walks in would be 100 per cent. The second one that walks in would reduce it
28 by whatever – I cannot do that maths – the third one that walks in would reduce it again, and
29 so it becomes an incremental cost, it does not seem to make sense.

30 MR. BOWSHER: Those people are not actually service users. The easiest way may be the 2002
31 Guidelines themselves. It is actually the passage which is quoted just above 3 in the Ofcom
32 skeleton, but we can take it in the guidelines, I think it is para. 3.4, but actually on p.6 it was
33 the text just above.

34 THE CHAIRMAN: “With a conditional access or access control system”?

1 MR. BOWSHER: Yes, it is about fixed and common costs.

2 THE CHAIRMAN: If it was an incremental cost it is the same cost to each new purchaser of the
3 box, or supplier of the box, through whom the box is supplied.

4 MR. BOWSHER: Yes, that is what 3.4 is saying.

5 THE CHAIRMAN: So why does it make any difference if it is common cost or an incremental
6 cost?

7 PROFESSOR STONEMAN: I do not want to cut across you, but 3.4 is in terms of broadcasters,
8 it is not in terms of consumers or viewers at all, it is in terms of the number of people
9 broadcasting on a platform, and so is 3.5 and 3.6. It specifically says that the costs involved
10 vary significantly with the number of channels provided, and "the costs of supplying the
11 service to one additional broadcaster or channel is likely to be low". It does not talk about
12 viewers at all.

13 MR. BOWSHER: But the purchaser must be the consumer here.

14 PROFESSOR STONEMAN: No.

15 MR. BOWSHER: That, in our submission, must be what Ofcom had in mind, because that is the
16 logic, that is why in their skeleton they link from that passage to what we call "the strict
17 analysis".

18 PROFESSOR STONEMAN: All right, you may propose that to us and we will argue about it,
19 but I do not think I have to take it in that way.

20 THE CHAIRMAN: I think the purchaser there, unless you convince me otherwise, is the
21 purchaser of the service ----

22 PROFESSOR STONEMAN: Of what, the EPG?

23 THE CHAIRMAN: Yes, in other words, the broadcaster.

24 PROFESSOR STONEMAN: Yes.

25 MR. VAJDA: That is certainly our view, yes. The whole point of this is that this is something in
26 relation to broadcasters who are buying services from Sky.

27 THE CHAIRMAN: Yes.

28 MR. BOWSHER: If that is right, it works whatever the textural point is in a sense it does not
29 change the fundamental issue. I take maybe a construction point. The underlying point
30 which I was hoping to get through that way but I will do it the other way, is that there is no
31 reason why we should be paying for services that we are not using and we do not need to
32 purchase, and whatever label one gives to that, that is what really comes back to the correct
33 analysis on FRND.

1 THE CHAIRMAN: But you are using because unless they have the set up box you would not
2 have the benefit of the listing.

3 MR. BOWSHER: That is all we are having, the benefit of the listing.

4 THE CHAIRMAN: But that requires – in order to give you the EPG they have to have a set top
5 box.

6 MR. BOWSHER: The cheapest, most basic set top box, yes, but there are many different
7 kinds ----

8 THE CHAIRMAN: No, no, but they have to have the cheapest, so the subsidy in relation at least
9 to the cheapest set up box is a cost for the purposes of EPG.

10 MR. BOWSHER: Yes, or of course the alternative is to go and buy your own, but that is
11 absolutely right. You will have seen that that is a factor, it was in the list of factors – I
12 think it was factor 4 – there are lots of different kinds of boxes and lots of them do things
13 which go way beyond what Rapture need.

14 THE CHAIRMAN: So is the point that the basic box cost would be a common cost, and the
15 subsidy in relation to more sophisticated boxes is not actually to do with EPG? I am not
16 sure it is an incremental cost but it is not something to do with the EPG, because you only
17 need the basic box, and you need the more sophisticated box to have these other services
18 which are separate.

19 MR. BOWSHER: It is certainly true that any cost for a box beyond the most basic box is not a
20 common cost related to the EPG service. If you are not with me on the sort of the high level
21 point, definitional point it is necessary to try and work out by reference ----

22 THE CHAIRMAN: Have they included the cost of a more high level box, or have they only
23 included the cost of a basic box?

24 MR. BOWSHER: Well we do not know. First, of course, it is not something that Sky would be
25 telling us (Rapture), but what Ofcom say in that list is that is one of the things that you
26 might investigate if you were trying to investigate the common cost of set top boxes – that is
27 p.37 and 38 of the determination. It is para.5.54.5. Each of these are important points
28 which Ofcom recognises one can deal with and 5.54.4 is also important, but I will not take
29 time on it at the moment. 5.54.5 is exactly this point.

30 THE CHAIRMAN: It does not say how you resolve it.

31 MR. BOWSHER: It does not say how you resolve it, it says you could do it. 5.55 is “Ofcom has
32 not considered it necessary to undertake a detailed review of all these complex and
33 interrelated issues.” It may be we will be told on the basis of what is in the skeleton that that

1 is because of the wider policy issues. I am not quite sure how that would come to pass. But
2 that is the explanation for why they have not dealt with this.

3 PROFESSOR STONEMAN: Can you pick it up half way through 5.56 in the determination
4 where it says that

5 “Direct costs associated with conditional access and access control services
6 comprise only a relatively small proportion of total platform cost and are not
7 included in Ofcom’s calculation of relevant common costs.”

8 Is that clear?

9 MR. BOWSHER: That is taking total platform costs – of course, there is a huge number, and it
10 really does not take the matter very much further to say that these costs are a small
11 percentage of a really very large number because one has no idea how that will infer back.
12 You cannot infer back from that anything about what the correct cost is for this service in
13 my submission, that is simply to say that of a very large number that it is quite a small
14 percentage.

15 PROFESSOR STONEMAN: I thought you were saying that Rapture should not cover CA/AC
16 costs and they were not included in the calculation therefore they did not.

17 MR. BOWSHER: They have taken out direct costs of CA and AC but what is clear ----

18 THE CHAIRMAN: I do not know if it is anywhere in here – I cannot remember – if we are told
19 what is the difference in the cost of set up boxes or the subsidy?

20 MR. BOWSHER: It is not in the determination and you can understand why we would not
21 necessarily know. That is something which Ofcom would investigate but it is clear this is a
22 separate topic. There obviously are ongoing direct costs at AC and CA.

23 THE CHAIRMAN: Part of that might be the subsidy to the more sophisticated set up?

24 MR. BOWSHER: It might be but they have explicitly said that that is not something that they
25 have looked into – 5.54.5 – in terms of the purchase cost for the set top boxes, so it seems
26 highly unlikely that that is the case. If that were the case that is not what they have said
27 they have done in the determination. They have explicitly said that in the context of the
28 dispute they have not done that. There are things obviously that Miss Holmes, Miss Banks
29 and I know and have seen, and you have seen which no one else can see, other than one or
30 two other people here.

31 THE CHAIRMAN: Yes.

32 MR. BOWSHER: In my submission they do not actually take the matter very much further other
33 than to tell you there are some numbers, but they do not tell you anything about the
34 breakdown.

1 THE CHAIRMAN: They are not going to help.

2 MR. BOWSER: I do not know whether or not – I am sure I could not do it, it may be the
3 Tribunal could, I do not know whether that means the Sky platform model would take us
4 very much further in terms of trying to work out what Ofcom had or could have done, but
5 what is clear is that there is some direct cost which they say should be taken out but there
6 plainly are some other costs which in the circumstances of the case they did not feel it was
7 necessary to grapple with, and it seems to us that must be wrong. We simply do not know
8 the size of the subsidy, we do not know the different costs that we are dealing with. There
9 is a small amount of material in our skeleton which the other parties object to so I am not
10 going to come back to it lest it promote an outrage at this time in the afternoon. Again one
11 would need to look at the differential costs of these different things. The short point is
12 Ofcom have not done that.

13 Ofcom have alluded to the correct way of doing it in para.38 of their skeleton, although it is
14 a slightly confusing passage. Under the general heading ‘Failing to Assess whether the cost
15 was a reasonable contribution to common costs’. It is the same general subject. Paragraph
16 38:

17 “It was not necessary for Ofcom to undertake a detailed assessment of such costs.
18 This is because EPG customers benefit from a large number of STBs, [In terms of
19 different STBs, they certainly have not grappled with that] while the collective
20 contribution of all third party contributors is very small (being in aggregate
21 equivalent to less than 5 percent of the common costs) ----”.

22 Again, we say that does not really take you anywhere. All that tells you is that the common
23 cost is going to be a very large number. We do not know what the number is, but it does not
24 take the debate very much further.

25 “Therefore, even on Rapture’s case (which is not accepted by Ofcom) in order for
26 the contribution of third party EPG customers to exceed the ‘ceiling’ of stand-alone
27 cost, [we do not say it should] it would have to be the case that more than 95 percent
28 of the costs treated as common costs in the platform model, including the costs of
29 the STBs were in fact not necessary ----”

30 Of course it is not necessary to subsidise the STB - and, again, this is something of a
31 definitional point - in order to produce an EPG service. A common cost has to be necessary
32 for the service. One has to consider what is in fact the necessary component of all these
33 STB costs and subsidies before identifying what was the common cost. That is what they

1 have actually said they have not done. In our submission their reasons for not doing so
2 simply do not stack up. The reasons they have given at 5.55 just are not sufficient.
3 When they say it is entirely irrelevant whether the STB subsidy is labelled as a cost or an
4 externality, well, again, they are wrong - although we can argue it either way. It
5 demonstrates, again, a fundamental error (para. 23 of their skeleton). If the STB subsidy is
6 a cost, then you have to analyse it as such. It is a fixed amount that has to be made as part of
7 your analysis. If it is an externality then it is a matter for regulation, if I can put it that way.
8 It is a matter which has to be investigated. Now, if they are right that the different cost of
9 different STB boxes are maybe an externality that has to go into their analysis of cost - and
10 that they say they did not do, and reasons given for not doing it, in our submission, do not
11 stack up - to say it is irrelevant whether it is one or the other, in our submission, betrays a
12 rather lackadaisical approach to this. If it is one you deal with it in a certain way; if it is the
13 other you deal with it in a different way. In our submission it is simply not a satisfactory
14 way of dealing with it.

15 The way we put this on the set top box subsidy is summed up -- We had set out the general
16 case on common costs and incremental costs and then at para. 63 we say they should not
17 have dealt with it as a common cost; they should have dealt with it as an externality. We
18 explain why from para. 63. We say that if it is an externality then you assess it as such
19 (from paras. 66 to 69). In our submission, Ofcom cannot really have it both ways. Either it
20 is a common cost - in which case you have to properly analyse what the common costs are,
21 and that they have not done because they have simply not analysed what the different costs
22 of the different STBs are, and they have not actually grappled with the facts that they would
23 need to deal with if they were going to say that the STB subsidies are common costs. They
24 would have to work out what the different STBs were and the different STB subsidy.
25 If, on the other hand, the STB subsidy is not a common cost, or part of it is not, then it may
26 be something that has to be dealt with as an externality and regulated as such. They plainly
27 have not done that. One way or the other, it seems to us that they have failed to apply the
28 2002 Guidelines to a proper analysis of common cost - as it were, the starting point for their
29 calculations.

30 When you look at that cumulatively, the case in which they have decided, for whatever
31 reason, that the cost is very high, they are not going to go into all the matters which might
32 enable one to come up with a more refined review as to what the costs might be -- They
33 have reached a conclusion on an erroneous basis. I have already explained the relevance of
34 the negotiated settlement -- the non-negotiated price. They have failed to take a proper view

1 on the relevance of Rapture's particular situation. It may be that for one or more of those
2 reasons they have simply allowed themselves to fall into the trap of, "Well, £76,800 is
3 within the range. There is a band. It is a very big band. That will be it". In our submission,
4 if any one of the errors that we have contended for are indeed wrong - and we say that any
5 one of those is sufficient reason for the basis of that decision to be wrong -- It is simply not
6 practical for this tribunal to seek to take that decision afresh - not least because there are all
7 sorts of reasons why Rapture could not be a party to a lot of that analysis. It is something for
8 Ofcom to do. It involves a discussion between Sky and Ofcom which we could only
9 partially be involved in. Likewise, it is not something that one could sensibly deal with in
10 an open court in this sort of way.

11 THE CHAIRMAN: The question of how you deal with it is something that everybody can ----

12 MR. BOWSHER: Indeed. It should, in our submission, be remitted with such direction as the
13 Tribunal believes should be attached to it, insofar as the Tribunal concludes that any of the
14 errors we have submitted have been made, then the Tribunal can identify those errors -
15 errors of principle, errors of assessment, or whatever - and attach them to the remission and
16 tell Ofcom to correct the matter. There may then be a complicated issue as to whether or
17 not it is possible to fix the decision just by remedying that error, or whether the nature of the
18 error is such that it opens up the whole decision. Given the fundamental nature of each of
19 the errors, and the way they seem to interlink in the process that Ofcom went through, it
20 seems to us unlikely that you are likely to be able to send it back and say, "Forget about
21 negotiations. Just take the decision without looking at the negotiations". It is clear when
22 you look at the determination that there was a series of what Ofcom thought were mutually
23 supportive conclusions. So, for example, when they let themselves off the hook from the
24 common cost analysis they should have carried out, they seem to have been taking account
25 of other parts of their decision. The only way to fix that, in a sense, is to say that, "These
26 were the errors; these were okay. Go back and re-do the decision".

27 PROFESSOR STONEMAN: I have a bit of a problem with your discussion of externalities.

28 Now, I quite appreciate that you are not an expert in externalities. I am. It is part of my
29 trade, if you like, as an economist. I have some great difficulty in understanding what you
30 are talking about. I know we are not having any expert evidence. Therefore we are not
31 getting any further support. But, is what you are trying to say that Sky chose to subsidise
32 these set-top boxes, and because they did so everybody else can then free-ride on the
33 availability of these boxes to their own benefit? Is that what you mean by an externality?

1 MR. BOWSHER: There may be more than one externality. There is what Rapture brings to the
2 collection of channels, which is something which Rapture raised in the determination
3 process. There is another externality along the lines of ----

4 PROFESSOR STONEMAN: The one you have been talking about.

5 MR. BOWSHER: Primarily what you have identified, but there is a range of externalities which
6 would need to be taken into account because Rapture bring value, but there is also a value
7 that the channel base has to Rapture.

8 PROFESSOR STONEMAN: Let us put that on one side, shall we, and take the previous one?

9 The idea is that Sky subsidises these set-top boxes and there are externalities to everybody
10 else in that they will be able to get access to the platform because Sky has subsidised these
11 set-top boxes. Now, standard economic analysis would say that in such a circumstance the
12 market would work better if Sky were able to internalise those externalities - in other words,
13 if it were able to charge for that access. So, the case here is that it may well be treated as an
14 externality, but the argument would be that this would lead to Sky charging an access fee to
15 other broadcasters related to the size of the money that they put in to create the externality.
16 Otherwise they would under-invest in the supply of set-top boxes. That is what the
17 economics says.

18 MR. BOWSHER: Well, it may do, but, of course ---- The externality does not have a standard ---
19 - The broadcaster who agrees to enter into an EPG agreement and pays the £76,000 (or
20 whatever the price happens to be) ---- Not all broadcasters will get the same value of
21 externality out of that. The range of channels does not have an equivalent value to all of
22 them. This really goes back to dealing with the nature of Rapture as a particular kind of
23 broadcaster with a particular capability. It is not the case that all viewers of Rapture - or all
24 potential viewers of Rapture - are interested in other channels. That is why, for example,
25 one of the points we have made in our submissions is that not everyone comes to the
26 collection of channels with a universal view. So, you have to take account of the different
27 value of the externality to different people.

28 PROFESSOR STONEMAN: That is the non-discrimination point.

29 MR. BOWSHER: Yes. The externality that Sky might be entitled to charge for in the access
30 charge - and that is part of what is being done here - that they are purporting to charge for
31 that - is not worth the same to everyone. If you start with a small viewer base with the
32 potentially relatively low projected maximum viewer base, or potentially relatively low
33 revenue, then the value of that externality to you is a lot less than it is to a mass audience

1 station. So, it is not right that the externality should have a standard across-the-board
2 internalised charge. It is not a very complicated proposition to make.

3 PROFESSOR STONEMAN: But that proposition is no different than your proposition on
4 common costs.

5 MR. BOWSHER: I am putting the point in the same way. One way you put it is as a sort of
6 definitional argument: is it a common cost or is it not? That, as I say, is a somewhat
7 black/white argument. Or, you treat it as an externality and you value it as such, but if that
8 is the right approach then the value of that externality is not the same for every broadcaster
9 and the FRND price as to reflect the different value of externality. I am not an expert.

10 PROFESSOR STONEMAN: No, I know. I just wanted to make it clear ----

11 MR. BOWSHER: I think that is the way we put it. (After a pause): These arguments all inter-
12 link. There are two other aspects to that, of course. One links back. It would be fair to say
13 that this is the same argument put a different way, but it is still true in the externality
14 analysis. The externality is also different for a viewer who has a different box. Obviously
15 for a channel that is able to access channels through that box the ability to get those viewers
16 is different. We need to remember also that the subsidy is, of course, paid. It is made to a
17 price paid by the viewer. So, one has to look at the matter also by reference not just to the
18 value to Rapture, but also to Sky in terms of having Rapture in the basket of channels, and
19 also to the viewer. It is effectively a multi-sided market here. There is the fact of that
20 subsidy and brought to it the basket of channels that you can access through that STB. I do
21 not need to go into it too far. It is a complex mix of externalities, all of which need to be
22 taken into account. Our short point is that they seem to have just shrugged their shoulders
23 and decided that they did not need to. I think the reason why they decided they did not need
24 to - when one looks at the determination - is that they thought that, "The common cost is
25 such a huge number, even a small percentage of a very big number -- or, the negotiations
26 did not work, or something. Therefore we just do not need to" ----

27 THE CHAIRMAN: Mr. Bowsher, it may be to do with what we are talking about, or it may be
28 slightly separate, but if we go back to the definition of 'electronic programme guide' and
29 the (b) which is the facility for obtaining access -- Previously in our mind was pressing the
30 Select button. Is the facility for obtaining access actually the box? (After a pause): If
31 you do not have the box, you cannot press the button. So, actually the facility that has to be
32 provided is the box.

33 MR. BOWSHER: It is a part of the box. Different boxes do different things.

34 THE CHAIRMAN: The basic box.

1 MR. BOWSHER: Part of the basic box is providing that facility.

2 THE CHAIRMAN: Part of the basic box is providing the list as well, because you could not
3 access ----

4 MR. BOWSHER: The list, I think, actually is not coming from the box.

5 THE CHAIRMAN: But you could not access the box.

6 MR. BOWSHER: You could not access the list.

7 THE CHAIRMAN: Yes. Sorry. You could not access the list if you did not have the box.

8 MR. BOWSHER: Yes.

9 THE CHAIRMAN: So, the facility for obtaining access to the list would be the box.

10 MR. BOWSHER: Indeed. The lowest cost STB brings within it - it is not the only thing it does,
11 but it brings within it - an ability to access the list and the facility.

12 THE CHAIRMAN: So, if you look at the definition again of 'electronic programming guide' it
13 means a facility by means of which a person has access to any services and consists of the
14 listing and the facility for obtaining access to the programme service listed or promoted in
15 the guide, and you could not do that without some sort of box.

16 MR. HENRY: Could I offer some clarity on that? You can use free-to-air satellite boxes which
17 are not supplied by Sky; do not have any of Sky's technology in them, and they will still
18 pick up most of the EPG data. So, it is not strictly true. So, there are people out there now
19 with free-to-air satellite boxes that can tune in and watch Rapture. The only reason I
20 purchased this is by shock - on the back of that list is all the BBC channels, all the ITV, and
21 Rapture is listed on it. It was obviously produced more than a year ago. The fact is that this
22 is not a Sky box, and yet it could receive Rapture.

23 PROFESSOR STONEMAN: How much is it?

24 MR. HENRY: It retailed for £59.95 and there is no subsidy. It is everything - dish, set-top box,
25 cabling, connections ---- There is a central question here which I would like to answer very
26 briefly. The set-top box subsidy is not necessary - that Sky subsidise their equipment. They
27 choose to subsidise it to encourage take-up. I believe that there have been submitted
28 documents by Ofcom in their annexes - which I am sure our counsel can point you to - that
29 show that the conditional access is what is linked to subsidy, and the only reason Sky ever
30 subsidise the equipment is because they did not want those being sold in the shops. They
31 wanted people to get a Sky box where you needed a Sky viewing card to buy Sky's
32 services. I am not an expert on externalities, but it is fairly clear that there is no need for
33 them to subsidise the box.

1 THE CHAIRMAN: I am not sure that the alternative over there is anything to do with it because
2 what we are looking at is what 'electronic programme guide' means. The fact that there
3 may be another system which gives you access and does not have an electronic programme
4 guide is irrelevant to this.

5 MR. HENRY: Can I just answer please?

6 THE CHAIRMAN: I think I am getting concerned that evidence might be given which others
7 may challenge, and we will start getting into areas which it might not be appropriate to do.
8 If it is irrelevant anyway, then we ought to sideline it.

9 MR. BOWSHER: Plainly when you buy the STB you get access to an EPG service as defined.
10 Is the existence of other technical means of reaching the channel relevant or not? It is
11 relevant in trying to identify what the cost of the STB is. The overall cost of the STB is not
12 a great deal more. The value of the EPG service that you access through the Sky set-top
13 box is not of the sort ---- The charges that are being levied here relate to other services.
14 That is really the point Mr. Henry is dealing with.

15 THE CHAIRMAN: I appreciate that.

16 MR. BOWSHER: So, if you look at the bottom of the range Sky STB and you look at what we
17 have got here -- I do not want to give evidence, but the increments that the EPG brings is
18 not that great, in our submission. In any event, it is not something that Ofcom have
19 grappled with. That is the core point I want to bring home. That is the question that Ofcom
20 should have looked at. What is the cost of the EPG service? It might be that on top of that
21 they would have to look at a question about what the value of the externality actually was.

22 THE CHAIRMAN: What they say, as I understand it, is, "Well, we do not think it is
23 proportionate to have looked at that because it really will not have very much difference, if
24 any".

25 MR. BOWSHER: With respect, that simply cannot be right given, for example, the fact that they
26 have taken out of account - just to take the one example we have focused on because it is an
27 important example -- the fact that they have not looked at the fact that a number of the set-
28 top boxes which are one-off purchases have not been taken ... You make a one-off purchase
29 with a different subsidy for a box that does many things for services that go far beyond the
30 EPG. That, as it were, is the externality argument.

31 The alternative way of looking at it is to say, "Well, if you are being asked to pay for an
32 EPG service what are the common costs of providing that service?" They are actually very
33 small, but you should not be looking at the common costs of the entire basket of channels,
34 but less conditional access, which seems to be the approach Ofcom have taken. They have

1 simply taken the entire common costs of the basket of channels, taken off CA and the direct
2 costs of CA and AC, and said, “Well, that is the common cost. That is what needs to be
3 covered. But, those are not common costs necessary for providing the EPG service”.

4 THE CHAIRMAN: Is your point that it is not fair and reasonable for the subsidy to be made, and
5 therefore charged for?

6 MR. BOWSHER: Well, it is not for us to challenge whether the subsidy is, or is not, made. That
7 is a different ----

8 THE CHAIRMAN: Yes, but in looking at what is fair, reasonable, and non-discriminatory ----

9 MR. BOWSHER: We say that the subsidy should not be part of a common cost because it is not
10 a part of the necessary costs of providing the EPG.

11 THE CHAIRMAN: Subsidy is not part of the necessary cost whereas the box is part -- or, some
12 facility of that sort.

13 MR. BOWSHER: Some facility within it.

14 THE CHAIRMAN: Some facility which is within that box is necessary, but the subsidy is not
15 necessary.

16 MR. BOWSHER: I think that is a way of putting it. One has to identify what are the common
17 costs that are necessary for the provision of the relevant service for which a charge is being
18 levied. That, I think, is probably the correct analysis. If it is right, and it is fair and
19 reasonable that some externality charge should be added on top, then one has to assess what
20 that externality charge should be. But, that is, as it were, the next step - not the first step,
21 which is the wrong way - saying, “Well, it’s all broadly speaking there. Treat it all as
22 common cost”. They should have done it the other way round and said, “Well, there is an
23 externality here which you might have to make an addition for to reach fair and reasonable”.
24 But, the common costs for the EPG service does not include all these costs of producing the
25 platform.

26 THE CHAIRMAN: It is not actually the cost of the box because it is only the subsidy that is
27 being included. Therefore, what you are really looking at is whether the subsidy - not the
28 cost of the box ---- Do you see what I mean? It is not the box. It is the subsidy.

29 MR. BOWSHER: Again, we are getting into figures ----

30 THE CHAIRMAN: Do you see what I mean? I think maybe certainly I was focusing on the
31 wrong thing because I was focusing on the box, and I ought to have been focusing on the
32 subsidy. The question is whether it is fair, reasonable and non-discriminatory ----

33 MR. BOWSHER: Yes.

1 THE CHAIRMAN: -- and if it is a common cost and whether the subsidy is actually a common
2 cost.

3 MR. BOWSHER: I am not sure it gets any better by saying it again.

4 THE CHAIRMAN: I think it is just the subsidy one has to focus on.

5 MR. BOWSHER: If I have not made it clear -- The skeleton, with which I had a great deal of
6 help, puts it probably better than I did. If in doubt, go back to the skeleton.

7 PROFESSOR STONEMAN: Can I try it another way? With the EPG charge you are not actually
8 buying EPG services. What you are buying is access to the 8.5 million Sky customers.
9 You could, if you wished, broadcast to everybody who owns one of those boxes. There will
10 be perhaps a couple of thousand where it is not worth the bother because everybody has got
11 Sky boxes and there are 8.5 million out there with Sky boxes, and they are the ones that you
12 want to get to. If you do not want to get to them, then I am not sure who you are going to
13 broadcast to. So, the whole idea is that you pay Sky an EPG charge so that you can get to
14 the 8.5 million Sky set-top box people. They argue that you should make some return for
15 the cost of setting up that -- building up that 8.5 million subscribers. Lots of nods on that
16 side and lots of shakes on this side.

17 MR. BOWSHER: What that does not lead to is an analysis that the STB subsidy is somehow to
18 be treated in its entirety as part of the common cost. The logical consequence of that is to
19 say that this is not a charge just for EPG services - it is the charge for EPG services plus an
20 externality which has to be valued. It does not follow from that that the total basket of
21 common costs, including the whole STB subsidy is a proper value of the externality.
22 Indeed, to fail to value the externality is as much a failure as to make an incorrect
23 classification of the common cost.

24 PROFESSOR STONEMAN: We are back where we were at half past ten this morning when I
25 said to you, "What is an EPG service?" and we had the description, "It's the electronic
26 programme guide, plus the ability to access the programme".

27 MR. BOWSHER: It is that, plus ---- It is our second line position, but our second line position is
28 indeed that what the FRND would be is a common cost necessary for providing that -
29 whatever the defined facility is - plus an appropriately established FRND externality value.
30 But, neither of those have been established in this dissemination for reasons we have seen
31 set out.

32 I have a whole list of points that I am being shown. Obviously, the size of the subsidy
33 increases if you add CA or AC, but I think that is self-evident. That is the point I am

1 making. If you buy a bigger, better box, you get a bigger, better subsidy. I think that is
2 obvious.

3 PROFESSOR STONEMAN: I do not think we will get evidence on that because it is not ... what
4 is happening to revenues. If a box is sold there is a subsidy perhaps paid by Sky, but I am
5 not quite sure where the revenues come in - whether they are discounted, or whether the
6 cost model only includes the subsidy. I think we will need some evidence on that.

7 THE CHAIRMAN: Or, some assistance anyway. It may be of some assistance.

8 MR. BOWSHER: I am sorry. Can I be clear then what is the assistance that we are looking for?

9 THE CHAIRMAN: I do not think it is evidence. It does not matter what the evidence is. What
10 we need is assistance on ----

11 PROFESSOR STONEMAN: We need some assistance on what is included in the Sky platform
12 model with respect to the subsidy. Is it just the subsidy that is included in there, or is it the
13 total cost of all the set-top boxes sold? What is in the model with respect to the subsidy? I
14 think that is what we would like some assistance with.

15 MR. BOWSHER: It will be difficult for us.

16 PROFESSOR STONEMAN: I am not looking at you. I am looking at Sky.

17 THE CHAIRMAN: Is it what, or is it whether it was taken into account? (After a pause):
18 Maybe it is whether it was taken into account.

19 PROFESSOR STONEMAN: Yes.

20 THE CHAIRMAN: It is not the numbers.

21 PROFESSOR STONEMAN: We do not need the actual numbers.

22 MR. VAJDA: I am slightly surprised. This is an absolutely fundamental part of the Ofcom case.
23 It is slightly alarming that there might be some doubt in the Tribunal's mind ---- Yes, the
24 subsidy has been taken into account, and it is absolutely critical to understand that. That is
25 in the determination. The table that I have handed up at lunch-time I will go through
26 tomorrow. That will explain that in a little more detail. Yes, absolutely. It has been taken
27 into account.

28 PROFESSOR STONEMAN: It is a direct cost as opposed to an indirect cost. We do not know
29 what you do with direct costs ... the net costs. That is the difference .

30 MR. BOWSHER: There we are. Having written it down, I am not sure. I will bear that in mind.

31 THE CHAIRMAN: What we do not want is to start going into evidence, because that is not
32 relevant to what we want to do or what you want us to do.

33 MR. BOWSHER: Absolutely. For the moment, and much later than I anticipated ----

34 THE CHAIRMAN: That is not your fault at all.

1 MR. BOWSHER: That is our case. No doubt I will have points to come back on in reply.
2 Perhaps I should just wrap up then. We say that this decision should be remitted. I have
3 made these points. We say the decision should be remitted with appropriate guidance from
4 the Tribunal as to where errors have been made. We say a number of errors have been
5 made. They are cumulative errors. The determination seems to be a rather flimsy stool,
6 based on mutually supportive legs, each one of which has been -- It says, "Well, we do not
7 need to go into that any further because the other one will do. We do not need to go into
8 that any further because the other one will do". But, when you add them all up, either they
9 have got the definition of common costs wrong, or they have failed to value the externality.
10 We can see that they failed to do that in a number of ways - not least because they say they
11 simply did not look at the advanced blocks. They satisfied themselves that it was all all right
12 because of the failed negotiation. That failed negotiation failed to take account of Rapture's
13 position. They failed to take a proper account of Rapture's ----

14 THE CHAIRMAN: You are going too quickly. This is very, very important. I think we need to
15 identify exactly what you say were the errors in the determination. I think I need to write
16 them down because as far as we can see there is no list that we can tick off.

17 MR. BOWSHER: The list is the headings in our skeleton. Some months ago I was asked whether
18 we were going to have 997 allegations of breach . We have tried to help the Tribunal by
19 boiling them down.

20 THE CHAIRMAN: Can we have the list very carefully? You say in relation to common costs
21 that it is within the definition of common costs or whether they failed to value the
22 externality. That is where I picked you up ----

23 MR. BOWSHER: Okay. Can we just pause there then? The first question is: have they taken a
24 correct approach to the value of the common costs, in particular the STB subsidy?

25 THE CHAIRMAN: Value or amount?

26 MR. BOWSHER: Amount. Sorry. Amount. Have Ofcom correctly ascertained the amount to be
27 treated as cost for the purposes of the calculation of the FRND price?

28 THE CHAIRMAN: That is a very general question.

29 MR. BOWSHER: I am going back to make a specific. There are two sub-headings to that.

30 Either: did they fail properly to attribute the STB subsidy -- or, did they incorrectly attribute
31 the STB subsidy as a common cost? That is our first point. Alternatively, did they make an
32 error in establishing the proper amount of the value of the services because they should
33 have valued the common costs of providing the EPG service and added to it an element

1 reflecting the externality? Both of those two components would have required an
2 investigation, neither of which were done.

3 THE CHAIRMAN: What investigation?

4 MR. BOWSHER: An investigation as to what the EPG service costs were.

5 THE CHAIRMAN: But only in relation to the set-top box. Or in relation to something else?

6 MR. BOWSHER: Generally. Whatever the cost is of the EPG service. As you have heard, there
7 are costs beyond the set-top box. There are other costs - direct costs - of the EPG service.

8 THE CHAIRMAN: Are you saying they have not opened on that properly either?

9 MR. BOWSHER: Well, they have not actually ascertained any costs of the EPG service. They
10 have simply identified the common costs total, the incremental costs total. "£76,800. Rate
11 of return. That all seems roughly all right. £76,800 is within the top and the bottom. The
12 rate of return calculation does not suggest £76,800 is wrong. Therefore, £76,800 will do."
13 That is what they have done as far as one can tell. What they should have done is either -- I
14 sense that not all of the Tribunal are with me on this, but they should either have come up
15 with a correct ascertainment of common costs in the way that we have said, or they should
16 have worked out what the precise costs were of the EPG service, which they did not do --
17 the costs of providing the EPG service, add to that an appropriate valuation of the
18 externalities (whatever they were), and that would have been a value -- well, Professor
19 Stoneman will pick me up if I use the wrong word, but I think it is a value -- which would
20 be the starting point for your FRND analysis because you would then know where the
21 FRND lay between the top and the bottom of the range. They failed to do either of those.
22 They failed to do (1) or (2). (2) involves two elements and they did not do either of them.

23 THE CHAIRMAN: I think what would be helpful is if, overnight, you just set out what you say,
24 in writing, is what they did wrong - not in pages and pages and pages, but in a couple of
25 sentences for each one -- or one sentence for each one.

26 MR. BOWSHER: Very well, madam. I can do that. What I was proposing to do is do it by
27 reference to the headings in the determination because it is more easily done perhaps just to
28 go through the determination and point out where we say which bit of the determination the
29 case ----

30 THE CHAIRMAN: We would just like a piece of paper that we can tick.

31 MR. BOWSHER: Yes, but it does involve relating back what we have said in the notice of appeal
32 - back to the determination.

33 THE CHAIRMAN: That is fine. But, we need a piece of paper in front of us that we can ----

34 MR. BOWSHER: I can do that overnight if that is helpful.

1 THE CHAIRMAN: It would be fair to Ofcom and Sky. They need a piece of paper so that they
2 know what they are addressing.

3 MR. VAJDA: It would be very helpful to have it some time before I start tomorrow morning.

4 MR. BOWSHER: You can have it before tomorrow morning, but I am afraid you will not have
5 until very late tonight because I have other commitments this evening.

6 THE CHAIRMAN: They will have it in chambers in the morning. I am sure you can negotiate
7 something between yourselves.

8 MR. BOWSHER: It will not take very long to do.

9 THE CHAIRMAN: It would be helpful if we all knew exactly what you are saying.

10 MR. BOWSHER: Shall I postpone that listing until tomorrow?

11 THE CHAIRMAN: I do not think it is very helpful to try to explain what it is. I think one has to
12 sit down. If one sits down and writes it down, one sees. It has got to be very specific.

13 MR. BOWSHER: I was filled with excitement. I did it too fast. As you know, my best points are
14 always made at a gabble.

15 For the reasons to be set out, we say that the determination fails to grapple with what
16 needed to be done. It should be remitted so that they can do a proper job. Obviously we
17 will have to come back in reply.

18 But, just so that my homework is set out, there is the document we have just discussed.
19 There is the possibility, I suppose, that more may come back on the Sky platform model
20 which only I and my juniors will be able to look at in any detail.

21 THE CHAIRMAN: That will be in reply though.

22 MR. BOWSHER: It will be in reply, indeed. As I have already forewarned, there will be some
23 material on the platform to come, but I am not sure it will take the matter very much further.

24 THE CHAIRMAN: As to what 'platform' means.

25 MR. BOWSHER: As to what the 'platform' means.

26 THE CHAIRMAN: It is the use of the word in different contexts. It has been used to mean
27 different things. It may be that it does not actually matter. It is just that we have to
28 understand in what context it is being used.

29 MR. BOWSHER: The danger is that we do not want to get into an analysis of which usage is
30 being made where. But, it is a bit difficult because plainly there are a number of usages.
31 Unless there is anything else I can assist with?

32 THE CHAIRMAN: No. Thank you.

1 PROFESSOR STONEMAN: Rather than you try to interpret what OFTEL and Sky think the
2 platform is, it might be better if each of you independently wrote down what you think the
3 platform is.

4 MR. BOWSHER: We have had Mr. Roth's reference, but no doubt he may come back on that. I
5 have no doubt that Ofcom will tell us what they think 'platform' means.

6 MR. VAJDA: That is correct.

7 THE CHAIRMAN: I think if we proceed tomorrow it will all hopefully become more clear. If
8 Mr. Bowsher writes down what he says is wrong, I think that will be clarity rather than
9 complication.

10 MR. BOWSHER: Unless there is anything else I can assist with?

11 THE CHAIRMAN: No. Thank you.

12

13 (Adjourned until 11.00 a.m. on Wednesday, 19th December, 2007)

14

15

16
